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CANINES IN THE CLASSROOM: SERVICE ANIMALS IN PRIMARY AND SECONDARY EDUCATIONAL INSTITUTIONS*

REBECCA J. HUSS

I. INTRODUCTION

This Article focuses on the issue of whether a child with a disability has the legal right to attend a primary or secondary school with a service animal. In addition to federal law, each state has its own laws protecting individuals with disabilities and providing for the education of children with disabilities. Needless to say, this area of the law is rich with areas of research. This Article is relatively narrow in its focus.¹ In order to have a sense of the potential scope of the issue, the Article begins by setting forth basic information regarding the children who are currently receiving special education services and discussing the increasing number of animals placed into service with individuals under the age of eighteen, focusing on the recent trend of utilizing service animals to assist children with an autism spectrum disorder.² Studies relating to the common argument against allowing service animals in schools—the impact of such service animals on others in the environment with allergies to animal dander are then examined.³ The Article continues with a brief summary of the federal law to provide a platform for the analysis of the major cases in this area.⁴ As state laws that expand the rights of students appear to be an effective tool in litigation in this area, several of these state laws are evaluated along

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¹ This Article was written in anticipation of the author's participation in the Mid-Atlantic Regional Animal Law Symposium held at the University of Baltimore in April 2010. Its scope is limited, in part, due to other presentations at that symposium. This Article has not been updated or substantially edited since its submission to the Journal in March 2010. Readers are cautioned that there have been additional cases and changes in state law since that time.

² See *infra* notes 7-62 and accompanying text. The issue of autism service dogs is analyzed because it appears to be one of the areas in which school districts have been reluctant to allow a student to be accompanied by a service animal.

³ See *infra* notes 63-85 and accompanying text.

⁴ See *infra* notes 86-273 and accompanying text.

with descriptions of language likely to be found in school district policies.⁵ Next, state laws that allow for service animals in training are examined as they provide another way that service animals may be found in a primary or secondary school that may involve students.⁶ The Article concludes by arguing that school districts need to be prepared with policies that provide for compliance with the law while still considering impact of such animals on the school environment generally, given the legislative trends in this area.

II. STUDENTS AND SERVICE ANIMALS

A significant number of children with disabilities in the United States are receiving services from federally supported programs.⁷ Students with disabilities constitute 13.6 percent the total student enrollment.⁸ Statistics categorize the type of disability, with the largest percentage of students receiving services relating to “specific learning disabilities” or “speech or language impairments.”⁹ Students with autism constitute .5 percent of the total enrollment of students.¹⁰

Ninety-five percent of students served under the Individuals with Disabilities Education Act, as amended, (the “IDEA”) are enrolled in regular school.¹¹ The amount of time that a child with a disability spends outside of a regular classroom varies widely depending on the type of disability.¹² Using autism as an example, 32.3 percent of children with autism spend less than 21 percent of their time outside

⁵ See *infra* notes 274–333 and accompanying text.

⁶ See *infra* notes 334–62 and accompanying text. The use of service animals by staff with disabilities is beyond the scope of this Article.

⁷ Fast Facts, *How Many Students with Disabilities Receive Services?*, National Center on Educational Statistics, available at <http://nces.ed.gov/fastfacts/display.asp?id=64> (last visited Feb. 17, 2010).

⁸ *Id.* This translates into 6,686,000 students. *Id.*

⁹ *Id.* The percentages are 5.4 percent and 3.0 percent respectively. *Id.*

¹⁰ *Id.* This translates into 258,000 students with autism. *Id.*

¹¹ Fast Facts, *What Percentage of Students with Disabilities are Educated in Regular Classrooms?*, National Center on Education Statistics, available at <http://nces.ed.gov/fastfacts/display.asp?id=59> (last visited Feb 17, 2010) [hereinafter *Regular Classrooms*]. See *infra* notes 86–95 and accompanying text (discussing the federal laws relating to the education of children with disabilities including the IDEA).

¹² *Regular Classrooms*, *supra* note 11. For example, children with “speech or other language impairments” spend less than 21 percent of their time outside the regular classroom in contrast to 48.4 percent of students with “mental retardation” who spend more than 60 percent of their time outside a regular classroom. *Id.*

the regular classroom, and 38.7 percent of children with autism spend more than 60 percent of their time outside a regular classroom.¹³

There is an increasing demand for service animals for individuals under the age of eighteen.¹⁴ There is limited academic research into the benefits and possible problems with such placements.¹⁵ Historically, many service dog organizations did not train service dogs for children.¹⁶ Concern over the ability of a child to care for and maintain a dog has been cited as one of the reasons that, until recently, service dogs were not consistently placed to work with children.¹⁷ As discussed below, for younger children, a facilitator is used to deal with some of these concerns.¹⁸ Providing service dogs for children is now “a growing part of the work of many assistance dog organizations.”¹⁹ As a representative of one organization that trains service animals stated when asked about its policy regarding placing service animals with children:

Helping Paws has changed our policy regarding child placements and will be accepting applicants from the

¹³ *Id.*

¹⁴ Telephone Interview with Carolyn Clark Beedle, Executive Director, Assistance Dogs of the West, in Santa Fe, NM (Feb. 1, 2010) [hereinafter Beedle Telephone Interview] (reporting an huge increase in requests for service dogs to assist children with autism and an increase in requests for service dogs that assist with seizure disorders). About twenty-five percent of Assistance Dogs of the West placements have been to clients fifteen years and younger. Assistance Dogs of the West, *In School Programs*, <http://www.assistedogsofthewest.org/education-programs/school-programs> (last visited Feb. 17, 2010).

¹⁵ B.W. David, *Assistance Dog Placement in the Pediatric Population: Benefits, Risk and Recommendations for Future Application*, 17 ANTHROZOOS 130, 131 (2004) (citing to the many studies that show the benefits of service dogs for adults).

¹⁶ Pauline W. Ng et al., *Service Dogs for Disabled Children: Effects on Level of Independence and Quality of Life*, TOPICS IN SPINAL CORD INJURY REHABILITATION 96, 96 (Summer 2000/Supplement).

¹⁷ K. Nattrass et al., *In Puppy Love: How an Assistance Dog Can Enhance the Life of a Child with a Disability* 57, 58, 21 CONTEMP. PEDIATRICS (Jan. 2004) (discussing the trend of placing service dogs with children). See also Althea Peterson, *Dogs Graduate, Owners Wait*, TULSA WORLD, Oct. 13, 2008, at A3 (discussing the placement of a service dog with a boy aged eleven with muscular dystrophy, along with the placement of other dogs to children under the age of eighteen and stating “usually children are not eligible for service dogs, as applicants need to be mature and responsible enough to care for a dog”).

¹⁸ See *infra* notes 39–40 and accompanying text (discussing “three unit teams”). See also Nattrass, *supra* note 17, at 58 (discussing the development of the facilitated assistance dogs).

¹⁹ Nattrass, *supra* note 17, at 58.

age of 10 years. We expect most placements under the age of 18 will be a skilled companion placement which will consist of a person with a disability, a service dog and a facilitator (in most cases with child placement, this will be a parent). Our prior policy of placing only with adults 18 yrs and over was based on the theory that as an adult, a service dog could help an individual live independently. We hope that by adding a skilled companion service dog category, that Helping Paws can provide both adults and children with a service dog that can assist with daily living tasks and increase self sufficiency and independence.²⁰

Very young children can be matched with a service dog depending on the type of tasks that the dog is expected to perform. One organization has found that, in its experience, the age of five is the age most children are able to develop a relationship with the service dog and is the lowest age child where it has placed a dog.²¹ Another organization placed a dog for use by a four year old child but “depending on the individual family dynamics . . . would consider placing a dog with a younger child.”²² As discussed below, when a dog is placed with a younger child, there is generally an adult handler with the dog and child.²³ The age in which a child can handle a service dog on his or her own also will differ based on the child and the disabilities, but one organization has found that some children as young as the age of eight have the capacity to train and handle a service dog.²⁴

One of the areas in which there is an increased demand for service animals for children is for animals that are trained to assist individuals

²⁰ E-mail from Eileen Bohn, Director of Programs, Helping Paws Inc., to Rebecca J. Huss, Professor of Law, Valparaiso University School of Law (Jan. 25, 2010, 18:43 CST) (on file with author).

²¹ Beedle Telephone Interview, *supra* note 14 (discussing the experience of Assistance Dogs of the West in placing dogs with children).

²² E-mail from Beverly Swartz, Executive Director, All Purpose Canines, Inc., to Rebecca Huss, Professor of Law, Valparaiso University School of Law (Jan. 29, 2010, 14:29 CST) (on file with author) [hereinafter Swartz E-mail] (stating that the organization believes “that early intervention is the key to helping children of the autism spectrum”).

²³ See *infra* notes 39–40 and accompanying text (discussing three unit teams).

²⁴ Beedle Telephone Interview, *supra* note 14 (discussing the organization’s service dog training programs and their experience that some eight year olds have the ability to be a leader, be consistent and have the patience to train and handle a service dog).

with autism spectrum disorders (“ASD”), also referred to herein as autism.²⁵ The United States Centers for Disease Control and Prevention (the “CDC”) reports that based on 2006 figures, one in 110 children have ASD.²⁶ The CDC also reports that the proportion of children with ASD who also had signs of intellectual disability averaged 41 percent.²⁷ ASD is a complex diagnosis with a wide variance of symptoms among individuals.²⁸ A meaningful discussion of autism is beyond the scope of this Article, but, in order to understand the use of service animals to assist individuals, it is important to have an understanding of the types of symptoms that are generally viewed as present due to the disorder. The presence of repetitive or restrictive behaviors, impairment in social interaction, and impairment of communication skills are the three symptoms that are commonly viewed as present in ASDs.²⁹ These symptoms may change over time and there can be co-existing conditions that can alter the symptoms as well.³⁰

The first placement of a service dog with a child with autism in Canada occurred in 1997.³¹ Placement of a service dog with a child with autism in the United States occurred around the same time.³² One

²⁵ Sandra Eckstein, *Family Seeks Funds for Autism Service Dog*, ATLANTA J. CONST., Oct. 12, 2008, at 10M (quoting Karen Shirk, Executive Director of 4 Paws For Ability that “autism service dogs are the most requested”); Autism Service Dogs of America, *Frequently Asked Questions*, <http://autismservicedogsofamerica.com/faq.cfm> (last visited Feb. 17, 2010) (stating that the “demand for specialized service dogs for autism is growing rapidly”). Sometimes individuals are described as having autism or autism spectrum disorder and other times people use the terminology that distinguishes the various disorders within ASD (i.e. diagnosed with “an” ASD).

²⁶ Centers for Disease Control and Prevention, National Center on Birth Defects and Developmental Disabilities, *Counting Autism*, available at <http://www.cdc.gov/ncbddd/features/counting-autism.html> (last visited Feb. 17, 2010).

²⁷ *Id.* ASDs are much more prevalent in males than females with estimates of one in seventy boys and one in 315 girls having an ASD. *Id.*

²⁸ MEROPE PAVLIDES, ANIMAL-ASSISTED INTERVENTIONS FOR INDIVIDUALS WITH AUTISM 14 (2008).

²⁹ *Id.* at 15.

³⁰ *Id.* at 19 (providing the example of epilepsy as a possible co-condition).

³¹ Kristine E. Burrows et al., *Factors Affecting Behavior and Welfare of Service Dogs for Children With Autism Spectrum Disorder*, 11 J. APPLIED ANIMAL WELFARE SCI. 42, 42 (2008) [hereinafter Burrows, *Factors*].

³² 4 Paws for Ability, *Autism Service Dogs*, <http://www.4pawsforability.org/autismdogs.html> (last visited Feb. 17, 2010) (stating that it was the first agency to begin placing service dogs for children with autism). 4 Paws for Ability was established in the late 1990s. 4 Paws for Ability, *The 4 Paws Story*, <http://www.4pawsforability.org/history.html> (last visited Feb. 17, 2010). Another organization that places service dogs

commentator acknowledges that some scientists have argued that there is little scientific evidence that animal assisted interventions for children with autism (including the use of service dogs) have “marked efficacies”, and acknowledges that more research should be performed.³³ Another study, considering service dogs used for the pediatric population generally, found that “the social benefits and improvement in quality of life generally outweigh the physical and medical benefits of assistance dog ownership.”³⁴

One researcher focusing on the use of service dogs by children with autism found that that “for many families, acquiring a service dog has increased quality of life substantially.”³⁵ An additional study found that autistic service dogs can provide numerous benefits to the child with disabilities as well as for the child’s family.³⁶ In addition to the specific tasks that service dogs perform, adding a service dog has been found by some families “to alleviate some of the stress they experienced in raising a child with a developmental disorder.”³⁷ One research study reported an increase in positive social acknowledgement for the child and families as well.³⁸

The tasks a service dog performs for a child with autism vary. Usually, there is an adult handler who is with the child and dog in public places.³⁹ In a school environment, if a child already is assigned a human

with children with autism believes it placed its first autism service dog in 2000. Beedle Telephone Interview, *supra* note 14.

³³ PAVLIDES, *supra* note 28, at 188–89. Another research study that found pediatric assistance dogs to benefit children acknowledged that “further study is needed to determine if the presence of pediatric assistance dogs has lasting effects on children, or if the effect is of short-term relevance only.” David, *supra* note 15, at 144.

³⁴ David, *supra* note 15, at 144.

³⁵ PAVLIDES, *supra* note 28, at 34.

³⁶ Kristen E. Burrows et al., *Sentinels of Safety: Service Dogs Ensure Safety and Enhance Freedom and Well-Being for Families With Autistic Children*, 18(2) QUALITATIVE HEALTH RESEARCH, 1642, 1648 (2008) [hereinafter Burrows, *Sentinels*].

³⁷ *Id.* at 1647.

³⁸ *Id.* at 1647–48. Unlike previous research that observed that some persons using guide dogs found that the dog had a stigmatizing affect in public, the families followed in the study reported that the “response from the public was more gracious and positive than it was without the dogs.” *Id.* at 1647. The researchers concluded that “it appears that increased social acknowledgement has different meanings for recipients of different types of assistance dogs.” *Id.*

³⁹ PAVLIDES, *supra* note 28, at 43. One challenge in placing a service dog with an autistic child is ensuring that a bond develops between the child and the dog, rather than between the dog and the adult handler. *Id.* at 45. This unique (compared to traditional assistance dog pairings) three-person system is recognized by Virginia law. VA.

aide, that aide can be trained to handle the dog.⁴⁰ One task that a service dog can be trained for is to stop or block a child's movements.⁴¹ Some children with autism bolt unexpectedly into dangerous environments such as streets.⁴² The service dog can be tethered to the child and the dog is trained to "hold" the child in place if this occurs.⁴³

A dog can also be trained to alert parents or other caretakers when a child engages in certain dangerous activities such as climbing onto window ledges or furniture.⁴⁴ Dogs also can be trained to assist with "sensory integration and calming"⁴⁵ For example, a service dog can be trained to "nudge" the child with autism if the child is engaging in repetitive behavior or to disrupt a tantrum.⁴⁶ Another task that a dog can be trained to perform is to provide "deep pressure therapy" to help calm the child.⁴⁷ In this type of therapy a dog is taught to drape most of his or her body weight on top of the child's abdomen—which for some children with autism has been shown to have a calming effect.⁴⁸ Parents of children with autistic service animals have reported "decreased anxiety, increased calmness, reduction in the number of

CODE§ 51.5-44 (2009) (defining "three-unit service dog team" as "a team consisting of a trained service dog, a disabled person and a person who is an adult and who has been trained to handle the service dog").

⁴⁰ PAVLIDES, *supra* note 28, at 43.

