

OPPOSITION TO SEVERAL PROPOSED CHANGES
TO OUR PARATRANSIT SYSTEM

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Capital Metro Board of Directors

I first want to sincerely thank Mike Martinez and Mike Maynor who want to help us by experiencing the complex issues concerning MetroAccess paratransit firsthand. All of us really appreciate your interest and desire to help. I just hope that neither of you become a victim of wrongful “No-Shows” and have your paratransit service suspended!

I urge all of you to please take the time to read the next 5 pages because the issues at hand are serious and there are grave consequences pertaining to civil rights for the disabled if all proposed MetroAccess policy changes are allowed to occur without modification.

The last 2 pages are excerpts from the TCRP Synthesis 60 Report, which documents changes to FTA Guidelines and interpretations.

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| (Transit Cooperative Research Program) | |

It is critically important that all of you understand that the two proposed changes to MetroAccess paratransit listed below were not approved by the Metro Mobility Working Group, hereafter referred to as the MMWG. The MMWG is the result of federal court approved mediation in the class action suit, disabled MetroAccess paratransit riders Vs. Capital Metro, that took affect last August. Furthermore, for many reasons, these two changes are not approved by the Access Advisory Committee as well as the majority of paratransit riders.

- ◆ Did Capital Metro inform you that in July, they violated the Mediation Agreement when they implemented major changes in the recertification process for paratransit passengers without fully discussing this with the MMWG?

In fact, the Access Advisory Committee never knew about this illegal policy change until a paratransit passenger called Diane Aleman when her ride to work never came. Subsequently, MetroAccess supervisors informed this passenger that her certification had ended and that she must resubmit a detailed application completed in part by a medical professional.

Capital Metro has committed a major violation in trust when someone decided to ignore the mediation agreement and change policy. The two proposed changes discussed below certainly do not encourage trust, instead they erode it to a similar nonexistence, the same low point prior to judicial action last year.

- ◆ **NEW NO-SHOW POLICY**
Capital Metro will impose suspensions for those who have four or more no-shows in a calendar month. The length of the suspensions will increase each time the user has 4 or more no-shows in a given month.

Access Chair and MMWG Chair Diane Aleman

“We also oppose the No-Show Policy because Capital Metro had originally agreed to notify users each time a no-show occurred, but now are saying that would be too expensive and will only agree to sending out the federally mandated cumulative monthly no-shows. This will cause problems for riders who are charged with no-shows that they were not aware of until the end of the month.”

- ◆ **30-MINUTE WINDOW**
Currently MetroAccess has a 15-minute window, which begins at the scheduled time and extends for 15 minutes after that time. The 30-minute window would increase the wait time for a pickup to 15 minutes before through 15 minutes after the negotiated time. The negotiated time is the time that is agreed upon on the phone. The negotiated time often changes due to scheduling issues, without the passengers knowledge. If a person cannot be picked up before a certain time, because they cannot leave their job early, the pickup window would begin at that time and extend for 30 minutes.

Access Chair and MMWG Chair Diane Aleman

“The Access Committee and Metro Mobility Work Group oppose the implementation of the 30-minute window at this time, because Capital Metro had originally agreed to implement a call-out system that would alert riders when their ride was about 5 minutes away. They are no longer willing to do this. That means that people will have to wait for up to 30 minutes without having any idea when the ride might arrive. Many of the designated pickup locations are outside, and/or do not have seating available as well as being potentially unsafe because the disabled passenger might be forced to wait outside of a building that has been locked up for the day.”

Analysis & Opposition to Proposed No-Show Policy

First, Capital Metro is blatantly incorrect that it is federally mandated that they only notify paratransit passengers at the end of the month listing the alleged No-Shows as well as proposed action against the passenger, i.e. suspension from vital paratransit service. Their claim is based on original ADA language, which has thankfully been revised by the FTA, (see excerpts from TCRP Synthesis 60 – Practices in No-Show and Late Cancellation Policies for ADA Paratransit, page 6).

