



CONSORTIUM
for
CITIZENS
with
DISABILITIES

COMMENTS OF THE
CONSORTIUM FOR CITIZENS WITH DISABILITIES
ON PROPOSED REGULATIONS
IMPLEMENTING THE
AIR CARRIER ACCESS ACT

69 Fed. Reg 64364
To be codified at 14 CFR 382
Docket Number 19482
March 4, 2005

These comments are submitted on behalf of the Consortium for Citizens with Disabilities (CCD) in response to a Department of Transportation (Department) Notice of Proposed Rulemaking (NPRM) to revise its rule requiring nondiscrimination on the basis of disability in air travel to update, reorganize, and clarify the rule and to implement a statutory requirement to cover foreign air carriers under the Air Carrier Access Act (ACAA). 45 Fed. Reg. 64364 (2004) (to be codified at 14 CFR 382).

CCD is a Washington-based coalition of national disability organizations that advocates on behalf of the 54 million people with disabilities and chronic conditions in the United States. The people CCD organizations represent are "individuals with disabilities" under the ACAA, and have a significant interest in the strongest possible implementation and enforcement of the ACAA.

CCD believes that the Department's proposals promote clarity in understanding of the mutual obligations of air carriers and passengers with disabilities under the ACAA. The question and answer format of the proposals appears to be a useful change, while retaining the compulsory nature of regulations. These comments will address the issues, according to the order in which they are raised in the NPRM.

Section 382.3: What Do the Terms in This Rule Mean?

The term "vehicles" should be defined in this section to include all vehicles owned and operated by air carriers that are used to transport passengers with disabilities. All such vehicles are required by the ACAA to be accessible to and usable by passengers with disabilities. The term "vehicles" could be defined separately or included in the broader definition of "facility."

CCD also supports the addition of "traveling" to the list of major life activities in the definition section. Case law has recognized the right to travel for the purposes of interstate commerce and social services, and it certainly is a critical part of the life of most Americans.

Section 382.5: To Whom Do the Provisions of This Rule Apply?

As stated in the preamble, the Department proposes "to cover only those flights operated by a foreign air carrier that begin or end at a US airport. Aircraft accessibility requirements would apply only to those aircraft that are used for these flights." CCD understands that this proposal is premised on the Department's view that "it would exceed the scope of the Department's authority to attempt to apply ACAA requirements to all the operations of a foreign air carrier." CCD does not object to the Department's proposal, but only in light of its explanation of what constitutes a flight that "begins or ends at a US airport" and, in particular, the definition of what constitutes a continuous journey on a segmented flight.

Section 382.7: What May Foreign Carriers Do If They Believe a Provision of a Foreign Nation's Law Precludes Compliance with the Provision of This Part?

CCD understands the need for a waiver provision for foreign carriers but is concerned that this exception will eventually swallow the rule. Therefore, CCD strongly supports the proposed regulatory language expressing the exacting standards to which the Department will hold a foreign carrier seeking a waiver.

Section 382.15: Do Carriers Have To Make Sure That Contractors Comply With the Requirements of This Part?

CCD strongly supports the proposed language codifying the Department's interpretations of provisions governing the relationship between contractors and air carriers. These provisions are that contractors (including airports) must meet the same requirements that would apply to the carrier itself in providing the services in question, that a contractor's noncompliance is a material breach of its contract with the carrier, that the assurance must commit the contractor to complying with all applicable provisions of the rule with respect to all activities performed for the carrier, that the carrier remains responsible for the contractor's compliance, and that carriers cannot defend against DOT enforcement actions by saying that their noncompliance was the contractor's fault.

The Department seeks comment regarding its interpretation of paragraph (c) of proposed section 382.15 that as drafted, it would apply only to U.S. carriers with respect to U.S. travel agents. The Department's rationale for not proposing to cover foreign airlines or foreign travel agents under this provision is that rules concerning relationships between U.S. carriers and foreign travel agents, or foreign carriers and their travel agents, could prove very difficult to monitor and enforce. CCD understands the difficulty in monitoring the actions of foreign travel agents, but does not agree that they should be entirely exempt. Especially considering that an enormous number of people visiting the United States will use a foreign travel agent to plan, some minimal notification must be required. Domestic carriers frequently provide daily bulletins through their travel agent reservation systems. It is likely that foreign carriers do the same. These carriers should be required to notify everyone using their system that flights to and from the United States are now covered by the Air Carrier Access Act, and include some basic information about at least what that means for the reservation and ticketing process. At the very least, the Department should accept complaints regarding conduct of foreign contractors and comment to the best of its ability on the legality of the foreign contractor's actions under the ACAA.

CCD also believes that online travel agencies, e.g., Expedia and Orbitz, must be specifically required to comply with the accessibility requirements of 39 CFR Part 1194. As they are "standing in the shoes of" the air carrier, they must meet the same standards that the carrier's website must meet.

