

Managing Issues With Service and
Emotional Support Animals on Campus
Podcast Transcript

Prevention and Protection a United Educators Risk Management Podcast

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HEATHER: Hello and welcome to *Prevention and Protection*, the United Educators risk management podcast. I'm Heather Salko, senior risk management counsel. I'm joined by Jeffrey Nolan, a partner at the law firm of Dinse, Knapp, and McAndrew in Burlington, Vt. Jeff is a well-known expert in the area of higher education law. He represents, counsels, and does training for colleges and universities throughout the United States on issues related to Title IX, the Clery Act, campus threat assessment, the Americans with Disabilities Act (ADA), and other student and employment-related issues. Jeff and I will be discussing the issues surrounding service animals and comfort or emotional support animals on campus. Jeff, thank you for joining me.

JEFFREY: Thanks to you, Heather and United Educators, for hosting the discussion.

HEATHER: Before we begin, I just want to let listeners know that in addition to this topic, they can find other podcasts and risk management resources on our website, EduRiskSolutions.org. Jeff, let's begin at the beginning. Please define a service animal and an emotional support animal for us and talk about the difference between the two.

JEFFREY: Service animals are defined by Department of Justice (DOJ) regulations for ADA purposes as dogs that are individually trained to do work or perform tasks for people with disabilities. Examples include guiding people who are blind, alerting people who are deaf, pulling a wheelchair, alerting and protecting a person who's having a seizure, reminding a person with mental illness to take prescribed medications, calming a person with post-traumatic stress disorder during an anxiety attack, or performing other duties. The work or task a dog has been trained to provide must be directly related to the person's disability.

A related section of the DOJ regulations provides that public accommodations may also have to make reasonable accommodations to allow miniature horses in covered facilities if they generally can meet the service animal criteria and their presence in the specific facility does not compromise legitimate safety requirements that are necessary for safe operation. Dogs whose sole function is to provide comfort or emotional support do not qualify as service animals under the ADA. Through Title II and Title III of the ADA, this definition of service animals applies in all areas of public and private colleges and universities where members of the public and program participants are allowed to go. Service animals that provide assistance

and perform tasks or services for individuals with disabilities must also be allowed to live in college and university housing under the Fair Housing Act (FHA) and Section 504 of the Rehabilitation Act. For FHA and Section 504 purposes, the Department of Housing and Urban Development (HUD) and the DOJ defined ADA service dogs and comfort or emotional support animals of any species as assistance animals: a term we won't use in this discussion in order to avoid undue confusion.

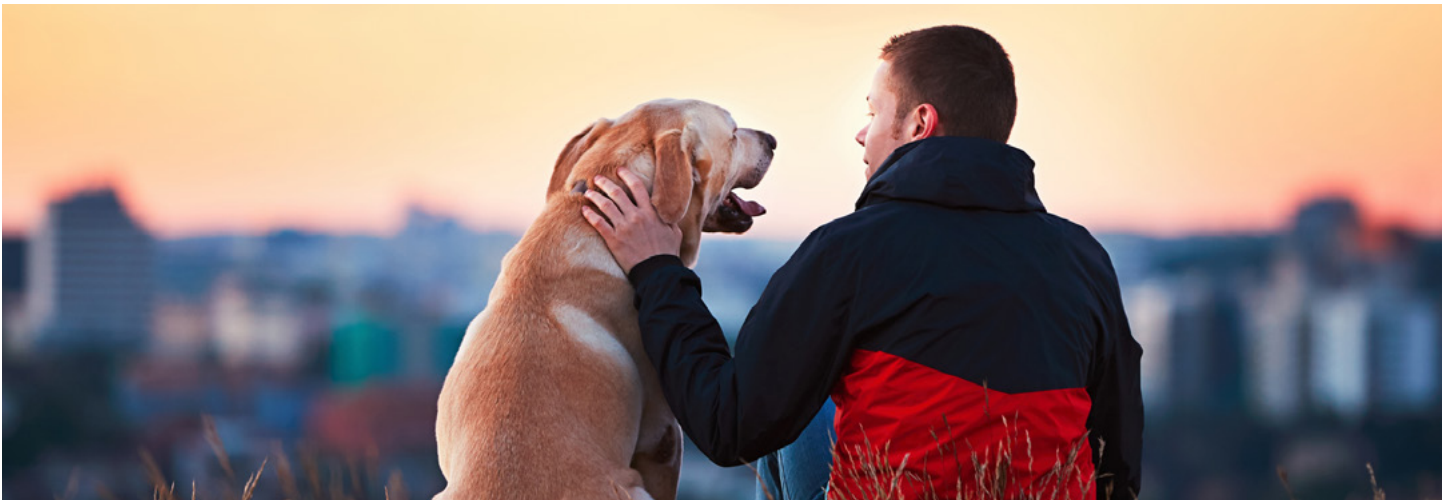
The definition of comfort or emotional support animals, we'll call them emotional support animals or ESA in this discussion, has no limitation on the basis of species. But practically, it applies only through the FHA and Section 504 to college and university housing. The Department of Housing and Urban Development defined an ESAs as an animal that provides emotional support or alleviates one or more of the identified symptoms or effects of a person's disability. In some, service dogs can generally go anywhere at an institution where members of the public or program participants such as students can go, while ESAs can only be in residence halls and places in the residence halls where residents are allowed to go.