Once an entity has certified someone as eligible, the individual's eligibility takes on the coloration of a property right.... It is a civil right. (TCRP Synthesis 60 Report) Furthermore, a No-show can only legally be assessed to circumstances directly in the control of the passenger. The specific language is:

“It is very important to note that sanctions could be imposed only for a "pattern or practice" of missed trips. A pattern or practice involves intentional, repeated, or regular actions, not isolated, accidental, or singular incidents. Moreover, only actions within the control of the individual count as part of a pattern or practice.”

Circumstances which are not in the control of the passenger and are thus NOT counted as a no-show include, but are not limited to:

- ◆ Operator/driver error - the vehicle got lost;
- ◆ The vehicle arrived late and the passenger found another ride;
- ◆ The passenger has a variable medical condition which made him/her either unable to cancel the trip in time or ride on the vehicle when it arrived;
- ◆ Unexpected illness or family emergency;
- ◆ The vehicle arrived at the wrong entrance of a building and left without picking up the passenger.

The reason why it is unacceptable for Capital Metro to be allowed to contact passengers only at the end of the month concerning alleged no-shows is that it creates an unfair barrier to the due process for an appeal process, which is mandated by the ADA. In order to dramatically increase efficiency while at the same time cutting administrative costs and avoiding the potential for costly and unnecessary law suits, it has become “best practice” in the transit industry for passengers to be contacted after their first and second no-show in a calendar month. This “best practice” was developed to solve any errors in the system, (driver negligence, etc.) and streamline the appeals process. This is important because in many cases, data such as whether the driver showed up at the wrong location is not available a month later - GPS and AVL records are commonly stored for only a week. Furthermore, after receiving numerous complaints of unfair suspension practices which were overturned in subsequent appeals, (transit agencies improperly handled the process), the FTA now feels it is a violation of fair due process and an unreasonable burden of proof to expect a passenger to remember why they missed a pickup a month ago.

Sadly, I find it truly revealing and a clear demonstration that Capital Metro lacks integrity that they ask your approval to implement a No-Show policy which is based on markedly incorrect FTA guidelines. Remember the deception which arose in March concerning the \$200 million not in Metro's reserve? Is this the respect from Capital Metro that you deserve? All of us feel that the answer is emphatically “NO.”

There is a very simple solution, one that Cap Metro wrongly claims is “just too expensive”, which would uphold our sacred civil rights.

- ◆ the IVR automated system and/or the reservations call taker could indicate that a passenger had an alleged no-show. The passenger would have a chance to prove or disprove that the no-show was out of their control within a few days after the occurrence.

If Cap Metro did not want to impose a burden on reservationists and/or modify the IVR to make a simple announcement upon the passengers login, then they could easily modify the existing automated outbound call notification system to leave the passenger a message that an alleged No-Show had recently occurred. This system is already used to leave the passenger a message that their ride on a paratransit vehicle has been changed into a cab voucher.

However, Capital Metro seeks to implement an out-dated policy which would cause undue mental/emotional hardship upon passengers who must prove their innocence during an appeal that might take place several months after missed rides. Perhaps Capital Metro wants to take out its anger and frustration to punish the disabled community because they did not achieve their goals when Metro tried to implement illegal changes in January of 2008 that ultimately led to a costly and unnecessary law suit.

◆ Finally, did Capital Metro advise you that the proposed No-Show policy only meets minimal ADA Standards?

I remember very well that in June of 2008, Bob Heath, Cap Metro's attorney, repeatedly told federal judge Lee Yeakel (as he had done in previous hearings), that during the last 3 or 4 years, Capital Metro paratransit had progressively done more than the ADA minimum. Aside from the fact that during this time, the service area has progressively decreased from approximately one and a half miles to the minimum ADA standard of 3/4 mile from fixed route, the proposed No-Show policy is a step backwards when compared to the current policy which first imposes fines on passengers who consistently and intentionally abuse the system before a suspension of service occurs.

Outlined below, is the evidence that the 4 No-show threshold is the minimum number allowed per month under FTA guidelines. (See excerpts from the TCRP report starting on page 6) If these are legitimate No-Shows which cause a negative impact to the paratransit system, and are in fact proven to be an intentional and repeated pattern of abuse, then this threshold would be acceptable. However, notification at the end of a month of alleged No-Shows would not be acceptable under these guidelines. Capital Metro must give passengers a reasonable opportunity before the appeals process to prove or disprove the no-show. Otherwise, it would almost be impossible for a passenger to prove that the alleged no-show was accidental and out of his/her control, especially since the event would have occurred a month ago.