Section 382.19: May Carriers Refuse To Provide Transportation on the Basis of Disability?

The Department proposes language that "would clarify the basis on which an air carrier may deny transportation to a passenger. In addition to updating the citations to statutory and regulatory provisions that provide a basis for excluding passengers from a flight . . . the NPRM uses the concept of 'direct threat' as the standard for when a carrier may conclude that there is a safety basis for excluding a passenger from a flight."

CCD disagrees with the introduction of this concept into the regulations. Over the years, CCD has had to refute arguments from the airline industry that people with disabilities threaten their own and others' safety in air travel. There is no evidence to support these arguments and the Department has never allowed air carriers to use such generalizations to exclude passengers with disabilities from air travel, require them to travel with attendants or limit their numbers on flights. In our view, introducing the concept of "direct threat" into the stressful and hurried air travel context, would inevitably lead to such results. Specific FAA or TSA safety regulations must continue to be the sole source of discretion for air carriers who think it necessary to exclude passengers with disabilities or take other action on the basis of safety.

Should the Department introduce the concept of "direct threat," the regulatory language must make it clear that a threat to safety which air carriers believe cannot be mitigated by reasonable measures is limited to a threat to other passengers and not solely to the passenger himself. Consideration by the airlines of risk to self is unjustifiably paternalistic, in view of the fact that people with disabilities are clearly in the best position to make a determination about risk to their own health and safety. Air carriers must not be permitted to substitute their judgment for that of the passenger with a disability.

Section 382.29: May a Carrier Require a Passenger With a Disability To Travel With a Safety Assistant?

CCD does not object to the NPRM's use of the term "safety assistant" rather than the term "attendant" in current Section 382.35. We are concerned, however, with the explanatory language that "A safety assistant is someone who accompanies a passenger with a disability in order to provide assistance in the event of an emergency, such as an evacuation of the aircraft." Our concern is premised on the practice of some air carriers to require quadriplegics and others with severe mobility impairments to travel with attendants simply because they may not be able to physically assist with an emergency evacuation to the satisfaction of air carrier personnel. The Department should make clear its long-standing policy that so long as a passenger with a disability can communicate to others how best to physically assist him in the event an evacuation is necessary, he should be free to travel unaccompanied.

Section 382.43: Must information and reservation services of carriers be accessible to individuals with hearing and vision impairments?

The Department asks in this section whether carrier websites should be modified to enable passengers with disabilities to request accommodations. This should be a requirement, and should be able to be easily incorporated into existing systems. This will give the passenger and carrier a written record of the request with a record number, and should make compliance easier for all.

Section 382.45: Must Carriers make copies of this rule available to Passengers?

The Department asks whether greater specificity should be required. CCD believes that it must be specified that alternative formats for people with vision disabilities must be available as well.

Section 382.51: What Requirements Must Carriers Meet Concerning the Accessibility of Airport Facilities?

The Department proposes a performance requirement for all carriers at foreign airports, rather than strict adherence to ADAAG or other standards. CCD believes that domestic carriers should apply ADAAG even in its foreign locations to the extent that it does not conflict with foreign law. This provides both passengers and carriers with a "safe harbor" as far as physical facilities.

We urge the Department to require that ticket or information kiosks be usable by all people with disabilities, including people who are blind or visually impaired and those who use wheelchairs or other mobility devices. Kiosks should meet the minimum accessibility requirements of Section 707 of ADAAG, which apply to automatic teller machines and fare machines. Considering that the environment in which these kiosks are located is often noisy, crowded and confusing, the machines themselves should also comply with 36 CFR 1194.25, the Access Board's Section 508 standards. CCD believes that including these by reference may be sufficient, but including the standards as an appendix, with a requirement to keep current on changes or updates, would make a more complete final rule.

Section 382.55: What Requirements Apply to Carriers' Security Screening Procedures?

Proposed Section 382.55 recognizes that the Transportation Security Administration now controls security screening at U.S. airports and that there may be foreign legal requirements for security screening at foreign airports that are not subject to ACAA regulation. However, the proposal also anticipates the possibility that some air carriers may choose to conduct security screening procedures that go beyond those carried out under TSA or foreign legal requirements. Consequently, for such additional carrier-imposed procedures, the Department proposes to carry forward the substance of current Section 382.49 and seeks comment on whether this is necessary. CCD believes that it is

necessary to carry forward the current language, especially if Congress should once again privatize security screenings.

Section 382.61: What Are the Requirements for Movable Aisle Armrests?

CCD strongly supports paragraph (c)'s explicit statement that movable aisle armrests must be provided proportionately in all classes of service in the entire passenger cabin. As stated in the preamble, "if 80 percent of the aisle seats on the aircraft in which passengers with mobility impairments may sit are in coach, and 20 percent are in first class, then 80 percent of the movable aisle armrests must be in coach, with 20 percent in first class." This express regulatory requirement is long overdue.

