

The Air Carrier Access Act: It Is Time for an Overhaul

by Stuart A. Hindman*

It is axiomatic that flying in today's post-September 11th world is a hassle. Between airlines suggesting that passengers arrive at the airport anywhere from 60 minutes to 120 minutes before flight time¹ and security checkpoints that can be anything but user-friendly, flying today is turning author Greg Anderson's idea, "[f]ocus on the journey, not the destination,"² into something of a misnomer. Imagine then, in addition to check-in counters, long lines at security checkpoints, great distances between terminals and boarding gates, crowded airports, and less than favorable flying conditions, having to navigate the world of air travel with a disability. Depending on the nature and extent of the disability, accommodations needed to help the disabled passenger could be as simple as extra time on the jet bridge or a wheelchair through the airport. But, as will be discussed in this paper, these small requests might subject a disabled individual to discrimination, mental and potential physical injury, not to mention precious lost time, lengthy delays, unnecessary costs, and other unpleasantness that come with embarking into today's world of transportation by air. As former Chief Justice Rehnquist put it, "[d]elays may be particularly costly in [air travel], as a flight missed by only a few minutes can result in hours worth of subsequent inconvenience."³

This paper will focus on the statutory protections for travelers with disabling conditions, specifically the Air Carrier Access Act (ACAA),⁴ as well as the remedies, or lack thereof, which are afforded to passengers when incidents of discrimination occur. In addition, the history of the ACAA and the case law relating to it will be discussed. Throughout the paper, the interplay of the ACAA with other disability and civil rights laws, namely the Americans with Disabilities Act (ADA)⁵ and section 504 of the Rehabilitation Act of 1973⁶ will be addressed. Furthermore, this paper will reveal some of the challenges faced by a family flying with a child with a serious disability. Finally, changes will be suggested to existing laws and airline employee practices in order to bring the ACAA in line with its original spirit and purpose, the protection of the civil rights of air travelers with disabilities.

Permeating this discussion will be a focus on a specific subset of the flying population: a family that is traveling with a child with a disability. For purposes of this paper, I have created a

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¹ *E.g.*, United Airlines, Airport Check-In Information, <http://www.united.com/page/article/0,6867,2131,00.html> (last visited Mar. 3, 2010).

² GREG ANDERSON, THE 22 NON-NEGOTIABLE LAWS OF WELLNESS 128 (1995).

³ *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 684 (1992).

⁴ 49 U.S.C. § 41705 (2006).

⁵ 42 U.S.C. § 12101, *et seq.* (2006).

⁶ 29 U.S.C. § 794, *et seq.* (2006).

hypothetical nuclear family consisting of a mother, father, and two children, one of whom (called “Jack”) has a serious disabling condition which affects one or more major life activities. The obstacles that both Jack and his family face in using our nation’s network of airports and flights and what tools Jack and his family might have at their disposal to deal with discrimination as they “fly the friendly skies”⁷ will be discussed.

To help illustrate the issues faced by Jack and his family, two situations will be analyzed to demonstrate common problems that families flying with children with disabilities might face in the course of travel. In scenario A, Jack is flying alone and the airline is requiring that he fly with an escort even though Jack has the ability to care for himself on board the aircraft. In scenario B, Jack has caused some sort of ruckus on board the aircraft due to his disability. The Captain feels uncomfortable flying the plane with Jack’s behavior, and the entire family is removed from the flight.

I. ACAA: A BRIEF PRIMER

A. The History Preceding the ACAA

The ACAA can trace its roots back to the Federal Aviation Act of 1958.⁸ Section 404 of the Act required air carriers to “provide safe and adequate service . . .” and forbade carriers from “[subjecting] any particular person to any unjust discrimination or any undue or unreasonable prejudice or any disadvantage in any respect whatsoever.”⁹ In 1973, the Rehabilitation Act was enacted, which prohibited, *inter alia*, discrimination by “any program or activity receiving federal financial assistance”¹⁰ Due to the limiting language of the Rehabilitation Act, the then overseeing agency, the Civil Aeronautics Board (CAB), prosecuted only unlawful disability discrimination by air operators that were direct recipients of federal money.¹¹ However, with the passage of the Airline Deregulation Act of 1978,¹² the aforementioned section 404 was repealed, the CAB was sunsetted, and disabled passengers were left without express statutory protections against discriminatory acts by airlines.

Disabled passengers were dealt an even bigger blow when the United States Supreme Court heard and ruled on *U.S. Department of Transportation v. Paralyzed Veterans of America*.¹³ In that case, the Supreme Court was asked to apply section 504 of the Rehabilitation Act to commercial airlines by way of the benefits they receive as indirect recipients of federal funds that are used to build and maintain airports, as well as to operate the national air traffic control system.¹⁴ The Court, per Justice Powell, held that “. . . Congress has made it explicitly clear that these funds are to go to airport operators. Not a single penny of the money is given to the airlines. Thus, the recipient for purposes of section 504 is the *operator* of the airport and not its

⁷ Advertising campaign of United Airlines, 1965-1996.

⁸ James S. Strawinski, *Where is the ACAA Today? Tracing the Law Developing from the Air Carrier Access Act of 1986*, 68 J. Air L. & Com. 385 (2003) (citing 49 U.S.C. app. § 1374 (1982), *repealed by* Pub. L. No. 103-272, 108 Stat. 1141 (1994)).

⁹ *Id.* at 385-386.

¹⁰ 29 U.S.C. § 794(a).

¹¹ Strawinski, *supra* note 8, at 386.

¹² 49 U.S.C. § 1301 (1994) (current version at 49 U.S.C. § 40101 *et seq.*). The Airline Deregulation Act, often cited as ADA, will not be identified by its acronym in this paper so as to not confuse the Deregulation Act with the Americans with Disabilities Act, which has been cited in this paper as “ADA.”

¹³ 477 U.S. 597 (1986).

¹⁴ *Id.* at 599.

users.”¹⁵ The Court declared that federal protections under section 504 do not apply to airlines because they do not “actually ‘receive’ federal financial assistance.”¹⁶ The holding in *Paralyzed Veterans* left disabled travelers with no statutory protection against discrimination.¹⁷

B. *The ACAA*

The Air Carrier Access Act was enacted to overturn the holding in *Paralyzed Veterans*. The ACAA passed through Congress with little resistance and became law on October 2, 1986 when it was signed by President Reagan.¹⁸ The ACAA¹⁹ provided the following statutory protections to disabled travelers:

(c)(1) No air carrier may discriminate against any otherwise qualified handicapped individual, by reason of such handicap, in the provision of air transportation.

(2) For the purposes of paragraph (1) of this subsection the term “handicapped individual” means any individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.²⁰

After a recodification in 1994 and an amendment in 2000 to apply its protections to foreign carriers,²¹ the current version of the ACAA can be found at 49 U.S.C. § 41705. Of the current provisions of the ACAA, the sections relevant to this paper are:

(a) In General.— In providing air transportation, an air carrier, including (subject to section 40105 (b)) any foreign air carrier, may not discriminate against an otherwise qualified individual on the following grounds:

(1) the individual has a physical or mental impairment that substantially limits one or more major life activities.