⁴¹ *Id.* at 32.

⁴² *Id.*

⁴³ *Id.* at 32, 51 (describing the use of tethering and one tethering system where the child wears a belt and a long leash that is attached to the dog's harness). As one Executive Director of an organization placing service dogs described a video showing a child with autism tethered to a service dog: "[e]scaping from home, school etc [sic] is a common issue parents confront. We have found that problem is virtually eliminated when the child is attached to the dog. The video does show how children that do 'run' are content to walk quietly with the dog by their side." Swartz E-mail, *supra* note 22.

⁴⁴ PAVLIDES, *supra* note 28, at 32. *See also* Burrows, *Sentinels*, *supra* note 36, at 1644 (describing how the service dogs act as an extra caregiver or second set of eyes).

⁴⁵ PAVLIDES, *supra* note 28, at 33. Pavlides acknowledges that there has been no research conducted that shows how this calming effect occurs. *Id.* *See also* Amy Wilson, *A Boy with Autism and His Dog Find a World in Common*, LEXINGTON HERALD-LEADER (Kentucky), Feb. 2, 2009 (page number unavailable) (describing the training of a service dog to assist a boy with autism including dealing with sensory issues and meltdowns).

⁴⁶ International Association of Assistance Dog Partners, *Service Dog Tasks for Psychiatric Disabilities*, http://www.iaadp.org/psd_tasks.html (last visited Feb. 17, 2010) [hereinafter *Psychiatric Disabilities*]. *See also* Eckstein, *supra* note 25, at 10M (describing the tasks a service dog was being trained for including curbing repetitive behaviors).

⁴⁷ *Psychiatric Disabilities*, *supra* note 46.

⁴⁸ *Id.*

meltdowns or tantrums, dissipated/defused anger, and [other benefits].”⁴⁹

Experts caution that autism service dogs are not appropriate for every child with autism.⁵⁰ Some children may have a negative reaction to dogs due to a negative sensory perception of the sound or smell of the dog.⁵¹ Other children have a fear of dogs due to past experiences that have illustrated that dogs may act in an unpredictable manner.⁵² As discussed below, for children with allergies, the use or presence of a service dog may be problematic.⁵³ The use of a third party handler (whether it is a parent or other caregiver) requires individuals, other than the child with a disability, to undergo training.⁵⁴ The commitment that must be made to care of the dog, over the dog’s working life, is not one that is appropriate for all families.⁵⁵

It is always important to consider the ethics of using and the welfare of service animals. A general discussion of these issues can be found in another of the author’s publications.⁵⁶ Specific concerns have been raised over the welfare of autistic service dogs due to the inconsistent and lashing out behavior some children with autism exhibit.⁵⁷ It is important to note that although there is usually an adult handler present when the child is in public, such as at school, the dog and child may left alone for extended periods of time at home, such as during the night.⁵⁸ One study found that although the welfare of the dogs observed was adequate, there were “gaps” identified.⁵⁹ The dogs

⁴⁹ Burrows, *Sentinels*, *supra* note 36, at 1645. Other benefits include more manageable bedtime routines and, for some, the ability of the dog to break a child’s trance behavior. *Id.*

⁵⁰ PAVLIDES, *supra* note 28, at 7.

⁵¹ *Id.*

⁵² *Id.*

⁵³ See *infra* notes 63–85 and accompanying text (discussing studies showing the presence of animal allergens in classroom environments).

⁵⁴ PAVLIDES, *supra* note 28, at 35.

⁵⁵ *Id.* at 34–35. There is a significant time commitment to care for and continue training a service dog in addition to a financial commitment for the upkeep of the dog. David, *supra* note 15, at 134, 139–40 (discussing the potential pitfalls of utilizing a service dog).

⁵⁶ Rebecca J. Huss, *Why Context Matters: Defining Service Animals Under Federal Law*, 37 PEPP. L. REV. 1163, 1170–74 (2010) (analyzing ethical issues relating to the use of service animals).

⁵⁷ Burrows, *Factors*, *supra* note 31 at 51.

⁵⁸ Burrows, *Sentinels*, *supra* note 36, at 1644.

⁵⁹ Burrows, *Factors*, *supra* note 31, at 59.

in the study were exposed to several physical stressors including “lack of relief time for urinating or defecating, being in the jacket for long periods of time, and unprovoked negative attention from the child with autism.”⁶⁰ The study found that the autism service dogs developed a sense of when to “move in to distract or comfort the child and when to move away to avoid the child’s anger.”⁶¹ As with other “working animals” the impact of these physical stressors can be alleviated with proper training and support for the handlers.⁶²

III. THE ALLERGIES ISSUE

Whether it is a student with a disability or a trainer of a service animal, one of the objections almost universally made by a school district when a request is made to bring a service dog to school is the problem of the dog triggering allergies or asthma attacks for other students and staff.⁶³ Animal dander can cause allergic reactions in 20 to 30 percent of people with asthma.⁶⁴ Childhood asthma is a leading cause of school absenteeism.⁶⁵ According to the 2008 National Health Interview Survey conducted by the Centers for Disease Control and Prevention, 10 to 14 percent of children suffered from allergies in the previous 12 months.⁶⁶ In the general population, allergies to cats are “twice as common as allergies to dogs.”⁶⁷

⁶⁰ *Id.* at 50, 60.

⁶¹ *Id.* at 51. “After the first few months of placement (1–3 months), the dogs developed an ability to interpret the child’s behavior and discriminate touch investigation from physical threats.” *Id.*

⁶² *Id.* at 59.

⁶³ See, e.g., *Cave v. East Meadow Union Free School District*, 480 F.Supp. 2d 610, 619, 622–23 (E.D.N.Y. 2007) (discussed *infra* notes 133–91 and accompanying text). An allergic sensitization to cat or dog allergens is a risk factor for asthma symptoms. Samuel J. Arbes, Jr. et al., *Dog Allergen (Can f 1) and Cat Allergen (Fel d 1) in US Homes: Results from the National Survey of Lead and Allergens in Housing*, 114 J. ALLERGY & CLINICAL IMMUNOLOGY 111, 113 (July 2004).

⁶⁴ Andrea Coombes, *Onboard Pets May Aggravate Allergies of Some Air Travelers*, SEATTLE TIMES, Oct. 26, 2003, at M5 (discussing travelers that are allergic to animals).

⁶⁵ Paivi M. Salo et al., *Indoor Allergens in Schools and Day Care Environments*, 124 J. ALLERGY & CLINICAL IMMUNOLOGY 185, 188 (Aug. 2009).

⁶⁶ Barbara Bloom, Robin A. Cohen & Gulnar Freeman, *Summary Health Statistics for U.S. Children:*

National Health Interview Survey, 2008, 2009 NAT’L CTR. FOR HEALTH STATISTICS 5, 11 (Vital Health & Stat. Series 10, No.244), available at http://www.cdc.gov/nchs/data/series/sr_10/sr10_244.pdf (last visited Jan. 29, 2010) (reporting that ten percent of children suffered from hay fever, eleven percent of

One of the challenges is that allergens from cats and dogs are found in environments in which no animal resides.⁶⁸ One study found that “essentially all homes in the United States” contain dog and cat allergens.⁶⁹ There is evidence that the primary transfer mechanism and source of pet allergens is clothing.⁷⁰ Human hair might also be a source for transfer.⁷¹

Multiple studies have demonstrated a correlation between the number of children and staff who have frequent contact with dogs or cats (either by living with them or otherwise) and the level of dog or cat allergens in schools.⁷² One study in Sweden found that a ban on pet ownership—where the students had been banned from pet ownership from five to six years prior to the study—reduced cat allergens in the classroom.⁷³ A ban on pet ownership in the United States is likely to be challenging if not impossible (considering the mobility of the population and level of pet ownership in the United States). Fortunately, a similar decrease in pet allergens was found in classes that implemented the use of school clothing.⁷⁴ These studies illustrate that dog and cat allergens are regularly found in classrooms, even classrooms without the presence of a service animal.⁷⁵

children suffered from respiratory allergies and fourteen percent of children suffered from other allergies). The survey did not break down the triggers for the allergies. *Id.*

⁶⁷ Linda Stahl, *Coping with Cat Allergies*, COURIER J. (Louisville, KY), Aug. 16, 2007, at 1E.

⁶⁸ Salo, *supra* note 65, at 185.

⁶⁹ Arbes, *supra* note 63, at 116.

⁷⁰ Salo, *supra* note 65, at 187 (citing to studies that show that allergen levels are higher in the dust of pet owners clothing versus non-pet owners).

⁷¹ *Id.*

⁷² *Id.*

⁷³ Anne-Sophie Karlsson et al., *Airborne Cat Allergen Reduction in Classrooms That Use Special Clothing or Ban Pet Ownership*, 133 J. ALLERGY & CLINICAL IMMUNOLOGY 1172, 1173, 1177 (June 2004). The parents agreed to the pet ban prior to the students' enrollment in first grade. *Id.* at 1173.

⁷⁴ *Id.* at 1177. The students and staff changed clothes prior to entering into the classroom and the special school clothes, purchased by the school, were washed in a nearby laundry. *Id.* at 1173.

⁷⁵ Another study determined that the level of cat allergens did not decrease after the introduction of a “number of feasible and economically defensible intervention measures in classrooms.” S. Karlsson et al., *Allergen Avoidance Does Not Alter Airborne Cat Allergen Levels in Classrooms*, 59 ALLERGY 661, 662 (2004). Allergen intervention measures included replacing shelves with cupboards, removal of curtains, upholstery and other textiles, removal of plants, and increased cleaning of the classrooms. *Id.* at 663. The study did confirm that classrooms with a lower rate of cat owners resulted in significantly lower levels of cat allergens. *Id.* at 665.

It appears unlikely that classrooms in the United States will either ban pet ownership by the students or institute special “school clothes” programs to reduce the level of cat and dog allergens that are transferred into the school environment. In contrast, it is possible to reduce dog allergen levels from service animals by washing a dog regularly,⁷⁶ and some people with disabilities choose breeds of dogs thought to produce less dander.⁷⁷ One organization instills with their clients the idea of “responsibility of public access” including the need to keep their animal clean and well-groomed to reduce shedding etc.⁷⁸ Assistance Dogs International, Inc.’s “Minimum Standards for Assistance Dogs in Public” also provide that a service dog should be “clean, well-groomed and does not have an offensive odor.”⁷⁹

Of course, physically separating the child with allergies from the service animal also would assist in reducing the exposure to allergens. It is important to note that the U.S. Department of Justice has stated that allergies (and a fear of animals) are “generally not valid reasons for denying access or refusing service to people with service animals.”⁸⁰ In situations where allergies are severe enough that a child would be considered disabled under the ADA, the school would need to accommodate that disability as well. Essentially, allergic reactions would not support a finding that the individual is disabled if the effects are only temporary and they do not significantly disrupt a major life activity.⁸¹

⁷⁶ Tess Hodson et al., *Washing the Dog Reduces Dog Allergen Levels, but the Dog Needs to be Washed Twice a Week*, 103 J. ALLERGY & CLINICAL IMMUNOLOGY 581, 585 (Apr. 1999).

⁷⁷ Although some breeds of dogs are touted as “hypoallergenic,” some experts say that no breed is truly hypoallergenic but breeds with single coats that are low shedding are believed to minimize the extent of allergic reactions. Steve Dale, *There is No Breed or Cat or Dog that Won’t Cause Allergies*, CHI. TRIB., Jan. 10, 1999, at D5 (recommending Poodle varieties, the Portuguese Water Dog and the Bichon Frise as breeds that may work better for people with mild allergies).

⁷⁸ Beedle Telephone Interview, *supra* note 14 (discussing that the organization has not had a problem with schools being concerned about dog dander in connection with its in school training or placement of animals).

⁷⁹ Assistance Dogs International, Inc., *Minimum Standards for Assistance Dogs in Public*, <http://www.assistedoginternational.org/Standards/AssistanceDogPublicStandards.php> (last visited Feb. 17, 2010).

⁸⁰ United States Department of Justice, Civil Rights Division, *ADA Business Brief: Service Animals* (April 2002), <http://www.ada.gov/svcanimb.htm> (last visited Feb. 17, 2010).

⁸¹ *Respiratory Disorders*, DISABILITY COMPLIANCE FOR HIGHER EDUCATION, Sept. 1, 2008, Vol. 14, No.22 (discussing when allergies are disabling in their intensity).

Complicating this issue even further is the use of service animals by children *with* certain types of allergies. A recent report found that the prevalence of reported food allergies increased eighteen percent in the years 1997–2007 with four percent of children now having a food allergy.⁸² Allergies to peanuts and tree nuts are among the most common.⁸³ Several children are now using service dogs to alert the child to the presence of peanuts with the first one reportedly placed in 2006.⁸⁴ As with other allergies, allergies to peanuts may rise to the level of severity as to constitute a disability under the ADA.⁸⁵

IV. CASE LAW: THE INTERSECTION OF FEDERAL AND STATE LAW

A complicated set of laws govern the education of children who are disabled.⁸⁶ Three aspects of federal law may impact this analysis. The first aspect of federal law is the Rehabilitation Act—specifically Section 504 of that statute (“Section 504” or the “Rehabilitation Act”).⁸⁷ The Rehabilitation Act applies to state and local educational programs and provides that “no otherwise qualified individual with a disability . . .

⁸² Amy M. Branum & Susan L. Lukacs, *Food Allergy among U.S. Children: Trends in Prevalence and Hospitalizations*, 2008 NAT'L CTR. FOR HEALTH STATISTICS 2 (NCHS Data Brief, No. 10, Hyattsville, MD), available at <http://www.cdc.gov/nchs/data/databriefs/db10.pdf> (last visited Jan. 29, 2010). Complicating this issue further is that twenty-nine percent of children with food allergies also reported having asthma in contrast to twelve percent of children without food allergies. *Id.* at 3.

⁸³ *Id.* at 1.

⁸⁴ Brian Newsome, *Peanut-Sniffing Dog is Allergic Girl's Best Friend*, ST. PAUL PIONEER PRESS, Feb. 19, 2009 (page number unavailable) (reporting on a peanut sniffing dog in Colorado and interviewing Sharon L. Perry who claims to have trained the first peanut-detecting dog three years prior). See also Terry Brown, *Family Hopes Young Dog will Learn New Tricks as a Lifesaver; Labrador/Poodle will be Trained to Detect Peanuts for His Allergic Master*, FLORIDA TIMES-UNION, July 15, 2005, at SU-16 (discussing the training of a dog in Florida for child with peanut allergies); Champ Clark, *He Makes Me Safer*, 71 TIME Apr. 6, 2009, at 98 (describing the work of a dog trained to alert in the presence of peanuts); Michael O'Connor, *Sniffing Out Danger: Teen with Severe Peanut Allergies Relies on Her Dog: Food Allergies*, OMAHA WORLD-HERALD, Nov. 17, 2008, at 1B (discussing placement of a dog in Nebraska with child with severe food allergies).

⁸⁵ Marie Plicka, *Mr. Peanut Goes to Court: Accommodating an Individual's Peanut Allergy in Schools and Day Care Centers Under the Americans with Disabilities Act*, 14 J.L. & HEALTH 87, 102 (1999–2000) (analyzing the application of the ADA to persons with peanut allergies).

⁸⁶ The constitutional basis for special education is beyond the scope of this Article. See generally LAURA ROTHSTEIN & JULIA ROTHSTEIN, *DISABILITIES AND THE LAW* 95–100 (4th ed. 2009).