HEATHER: Jeff, that's really helpful, and that baseline knowledge is good for us moving forward. With that information in mind, let's move on to some additional questions that we at United Educators often receive and let's have a brief discussion about how to deal with problems that might arise with these animals. Jeff, with regard to training, vaccinations, and licensing, what can schools ask about with regard to each type of animal?

JEFFREY: In general, the scope of inquiries that can be made regarding service animals is relatively narrow. This is because the same regulations govern all contacts between an institution and the service animal, ranging from, for example, a short-term situation where a member of the public who uses the service animal wants to shop once at the campus bookstore and should not expect to have to produce documentation to simply visit the bookstore, to a long-term situation where the animal is going to live with the student on an institution's campus, possibly for years.

Regarding training, if a person appears in a public space with a dog, the institution can ask only if the animal is required because of a disability, and what work or task the animal is trained to perform. If the answer to the first question is no, then the institution's pet policy can be applied. If the answer to the first question is yes, but the second one is no, then the ESA rules we'll discuss in a moment apply. In dealing with the service animal, an institution cannot ask about the nature or extent of a person's disability and cannot require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. Generally, an institution may not make these inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability.





For example, the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability. In terms of vaccinations and licensing, if applicable, state or local law or ordinance requires that animals be vaccinated or licensed. Those requirements apply equally to service animals, and institutions can ask for proof of compliance with such laws. Practically, this should be provided for in any institution service animals policy. It is probably not worth demanding documentation of individuals who are using service animals on campus only occasionally, such as in our earlier bookstore example. The same vaccination and licensing rules apply to ESAs. Since ESAs do not need to be trained in any particular task, there's no basis for asking about their training. Again, the relevant question for ESAs is whether they provide emotional support or alleviate one or more of the identified symptoms or effects of a person's disability.

HEATHER: Thank you for that important information. I appreciate you breaking down these complex concepts. But let's focus then on service animals for just a moment. Since service animals are allowed virtually everywhere on campus, what happens if a service animal becomes uncontrollable or, say, even bites someone?

JEFFREY: The DOJ regulations provide explicitly that a service animal can be excluded if it is out of control, and the handler does not take effective action to control it. Usually, the animal must be on a leash or a tether. If that's not possible because of the handler's disability or the nature of the task performed by the animal, the animal must be controlled by the handler's voice, signs, or other effective means. In the unlikely event that the service dog bit someone, I think it would be fair for the institution to question whether the handler had effective control over it. If it concluded that they do not, as opposed to concluding that the incident was the fault of the person who was bitten, the animal could be excluded. If an institution properly excludes a service animal, it must give the individual with the disability the opportunity to obtain good services and accommodations without having the service animal on the premises.

HEATHER: What would happen if, instead, a service animal caused damage to a dorm room or another campus facility, such as a classroom? Also, can the institution require what I would call a pet deposit?

