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# Canines in the Classroom Revisited: Recent Developments Relating to Students' Utilization of Service Animals at Primary and Secondary Educational Institutions

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**CANINES IN THE CLASSROOM REVISITED:  
RECENT DEVELOPMENTS RELATING TO  
STUDENTS' UTILIZATION OF SERVICE  
ANIMALS AT PRIMARY AND SECONDARY  
EDUCATIONAL INSTITUTIONS**

*Rebecca J. Huss\**

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## INTRODUCTION

The number of service animals utilized by persons with disabilities in the United States appears to be growing.<sup>1</sup> The role these animals play in the lives of their human partners can go beyond their utility to assist with a disability and it is a relationship that people will fight to protect.<sup>2</sup> This Article considers the use of service animals by juveniles in a specific environment—primary and secondary educational institutions.

In April 2010, the author presented an article on this topic at the Mid-Atlantic Regional Animal Law Symposium.<sup>3</sup> Since that time there have been important legislative and case law developments in this field.<sup>4</sup> This Article focuses on those recent developments.<sup>5</sup>

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<sup>1</sup> Beth Teitell, *Service Dogs Barred, Doubted and Deeply Treasured*, BOS. GLOBE (Sept. 18, 2013), <https://www.bostonglobe.com/lifestyle/2013/09/18/the-growing-number-dogs-assisting-people-with-invisible-conditions-causing-conflict-and-some-cases-confrontation/igPnUBYHa97K07ccBGJJVJ/story.html> (discussing growing number of persons with non-apparent disabilities using service animals).

<sup>2</sup> See *id.* (reporting on confrontations some persons using service animals have had in connection with utilizing their animals in public).

<sup>3</sup> Rebecca J. Huss, *Canines in the Classroom: Service Animals in Primary and Secondary Educational Institutions*, 4 J. ANIMAL L. & ETHICS 11, 11 n.1 (2011) [hereinafter Huss, *Classroom*]. Around the time of the publication of that article there was a “flurry” of other articles relating to the subject; however, the topic has been covered less frequently in academic journals in recent years. See Jennifer Berry & Antonis Katsiyannis, *Service Animals for Students with Disabilities Under IDEA and Section 504 of the Rehabilitation Act of 1973*, 47 INTERVENTION SCH. & CLINIC 312, 312 (2012); Susan G. Clark, *The Use of Service Animals in Public Schools: Legal and Policy Implications*, 254 EDUC. L. REP. 1,1 (2010); Scott B. Mac Lagan, *Right of Access: How One Disability Law Disabled Another*, 26 TOURO L. REV. 735, 735 (2010-2011); Danny Schoenbaechler, *Autism, Schools, and Service Animals: What Must and Should be Done*, 39 J.L. & EDUC. 455, 456 (2010); Joshua T. Walthall, *The Dog Days in American Public Schools: Observations and Suggestions Regarding the Laws, Challenges and Amazing Benefits of Allowing Service Animals to Accompany Children with Special Needs to School*, 35 CAMPBELL L. REV. 149, 151 (2012); Tara A. Waterlander, *Canines in the Classroom: When Schools Must Allow a Service Dog to Accompany a Child with Autism into the Classroom Under Federal and State Laws*, 22 GEO. MASON U. C.R. L.J. 337, 337, 339 (2012); Sarah Allison L. Wieselthier, *Grooming Dogs for the Educational Setting: The “IDEIA” Behind Service Dogs in the Public Schools*, 39 HOFSTRA L. REV. 757, 757–58 (2011); Perry A. Zierkel, *Service Animals in Public Schools*, 257 EDUC. L. REP. 525, 525 (2010).

<sup>4</sup> See *infra* notes 31–229 and accompanying text (discussing developments since the author’s previous article analyzing this issue).

<sup>5</sup> Readers interested in this area of the law are encouraged to read the author’s previous work on the issue. See Huss, *Classroom*, *supra* note 3, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1586029](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1586029) and at [http://works.bepress.com/rebecca\\_j\\_huss/8/](http://works.bepress.com/rebecca_j_huss/8/). The previous article includes

Because of the limited scope of this Article, it will not cover ethical concerns regarding the use of service animals. However, the author has written about that issue in the past and encourages those involved in these relationships to always consider the needs of the animal in the partnership, as well as needs of the human.<sup>6</sup>

After setting forth a basic overview of the issue, the Article analyzes the amendments to the regulations of the Americans with Disabilities Act (“ADA”) relating to service animals that became effective in March 2011.<sup>7</sup> The Article then considers recent case law and other indications of how agencies of the federal government interpret the issue.<sup>8</sup> The Article continues by examining state laws enacted to allow for a right for students with disabilities to be accompanied by service animals in schools.<sup>9</sup> The Article concludes by providing guidance for student advocates and school administrators dealing with this issue.<sup>10</sup>

There is no way to know how many service animals have been partnered with juveniles in the United States; however, the number appears to be increasing.<sup>11</sup> Although it will not provide a definitive answer, the United States Department of Education

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background on students utilizing service animals, and the issue of allergies in addition to analysis of older cases and state laws in existence at the time of the writing of that article. *Id.* at 11.

<sup>6</sup> See, e.g., Rebecca J. Huss, *Why Context Matters: Defining Service Animals Under Federal Law*, 37 PEPP. L. REV. 1163, 1170–74 (2010) [hereinafter Huss, *Context*] (discussing ethical issues regarding the use of service animals); Huss, *Classroom*, *supra* note 3, at 18–19 (discussing ethical issues relating to the use of service animals by juveniles); see also Temple Grandin et al., *The Roles of Animals for Individuals with Autism Spectrum Disorder*, in HANDBOOK ON ANIMAL-ASSISTED THERAPY, FOUNDATIONS AND GUIDELINES FOR ANIMAL-ASSISTED INTERVENTIONS 225, 231–35 (Aubrey H. Fine ed., 2015) (discussing selection of service animal and animal welfare issues); Phillip Tedeschi et al., *On Call 24/7—The Emerging Roles of Service and Support Animals*, in HANDBOOK ON ANIMAL-ASSISTED THERAPY, FOUNDATIONS AND GUIDELINES FOR ANIMAL-ASSISTED INTERVENTIONS 321, 328–31 (Aubrey H. Fine ed., 2015) (discussing selection, training, and animal welfare considerations).

<sup>7</sup> See *infra* notes 25–30 and accompanying text.

<sup>8</sup> See *infra* notes 31–254 and accompanying text.

<sup>9</sup> See *infra* notes 256–300 and accompanying text.

<sup>10</sup> See *infra* notes 301–07 and accompanying text.

<sup>11</sup> Huss, *Classroom*, *supra* note 3, at 12–15 (discussing students’ utilization of service animals); see also Christine T. Cossler, *Dog and Pony Show: New Guidance for Service Animals in the School Setting*, 77 SCH. BUS. AFF. 23, 23 (2011) (stating that “schools may see a significant increase in the number of service animals or service animal requests”); Ed Finkel, *Who Let the Dogs In?: Non-Visually Impaired Kids are Bringing Their Aide Dogs to Class*, A.B.A. J., Apr. 2010, at 20 (quoting supervising attorney with the Ohio Legal Rights Service, Kristin Hildebrant, that “[t]here has been sort of an upsurge in those cases . . . [p]eople are getting service dogs at younger ages”).

“DOE”) has announced that it will be including questions in an upcoming survey of special education teachers to report on whether students with disabilities are using service animals.<sup>12</sup> If future surveys include similar questions, it will be possible to better estimate the percentage of students utilizing service animals in schools.<sup>13</sup>

In the context of the use of service animals in primary and secondary educational institutions, two federal laws intersect in a manner that can cause conflicts.<sup>14</sup> The comprehensive federal civil rights law prohibiting discrimination on the basis of disability (regardless of age) is the ADA.<sup>15</sup> Public entities and places of accommodation must grant access and make reasonable accommodations for individuals with disabilities under Title II and Title III respectively.<sup>16</sup> As discussed *infra*, a reasonable accommodation may consist of allowing a service animal in a setting that generally bars animals.<sup>17</sup>

The Individuals with Disabilities Education Act (“IDEA”) is another federal law that applies to students with disabilities.<sup>18</sup>

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<sup>12</sup> Dept’ of Educ., *Appendix E: Fourth-Grade Special Education Teacher Questionnaires*, REGULATIONS.GOV (Sept. 25, 2014), <http://www.regulations.gov/#!documentDetail;D=ED-2014-ICCD-0103-0010>.

This is a survey that is part of the Department of Education’s Early Childhood Longitudinal Study, Kindergarten Class of 2010–11. *Id.* The question regarding the use of service animals is included in Appendix E Fourth-Grade Special Education Teacher Questionnaire. *Id.* It is important to note that, in theory, a student utilizing a service animal may not be receiving special education services.

<sup>13</sup> See Huss, *Classroom*, *supra* note 3 and accompanying text. There is currently no census or official national registration of service animals so estimates vary widely regarding the number of service and assistance animals partnered with persons with disabilities in the U.S. Huss, *Context*, *supra* note 6, at 1166–67 (discussing the estimates of the number of service animals in the U.S.).

<sup>14</sup> See generally LAURA ROTHSTEIN & JULIA IRZYK, *DISABILITIES AND THE LAW* §§ 2:1–2:5 (4th ed. 2009). Along with many other topics, a general discussion of the federal laws impacting special education is beyond the scope of this Article. *Id.*

<sup>15</sup> See generally 42 U.S.C. § 12101, *et seq.* (2012) (as amended by the ADA Amendments of 2008, Pub. L. 110-325 (S. 3406) (Sept. 25, 2008)).

<sup>16</sup> See generally Title II, 42 U.S.C. §§ 12131–12165 (2012) and Title III, 42 U.S.C. §§ 12181–12189 (2012). Section 504 of the Rehabilitation Act provides “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability . . . be denied the benefits of . . . any program or activity receiving Federal financial assistance . . . .” 29 U.S.C. § 794(a) (2006). If applicable, Section 504 is utilized along with the ADA in service animal cases.

<sup>17</sup> See *infra* notes 25–30 and accompanying text (discussing the ADA regulations).

<sup>18</sup> See generally 20 U.S.C. §§ 1400–1482 (2006). The IDEA was amended in 2004 by the Individuals with Disabilities Educational Improvement Act, Pub. L. No. 188-446, 118 Stat. 2647. See ROTHSTEIN & IRZYK, *supra* note 14, at §§ 2:3–2:5 (providing a brief history of the IDEA).

Under the IDEA, states are required to have policies that provide “[a] free appropriate public education” (“FAPE”) to all children with disabilities.<sup>19</sup> An individualized educational program (“IEP”) is established for every student with a disability.<sup>20</sup> The IDEA requires extensive administrative procedures that must be exhausted prior to a parent filing a lawsuit based on an argument that a school district has not provided a FAPE or otherwise has violated the IDEA.<sup>21</sup>

A third federal law—the Rehabilitation Act—specifically Section 504 of that statute (“Section 504” or the “Rehabilitation Act”)<sup>22</sup> applies to state and local educational programs and provides that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability . . . be denied the benefits of . . . any program or activity receiving Federal financial assistance.”<sup>23</sup> Because Section 504 is often referenced secondarily to the ADA and IDEA, it will not be discussed separately in this Article.<sup>24</sup>

## I. AMERICANS WITH DISABILITIES ACT REGULATIONS

New regulations governing the ADA, including a definition of service animal, became effective in March 2011.<sup>25</sup> Prior to that time, the regulations under Title II of the ADA (applicable to state and local entities) did not include specific language relating to

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<sup>19</sup> 20 U.S.C. § 1412(a)(4) (2012). Free appropriate public education is defined as: “special education and related services that . . . (B) meet the standards of the State educational agency; (C) include an appropriate . . . education in the State involved; and (D) are provided in conformity with the individualized education program . . . .” 20 U.S.C. § 1401(9) (2012).

<sup>20</sup> 20 U.S.C. § 1414(d)(1)(A)(i) (2012).

<sup>21</sup> See *infra* notes 33–164 and accompanying text (discussing the cases where the exhaustion of administrative procedures requirement was argued).

<sup>22</sup> 29 U.S.C. § 794 (2012).

<sup>23</sup> Local school districts are subject to the mandates of Section 504 because entities that receive funds indirectly are covered under the Rehabilitation Act. ROTHSTEIN & IRZYK, *supra* note 14, at § 2:2 (discussing the applicability of Section 504). All states receive federal funding for public educational programming. *Id.*

<sup>24</sup> *Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools*, U.S. DEP’T. OF JUSTICE, CIVIL RIGHTS DIV., at 4–5, (Nov. 2014), <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/doe-doj-eff-comm-faqs.pdf>.

<sup>25</sup> See 28 C.F.R. § 35.104 (2011) (effective March 2011, includes definition of “service animal”); see also 28 C.F.R. § 35.104 (2010) (2010 version of the regulation, without a definition of “service animal”); Huss, *Context*, *supra* note 6, at 1174–79 (discussing the proposed ADA regulations).

service animals, although Department of Justice (“DOJ”) policy statements asserted that state and local entities would have the legal obligation to allow for a service animal if it would be a reasonable modification in the entity’s policies, practices, or procedures.<sup>26</sup> Under the new regulations “service animal” is defined as: “any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.”<sup>27</sup> The regulations also require entities to make reasonable accommodations to permit the use of a miniature horse as a service animal using several assessment factors.<sup>28</sup>

Entities are not allowed to “ask about the nature or extent of a person’s disability” but are permitted to “ask if the animal is required because of a disability and what work or task the animal has been trained to perform.”<sup>29</sup> The regulations prohibit entities

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<sup>26</sup> Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56,164, 56,191 (Sept. 15, 2010) (to be codified at 28 C.F.R. pt. 35).