(2) the individual has a record of such an impairment.

(3) the individual is regarded as having such an impairment.

* * *

(c) Investigation of Complaints.—

¹⁵ *Id.* at 605 (emphasis in original).

¹⁶ *Id.*

¹⁷ The issue of airlines being subject to the Rehabilitation Act resurfaced in 2005 when the Eleventh Circuit heard *Shotz v. American Airlines, Inc.*, 420 F.3d 1332 (11th Cir. 2005). In *Shotz*, a class of disabled passengers brought a Rehabilitation Act claim against several airlines, claiming the airlines had received federal subsidies when Congress passed the Air Transportation Safety and System Stabilization Act in the aftermath of the terrorist attacks of Sept. 11, 2001. *Id.* at 1334. The Eleventh Circuit held that the almost 5 billion dollars given to airlines after the 9/11 attacks were “compensation” and not a “subsidy,” using a definition from the Tenth Circuit in *DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377 (10th Cir. 1990). 420 F.3d at 1335. The *Shotz* court held that since the money was compensation, the airlines were not recipients of “federal financial assistance,” thereby not subjecting them to the Rehabilitation Act. *Id.* at 1334.

¹⁸ Air Carrier Access Act, Pub. L. No. 99-435, 100 Stat. 1080 (1986).

¹⁹ Originally codified at 49 U.S.C. § 1374.

²⁰ Air Carrier Access Act § 2(a).

²¹ See Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, § 707(a)(2) (2000). The act is often referred to as “AIR21.” See also *infra*, Part IV.C.

(1) In general.—The Secretary [of Transportation] shall investigate each complaint of a violation of subsection (a).²²

II. **PROTECTIONS UNDER THE ACAA**

Generally, the initial issue in an ACAA case is whether an individual fits into the category of an “otherwise qualified individual.” The ACAA’s use of the term “otherwise qualified individual”²³ is very similar to the language of the ADA²⁴ and section 504 of the Rehabilitation Act.²⁵ While there has been some case law on the interpretation of the definition of an “otherwise qualified individual” in terms of the ACAA, it is helpful to refer back to ADA or Rehabilitation Act cases involving definitional interpretation.²⁶

As required by the ACAA,²⁷ the U.S. Department of Transportation (DOT) promulgated rules to enforce the law.²⁸ In order to be covered by the ACAA and meet the threshold test, a passenger must: (1) be a qualified passenger with a disability as defined in 14 C.F.R. § 382.3; (2) buy or otherwise validly obtain, or make a good faith effort to obtain, a ticket for air transportation on a carrier and present himself or herself at the airport for the purpose of traveling on the flight to which the ticket pertains; and (3) meet reasonable, nondiscriminatory contract of carriage requirements applicable to all passengers.²⁹

To be considered an “otherwise qualified individual,” a passenger must meet the following definition: any individual who has a physical or mental impairment that, on a permanent or temporary basis, substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.³⁰ When courts have been faced with the issue of whether a litigant is an “otherwise qualified individual,” they have frequently looked to other sources of law, such as an ADA case or the Equal Employment Opportunity Commission regulations.³¹

Assuming a passenger is entitled to ACAA protections, there are certain actions that an airline may not take against a passenger with a disability. Some of these prohibited activities include refusing to provide transportation on the basis of the passenger’s disability³²; requiring disabled individuals to notify airlines in advance of their travel intentions³³; under most

²² 49 U.S.C. § 41705.

²³ *Id.*

²⁴ *See* 42 U.S.C. § 12112(b)(5)(A).

²⁵ *See* 29 U.S.C. § 794(a).

²⁶ It should be noted, however, that while the language of the ADA is often used as a source of interpretation for the ACAA, transportation by aircraft is expressly excluded from the definition of “specified public transportation” in the ADA. 42 U.S.C. § 12181(10). Transportation by aircraft, therefore, is not subject to ADA regulations. However, the airport itself is a “commercial facility” as defined under 42 U.S.C. § 12181(2) and discrimination that occurs inside the airport is covered by the ADA. The exclusion of transportation by aircraft could be due to the fact that when the ADA was enacted in 1991, the ACAA was already in effect and Congress may not have felt it necessary to provide double protection.

²⁷ 49 U.S.C. § 41705(c)(4)(A).

²⁸ *See generally* 14 C.F.R. § 382.

²⁹ 14 C.F.R. § 382.3.

³⁰ *Id.*

³¹ *See, e.g.,* *Deterra v. Am. W. Airlines, Inc.*, 226 F. Supp. 2d 298 (D. Mass. 2002).

³² 14 C.F.R. § 382.19.

³³ § 382.25.

circumstances, requiring a qualified individual to travel with an attendant³⁴; refusing transportation or requiring a medical certificate on the basis of a communicable disease, unless the disease poses a direct threat to the health or safety of others³⁵; refusing service animals from accompanying persons with disabilities in the cabin³⁶; and requiring extra charges for providing facilities, equipment, or services to a qualified passenger with a disability.³⁷ Furthermore, airlines are required to have a Complaint Resolution Officer (CRO) available at the airport to any person who alleges violations of the ACAA.³⁸

III. REMEDIES FOR ACAA VIOLATIONS

Once an airline has been accused of violating the ACAA, the remedies available to the individual are subject to much controversy. The existence of certain remedies and the effectiveness of others for violations of the ACAA have been the source of most of the criticism and litigation surrounding the Act. The two principal remedies that either exist or are alleged to exist are: (1) administrative DOT enforcement action; and (2) lawsuits maintained under a private right of action.

A. DOT Enforcement Action

The only statutory remedy expressly set forth in the text of the ACAA for suspected violations is DOT enforcement action. This mandate comes from subsection (c) of the ACAA, which states that “[t]he Secretary [of Transportation] shall investigate each complaint of a violation of subsection (a).”³⁹ In order to comply with this statutory requirement, the DOT promulgated 14 C.F.R. § 382.159 which details the steps that an individual may take in order to file a complaint for alleged disability discrimination. Passengers are given two options on how to make a complaint to the DOT of suspected ACAA violations: (1) filling out an online report on the website of the DOT’s Aviation Consumer Protection Division; or (2) writing directly to the Department of Transportation, Aviation Consumer Protection Division.⁴⁰

Once the DOT receives a complaint of discrimination, the agency follows detailed, internal procedures as outlined in 14 C.F.R. § 302 *et seq.* to investigate the charge.⁴¹ If, after the full adjudication process, the DOT discovers a violation of the ACAA, it is authorized to assess civil penalties of up to \$11,000 per violation.⁴² While these civil fines are authorized for ACAA violations, the penalties are paid directly to the U.S. government.⁴³ There is no provision that allows the DOT to order an airline to make restitution to a passenger who has been the victim of

³⁴ § 382.29.