JEFFREY: I think an institution could charge the person with the disability for damages caused by a service animal as long as the charges were reasonable and no more than would be charged others for similar damages. The same is true for ESAs, given the terms of the instructive policy hammered out in the settlement between the DOJ and the **University of Nebraska at Kearney (UNK)**, in connection with the September 2015 resolution agreement. It indicated that UNK would not require individuals with disabilities to pay a surcharge or a fee to have an ESA. It seems likely that the DOJ would object to the institution's requiring a prospective pet deposit from an individual who uses a service animal. This would be consistent with HUD guidelines applicable to service animals and ESAs, which provides that requests to use such animals as reasonable accommodations may not be conditioned on payment of a fee or a deposit.

HEATHER: I appreciate you answering that because I see that question quite a lot from a number of our members. Jeff, before we move on to talk specifically about the ESAs, are there any other issues or concerns you think we should address regarding service animals?

JEFFREY: Sure. I understand that the restrictions on inquiries regarding service animals can seem unduly restrictive in a college or university residential setting in which the parties will have a long-term relationship and where it is reasonable to assume that the animal's presence will be less disruptive if the institution has advance knowledge of where and when the animal will be present in a classroom or laboratory or residential setting. Such knowledge and some related advanced planning can help with this use, such as room assignment, identification of others' potential allergy concerns, and training for the faculty and staff on appropriate responses to individuals who use the service animal. Because the regulations do not permit detailed pre-registration-type inquiries for reasons discussed a few moments ago, institutions cannot require advance notice. But the DOJ has indicated that public accommodations can create registries through which individuals can voluntarily provide detailed information in advance about their service animal. Institutions can certainly mention and promote the existence and positive benefits of such a registry in their service animal policy and related publications and websites.

HEATHER: Thank you, Jeff. Let's turn now to the topic of ESAs. That topic seems to be, in my experience, where institutions have the most questions and the most uncertainty about how to respond to different requests for them. There also seem to be more issues with these animals on campus. What rules govern support animals, and where are they allowed to go on campus?

JEFFREY: It appears, by reference to the **UNK policy** negotiated through the settlement with the DOJ and a policy similarly negotiated between the DOJ and **Kent State University**, which was approved in September of 2016, both of which should be looked to as guidance as to what restrictions on ESAs are apparently acceptable to the DOJ. The institutional policies can provide that ESAs must be confined to the residence, individually assigned residence hall room, except as is necessary for the animal to go outside for natural relief. The FHA does not apply to other campus buildings. At this point, it does not appear that the ADA or Section 504 are being interpreted as requiring that ESAs be allowed in buildings other than the individual's assigned residence hall.

It should be noted that the 2013 HUD guidance also provides that ESAs should be allowed in other areas of residential premises where people are normally allowed to go unless doing so would impose an added financial or administrative burden or would fundamentally alter the nature of the institution's residential services. Given the terms of the UNK and Kent State policies, I think it's appropriate to restrict ESAs to individual rooms except as is necessary for natural relief by policy. If an individual requests to bring an ESA to common areas of a residential facility, evaluated on a case-by-case basis, whether allowing that would impose an undue administrative hardship or constitute a fundamental program alteration because, for example, it would limit access to other students who have allergies or who are afraid of the ESA.

HEATHER: Jeff, what happens if an ESA causes harm or damage on campus? What can an institution do then?

JEFFREY: The institution can charge for damage by an ESA on the same basis as it would charge for similar damage by others. The UNK and Kent State settlement-related policies both require that owners must agree in advance to be responsible if such damages occur and also must agree to a range of other responsibilities. I would recommend that institutions review the UNK and Kent State policies closely and consider adopting their terms because, again, they impose substantial restriction and conditions on owners of ESAs that are apparently acceptable to the DOJ.

HEATHER: Jeff, I'm going to throw a scenario at you. It may not be typical, but it is something that I did hear recently. I heard a story about a student who had an ESA on campus, and in his case, it was a cat. He lived with two other men in a dorm suite. Midway through the semester, he got a pretty serious girlfriend and he started staying with her a few nights a week. He wasn't back in his dorm room very often and didn't take great care of his cat. The roommates complained to the school because, one, they felt like the cat was being neglected, and two, they didn't want this pet to be their responsibility.