Presentation by Marilyn Golden
an attorney with the Disability Rights Education and Defense Fund,
National Law and Policy Center.

“However, FTA has said that this stringent of sanction may be an unreasonable limitation of the ADA service with language that suggests it's a capacity constraint and therefore an illegal policy. And FTA's letter about this that is quoted here stated the following:”

"Considering only three no shows or in this case six cancellations in a 30 day period to be excessive and an abuse of the service may unreasonably limit service to ADA eligible customers."

“Yet a lot of cities have that policy. These policies need to be reconsidered in the light of FTA's view that this may not constitute a sufficient showing of pattern or practice. Moreover, no show suspensions may be imposed only when the rider's record involves intentional, repeated or regular actions not isolated, accidental or singular incidents. This is language from the DOT's regular language which interpreted it and it's very interesting because it shows that it's not appropriate if suspension is applied for an accident or singular incident or two singular incidents, but really for intentional, repeated or regular actions.”

Opposition to Proposed 30-Minute Window

In fairness, the proposed 30-Minute Window does exceed the minimum ADA standards as does the current pick-up window. However, as Access and MMWG chair Diane Aleman states, our opposition is based upon Capital Metros refusal to abide by its commitment to implement necessary call notification technology, proven to be effective in transit industry “best practices”, before changing the pick-up window. It is court and public record that Bob Heath, Capital Metros attorney, repeatedly assured federal judge Lee Yeakel that all phases of the new technology would be tested and shown to work for 30 days before changes such as the pick-up window and No-show policy would be changed. He stated that the AVL system, (automatic vehicle location), the IVR, call notification system as well as web-based scheduling for passengers were under beta testing and that no changes would be considered until they all worked.

It is a verifiable fact, that to date, major improvements must take place with the IVR because it remains ineffective and not up to industry standards in its current form. Furthermore, Cap Metro admitted at the Access meeting on 09/02/09, that a new company, (Product Support Solutions), now managed the call notification system, because the former vendor had gone out-of-business. It is important to note that this scenario has also taken place with regards to the IVR automated scheduling system.

Suddenly, without warning, the MMWG is told that Capital Metro will not implement its automated call notification system which gives passengers an updated realtime estimate of when the vehicle will arrive. Instead, Capital Metro asks you to implement a policy change without first establishing an automated notification system which complies to “best practice” industry standards.

◆ Capital Metros Excuse to the MMWG:

Ten months of beta testing has proved ineffective and it would be too expensive to implement.

However, even preliminary research of paratransit providers demonstrate that this is not the case. For example, paratransit passengers in Houston Texas can call the IVR and receive both the scheduled pick-up time and an estimated arrival time, updated as the schedule changes. A further example are systems in Rochester New York and Rhode Island public transit authority, implemented and managed by just one vendor, LogicTree. These systems use an automated outbound calling system to notify passengers when the vehicle will arrive late, (outside the 30-minute pick-up window). Last week, I was assured by Phil Silver of LogicTree that their systems could also be programmed to notify passengers when the vehicle would arrive. This is similar to the capability that Yellow cab offers its passengers who have taxi vouchers.

Now the obvious question is: Was the testimony of Metro attorney Bob Heath an accurate representation of Capital Metros plans to use technology to enhance its paratransit service, or did Capital Metro not disclose to him that in reality, they did not plan to implement all promised phases before asking your approval to change paratransit policies?

◆ Perhaps Capital Metros premeditated and unauthorized breach of the mediation agreement gives us the answer. After all, they never consulted you, the Capital Metro board, who do represent integrity!

As a final critical note, it has become “best practice” for paratransit providers who operate with a 30-minute pick-up window to implement some type of an automated notification telephone system, regardless of whether it is outbound or an enhancement of their IVR, to let passengers know when the vehicle will arrive, or if the vehicle will arrive earlier/later than the pick-up window. It is a proven fact that this one-time investment decreases actual No-Shows, increases scheduling efficiency, and saves costs and enhances positive publicity because the need for suspension appeals are reduced.