³⁵ § 382.21. A direct threat from a communicable disease would be SARS, but not the common cold or H1N1.

³⁶ § 382.117.

³⁷ § 382.31.

³⁸ § 382.151(c)(1).

³⁹ 49 U.S.C. § 41705(c).

⁴⁰ 14 C.F.R. § 382.159(a).

⁴¹ Specifically, *see* 14 C.F.R. § 302.401 *et seq.*

⁴² § 383.2(b)(1). Further, subsection (b) of the ACAA states that “[f]or purposes of [civil penalties] a separate violation occurs under this section for each individual act of discrimination prohibited by subsection (a).” 49 U.S.C. § 41705(b). In theory then, an airline that violates the ACAA multiple times in its actions regarding one person (for example, at the check-in counter, then at the gate, and then upon arrival) could be subjected to triple penalties.

⁴³ 14 C.F.R. § 383.2. To add insult to injury, all violations of the ACAA are also violations of 49 U.S.C. 41712, the prohibition on unfair and deceptive practices by airlines. *British Airways, PLC Violations of 49 U.S.C. § 41310, 41705 and 41712*, Order 2006-8-7, 2006 WL 2666504 (Dep’t of Transp. Aug. 7, 2006).

discrimination and has suffered injury.⁴⁴ Furthermore, the DOT's discretionary powers to decline to initiate enforcement proceedings are not judicially reviewable.⁴⁵ The effect of the lack of protections and the unavailability of individual remedies by means of DOT enforcement proceedings will be detailed in Part VI.A, *infra*.

B. *The Existence, or not, of a Private Right of Action under the ACAA*

The greatest source of tension regarding a remedy under the ACAA is whether the law allows for an implied private right of action which would permit a discriminated individual to sue the airline directly for injuries that resulted from a violation of the Act. However, the only way a private right of action could be maintained would be for a court to find an implied right, since the plain language of the statute makes no provision for one. After early interpretations found an implied private right of action, subsequent courts overturned those decisions. The most current cases hold that there is no right to sue an airline directly for ACAA violations.

1. *A Private Right of Action Exists*

While most of the early cases that interpreted the ACAA held that a private right of action exists, those decisions were based on Supreme Court precedent that has since been overturned.⁴⁶ The first case to be brought under the ACAA was *Tallarico v. Trans World Airlines, Inc.*⁴⁷ In *Tallarico*, Polly, a 14-year-old girl with cerebral palsy, was not allowed to fly unaccompanied during a trip to visit her family over a Thanksgiving holiday.⁴⁸ The airline was concerned about Polly's ability to take care of herself in the event of an emergency and exit the plane expeditiously,⁴⁹ and required that someone accompany her on the flight.^{50, 51} Polly's father then flew to meet her and accompanied her on the flight at a cost of \$1,350.⁵² Polly's parents, on their own and on behalf of their daughter, brought a lawsuit against TWA for violations of the ACAA.⁵³ The district court struck Mr. and Mrs. Tallarico's individual claims in an unreported decision.⁵⁴ A jury verdict in the district court found for the Tallaricos on Polly's claims alone, and awarded damages in the amount of \$80,000, covering both pecuniary losses and emotional

⁴⁴ Lex Frieden, National Council on Disability, Position Paper on Amending the Air Carrier Access Act to Allow for Private Right of Action, July 8, 2004.

⁴⁵ *Caplan v. Dep't of Transp.*, No. 02-1044, 2002 WL 31545973 (D.C. Cir. Nov. 12, 2002) (unpublished opinion). *See also* *Heckler v. Chaney*, 470 U.S. 821 (1985) (an agency's decision to decline to initiate enforcement proceedings is reserved for the agency's discretion and thus is not judicially reviewable under the Administrative Procedure Act); 5 U.S.C. § 701(a)(2) (2006) (administrative agency actions are not subject to judicial review if the decision "is committed to agency discretion by law").

⁴⁶ *Cort v. Ash*, 422 U.S. 66 (1975).

⁴⁷ 881 F.2d 566 (8th Cir. 1989).

⁴⁸ *Id.* at 568.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ It should be noted, as discussed *supra* in Part II, airlines are forbidden from requiring an otherwise qualified individual to fly with a safety attendant, per 14 C.F.R. § 382.29. However, when the ACAA was enacted, the DOT was given 180 days to put rules into effect to enforce the new law. 49 U.S.C. § 41705(c)(4)(A). The initial suit filed by the Tallaricos was commenced within the 180-day grace period, and thus the current provisions of the C.F.R. were not in effect.

⁵² 881 F.2d at 568.

⁵³ *Id.*

⁵⁴ *Tallarico v. Trans World Airlines, Inc.*, 693 F. Supp. 785, 787. The striking of the parent's claims demonstrates that the ACAA, unlike certain sections of the ADA, does not allow association claims. This also will be discussed in Part VII.B, *infra*.

distress.⁵⁵ After a motion was granted remitting damages to out-of-pocket expenses (\$1,350), the Tallaricos appealed and the Eighth Circuit Court of Appeals was given the first opportunity to take up the issue of an implied right of action under the ACAA.⁵⁶

The Court of Appeals, holding that the ACAA did imply a private right of action, relied on a test that the Supreme Court had handed down in *Cort v. Ash*⁵⁷ to determine the existence of an implied private right of action in a statute.⁵⁸ The Supreme Court, in *Cort*, outlined four factors that are to be used to determine whether an implied right of action exists.⁵⁹

Agreeing with the district court, the Eighth Circuit found that a private right of action did exist. The holding in *Tallarico*, finding an implied private right of action, was followed in subsequent cases in the Fifth Circuit,⁶⁰ the Ninth Circuit,⁶¹ and two district courts, the Western District of Tennessee⁶² and the District of New Jersey.⁶³

After these early cases seem to have laid the issue to rest, the Supreme Court, in *Alexander v. Sandoval*,⁶⁴ clarified the test from *Cort* for determining the existence of an implied right of action, leading several lower courts in subsequent decisions to hold that the ACAA does not provide a private right of action, which is where the law stands today.

2. A Private Right of Action Does NOT Exist

The Court, in *Alexander*, redefined the *Cort* test and held that the four factors were not all to be given equal weight and that the correct analysis is whether Congress intended to create a private right of action.⁶⁵ The other three factors were designed only to aid in the meaning of the statute's text.⁶⁶ After the court's holding in *Alexander*, federal appellate and district courts, in several cases that followed, found no implied right of action under the ACAA.⁶⁷ The first court

⁵⁵ *Id.*

⁵⁶ 881 F.2d 566.

⁵⁷ 422 U.S. 66.

⁵⁸ 881 F.2d at 568.

⁵⁹ Relying on *Cort*, the *Tallarico* court stated:

First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted,' that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 569 (citing *Cort*, 422 U.S. at 78).