<sup>27</sup> 28 C.F.R. § 35.104 (2014). The remainder of the definition is as follows:

Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the . . . [handler’s] disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal’s presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.

*Id.*

This language is mirrored in regulations applicable to Title III of the ADA. 28 C.F.R. § 36.104 (2014).

<sup>28</sup> 28 C.F.R. § 35.136(i) (2014); 28 C.F.R. § 36.302(c)(9) (2014). There have been no reported cases involving access for a miniature horse acting as a service animal for a student in primary or secondary school. However, according to media reports, a pre-school student has utilized a service horse at one school. See The Associated Press, *Miniature horse is a service animal for an Alaskan 4-year-old*, *Oregonlive*, THE OREGONIAN (Mar. 22, 2013, 11:32 AM), [http://www.oregonlive.com/pacific-northwest-news/index.ssf/2013/03/post\\_116.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2013/03/post_116.html).

<sup>29</sup> 28 C.F.R. § 35.136(f) (2014); 28 C.F.R. § 36.302(c)(6) (2014).



from requiring “documentation, such as proof that the animal has been certified, trained, or licensed as a service animal.”<sup>30</sup>

## II. CASE LAW AND FEDERAL AGENCY ACTIONS—COMMONALITY OF ISSUES

In situations where there is not a specific state law allowing for access of a service animal in a school, common themes often arise in the disputes. This Part of the Article will focus on recent cases that have conflicting analyses regarding the intersection of the IDEA and ADA.<sup>31</sup> As discussed below, even if the IDEA’s exhaustion of administrative remedies requirement is not applied to enable a school district to exclude a service animal from school property, there still may be issues regarding allowing a student to be accompanied by a service animal under the ADA.<sup>32</sup>

### A. *Fry v. Napoleon Community Schools*<sup>33</sup>

In June 2015, the Sixth Circuit affirmed a district court decision dismissing a case based on the fact that a student utilizing a service animal failed to exhaust the IDEA’s administrative remedies.<sup>34</sup> This is a key case in this field because it is the first appellate decision on the issue since the revised ADA regulations became effective in 2011, and the result is contrary to other recent cases and arguably federal agencies’ interpretation of the issue of when a student must be allowed to be accompanied by his or her service animal in school.<sup>35</sup>

In the *Fry* case, Ehlena Fry,<sup>36</sup> who has cerebral palsy, began

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<sup>30</sup> 28 C.F.R. § 35.136(f) (2014); 28 C.F.R. § 36.302(c)(6) (2014).

<sup>31</sup> Two contrasting cases will be discussed in more detail with less coverage for other recent cases. See *infra* notes 33–178 (discussing the *Fry* and *Alboniga* cases in more detail).

<sup>32</sup> See *infra* notes 91–106, 165–78 (discussing cases where exhaustion of administrative remedies was not an issue but other issues under the ADA were analyzed).

<sup>33</sup> *Fry v. Napoleon Cmty. Sch.*, 788 F.3d 622 (6th Cir. 2015).

<sup>34</sup> *Id.* at 623, 631.

<sup>35</sup> See *infra* notes 85–89, 135–50, 156–64, 203, 209, 232, 238 (discussing cases where exhaustion of remedies was not a barrier and administrative decisions that applied the ADA rather than deferring to the IDEA process). The plaintiffs in the *Fry* case petition for an *en banc* rehearing of the case was denied in August 2015. *Fry v. Napoleon Cmty. Sch.*, No. 14-1137, 2015 BL 254405 (6th Cir. Aug. 5, 2015). The plaintiffs in the *Fry* case filed a petition for writ of certiorari to the U.S. Supreme Court in October 2015. *Fry v. Napoleon Cmty. Sch.* No 15-497.

<sup>36</sup> The court documents generally refer to the student by the designation E.F., but media accounts identify her as Ehlena Fry. Leanne Smith, *Lawsuit Claims*

training with a service dog (Wonder) in 2008.<sup>37</sup> In October 2009, her elementary school refused permission for Ehlena to be accompanied by Wonder and this decision was confirmed in January 2010.<sup>38</sup> In April 2010, the school allowed a trial period where Wonder accompanied Ehlena for the remainder of the school year.<sup>39</sup> At the end of the school year the school informed the Frys that Ehlena would not be allowed to attend school the next year with Wonder.<sup>40</sup>

The Frys subsequently home schooled Ehlena and filed a complaint with the federal Department of Education's Office for Civil Rights ("DOE OCR") based on violation of the ADA.<sup>41</sup> In May 2012, the DOE OCR "found that the school's refusal to permit Wonder to attend [school with Ehlena] was a violation of the ADA."<sup>42</sup> The school did not accept the conclusions of the DOE OCR but agreed to permit Ehlena to attend school with Wonder in the Fall of 2012.<sup>43</sup> In the letter associated with the Resolution Agreement entered into by the school district, the DOE OCR focused on Section 504 of the Rehabilitation Act and Title II of the ADA stating:

As a general rule, a school district's responsibilities to students with disabilities in the elementary and secondary setting may be satisfied through adherence to Section 504 FAPE procedures. However, there are situations in which a student with a disability may allege disability discrimination that is properly analyzed as a question of alleged different treatment program exclusion, or failure to provide equal opportunity on the basis of disability under the Section 504 implementing regulation . . . and the Title II implementing regulation . . . and/or as a denial of a reasonable modification under

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*Napoleon Community Schools, Jackson County Intermediate School District Discriminated Against Child and Her Service Dog*, MLIVE (Dec. 18, 2012, 2:15 PM),

[http://www.mlive.com/news/jackson/index.ssf/2012/12/lawsuit\\_claims\\_napoleon\\_commun.html](http://www.mlive.com/news/jackson/index.ssf/2012/12/lawsuit_claims_napoleon_commun.html).

There is no disrespect intended by identifying the students by name in this Article if he or she has already been identified in the media. It is done merely to simplify the description of the facts of the cases.

<sup>37</sup> *Fry*, 788 F.3d at 624.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* The complaint was based under the ADA and Section 504 of the Rehabilitation Act. *Fry*, 788 F.3d at 624.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

the Title II implementing regulation . . . .<sup>44</sup>

In the letter associated with the Resolution Agreement, the DOE OCR established that Ehlena had a disability, Wonder met the definition of service animal, and the school district had sufficient information to make that determination.<sup>45</sup> Thus, the school district should have modified its procedures to permit the service animal to accompany Ehlena rather than placing restrictions on the dog's use, "in effect preventing the service animal from serving [Ehlena]."<sup>46</sup>

The Frys enrolled Ehlena in school in another district and filed suit in December 2012, based on the school's refusal to accommodate between the Fall of 2009 and Spring 2012, seeking relief under Title II of the ADA and Section 504 of the Rehabilitation Act.<sup>47</sup>

The district court granted the school district's motion to dismiss finding that:

although the Frys did not specifically allege any flaw in [Ehlena's] IEP, if she were permitted to attend school with Wonder, that document would almost certainly have to be modified in order to articulate the policies and practices that would apply to the dog . . . [t]herefore, the Frys' request for permission for [Ehlena] to attend school with Wonder 'would be best dealt with through the administrative process,' and exhaustion [of the IDEA administrative remedies] was required.<sup>48</sup>

The Sixth Circuit reviewed the basis and justification for the IDEA's exhaustion requirement.<sup>49</sup> The *Fry* court referenced the language in the IDEA that precludes the possibility that a party can evade the IDEA's procedures "by bringing suit contesting educational accommodations under other causes of action."<sup>50</sup>

The Sixth Circuit stated that the IDEA exhaustion requirement

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<sup>44</sup> Letter Associated with Resolution Agreement between the Department of Education, Office for Civil Rights and Jackson County (MI) Intermediate School District, dated May 3, 2012, 59 IDELR 172 (2012) (begins on p. 982, at 986, 986–987) [hereinafter Jackson County Letter].

<sup>45</sup> *Id.* at 986–87.

<sup>46</sup> *Id.* at 987.

<sup>47</sup> *Fry*, 788 F.3d at 624. The district court declined supplemental jurisdiction over state law claims based on the Michigan Persons with Disabilities Civil Rights Act. *Id.*

<sup>48</sup> *Id.* at 624–25 (citing E.F. *ex rel.* Fry v. Napoleon Cmty. Schs., 2014 WL 106624, at \*5 (E.D. Mich. 2014)).

<sup>49</sup> *Id.* at 625. "The IDEA's exhaustion requirement ensures that complex factual disputes over the education of disabled children are resolved, or at least analyzed, through specialized local administrative procedures." *Id.*

<sup>50</sup> *Id.* at 626.

applied in this case because it found the suit “turns on the same questions that would have determined the outcome of IDEA procedures,” essentially saying that the Frys alleged that the school’s decision regarding the service animal denied Ehlena a FAPE.<sup>51</sup> The *Fry* court found that “the Frys’ claim [was] not that the school failed to accommodate [Ehlena]’s disability at all, but that the accommodation provided was not sufficient.”<sup>52</sup> The Sixth Circuit considered the primary claims that not allowing Wonder at the school inhibited the development of the bond between Wonder and Ehlena and “perhaps, hurting her confidence and social experience at school” fell under the scope of factors that the IDEA procedures consider.<sup>53</sup> The *Fry* court cited to the only other appellate decision on this issue decided by the Second Circuit in 2008, that stated a “request for a service dog to be permitted to escort a disabled student at school as an ‘independent life tool’ is hence not entirely beyond the bounds of the IDEA’s educational scheme.”<sup>54</sup>

The *Fry* court also found that the allegations that allowing Wonder at the school would have provided specific psychological and social assistance at school were also “crucially linked” to Ehlena’s education.<sup>55</sup> The Sixth Circuit pointed to the role the IDEA procedures have in creating a record that would assist in any dispute based on ADA claims.<sup>56</sup> Although the Frys sought money damages, which are not available under the IDEA, this would not be sufficient to excuse the exhaustion requirement.<sup>57</sup> In addition, although there is a “futility” exception to the exhaustion requirement, the court did not find it applicable.<sup>58</sup> In rejecting arguments made by the Frys that relied upon the analysis of a 1990 case,<sup>59</sup> which did not require the exhaustion of remedies, the court stated utilizing that case’s logic “would allow any ADA or

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<sup>51</sup> *Fry*, 788 F.3d at 627.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 628.

<sup>54</sup> *Id.* (citing *Cave v. E. Meadow Union Free Sch. Dist.*, 514 F.3d 240, 248 (2d Cir. 2008)). The *Cave* case is fully discussed in the author’s previous article on this topic. Huss, *Classroom*, *supra* note 3, at 28–35.

<sup>55</sup> *Fry*, 788 F.3d at 629.

<sup>56</sup> *Id.* at 629–30.

<sup>57</sup> *Id.* at 630.

<sup>58</sup> *Id.*; see also notes 151–54 and accompanying text (discussing another case where the futility exception was discussed and rejected).

<sup>59</sup> The case of *Sullivan v. Vallejo City Unified Sch. Dist.*, 731 F. Supp. 947 (E.D. Cal. 1990) is fully discussed in the author’s previous article on this topic. Huss, *Classroom*, *supra* note 3, at 24–27.

Rehabilitation Act lawsuit to avoid the IDEA exhaustion requirement by not explicitly alleging a denial of a FAPE.”<sup>60</sup> The Sixth Circuit court rejected the approach that views a claim based on the Rehabilitation Act (or presumably the ADA) as asking questions distinct from those considered by the procedures of the IDEA.<sup>61</sup> Instead, the Sixth Circuit found that having the service dog at school is “reasonably related” to Ehlena’s disability only because the service dog “enhances [Ehlena]’s educational opportunities.”<sup>62</sup>

Unlike the Second Circuit case decided prior to the effective date of the ADA revised regulations that the *Fry* majority court relies upon in its analysis, in the *Fry* case there was a dissenting opinion that found that the district court’s dismissal was inappropriately premature and would have allowed, at a minimum, for the case to be remanded to the district court to permit the Frys to attempt to show that the IDEA’s exhaustion requirement was inapplicable or it would have been futile or inadequate.<sup>63</sup>

The dissenting opinion distinguished between the ADA or Rehabilitation Act and the IDEA stating that:

The ADA and the Rehabilitation Act guard Ehlena’s civil rights, ensuring that she, like her fellow citizens, has equal access to public facilities and publicly-funded programs. By contrast, the IDEA guarantees that her education will be appropriate for her individual situation. . . . In short, the ADA’s focus is on ensuring *access*; the IDEA’s focus is on providing *individualized* education.<sup>64</sup>

The dissent also articulated that the majority opinion did not establish a useful test, only providing a “loose standard” and the district court’s test was “impossibly broad.”<sup>65</sup> The dissent also pointed to the language of the IDEA that states, “[n]othing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities . . . .”<sup>66</sup>

The dissent cited to a Ninth Circuit case holding “[n]on-IDEA claims that do not seek relief available under the IDEA are not

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<sup>60</sup> *Fry*, 788 F.3d at 630–31.

<sup>61</sup> *Id.* at 631.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 638.

<sup>64</sup> *Id.* at 633 (emphasis in original).

<sup>65</sup> *Fry*, 788 F.3d at 633–34.