⁸⁷ 29 U.S.C. § 794 (2006).

shall solely by reason of her or his disability, . . . be denied the benefits of . . . any program or activity receiving Federal financial assistance.”⁸⁸

The IDEA is the second aspect of federal law that applies to students with disabilities.⁸⁹ States receiving funding under the IDEA are required to have a policy that provides a “free and appropriate public education” to all children with disabilities.⁹⁰ Pursuant to the IDEA, an individualized educational program (“IEP”) is established for every student with a disability.⁹¹

The Americans with Disabilities Act (“ADA”) is the third aspect of federal law that applies to students with disabilities.⁹² Title II of the ADA applies to state and local government agencies, such as public school systems.⁹³ Title III of the ADA applies to privately operated programs that are public accommodations.⁹⁴ Recent changes to the ADA regulations dealing with service animals reinforced prior U.S. Department of Justice guidance regarding service animals by revising the definition and reiterating that the failure to allow for a person with a disability to be accompanied by a service animal may be a violation of the ADA.⁹⁵ The intersection of these laws and state law can be found in the limited reported case law addressing the ability of a student to be accompanied by a service animal to school.

⁸⁸ *Id.* Local school districts are subject to the mandates of Section 504 because entities that receive funds indirectly are covered under the Rehabilitation Act. ROTHSTEIN & ROTHSTEIN, *supra* note 86, at § 2:2 (discussing the applicability of Section 504). Currently all states receive federal funding for public educational programming. *Id.*

⁸⁹ The IDEA was amended in 2004 by the Individuals with Disabilities Educational Improvement Act. Pub. L. No. 188-446, 118 Stat. 2647 (codified at 20 U.S.C. §§ 1400-1482 (2006)). The precursor statute to the IDEA was the Education for All Handicapped Children Act. 20 U.S.C. §§ 1400 *et. seq.* (2006). See also ROTHSTEIN & ROTHSTEIN, *supra* note 86, at §§ 2.3–2.5 (providing a brief history of the IDEA).

⁹⁰ 20 U.S.C. §§ 1401(9) (2006). Free appropriate public education is defined as: “special education and related services that . . . (B) meet the standards of the State educational agency, (C) include and appropriate . . . education in the State involved, and (D) are provided in conformity with the individualized education program.” 20 U.S.C. § 1414(d) (2006).

⁹¹ 20 U.S.C. § 1412(a)(4) (2006).

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

⁹³ 42 U.S.C. §§ 12131–12165 (2006).

⁹⁴ 42 U.S.C. §§ 12181–12189 (2006).

⁹⁵ 28 C.F.R. § 35.104 (2010); 28 C.F.R. § 36.104 (2010).

A. *Sullivan v. Vallejo City Unified School District*

Although the number of cases dealing with service animals in schools appears to be growing, certain school districts have been hesitant to allow service animals in the past. The case of *Sullivan v. Vallejo City Unified School District*⁹⁶ is one illustration. In the *Sullivan* case, the student (Christine) was 16 years old and had cerebral palsy, learning disabilities, and right side deafness.⁹⁷ In February 1988 she participated in a training program with Canine Companions for Independence and subsequently received a service dog.⁹⁸ Christine (through her guardian ad litem) filed a complaint alleging that the school district (hereinafter “Vallejo”) refused to allow her to bring her service dog to school in violation of Section 504 of the Rehabilitation Act of 1974 and California law.⁹⁹ Vallejo moved to dismiss Christine’s claim under the Rehabilitation Act arguing that Christine failed to exhaust her administrative remedies provided by the Education of the Handicapped Act (“EHA”)¹⁰⁰ as required by the Handicapped Children’s Protection Act of 1986 (“HCPA”).¹⁰¹

The district court examined the relationship among the Rehabilitation Act, the EHA, and the HCPA.¹⁰² The court found that although the EHA and Section 504 of the Rehabilitation Act create “parallel remedies where a school district fails in its obligation to

⁹⁶ 731 F. Supp. 947 (E.D. Cal. 1990). *See also* *Gaudiello v. Delaware Co. Intermediate Unit*, 796 F.Supp. 849 (E.D. Penn. 1992). In the *Gaudiello* case, a physically disabled student and his parents utilizing a service dog challenged the mainstreaming of the student. *Id.* at 851–53. The court did not reach the merits of the claim relying on the lack of exhaustion of administrative remedies and stated that the court “has determined that *Sullivan* is not applicable to the facts of this case.” *Id.* at 853.

⁹⁷ *Sullivan*, 731 F.Supp. at 948. In this Article the student with the disability will be identified using his or her first name, in part to avoid confusion over actions by the student’s parents.

⁹⁸ *Id.* at 949.

⁹⁹ *Id.* The defendants sought unsuccessfully to dismiss Christine’s state law claims by arguing that a public high school would not be included in the definition of public accommodation under the purview of the civil laws upon which Christine based her claims. *Id.* at 951–54.

¹⁰⁰ The Education of the Handicapped Act and Handicapped Children’s Protection Act was renamed the IDEA. *See supra* note 89 (discussing the history of the IDEA).

¹⁰¹ *Sullivan v. Vallejo City Unified Sch. Dist.*, 731 F. Supp. 947, 949 (E.D. Cal. 1990). If Christine did not exhaust her administrative remedies the court would be without subject matter jurisdiction. *Id.* *See also* 20 U.S.C. § 1415 (setting forth the administrative remedies and appeal process under the IDEA).

¹⁰² *Sullivan*, 731 F. Supp. at 949–52.

provide a handicapped child with a basic floor of educational opportunity . . . the substantive rights created by the two statutes are distinct.”¹⁰³ However, the HCPA “requires exhaustion of the EHA administrative remedies prior to filing suit under Section 504 to the extent that the relief sought in the Section 504 action would be equally available under EHA.”¹⁰⁴

Vallejo argued that Christine could achieve the goal of being allowed to bring her service dog to school by convening an IEP hearing to determine whether the service dog is necessary to obtain the educational benefits guaranteed to her by EHA.¹⁰⁵ The court rejected this argument, citing to the fact that Christine did not dispute whether the IEP created for her was adequate from an educational standpoint or allege that the service dog is educationally necessary.¹⁰⁶ The district court found that the issue was whether Vallejo discriminated against Christine on the basis of her disability by arbitrarily refusing her access if she was accompanied by her service dog, and because the EHA inquiry was irrelevant, the EHA administrative remedies need not be exhausted.¹⁰⁷

The district court then turned to the issue of Christine’s preliminary injunction. As part of that analysis, the district court analyzed the Section 504 claim.¹⁰⁸ The first criterion for establishing a case of discrimination is that the person be “handicapped” within the meaning of the statute.¹⁰⁹ The court found that there was no dispute that Christine would meet this standard citing to her cerebral palsy and her use of a wheelchair to assist in mobility.¹¹⁰

¹⁰³ *Id.* at 950. The court provided an example that Section 504 provides a remedy (not found in the EHA) where a disabled student has been treated “arbitrarily or in a different manner than similarly situated able-bodied students by virtue of his or her handicap.” *Id.* at 951.

¹⁰⁴ *Id.* at 951. The district court continued by reiterating that the language of the HCPA makes it clear that EHA does not restrict or limit the rights available under the Rehabilitation Act. *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Sullivan v. Vallejo City Unified Sch. Dist.*, 731 F. Supp. 947, 957 (E.D. Cal. 1990).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

The second element is that Christine must be excluded from participation as a result of her handicap.¹¹¹ Vallejo argued that it did not exclude Christine, but only the service dog from the school premises.¹¹² The district court found that Vallejo's attempt to distinguish between Christine and her service dog was not consistent with the letter or spirit of the Rehabilitation Act.¹¹³ The district court found that "as long as the choices the handicapped person makes concerning how to effectively address her circumstances are reasonable, the Rehabilitation Act both protects those choices from scrutiny, and prohibits discrimination against the disabled person on the basis of those choices."¹¹⁴ The court concluded that Christine had made a prima facie case of discrimination under Section 504.¹¹⁵

The district court then considered whether Vallejo failed to make a reasonable accommodation to allow Christine's service dog on school premises.¹¹⁶ Vallejo justified the exclusion of the dog citing to the argument that the dog was unnecessary and there were space and health concerns.¹¹⁷ The district court found that the argument that the dog was unnecessary demonstrated "a lack of sensitivity to the special needs of physically disabled people, it also appears to be contradicted by their own affidavits, and finally, may well be irrelevant to her Section 504 claim."¹¹⁸ The district court also rejected the arguments regarding space and health concerns by Vallejo.¹¹⁹ The district court found that Christine was entitled to a preliminary injunction and set forth the scope of the judicial decree that provided that a new or modified IEP be created ensuring Christine's ability to be accompanied by her service animal.¹²⁰

¹¹¹ *Id.* Vallejo did not contest the third required element—that it be the recipient of federal funds. *Id.* at 958.

¹¹² *Id.* at 958.

¹¹³ *Sullivan v. Vallejo City Unified Sch. Dist.*, 731 F. Supp. 947, 958 (E.D. Cal. 1990).

¹¹⁴ *Id.* The court viewed the choice to use a service dog as "akin to choosing to use a wheelchair to increase her mobility rather than a pair of crutches." *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 959-60.

¹¹⁷ *Id.* at 960.

¹¹⁸ *Id.*

¹¹⁹ *Id.* Christine had been placed in a classroom taught by a person known to have severe allergies to animal dander, and the court found that Vallejo had failed in their obligation to ensure that Christine had meaningful access to its educational program. *Id.*

¹²⁰ *Id.* at 961. The district court stated that Vallejo could not alter Christine's placement "to accommodate the purely personal feelings of others, either students or faculty, about

If the *Sullivan* case was the only reported case, it would appear clear that a court's analysis would focus on the Rehabilitation Act (and the ADA) to avoid the procedural issues under the IDEA that may delay or prevent a student from being accompanied by a service animal.

B. *Hughes v. Collier County*

The case of *Hughes v. District School Board of Collier County* ("*Collier*") is one illustration of the difficulties inherent in the IDEA procedural process.¹²¹ The *Collier* case consisted of multiple administrative hearings and district court decisions that resulted in the parents of a boy (Derek), diagnosed with autism and epilepsy, moving him to another district.¹²²

In the *Collier* case, Derek Hughes attended school in the Collier County School District from 1991 to August 2006.¹²³ Concerns about Derek's education arose when he began attending middle school.¹²⁴ Derek's parents complained about the physical environment and capacity of the staff to deal with Derek's communication limitations and health status.¹²⁵ Multiple IEP meetings failed to resolve the controversy, with one of the central issues being Collier's denial of the Hughes' request to allow a service animal.¹²⁶ Ultimately the Hughes alleged that Derek was "constructively evicted" from Collier and that the parents' only alternative was to place Derek in another school district.¹²⁷

dogs in the school environment" but it did recognize that Christine may be required to change classrooms or even school campuses. *Id.*

¹²¹ 2007 WL 2729588 (M.D. Fla.).

¹²² Katherine Albers, *Boy with Disabilities, Parents File Federal Suit Against Schools*, Naplesnews.com, Dec. 1, 2006, http://www.naplesnews.com/news/2006/dec/01/boy_disabilities_parents_file_federal_suit_against/ (last visited Feb. 15, 2010). See also Katherine Albers, *Parents File Federal Complaint Against School District*, Naplesnews.com, Feb. 23, 2006 available at http://www.naplesnews.com/news/2006/feb/23/parents_file_federal_complaint_against_school_dist/ (last visited Feb. 15, 2010).

¹²³ *Hughes v. Dist. Sch. Bd. of Collier County*, Case No. 2:06-cv-629-FtM-29DNF, Report and Recommendation (M.D. Fla. Aug. 23, 2007) [hereinafter *Hughes Report and Recommendation*] (on file with author).

¹²⁴ *Id.* at 3. Derek was placed at the middle school that centralized autistic children in the district. *Id.*

¹²⁵ *Id.* Derek communicates using sign language. *Id.* at 4. Derek had his first seizure in December 2005. *Id.*

¹²⁶ *Id.* at 4-5.

¹²⁷ *Id.* at 5.

Among other assertions, Collier alleged that the Hughes failed to exhaust their administrative remedies and the claim would be time-barred because the Hughes did not seek timely judicial review of a December 26, 2006, decision by an administrative law judge.¹²⁸ The Magistrate judge recommended the denial of Collier's motion to dismiss Hughes' claims, and the district court agreed.¹²⁹

During the same period, complaints were filed with the Office for Civil Rights regarding the procedures that Collier was following.¹³⁰ The Office of Civil Rights concluded that Collier's Section 504 procedures did not comply with the requirements of Section 504.¹³¹ In a Resolution Agreement Collier agreed to revise its policies and practices for Section 504 due process hearings.¹³² As illustrated below, it is not uncommon for concurrent procedures to occur in these cases.

C. Cave v. East Meadow Union Free School District

Recently a hearing impaired student who was denied permission to bring a hearing dog with him to school generated significant press.¹³³ The case involving John Cave resulted in multiple court hearings, an investigation by the New York Department of Human Rights and a related appeal to the New York State Education Department.¹³⁴

John Cave ("John") is hearing impaired.¹³⁵ Pursuant to his IEP, the East Meadow Union Free School District ("East Meadow") provided a sign language interpreter and an FM transmitter to make it easier to

¹²⁸ *Id.* at 7–9.

¹²⁹ *Hughes v. Dist. Sch. Bd. of Collier County*, 2007 WL 2729588 (M.D. Fla. 2007). A subsequent district court decision remanded the issues to the State of Florida, Division of Administrative Hearings to complete the administrative process. *Hughes v. Dist. Sch. Bd. of Collier County*, 2008 WL 4661691 (M.D. Fla. 2008).

¹³⁰ Office for Civil Rights, Southern Division, Atlanta Collier County (FL) School District, No. 04-07-1264m Sept. 30, 2008, in 39 NAT. DISABILITY LAW REP. 161.

¹³¹ *Id.*

¹³² *Id.*

¹³³ See, e.g., Sophia Chang & Carl Macgowen, *Court Says State Can Investigate East Meadow Schools for Barring Service Dog*, NEWSDAY (New York), Aug. 15, 2007 (page number unavailable); Richard Weir, *No Dog in School, Court Rules E. Meadow Help Hound Ban Upheld*, DAILY NEWS (New York), Feb. 28, 2007, at 1.

¹³⁴ See *infra* notes 135–91 and accompanying text (discussing issues relating to John Cave's use of a service dog).

¹³⁵ *Cave v. East Meadow Union Free Sch. Dist.*, 480 F.Supp. 2d 610, 615 (E.D.N.Y. 2007). During the four and a half day hearing there was significant testimony on the extent of John's hearing impairment and impact of the use of his cochlear implants and other technology. *Id.* at 616–17.

hear when there was background noise, in addition to other accommodations.¹³⁶ In May 2005 John's mother contacted the school and the Superintendent of East Meadow to discuss the admission of a service dog for John and was told that the dog would not be allowed in the school and that there was no policy regarding service dogs.¹³⁷

John went through training and was matched with Simba.¹³⁸ In January 2007 John and his mother entered the school with Simba and had a negative encounter with the principal and assistant principal.¹³⁹ Subsequent attempts by John with his mother to bring the service dog to school also ended without a positive resolution of the issue.¹⁴⁰ Ultimately, Simba was denied access to the high school.¹⁴¹ There was extensive testimony about John's daily activities and the concerns of East Meadow over having a service dog in the school at the initial district court hearing.¹⁴²

The evidence supporting John's case included testimony detailing the negative impact on Simba's training caused by the decision to bar Simba from accompanying John at school; additionally, an expert testified as to the impact of having a dog in the classroom.¹⁴³ There was no testimony that a service dog was necessary to assist John in his school work.¹⁴⁴

East Meadow also had witnesses who addressed the issue of allergens and the impact of having a dog in the school building on

¹³⁶ *Id.* at 617-18.