⁶⁰ *Shinault v. Am. Airlines, Inc.*, 936 F.2d 796 (5th Cir. 1991).

⁶¹ *Adiutori v. Sky Harbor Int'l Airport*, 103 F.3d 137 (9th Cir. 1996) (unreported decision).

⁶² *Bower v. Fed. Express Corp.*, 156 F. Supp. 2d 678 (W.D. Tenn. 2001).

⁶³ *Waters v. Port Auth. of N.Y. & N.J.*, 158 F. Supp. 2d 415 (D.N.J. 2001).

⁶⁴ 532 U.S. 275 (2001).

⁶⁵ *Id.* at 288.

⁶⁶ *Strawinski*, *supra* note 8, at 394 (citing *Alexander*, 532 U.S. at 287-288).

⁶⁷ The holding in *Alexander v. Sandoval* was announced on April 24, 2001. 532 U.S. at 275. Two district court cases decided after *Alexander* ignore its holding; ironically, both were from the District of New Jersey. The court in *DeGirolamo v. Alitalia-Linee Aeree Italiane, S.p.A.*, found an implied cause of action under 49 U.S.C § 41310(a) and the ACAA without any sort of analysis and awarded \$600 compensatory damages under the ACAA. 159 F. Supp. 2d 764, 767, 769 (D.N.J. 2001). The decision in *DeGirolamo* is dated Sept. 12, 2001, four months after *Alexander* was announced. The same court (but with a different judge) undertook a similar "implied right of action" analysis in *Waters*. *Waters*, decided on Aug. 14, 2001, relied on the then-overturned *Cort v. Ash* to find an implied cause of action under § 404(b) of the FAA. 158 F. Supp. 2d at 430-435. While the decision in *DeGirolamo*

to so hold was the Eleventh Circuit in *Love v. Delta Air Lines*.⁶⁸ In *Love*, the court opined that due to the extensive nature of enforcement proceedings the ACAA provides within the DOT, Congress's omission of a private right of action was purposeful and conspicuous.⁶⁹ After the holding in *Love* was announced, courts in the Tenth Circuit,⁷⁰ Southern District of New York,⁷¹ and Eastern District of Missouri⁷² all followed suit, declining to find a private right of action in the ACAA.⁷³ Based upon the Supreme Court's clarification of the *Cort* factors, the prevailing notion within ACAA litigation is that the law does not confer a private right of action upon discriminated passengers. This topic will be a source of discussion in Part VII.A, *infra*, in terms of recommendations for changing and advancing the ACAA.

IV. AIRLINES' DEFENSES TO ACAA CLAIMS

When a passenger makes a claim of disability discrimination during travel against an airline, that airline has several defenses it can raise. The sources of these defenses are statutory, common law, and "self-help" measures.

A. Statutory "Safety" Defense

The first defense that an airline may assert to protect itself against an ACAA claim can only be used in situations like hypothetical scenario B, *supra*, with Jack and his family; an airline refusing to fly a passenger because of a concern involving the behavior of the passenger. Airlines are given statutory protection⁷⁴ to refuse transportation to a passenger on the basis of safety. Section 44902 sets out situations where airlines are required to,⁷⁵ and where they permissively may,⁷⁶ refuse transportation to passengers.⁷⁷ In order to give airlines proper guidance as to when they may rightfully deny transportation on the basis of safety, federal law provides steps for airlines to take prior to making a determination that the passenger poses a "direct threat."⁷⁸ A direct threat is defined as "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services."⁷⁹ The regulations require the airline to examine the following to evaluate a direct threat: (i) the nature, duration, and severity of the risk; (ii) the

assumingly found a private right of action under the ACAA, most commentators think of this case as an outlier. *See e.g.*, Strawinski, *supra* note 8.

Bower, also decided after *Alexander*, should be taken with a grain of salt because the cited decision is on remand from the Sixth Circuit. The initial suit was filed in 1994, during the *Cort* period. Even though the holding that a private right of action existed was simply a citation to *Shinault*, 156 F. Supp. 2d 688 n. 17, the court was hearing a case again prior to the overruling of *Cort*.

⁶⁸ 310 F.3d 1347 (11th Cir. 2002).

⁶⁹ Kristine Cordier Karnezis, Annotation, *Recovery for Discriminatory Conduct under Air Carrier Access Act*, 49 U.S.C. § 41705, 188 A.L.R. FED. 367 (2003) (citing *Love*, 310 F.3d 1374).

⁷⁰ *Boswell v. Skywest Airlines, Inc.*, 361 F.3d 1263 (10th Cir. 2004).

⁷¹ *Ruta v. Delta Airlines, Inc.*, 322 F. Supp. 2d 391 (S.D.N.Y. 2004).

⁷² *Wright ex rel. D.W. v. Am. Airlines, Inc.*, 249 F.R.D. 572 (E.D. Mo. 2008).

⁷³ For a recent case which accepted the "no cause of action" theme, *see Thomas v. Nw. Airlines Corp.*, No. 08-11580, 2008 WL 4104505, at *2-5 (E.D. Mich., Sept. 2, 2008) (unreported decision).

⁷⁴ 49 U.S.C. § 44902 (2006).

⁷⁵ § 44902(a).

⁷⁶ § 44902(b).

⁷⁷ Subsection (b) of § 44902 allows an airline to "refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety."

⁷⁸ 14 C.F.R. § 382.19.

⁷⁹ § 382.3.

probability that the potential harm to the health and safety of others will actually occur; and (iii) whether reasonable modifications of policies, practices, or procedures will mitigate the risk.⁸⁰ However, even if an airline determines that a direct threat exists, it must choose the least restrictive means of alleviating that danger from the point of view of the passenger.⁸¹ Refusal to transport should be considered a last resort.⁸² Once an airline has invoked the “safety” provision of federal law, it is required to provide a written statement to that effect to the passenger, which must include several specific items.⁸³

An airline would assert a safety defense in a situation where a disability might cause a passenger to have uncontrollable violent episodes or be unable to remain calm during a flight. In Jack’s situation, assuming *arguendo* that he has autism, his inability to sit still and remain calm could pose a direct threat to the flight. The sensory overload that a child with autism could experience onboard an aircraft could cause “meltdowns that involve crying, screaming or kicking.”⁸⁴ Airlines are more keen to simply remove the family from the aircraft if the child cannot calm down instead of attempting other means to soothe the child.⁸⁵ Such least restrictive means could include giving the child a ten- or fifteen-minute rest in the terminal or reseating the family to the rear of the aircraft to allow the child more space to calm down. Since removal from the aircraft and refusal to transport is considered only as a last resort, the regulations provide protections to the passengers to ensure that this drastic option is only used when all other available solutions have been exhausted.