<sup>66</sup> *Id.* at 635 (citing to the IDEA, 20 U.S.C. § 1415(I)).

subject to the exhaustion requirement, *even if they allege injuries that could conceivably have been redressed by the IDEA*.<sup>67</sup> The dissent stated that the same Ninth Circuit opinion identified the Sixth Circuit as one of the “courts [that] have not articulated a comprehensive standard for determining when exactly the exhaustion requirement applies.”<sup>68</sup> If the Ninth Circuit’s approach to this issue was utilized, the dissent argued that the issue would be whether the “request for the service dog under the circumstances of this case [would be] ‘the functional equivalent of an IDEA remedy.’”<sup>69</sup>

The dissent distinguished between technical educational matters that would fall within the IDEA and the experts qualified to make decisions regarding issues such as whether a child should be “confined to a wheelchair or encouraged to use a walker *assisted in balance and navigation by a service dog*.”<sup>70</sup> The dissent then reviewed the results of the complaint to the DOE OCR that articulated the various tasks Wonder performs with Ehlena.<sup>71</sup> The dissent pointed out, given that the school district refused to accept the findings of the DOE OCR report, “[i]t is difficult to fathom what could have been gained by requiring the Frys to undergo additional ‘exhaustion’ before filing suit.”<sup>72</sup>

As discussed below, recent decisions in other circuits’ district courts have been mixed in determining whether it is necessary to exhaust administrative remedies prior to bringing a suit based on violation of the ADA.<sup>73</sup> This illustrates the real challenge for student advocates and school districts in determining the standard that will be applied in these cases.<sup>74</sup>

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<sup>67</sup> *Id.* at 635 (emphasis added) (citing *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 871 (9th Cir. 2011) (en banc), *overruled on other grounds* by *Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014)).

<sup>68</sup> *Fry*, 788 F.3d 622 at 635 (citing *Payne*, 653 F.3d at 874).

<sup>69</sup> *Id.* at 635–36.

<sup>70</sup> *Id.* (emphasis in original). Presumably the emphasis was due to the fact that this was the type of task Wonder performs with Ehlena.

<sup>71</sup> *Id.* at 637. The dissent pointed out that the existing school district policy allowed for a guide dog but not a service dog—described as a “stupefying fact.” *Id.*

<sup>72</sup> *Fry*, 788 F.3d at 637. The dissent also articulated that this is a possible rationale for arguing that exhaustion would be futile. *Id.* at 637–38.

<sup>73</sup> See *infra* notes 75–164 and accompanying cases.

<sup>74</sup> See *infra* notes 85–87, 142–44, 147–49 and accompanying cases (discussing cases where the exhaustion of remedies argument failed).

*B. Alboniga v. School Board of Broward County Florida*<sup>75</sup>

The February 2015, *Alboniga* case in Florida is another recent example of how courts may interpret the request for a juvenile to be accompanied by a service animal in school.<sup>76</sup> In addition to the “usual” analysis relating to the intersection of the ADA and IDEA, this case provides the opportunity to consider other issues relating to the ADA’s service animal regulations.<sup>77</sup>

Anthony Merchante<sup>78</sup> was a six-year-old child with multiple disabilities including cerebral palsy and a seizure disorder.<sup>79</sup> Anthony’s mother (Alboniga) determined that Anthony required a seizure alert and response dog.<sup>80</sup> Stevie, the service dog that was obtained, was trained to do multiple tasks relating to Anthony’s seizures including alerting others if Anthony was undergoing a medical crisis.<sup>81</sup> Alboniga filed declarations, not controverted by the School Board of Broward County (“School Board”), that Anthony and Stevie formed a “service dog team” and separation of the team could result in detrimental effects to the team.<sup>82</sup> The School Board’s response to Alboniga’s petition that Stevie be allowed to accompany Anthony to the school was to request additional vaccinations and liability insurance in addition to requiring Alboniga provide an adult handler for Stevie.<sup>83</sup> Initially issues of jurisdiction were considered by the court.<sup>84</sup>

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<sup>75</sup> *Alboniga v. Sch. Bd. of Broward Cnty. Fla.*, 87 F. Supp. 3d 1319 (S.D. Fla. 2015).

<sup>76</sup> *See id.* at 1331–32.

<sup>77</sup> *See infra* notes 107–31 (discussing validity of service animal regulations and the issue of breed-discriminatory legislation).

<sup>78</sup> Anthony Merchante was identified as A.M. in court documents, however, his full name was disclosed in media reports about the case. Carol Marbin, *In Fight Over Boy’s Service Dog, Broward School Board is Brought to Heel*, MIAMI HERALD (Feb. 2, 2015), <http://www.miamiherald.com/news/local/community/broward/article10782953.html>.

<sup>79</sup> *Alboniga*, 87 F. Supp. 3d at 1323.

<sup>80</sup> *Id.* at 1323–24.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 1324–25. Anthony’s mother acted as handler for Stevie from August 2013 to November 2013 and after that time the School Board provided a handler for Stevie. *Id.* Stevie’s handler also acts as school custodian. *Alboniga*, 87 F. Supp. 3d at 1325.

<sup>84</sup> *Id.* at 1327.

1. Jurisdiction: Failure to Exhaust Administrative Remedies and Mootness Claims

Like other cases in this area of law, the School Board argued that because *Alboniga* failed to exhaust the administrative remedies under the IDEA, the court lacked subject matter jurisdiction in the case.<sup>85</sup> The *Alboniga* court cited to case law supportive of the argument that the claims in this case were not related to the child's educational experience (either that the child was being denied a FAPE or the IEP was deficient).<sup>86</sup> Because the district court found that the IDEA's administrative scheme was not implicated by the claims, it was not necessary to exhaust those procedures prior to bringing this cause of action.<sup>87</sup>

The School Board also argued that the case was moot because Anthony was allowed to attend school with Stevie.<sup>88</sup> However, because the decision to allow Stevie in the school was an administrative decision that was actually in conflict with the School Board's own policies, the *Alboniga* court rejected the mootness argument.<sup>89</sup> The *Alboniga* court then analyzed issues arising under the ADA regulations.<sup>90</sup>

2. Failure to Accommodate and Reasonableness of the Requested Accommodation

The *Alboniga* court reiterated that the failure to accommodate claim was an independent basis for establishing discrimination under the ADA and focused on whether the accommodation was reasonable.<sup>91</sup> The *Alboniga* court held that the School Board's requirement for liability insurance and additional vaccinations for Stevie in excess of the requirements under state law were a surcharge prohibited by the ADA regulations.<sup>92</sup> The court stated

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 1329.

<sup>87</sup> *Id.* at 1329–30.

<sup>88</sup> *Id.* at 1330.

<sup>89</sup> *Alboniga*, 87 F. Supp. 3d at 1331. The School Board's policy provided that "[i]n the case of a young child or a student with a disability who is unable to care for and supervise his/her service animal, a handler provided by the parent is responsible for providing care and supervision of the animal." *Id.* The conflict was that after November 2013, the school provided a handler for Stevie. *Id.* at 1325.

<sup>90</sup> *See id.* at 1332, 1333.

<sup>91</sup> *Id.* at 1337.

<sup>92</sup> *Id.* at 1339 (citing to 28 C.F.R. § 35.136(h) (2011)).



the analysis to determine whether an accommodation is reasonable “must focus . . . on whether the requested accommodation is reasonable under the specific circumstances particular to the individual in question[ ]”<sup>93</sup> and that the separation of Anthony from Stevie during the school day would diminish Stevie’s effectiveness outside of the school setting.<sup>94</sup>

The *Alboniga* court then turned to the specific regulatory provision that “[a] service animal shall be under the control of its handler.”<sup>95</sup> The School Board argued that it would not be a reasonable accommodation to require it to act as a handler for and control Stevie and thus *Alboniga* must act as or provide a handler.<sup>96</sup> The court recognized there was little case law interpreting what constituted being a handler with control over a service animal.<sup>97</sup> The *Alboniga* court considered the language in the regulations requiring a service animal be leashed, tethered, or otherwise under the handler’s control such as through voice commands or signals.<sup>98</sup> Using this analysis, the court found that “normally, tethering a service animal to the wheelchair of a disabled person constitutes ‘control’ over the animal by the disabled person, acting as the animal’s ‘handler.’”<sup>99</sup> With the exception of when Stevie needs to urinate (and Stevie physically indicates when he needs to do so), Stevie is tethered to Anthony’s wheelchair and the district court found this would constitute Anthony acting as Stevie’s handler.<sup>100</sup>

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<sup>93</sup> *Alboniga*, 87 F. Supp. 3d at 1341.

<sup>94</sup> *Id.* The *Alboniga* court cited to a statement in the Congressional Record for the legislative history of the ADA: “[a] person with a disability and his . . . [service] animal function as a unit[ such that] . . . separating the two generally [is] discriminatory under the [ADA].” *Id.* at 1335.

<sup>95</sup> *Id.* at 1341 (citing to 28 C.F.R. § 35.136(d) (2011)).

<sup>96</sup> *Id.* at 1342.

<sup>97</sup> *Id.* The court cited to a case that implies that the “opposite of a service animal being under ‘control’ of a ‘handler’ is [the animal] being unattended.” *Alboniga*, 87 F. Supp. 3d at 1342 (citing *Shields v. Walt Disney Parks & Resorts US, Inc.*, 279 F.R.D. 529, 547 (C.D. Cal. 2011)). The extent to which a school district must assist a student in managing a service animal is a significant issue, and it is likely this case will be referred to in these disputes. See, e.g., Wendy Owen, *Sherwood School District Thwarts Family’s Attempt to get Autism Service Dog in Class with Son*, THE OREGONIAN/OREGON LIVE (Mar. 11, 2015, 11:10AM), [http://www.oregonlive.com/sherwood/index.ssf/2015/03/sherwood\\_school\\_district\\_thwar.html](http://www.oregonlive.com/sherwood/index.ssf/2015/03/sherwood_school_district_thwar.html) (discussing Sherwood Oregon School District’s position that the parents provide a handler for a child’s service dog and referencing this case). The parents of the student in Sherwood, Oregon filed a complaint with the Department of Justice in December 2014. *Id.*

<sup>98</sup> *Alboniga*, 87 F. Supp. 3d at 1342 (citing to 28 C.F.R. § 35.136(d) (2011)).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

The School Board argued that its responsibility for leading Stevie outside to urinate would constitute care and supervision of a service animal—activities not required of public entities under the ADA regulations.<sup>101</sup> The *Alboniga* court’s interpretation of “care and supervision” would consist of “routine animal care—such as feeding, watering, walking or washing the animal.”<sup>102</sup> The *Alboniga* court found that requiring a school employee to assist Anthony in using his service animal is analogous to helping students with other activities such as the use of an insulin pump or motorized wheelchair.<sup>103</sup> Because the School Board is being asked to accommodate Anthony, not to care for Stevie, the *Alboniga* court found the requested accommodation (not to provide a separate handler), reasonable.<sup>104</sup>

Thus, the School Board was required to accommodate Anthony by assisting Anthony in taking Stevie outside to urinate and would not be allowed to require Alboniga to maintain additional liability insurance or obtain additional vaccinations for Stevie in excess of those required by state law.<sup>105</sup>

The *Alboniga* case also discussed of the validity of the ADA’s service animal regulations, and provides the opportunity to discuss the issue of the ADA regulations preempting local breed-discriminatory legislation.<sup>106</sup>

### 3. Validity of Service Animal Regulations

One argument that the School Board made in *Alboniga* that was unique, compared to other cases in the field, was that the DOJ exceeded its statutory authority in promulgating the service animal provision.<sup>107</sup> It claimed the service animal regulations were “inconsistent with, and impermissibly stricter than, the regulatory provision requiring that public entities make reasonable modifications to avoid discrimination on the basis of disability[.]”<sup>108</sup>

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 1343. The *Alboniga* court also looked to Florida state law and the guidelines of the Florida Department of Education to establish that care and supervision “equates to the general upkeep and routine animal maintenance—such as feeding, curbing, training or healthcare.” *Id.*

<sup>103</sup> *Alboniga*, 87 F. Supp. 3d at 1344.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 1344–45.

<sup>106</sup> *See infra* notes 123–31 and accompanying text.

<sup>107</sup> *Id.* at 1333.

<sup>108</sup> *Alboniga*, 87 F. Supp. 3d at 1333; *see* Statement of Interest of the U. S. of Am., at 1, *Alboniga v. Sch. Bd. of Broward Cty., Fla.*, (Case No. 0:14-CV-60085-

The DOJ responded to these contentions by filing a Statement of Interest.<sup>109</sup> The Statement of Interest provided the regulatory background for the ADA regulations.<sup>110</sup> The DOJ cited to the regulations that “generally permit individuals with disabilities to use their service animals.”<sup>111</sup> The DOJ then argued that it provided a comprehensive view of “how public entities should address the myriad issues that may arise in the service animal context[ ]”<sup>112</sup> because of the inclusion of the specific exceptions to the general rule allowing individuals with service animals to have access.<sup>113</sup> The DOJ argued that its interpretation of the ADA should be entitled to judicial deference and the agency’s regulations should be “given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”<sup>114</sup>

The DOJ referenced the legislative history of the ADA in its argument “that Congress specifically intended that individuals with disabilities not be separated from their service animals, including in schools.”<sup>115</sup> The DOJ reiterated that “the ADA is designed to respect the choices of individuals with disabilities and ensure their ability to live independently.”<sup>116</sup> The DOJ asserted that “it is not for the School Board to survey the universe of possible accommodations or modifications [to] determine for

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BB) (Jan. 26, 2015) [hereinafter *Alboniga* Statement of Interest].

<sup>109</sup> *Alboniga* Statement of Interest, *supra* note 108, at 3. The DOJ argued that its interests were “particularly strong here, where the School Board has called into question the Department’s authority to promulgate the Title II regulation.” *Id.* “Because the Department authored the regulation and has an interest in ensuring the ADA’s consistent interpretation and application[ ] the United States respectfully requests that the Court consider the views expressed herein in resolving the School Board’s Motion for Summary Judgment.” *Id.* at 12.

<sup>110</sup> *Id.* at 3.

<sup>111</sup> *Id.* at 3 (citing to 28 C.F.R. § 35.136(a) (2011)). In addition, the DOJ cited to other subsections of the regulations relating to permissible inquiries and generally prohibiting requiring an individual using a service animal from paying a surcharge. *Id.* See 28 C.F.R. § 35.136(f) & (g) (2011).