¹³⁷ *Id.* at 618, 631. John's mother also made an appointment with the high school principal who was told by the school district's office that the dog was not permitted. *Id.* at 619.

¹³⁸ *Id.* at 619.

¹³⁹ *Id.* The court stated it would not review the testimony as to the "unfortunate" incident on January 3, 2007. *Id.* at 626.

¹⁴⁰ *Cave v. East Meadow Union Free Sch. Dist.*, 480 F.Supp. 2d 610, 626-28 (E.D.N.Y. 2007).

¹⁴¹ *Id.*

¹⁴² *Id.* at 619-26.

¹⁴³ *Id.* at 620-21. The witnesses included a woman with a visual impairment who used service dogs in public schools. *Id.* at 620.

¹⁴⁴ *Id.* at 619. John's mother testified that she never suggested that Simba would help John learn in school. *Id.* However, in arguing that irreparable harm would be caused if the preliminary injunction was not issued, the Caves argued that John would be "denied a full educational experience, both academic and social without the use of his hearing dog." *Id.* at 633.

others.¹⁴⁵ The focus of East Meadows' case was that "there was no need for a service dog because John, Jr. had reasonable accommodation and access and, equally important, he was doing well in school."¹⁴⁶

In determining whether a preliminary injunction would be issued, the district court first considered whether there would be irreparable harm if John was not permitted to bring Simba to school.¹⁴⁷ The district court found that the element of irreparable harm was established, focusing on the impact on Simba's training.

As to the second element required to support the issuance of a preliminary injunction, the likelihood of success on the merits, the court found that the Caves had failed to prove the element.¹⁴⁸ In analyzing this issue the district court began by disagreeing with the contention that a public school be treated the same as any other public accommodation under federal disability discrimination laws.¹⁴⁹ The district court referenced the IDEA as a statute "specifically designed to guide the relationship between federally funded public schools and their disabled students."¹⁵⁰ The court also rejected the Caves' contention that the IDEA did not apply because that statute deals solely with educational issues, finding that the IDEA's coverage of "[e]ducation . . . encompasses more than simply academics."¹⁵¹

The district court did not find the *Sullivan* case (discussed *supra*) persuasive.¹⁵² The district court distinguished the level of

¹⁴⁵ *Id.* at 622–23. The mother of a student with allergies and asthma who testified on behalf of the school district subsequently supported John's request to bring the dog to school. Carl MacGowan, *East Meadow: Former Foe Turns Supporter in Service Dog, School Case*, *NEWSDAY* (New York), Sept. 20, 2007, at A39. Six months after testifying that her daughter "could literally die" from an asthma attack if John brought Simba to school, Heather Hanlon-Pieron joined the Caves in bringing their concerns to the school board. *Id.* John Cave's mother met with Ms. Hanlon-Pieron and the Caves agreed to wash Simba with a shampoo designed to reduce the risk of allergic reactions. *Id.* Ms. Hanon-Peiron stated that she felt that her daughter's disability was used for the school district officials' agenda. *Id.*

¹⁴⁶ *Cave v. East Meadow Union Free Sch. Dist.*, 480 F.Supp. 2d 610, 631 (E.D.N.Y. 2007).

¹⁴⁷ *Id.* at 631–33. Because an injunction in this case would not merely preserve the status quo, but would require East Meadow to commit an affirmative act, a heightened standard requiring that extreme or very serious damage would result if it was not issued was necessary. *Id.* at 632.

¹⁴⁸ *Id.* at 639.

¹⁴⁹ *Id.* at 633.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 635 (emphasis omitted).

¹⁵² *Cave v. East Meadow Union Free Sch. Dist.*, 480 F.Supp. 2d 610, 637 (E.D.N.Y. 2007).

independence of the student involved in the *Sullivan* case, found that the relief the Caves sought was in substance a modification of John's IEP, and that such relief was available under the IDEA.¹⁵³ The court found that the Caves did not exhaust their administrative remedies under any of the applicable statutes; thus, they could not proceed with the federal causes of action.¹⁵⁴

In order to complete the record, the court continued its analysis by considering whether East Meadow failed to reasonably accommodate John's use of a service dog in violation of the ADA and Rehabilitation Act.¹⁵⁵ The district court found that the provision of "extraordinary" services by East Meadow established that it had provided John with reasonable accommodations under the provisions of the ADA and Rehabilitation Act.¹⁵⁶

The Caves appealed the district court's decision denying their motion for a preliminary injunction.¹⁵⁷ The court of appeals held that the rule providing that it was necessary to exhaust all administrative remedies under the IDEA prior to bringing the federal claims was applicable.¹⁵⁸ Thus, their federal claims were not properly brought before the district court.¹⁵⁹ The court of appeals remanded the case back to the district court directing it to dismiss without prejudice the complaint in its entirety for lack of subject matter jurisdiction.¹⁶⁰

Concurrently with the Caves' lawsuit in the federal court system, the New York State, Division of Human Rights ("NYS DHR") process was

¹⁵³ *Id.* at 638.

¹⁵⁴ *Id.* at 638-39. The district court referenced the IDEA, IEP and 504 Committee ruling. *Id.*

¹⁵⁵ *Id.* at 39-42.

¹⁵⁶ *Id.* at 641. The court also found that the Caves failed to establish the likelihood of success on their state law claims. *Id.* at 642-45.

¹⁵⁷ *Cave v. East Meadow Union Free Sch. Dist.*, 514 F.3d 240, 243 (2d Cir. 2008). The Caves also requested that the appellate court certify all the questions of state law to the New York Court of Appeals, and East Meadow moved for dismissal of the complaint "in its entirety for lack of subject matter jurisdiction or, in the alternative, for summary judgment." *Id.* at 244-45.

¹⁵⁸ *Id.* at 246-49. The court of appeals also rejected the argument that the exhaustion requirement would be excused if exhaustion was "futile because the administrative procedures do not provide an adequate remedy" (the futility exception). *Id.* at 249.

¹⁵⁹ *Id.* at 250. The court of appeals found that the Caves' state law claims should also be dismissed without prejudice because it was inappropriate for the district court to retain jurisdiction over the state law claims when there was no basis for supplemental jurisdiction. *Id.* at 250.

¹⁶⁰ *Id.* at 251.

considering the actions of East Meadow.¹⁶¹ On January 8, 2007, a verified complaint was filed with NYSDHR charging East Meadow with unlawful discriminatory practices based on East Meadow preventing the use of service dogs by certain students in educational facilities.¹⁶² NYSDHR commenced an investigation and found that it had jurisdiction over the complaint and that there was probable cause to “believe East Meadow had engaged and was engaging in the alleged unlawful discriminatory practices.”¹⁶³ Specifically, the complaint alleged that East Meadow utilized a “balancing test to assess whether guide, hearing, and/or service dogs should be allowed.”¹⁶⁴

East Meadow contested NYSDHR’s jurisdiction over it seeking to enjoin a public hearing on the allegations.¹⁶⁵ East Meadow contended that NYSDHR’s proceeding should be precluded because of the federal district court case commenced by the Caves. The New York Supreme Court rejected this argument in citing, among other issues, that East Meadow’s “overall policy regarding service animals was not and could not be made an issue in the District Court proceeding,”¹⁶⁶ thus East Meadow’s policy related to service animals in general would be subject to review by NYSDHR.¹⁶⁷

NYSDHR continued the process, and, after a hearing and post-hearing submissions, the Administrative Law Judge issued a Recommended Order, and the NYSDHR Commissioner found that East Meadow’s “balancing test” policy with respect to students’ use of guide, hearing and service dogs violated two sections of New York Human Rights Law.¹⁶⁸ East Meadow objected to the Recommended Order, with its principal argument being that it is not an “educational corporation or association” covered by the New York Human Rights Law.¹⁶⁹

¹⁶¹ N.Y. State Div. of Human Rights v. East Meadow Union Free Sch. Dist., Case No. 10115533, Mar. 10, 2008 [hereinafter “NYSDHR Final Order”].

¹⁶² *Id.* at 2. Specifically the complaint alleged that East Meadow prevented the use of “guide dogs, hearing dogs or service dogs by hearing impaired or other [students] with disabilities in educational facilities.” *Id.*

¹⁶³ *Id.* at 3.

¹⁶⁴ *Id.* at 2.

¹⁶⁵ East Meadow Union Free Sch. Dist. v. N.Y. State Div. of Human Rights, 2007 N.Y. Misc. LEXIS 6004 (N.Y. Sup. Ct. Aug. 7, 2007) [hereinafter East Meadow Supreme Court Order].

¹⁶⁶ *Id.* at *13.

¹⁶⁷ *Id.* at *15.

¹⁶⁸ NYSDHR Final Order, *supra* note 158, at 4. East Meadow was found to violate Sections 296.4 and 296.14 of the New York Human Rights Law.

¹⁶⁹ *Id.* at 4.

Ultimately, as discussed *infra*,¹⁷⁰ East Meadow was successful in this argument, with the New York Supreme Court finding that East Meadow was not an “educational corporation or association” and the determination of NYSDHR was annulled.¹⁷¹

Notwithstanding the eventual annulment of the NYSDHR order on jurisdictional grounds, the order itself provides useful analysis of how a state human rights division with jurisdiction might analyze a school’s policy on service animals.¹⁷² East Meadow’s policy utilized a balancing test “that weighs the potential benefits to the student with the disability against ‘the risks inherent in having a service animal in the school building.’”¹⁷³ The New York Human Rights Law was the “first anti-discrimination law in the country”; it is “one of the broadest in the country with respect to disabilities . . . and is far broader than the [ADA] in many important respects.”¹⁷⁴ In contrast to the ADA, which generally requires only reasonable accommodations to people with disabilities, the New York Law expressly bans discrimination based on the use of a service dog.¹⁷⁵

East Meadow’s citation to its own manual, which establishes access to individualized educational programs for students with disabilities, was deemed irrelevant, as was its citation to a case involving access by a service animal in a hospital delivery room.¹⁷⁶ The Commissioner distinguished the hospital delivery room case based on the fact that the hospital would be violating the Public Health Law by allowing the service dog into the room.¹⁷⁷ The Commissioner cited the fact that education had been recognized in New York as a civil right.¹⁷⁸ As to East Meadow’s contention that it had a responsibility to individuals in the school who may be allergic to dogs, the Commissioner recognized

¹⁷⁰ *Infra* notes 179–80 and accompanying text (discussing the final result in this case).

¹⁷¹ *E. Meadow Union Free Sch. Dist. v. N.Y. State Div. of Human Rights*, 886 N.Y.S.2d 211, 213 (2009), *appeal denied*, 14 N.Y.3d 710 (2010).

¹⁷² NYSDHR Final Order, *supra* note 158, at 10–15. The Final Order considered and rejected the argument by East Meadow that it should not be considered an “education corporation or association.” *Id.*

¹⁷³ *Id.* at 5.

¹⁷⁴ *Id.* at 6, 8.

¹⁷⁵ *Id.* at 8.

¹⁷⁶ *Id.* at 15–17. The manual was based on the ADA and did not address the Human Rights Law. *Id.*

¹⁷⁷ NYSDHR Final Order, *supra* note 158, at 16.

¹⁷⁸ *Id.* at 16. Access to education and educational facilities is an exercise of that civil right. *Id.*

that East Meadow had a responsibility to such individuals but found that the Human Rights Law provided that East Meadow should then reasonably accommodate any individuals so situated.¹⁷⁹

The Commissioner found that to

deny a student the use of her/his guide, hearing, and service dog—which has been trained specifically to aid the student in overcoming obstacles presented by her/his impairment, so that s/he can function and enjoy life and the opportunities of life, such as education, as fully as a student without such an impairment—because of the problems allegedly caused by the dog’s presence is discrimination against the student because of the dog

and would be unlawful under the Human Rights Law.¹⁸⁰ The Commissioner ordered East Meadow to stop using the “balancing test” and adopt a new policy, including practices and a training program with respect to service animals.¹⁸¹

As discussed above, notwithstanding the findings of NYSDHR and the Commissioner’s order, East Meadow prevailed in this process.¹⁸² The New York Supreme Court, Appellate Division, Second District utilized New York’s General Construction Law to determine that East Meadow would not be considered an educational corporation, under the Human Rights Law.¹⁸³

An attempt to utilize the New York State Education Department appeal process also failed.¹⁸⁴ On August 13, 2008, John attempted to enter the high school building with his service dog in order to take the

¹⁷⁹ *Id.* at 17.

¹⁸⁰ *Id.* at 18–19, citing to Section 296.14 of the New York Human Rights Law. N.Y. Exec. Law § 296 (McKinney).

¹⁸¹ *Id.* at 20.

¹⁸² *E. Meadow Union Free Sch. Dist. v. N.Y. State Div. of Human Rights*, 886 N.Y.S.2d 211, 213 (2009), *appeal denied*, 14 N.Y.3d 710 (2010).

¹⁸³ *Id.* at 212. East Meadow was considered a public corporation and it could not be an educational corporation under the Human Rights Law. *Id.*

¹⁸⁴ *See infra* notes 185–91 and accompanying text (discussing the Cave’s use of the New York State Education Department appeal process).

New York State Regents Examination in Global Studies.¹⁸⁵ The principal denied his request to have the dog with him during the examination.¹⁸⁶ John took the examination without the dog but appealed the decision, contending that the principal and superintendent violated federal and state anti-discrimination laws.¹⁸⁷ John sought a “determination that students who utilized guide dogs, hearing dogs or service dogs be granted access to all New York State Education Department approved Regents Examination testing sites.”¹⁸⁸ The Commissioner of Education dismissed the appeal on several grounds, including mootness,¹⁸⁹ lack of standing,¹⁹⁰ and lack of jurisdiction.¹⁹¹

As illustrated by the *Cave* case, the use of state or federal Office of Civil Rights process may be an alternative method for a student requesting to be accompanied by a service animal to school.

D. Bakersfield City School District—U.S. Department of Education

Although not a reported case, the resolution plan adopted by the Bakersfield City School District to address the findings of the U.S. Department of Education, Office of Civil Rights (“OCR”), provides useful analysis for these situations as the case involved a student with

¹⁸⁵ Appeal of a Student With a Disability, by his parent from action of the Board of Education of the East Meadow Union Free School District Regarding Discrimination, New York State Education Department, Decision of the Commissioner of Education, Decision No. 15,899, Mar. 25, 2009 [hereinafter Decision No. 15,899]. John Cave was not identified by name in this appeal, however, references to the court and New York State Division of Human Rights proceedings and the description of the student provide a clear connection to John Cave. John had attended summer school in preparation for the examination. *Id.* at 1.

¹⁸⁶ *Id.* The principal “explained that no prior request or arrangements had been made for the dog’s admission” and told John that he “would be admitted to the examination without the dog.” *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 2.