B. State Law Preemption

The second source of a defense for an airline arises in a situation where a passenger brings a claim against the airline for tortious conduct under state law. The Supreme Court, in *Morales v. Trans World Airlines, Inc.*,⁸⁶ held that the preemption clause of the Airline Deregulation Act⁸⁷ preempted all state law claims regarding “rates, routes or services” of the airlines.⁸⁸ The decision in *Morales* concerned the state of Texas attempting to regulate airlines in terms of price advertising.⁸⁹ Following the Supreme Court’s holding, a district court applied that decision to state law claims brought by a disabled passenger for false imprisonment, holding that the claims were preempted.⁹⁰ There, the district court held that *Morales* “leaves little doubt that a claim based on common law tort or contract is subject to . . . pre-emption . . . if it can be demonstrated that it ‘relates to’ airline ‘rates, routes, or services.’ ”⁹¹

However, in 1995 the Supreme Court heard *American Airlines v. Wolens*⁹² to decide a preemption issue regarding the altering of an airline’s contract with its passengers in connection

⁸⁰ § 382.19(c)(1).

⁸¹ § 382.19(c)(2).

⁸² *Id.*

⁸³ § 382.19(d).

⁸⁴ Rebecca Kaplan, *Flying can be a rough ride for autistic children, families*, USA TODAY, Jul. 25, 2008, available at www.usatoday.com/news/health/2008-07-23-traveling-with-autism_N.htm.

⁸⁵ *Id.*

⁸⁶ 504 U.S. 374 (1992).

⁸⁷ 49 U.S.C. § 41713 (2006).

⁸⁸ *Id.*

⁸⁹ 504 U.S. at 380.

⁹⁰ *Williams v. Express Airlines I, Inc.*, 825 F. Supp. 831, 832 (W.D. Tenn. 1993).

⁹¹ *Id.* at 833 (quoting 49 U.S.C. § 41713(b)(1)).

⁹² 513 U.S. 219 (1995).

with its frequent flier program. In *Wolens*, the Supreme Court ruled that the Airline Deregulation Act did not preempt state law claims in actions to enforce private contract rights.⁹³ Since the ACAA contains no preemption clause regarding state claims, a court will usually look to both *Morales* and *Wolens* to determine if the ACAA, by way of the preemption clause of the Airline Deregulation Act, preempts the specific state law claims at bar.⁹⁴

Finally, in a case decided by the Ninth Circuit in 1999, that court held that the preemption clause of the Airline Deregulation Act does not preempt state law claims based upon disability discrimination.⁹⁵ The court came to this conclusion by holding that “[a]s used in a public utility sense, the term “service” does not refer to alleged discrimination to passengers due to their disabilities.”⁹⁶

Because courts dealing with preemption issues have generally declined to adopt a general rule regarding which types of claims will be subject to preemption, it seems likely that most preemption issues will be handled on a case-by-case basis by the courts.⁹⁷

C. Preemption under the Montreal Convention

A third source of a useable defense for an airline addresses claims of injuries arising from international travel. When a passenger brings a claim of injuries resulting from disability discrimination, the airline can assert a defense that the claim is preempted by the Montreal Convention.⁹⁸ The Montreal Convention provides the exclusive remedy against an air carrier for any injury or death of a passenger during a flight between countries that are parties to the Convention.⁹⁹ Therefore, the Montreal Convention can be the only source of a remedy for injuries that occur during international travel.

The Montreal Convention, of course, only applies to international carriers if that airline’s country is a party to the treaty.¹⁰⁰ However, in 2000 the ACAA was amended to apply to foreign carriers¹⁰¹ *subject to* 49 USC § 40105(b).¹⁰² The “subject to” clause in the ACAA refers back to language in section 40105 which states “[i]n carrying out this part, the Secretary of Transportation and the [FAA] Administrator shall act consistently with obligations of the United States Government under an international agreement.”¹⁰³ This provision of federal law subjects the ACAA to international agreements, such as the Montreal Convention.

⁹³ *Id.* at 232.

⁹⁴ Strawinski, *supra* note 8, at 412.

⁹⁵ *Newman v. Am. Airlines, Inc.*, 176 F.3d 1128, 1130-1131 (9th Cir. 1999).

⁹⁶ *Id.* at 1131.

⁹⁷ Strawinski, *supra* note 8, at 414.

⁹⁸ Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, T.I.A.S. 13038, 2242 U.N.T.S. 350 [Montreal Convention]. The Montreal Convention superseded, for its parties, the 1929 Warsaw Convention, 137 L.N.T.S. 11, 49 Stat. 3000, which itself had been amended several times over the years. The Warsaw Convention remains in force for its parties that have not become parties to the Montreal Convention.

⁹⁹ *Ugaz v. Am. Airlines, Inc.*, 576 F. Supp. 2d 1354 (S.D. Fla. 2008) (quoting *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 161 (1999)).

¹⁰⁰ As of April 2010, there are 95 parties to the Montreal Convention. For a current list of parties, *see* <http://www.icao.int/icao/en/leb/mtl99.pdf>.

¹⁰¹ Pub. L. No. 106-181 § 707(a)(2).

¹⁰² 49 USC § 41705(a).

¹⁰³ 49 U.S.C. § 40105(b)(1)(A). Federal courts have upheld this provision; *see e.g.*, *British Caledonian Airways Ltd. v. Bond*, 665 F.2d 1153, 1162 (D.C. Cir. 1981) (holding that the FAA Administrator was required to adhere to a provision of the Chicago Convention before invalidating aircraft airworthiness certificates issued internationally).

One of the early cases that dealt with an issue of Montreal Convention preemption after the 2000 amendment to the ACAA was *Turturro v. Continental Airlines*.¹⁰⁴ In *Turturro*, the district court stated that “[t]he [ACAA] amendment’s legislative history notes that the change ‘extends the existing prohibition on discrimination to foreign airlines operating to the United States *subject to bilateral obligations* under § 40105(b).’ ”¹⁰⁵ That court concluded by saying “. . . Congress, in extending protection to travelers on foreign carriers, manifestly did not intend to rescind components of a crucial and longstanding treaty.”¹⁰⁶

Therefore, since it seems that the ACAA’s extension to cover foreign carriers is preempted by the Montreal Convention, it is difficult to tell what, if any, effect the ACAA’s foreign airline provision really has.¹⁰⁷ What is clear, though, is that the Montreal Convention can be used by airlines as a defense to private claims brought under the ACAA involving international flights.¹⁰⁸

¹⁰⁴ 128 F. Supp. 2d 170 (S.D.N.Y. 2001).

¹⁰⁵ *Id.* at 180 (quoting H.R. Conf. Rep. No. 106-513) (emphasis in original).

¹⁰⁶ *Id.*

¹⁰⁷ The ACAA would apply to international airlines that are the flag carriers of countries that are not parties to the Montreal or Warsaw Conventions. The ACAA would apply to all carriers if the U.S. were to denounce the Montreal and Warsaw Conventions.