<sup>112</sup> *Alboniga* Statement of Interest, *supra* note 108, at 4.

<sup>113</sup> *Id.* at 4 (citing to 28 C.F.R. §§ 35.104 (2010), 35.130(b)(7) (2010), 35.136(b) (2011), and 35.139 (2010)) (providing for access only if a dog that is individually trained, allowing for a service animal to be excluded of the animal is out of control, not housebroken, poses a direct threat to the health or safety of others, or if allowing the service animal would fundamentally alter the nature of the entity’s activities).

<sup>114</sup> *Id.* at 5–6 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984)). The DOJ asserted that there was no language in the ADA that explicitly addresses the use of service animals and because Congress had not directly spoken to the issue this deference was appropriate. *Id.* at 5.

<sup>115</sup> *Id.* at 7.

<sup>116</sup> *Id.* at 8.

[Anthony] the best, or most “reasonable” (from its perspective) approach.”<sup>117</sup> The DOJ rejected the School Board’s argument that the ADA’s service animal regulation imposes an absolute mandate and instead asserted that the provision is “a specific application of the regulation’s reasonable modifications requirement[.]”<sup>118</sup> The DOJ also argued that its view had been long held and had extensive judicial support over the years.<sup>119</sup>

The *Alboniga* court agreed with the DOJ’s analysis finding that the “DOJ’s Title II regulations regarding service animals are clearly a permissible interpretation of the ADA.”<sup>120</sup> The *Alboniga* court also stated the service animal regulations were “consistent with and a specific application of the reasonable modification regulatory requirement.”<sup>121</sup> Utilizing this analysis the court determined that the DOJ’s service animal regulations implementing Title II were “valid, internally consistent, and therefore enforceable against the School Board” in this situation.<sup>122</sup>

#### 4. Breed-Discriminatory Legislation

Although not raised as an issue in *Alboniga*, it is important to note that the service dog in this case was reportedly a Staffordshire terrier.<sup>123</sup> Although Broward County does not have a breed-discriminatory ordinance (legislation that restricts or bans ownership of certain breeds of dogs),<sup>124</sup> the county located immediately to the south (Miami-Dade) is one of the counties in Florida that continues to impose a ban on pit-bull-terrier-like dogs, including American Staffordshire Terriers.<sup>125</sup> Although nineteen

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<sup>117</sup> *Alboniga* Statement of Interest, *supra* note 108, at 8. The DOJ also cited to regulations that prohibit public entities from requiring individuals with disabilities “to accept an accommodation . . . which [an] individual chooses not to accept.” *Id.* (quoting 28 C.F.R. §§ 35.130(d), (e)(1) (2010)).

<sup>118</sup> *Id.* at 10.

<sup>119</sup> *Id.* at 9 (citing to several cases relating to service animal access).

<sup>120</sup> *Alboniga v. Sch. Bd. of Broward Cnty. Fla.*, 87 F. Supp. 3d 1319, 1334 (S.D. Fla. 2015).

<sup>121</sup> *Id.* at 1333.

<sup>122</sup> *Id.* at 1337.

<sup>123</sup> Marbin, *supra* note 78 (publishing a photo of Anthony Merchante with his service dog Stevie and describing the dog as a Staffordshire terrier).

<sup>124</sup> See *Ch. 4, Animals*, BROWARD COUNTY, FLA., CODE OF ORDINANCES, [https://www.municode.com/library/fl/broward\\_county/codes/code\\_of\\_ordinances?nodeId=PTIICOOR\\_CH4AN](https://www.municode.com/library/fl/broward_county/codes/code_of_ordinances?nodeId=PTIICOOR_CH4AN) (last updated June 16, 2015) (showing an absence of breed-discrimination ordinance).

<sup>125</sup> *Pit Bull Law*, MIAMI-DADE COUNTY ANIMAL SERVICES, <http://www.miamidade.gov/animals/pitbull-law.asp> (last updated July 28, 2015).

states restrict or prohibit local jurisdictions from enacting breed-discriminatory legislation, due to grandfathering of existing ordinances and the application of concepts such as home rule, there are still many local jurisdictions with this type of ordinance.<sup>126</sup> A full discussion of the intersection of the ADA and breed-discriminatory legislation is beyond the scope of this Article.<sup>127</sup> However, it is important to note that there is regulatory guidance by the DOJ and case law that state the regulations of the ADA would preempt a local ordinance that would restrict or ban a pit-bull-terrier-like dog being utilized as a service animal, solely based on the dog's appearance or breed.<sup>128</sup> ADA regulations provide that if a service dog is out of control (regardless of the breed), the individual with the disability can be asked to remove the service animal from the premises.<sup>129</sup> It must be an individual determination based on the behavior of the specific animal.<sup>130</sup> Due to the DOJ's guidance and existing case law, it should be clear to school boards that making an argument that a service animal should not be permitted to accompany a child to school because of the dog's appearance or breed (rather than the dog's behavior), is going to be unsuccessful.<sup>131</sup>

*C. Other Recent Cases: Exhaustion of Administrative Remedies and Fundamental Alternation of Program Arguments*

This Part of the Article discusses other recent cases that illustrate the complicated issues that arise in these situations.

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<sup>126</sup> Rebecca J. Huss, *A Conundrum for Animal Activists: Can or Should the Current Legal Classification of Certain Animals Be Utilized to Improve the Lives of All Animals*, MICH. ST. L. REV. (forthcoming 2016) (at nn.54 – 56 and accompanying text) [hereinafter Huss, *Conundrum*], [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2583208](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2583208) (discussing the intersection of federal disability laws and breed discriminatory legislation).

<sup>127</sup> See generally *id.* at 2 (discussing this issue in depth).

<sup>128</sup> *Id.* at nn. 57–59 and accompanying text (analyzing the guidance and case law relating to the intersection of the ADA and breed discriminatory legislation).

<sup>129</sup> 28 C.F.R. § 35.136(b) (2010); 28 C.F.R. § 36.302(c)(2) (2011). The animal's handler should be asked to take effective action to control the dog. See 28 C.F.R. § 35.136(b) (2010); 28 C.F.R. § 36.302(c)(2) (2011).

<sup>130</sup> Huss, *Conundrum*, *supra* note 126, at 22 n.85 (discussing the DOJ's guidance on the ADA service animal regulations).

<sup>131</sup> U.S. Dep't of Justice, Civil Rights Div., *Frequently Asked Questions About Service Animals and the ADA*, ADA (July 20, 2015), [http://www.ada.gov/regs2010/service\\_animal\\_qa.html](http://www.ada.gov/regs2010/service_animal_qa.html) (discussing among other issues, that service animals may be any breed of dog).

1. Exhaustion of Administrative Remedies: *Bardelli v. Allied Services Institute of Rehabilitative Medicine*,<sup>132</sup> *M.T. v. Evansville Vanderburgh Sch. Corp.*,<sup>133</sup> and *A.S. v. Catawba County Board of Education*<sup>134</sup>

In the *Bardelli* case, a student at a private school (division of a Pennsylvania not for profit health care and human services provider) was initially not allowed to be accompanied by her service dog at school.<sup>135</sup> The student (M.B.), who has severe, uncontrolled epilepsy, a learning disability, and is developmentally delayed, attended a different school with her previous service dog.<sup>136</sup> After M.B. and Buddy (her new service dog) completed their training, the dePaul School (“dePaul”)<sup>137</sup> refused to allow Buddy at the school based on a variety of reasons, including arguments that the school could accommodate M.B. without Buddy, Buddy would be a distraction, and another student at the school had dog allergies.<sup>138</sup> After over a year of discussions, Buddy was allowed to accompany M.B. to dePaul if Buddy would wear a T-shirt.<sup>139</sup> The Bardellis alleged that the t-shirt hindered Buddy’s ability to function as a service dog.<sup>140</sup> The Bardellis withdrew M.B. from dePaul after the parents were not notified that she had suffered another seizure, and subsequently brought multiple claims against the school.<sup>141</sup>

The school brought a motion to dismiss based on the argument that the Bardellis failed to exhaust their administrative remedies

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<sup>132</sup> *Bardelli v. Allied Serv. Inst. of Rehab. Med.*, No. CIV.A. 3:14-0691, 2015 WL 999115 (M.D. Pa. Mar. 6, 2015).

<sup>133</sup> *M.T. v. Evansville Vanderburgh Sch. Corp.*, 2013 WL 5918804, at \*2 (S.D. Ind. 2013).

<sup>134</sup> *A.S. ex rel. Leonel S. v. Catawba Cnty. Bd. of Educ.*, No. 5:11CV27-RLV, 2011 WL 3438881 (W.D.N.C. Aug. 5, 2011).

<sup>135</sup> *Bardelli*, 2015 WL 999115, at \*1.

<sup>136</sup> *Id.*

<sup>137</sup> Although the named defendant was Allied Services Institute of Rehabilitative Medicine, for purposes of simplicity, the defendant will be referred to as dePaul.

<sup>138</sup> *Bardelli*, 2015 WL 999115 at \*1. The Bardellis provided documentation from M.B.’s physician explaining why it was medically necessary for Buddy to accompany M.B. to school. *Id.*; see *infra* notes 291–92 and accompanying text (discussing the DOJ’s position relating to possible conflicts with persons with allergies).

<sup>139</sup> *Bardelli*, 2015 WL 999115 at \*2.

<sup>140</sup> *Id.* The school allegedly did not propose an alternative accommodation. *Id.*

<sup>141</sup> *Id.* In addition to the ADA and Section 504 of the Rehabilitation Act claims that are the focus of this Article, the Bardellis also brought state law claims for breach of contract, negligence and intentional infliction of emotional distress. *Id.*

under the IDEA.<sup>142</sup> Unlike many of the other cases that consider this issue, the focus in this case was on dePaul's status as a private entity.<sup>143</sup> The Bardelli successfully argued because dePaul is a private school, and because private entities are not subject to liability under or bound to the IDEA, that the Bardelli would not be subject to the IDEA's exhaustion requirement.<sup>144</sup> As of the summer of 2015, this case was ongoing.<sup>145</sup>

In the *M.T. v. Evansville Vanderburgh School Corporation* ("EVSC") case, two high school students alleged that the EVSC service animal policy placed special burdens on students with service animals in contravention of the ADA.<sup>146</sup> EVSC argued that the students' claims should be dismissed because the students had not exhausted their administrative remedies under the IDEA.<sup>147</sup> The court's discussion in this case was related to the general concept that a failure to exhaust administrative remedies under the IDEA would be an affirmative defense.<sup>148</sup> Because generally, the earliest time to consider an affirmative defense is after the answer is filed, the court found that EVSC's motion to dismiss was premature and rejected it.<sup>149</sup>

Although the published opinion relating to the *EVSC* case only related to the exhaustion of administrative remedies argument, this case is also important because it illustrates the issues a school

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<sup>142</sup> *Id.* at \*4. dePaul also argued that the state law claims should be dismissed based on a failure to state cognizable claims. *Id.* The court did not dismiss the state law claims and exercised supplemental jurisdiction over those claims. *Id.* at \*7.

<sup>143</sup> *Id.* at \*5.

<sup>144</sup> *Bardelli*, 2015 WL 999115 at \*4, \*5. As previously discussed, the IDEA requires states receiving funding from the federal government for education to provide a free appropriate public education. *See supra* notes 20–21 and accompanying text. Thus, the argument discussed in the *Bardelli* case is that the IDEA obligates the *state* not the private school to fulfill this requirement. *Bardelli*, 2015 WL 999115 at \*4, \*5. The public agencies retain responsibility under the IDEA even if a private entity is utilized to comply with the IDEA. *Id.*

<sup>145</sup> *Bardelli et al v. Allied Serv. Inst. of Rehab. Med.*, No. 3:14-cv-00691 (M.D. Pa. Apr. 9, 2014) (Bloomberg Law).

<sup>146</sup> *M.T. v. Evansville Vanderburgh Sch. Corp.*, 2013 WL 5918804, at \*1, \*2 (S.D. Ind. 2013). The students each had physical disabilities and there was no controversy over the students' use of the service animals—only on the documentation and other requirements EVSC placed on the students prior to their use of the dogs at school. *Id.*

<sup>147</sup> *Id.* at \*2.

<sup>148</sup> *Id.* at \*2.

<sup>149</sup> *Id.* at \*2–3. The court did not find the exception to this issue—when “the failure to exhaust, is so plain from the face of the complaint that the suit can be regarded as frivolous[ ]” was applicable. *Evansville*, 2013 WL 5918804 at \*2 (citing *Turley v. Gaetz*, 625 F.3d. 1005, 1013 (7th Cir. 2010)).

district may encounter if it has a service animal policy that is considered to be one that burdens the students with disabilities. The policy at issue required a student to provide certain documentation to the school at least ten business days prior to bringing a service animal to school.<sup>150</sup>

In the *A.S. v. Catawba County Board of Education* (“CCBE”) case, the CCBE was successful in arguing that a case involving a four year old (Ayden Silva) with multiple disabilities<sup>151</sup> should be dismissed based on a lack of subject matter jurisdiction due to a failure to exhaust administrative remedies under the IDEA.<sup>152</sup> The CCBE court was not persuaded by the argument that an exception to this exhaustion requirement (“that undertaking the administrative procedures necessary to accomplish exhaustion would work a *severe harm* on Plaintiff, or would be *futile* [ ]”)<sup>153</sup> would apply.<sup>154</sup> Although the DOJ filed a Statement of Interest in this case, the court found that the Statement of Interest addressed the merits of the cause of action (whether the student is entitled access) and not whether exhaustion is futile.<sup>155</sup>

Although the CCBE case was dismissed by the U.S. District Court in 2011, the Silvas subsequently filed a complaint with the DOE OCR. The Resolution Letter and Resolution Agreement issued by the DOE OCR relating to that complaint focused on the rights of individuals under Section 504 of the Rehabilitation Act and the ADA.<sup>156</sup> The Resolution Letter stated that the CCBE’s

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<sup>150</sup> *Evansville*, 2013 WL 5918804 at \*1. Note the ADA regulations do not require any certification or other documentation. *See supra* note 30 and accompanying text.