¹⁸⁹ *Id.* at 3. The principal of the school submitted an affidavit in February 2009 “indicating that two district employees were advised by the student and/or his father that the student no longer uses a hearing dog” and the petitioner did not dispute the contents of that affidavit. *Id.*

¹⁹⁰ *Id.* The Commissioner found that John lacked standing to assert the rights of others. *Id.*

¹⁹¹ *Id.* at 3–4. The Commissioner cited to John’s IEP and found that he would be obliged to exhaust his administrative remedies under the IDEA. *Id.* The Commissioner also noted that there was a pending case in State court and that it was well established that the Commissioner does not issue declaratory rulings or advisory opinions. *Id.*

autism.¹⁹² The OCR in this case received a complaint on April 18, 2007, alleging that the Bakersfield City School District (“Bakersfield”) had set discriminatory conditions on the student’s (“Jacob”) use of a trained dog (“Thor”) as a service animal.¹⁹³ Jacob was twelve years old at the time he started using Thor and bringing Thor to school.¹⁹⁴

The OCR Case Resolution Letter states that the “proper standard for an elementary and secondary school district to use when considering use of a service animal or other animal by a student is not yet a well-settled question of law.”¹⁹⁵ The OCR referred to other contexts where the OCR has held “that a recipient’s prohibition or limitation on use of a service animal by a student would constitute discrimination if such a decision would limit or deny the student’s opportunity to participate in or access the programs or facilities of the recipient” and any “policy or procedure limiting or prohibiting use of a service animal, must be modified to permit its use, unless the modification would require a fundamental alteration or undue burden or pose a direct threat to the health and safety of the student or others.”¹⁹⁶

In other contexts the OCR concluded the following with respect to the use of a service animal by a student:

[T]he recipient may review existing documentation or evaluate his/her disability and obtain documentation or demonstration of the animal’s function, as well as whether a nexus exists between the disability, the animal’s function and access to the programs, activities,

¹⁹² OCR Case Resolution Letter, United States Department of Education, Office for Civil Rights, Region IX to Michael D. Lingo, Superintendent, Bakersfield School District, Bakersfield, California, date stamped Jan. 25, 2008, Case No. 09-07-1220, in 37 NAT’L DISABILITY L. REP. 218, 2008 NDLR (LRP) Lexis 408 (on file with author)[hereinafter referred to as OCR Case Resolution Letter]. Bakersfield denied any violation of law but agreed to adopt a resolution plan. *Id.* at 3.

¹⁹³ *Id.* at 2. The name of the student was withheld from the case resolution letter to protect the student’s privacy; however, local news reports identified the student as Jacob Saecker and the dog’s name as Thor. *Boy, Family Fight for Dog to Be in Class*, KERO23 (ABC), <http://www.turnto23.com/news/12653422/detail.html?subid=22100581&q=1;bp=t> (last visited Feb. 18, 2010) [hereinafter KERO23].

¹⁹⁴ KERO23, *supra* note 193.

¹⁹⁵ OCR Case Resolution Letter, *supra* note 192, at 5.

¹⁹⁶ *Id.* at 2. The OCR set forth the law that would be applied in this situation in the OCR Resolution Letter, citing to Section 504 Regulation and Title II of the ADA. The Title II regulations defining the term “reasonable modifications” were linked with the regulations for Title III of the ADA definition of that term. *Id.*

and/or facilities of the recipient. A recipient may offer effective alternatives to the requested modification, but the alternative must be effective in all of the functions the service animal performs with respect to the student's disability. In making these determinations, the recipient must engage with the student (or his parents) in an interactive process, making an individual case-by-case determination, specific to the student and his/her animal.¹⁹⁷

The OCR factual determinations were set forth in the letter.¹⁹⁸ Jacob was described as being diagnosed with Autistic Disorder and identified as an individual with a disability under the IDEA by Bakersfield.¹⁹⁹ Bakersfield had been providing special education services to Jacob since he was in second grade and he was on an IEP.²⁰⁰ At times in the years preceding obtaining Thor, Jacob did not attend school because of safety concerns identified by Jacob's parents.²⁰¹ In January 2007 at Jacob's IEP meeting concerns over Jacob's difficulties resulted in the IEP team recommending that Jacob receive additional personal aide support for six hours a day for a year.²⁰²

In February, Jacob's parents attended a conference and met a representative from U.S. K9, an organization that trains service dogs for persons with autism.²⁰³ At the beginning of March, the family visited the U.S. K9 facility and entered into a contract for the training and acquisition of a dog.²⁰⁴ Jacob's parents informed the administration at Jacob's school (Thorner Elementary) that they were acquiring a dog for Jacob.²⁰⁵ Jacob attended weekly training sessions with Thor over the next month, and, at the beginning of April 2007, Thor was brought to Jacob's home.²⁰⁶

¹⁹⁷ *Id.* at 6-7.

¹⁹⁸ *Id.* 3-9.

¹⁹⁹ *Id.* at 8. News reports further clarified that Jacob has Asperger's Syndrome. KERO 23, *supra* note 193.

²⁰⁰ OCR Case Resolution Letter, *supra* note 192, at 8.

²⁰¹ *Id.* at 9.

²⁰² *Id.* at 9-10.

²⁰³ *Id.* at 10.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

On April 10, 2007, Jacob attended school with Thor, accompanied by his father and an adult cousin who, among other things, “ensured that no problems occurred.”²⁰⁷ That same day, Jacob’s family provided documentation regarding Thor to Thorner Elementary’s principal and the special education department.²⁰⁸ The school principal consented to Thor’s presence at the school; however, two days later, a district administrator expressed concerns about Thor’s presence at the school, and the district’s Assistant Superintendent informed Jacob’s parents that the district was refusing to permit Jacob to attend school with Thor.²⁰⁹ Until resolution of the issue, Jacob did not attend school.²¹⁰

Initially, the District Administrator raised the issue that the special education department had not approved the practice and it was not on Jacob’s IEP.²¹¹ The District Administrator expressed hesitancy about Thor riding the bus and also was “concerned about the classroom for fear of the dog biting someone or if it were to become sick and vomit and a child slipping on it, etc.”²¹² During the OCR investigation, Bakersfield also justified its exclusion of Thor because it “believed there is a genuine dispute over the function of the dog” considering the dog is a “behavior therapy dog” rather than a service animal.²¹³ Further, Bakersfield did not believe the use of Thor was required because of the support services provided to Jacob through his IEP and other services.²¹⁴ From the end of April 2007 through October 2007, Jacob’s parents met with representatives from Bakersfield multiple times to discuss the issue and Jacob’s IEP.²¹⁵

²⁰⁷ *Id.* Jacob’s father and cousin also introduced Thor to staff and students. *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 5 and 6.

²¹⁰ *Id.* at 6.

²¹¹ *Id.*

²¹² OCR Case Resolution Letter, *supra* note 192, at 6.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 6–8. On April 20, 2007, Jacob’s parents refused to execute an agreement that characterized Thor as a “behavior therapy” dog and released the district from “all its obligations to [Jacob] under Federal education and civil rights laws.” *Id.* at 6. The minutes from an IEP meeting on May 9 “demonstrate that the topic of whether use of the dog as an element of an appropriate education was not discussed because [Bakersfield] concluded it was to be handled in another forum.” *Id.* at 7. An attempt to enroll Jacob in another school district failed because the school had reached its maximum enrollment. *Id.* at 8.

The OCR did not conclude whether Thor should be considered a “service animal.”²¹⁶ The OCR did find that Bakersfield’s decision to exclude Thor was inconsistent with Bakersfield’s obligations under the ADA because it “was made without conducting a specific inquiry into whether it was an appropriately trained service animal, whether the function the animal performed addressed the limitations related to the Student’s disabilities and whether it presented an unreasonable risk to the health and safety of [Jacob] or others.”²¹⁷ Furthermore, the OCR found that Bakersfield had the responsibility to consider the dog as an element of an appropriate education if it determined that Thor was not a service animal.²¹⁸

In the Resolution and Assurances Agreement executed by Bakersfield, the district agreed to resolve the issue by implementing a process to determine whether Jacob should be able to bring Thor with him to school.²¹⁹ The process consisted of two steps.²²⁰ The first step determined whether Thor would be deemed a service animal pursuant to the ADA.²²¹ If Bakersfield determined that Thor is a service animal, it would be required to promptly make arrangements for Jacob to attend school with him unless Bakersfield determined that Thor “represents an unacceptable risk to the health and safety of other students, faculty, or staff.”²²² Factors included in the determination of whether Thor poses an unacceptable risk were considerations of Thor’s “pedigree, breed, training, or propensity for harmful or frightening interactions with other students or others” using the best available objective evidence.²²³

²¹⁶ *Id.* at 11.

²¹⁷ *Id.* at 10. Even if Bakersfield concluded that Thor was not a service animal or if Thor presented too great a risk, the denial of a reasonable modification should have been internally grievable under a Section 504/Title II grievance procedure. *Id.* The OCR concluded that Bakersfield “did not fully comply with the requirements of ADA and Section 504.” *Id.* at 10-11.

²¹⁸ *Id.* at 11.

²¹⁹ Bakersfield City School District, Resolution & Assurances Agreement, OCR Case No. 09-07-1220, executed Jan. 14, 2008, at 1 *available at* 37 NAT’L DISABILITY L. REP. 218, 2008 NDLR (LRP) Lexis 408 (on file with the author).

²²⁰ *Id.* at 1-2.

²²¹ *Id.* at 2-3. Specific conditions for this meeting were set out in the Resolution & Assurances Agreement including setting forth the timing of the meeting and the people who would be allowed to attend the meeting. *Id.*

²²² *Id.* at 2. The determination of whether Thor being at the school is an unacceptable risk was to be made on a specific and individual basis—not just any service animal. *Id.*

²²³ *Id.* at 4.

If Bakersfield determined that Thor was not a service animal, it agreed to convene an IEP meeting to “consider whether Thor should attend school with [Jacob] on a continuous basis as an element of a free appropriate public education. . .including as a necessary related aid or service.”²²⁴ Factors to be considered in the determination of whether Thor would be part of the IEP for Jacob included the impact of the presence or absence of Thor upon the ability of Jacob to “function successfully and independently in an environment of non-disabled peers” and the “degree, if any, to which the separation of [Jacob] from Thor during the school day would impair a transition of independent living skills.”²²⁵

An added complication to the analysis is when an applicable state law purports to specifically address the issue of when service animals should be allowed to accompany students to school.

*E. Kalbfleisch v. Columbia Community Unit School District Unit No. 4*²²⁶

The *Kalbfleisch* case illustrates the challenges that may face parents who wish to have their child with autism accompanied to school with a service animal—but with a twist given the applicable Illinois state law. Carter Kalbfleisch (“Carter”) was diagnosed with medium to severe autism at eighteen months of age.²²⁷ Carter’s behavior prior to having his service dog consisted of daily tantrums,²²⁸ pica,²²⁹ issues with going to and staying asleep,²³⁰ impulse running,²³¹ lack of communication,²³² and lack of focus.²³³ When Carter was around three years old his doctor

²²⁴ *Id.* at 2.

²²⁵ *Id.* at 5.

²²⁶ 920 N.E.2d 651 (Ill. App. 2009).

²²⁷ *Id.* at 654.

²²⁸ *Id.* at 655. The tantrums would involve kicking, screaming and biting, *Id.*

²²⁹ *Id.* Pica is an eating disorder consisting of a pattern of eating nonfood materials. Carter exhibited this eating disorder by attempting to eat items including rocks, mulch, cleaning supplies, batteries and coins. *Id.*

²³⁰ *Id.* Carter’s mother described his issues with sleeping as not being able to fall asleep on his own and waking up approximately every hour. *Id.*

²³¹ *Id.* Carter would take off running into a pond near his house or a nearby road with traffic. *Id.*

²³² *Id.* Carter would not communicate with other students on his own and did not speak any meaningful words. *Id.*

²³³ *Id.*

suggested obtaining a service dog for Carter.²³⁴ After researching the issue, Carter's family applied for a service dog with Wilderwood Service Dogs.²³⁵

After the application for the service dog was accepted, Carter's mother informed Carter's special education coordinator that Carter was going to obtain a service dog and, on several other occasions, spoke to the coordinator about the service dog.²³⁶ Carter's annual IEP meeting was held and Carter's attorney was informed that the school's superintendent handled policy considerations relating to whether the dog would be allowed at the school.²³⁷

In July 2009, Carter received a service dog ("Corbin") and Carter's parents completed approximately eighty hours of training over an eight-day period.²³⁸ Since having the Corbin, Carter's tantrums have reduced, he is able to sleep on his own and he does not try running for the road anymore.²³⁹ Carter also used meaningful words for the first time in his life when he told Corbin to "wait" and "hold."²⁴⁰

After Corbin was placed with Carter, the Kalbfleischs filed an action in the Circuit Court of the Twentieth Judicial Circuit, Monroe County, Illinois seeking an injunction to compel officials at the school district ("Columbia") to permit Carter to be accompanied by Corbin to school.²⁴¹ The basis for the injunction was Section 14-6.02 of the Illinois School

²³⁴ *Id.* Two different doctors prescribed a service dog for Carter. *Id.*

²³⁵ *Id.* Wilderwood Service Dogs is a company that provides service dogs that are trained to aid persons with neurological disorders. *See also* <http://www.wilderwood.org/> (last visited Feb. 17, 2010). There is an application process and two-year waiting list for dogs. *Id.*

²³⁶ *Kalbfleisch v. Columbia Cmty. Unit Sch. Dist. Unit No. 4*, 920 N.E.2d 651, 656 (Ill. App. 2009). Carter's mother testified that she asked at that time "what she needed to do to prepare the school for the dog's arrival" and was told "when the start of school was closer, the school would look into any issues that might arise." *Id.*

²³⁷ *Id.* at 656-57. Carter's mother stated that "she was informed at this meeting that Carter would not be allowed to bring his service dog to school but she was unable to get the school to give her this message in writing" and "she tried on several other occasions to get something in writing indicating that Carter would not be able to bring the service dog to school but that her efforts failed until June 2009." *Id.* at 657.

²³⁸ *Id.* at 656. *See also* <http://www.wilderwood.org/graduates.htm> (last visited Feb. 17, 2009) (providing information about persons who have received service animals through Wilderwood Service Dogs including Carter).

²³⁹ *Id.* at 656 (Ill. App. 2009). Corbin was trained specifically to deal with Carter's issues. *Id.* at 655.

²⁴⁰ *Id.* at 656.

²⁴¹ *Kalbfleisch v. Columbia Cmty. Unit Sch. Dist. Unit No. 4*, 644 F. Supp. 2d 1084 (S.D. Ill. 2009).

Code discussed *infra*.²⁴² Columbia removed the case to federal court citing to the IDEA.²⁴³ The U.S. District Court for the Southern District of Illinois granted a motion brought by the Kalbfleischs to remand the case to state court.²⁴⁴ Columbia unsuccessfully argued that the circuit court lacked jurisdiction over the motion for a preliminary injunction contending that Carter had failed to exhaust his administrative remedies.²⁴⁵ On August 24, 2009, the circuit court entered an order for a preliminary injunction “enjoining the school district from preventing Carter from attending school while being accompanied by his service dog...”²⁴⁶ The order would be effective on September 14, 2009.²⁴⁷

²⁴² See *infra* notes 301–03 and accompanying text. That Illinois provision states that “[s]ervice animals such as guide dogs, signal dogs or any other animal individually trained to perform tasks for the benefit of a student with a disability shall be permitted to accompany that student at all school functions, whether in or outside the classroom.” 105 Ill. Comp. Stat. 5/14-6.02 (2009). A county judge in a second case in Illinois ruled that a first-grader with autism would have the right to be accompanied by his service animal in another school district. Zach Miners, *For Student with Autism, Having Service Animal in School is “Lifesaver,”* U.S. NEWS & WORLD REP., Nov. 25, 2009 (page number unavailable) (reporting on the case involving Kaleb Drew in Villa Grove, Illinois). The Illinois Appellate Court affirmed the decision of the Circuit Court’s decision in the Drew case citing to the *Kalbfleisch* decision. *K.D. v. Villa Grove Community Unit School District*, 936 N.E.2d 690, 698–700 (Ill. App. Ct. 2010). In the *K.D.* case the court rejected the school district’s exhaustion of remedies argument and the contention that because an adult handler was being used the service dog was not “accompanying” the student. *Id.* at 698–99. The appellate court also concluded that the dog was a service animal individually trained to perform tasks for the student’s benefit and stated that the school code section at issue “does not specify service animals must behave perfectly at all times.” *Id.* at 699–700.