CONCLUSION

We all agree that there is a need to make changes in our paratransit system, but it is imperative that policy changes mirror updated FTA interpretations. It is beyond comprehension, especially given the fact that Capital Metro received much knowledgeable and constructive feedback from the MMWG as well as the Access Advisory Committee, that they propose such flawed changes. Surely, if the legal department of Capital Metro would have been consulted, they would have advised MetroAccess that these proposed policy changes were not substantiated on updated FTA interpretations of the ADA

Capital Metro's proposed No-Show policy and 30-Minute Pick-Up Window clearly do not mirror "best practice". It is unacceptable to the disabled community, who are taxpayers just like everyone else, for MetroAccess to be allowed to implement the proposed No-Show policy without modifications in consultation with both the MMWG and the Access Advisory Committee. In order to maintain and uphold the civil rights for all paratransit passengers, I am quite sure all of you would agree that unless it was a prohibitive burden on the transit agency, that paratransit passengers be given the opportunity after an alleged No-Show, to dispute or prove its validity.

Even before new FTA guidelines, (listed below), paratransit providers have successfully implemented automated systems for No-Show policies and those regarding the pick-up window, in order to maximize efficiency and ensure that only legitimate and intentional abusers of the system were suspended from receiving service. Another important benefit of an automated notification system is that it avoids the necessity of providing letters in accessible formats after No-Shows occur. Thus the realized cost savings in conjunction with lower appeal rates will pay for the system.

"There are means other than sanctions, however, by which a transit provider can deal with a 'no-show' problem in its system. Providers who use "real-time scheduling" report that this technique is very effective in reducing no-shows and cancellations, and increasing the mix of real-time scheduling in a system can probably be of benefit in this area. Calling the customer to reconfirm a reasonable time before pickup can head off some problems."

Furthermore, the FTA as well as performance data from paratransit providers nationwide demonstrates that a low cost solution exists.

- ◆ The number of actual No-Shows does decrease when the period to schedule a ride is decreased.

Therefore, we respectfully request that you inform Capital Metro not to change the No-Show policy until the effect of changing the reservation window from 8 days to 6 days is properly evaluated.

We also respectfully request, in light of all the evidence presented at this hearing, that members of the Capital Metro board of directors strongly encourage MetroAccess to restructure proposed policy changes regarding No-Show and Pick-Up Window, , perhaps over the next six months, with regards to:

- ◆ Consultation with other paratransit providers as well as with companies such as LogicTree who have proven experience developing and maintaining automated notifications systems to develop "best practice" No-Show and Pick-Up Window policies.
- ◆ The need to impose proper penalties for only habitual and intentional abusers of the No-Show policy as defined by recent FTA interpretations.
- ◆ Ensure MetroAccess has a higher degree of cooperation than currently exists with both the MMWG and Access Advisory Committee in order to prevent future violations of the mediation agreement.

All of us want to avoid further litigation. We want to work with Capital Metro in order to make our paratransit system a model for the rest of the country.

TCRP Synthesis 60 – Practices in No-Show and Late Cancellation Policies for ADA Paratransit

Section 37.125(h) further states that transit systems must consider only missed trips (no-shows) that are within the control of the rider and not count against the individual trips that are missed for reasons beyond the person’s control, which may include trips missed because of operator error.

Specifically, 49 CFR 37.125(h)(1) states that “Trips missed by the individual for reasons beyond his or her control (including, but not limited to, trips which are missed due to operator error) shall not be a basis for determining that such a pattern or practice exists.”

Finally, Section 37.125(h)(3) of the regulation states that “The sanction is to be stayed pending the outcome of the appeal”; that is, ADA complementary paratransit service must continue to be made available to the person until the appeal of his or her proposed suspension is decided. In the Construction and Interpretation of Provisions section of the regulation (Appendix D), there is significant additional information interpreting the intent of Section 37.125. There also is guidance on how several aspects of a no-show policy should be implemented.