<sup>151</sup> In addition to other developmental disabilities, Ayden is diagnosed with static encephalopathy. *A.S. ex rel. Leonel S. v. Catawba Cnty. Bd. of Educ.*, No. 5:11CV27-RLV, 2011 WL 3438881, at \*1, \*2, \*7–8 (W.D.N.C. Aug. 5, 2011). Although Ayden’s name was not disclosed in court documents, media reports provided the information. Jeremy Detter, *Therapeutic Dog to be Allowed in Catawba County School*, HICKORY DAILY RECORD (Mar. 21, 2013, 4:10PM), [http://www.hickoryrecord.com/news/therapeutic-dog-to-be-allowed-in-catawba-county-school/article\\_5fa47ed0-9263-11e2-809a-001a4bcf6878.html](http://www.hickoryrecord.com/news/therapeutic-dog-to-be-allowed-in-catawba-county-school/article_5fa47ed0-9263-11e2-809a-001a4bcf6878.html).

<sup>152</sup> *Catawba*, 2011 WL 3438881 at \*2, \*8.

<sup>153</sup> *Id.* at \*4 (emphasis in original).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at \*7.

<sup>156</sup> Letter from United States Dep’t of Educ., Office for Civil Rights, to Holly Stiles, OCR Complaint NO. 11-12-1553, (Mar. 8, 2013), at 3, <http://disabilityrightsnc.org/sites/default/files/OCR%20ltr%20re%20Catawba%20service%20animal%203-8-13.pdf> [hereinafter CCBE Resolution Letter]; Resolution Agreement, OCR Complaint NO. 11-12-1553, at 2, <http://www.disabilityrightsnc.org/sites/default/files/OCR%20agrt%20with%20Catawba%20re%20service%20animal.pdf> (last visited Aug. 22, 2015) [hereinafter



policy on its face was generally consistent with Title II of the ADA; however, the application of the policy in this instance that resulted in the exclusion of the student's service animal raised concerns over compliance.<sup>157</sup> The CCBE policy allowed for a service animal to be excluded if "the presence of the animal fundamentally alters the service, program or activity of the school system."<sup>158</sup> The principal of the school told the DOE OCR that his understanding of when this would occur is "if the presence of the animal is in conflict with the educational program or the specific goals of the [student's] IEP."<sup>159</sup>

The DOE OCR found that the decision makers for the CCBE in this situation "were unable to articulate *how* the Student's IEP goals conflicted with the presence of the service animal, in large part because they lacked a basic understanding of how the Student's service animal performs its functions."<sup>160</sup> In this situation, the DOE OCR found that there was not a conflict between the student's use of a service animal and the IEP.<sup>161</sup> The DOE OCR Resolution Letter also analyzed the role of the service animal and found that the dog's presence would further the student's independence—a goal set forth in the IEP.<sup>162</sup>

The DOE OCR Resolution letter found that CCBE "failed to meet its heavy burden of proving that the Student's service animal would fundamentally alter his educational program."<sup>163</sup> The accompanying Resolution Agreement provided that the CCBE would revise its Service Animals in Schools policy, provide training

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CCBE Resolution Agreement].

<sup>157</sup> CCBE Resolution Letter, *supra* note 156, at 4.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* (emphasis in original).

<sup>161</sup> *Id.* The DOE OCR also stated that it "need not address what rare circumstances, if any, the use of a service animal could conflict with a student's IEP or 504 Plan and could, therefore, constitute a fundamental alteration. In promulgating the amended Title II regulation, the Department of Justice intended the 'fundamental alteration' exception to be narrow." CCBE Resolution Letter, *supra* note 156, at 4.

<sup>162</sup> CCBE Resolution Letter, *supra* note 156, at 5. The DOE OCR used the status of the fundamental alteration as a legal standard to justify its own review of the student's IEP though "[n]ormally, the OCR does not second-guess educational decisions made through the FAPE process." *Id.*

<sup>163</sup> *Id.* at 6. The DOE OCR found that CCBE's "explanation [for excluding the service dog] is of particular concern because service animals generally function to *increase* a person with a disability's independence by assisting with functions that the person, or student, cannot or in some cases may never be able to perform without assistance." *Id.*

on the revised policy, and provide written notification that the student would be permitted to bring the service animal to school.<sup>164</sup>

2. ADA Interpretation—Service Animal and Fundamental Alteration of Program: *C.C. v. Cypress School District*<sup>165</sup>

In the *C.C. v. Cypress School District* case, the Central District Court of California granted a preliminary injunction motion requesting that the Cypress School District (“Cypress”) be required to accommodate Caleb Ciriacks’ use of a service dog in school.<sup>166</sup> Caleb was diagnosed with autism and was paired with his service dog Eddy in May 2010.<sup>167</sup> The *Cypress* court’s findings of fact described the extensive training Eddy went through and the tasks that Eddy performs with Caleb.<sup>168</sup> The *Cypress* court found that a preliminary injunction was warranted, focusing on two issues in connection with a possible violation of Title II of the ADA: “(1) whether Eddy is a service dog; and (2) whether [the Cypress] educational program would be fundamentally altered if Eddy accompanied [Caleb] to school.”<sup>169</sup>

The *Cypress* court cited to the then newly effective ADA service animal regulations to find that Eddy was a service dog under the ADA.<sup>170</sup> The *Cypress* court also found that the school district failed to meet the burden of showing that allowing Caleb to bring his service dog to school would fundamentally alter the school district’s

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<sup>164</sup> CCBE Resolution Agreement, *supra* note 156. There were other reporting requirements. Another required revision to the service animal policy was to remove any language stating that service animals were required to wear identification in order to provide notice of the animal’s status. *Id.* at 2.

<sup>165</sup> *C.C. v. Cypress Sch. Dist.*, No. 11-352, 2011 U.S. Dist. LEXIS 88287 (C.D. Cal. 2011).

<sup>166</sup> *Id.* at 2. Caleb’s and his service dog Eddy’s names were disclosed in media reports about the case. Fred Mamoun & Vicki Vargas, *Family of Autistic Boy Rejoices After Judge Rules Service Dog Must be Allowed at School*, NBC 4 SOUTHERN CALIFORNIA (Jun. 16, 2011), <http://www.nbclosangeles.com/news/local/Judge-Rules-Service-Dog-124028879.html>.

<sup>167</sup> *Cypress*, 2011 U.S. Dist. LEXIS 88287 at \*2–3.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at \*2, \*9.

<sup>170</sup> *Id.* at \*10–11 (citing 28 C.F.R. §35.104 (2011)). The school district argued that “Eddy [was] primarily present to comfort [Caleb] and this comforting presence is not enough to make him a ‘service dog’ under the ADA.” *Id.* at \*10. The *Cypress* court cited to Eddy’s specialized training and other tasks that Eddy performs including preventing Caleb from elopement to support its finding that Eddy was a service dog. *Id.* at \*11.

educational program.<sup>171</sup> The *Cypress* court found the school district's evidence "scant" that the educational program would be impacted—consisting of arguments that a staff member would need to learn five-to-ten commands, hold the leash when navigating campus, and tether and untether Eddy occasionally during the day.<sup>172</sup>

Although the *Cypress* court acknowledged that the school district's strongest argument could be the possible impact Eddy may have on other children at the school, it stated that the school district raised "largely unsupported concerns about canine aggression" and having "to teach the remaining students to ignore the dog," which were insufficient in this situation to show a fundamental change to the educational program.<sup>173</sup> The *Cypress* court also found the school district's argument "that allowing [Caleb] to bring Eddy to school 'would impede [Caleb's] educational process and independence. . .'" largely irrelevant.<sup>174</sup> The *Cypress* court distinguished between whether Eddy would fundamentally alter the educational program versus whether it would improve Caleb's educational progress.<sup>175</sup>

In order to grant the preliminary injunction the *Cypress* court also had to find there would be irreparable harm if the injunction was not granted.<sup>176</sup> The *Cypress* court accepted the argument that preventing Eddy from attending school with Caleb was damaging to the bond between Caleb and Eddy and would disrupt the service animal relationship.<sup>177</sup> The *Cypress* court ordered that the plaintiffs in the case would be required to post a \$50,000 bond before the injunction would become effective.<sup>178</sup>

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<sup>171</sup> *Cypress*, 2011 U.S. Dist. LEXIS 88287, at \*11.

<sup>172</sup> *Id.* at \*11–13.

<sup>173</sup> *Id.* at \*15. The school district also argued that it "would have to teach the remaining students to ignore the dog." *Id.*

<sup>174</sup> *Id.* at \*13.

<sup>175</sup> *Cypress*, 2011 U.S. Dist. LEXIS 88287, at \*14.

<sup>176</sup> *Id.* at \*17.

<sup>177</sup> *Id.* The *Cypress* court stated that "the Ninth Circuit presumes irreparable harm when a plaintiff shows a likelihood of success for violation of a civil rights statute. *Id.* at \*17–18 (citing to *Silver Sage Partners v. City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001)). The *Cypress* court also found that the "[b]alancing of equities [element] tip[ped] in favor of granting the preliminary injunction[.]" and granting the injunction was in the public interest, completing the preliminary injunction analysis. *Id.* at \*19, \*20.

<sup>178</sup> *Id.* at \*21–22. According to the docket of the case, at the plaintiff's request, the case was dismissed with prejudice on June 20, 2012 (approximately a year after the preliminary injunction was granted). United States District Court for the Central District of California (Southern Division—Santa Ana) Civil Docket

It is noteworthy that, consistent with the DOJ's position in other cases, the DOJ filed a Statement of Interest in *Cypress* addressing the application of Title II of the ADA.<sup>179</sup> The Statement of Interest cited to references supporting the importance of maintaining the relationship between the individual with a disability and his or her service animal.<sup>180</sup> The DOJ reviewed the ADA service animal regulations and its applicability to the school environment.<sup>181</sup> The Statement of Interest emphasized that students and their parents have a right to choose whether a student utilizes a service dog, even if a school district does not agree with the decision.<sup>182</sup> The DOJ argued that the assistance that Caleb would need with Eddy “falls squarely within the scope of reasonable policy and practice modifications” required by the ADA regulations and that the school district had not shown an undue burden or fundamental alteration of its program.<sup>183</sup>

In response to the school district's concern over safety, the DOJ stated that the affirmative defense of a “direct threat” . . . can only be proved where there are facts establishing a significant risk to the *health and safety of others* that cannot be eliminated or reduced to an acceptable level by the public entity's modification of its policies, practices, or procedures.”<sup>184</sup> The DOJ asserted that the school district had not met the heavy burden of showing a direct threat.<sup>185</sup>

#### *D. Department of Justice Civil Rights Division*

Along with the documents filed by the DOE and DOJ in the cases discussed above, another indication of the likely interpretation of the rights a student with a disability may have to be accompanied by his or her service animal can be found in materials resulting

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for Case #: 8:11-CV-00352-AG-RNB.

<sup>179</sup> Statement of Interest of the U.S., *C.C. v. Cypress School District*, No. CV 11-00352, at 1 (June 13, 2011) [hereinafter *Cypress* Statement of Interest].

<sup>180</sup> *Id.* at 6.

<sup>181</sup> *Id.* at 9–11.

<sup>182</sup> *Id.* at 12–13.

<sup>183</sup> *Id.* at 15–16.

<sup>184</sup> *Id.* at 17–18 (emphasis in original).

<sup>185</sup> *Cypress* Statement of Interest, *supra* note 179, at 18–19. In the service animal context the Ninth Circuit has stated that an individual has a heavy burden when asserting a direct threat as a basis for excluding a service animal. *Id.* at 18 (citing *Lockett v. Catalina Channel Express, Inc.*, 496 F.3d 1061, 1066 (9th Cir. 2007); *Bragdon v. Abbott*, 524 U.S. 624, 649–50 (1998)).

from investigations of the DOE and DOJ.<sup>186</sup> Both the DOJ Civil Rights Division and the DOE OCR have jurisdiction to enforce the ADA and investigate complaints of disability discrimination in connection with schools.<sup>187</sup> The DOE “OCR engages in complaint[s] resolution, compliance reviews, directed investigations, enforcement actions, and technical assistance” while the DOJ’s “Civil Rights Division engages in selective investigation of complaints, out-of-court settlements, and litigation in federal court.”<sup>188</sup>

### 1. Gates-Chili Central School District

A Letter of Findings dated April 13, 2015, from U.S. Department of Justice’s Civil Rights Division to the Gates-Chili Central School District (New York) (“Letter of Findings”) illustrated the DOJ’s position regarding the extent to which a school district may be required to provide assistance to a student in handling his or her service animal.<sup>189</sup> In the Letter of Findings, the DOJ investigation focused on the refusal of the Gates-Chili School District (“GCSD”) to allow Devyn Pereira to bring her service dog, Hannah,<sup>190</sup> unless her parent, Pereira, employs a full-time handler for the dog.<sup>191</sup> Pereira asserted that she was asking only that the GCSD “provide minimal and intermittent assistance” to Devyn so Devyn can

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<sup>186</sup> See *infra* notes 189–242 (discussing administrative actions); see also *Information About Filing a Complaint with the U.S. Department of Justice, Civil Rights Division and the U.S. Department of Education, Office for Civil Rights*, JUSTICE.GOV, 1, <http://www.justice.gov/crt/about/edu/documents/filecomp.pdf> (last visited Sept. 3, 2015) [hereinafter *Information About Filing*] (general information about DOJ’s common goals in education).

