

# Disability Rights Nebraska

Protection and Advocacy for People with Disabilities

**Testimony on LB 309  
Before the Judiciary Committee  
February 4, 2021**

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Good afternoon Senator Lathrop and members of the committee. For the record, my name is Brad, B-R-A-D, Meurrens, M-E-U-R-R-E-N-S, and I am the Public Policy Director at Disability Rights Nebraska. Disability Rights Nebraska is the designated Protection and Advocacy organization for people with disabilities in Nebraska. I am here in opposition to LB 309.

Service animals and support animals are not pets and they work a variety of vital tasks for many individuals with disabilities--apparent or non-apparent. The 2020 guidance by the US Department of Housing and Urban Development lists some examples of work/tasks/assistance/emotional support: navigation, assistance with balance or retrieving items; but seizure alerts, alerting to allergens, or medication reminder. The Americans with Disabilities Act defines "service animals" and excludes "support animals" or what LB 309 refers to as "assistance animals". Both the Air Carrier Access Act (ACAA) and the Fair Housing Act (FHA) also have different standards for designating which animals are given access and require different documentation to secure access to housing and aircraft. The FHA requires housing providers to make reasonable accommodations to allow people with disabilities equal access to housing, for example modifying a 'no pet' policy.

With three different sets of definitions and standards in federal law, the issue can be confusing. A person who, for example, has a service animal for the purposes of the ACAA and the FHA may not realize that a separate and more restrictive definition of service animal applies under the ADA. Thus we would caution against framing this issue solely as "a problem created by selfish people who take "advantage of the disadvantaged," people who are liars, unethical individuals, and knowingly pass off their pets as service animals...The use of unqualified animals as service animals may not be a deliberate act, but, instead, a problem created by misunderstood definitions, differences between the civil rights laws affecting service animals, and misinformation distributed in the medical community."<sup>1</sup>

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<sup>1</sup> Tiffany Lee (2017) "Criminalizing Fake Service Dogs: Helping or Hurting Legitimate Handlers?", *Animal Law*, 23 Animal L. 337

Criminalizing the misrepresentation of service or support animals presents several concerns. Our research warns of significant unintended consequences such as problems determining probable cause (which could ultimately violate the civil rights guaranteed under the ADA)<sup>2</sup>:

“If law enforcement becomes involved in a service animal dispute under one of these state statutes, it will be difficult to determine whether probable cause exists to support an arrest. At the time of contact, the law enforcement officer will not have any means of verifying the presence or absence of a disability. Service dog handlers are not required to carry documentation of their disability, and with many disabilities not being readily apparent to the casual observer, the fact that a person does not appear to have a disability does not establish, or even suggest, the absence of one. Places of public accommodation and state or local government representatives are not permitted to even inquire about the nature or type of the disability. In addition, a service animal handler is not required to carry any verification or documentation of the animal's training. A law enforcement officer cannot demand a handler produce documentation of disability or documentation of the animal's training as a condition of access without violating the ADA. Since it is essentially impossible to make any determination about a service animal handler's disability status and the training of the animal without violating the ADA, there is also no way a police officer can develop a factual basis on which to make a probable cause determination to arrest the service animal handler, or to seek a warrant for their arrest. This difficulty was noted by the court in *Hurley v. Loma Linda University Medical Center*, saying, "Indeed, 'knowingly and fraudulently representing [oneself] ... to be the owner of [a] ... service dog' is illegal in California, Cal. Penal Code § 365.7; but it is not clear how anyone is supposed to determine whether someone is violating the California law without violating the federal regulation." This issue will lead to one of two problems in the enforcement of these statutes: either law enforcement personnel will base their determinations of probable cause on the presence or absence of a visibly apparent physical disability and people with not readily apparent disabilities will be arrested and detained despite the absence of a means of determining probable cause, or, to avoid civil rights complaints under the ADA, law enforcement personnel will simply not enforce the law.”

Since there would be a question about the individual's disability (especially if not readily apparent) they may not receive disability accommodations if arrested<sup>3</sup>:

“Another area of concern in the determination of probable cause is the potential after-effects of a probable cause determination in the states that base their service animal fraud statutes largely on the disability status of the handler. If law enforcement determines there is probable cause to believe that a person does not have a disability, that person, if arrested, may not be provided the legally required accommodations under Title II of the ADA. Since police departments have been repeatedly accused of Title II violations towards arrestees and detainees with obvious disabilities, it is reasonable to assume that these violations would also occur when an arrestee or detainee with a disability was arrested on probable cause of not having a disability. If this occurred, it would open law enforcement agencies up to civil suits based on Title II violations from both the arrest itself and any subsequent actions that might violate the ADA.”