The applicable section of Appendix D included in the Federal Register (Vol. 56, No. 173, p. 45747) provides the following additional guidance:

The rule also allows an entity to establish a process to suspend, for a reasonable period of time, the provision of paratransit service to an ADA eligible person who establishes a pattern or practice of missing scheduled trips. The purpose of this process would be to deter or deal with chronic "no-shows." The sanction system-articulated criteria for the imposition of sanctions, length of suspension periods, details of the administrative process, etc.—would be developed through the public planning and participation process for the entity’s paratransit plan, and the result reflected in the plan submission to FTA.

It is very important to note that sanctions could be imposed only for a "pattern or practice" of missed trips. A pattern or practice involves intentional, repeated, or regular actions, not isolated, accidental, or singular incidents. Moreover, only actions within the control of the individual count as part of a pattern or practice. Missed trips due to operator error are not attributable to the individual passenger for this purpose.

If the vehicle arrives substantially after the scheduled pickup time, and the passenger has given up on the vehicle and taken a taxi or gone down the street to talk to a neighbor, that is not a missed trip attributable to the passenger.

If the vehicle does not arrive at all, or is sent to the wrong address, or to the wrong entrance to a building, that is not a missed trip attributable to the passenger.

There may be other circumstances beyond the individual’s control (e.g., a sudden turn for the worse in someone with a variable condition, a sudden family emergency) that make it impracticable for the individual to travel at the scheduled time and also for the individual to notify the entity in time to cancel the trip before the vehicle comes. Such circumstances also would not form part of a sanctionable pattern or practice.

Once an entity has certified someone as eligible, the individual’s eligibility takes on the coloration of a property right.... It is a civil right.

RECENT FEDERAL TRANSIT ADMINISTRATION GUIDANCE AND INTERPRETATIONS

FTA is responsible for ensuring compliance with ADA and U.S. DOT regulations. As part of its compliance efforts, FTA, through its Office of Civil Rights, reviews formal complaints filed with its office and conducts periodic reviews of fixed-route transit and ADA complementary paratransit services operated by grantees. The information included here represents publicly available regulatory interpretations and guidance offered by FTA based on ADA paratransit compliance reviews, related transmittal letters and letters of findings, and responses to consumer complaints that pertain to the topic of no-show and late cancellation policies.

Pattern or Practice of No-Shows

“A pattern or practice involves intentional, repeated, or regular actions, not isolated, accidental, or singular incident” (FTA October 2003).

In the same transit system review, FTA provided additional guidance on what level of no-shows might be considered a pattern or practice of abuse of the system.

“Considering only six no-shows or late cancellations in a six-month period to be excessive and an abuse of the service may unreasonably limit service to ADA eligible customers.”

Appendix D of 49 CFR Part 37 indicates that suspensions of eligibility for no-shows are intended to prevent a “pattern or practice of no-shows.” It is further noted, “a pattern or practice involves intentional, repeated, or regular actions, not isolated, accidental, or singular incidents.” [The transit system] should reconsider this policy and should also consider analyzing over-all frequency of riders’ use of the service as well as the number of no-shows when determining whether there is a sufficient pattern or practice of no-shows to justify a suspension (FTA October 2003).

Given that a rider who forgets that he or she has booked a trip could be assessed two no-shows for a single round-trip, three no-shows could be exceeded by forgetting to cancel only two round-trips. (FTA January 2005).

In a December 2004, letter FTA stated that We remain concerned that [the transit system’s] revised policy could result in suspension of service for regular riders who, due to the frequency of their trips, amass 10 to 15 violations, but at the same time do not establish a pattern or practice of no-shows. To appropriately determine such a pattern or practice, we encourage you to consider the frequency of use by the rider.

Automatic Cancellation of Return Trips

“We find [the transit system’s] policy to cancel automatically a return trip if the rider was a ‘no-show’ for the first half of the trip not acceptable” (FTA February 2001).

From a transmittal letter to a transit agency:

As for the suspension of service for no-shows/late cancellations, considering only three no-shows or six cancellations in a 30-day period to be excessive and an abuse of the service may unreasonably limit service to ADA-eligible customers... [the transit agency] should reconsider this policy and should also consider analyzing overall frequency of riders’ use of the service, as well as the number of no-shows, when determining whether there is a sufficient pattern or practice of no-shows to justify a suspension. (FTA December 2003).