¹⁰⁸ A few additional points need to be made. First, what is undeniable is that foreign airlines remain subject to DOT enforcement actions for violation of the ACAA. However, disability discrimination that occurs during international flights are violations of 49 U.S.C. § 41310(a), and not § 41705. This provision covers all discrimination, not merely disability-related discrimination. This point is made clear in a Consent Order from the DOT to British Airways wherein the DOT said “[s]ince the apparent ACAA violations occurred in foreign air transportation they would constitute violations of 49 U.S.C. § 41310(a), which prohibits an air carrier from subjecting a person to unreasonable discrimination in foreign air transportation.” *British Airways*, 2006 WL 2666504. The 2000 amendment to the ACAA to include foreign airlines might still be subject to Montreal Convention preemption.

Under 49 U.S.C. § 41301, a foreign carrier, an airline that is not a U.S. citizen as defined by 49 U.S.C. § 40102 (a)(15), may only engage in flight operations between the U.S. and another country. § 40102(a)(23). If the Montreal Convention was designed to be the exclusive remedy for injuries resulting from international travel, why would the 2000 amendment to the ACAA specifically include foreign carriers, subject to the Montreal Convention? It makes one think that the 2000 amendment was designed to repeal some section of the Montreal Convention which would preempt ACAA claims on international flights. However, the Supreme Court in *Trans World Airlines v. Franklin Mint Corp.* held that “[a] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.” 466 U.S. 243, 252 (1984) (quoting *Cook v. U.S.*, 288 U.S. 102, 120 (1933)). Therefore, the ACAA’s addition of foreign carriers to its coverage did not modify the Montreal Convention because there was no language that Congress had expressly intended to modify the Convention. After a detailed and exhaustive search of the available legislative history of AIR21, Congress’ intent in amending the ACAA to apply to foreign carriers cannot be fully explained. The Montreal Convention doesn’t apply only to foreign air carriers, but to all air carriers engaged in international transportation (including U.S. carriers). It invites the conclusion that the ACAA then only protects domestic passengers. The district court in *Turturro* outlined some situations where a U.S. airline would still be liable under the ACAA for injuries sustained during the course of international travel: if the discrimination constitutes an “accident” under the Convention; also, if the injuries occurred after disembarkation has already occurred. 128 F. Supp. 2d at 180-181. The highest court to take up this issue to date is the U.S. Court of Appeals for the Second Circuit, when it decided the case of *King v. American Airlines Inc.*, 284 F.3d 352 (2d Cir. 2002). The court in *King* cited *Turturro* and concurred with its holding when it said “[n]otably, every court that has addressed the issue of whether discrimination claims are preempted by the Montreal Convention post-*Tseng* has reached a similar conclusion.” *Id.* at 361. The *King* court held that the Montreal Convention does preempt discrimination claims.

With all that being said, it seems clear that the ACAA’s protections must give way to the international nature of air transportation and that international agreements need to be implemented to ensure that foreign airlines are aware of their legal responsibilities during flights.

D. Self-Help Remedy for the Airline

The final tool that an airline could use has no legal standing, but has practical use: direct compensation to passengers. An airline is free to directly compensate a passenger who makes a claim against it for violation of the ACAA. This compensation generally is offered by a supervisor at the airport as an attempt to remedy the situation and keep it from escalating further. As a former station manager for a major airline at Washington Dulles International Airport concluded, most people who make a charge are simply looking for some sort of compensation.¹⁰⁹ The manager explained that if a situation arose which could have been the basis of an ACAA claim against the airline, it seemed simple enough to provide the passenger with some form of compensation at the airport, be it a flight credit or a voucher.¹¹⁰ The passenger might then see the situation as nothing more than an inconvenience, accept the compensation from the airline, and write the whole matter off as a bad travel experience.¹¹¹

It should be noted that this form of a “defense,” much akin to simply buying the passenger off, in no way insulates an airline from subsequent penalties if the passenger chooses to file an ACAA claim, and such voluntary compensation is not considered a “settlement.” The DOT does, however, ask passengers who file complaints if they attempted “efforts to resolve the complaint through the airline’s Complaint Resolution Official (CRO) or other airline staff.”¹¹² It would be at this point where the passenger would inform the DOT of any compensation received from the airline; however, the fact that a passenger received compensation from the airline does not foreclose DOT enforcement action.¹¹³

V. THE ACAA’S IMPACT ON FAMILIES WITH CHILDREN WITH DISABILITIES

The impact that flying has on a family is difficult enough. Airports are one of the least child-friendly places around. A family traveling with a child who has a disability has many more obstacles that must be overcome in order to keep air travel as the most efficient means of transportation. When the ACAA was enacted, it was designed to protect the disabled traveler, but there are no special provisions aimed at protecting a disabled child. While parents of children who have disabilities can be strong advocates for their children, it doesn’t take much for a family to become overwhelmed by the arduous process of flying with their disabled child.

An example of the difficulties that families with children who have disabilities face when flying was disclosed in a conversation with Mrs. Jordan Richards. Mrs. Richards and husband John Richards have a 10-year-old boy, T.R., who has multiple disabilities resulting from tuberous sclerosis complex (TSC). TSC is a degenerative genetic disorder that causes tumors to form in different organs in the body; for T.R., the tumors formed in his brain.¹¹⁴ TSC affects one

¹⁰⁹ Interview with Dennis Hazel, Associate Executive Staff Coordinator, Metropolitan Washington Airports Authority, Washington Dulles International Airport, in Arlington, Va. (Dec. 21, 2009).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² DOT, Complaint Concerning Accessibility of Airline Service (Passengers with Disabilities), <http://airconsumer.ost.dot.gov/forms/382form.pdf> (last visited Dec. 23, 2009).

¹¹³ Interestingly, AIR21, as originally introduced in the Senate by John McCain, included an amendment to the ACAA that, *inter alia*, would have prohibited DOT enforcement action against an airline if the airline provided a credit or a travel voucher to the discriminated passenger as compensation. Air Transportation Improvement Act, S. 82, 106th Cong. § 407(b)(2) (as introduced, Jan. 19, 1999).

¹¹⁴ Tuberous Sclerosis Alliance Home Page, <http://www.tsalliance.org/pages.aspx?content=2> (last visited Dec. 27, 2009).

in 60,000 births in the U.S.¹¹⁵ TSC manifests itself in T.R. by producing severe mental retardation, autism, and seizures.¹¹⁶ While T.R. is 10 years old, he has the cognitive functioning level of an 18-month-old child but weighs approximately 145 pounds.¹¹⁷

Mrs. Richards explained that her son is prone to random seizures which must be dealt with immediately. Given the unknown and sporadic nature of the seizures, travel with T.R. is very difficult. Mrs. Richards discussed that her family has flown a few times, but when given the option, will often pick driving over flying. Driving gives T.R. the space and comfort that air travel cannot afford him. Mrs. Richards mentioned that her family would much rather fly than travel by car, but she is concerned regarding the difficulties that flying with T.R. would produce, given his size and severe disabilities. Furthermore, Mrs. Richards questions the amount of support that an airline could provide T.R. in the event that he experiences a seizure mid-flight or develops other issues requiring prompt attention or medical care.