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<sup>2</sup> Ibid, at page 346-347

<sup>3</sup> Ibid.

Furthermore, for the criminalization to have any deterrent effect, it would need to be enforced or enforceable. Beyond the aforementioned impediments, our research indicates case dismissal rates are significant:

“About half of misdemeanor cases are dismissed. In Chicago, the rate of dismissal has reached as high as 42%. The majority of the misdemeanor charges that were dismissed or otherwise disposed of were dismissed within forty-eight hours of arrest. Given the difficulty in showing probable cause in service animal fraud cases, the rate of dismissal is likely to be high in these misdemeanor cases as well.”<sup>4</sup>

For sake of brevity, we strongly suggest reviewing the law review article by Tiffany Lee for a further list and discussion of significant harms (see in particular Section V, pages 342-351).

The U.S. Department of Housing and Urban Development (HUD) and the U.S. Department of Justice (DOJ) have provided guidance documents<sup>5</sup> in 2004 and most recently in 2020 explaining the rights and responsibilities existing under federal law for both individuals and landlords regarding service and support animals. Read together, these documents provide clarity and offer best practices and instructions that can be used by both individuals using service animals, requesting a reasonable accommodation for a support animal, and for landlords when faced with this issue. These guidance documents answer directly and give best practice answers to many of the issues raised in previous legislative hearings on this issue: for example, how to handle documentation from the internet (see 2020 guidance at page 11), requests for unique types of support animals (2020 guidance at page 13), and how to handle observable and non-observable disabilities (2020 guidance at page 9). The DOJ and HUD joint 2004 guidance provides a more theoretical overview of the parameters set out in the FHA and the ADA.

There are checks built into the federal laws involved in this issue; we do not need LB 309. Along with HUD<sup>6</sup>, we firmly believe education clarifying the rights and

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<sup>4</sup> Ibid.

<sup>5</sup> Housing and Urban Development “Assessing a Person’s Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act” 2020, at [www.hud.gov/sites/dfiles/PA/documents/HUDAsstAnimalNC1-28-2020.pdf](http://www.hud.gov/sites/dfiles/PA/documents/HUDAsstAnimalNC1-28-2020.pdf) and “Joint Statement of the Department of Housing and Urban Development and The Department of Justice: Reasonable Accommodations Under The Fair Housing Act” 2010/2004 available at [www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint\\_statement\\_ra.pdf](http://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf)

<sup>6</sup> See 2020 HUD Guidance at page 14: “Individuals with disabilities and housing providers may reference the best practices provided in this guidance in making and responding to reasonable accommodation requests within the scope of this guidance for as long as it remains in effect. HUD strongly encourages individuals with disabilities and housing providers to give careful attention to this guidance when making reasonable accommodation requests and decisions relating to animals”; and “Before denying a reasonable accommodation request due to lack of information confirming an individual’s disability or

responsibilities in the existing federal law and following the guidance set forth by the DOJ and HUD is the optimal approach. In fact, HUD encourages landlords and tenant to work out the animal accommodation between them, first by referring the requestor to the federal guidance outlining the information needed to successfully make a reasonable accommodation decision<sup>7</sup>. Moreover, HUD encourages landlords and tenants to work out the accommodation request privately through the “interactive process”<sup>8</sup>.

The precision of the law is vitally important: “When poorly constructed, these laws place an undue burden on people with disabilities and, potentially, even prevent people who require a service animal from obtaining one. Additionally, this makes it even more difficult for those who genuinely need an [Emotional Support Animal] ESA in public to be able to bring that animal with them. It is also a concern that some states will deny service animal designation in relation to psychological disabilities and thus deny access or encourage fraud on the part of persons with disabilities of this type.”<sup>9</sup> We note that there are several and significant definitional problems, the following is only a partial list:

- Conflating “service animals” with “assistive animals”;
- “Personal knowledge” is not sufficient or unworkable:
  - The language in LB 309 is incomplete from the 2020 HUD guidance (missing words in bold): “When providing this information, health care professionals should use personal knowledge of their patient/client –i.e., the knowledge used to diagnose, **advise, counsel,** treat, or **provide health care or other disability-related services to** their patient/client.”<sup>10</sup>
  - For the “firsthand observation” would that include video conferencing? If so, how does this get around the internet documentation or doctor shopping?