<sup>187</sup> *Information About Filing*, *supra* note 186, at 9. Only the DOJ Civil Rights Division has the authority to investigate disability discrimination allegations in schools that do not receive federal financial assistance. *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> Letter from Rebecca B. Bond, Chief, Disability Rights Section, Civil Rights Division, U.S. Dep’t of Justice, to David W. Oakes, Harris Beach PLLC (Apr. 13, 2015) at 1, 5 [hereinafter Letter of Findings], [http://www.ada.gov/briefs/gates-chili\\_lof.pdf](http://www.ada.gov/briefs/gates-chili_lof.pdf) (regarding Investigation of the Gates-Chili Central School District, DJ No. 204-53-128).

<sup>190</sup> Devyn Pereira was identified only as D.P. in the Letter of Findings; however, media reports identified her and her service dog by name. *Id.* at 1; David Andreatta, *Gates Chili Challenges Service Dog Ruling*, DEMOCRAT & CHRONICLE (Apr. 29, 2015), <http://www.democratandchronicle.com/story/news/2015/04/29/service-dog-devyn-pereira-gates-chili/26569961/>.

<sup>191</sup> Letter of Findings, *supra* note 189, at 1.

handle Hannah.<sup>192</sup>

The DOJ initially set forth the areas in which there appear to be no dispute among the parties.<sup>193</sup> “[Devyn] is a person with a disability[,]”<sup>194</sup> and Hannah was a service animal that performs numerous tasks directly related to Devyn’s disabilities.<sup>195</sup> Although Devyn was accompanied by Hannah during her Preschool year, when Devyn was scheduled to begin her Kindergarten year, Pereira was told that she needed to provide a separate adult handler.<sup>196</sup> Pereira did so at her own cost but requested in writing that the GCSD permit Devyn’s one-on-one aide (already provided by the school district) to assist Devyn in issuing commands and tethering and untethering Hannah.<sup>197</sup>

The DOJ set forth the relevant service animal regulations and stated that the GCSD had acknowledged that there had never been an incident where Hannah “was out of control or exhibited any indication of not being house broken in the four years” that Hannah had been coming to school with Devyn.<sup>198</sup> The DOJ stated that “[c]are and supervision is a distinct responsibility and different from handling.”<sup>199</sup> Because Hannah “does not require any walking, feeding, grooming, or veterinary care while [Devyn] is at school[,]” the DOJ stated that care and supervision is not an issue in this situation.<sup>200</sup>

In regards to the assistance that Pereira requested, the DOJ asserted that the request was reasonable given the current support Devyn is being provided.<sup>201</sup> The DOJ also stated the GCSD had “not established that the provision of reasonable modifications to assist [Devyn] would fundamentally alter the nature of the service,

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 1–2.

<sup>194</sup> *Id.* at 1. Among other issues, Devyn has autism, epilepsy, and asthma. Her service dog Hannah was chosen in part because the dog’s breed (Bouvier) is considered hypoallergenic. *Id.* at 2; Andreatta, *supra* note 190.

<sup>195</sup> Letter of Findings, *supra* note 189, at 2. The tasks include alerting for seizures, preventing wandering, deep pressure, and mobility support. *Id.*

<sup>196</sup> *Id.* at 3.

<sup>197</sup> *Id.* at 3, 4.

<sup>198</sup> *Id.* at 5.

<sup>199</sup> *Id.* at 5 n.8 (citing to 28 C.F.R. § 35.136(e) (2011) and the guidance at Appendix A § 35.136).

<sup>200</sup> Letter of Findings, *supra* note 189, at 5 n.8.

<sup>201</sup> *Id.* at 5 (given Devyn’s one-on-one aide currently escorts Devyn, Hannah, and her adult handler around the school). “Staff assistance in issuing the few verbal commands necessary for D.P. to control the Service Dog would involve only minimal effort but would significantly further D.P.’s ability to use the assistance of the Service Dog.” *Id.*

program, or activity.”<sup>202</sup>

In a footnote, the DOJ directly addressed the possible issue of the intersection of federal laws stating “because the IDEA and ADA have different standards, whether or not the IDEA’s requirements have been met does not determine whether a valid ADA claim would exist.”<sup>203</sup>

The DOJ then instructed GCSD to permit Devyn to act as handler of Hannah and to direct staff in the classroom and on the bus to provide reasonable modifications as Devyn handles Hannah.<sup>204</sup>

The DOJ advised the GCSD that it may initiate a lawsuit if there is no resolution of the matter.<sup>205</sup> The GCSD’s response was to ask the DOJ for clarity with the position the DOJ has adopted because the GCSD believed the DOJ’s “interpretations of the rules concerning service dogs . . . are at odds with the language and application of the existing officially published ADA . . . rules.”<sup>206</sup>

## 2. Delran Township School District

In a Settlement Agreement between the United States of America and the Delran Township School District (New Jersey) (“DTSD”),<sup>207</sup> the DOJ determined that the DTSD had discriminated against an eight-year-old child due to its refusal to permit the child to be accompanied in school by his service animal when the parent was present as the dog’s handler.<sup>208</sup>

The Delran Settlement Agreement was based on the DOJ’s authorization to bring a civil action to enforce Title II of the ADA,

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<sup>202</sup> *Id.* at 6.

<sup>203</sup> *Id.* at 2 n.1.

<sup>204</sup> *Id.* at 6. The reasonable modifications include, but are not limited to, tethering and untethering, issuing commands, and escorting Devyn on school grounds. Letter of Findings, *supra* note 189, at 6.

<sup>205</sup> *Id.* at 7.

<sup>206</sup> *District Statement to Service Dog Findings*, GATES CHILI SCH. DISTRICT, <http://www.gateschili.org/news.cfm?story=1896> (last visited Sept. 3, 2015). The DOJ filed a Complaint on September 29, 2015 alleging that the school district violated Title II of the ADA and requesting, among other things, that the school district permit Devyn to act as a handler of her service dog with assistance from school staff. Complaint, *U.S. v. Gates-Chili Central School District*, No. 6:15-cv-06583-CJS (W.D.N.Y. Sept. 19, 2015).

<sup>207</sup> Settlement Agreement under the Americans with Disabilities Act Between the U. S. of Am. & Delran Township Sch. Dist. (DJ# 204-48-284) (June 24, 2014) [hereinafter *Delran Settlement Agreement*], <http://www.ada.gov/delran-sa.htm>.

<sup>208</sup> The eight-year-old boy was not identified in the settlement agreement or in media reports; however, he was described as having several disabilities including autism and encephalopathy. *Id.*

and the DOJ stated it was not addressing any rights and responsibilities under the IDEA.<sup>209</sup> The DTSD initially requested medical records to support the use of the service dog and stated the dog would only be admitted if “deemed necessary by the child’s IEP team.”<sup>210</sup> However, after the parent objected to the assertion that the IDEA process would be used and asked for a copy of the DTSD service animal policy (there was no policy in existence at the time), the DTSD stated that the request would be viewed as one for “a ‘general accommodation.’”<sup>211</sup>

The DTSD requested further information, including documentation of the dog’s license, veterinary certification that the dog was vaccinated, and more specific information about the work or tasks the dog had been trained to perform.<sup>212</sup> Ultimately the DTSD “never allowed the child to be accompanied by his service dog at school or during school-related activities.”<sup>213</sup> The Settlement Agreement stated that internal DTSD e-mails demonstrated that its “officials considered improper factors such as generalized concerns about student allergies and fear of dogs as justification for refusing to grant the child’s request for a reasonable modification.”<sup>214</sup> The Settlement Agreement also stated that the DTSD “lodged a series of unnecessary and burdensome requests for information and documentation, some of which were redundant and others of which were outside the scope of permitted inquiry as set forth in the ADA regulations.”<sup>215</sup>

The DTSD disputed the DOJ’s findings of facts, and, without admitting liability or wrong-doing, agreed to actions including establishing a service animal policy, providing training to its staff, and record-keeping.<sup>216</sup> The DTSD also paid \$10,000 to the parent complainant.<sup>217</sup>

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<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> Delran Settlement Agreement, *supra* note 207. In addition to not allowing the service animal at school, the DOJ discussed a specific instance of the service animal not being allowed to accompany the child on a school trip, with the “articulated reason for [the] refusal . . . that it did not have adequate time to prepare for the presence of the service animal on the bus and field trip, or to address any concerns of other students and staff.” *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* The DTSD also was required to provide such records to the DOJ quarterly for the three year duration of the agreement. *Id.*

<sup>217</sup> Delran Settlement Agreement, *supra* note 207.



### 3. The Learning Clinic

The Settlement Agreement between the DOJ and The Learning Clinic, Inc. (“TLC”) in Connecticut provides an example of how these issues may be resolved under Title III of the ADA.<sup>218</sup> As discussed earlier, the ADA Title II and Title III service animal regulations consist of the same language.<sup>219</sup> TLC is a private, nonprofit corporation that is considered a place of public accommodation under Title III of the ADA.<sup>220</sup> Among other services TLC provides residential boarding services.<sup>221</sup> The complainants alleged that TLC failed to provide reasonable modifications in connection with their request that their child with multiple disabilities be allowed to live and attend school with his service animal.<sup>222</sup>

In response to the request, TLC required the complainants to provide documentation to support the request that the service dog be allowed at the school including a certificate of liability insurance.<sup>223</sup> The complainants rejected TLC’s terms and withdrew their child from the school.<sup>224</sup> The DOJ concluded that TLC violated the ADA “by requiring documentation of the animal’s certification or training, medical verification, and other conditions amounting to a surcharge.”<sup>225</sup> TLC denied the allegations in the complaint; however, it agreed to resolve the matter through the TLC Settlement Agreement.<sup>226</sup>

The TLC Settlement Agreement states that TLC will modify its policies to permit the use of service animals in accordance with the ADA.<sup>227</sup> Specifically, “[w]hen a person with a disability is accompanied by a service animal, TLC shall not ask about the nature or extent of the person’s disability, require documentation of the animal’s certification or training, or require the payment of

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<sup>218</sup> Settlement Agreement between the U. S. & The Learning Clinic (DJ # 202-14-133) (Mar. 14, 2014) [hereinafter TLC Settlement Agreement], <http://www.ada.gov/tlc.htm>.

<sup>219</sup> See *supra* notes 15–16 and accompanying text.

<sup>220</sup> TLC Settlement Agreement, *supra* note 218.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* The child was identified as an individual with disabilities including bipolar disorder and attention deficient hyperactivity disorder. *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> TLC Settlement Agreement, *supra* note 218.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

a surcharge.”<sup>228</sup> TLC also paid \$35,000 to the complainants to reimburse them for attorney’s fees and other costs.<sup>229</sup>

*E. Department of Education, Office for Civil Rights*

Because of the differences in the enforcement tools, the results of the processes used by the DOE OCR may not be as visible; however, recent actions taken by that agency can be useful in considering a school’s obligation to accommodate students with disabilities.<sup>230</sup>

There are two DOE OCR Resolution Agreements in 2010 (prior to the new ADA service animal regulations becoming effective) that discussed the use of the IEP process in connection with a student’s

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<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> The focus of this Article is on access for students utilizing service animals; however, the DOE OCR has also acted in situations wherein a visitor to a school utilizing a service animal has had issues. In a 2012 Settlement Agreement with the Hillsboro, Oregon School District [Hillsboro], and the DOE OCR, Hillsboro agreed to review and revise its “policies and procedures as they related to the use of service animals to ensure consistency with Title II.” Settlement Agreement between the U.S. Department of Education, Office for Civil Rights and the Hillsboro School District 1J, dated Mar. 21, 2012, (No. 10-11-1048), 59 IDELR 82 (2012) (begins on p.490, at 493). This appears to be the same school district involved in a dispute regarding the use of service dog by a student a few years earlier discussed *supra* notes 226–27 and accompanying text. The Hillsboro Settlement Agreement was the result of a complaint by a parent volunteer who utilized a service animal being asked questions supporting the need for a service animal and requiring the parent to provide certification of the dog’s training, vaccinations, and documentation of insurance coverage. *Id.* at 491. Other volunteers were not asked provide evidence of insurance and were covered under the school district’s policy. *Id.* at 492. The DOE OCR cited to the then new Title II regulations to find that when the parent volunteer was asked to provide proof of insurance for her service animal and other conditions were placed on her presence in the school, the school district exceeded what is necessary and appropriate under Title II. *Id.* at 492. Although relating to a parent rather than a student, the DOE OCR’s citation of the limited inquiries that a school may make, and limited circumstances wherein a service animal may be excluded from a premises support the argument that the DOE OCR will closely follow the ADA service animal regulations when considering these issues in the future. *See, e.g., id.* In a subsequent Resolution Agreement the DOE OCR addressed the issue again in the context of an allegation by a grandparent that a school had discriminated against him by “not allowing full participation in the end of the year celebrations for his grandson (Student) due to the presence of his service animal.” Letter and Resolution Agreement between U.S. Department of Education, Office for Civil Rights and Alpine Union Elementary School District, dated July 19, 2012, (No. 0912-1391), 112 LRP 49101 (2012). The Alpine School District agreed to update its policy to reflect the new ADA regulations and provide staff training to be reviewed by the DOE OCR. *Id.*

request for a service animal.<sup>231</sup> However, in 2012, in a letter associated with a DOE OCR Resolution Agreement focusing on the provision of assistive technology and parent communication, the DOE OCR addressed the issue of a service animal utilizing Title II of the ADA rather than the IDEA or a student's IEP.<sup>232</sup> In that letter to the Pasadena California Unified School District, the DOE OCR considered the issue of whether the district had a policy against the use of guide dogs.<sup>233</sup> According to the DOE OCR investigation, there was evidence that a parent had been told by a teacher that guide dogs were prohibited at the school, the school district told the DOE OCR that "guide dogs are not provided to persons who are under 16 years old" and the school district did not have a formal policy on service animals.<sup>234</sup> The DOE OCR determined that the parent never requested to bring a guide dog to the school and found that there was insufficient evidence to establish that the school district had a policy *against* students using guide dogs.<sup>235</sup> The DOE OCR did provide technical assistance by reminding the school district:

individuals with disabilities are not required to obtain the District's approval before bringing a service animal onto campus. Title II provides individuals with disabilities a right to be accompanied by service animals except in very limited circumstances such as when the service animal is out of control and the animal's handler does not take effective action to control it, or the animal is not housebroken. Absent these conditions, individuals with disabilities *including students* must be allowed to bring a service animal to school. Policies, procedures or practices that explicitly or implicitly lead a parent to believe that District pre-approval of the service

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<sup>231</sup> Resolution Agreement between U.S. Department of Education, Office for Civil Rights and Colorado Springs (CO) School District #11, dated Nov. 15, 2010, 56 IDELR 52 (2011) (beginning on p. 270, at 272) (finding that the school district failed to comply with applicable law and regulations when it did not consider whether the presence of a service dog should be incorporated into a student's IEP); Resolution Agreement between U.S. Department of Education, Office for Civil Rights and Trinity Area (PA) School District, dated Sept. 17, 2010, (No. 03-08-1279), 56 IDELR 143 (2011) (beginning p.721, at 721) (finding an IEP team's consideration of a service animal request inadequate).