²⁴³ *Kalbfleisch*, 644 F. Supp. at 1086.

²⁴⁴ The federal court found that no issue of federal law appeared on the face of the complaint and that it seemed “very likely that the only way the IDEA will enter into this case, if at all, is by way of a defense.” *Id.* at 1088. The federal court found that there was insufficient basis to confer federal jurisdiction. *Id.* The court further found that there was nothing in the IDEA “to suggest that it was intended to displace all state law with respect to the education of disabled persons” in determining whether preemption would apply. *Id.* at 1089–90.

²⁴⁵ On August 13, the school district, contending that the circuit court lacked jurisdiction because Carter failed to exhaust his administrative remedies, filed a motion to dismiss the verified complaint for injunctive relief and the motion for a preliminary injunction. *Kalbfleisch v. Columbia Cmty. Unit Sch. Dist. Unit No. 4*, 920 N.E.2d 651, 654 (Ill. App. 2009).

²⁴⁶ *Id.* at 657.

²⁴⁷ *Id.*

Columbia appealed the order.²⁴⁸ The Illinois Attorney General's office filed an *amicus curiae* brief on Carter's behalf.²⁴⁹

On December 16, 2009, the Appellate Court of Illinois, Fifth District affirmed the judgment of the circuit court ordering the preliminary injunction.²⁵⁰ The appellate court considered three arguments that were raised by Columbia.²⁵¹ The first argument was that "the circuit court lacked jurisdiction to issue a preliminary injunction because Carter failed to exhaust his administrative remedies."²⁵² Since the circuit court found that "Carter would be subjected to irreparable harm and that any other process would be inadequate due to time constraints,"²⁵³ the appellate court found it unnecessary to determine whether Carter had failed to exhaust his administrative remedies.²⁵⁴

Columbia's second argument was that Carter had failed to establish two of the elements necessary for a preliminary injunction.²⁵⁵ The first element is that a person must establish the likelihood of success on the merits of the complaint.²⁵⁶ The appellate court found that Carter "need only raise a fair question regarding the existence of a claimed right and a fair question that he will be entitled to the relief prayed for if the proof sustains the allegations."²⁵⁷ The court found that Carter raised a fair question about the existence of his right under the Illinois statute and that the circuit court "did not err in finding a likelihood of success on the merits of Carter's claim."²⁵⁸

²⁴⁸ *Id.* (discussing motions filed by the school district and Carter leading up to the appellate decision). During this time, Carter attended a special needs school approximately forty-five minutes from Carter's residence. *AG Trying to Intervene in Autism Service Dog Case*, MT. VERNON REGISTER-NEWS (Ill.), Oct. 7, 2009 (page number unavailable).

²⁴⁹ *Kalbfleisch*, 920 N.E.2d 651, 657.

²⁵⁰ *Id.* at 664.

²⁵¹ *Id.* at 657.

²⁵² *Id.* at 658.

²⁵³ *Id.*

²⁵⁴ *Id.* at 659. In addition, the appellate court questioned whether Columbia preserved the issue for its review given that the school district did not raise the argument at the hearing on the motion for a preliminary injunction. *Id.*

²⁵⁵ *Kalbfleisch v. Columbia Cmty. Unit Sch. Dist. Unit No. 4*, 920 N.E.2d 651, 659 (Ill. App. 2009).

²⁵⁶ *Id.* at 660.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 661. The court rejected Columbia's argument that the service animal statute should be construed as requiring an educational benefit, although the court referred to

The second element necessary for a preliminary injunction that Carter established is that he would suffer a valid irreparable harm if the preliminary injunction were not granted.²⁵⁹ The appellate court found that “the circuit court did not abuse its discretion in finding that Carter would suffer irreparable harm if Corbin was not allowed to attend school with him.”²⁶⁰ The court referenced testimony provided by Carter’s mother that Carter and Corbin needed to be together every day as part of their daily routine or the working relationship deteriorated, and Columbia did not rebut this evidence.²⁶¹

The third argument that Columbia made was that the circuit court abused its discretion in (a) issuing the preliminary injunction because it altered the status quo²⁶² and (b) in “balancing the hardships in favor of Carter because it failed to take into consideration the public interest.”²⁶³ The appellate court considered the interpretation of the term “status quo” and found that “the status quo was not a condition of rest but, rather, was a condition of action that was necessary to prevent irreparable harm” in determining that the circuit court did not abuse its discretion on this point.²⁶⁴

The appellate court also found that the circuit court did not abuse its discretion in making the finding that “the injury Carter would suffer by being denied his right to be accompanied by Corbin outweighed any harm potentially incurred by the school district.”²⁶⁵

During the litigation Columbia raised two concerns about allowing the service dog at the school. The first was that there was testimony from Carter’s case manager that she believed that having a dog in

testimony from Carter’s mother that supported the argument that Corbin’s presence and actions provided educational benefits. *Id.*

²⁵⁹ *Id.* Columbia argued that “Carter’s harm is self-inflicted because Carter can attend school without his service dog if he so chooses” and that “self-inflicted harm cannot be irreparable harm.” *Id.* The court found the “self-inflicted harm” argument without merit and stated that the “school district cannot deny Carter access to school with his service dog and then claim that his harm is self-inflicted.” *Id.*

²⁶⁰ *Id.*

²⁶¹ *Kalbfleisch v. Columbia Cmty. Unit Sch. Dist. Unit No. 4*, 920 N.E.2d 651, 661 (Ill. App. 2009).

²⁶² *Id.* Columbia’s argument was that, because Carter did not have a service dog with him in school the previous year, it would be a change to allow the dog now. *Id.* at 661–62.

²⁶³ *Id.* at 661.

²⁶⁴ *Id.* at 663.

²⁶⁵ *Id.* at 664.

school would be disruptive.²⁶⁶ The second was that another child at the school has a rare lung disease and is highly allergic to dogs.²⁶⁷ The court found that the circuit court considered these competing interests in making the injunction effective three weeks after its entry presumably to allow Columbia time to accommodate both students.²⁶⁸ In so reasoning, the court cited the offer by Carter's mother to train the school's staff on how to handle Corbin or to remain with Carter and Corbin at the school.²⁶⁹ The appellate court also stated that there was no evidence that the other child would be allergic to Corbin, whose breed is Bouvier, a breed considered to be hypoallergenic.²⁷⁰ (By analogy, the regulations involving competing concerns under the Air Carrier Access Act have made it clear that both interests should be accommodated.²⁷¹) Carter's attorney stated that he believes that "the student with the allergies and his client could both be accommodated by giving the two students different class schedules and otherwise keeping them apart."²⁷² During the litigation, Carter and his service dog attended a private school approximately forty-five minutes from home that focuses on children with autism.²⁷³

²⁶⁶ *Id.* at 657, 664. The case manager also testified that "Carter had an individual aide at the school to ensure that Carter's needs were met." *Id.* at 657, 664. The principal at the school testified that "the school had a policy of allowing no animals at school." *Id.* at 657.

²⁶⁷ *Id.* at 657, 664. That child's mother testified that the "the school district promised her at her child's IEP meeting on August 18, 2009, that her child would not be exposed to any animals, and that if there was a dog in her child's classroom, her child would not go to school." *Id.*

²⁶⁸ *Id.* at 664.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ Huss, *supra* note 56, at 1204 (discussing need to accommodate both individuals).

²⁷² *School Districts Also Face Assistance Animal Requests*, 39 DISABILITY COMPLIANCE BULL., Sept. 24, 2009 (citing to Clay St. Clair who represents Carter Kalbfleisch).

²⁷³ Nancy Cambria, *Autistic Boy, Dog Will Not Attend Hometown School: Instead, He Will Go to Special-Needs School While Lawsuit Proceeds*, ST. LOUIS POST-DISPATCH, Sept. 15, 2009, at A1 (discussing Carter's attendance at the Illinois Center for Autism, a not-for-profit school, with the Columbia school district paying for the cost of the school, but not transportation for Corbin the service dog). Carter continued his education at the Illinois Center for Autism after the appellate court's decision. E-Mail from Jeremy Thompson, Attorney, Crowder & Scoggins, Ltd., to Rebecca Huss, Professor of Law, Valparaiso University School of Law (Feb. 15, 2010, 11:16 CST) (on file with author) (confirming that Carter was continuing his education at the Illinois Center for Autism after the appellate court's decision).

V. STATE LAWS AND SCHOOL DISTRICT POLICIES

A. *State Laws*

Given the difficulty that some students with disabilities have had with school districts refusing to permit them to be accompanied by their service animals, and the resulting media attention to those cases, it is not surprising that some states have introduced and passed legislation specifying the rights of persons with assistance animals in a school environment. These laws address arguments that have been successfully raised by school districts that have prevented students with disabilities from being accompanied by their service animals to school.

The argument that schools should not be considered places of public accommodation was addressed in an amendment to Virginia law in 2008.²⁷⁴ The state legislator that sponsored the bill did so because school officials in his district refused to permit a ten-year-old boy with X-linked hydrocephalus to bring his service dog to school.²⁷⁵ The Code of Virginia now specifically states that “public entities including schools” are listed as places where persons with disabilities are entitled to full and equal accommodations.²⁷⁶ The Virginia Department of Education (“VDOE”) issued “Guidelines for School Division Policy Regarding Service Dogs in Virginia’s Schools” after the law was

²⁷⁴ *Virginia Requires Schools to Allow Service Animals*, 37 DISABILITY COMPLIANCE BULL. 2 (2008) (stating that the law was passed on May 6, 2008, and would take effect on July 1, 2008).

²⁷⁵ Chelyen Davis, *Gov. Kaine Signs Bill Allowing Service Dogs into State Schools: Kaine Signs Service-Dog Bill*, FREE LANCE-STAR (Fredericksburg, Va.), May 7, 2008 (page number unavailable) (describing bill and signing ceremony). A bill clarifying that trainers of service dogs have the same rights of access as persons with disabilities that have service dogs was signed at the same time., *id.* See *infra* notes 334–62 and accompanying text (discussing issues relating to service dogs in training).

²⁷⁶ VA. CODE ANN. § 51.5-44 (2009). Colorado law also defines “places of public accommodation” for private entities as including “nursery, elementary, secondary, undergraduate, or graduate schools or other places of education.” COLO. REV. STAT. § 24-34-803 (7)(e)(XI) (2009). Persons with disabilities also have the right to be accompanied by assistance dogs in public buildings, public facilities and services, and other public places. COLO. REV. STAT. § 24-34-803(1) (2009). Public school is defined in the Colorado code as “a school that derives its support, in whole or in part, from moneys raised by a general state, county, or district tax.” COLO. REV. STAT. § 22-1-101 (2009). Given this statutory authority, it would appear that all public and private educational institutions in Colorado give persons with assistance dogs the right of access.

enacted.²⁷⁷ The VDOE found that the Virginia statutory provision, along with the requirements of IDEA, Rehabilitation Act, and ADA, “affords each student a near absolute right to be accompanied by a service dog in a Virginia public school.”²⁷⁸ The guidelines continued by stating that “this right must be qualified, carefully weighed against the rights of other students who are equally entitled to receive educational benefits at the school. . .[and] weighed against the school division’s ongoing legal responsibility to operate, maintain, and supervise Virginia’s public schools.”²⁷⁹ The guidelines recognize that in the past, the determination of whether a service dog would be allowed in a student’s educational environment “was determined as an accommodation by the child’s IEP or 504 team,” but the new amendment “provides a separate statutory right of the student to be accompanied by a service dog, thereby making IEP/504 team determinations unnecessary.”²⁸⁰

The VDOE set forth a general framework and checklist it recommends school districts follow.²⁸¹ There will likely be more consistency among Virginia school districts’ policies, in comparison to other states, because of this general framework. The VDOE recommended that school divisions’ policies emphasize that service animals are considered personal property, and prior approval should be obtained before bringing the animal onto school property.²⁸² The VDOE recommended providing legal definitions and examples of what animals constitute “trained service dogs.”²⁸³ The guidelines also recommend the following standards: (a) the service dog must have a health

²⁷⁷ VA. DEP’T OF EDUC., DIV. OF SPECIAL EDUC. & STUDENT SERVS., GUIDELINES FOR SCHOOL DIVISION POLICY REGARDING SERVICE DOGS IN VIRGINIA’S PUBLIC SCHOOLS (2008), available at http://www.doe.virginia.gov/special_ed/tech_asst_prof_dev/guidance_service_dog.pdf (last visited Mar. 6, 2011) [hereinafter VDOE GUIDELINES].

²⁷⁸ *Id.* at 1.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.* at 2–8.

²⁸² *Id.* at 2. The guidelines recognized that other forms of personal property, such as toys and weapons, are already likely restricted in school policies. *Id.* at 3.

²⁸³ *Id.* at 3–4. For example, a “trained service dog” can be called a psychiatric service dog or autism service dog but not a helping or support dog. *Id.* at 4.

certificate,²⁸⁴ (b) the dog wears identifying gear,²⁸⁵ and (c) the “service dog and its primary handler must be certified for ‘public access.’”²⁸⁶

It is important to note that the ADA does not require that service animals be certified—and in fact only requires that service animals be “individually trained.”²⁸⁷ Applying this public access certification requirement to deny access to a service dog, without a change in the ADA regulations, is an area that is likely to be litigated.²⁸⁸ That said, much of the requirements in the public access certification process deal with a dog’s behavior—and, of course, under the ADA, since only a reasonable accommodation must be made, if a service animal exhibits inappropriate behavior, it is likely that a school district would be allowed to deny access to a dog that does not meet the general standards. Types of inappropriate behavior that would cause a dog to be denied access include vocalizing unnecessarily, showing aggression towards animals or people, or having an offensive odor.²⁸⁹

The VDEO provides additional recommendations for schools if a service dog is granted access including providing for a rest place and rest times for the dog as well as training for handling or behaving

²⁸⁴ *Id.* at 4 (evidencing the dog has received all vaccinations, is free from parasites, and is in good health).

²⁸⁵ *Id.* (including a harness, backpack or vest).

²⁸⁶ *Id.* The guidelines state that any “purported service dog that is being brought into a school setting must have sufficient training to be certifiable for public access” and cite to the standardized Public Access Test utilized by Assistance Dogs International (“ADI”). *Id.* at 4–5.

²⁸⁷ 28 C.F.R. § 35.104 (2010); 28 C.F.R. § 36.104 (2010). *See also* Huss, *supra* note 56, at 1175–77 (discussing the recent rulemaking process that the DOJ utilized and the DOJ’s refusal to change the “individually trained” standards to one that would require service animals to be certified).

²⁸⁸ Alternatively, the guidelines require that the handler produce proof that the dog has met ADI’s “Minimum Standards for Training Service Dogs.” VDEO Guidelines, *supra* note 277, at 5. The ADI has several sets of standards. The Minimum Standards for Training Service Dogs relates to programs training service dogs. *See* <http://www.assistedogsinternational.org/Standards/ServiceDogStandards.php> (last visited Mar. 6, 2011). The ADI also has Minimum Standards for Assistance Dogs in Public. *See* <http://www.assistedogsinternational.org/Standards/AssistanceDogPublicStandards.php> (last visited, Mar. 6, 2011). The second of these standards would seem to make more sense for the school policy as it is directly related to the dog’s appearance, behavior, and training (and in fact, failure to meet these standards is grounds for denial of access), while the Minimum Standards for Training Service Dogs relates more towards the training programs themselves.