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disability-related need for an animal, the housing provider is encouraged to engage in a good-faith dialogue with the requestor called the “interactive process.”

<sup>7</sup> Ibid., p. 11. “To assist the person requesting the accommodation to understand what information the housing provider is seeking, the housing provider is encouraged to direct the requester to the Guidance on Documenting an Individual’s Need for Assistance Animals in Housing. Referring the requester to that Guidance will also help ensure that the housing provider receives the disability-related information that is actually needed to make a reasonable accommodation decision”

<sup>8</sup> See DOJ/HUD Joint Statement on reasonable accommodations under the Fair Housing Act (May 17, 2004), at <https://www.hud.gov/sites/documents/huddojstatement.pdf>.

<sup>9</sup> American Veterinary Medical Association (2017), “Assistance Animals: Rights of Access and The Problem of Fraud”, April 21, available at: [www.avma.org/sites/default/files/resources/Assistance-Animals-Rights-Access-Fraud-AVMA.pdf](http://www.avma.org/sites/default/files/resources/Assistance-Animals-Rights-Access-Fraud-AVMA.pdf)

<sup>10</sup> See HUD 2020 guidance, p. 16.

- “Reliable disability-related information” is cherry-picked from the 2020 HUD guidance, too:

“Information About Disability May Include: A determination of disability from a federal, state, or local government agency. Receipt of disability benefits or services (Social Security Disability Income (SSDI)), Medicare or Supplemental Security Income (SSI) for a person under age 65, veterans’ disability benefits, services from a vocational rehabilitation agency, or disability benefits or services from another federal, state, or local agency. Eligibility for housing assistance or a housing voucher received because of disability. Information confirming disability from a health care professional –e.g., physician, optometrist, psychiatrist, psychologist, physician’s assistant, nurse practitioner, or nurse”<sup>11</sup>

- Since the definition and parameters regarding service animals falls under the purview of the Americans with Disabilities Act (ADA) we would suggest including it in Sec. 3(7) on page 3.
- Section 4, page 4, lines 1-8 the language is incongruent with the 2004 joint DOJ/HUD guidance:
  - “If a disability is not obvious, what kinds of information may a housing provider request from the person with a disability in support of a requested accommodation? A housing provider may not ordinarily inquire as to the nature and severity of an individual's disability .... However, in response to a request for a reasonable accommodation, a housing provider may request reliable disability-related information that (1) is necessary to verify that the person meets the Act’s definition of disability (i.e., has a physical or mental impairment that substantially limits one or more major life activities), (2) **describes the needed accommodation**, and (3) **shows the relationship between the person’s disability and the need for the requested accommodation.**”<sup>12</sup>
  - HUD suggests that the impact for misrepresentation should be contained within the lease arrangement: “A housing provider, at its discretion, may make the truth and accuracy of information provided during the process part of the representations made by the tenant under a lease or similar housing agreement to the extent that the lease or agreement requires the truth and accuracy of other material information.”<sup>13</sup>

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<sup>11</sup> Ibid, p. 10

<sup>12</sup> Joint DOJ/HUD 2004 Guidance, p. 13 (question #18)

<sup>13</sup> See HUD guidance 2020, p. 9 (question 6)

Finally, the 2020 HUD guidance document provides a website and a 1-800 number for questions about service and support animals: “For more information, refer to the ADA rules and service animal guidance on DOJ’s ADA Home Page at [www.ada.gov](http://www.ada.gov) or call the ADA Information Line at 1-800-514-0301.”<sup>14</sup>

Education serves as the most appropriate deterrent: “One possible deterrent would be to educate businesses’ employees about how to distinguish between service animals, ESAs, and pets, and to ensure they know when they need to allow access to the animal and when it is up to their discretion. Employees should also be aware of how the animal should behave and when it is within their right to ask the animal to be removed. If people knew there was a greater chance of getting caught when presenting a fraudulent assistance animal, they might be less likely to commit fraud.” Furthermore, what purpose is served by making the punishment for misrepresenting an assistance animal more severe than simply not receiving the accommodation asked for?

Disability Rights Nebraska recommends LB 309 not be advanced.

For further information or questions, please contact me at your convenience: 402-474-3183 or [brad@drne.org](mailto:brad@drne.org)

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<sup>14</sup> Ibid, p. 7