<sup>232</sup> Letter and Resolution Agreement between U.S. Department of Education, Office for Civil Rights and Pasadena (CA) Unified School District, dated Aug. 17, 2012, (No. 09-11-1054), 60 IDELR 22 (2012) (beginning on p. 86, at 86).

<sup>233</sup> *Id.* at 90.

<sup>234</sup> *Id.* The school district also informed the DOE OCR that the student did not possess certain skills necessary to handle a guide dog. *Id.*

<sup>235</sup> *Id.* at 91 (emphasis added).

animal is necessary violate Title II.<sup>236</sup>

In 2013, in response to a complaint that a school district “constrained” a student’s ability to use a service animal, the DOE OCR entered into a Voluntary Resolution Agreement with School Administrative Unit No. 23 (New Hampshire) (“SAU #23”) before the DOE OCR reached a compliance determination.<sup>237</sup> There was no mention of the IDEA or the student’s IEP plan in the accompanying letter or agreement.<sup>238</sup> In the Voluntary Resolution Agreement SAU #23 agreed to revise its service animal policy to comply with Title II and disseminate it to all members of the school community.<sup>239</sup> In connection with the student’s use of the service dog, SAU #23 agreed to “designate a staff member or outside aide or paraprofessional who will be responsible for issuing commands as needed and ensuring Carina [the service dog] accompany the Student during transitions . . . .”<sup>240</sup> SAU #23 also agreed to contract with a service dog trainer to develop a training program and provide at school training for the aide.<sup>241</sup> Note that entering into a voluntary resolution agreement with the DOE OCR is no guarantee that things will go smoothly in the future. As recently as April 2014, there were media reports that SAU #23 was asserting that it was not obligated to “handle” Carina and the family would be required provide an outside handler.<sup>242</sup>

#### *F. Informal Resolution of Disputes*

There is no way to track the number of occurrences where there is initially conflict over whether a service animal will be allowed in

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<sup>236</sup> *Id.* at 91 (emphasis added). One of the teachers had provided an opinion as to the student not being a good candidate for a service dog when the parent asked the teacher to complete a form requested by a service animal school. The DOE OCR letter also stated “[w]hen a parent requests the District to complete a form that is required by a guide dog school, the District should complete and return the form but may and should provide honest feedback and opinions if solicited on the form.” *Id.*

<sup>237</sup> Letter and Voluntary Resolution Agreement between U.S. Department of Education, Office for Civil Rights and School Administrative Unit No. 23 (SAU #23), dated May 22, 2013, 113 LRP 32108 (2013).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at II (A).

<sup>241</sup> *Id.* at II (B–E).

<sup>242</sup> Maggie Cassidy, *Who Handles Carina? Service Dog for North Haverhill Boy at Center of Dispute Between Family, School District*, VALLEY NEWS (Apr. 6, 2014), <http://www.vnews.com/home/11250452-95/service-dog-for-north-haverhill-boy-at-center-of-dispute-between-family-school-district>.

a school.<sup>243</sup> These cases may be resolved informally even if a complaint has been filed with the DOJ or DOE.<sup>244</sup> An example was a dispute beginning in 2010 in which the Hillsboro, Oregon, school district initially refused to allow a student with autism to be accompanied by his service dog.<sup>245</sup> After a disability rights organization and the DOJ became involved, the school district reconsidered its stance and allowed the student to bring the dog to school.<sup>246</sup>

The role of the media also cannot be understated in these cases. In 2013 in Athens, Ohio, a dispute over allowing a student's service dog in a classroom where the teacher had a severe allergy to dog dander garnered significant media attention.<sup>247</sup> Although both

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<sup>243</sup> See generally U.S. Dep't of Justice, Civil Rights Div., Disabilities Rights Section, *Enforcing the ADA*, ADA.GOV (Oct. 7, 2008), <http://www.ada.gov/aprjun06.htm> (discussing requirement of informal settlements as a mechanism for resolving disputes before the Department of Justice may file a lawsuit).

<sup>244</sup> For example, although there were media reports that the DOE OCR was investigating the Cabot School District in Arkansas, the Author was unable to locate any official settlement agreement. See generally Christina Corbin, *Arkansas Family, School District Spar Over Cost of Service Dog for Epileptic Boy*, FOXNEWS (July 12, 2014), <http://www.foxnews.com/us/2014/07/12/arkansas-family-school-district-spar-over-cost-service-dog-for-epileptic-boy/> (reporting that parents had filed a complaint with the DOE OCR); Ben Velderman, *School Charged Family \$500 a Month to Allow Son's Service Dog in Classroom*, EAG NEWS.ORG (July 9, 2014), <http://eagnews.org/suit-school-charged-family-500-a-month-to-allow-sons-service-dog-in-classroom/> (discussing dispute in Cabot, Arkansas, and reporting that the school district was requiring parents to pay for a handler for the student's service animal).

<sup>245</sup> See Wendy Owen, *Dog Helps Stabilize Autistic Boy's Life, but Hillsboro School Says Not in the Classroom*, OREGONIAN/OREGONLIVE (Jan. 10, 2010), [http://www.oregonlive.com/washingtoncounty/index.ssf/2010/01/dog\\_helps\\_stabilize\\_an\\_autistic.html](http://www.oregonlive.com/washingtoncounty/index.ssf/2010/01/dog_helps_stabilize_an_autistic.html).

<sup>246</sup> See Kurt Eckert, *Hillsboro Service Dog Adds Class to Resume*, OREGONIAN/OREGONLIVE (Mar. 9, 2011, 10:10 AM), [http://www.oregonlive.com/argus/index.ssf/2011/03/hillsboro\\_service\\_dog\\_adds\\_class.html](http://www.oregonlive.com/argus/index.ssf/2011/03/hillsboro_service_dog_adds_class.html); see also Dep'y of Justice, Office of Pub. Affairs, Press Release, *Hillsboro School District Agrees to Access for Autism Service Dog* (Mar. 7, 2011), <http://www.justice.gov/opa/pr/hillsboro-school-district-agrees-access-autism-service-dog> (stating "the school board's vote shows a good faith effort to voluntarily resolve this dispute without more formal action by the department").

<sup>247</sup> See Sara Brumfield, *Teacher's Allergy Disrupts Plans for Autistic Girl, Service Dog*, THE ATHENS MESSENGER (Aug. 23, 2013), [http://www.athensmessenger.com/news/teacher-s-allergy-disrupts-plans-for-autistic-girl-service-dog/article\\_5b4859e2-a4b1-568a-adb8-acc649e08556.html](http://www.athensmessenger.com/news/teacher-s-allergy-disrupts-plans-for-autistic-girl-service-dog/article_5b4859e2-a4b1-568a-adb8-acc649e08556.html); see also Mary Beth Lane, *Autistic Girl in Athens Told to Transfer Schools Over Service Dog*, THE COLUMBUS DISPATCH (Aug. 23, 2013), <http://www.dispatch.com/content/stories/local/2013/08/23/autistic-girl-in-athens-told-to-transfer-schools-over-service-dog.html> (reporting on dispute between student and teacher); Jim Phillips, *Dispute Over Student's Service Dog Gets Big*

parties articulated that they felt the law supported their position, they came to resolution within a few weeks of the story being released to the media.<sup>248</sup> Another example occurred in 2011 when in Fairfax County, Virginia, school officials agreed to allow an epileptic twelve-year-old boy to bring his service animal to school after the family appeared on the *TODAY* Show.<sup>249</sup>

Given these governmental actions and the recent cases, it appears that school districts continue to struggle to determine the actions they must take to assist students utilizing service animals.<sup>250</sup> Arguments by school districts that there must be exhaustion of administrative remedies under the IDEA is likely to delay any consideration of ADA claims in court, especially in the states falling within the Second and Sixth Circuits given the appellate decisions in those circuits.<sup>251</sup>

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*Attention in Media*, THE ATHENS NEWS (Aug. 25, 2103), [http://www.athensnews.com/news/local/dispute-over-student-s-service-dog-gets-big-attention-in/article\\_e6d9730d-b8ac-5e56-bbfd-7ccf71085566.html](http://www.athensnews.com/news/local/dispute-over-student-s-service-dog-gets-big-attention-in/article_e6d9730d-b8ac-5e56-bbfd-7ccf71085566.html) (reporting on media attention); Arian Smedley, *Girl with Autism and Service Dog to Attend Beacon School*, THE ATHENS MESSENGER (Sept. 4, 2013), [http://www.athensmessenger.com/news/girl-with-autism-and-service-dog-to-attend-beacon-school/article\\_e926a2f1-c2e9-5b1b-85ac-63be7a503ebb.html](http://www.athensmessenger.com/news/girl-with-autism-and-service-dog-to-attend-beacon-school/article_e926a2f1-c2e9-5b1b-85ac-63be7a503ebb.html) (reporting on dispute and resolution).

<sup>248</sup> Phillips, *supra* note 247 (discussing the media attention to the issue); Smedley, *supra* note 247 (discussing resolution of conflict allowing student with service dog to attend a different school than what was initially proposed).

<sup>249</sup> See, e.g., *School to Allow 12-Year-Old Epileptic Boy's Service Dog*, TODAY (Jan. 4, 2011), [http://www.today.com/id/40918878/ns/today-today\\_health/t/school-allow-year-old-epileptic-boys-service-dog/#.VYGyXesqcyE](http://www.today.com/id/40918878/ns/today-today_health/t/school-allow-year-old-epileptic-boys-service-dog/#.VYGyXesqcyE) (discussing resolution of dispute in Fairfax County, Virginia, where a school agreed to allow a service dog at school on a trial basis after the family appeared on a network morning news program). Reportedly the school district's policy at the time required the dog be trained by a specific training school. *Id.* The current regulations of the ADA only require that a dog be "individually trained"—not that a dog be trained by a specific facility or any professional facility at all. 28 C.F.R. § 35.104 (2014); 28 C.F.R. § 36.104 (2014). The current Fairfax County Public School policy does not include that limitation. See Fairfax County Public Schools, *Regulation 2125, Special Services, Health and Welfare, Animals on School Property and Other Fairfax County Public Schools (FCPS) Buildings*, [http://www.boarddocs.com/vsba/fairfax/Board.nsf/files/8R5LR257BA5C/\\$file/R2125.pdf](http://www.boarddocs.com/vsba/fairfax/Board.nsf/files/8R5LR257BA5C/$file/R2125.pdf).

<sup>250</sup> See *supra* notes 29–170 and accompanying text.

<sup>251</sup> See, e.g., *GM v. Massapequa Union Free Sch. Dist.*, No. 14-CV-4126(JS), 2015 WL 4069201, at \*3–5 (E.D.N.Y. July 2, 2015) (citing to the Second Circuit *Cave* case, discussed *supra* note 54, among others to find that the federal claims a student brought relating to his treatment at school would be subject to the IDEA administrative exhaustion requirement and thus those claims would be dismissed); *Donoho v. Smith Cty Bd. of Educ.*, 21 Fed. Appx. 293, 294–99 (6th Cir. 2001) (affirming the dismissal of the case in the lower court for failure to exhaust and discussing the exhaustion requirement and characterizing the exceptions to

However, based on the documents memorializing their administrative activities, in the DOE and DOJ's view, Section 504 and the ADA may act as an independent basis for bringing a complaint.<sup>252</sup> In addition, when applying the ADA, the federal agencies distinguished between the role of handler and what a layperson may consider the caretaker of a service dog.<sup>253</sup> In multiple situations, the students were already provided significant support from aides, and it may be viewed as just another reasonable accommodation for such aides to assist with the service dog.<sup>254</sup>

#### IV. STATE LAWS PROVIDING ACCESS FOR STUDENTS UTILIZING SERVICE DOGS<sup>255</sup>

Because of the possible intersection of the IDEA and ADA (thus the likelihood a school district will raise the exhaustion of administrative remedies argument), and exceptions in the ADA regulations regarding access for students with service animals, individuals may utilize state laws to demand access for their service animals in schools.<sup>256</sup> This Part will discuss various ways state laws can provide a remedy in addition to the federal laws discussed above.