Mrs. Richards talked about the times when her family has flown on commercial airlines. She explained that while she hasn't run into a situation where she felt the airline discriminated against her or her family, other passengers have made harsh comments about T.R., which has made the flying experience less than satisfactory.

Mrs. Richards and her husband are activists in the fight to find a cure for TSC and are very involved with advocacy groups which share her goal. Mrs. Richards explained that she is familiar with anti-discrimination laws regarding disabilities because Mr. Richards is a lawyer with a prominent law firm in Washington, D.C., but she was unaware of the specific law that covers air travel discrimination.

After speaking with Mrs. Richards, one sentiment seemed paramount: families know the hassle that flying can be. They also are aware of the exacerbated complexities that flying with their disabled children creates. Some families might also be more willing to forego the speed of air transportation in favor of ground transportation when travel is required. Especially with a family like the Richards, who have an extremely high-need disabled child, the freedom of being able to change plans and make unscheduled stops to deal with T.R. as they travel is invaluable.

In addition to the plight of the Richards family, the hypothetical situations that this paper has posed for Jack and his family are anything but hypothetical. These are real-life scenarios often faced by families with children who have disabilities.¹¹⁸

The very issue that the court dealt with in *Tallarico* is the situation that Jack would have to endure in hypothetical A, being required by the airlines to fly with a safety attendant. As noted, when the holding in *Tallarico* was issued, the DOT had not yet promulgated its corresponding federal regulations. Now, however, the action by the airline of requiring a safety attendant is expressly forbidden by 14 C.F.R. § 382.29. An airline nevertheless may require Jack to be accompanied by a safety attendant if it can show that Jack meets one of four outlined requirements.¹¹⁹ As a protection for the disabled traveler, if Jack believes, through self-

¹¹⁵ *Id.*

¹¹⁶ Telephone Interview with Jordan Richards, in Baltimore, Md. (Dec. 24, 2009). All references herein to Mrs. Richards are from this interview.

¹¹⁷ *Id.*

¹¹⁸ For an example of hypothetical B, see Part VII.D, *infra*.

¹¹⁹ 14 C.F.R. § 382.29(b)(1)-(4).

assessment (or though the assessment of his parents), that he can fly alone and the airline insists on an escort, the airline cannot charge a fare for the safety attendant's seat on the aircraft.¹²⁰

While the ACAA provides protections for the disabled passenger in the family, there is no protection for the other injured family members if the child is subjected to discrimination. This is one of the ACAA's deficiencies, and is particularly harmful to families of disabled children, as detailed, *infra*, in Part VI.B.

VI. DEFICIENCIES OF THE ACAA

As noted throughout this paper, the ACAA is a well-intentioned law aimed at providing statutory protections to disabled travelers where none previously existed. However, the law has several deficiencies which cause it to be less than effective at its anticipated purpose. These deficiencies will be described herein, and suggestions will be made on how to correct them.

A. The Failure to Provide a Private Right of Action

The biggest shortcoming in the ACAA is the inability of the discriminated passenger to sue the airline directly for its discriminatory actions. Even though the early cases interpreting the ACAA found an implied private right of action,¹²¹ the later cases have turned away from those holdings, with courts now finding that the ACAA does not imply a private right of action.¹²² This leaves the disabled passenger without a remedy, save for DOT enforcement action prescribed expressly by the ACAA.¹²³ While the DOT can investigate claims of ACAA discrimination, there is no mandate that the DOT actually prosecute every claim.¹²⁴ Furthermore, while federal law prescribes civil penalties for violations of the ACAA, all penalties are paid to the U.S. government.¹²⁵ There are no provisions of federal law allowing the DOT to require the airline to pay restitution to the injured passenger.¹²⁶ Without a private right of action, the disabled passenger has no means to recover damages for injuries sustained when an airline discriminates on the basis of disability.

B. The Lack of an Association Claim

The Air Carrier Access Act lacks an association clause similar to that found in the ADA.¹²⁷ The association claim under the ADA allows a person to bring a disability discrimination suit because an employer discriminated against a non-disabled person "because of the known disability of an individual with whom the qualified individual is known to have a relationship or association."¹²⁸ The effect of this omission is far-reaching; the absence of an association claim means the disabled passenger may bring an action only for his or her own injuries and not for the injuries¹²⁹ of the family that was flying with the disabled passenger. This

¹²⁰ § 382.29(c)(1).

¹²¹ See Part III.B.1, *supra*.

¹²² See Part III.B.2, *supra*.

¹²³ 49 U.S.C. § 41705(c).

¹²⁴ See *Caplan v. Dep't of Transp.*, No. 02-1044, 2002 WL 31545973 (D.C. Cir. Nov. 12, 2002) (unpublished opinion).

¹²⁵ 14 C.F.R. § 383.2.

¹²⁶ See *Frieden*, *supra* note 44, at 4-5.

¹²⁷ 42 U.S.C. § 12112(b)(4) (2006).

¹²⁸ *Id.*

¹²⁹ "Injuries" in this context does not refer simply to physical agony, but to pecuniary losses, emotional harm, and other types of non-physical damage.

omission is problematic because of the unique nature of air transportation. Disabled passengers (for purposes of this article, disabled children) often fly with their families. If an act of discrimination occurs and the entire family is injured resulting in financial losses, only the disabled child could assert a disability discrimination claim. The family, however, could bring a private suit alleging breaches of the airline's contract of carriage (if a violation so occurred) or violations of other common law doctrines, but statutory protections for discrimination based upon the family's association with their disabled child would not be allowed under the ACAA.

C. The Interplay of the Montreal Convention and the ACAA

Another major deficiency in the ACAA is the interplay it has with the Montreal Convention. As discussed in Part IV.C, airlines involved in international air transportation into or out of the U.S. are apparently insulated from ACAA requirements during the course of the flight, up to and including disembarkation. To give an example of how far-reaching this deficiency in the ACAA could be, at Washington Dulles International Airport, the major airport for international travel into the Washington, D.C. metropolitan area, from October 2008 to September 2009, air carriers transported approximately 6.2 million passengers in international travel.¹³⁰ Therefore, the Montreal Convention would be a direct bar to disability discrimination claims by these 6.2 million passengers.¹³¹

VII. RECOMMENDATIONS FOR CHANGE

The ACAA needs changes; not minor, technical changes but broad and far-reaching changes. The proposals that follow are designed to bring the ACAA back to its original purpose, the effective protection of disabled travelers who partake in transportation by air.