²⁸⁹ VDOE Guidelines, *supra* note 277, at 5.

appropriately around the service dog.²⁹⁰ The VDEO guidelines also state that the dog “must not in any other way interfere with the educational process of any student,” but do not provide for any specific information on dealing with allergies or other possible issues that other students may have due to the presence of the service animal.²⁹¹ Although the VDEO guidelines are a useful tool for school districts, they do not deal with the likely objections that will be raised by the parents of other students, specifically students with allergies or asthma. It is a significant clarification that a service dog’s access to the school is now NOT part of the IEP process—and given the clear language of the Virginia guidelines, a school district attempting to require a parent to exhaust administrative remedies under the IDEA or deal with the issue pursuant to an IEP is likely to quickly find itself on the losing side in a Virginia courtroom.

The Virginia Office of the Attorney General did provide an advisory opinion to a Member of the Virginia Senate that illustrates the “balancing” that may be required to accommodate both a student with a service dog and another student with allergies.²⁹² The background provided in the advisory opinion stated that two students attending the same public school potentially would ride the same bus to school.²⁹³ The question raised was which of the two students had “the superior right to ride a school bus when one student has a service dog and the other student is allergic to dogs.”²⁹⁴ Student A, diagnosed with an autism spectrum disorder, is assisted by a service dog and rides on the special education school bus.²⁹⁵ The parents of Student A requested that the student ride the regular school bus accompanied by his service dog.²⁹⁶ Student B was described as having a “severe” allergy to dogs and Student B’s parents requested that the service dog not be permitted on the regular bus.²⁹⁷ There is no indication in the advisory letter that

²⁹⁰ *Id.* at 6.

²⁹¹ *Id.* at 5.

²⁹² Letter from Att’y Gen. William C. Mims to Sen. Jill H. Vogel, 08-085 Op. Va. Att’y Gen. 1 (2009) (responding to Ms. Vogel’s request for an official advisory opinion), *available at* <http://www.oag.state.va.us/OPINIONS/2009opns/08-085-Vogel.pdf> [hereinafter Virginia Advisory Opinion].

²⁹³ *Id.* at 1.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

Student B was considered disabled under the ADA or received any special services due to his allergies. The advisory letter set forth the applicable law (including Virginia Revised Code Section 51.5-44 discussed *infra*) and stated that the Attorney General did not find any provision of state or federal law, or case law applicable to the situation.²⁹⁸

Ultimately the Attorney General's opinion was that the school board was "the appropriate arbiter to resolve a dispute over the transportation of pupils" and "the decision to permit the two students to ride separate buses is not unreasonable or unlawful."²⁹⁹ In this case it appears that, notwithstanding Parent A's preferences on the subject, Student A will continue to ride the special education bus.

Another example of legislation in this area is the Indiana Code, which was revised in 2009 to add "an autism service animal" to the definition of "service animal" and to provide places of education to be included in the definition of places of public accommodation where persons with disabilities are entitled to be accompanied by a service animal.³⁰⁰

Illinois law also appears straightforward in its application to situations wherein a student with a disability wishes to be accompanied by his or her service animal to school. Illinois law states "[s]ervice animals such as guide dogs, signal dogs or any other animal individually trained to perform tasks for the benefit of a student with a disability shall be permitted to accompany that student at all school functions, whether in or outside the classroom."³⁰¹ As discussed *supra*, notwithstanding this language, school districts in Illinois have attempted to prevent students with disabilities from being accompanied by service animals.³⁰² Of course, pursuant to this language, if a purported service animal does not "perform tasks" for a

²⁹⁸ Virginia Advisory Opinion, *supra* note 292, at 2-3.

²⁹⁹ *Id.* at 3. The Attorney General also stated that "[s]ome disputes between parties are best resolved by appealing to reason and compromise and not by recourse to laws and the court system." *Id.*

³⁰⁰ IND. CODE §16-32-3-1.5 (2009) (defining service animal as "an animal trained as . . . an autism service animal"); IND. CODE § 16-32-3-2 (2009) (including nursery school, elementary school, secondary school, undergraduate or postgraduate public or private institution or other places of education in the definition of public accommodation).

³⁰¹ 105 ILL. COMP. STAT. 5/14-6.02 (2009).

³⁰² See *supra* notes 220-67 and accompanying text (discussing recent Illinois cases).

student, a school district would be able to refuse to permit the service animal access to the school.³⁰³

Further illustrating the role of state laws on the ability to be accompanied by a service animal is proposed state legislation dealing with the issue of service animals in schools. A New Jersey Assembly Bill provides that students classified “as eligible for special education programs and services for autism or other developmental disability may keep a medically-recommended service dog in school buildings, including the classroom. . . .”³⁰⁴ The right is subject to the provision of documentation to the school district consisting of “(1) a written recommendation from a physician or other medical professional that the student be allowed to bring the service dog in a school building, including the classroom, and on school grounds; and (2) certification that the service dog has been trained by a recognized training agency or school.”³⁰⁵ What would constitute a “recognized training agency or school” is not defined in the proposed legislation.³⁰⁶ The legislation contains a provision that “[t]he Legislature finds and declares that . . . [allowing these students] to bring a medically-recommended service dog to class . . . will enhance the learning process and help the student reach his full academic potential.”³⁰⁷

Legislation that reflects acceptance of the use of service dogs by persons with autism is likely to support arguments that a service dog be accommodated pursuant to provisions that apply to persons with disabilities generally, rather than incorporation of the decision into a process relating to a student’s individual education plan. An example is proposed legislation in Ohio that revises the definition of “mobility impaired person” to include “a person who is diagnosed with autism for purposes of the statutes governing assistance dogs.”³⁰⁸

B. School District Policies

School district policies set forth the process by which students will be allowed to bring service animals to schools. The language of the

³⁰³ 28 C.F.R. § 35.104 (2010); 28 C.F.R. § 36.104 (2010). See Huss, *supra* note 56, at 1175–79 (discussing the “perform task” language in the ADA regulations).

³⁰⁴ A.B. 1718, 214th Leg., 2010 Sess. (N.J. 2010).

³⁰⁵ *Id.*

³⁰⁶ However, this type of language supports a certification requirement like the VDOE Guidelines, discussed *supra* notes 277–91 and accompanying text.

³⁰⁷ A.B. 1718, 214th Leg., 2010 Sess. (N.J. 2010).

³⁰⁸ H.B. 399/S.B. 220, 128th Gen. Assem., Reg. Sess. (Ohio 2009–2010).

broadest policies reference or cite to the ADA.³⁰⁹ Many schools use similar language in their policies and link the use of the service animal to a Section 504 Plan or IEP.³¹⁰

Other common language found in school policies is that the use of a service animal by a student will be allowed “when it has been determined that a student’s disability requires such use for the student to have equal access to and benefit from the services, programs or activities offered by the school.”³¹¹ This language has been used by school districts if there are disputes over allowing animals in schools—which cite to a 1991 guidance letter by the federal Department of Education with similar language.³¹² An inquiry to the United States Department of Education regarding the letter resulted in the Department of Education, Office of Civil Rights (OCR) providing the author of this article with two letters from 1991 in which the OCR responded to information requests of individual congressmen on the issue of service animals. The e-mail accompanying the letters set forth the parameters of the information provided by the OCR—specifically that the “OCR does not provide legal or other advice or issue advisory

³⁰⁹ See, e.g., LAREDO INDEP. SCH. DIST., SERVS. FOR STUDENTS WITH DISABILITIES, RULES AND PROCEDURES FOR SERVICE ANIMALS ON CAMPUS, 1 (2009), available at <http://www.laredoisd.org/departments/specialedu/docs/LISD%20grr%20Procedure%20service%20animals%202009.pdf> (last visited Mar. 6, 2011) (stating the ADA definition of service animals) [hereinafter LAREDO SCH. DIST. POLICY].

³¹⁰ See, e.g., ALBUQUERQUE PUB. SCH., ANIMALS IN SCHOOLS, 1 (rev. 2007), available at <http://www.aps.edu/about-us/policies-and-procedural-directives/procedural-directives/i-instruction/animals-in-school> (last visited Mar. 7, 2011) (stating that “students seeking to use service animals should, in conjunction with APS, develop a Section 504 plan or Individual Education Plan, as appropriate, to identify needed reasonable accommodations and other issues relating to the use of a service animal”).

³¹¹ See, e.g., NASHUA SCH. DIST. (N.H.), SERVICE ANIMALS FOR STUDENTS, EMPLOYEES AND GUESTS OF THE NASHUA SCHOOL DISTRICT, POLICY NUMBER 6512, 1 (2006), available at <http://www.nashua.edu/district-documents/POPPS/6512%20-%20Service%20Animals.pdf> (last visited Mar. 7, 2011) [hereinafter NASHUA SCH. DIST. POLICY]; SEVIER SCH. DIST. (UTAH), 3350 SERVICE ANIMALS FOR STUDENTS, EMPLOYEES AND GUESTS, 1 (2009), available at http://www.sevier.k12.ut.us/index.php?option=com_content&view=article&id=192:3350-service-animals-for-students-employees-and-guests&catid=34:district-policies-3000&Itemid=127 (last visited Mar. 7, 2011) [hereinafter SEVIER SCH. DIST. POLICY]; MAINE SCHOOL ADMINISTRATIVE DISTRICT #35, ACAC SERVICE ANIMALS FOR STUDENTS AND EMPLOYEES, 1 (rev. Dec. 7, 2005), available at <http://www.msad35.net/?q=ACAC> (last visited Mar. 7, 2011) [hereinafter MARSHWOOD SCH. DIST. POLICY].

³¹² Christina A. Samuels, *Pet Smart*, 25 EDUC. WK., Mar. 8, 2006, at 25 (discussing a dispute in Virginia and stating that lawyers for the school district “pointed to a 1991 guidance letter from the federal Education Department that they say bolsters the district’s view”).

opinions to customers concerning specific factual scenarios. Correspondence issued by OCR in response to an inquiry from the public does not constitute a formal statement of OCR policy and should not be construed as creating or articulating new policy.”³¹³ The letters themselves utilized the same language in connection with an inquiry about whether the Rehabilitation Act would prohibit recipient schools from barring service dogs from the classroom.³¹⁴ The OCR’s response stated that “if not allowing a student to bring a service dog into the classroom would effectively deny the student the opportunity, or an equal opportunity, to participate in or benefit from the education program, then the recipient school would be in violation of Section 504 and its implementing regulation.”³¹⁵

In the second letter, a constituent’s concern was that the presence of animals in the classrooms could present “health risks to other students suffering from asthma or allergies whose educational rights could be severely affected.”³¹⁶ The OCR reiterated the general language it provided in the first letter and stated that if the person with asthma or allergies was a “handicapped person” within the meaning of the regulations implementing Section 504, then the “recipient school would be required to take necessary steps to ensure that the handicapped person is . . . afforded an opportunity to participate in its program that is equal to that afforded others.”³¹⁷ The OCR did not provide specific guidelines for dealing with such a conflict but stated that “[d]eterminations as to the steps a recipient school would have to take to address concerns such as those raised by your constituent would have to be made on a case-by-case basis, in light of the unique facts and

³¹³ E-mail from Javier Serrano, Staff Attorney, Program Legal Group, Office for Civil Rights, Dep’t of Educ. to Rebecca Huss, Professor of Law, Valparaiso Univ. Sch. of Law (Jan. 29, 2010, 14:16 CST) (on file with author).

³¹⁴ Letter from Michael L. Williams, Assistant Secretary for Civil Rights, U.S. Dep’t of Educ., Office for Civil Rights, to Bill Goodling, House of Representatives (Mar. 14, 1991) (on file with author); Letter from Michael L. Williams, Assistant Secretary for Civil Rights, U.S. Dep’t of Educ., Office for Civil Rights, to Joel Hefley, House of Representatives (Nov. 18, 1991) (on file with author) (referencing Mar. 14, 1991 letter to Bill Goodling).

³¹⁵ Letter from Michael L. Williams, Assistant Secretary for Civil Rights, U.S. Dep’t of Educ., Office for Civil Rights, to Bill Goodling, House of Representatives (Mar. 14, 1991) (on file with author).

³¹⁶ Letter from Michael L. Williams, Assistant Secretary for Civil Rights, U.S. Dep’t of Educ., Office for Civil Rights, to Joel Hefley, House of Representatives (Nov. 18, 1991) (on file with author).

³¹⁷ *Id.*

circumstances of the particular case.”³¹⁸ The resolution plan entered into by the Bakersfield City School District discussed *supra* illustrates a more recent approach to these issues by the OCR.³¹⁹

It is common for school districts to require registration of the service animals.³²⁰ There are often written procedures that must be followed prior to the use of a service animal in a school.³²¹ For example, the Fridley, Minnesota public schools’ procedure requires the request for the use of service animals to be made three weeks prior to the proposed use of the animal, and the request must “describe the manner in which the service animal will meet the individual’s particular need(s) and provide a letter from their physician who is the health care provider regarding the need for a service animal.”³²² Documentation that may be required by school districts include: (a) documentation or certification of the service animal’s training and licensing, (b) certification of vaccinations and good health by a veterinarian, (c) documentation that the handler for the service animal is properly trained or evidence that the student can maintain appropriate care and control over the animal, and (d) documentation of adequate liability insurance.³²³ Some school policies recognize the possibility of conflicting disabilities and require that persons who have an allergic reaction to an animal provide notice to resolve the issue.³²⁴

A school policy may provide a plan for introducing a service animal into the school environment including training for staff and students relating to interaction with the service animal.³²⁵ The conduct of other students and employees of the school in connection with a service animal may be regulated as well. For example, one policy states that

³¹⁸ *Id.*

³¹⁹ See *supra* notes 192–225 and accompanying text (analyzing the resolution agreement entered into by the Bakersfield City School District).

³²⁰ See, e.g., LAREDO SCH. DIST. POLICY, *supra* note 309, at 1 (requiring registration with the school district office).

³²¹ See, e.g., FRIDLEY PUB. SCH. (MINN.), 899 SERVICE ANIMALS IN THE SCHOOL DISTRICT, 1 (rev. Jan. 19, 2010), available at <http://www.fridley.k12.mn.us/AboutOurDistrict/documents/899%20Service%20Animals%20in%20the%20Schools.pdf> (last visited Mar. 7, 2011), [hereinafter FRIDLEY SCH. DIST. POLICY].

³²² *Id.*

³²³ See, e.g., FRIDLEY SCH. DIST. POLICY, *supra* note 321, at 2; MARSHWOOD SCH. DIST. POLICY, *supra* note 311, at 2.

³²⁴ See, e.g., LAREDO SCH. DIST. POLICY, *supra* note 309, at 2; NASHUA SCH. DIST. POLICY, *supra* note 311, at 3.

³²⁵ See FRIDLEY SCH. DIST. POLICY, *supra* note 321, § IV(E), at 1.

service animals “should not be petted, touched or spoken to unless authorized by the animal’s owner” and service animals “should not deliberately be startled.”³²⁶

Conditions relating to the use of service animals are also found in many school policies.³²⁷ For example, it is common to require that the animal remains on a leash at all times, and wears some type of commonly recognized identification of the animal’s status as a service animal, such as a harness or vest.³²⁸ Some areas, such as food preparation areas or laboratories, may be deemed to be off-limits to a service animal.³²⁹

Finally, school policies generally retain discretion to exclude or remove a service animal if an animal is not under the control of the handler or poses a direct threat to the health and safety of others.³³⁰ An unclean or unsanitary animal may be removed from a school.³³¹ Some policies would provide for the removal of a service animal if such animal’s presence “significantly impairs the learning of students” or “fundamentally alters the nature of any school program.”³³² If a service animal is unable to “perform reliably the service for which it has been approved” it may be excluded as well.³³³

VI. SERVICE ANIMALS IN TRAINING

Another way that an animal may be allowed to be in a school environment is if such animal meets the definition of “service animal in training.” There are frequent reports of waiting lists for service animals.³³⁴ The cost of training a service animal can be considerable.³³⁵

³²⁶ NASHUA SCH. DIST. POLICY, *supra* note 311, at 2–3.