The institution became reluctant to get involved and said there was no proof of negligence or neglect of the animal. Jeff, when you hear this type of situation, what issues do you see and what advice do you have for institutions who might face similar circumstances and complaints?

JEFFREY: Ideally, situations like this should be anticipated in policy and students should be required to agree in advance that they will not create such situations. Fortunately, the UNK and Kent State policies and agreements connected with them have excellent model language. Both policies require owners to agree that the ESA will be well cared for at all times and that the ESA will not be left alone or cared for by others overnight. The policies provide that the institution can order the animal removed if owners failed to carry out those responsibilities. Again, the DOJ approved such language in the context of litigation. I think it's reasonable to assume that other colleges and universities can safely adopt similar policy language and adopt similar agreements in advance. Having students agree in advance to fulfill such responsibilities and the other responsibilities outlined in the UNK and Kent State policies is obviously preferable to dealing with problematic situations on an ad hoc basis because ad hoc approaches are more likely to give rise to discrimination or failure to accommodate claims.

HEATHER: That's true, Jeff, and good advice. So let me ask another question we often hear. Once an institution has approved an emotional support animal on campus, is there an obligation to continue to allow the animal on campus, semester after semester, on an ongoing basis?

JEFFREY: Both the UNK and Kent State policies provide that an ESA is only allowed to stay in a residence hall for as long as it is necessary because of the owner's disability, and owners are required to notify the university if the animal is no longer necessary or no longer in the residence. I think institutions could and should adopt policy language to this effect.

HEATHER: Before we wrap up, are there any other issues or concerns with regard to ESAs that you would like to address for our listeners?

JEFFREY: I often hear concerns from college and universities that they will not be able to house a student with an ESA because other residential students will be allergic to animals. I would encourage institutions to anticipate such issues by providing in their residential contracts that the institution has discretion as to exactly where students will be housed, to require students seeking to live with an ESA to provide reasonable advance notice of their intent to do so—such as 60 days as provided in the UNK agreement—and to require students to give consent to the institution to disclose to other students living nearby that an animal will be present so that inquiry can be made about potential allergy-related conflicts. Good policy language to this effect should allow an institution adequate time to identify and resolve potential conflicts between students.



I also often hear concerns that some ESAs will have conflicts with other ESAs, such as dogs will chase cats, cats will chase birds, birds will chase snakes or vice versa. I would suggest the institutions review and consider adopting language in the UNK and Kent State policies that was apparently designed to address such concerns. Both of those policies provide that an ESA must be under the owner's control at all times, that it must be properly contained or restrained when the owner is not present during the day, and that the owner must remove the animal if it poses a direct threat to the health or safety of others, causes substantial property damage, or creates an unmanageable disturbance or interference with the university community.

If an institution finds, based on an ESA's actual behavior—not speculation or fear that it might do something—it could take action to remove the animal. Again, policy language like that used at UNK and Kent State could, therefore, help address concerns about conflicts between the animals. I would encourage institutions that have good policy language to not be timid about enforcing it. Institutions have grown accustomed to enforcing reasonable conduct standards on students both with and without disabilities, for example. With the increasing numbers of ESAs on campus, institutions similarly enforce reasonable ESA-related rules or risk losing control on their residence hall.

HEATHER: That control of the residence halls remains important. Thanks, Jeff. We appreciate your insight. Unfortunately, that's all we have time for in today's podcast. We hope that you, our listeners, have found this topic timely and helpful in managing risk on your campus. Let me remind you that additional resources are available on our website, EduRiskSolutions.org, and that we will have additional podcasts coming soon. Finally, I'd like to thank Jeff Nolan for joining me and for sharing his expertise so generously today.

JEFFREY: Thanks again to you, Heather and United Educators, for hosting the discussion. If listeners have further questions about service animals, emotional support animals or related policies, they should feel free to give me a call or send me an email. My contact information is at www.dinse.com.

HEATHER: Great. Thanks, Jeff.



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