CCD also strongly supports the Department's proposal to remove the current exception for types of seats in which incorporating movable aisle armrests would not be feasible. Like the Department, CCD has not seen evidence showing that any particular sort of seat truly makes the use of movable aisle armrests infeasible.

Section 382.63 What Are the Requirements for Accessible Lavatories?

This section carries forward the requirements of current Section 382.21(a)(3). It would make explicit that carriers may, but are not required to, install accessible lavatories in single-aisle aircraft. CCD appreciates the Department's recognition that the absence of accessible lavatories on single-aisle aircraft can create inconvenience and difficulty for many passengers with disabilities. The Department seeks comment on whether it would be desirable and feasible, practically and economically, to require accessible lavatories on at least some new single-aisle aircraft (e.g., those above a certain seating capacity).

A DOT Federal Advisory Committee convened in the mid-1990s to develop guidelines for designing onboard lavatories in single aisle aircraft. With a single exception, the aeronautical engineers from major manufacturers were able to design this accessibility into existing aircraft.

CCD recognizes the burdens of imposing new costs on economically fragile air carriers especially when it comes to retrofitting existing airplanes. Because accessible lavatories can be designed into single aisle aircraft, and because it is always cheaper to design accessibility into new or altered construction, CCD would encourage and support rulemaking requiring accessible lavatories in new single aisle aircraft of at least 100 seats or aircraft undergoing complete renovation and reconfiguration.

Section 382.67: What Is the Requirement for Priority Space in the Cabin To Store Passenger Wheelchairs?

The Department seeks comment on whether the proposed rule, should codify its current enforcement policy permitting "carriers to comply with the requirements

for passenger wheelchair stowage space across two or three seats using a strap kit approved by the FAA, rather than to retrofit an aircraft, possibly involving the removal of seats, to provide the designated wheelchair space."

CCD accepts this practice as an effective means of satisfying the requirement for existing aircraft, but believes that it is not and should not be the only feasible means of stowing a passenger's wheelchair on board on a plane that has yet to be constructed or have seats installed. The final rule should require a closet that is capable of accommodating a passenger's folding wheelchair in each new or reconfigured aircraft.

Section 382.81: For Which Passengers Must Carriers Make Seating Accommodations?

Section 382.83: Through What Mechanisms do Carriers Make Seating Accommodations?

Section 382.85: What Seating Accommodations Must Carriers Make to Passengers in Circumstances not Covered by Sec. 382.81 (a) Through (d)?

These sections carry forward the requirements of current Sec. 382.38, restructured for greater clarity. The Department seeks comment on whether other seating accommodations should be added to fill gaps, if any, in the existing provision.

In the initial rulemaking, seats with movable armrests were designated to be available to anyone using a boarding chair. We strongly urge that DOT require that bulkhead seats be available to passengers using wheelchairs. Reserving these seats makes it possible for many wheelchair users to board a plane without having to transfer to and from a boarding chair, an advantage for both carrier personnel and the passenger.

Section 382.91: What Assistance Must Carriers Provide to Passengers With a Disability in Moving Within the Terminal?

The proposed rule contains requirements concerning assistance in moving through the terminal other than in connecting flight situations. The Department seeks comment on whether, in the situation where a passenger is arriving at an airport to begin a journey, it is reasonable for the carrier to be able to require advance notice for meeting the passenger to provide the assistance required in this section.

CCD generally objects to extra advance notice requirements unless extreme or unusual provisions are requested. We understand the logic of advance notice for service to be provided upon arrival at an airport. If this regulation imposes this requirement, it should reflect, as in other provisions, the requirement for the

carrier to provide the assistance without advance notice if it can do so without delaying the flight.

Regarding the Department's question on limiting this assistance only to people with mobility impairments, CCD would not support such a limitation. For example, individuals with cognitive or sensory impairments may also require the type of assistance described in this section.

We believe that this section must also require a carrier to provide a passenger who uses a wheelchair with his personal wheelchair, upon request and when feasible, for transfers between flights. Too many wheelchair users must use airport wheelchairs to make connections. This practice prohibits independent use and limits access to the airport's bathroom. With a reasonable time limitation, including a prior check on delayed connecting flights, we believe that providing the personal wheelchair enables passengers to travel more independently.

Section 382.93: Must Carriers Offer Preboarding to Passengers With a Disability?

CCD concurs with the Department's belief "that providing a preboarding option for passengers is an essential accommodation for seating, stowage, and other activities that are more difficult for passengers with disabilities than other people." Hence, CCD supports the NPRM's proposal to require a preboarding opportunity for passengers with disabilities. It is particularly important for passengers who can stow a wheelchair on board only if they preboard.