³²⁷ *See, e.g.*, MARSHWOOD SCH. DIST. POLICY, *supra* note 311, at § I(6).

³²⁸ *See, e.g.*, MARSHWOOD SCH. DIST. POLICY, *supra* note 311, § I(6); LAREDO SCH. DIST. POLICY, *supra* note 309, at 1; FRIDLEY SCH. DIST. POLICY, *supra* note 321, § IV(F), at 2.

³²⁹ NASHUA SCH. DIST. POLICY, *supra* note 311, at 3.

³³⁰ LAREDO SCH. DIST. POLICY, *supra* note 309, § 3(b), at 2.

³³¹ NASHUA SCH. DIST. POLICY, *supra* note 311, at 4.

³³² *Id.*; *see also* MARSHWOOD SCH. DIST. POLICY, *supra* note 311, §§ (III)(G) & (H), at 2.

³³³ NASHUA SCH. DIST. POLICY, *supra* note 311, at 4; *see also* MARSHWOOD SCH. DIST. POLICY, *supra* note 311, § (III)(B), at 2.

³³⁴ For one organization placing service dogs with autistic children, the wait can be around one year for placement because it tries “very hard to match the right dog with the right child and family therefore the wait could vary.” Swartz E-mail, *supra* note 22.

³³⁵ This is an important issue because the cost of the training of a service animal can be substantial. The estimated cost of an organization training a service animal varies considerably. For example, the Children’s Village estimates the cost of a service animal

One method that is used for the training of service animals is through volunteer trainers. Volunteer trainers can be used for “puppy training” consisting of general socialization and obedience or more advanced training.³³⁶

Some school districts have uniform policies that bar students or staff from bringing service animals in training onto school grounds.³³⁷ Other schools use ad hoc policies to determine the ability of a student or staff member to bring a service animal in training to school.³³⁸ One

at \$10,000–15,000, Assistance Dog Training Program, <http://www.childrensvillage.org/programs-dog-more.htm> (last visited Mar. 7, 2011); Texas Hearing and Service Dogs estimates the cost of training their assistance dogs at \$17,500, What Hearing and Service Dogs Do, <http://www.servicedogs.org/whatwedo/public.html> (last visited Mar. 7, 2011). Approximately \$20,000 was the cost that another researcher estimated for the cost of a dog. PAVLIDES, *supra* note 28, at 36. Susquehanna Service Animals estimated that the actual cost to train and place a service dog was \$20,000. Susquehanna Service Dogs, <http://www.keystonehumanservices.org/ssd/ssd.php> (last visited Mar. 7, 2011). Caroline Canines estimates the cost of its service dogs at \$40,000. Service Dog FAQ, <http://www.carolinacanines.org/index.php?c=17> (last visited Mar. 7, 2011). One recent article stated that the placement for a guide dog for the blind may cost up to \$60,000. Rebecca Skloot, *Creature Comforts*, N.Y. TIMES, Dec. 31, 2008, (Magazine), at 34. In some cases, the cost of the service dog may be borne entirely by the person obtaining the dog, while, in other instances, organizations charge a percentage of the cost of the dog and use other sources of funding. PAVLIDES, *supra* note 28, at 36. The individual with the service animal generally pays for the ongoing costs of the animal, however some service providers help contribute to the expense. *Id.*

³³⁶ See, e.g., Helping Paws, Foster Home Trainers, http://helpingpaws.org/index.php?option=com_content&view=article&id=41&Itemid=47 (last visited Mar. 7, 2011) (discussing the training obligation of foster home trainers); Mary Wade Burnside, *Loved and Needed: Puppy Trainers Have Key Role in Developing Guide Dogs*, THE TIMES WEST VIRGINIAN (Fairmont, Va.), Feb. 15, 2009, (page number unavailable) (discussing puppy training program for Pilot Dogs, Inc.); Triveni Sheshadri, *Canine Companions Makes a Difference, Volunteers Train Pups to Service the Disabled*, SAN DIEGO UNION TRIB., Feb. 27, 2009, at NC-1 (discussing puppy training for Canine Companions for Independence).

³³⁷ See, e.g., LOS ANGELES UNIFIED SCH. DIST., POLICY BULLETIN BUL-3845, LIVE ANIMALS IN CLASSROOM, SERVICE ANIMALS, AND SCHOOL SPONSORED AND NON-SCHOOL SPONSORED ACTIVITIES INVOLVING ANIMALS 1, 5–6 (July 31, 2007) <http://lausd-oehs.org/docs/Bulletins/BUL-3845.pdf> (last visited Mar. 7, 2011) (providing that students, staff or community members would not be allowed to bring service animals in training to district facilities).

³³⁸ Telephone Interview with Maureen Fitzgerald, Instructor at Forest Hills Elementary School, Eden Prairie Sch. (Minn.), in Eden Prairie, Minn. (Oct. 5, 2009) (discussing the informal process by which she was allowed to bring a service dog in training to school). Note that Minnesota is one state that provides for service animals in training to be included in its statute regarding public accommodations. MINN. STAT. § 256 C.02 (2009). See also Elizabeth Doran, *Dog Goes to School; Marcellus Student Trains Labrador Retriever to be a Guide*, POST-STANDARD, (Syracuse, N.Y.), Dec. 29, 2008, at A1 (discussing a high school student who was training a service dog and the process by which she was granted

school district in New Mexico has an in-school program in which students can participate in training assistance dogs.³³⁹ Students in that program, who are also “puppy raisers” for the organization, may bring the service dogs in training to school with them—although, because of the structure of that program, the students would not be accompanied by the dog on a daily basis.³⁴⁰ Clearly the support for trainers of service animals varies significantly depending on the individual school district.³⁴¹

Several states have specifically provided that service animals in training should be accommodated in the same manner as service animals being used by a person with a disability. States sometimes have a separate statutory section that provides for trainers to have the same rights and privileges with respect to access as persons with disabilities.³⁴² The ability to have public access with a service dog in training may be conditional on the handler’s status (such as being from an accredited school for training service animals) and identification of

permission from her principal and teachers to bring the service dog in training to school with her). According to one program, generally teenagers who volunteer to train guide dogs don’t usually bring the dogs to school. *Id.* (quoting Joy Hawksby, regional manager for the Guiding Eyes for the Blind Program).

³³⁹ Beedle Telephone Interview, *supra* note 14 (discussing the in school program for the organization where dogs are brought to the school for training by the students). See also Assistance Dogs of the West, *In School Program*, <http://www.assistedogsofthewest.org/education-programs/school-programs> (last visited Mar. 7, 2011).

³⁴⁰ Beedle Telephone Interview, *supra* note 14 (discussing the structure of the training program and the fact that “puppy raisers” for that organization only have the dogs from Friday through Sunday, thus any students who are also puppy raisers would not have the dogs with them on a daily basis). Note that New Mexico’s statutes provide that a qualified assistance animal shall be admitted to public accommodations provided that the animal is under the control of the owner or trainer for the animal. N.M. STAT. § 28-11-3 (2009).

³⁴¹ Karel Holloway, *These Students Aren’t Your Ordinary Teacher’s Pets. Dogs Training to Become Service Animals Help Ease Stress, Conflict at Schools*, DALLAS MORNING NEWS, Nov. 28, 2009, at 1B (discussing multiple service dogs in training at Garland schools, the fact that service dogs in training have been in the schools for more than a decade, and that the ability to bring a service dog in training to school is dependent on approval by the trainer’s supervisor); Russ Keen, *Dogs Fill Special Need: Aberdeen Trainer Teaches Canines to Interact with Autistic Children*, ABERDEEN AM. NEWS (S.D.), Feb. 7, 2007, at A1 (discussing a special education teacher who trains autistic service dogs bringing her dogs in training to school on an occasional basis).

³⁴² See, e.g., N.J. STAT. ANN. § 10:5-29.3 (2010) (providing that the trainer must be “engaged in the actual training process and activities of service dogs” and has “the same responsibilities as are applicable to a person with a disability”).

the dog as being from an accredited school.³⁴³ Another way states have provided for access is by including service animals in training in the definition of service animal.³⁴⁴

Although there are certainly cases where a school district does not object to having a service dog in training on school grounds, just as with students with disabilities, trainers of service animals may encounter resistance from school authorities. A well-known case illustrating this issue is the Nevada case of *Clark County School District v. Buchanan*.³⁴⁵ Anne Buchanan (Buchanan) was an elementary school music instructor who was also a volunteer helping-dog trainer for Canine Companions for Independence.³⁴⁶ During the 1994–95 school year, Buchanan asked the Clark County School District (“CCSD”) for permission to bring her service dog in training, a twenty-five to thirty-five pound golden retriever named Maria, to her classroom every day.³⁴⁷ Maria would lie down or sleep under Buchanan’s desk.³⁴⁸ CCSD articulated two reasons for denying Buchanan’s request.³⁴⁹ CCSD believed that Maria would be a distraction to the students.³⁵⁰ CCSD also believed that it would be “improper to force students who were afraid of dogs or allergic to dogs to attend music class in the presence of Maria.”³⁵¹

Buchanan filed suit and the district court granted her a preliminary injunction that allowed her to bring Maria to her classroom during working hours, subject to legitimate conditions that the school district required.³⁵² The district court cited to language in the Nevada code that

³⁴³ GA. CODE ANN. § 30-4-2(3) (2010).

³⁴⁴ See, e.g., UTAH CODE ANN. § 62A-5b-102(3)(b) (2010) (including in the definition of service animal “an animal in training to become an animal described [above]”); MO. ANN. STAT. § 209.200(2) (2010) (defining service dog as a dog “that is being or has been specially trained . . .”).

³⁴⁵ 924 P.2d 716 (Nev. 1996).

³⁴⁶ *Id.* at 718.

³⁴⁷ *Id.*

³⁴⁸ *Id.* As the case stated, in public environments “helping dogs” are “trained to refrain from contact with other humans, unless directed, and will typically lie down or sleep next to their master for extended periods of time.” *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.* Buchanan was the only music instructor at her elementary school and each student at the school was required to receive fifty minutes of music instruction weekly. *Id.*

³⁵² *Id.* at 718–19.

provided that it would be unlawful for a place of public accommodation to refuse admittance or service to a person training a service animal.³⁵³

The focus of the Nevada Supreme Court decision was on whether the elementary school would be considered a place of “public accommodation.” The Supreme Court cited to the provision of the Nevada statute defining public accommodation as “any nursery, private school, university or other place of education” and found that the elementary school would be considered a place of public accommodation.³⁵⁴ CCSD then argued that the statutory provisions that provided for admittance of helping-dog trainers should only apply to non-employees of the public accommodation.³⁵⁵ The Nevada’s Supreme Court opinion rejected this interpretation finding that the purpose of the statutory provision was to extend to the trainers of assistance dogs the same protection that persons with disabilities accompanied by service dogs enjoyed. The majority opinion acknowledged that the right of the trainer of the helping dog “must be balanced against an employer’s operational needs” and in cases “where legitimate health concerns are proven, the employer may properly place reasonable restrictions on an employee’s right to train a helping dog as are necessary to prevent health problems.”³⁵⁶ The Supreme Court then rejected CCSD’s argument that it was not in the public interest to allow the dog in the classroom and that found that the district court appropriately considered the potential hardships on the parties.³⁵⁷

A dissenting opinion in the case argued that the majority erroneously interpreted the Nevada statutory provision, agreeing with CCSD argument that the “service animal in training” provision would not apply to employees of the place of public accommodation.³⁵⁸ The

³⁵³ *Id.* at 719 (citing to NEV. REV. STAT. § 651.075(1)). The same language is in the current Nevada Revised Statutes. NEV. REV. STAT. § 651.075(1) (2010).

³⁵⁴ *Clark County Sch. Dist. v. Buchanan*, 924 P.2d 718, 719. (Nev. 1996).

³⁵⁵ *Id.*

³⁵⁶ *Id.* at 720.

³⁵⁷ *Id.* at 720–21. The Supreme Court considered the public interest in facilitating the training of service animals. *Id.* at 720. The Supreme Court found that existing CCSD policy allowing other animals as pets in the classroom would be comparable to the distraction of the service dog, citing to the successful incorporation of service dogs in training in another Nevada school district, and referenced the acknowledgment that CCSD made that if Buchanan was disabled, they would not prevent her from being accompanied by a service animal. *Id.* at 721.

³⁵⁸ *Id.* at 721–22 (referring to the dissenting opinion of Justice Steffen). Justice Springer also provided a dissenting opinion focusing on the language defining “public

dissent raised concerns about employees of public accommodations who were training service animals demanding that they be allowed to be accompanied by such animals in non-public areas where there would be health concerns, such as hospitals and food establishments.³⁵⁹ The dissent continued by questioning the majority opinion's basis for determining that it was in the public interest to allow Buchanan to train the service dog at school, and would have deferred to the judgment of the school district on whether it was desirable to have service dogs in training in the schools.³⁶⁰

Presumably in response to the concerns raised by the dissenting opinions in this case, the statutory provision was revised finding it unlawful for a place of public accommodation to:

Refuse to permit an employee of the place of public accommodation who is training a service animal to bring the service animal into:

- (1) The place of public accommodation; or
- (2) Any area within the place of public accommodation to which employees of the place of public accommodation have access, regardless of whether the area is open to the public.³⁶¹

Since the ADA does not cover service animal in training (or trainers of service animals that are not disabled), whether a person (student or staff) will be allowed to be accompanied by a service animal in training to school is dependent on state law.³⁶²

VII. CONCLUSION

Given the recent litigation in this area of the law, school districts should take the time to evaluate their policies relating to service animals. In states where there is specific legislation on the issue, school districts will find that arguments based on exhaustion of administrative

accommodation" and finding that Buchanan was not refused "service" or "admittance" as required by the statute. *Id.* at 724.

³⁵⁹ *Id.* at 722-23.

³⁶⁰ *Id.* at 723-24.

³⁶¹ NEV. REV. STAT. § 651.075-1(c) (2010).

³⁶² Huss, *supra* note 56, at 1211 (analyzing the ADA and the lack of language regarding service animals in training).

processes under the IDEA will likely no longer prevent a student from being accompanied by a service animal. Even in the absence of state legislation on the issue, given the activity of offices of civil rights, school districts with restrictive service animal policies may find themselves the subject of administrative actions.

There is no question that there are complicated issues that are raised if a student is accompanied by a service animal, but school districts should be prepared for increasing requests given the growing use of service animals by the pediatric population. It would be prudent for school districts adopt a policy based in large measure on the United States Department of Education, Office of Civil Rights case resolution dealing with the Bakersfield City School District.³⁶³ A school district may, and should, have a reasonable procedure in place that first determines whether the animal in question is a “true” service animal. Dogs that do not behave appropriately can, and should, be excluded from school environments—but short of a specific animal posing an undue burden or direct threat, a student with a service animal should be allowed in a school. Even if the determination is made that an animal does not meet the definition of a service animal, a school should consider whether the animal should accompany a student as an element of a free appropriate public education. Needless to say, the inclusion of service animals in educational environments will likely provide challenges for school districts. However, if such inclusion can assist a student with a disability to function more successfully, society as a whole benefits.

³⁶³ See *supra* notes 192–225 and accompanying text (discussing this case resolution in depth).

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