A. A Private Right of Action

It hardly needs to be recapitulated that the biggest change needed for the ACAA is the inclusion of a private right of action. While DOT enforcement proceedings are successful at assessing civil fines against violating airlines, they are unable to fully protect the rights of the disabled flying public and to compensate them when pecuniary losses occur from discrimination. Disability advocacy groups have called for an amendment to the ACAA to include a private right of action.¹³² Congress thus far has failed to act. However, Congress made a step in the right direction in 2004 when Senator Kennedy introduced a bill that included a provision which would have amended the ACAA to include a private right of action.¹³³ The bill, however, died in

¹³⁰ METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, MONTHLY AIR TRAFFIC SUMMARY REPORT, OCTOBER 2008-SEPTEMBER 2009, available at <http://www.metwashairports.com/file/dmats909ye.pdf>, Dec. 24, 2009.

¹³¹ Subject to the caveats discussed in *Turturro*. See *supra* note 108.

¹³² Most notably, the National Council on Disability. See Frieden, *supra* note 44, for the NCD's position paper on amending the ACAA.

¹³³ Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004, S. 2088, 108th Cong. (2004). Further, AIR21, as reported in the Senate, would have amended the ACAA not only to enhance DOT enforcement proceedings but also to allow private suits against the violating airline for both compensatory and punitive damages arising from the discrimination. The amendment also would have allowed the recovery of reasonable attorneys' fees. See Air Transportation Improvement Act, S. 82, 106th Cong. § 407(c)(2) (as reported by S. Comm. on Com., Sci. & Transp., Mar. 8, 1999). However, the House version of AIR21, H.R. 1000, contained only language to, *inter alia*, amend the ACAA to apply its protections to foreign airlines. See 146 Cong. Rec. H649-04 (Mar. 8, 2000). Oddly, the House language was enacted word-for-word into the final law, and none of the Senate provisions survived. See Pub. L. No. 106-181; see *supra* note 113.

committee and there hasn't been a move since to amend the ACAA to include a private right of action.

Without a doubt, the ACAA must be amended to provide a private right of action if the law is to fulfill its intent to protect travelers. As it stands, the ACAA falls short of its promise.

B. *An Association Clause*

To complement the private right of action, the ACAA should include an association clause with language modeled on the association clause of the ADA. Due to the unique nature of air travel, seldom does a child with a disability fly alone (though it's already been conclusively shown that such children are permitted to fly unaccompanied). An airline that discriminates against an entire family because of the disability of the child is not liable for any damages to the family under disability laws. Neither the ADA nor the Rehabilitation Act apply to most segments of air travel, leaving the ACAA as the only source of remedy for disability discrimination. The absence of an association clause leaves Jack's family in hypothetical B with no remedy beyond claims for violations of the airline's contract of carriage. Jack would have an ACAA claim, but his family would not. Therefore, if Jack would be denied service, his family would then voluntarily leave the aircraft, providing a potential defense to the airline if his family members bring suit for their own damages. To avoid this unjust situation, the ACAA needs to have an association clause which allows for a private right of action for those who are discriminated against because of their association with a disabled person.

C. *The ACAA Needs to be Reconciled with the Montreal Convention*

As detailed in Part IV.C and footnote 108, there is a disconnect between the ACAA's applicability to international travel and the Montreal Convention. Too many international passengers are unprotected when their injuries don't fall into the Convention's definition of a cognizable claim and their "local law" claims are preempted by the very treaty that failed to protect them. If this area of the law can be reconciled, international travelers can be protected by anti-discrimination laws that protect their domestic traveling counterparts.

D. *Education about the ACAA and the Nature of Disabilities Needs to be Increased*

The ancient legal doctrine *ignorantia juris non excusat*, "ignorance of the law does not excuse," must stand true for airline employees. During the course of conducting research for this paper, the author found a lack of understanding by airline personnel in terms of the general nature of disabilities. All too often, situations involving the disabled while flying are escalated simply because airline personnel don't understand or take the time to fully grasp the situation. When a situation arises, airline personnel may be more concerned with their on-time departure rating than ensuring compliance with federal law in this area. This is exactly what happened in 2009 for two-year-old Jarret Farrell and his mother when the autistic child had a "meltdown" on a flight, prior to its takeoff, and the family subsequently was removed from the flight.¹³⁴ Instead of trying to find a more reasonable way of calming down this over-sensitized child (such as giving him some water, reseating him in an area with more space, or giving him an opportunity to "cry it out" in the terminal), the airline immediately jumped to the ultimate penalty, refusal to

¹³⁴ To read more about the incident with Jarret and his mother, *see* <http://abcnews.go.com/GMA/Parenting/story?id=5238571&page=1>.

transport.¹³⁵ If airline personnel are better trained on how to handle situations involving the most common disabilities, incidents like the one involving Jarret would become less frequent.

While federal regulations require airlines to provide specific training to personnel on the ACAA and its associated regulations,¹³⁶ additional education should include the nature of the most common disabilities that airline personnel see in the traveling public. This education will benefit both the airline and the public. The airline benefits because increased training would give personnel a better insight into disabilities, possibly making a positive change in the way airlines handle situations. In addition to providing disabled passengers with the increased level of service that they need and deserve (because air travel is still a service industry, after all), the increased education can help protect the airline from subsequent ACAA or other discrimination charges arising from alleged deleterious conduct. This pedagogical approach, in addition to the “legal requirement” approach, can only serve the interests of all parties and make flying for a passenger with a disability less stressful.

VIII. CONCLUSION

Transportation by air is one of the most common forms of moving people and goods from place to place in the U.S. Because the aviation industry often dips its “wings” into many different areas of the law and commerce, this mode of transportation remains one of the most fiercely regulated, with at least three major cabinet-level federal agencies¹³⁷ having to deal with some aspect of the day-to-day operation and/or regulation of the country’s aviation network. It shouldn’t seem odd that the world of aviation has its own rules regarding disability discrimination. When *Paralyzed Veterans* was announced, the ACAA became law within a matter of months. This well-intentioned law provides protections to disabled travelers to ensure they are treated equally and fairly when they fly. The ACAA’s associated regulations put firm requirements on airlines to ensure their compliance with this part of federal law.

The ACAA, like most laws, is not perfect. It contains shortcomings and deficiencies, such as the lack of both a private right of action and an association clause. Also, because of air transportation’s interplay with international law, the ACAA has been forced to take a back seat to long-standing international treaties. This weakens the protections the ACAA intended to afford to those travelers who need them most. Finally, the ACAA has a profound impact on the way families with children with disabilities fly, or even choose not to. While the ACAA is a good law, with good intentions, Congress needs to sit down with advocacy groups and airline representatives to amend this law and make it more uniformly applicable and practical.

No one wants to see incidents like the one with Jarret Farrell and his mother. With improved ACAA protections, increased education of airline personnel, and increased awareness by the traveling public, disabled children and their families won’t be wrongfully turned away from experiencing one of the most awesome and breathtaking means of traveling; because, after all, travel is all about the journey.

¹³⁵ *Id.*

¹³⁶ 14 C.F.R. §§ 382.141, 143, 145.

¹³⁷ *E.g.*, U.S. Departments of Transportation, Homeland Security, and Justice, to name the most prominent.