Section 382.95: What Are Carriers' General Obligations With Respect to Boarding, Deplaning, and Connecting Assistance?

The Department seeks comment on whether the requirement that carriers provide this assistance "promptly" should be more specific (e.g., by including a time frame or by requiring that carriers ensure that deplaning assistance is provided to passengers with disabilities who will use an aisle chair for deplaning no later than the time that the aircraft aisle is clear of other passengers, such that the aisle chair can be brought to the passenger's aircraft seat). CCD agrees with the Department's objective to address the many situations in which passengers who need assistance in deplaning have been left on board aircraft for an unreasonable length of time.

CCD does not disagree with the use of the word "promptly" or its flexible application in a multitude of circumstances. We suggest that regulatory guidance be included in the final rule explaining that "promptly" means as soon as possible, even if the plane is not empty of other passengers, and especially if the passenger needing assistance has a connecting flight to make. Further, passengers who use boarding chairs may miss connecting flights because they are forced to wait until all other passengers have left the plane. This regulation should specifically state that boarding chairs should be provided before the plane is cleared if all passengers with tight connections are permitted to get off the plane first.

Section 382.131: Do Baggage Liability Limits Apply to Mobility Aids and Other Assistive Devices?

The Department seeks comment on how liability for loss of or damage to wheelchairs and other assistive devices should be handled in the case of international transportation since the domestic baggage liability limits of 14 CFR Part 254, as well as the exception to these limits that this section in effect creates, do not apply to international transportation. The Department should simply assert that the same rules that apply to domestic carriers for calculating the compensation for a lost, damaged or destroyed wheelchair or other assistive device apply equally to foreign air carriers. If foreign air carriers believe that Warsaw or Montreal Convention liability limits dictate a different result, they are free to apply for a waiver under proposed Section 382.7.

Section 382.141: What Training Are Carriers Required To Provide for Their Personnel?

The NPRM adds a provision requiring the development of training in consultation with disability community organizations. The Department seeks comment on the application of this proposed requirement to foreign carriers. CCD believes that the requirement to work with disability community organizations should not be waived for foreign carriers who can not identify such a group in their home countries. Foreign carriers who operate flights to and from the United States normally have offices in the United States so they can easily reach out to disability community organizations located in the United States or international disability organizations for input on training information. Foreign carriers can also use DOT as a resource for training materials.

Section 382.143: When must Carriers Complete Training for their Personnel?

CCD believes that one year is adequate time for foreign carriers to complete their training, but that the deadline for domestic carriers should be six months. The substantive changes in this regulation are not complicated, ACAA training is a regular part of carrier training, and carriers do refresher training on a regular basis. It is not an undue burden for domestic carriers to provide targeted training to the appropriate personnel on the changes in this rule within six months.

Section 382.145: What Must Carriers Incorporate in Their Manuals?

The NPRM would delete the requirement of current Section 382.63 for carriers to establish ACAA compliance programs and submit them to the Department for review. Instead, the NPRM would require all carriers to incorporate their procedures for complying with ACAA requirements in their manuals, training materials, and guidance for their personnel, and make them available to the Department on its request.

CCD does not object to these revised requirements, but believes that the Department should have a program of randomly requesting such materials. CCD also believes it would be beneficial, and not unduly burdensome for carriers to be required to submit certifications of compliance with this requirement to the Department.

Section 382.151: What Are the Requirements for Providing Complaints Resolution Officials?

CCD agrees with the Department that "In any situation in which a person raises a disability-related issue, and a carrier's personnel do not resolve the issue immediately to the customer's satisfaction, the carrier's personnel must immediately inform the customer of the right to contact a Complaints Resolution Official (CRO)." People with disabilities generally do not know CROs exist and that they can be a resource to solve discrimination or accessibility problems. CCD supports the Department's requirement that it is the airline's responsibility to make passengers aware of this resource when a passenger's disability-related concern has not been addressed to the customer's satisfaction by the carrier's staff.

CCD appreciates the opportunity to respond to the issues raised by the Department and supports the Department's strong advocacy for equal access to the skies. For more information please contact Maureen McCloskey. If we can provide further information, please contact Maureen McCloskey, Paralyzed Veterans of America, at 202-416-7696 or maureenm@pva.org or Julie Ward, The Arc and UCP, 202-783-2229 ward@thedpc.org.

Respectfully submitted,

Adapted Physical Activity Council
American Association of People with Disabilities
American Association on Mental Retardation
American Council of the Blind
American Counseling Association
American Foundation for the Blind
Association of University Centers on Disabilities
Easter Seals
Epilepsy Foundation
Helen Keller National Center
National Coalition on Deaf-Blindness
National Association of Councils on Developmental Disabilities
National Association of Protection and Advocacy Systems
National Rehabilitation Association
Research Institute for Independent Living
The Arc of the U.S.
United Cerebral Palsy
United Spinal Association