An individual may rely on a general access provision regarding persons with disabilities having the right to be accompanied by a

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the requirement as narrow). The Second Circuit consists of the states of New York, Vermont, and Connecticut, and the Sixth Circuit consists of the states of Michigan, Ohio, Kentucky, and Tennessee. *Geographical Boundaries of the United States Courts of Appeals and United States District Courts*, U.S. COURTS, [www.uscourts.gov/file/document/us-federal-courts-circuit-map](http://www.uscourts.gov/file/document/us-federal-courts-circuit-map) (last visited July 8, 2015).

<sup>252</sup> See *supra* notes 189–241 (discussing administrative activities).

<sup>253</sup> See, e.g., *Alboniga v. Sch. Bd. of Broward Cnty. Fla.*, 87 F. Supp. 3d 1319, 1341–44 (S.D. Fla. 2015) (discussing the DOJ's guidance, the ADA regulations, and the difference between handling and control, and care and supervision).

<sup>254</sup> See, e.g., *id.* at 1344.

<sup>255</sup> This Article is providing information on some of the state laws in existence at the time of the writing of the article in June 2015, and readers are cautioned that these laws can change significantly within a short time. A good starting point for reviewing state laws on service animals can be found at the website of the Animal Legal & Historical Center based at Michigan State University. It publishes a table of state statutes. Rebecca F. Wisch, *Table of Assistance Animal Laws*, MICH. STATE UNIV., ANIMAL LEGAL & HISTORICAL CTR., <https://www.animallaw.info/topic/table-state-assistance-animal-laws> (2014).

<sup>256</sup> See, e.g., *supra* note 251 and accompanying text (discussing challenge of exhaustion requirements in 6th and 2nd Circuits).

service animal.<sup>257</sup> In addition, a number of states have passed legislation specifically allowing for students to be accompanied by their service animals in schools.<sup>258</sup>

### A. General State Laws

Several state laws providing persons with disabilities with access include in a list of the types of entities that must provide a reasonable accommodation for “educational institutions.”<sup>259</sup> In the State of Virginia, the addition of such language led to the Virginia Department of Education issuing comprehensive guidelines for service animals in schools.<sup>260</sup>

Some states have language in their statutes that could be used to strengthen an argument that the intent of the legislature is to allow for students to be accompanied by their service animals in schools.<sup>261</sup> For example, California law states, “service dogs trained to provide assistance to individuals with a disability may be transported in a schoolbus [sic] when accompanied by disabled pupils enrolled in a public or private school.”<sup>262</sup> Although there is no language in the general access provision referencing public schools,<sup>263</sup> logically why would a student be allowed to transport his or her service dog on a school bus if the dog was not allowed to be

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<sup>257</sup> See *infra* notes 259–70 and accompanying text. See generally David R. Hill et al., *Students with Autism, Service Dogs, and Public Schools: A Review of State Laws*, 25 J. DISABILITY POL’Y STUD. 106 (2014) (reviewing state laws as they relate to autism service animals).

<sup>258</sup> See *infra* notes 271–99 and accompanying text.

<sup>259</sup> *E.g.*, N.H. REV. STAT. ANN. § 167-D:1 (2015) (listing as a place of public accommodation “any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the state board of education, or the commissioner of education in the state of New Hampshire); VA. CODE ANN. § 51.5-44 (2015) (listing “public entities including schools”); VT. STAT. ANN. tit. 9 § 4501 (2015) (places of public accommodation “means any school. . .”); WASH. REV. CODE ANN. § 49.60.040(2) (LexisNexis 2015) (listing as a place of public accommodation an educational institution). Note that it is not uncommon to exclude educational facilities that are operated by “a bona fide religious or sectarian institution” from the types of entities that must accommodate service animals. See, *e.g.*, N.H. REV. STAT. ANN. § 167-D:3 (2015).

<sup>260</sup> See Va. Dep’t of Educ., *Guidelines for School Division Policy and Procedures Regarding Service Animals in Virginia Schools*, [http://www.doe.virginia.gov/special\\_ed/tech\\_asst\\_prof\\_dev/guidance\\_service\\_dog.pdf](http://www.doe.virginia.gov/special_ed/tech_asst_prof_dev/guidance_service_dog.pdf) (last visited June 18, 2015). For a detailed discussion of those guidelines. See Huss, *Classroom*, *supra* note 3, at 46–49.

<sup>261</sup> See *infra* notes 262–66 and accompanying text.

<sup>262</sup> CAL. EDUC. CODE § 39839 (West 2015).

<sup>263</sup> See CAL. CIV. CODE § 54.1 (West 2015) (listing private schools).



in the classroom as well?<sup>264</sup> Another example would be state laws where “autism service dog” is included in the type of service animal or when defining individuals with disabilities, including autism in the description.<sup>265</sup> By recognizing the validity of autism service animals, an argument can be made that individuals utilizing such dogs should have equal access to accommodations.<sup>266</sup>

The ability to “cobble together” an argument that is complicated by the fact that state laws can change quickly and there is not always consistency within the statutes.<sup>267</sup> For example, although the State of Indiana’s code includes “autism service animal” language, it was recently revised to delete educational institutions from the list of establishments required to allow persons with disabilities to be accompanied by their service animals.<sup>268</sup> Thus, by leaving out or removing schools from the list of establishments, a negative inference could be made as well.<sup>269</sup> Note that there may be an intersection of special education laws and general access laws at the state level that could complicate the analysis.<sup>270</sup>

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<sup>264</sup> See, e.g., CAL. PENAL CODE § 365.5 (West 2015) (listing private schools as a type of public accommodation).

<sup>265</sup> See, e.g., Bill Text IN H.B. 1603 (2009) (including in the definition of service animal “an animal trained as an autism service animal”); LA. REV. STAT. ANN. § 46:1952 (2014) (defining a service dog as including “an autism service dog”); OHIO REV. CODE ANN. § 955.011 (LexisNexis 2015) (including in the definition of mobility impaired person a person diagnosed with autism). *But see infra* note 267 and accompanying text (discussing recent changes to the Indiana law).

<sup>266</sup> See, e.g., LA. REV. STAT. ANN. § 46:1952 (2014) (defining a service dog as including “an autism service dog”).

<sup>267</sup> See, e.g., 2015 IND. LEGIS. SERV. P.L. 233-2015 (S.E.A. 500) (West); IND. CODE ANN. § 16-32-3-2 (West 2015) (showing a recent change in the state law).

<sup>268</sup> As part of a comprehensive deregulation of education, the State of Indiana removed schools from the list of public accommodations that are required to provide access to persons with disabilities. 2015 IND. LEGIS. SERV. P.L. 233-2015 (S.E.A. 500) (West) (removing a list of educational facilities from the establishments considered public accommodations in IND. CODE ANN. § 16-32-3-2 (West 2015)).

<sup>269</sup> See 2015 IND. LEGIS. SERV. P.L. 233-2015 (S.E.A. 500) (West); IND. CODE ANN. § 16-32-3-2 (West 2015).

<sup>270</sup> See, e.g., VT. STAT. ANN. tit. 9 § 4502(g) (2015) (stating that the chapter regarding public accommodations shall not apply to “special education claims and issues covered by federal and State special education laws, regulations, and procedures”).

*B. State Laws Specifically Allowing for Service Animal Access in Schools*

1. Illinois

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.”<sup>271</sup> If a purported service animal does not “perform tasks” for a student, a school district could refuse to permit the animal access to the school.<sup>272</sup> The Illinois law was analyzed in two cases decided in 2009 and 2010.<sup>273</sup>

In the *Kalbfleisch* case, the parents of a student with autism successfully sued based on the Illinois law for a preliminary injunction to compel the school district to allow the student to bring his service animal to school.<sup>274</sup> The *Kalbfleisch* case was initially filed in state court; the school district successfully removed the case to federal court, and the federal court remanded the case back to state court.<sup>275</sup> The federal district court found that remand back to state court was appropriate because it determined the complaint was based on Illinois state law and 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,” thus the school district’s preemption argument failed.<sup>276</sup> Upon remand, the state appellate court affirmed the circuit court’s grant of the preliminary injunction.<sup>277</sup> In addition to analyzing whether the *Kalbfleisch*s had met the standards to support the preliminary injunction, the Illinois appellate court rejected the school district’s argument that it was necessary to exhaust administrative remedies because the lower court found that the student “would be subject to irreparable harm and that any other process would be inadequate due to time

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<sup>271</sup> 105 ILL. COMP. STAT. § 5/14-6.02 (2015).

<sup>272</sup> 28 C.F.R. § 35.104 (2014); 28 C.F.R. § 36.104 (2014); see Huss, *Context, supra* note 6, at 1175–79 (discussing the “perform task” language in the ADA regulations).

<sup>273</sup> *K.D. v. Villa Grove Cmty. Unit Sch. Dist. No. 302 Bd. of Educ.*, 936 N.E.2d 690, 692 (Ill. App. Ct. 2010); *Kalbfleisch v. Columbia Cmty. Unit Sch. Dist. Unit No. 4*, 920 N.E.2d 651, 654 (S.D. Ill. 2009).

<sup>274</sup> *Kalbfleisch v. Columbia Cmty. Unit Sch. Dist. No. 4*, 644 F. Supp. 2d 1084, 1086 (S.D. Ill. 2009).

<sup>275</sup> *Id.*

<sup>276</sup> *Kalbfleisch*, 644 F. Supp. 2d at 1089–90.

<sup>277</sup> *Kalbfleisch*, 920 N.E.2d at 664.

constraints.”<sup>278</sup>

In *K.D. v. Villa Grove Community Unit School Dist. No. 302 Board of Education*, the Illinois appellate court affirmed a circuit court decision ordering a school district to allow a child with autism (Kaleb Drew) to be accompanied by his service dog, Chewey, at school.<sup>279</sup> As with the *Kalbflesich* case, the Villa Grove School District (“Villa Grove”) argued that Kaleb (through his parents) was required to exhaust his administrative remedies before he could bring the suit.<sup>280</sup> The *Villa Grove* court rejected this argument stating the “case at bar presents a single question: whether Chewey constitutes a service animal under the Illinois School Code, a matter irrelevant to any educational benefit he provides [Kaleb].”<sup>281</sup> The Illinois appellate court established that Chewey was a service animal that was individually trained to perform tasks for Kaleb, even if Chewey’s behavior had varied from his training as the statute “does not specify service animals must behave perfectly at all times.”<sup>282</sup> Of special note, given the recent cases based on the ADA concerning the status of a student acting as a handler, the *Villa Grove* court found that the Illinois statutory language stating a service animal may “accompany” a student did not require the student “control” the service animal and, thus, it was not necessary that Kaleb control or handle Chewey.<sup>283</sup>

A December 2014 Impartial Due Process Hearing Decision by the Illinois State Board of Education illustrates that even with access guaranteed by the Illinois law, integrating a service dog into a school can be challenging.<sup>284</sup> This decision documents conflicts a student had with a teacher who also utilized a service animal, based on the teacher’s belief that the student’s service dog was not

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<sup>278</sup> *Id.* at 658. For a more detailed account of the *Kalbfleisch* case, see Huss, *Classroom*, *supra* note 3 at 40–45.

<sup>279</sup> *K.D. v. Villa Grove Cmty. Unit Sch. Dist. No. 302 Bd. of Educ.*, 936 N.E.2d 690, 692 (Ill. App. Ct. 2010); Zach Miners, *For Students with Autism, Having Service Animal in School is ‘Lifesaver’*, U.S. NEWS & WORLD REPORT (Nov. 25, 2009, 9:00 AM), <http://www.usnews.com/education/articles/2009/11/25/for-student-with-autism-having-service-animal-in-school-is-lifesaver> (identifying student in case and discussing lower court ruling).

<sup>280</sup> *Villa Grove*, 936 N.E.2d at 697.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 699.

<sup>283</sup> *Id.* at 699–700.

<sup>284</sup> See Kellsey McGuire, ISBE Case No. 2014-0396, 2–3, 7–9, 37, (Illinois State Board of Education December 18, 2014) (final determination and order), <https://localtvwqad.files.wordpress.com/2014/12/click-here-to-read-the-illinois-board-of-education-decision-regarding-jasper-the-sherrard-service-dog1.pdf> [hereinafter Sherrard Hearing Decision].

properly trained.<sup>285</sup> Among other remedies, the school district was ordered to reimburse the parents for tuition costs incurred when they decided to send the student to a private school after the dog was banned from the school.<sup>286</sup> As of April 2015, the school district was continuing to appeal the decision.<sup>287</sup>

## 2. New Jersey

The New Jersey legislature included legislative findings and declarations when it adopted language regarding service animals in schools that became effective in January 2012.<sup>288</sup> It states:

in addition to their traditional roles, service animals can be trained to be a calming influence and provide a connection to the familiar in unfamiliar surroundings for students with autism or other developmental disabilities; under the federal Americans with Disabilities Act of 1990, service animals are permitted in schools, . . . allowing a student with autism or other disability to bring a service animal to class and on school grounds will enhance the learning process and help the student reach his full academic potential.<sup>289</sup>

When the New Jersey governor signed the legislation, he raised a concern about allergies:

I am concerned about the well-being [sic] of children who may be allergic to service animals that are brought into a classroom. It is one of the highest priorities of this Administration that all children are afforded a safe and comfortable environment in which to be educated. Therefore, I urge school districts to make reasonable accommodations for children who suffer from allergies to animals, and who may be affected by the introduction of a service animal into the classroom. With the expectation for these accommodations, I am hereby signing the bill.<sup>290</sup>

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<sup>285</sup> *Id.* at 3, 7–9. The Sherrard Hearing Decision’s facts indicate that the teacher had animosity towards the student’s service dog because she trained dogs with a competing service animal training entity. *Id.* at 8–9. After the student’s service dog growled or barked at the teacher, the dog was banned from the school. *Id.* at 9.

<sup>286</sup> *Id.* at 37–38.

<sup>287</sup> Chris Minor, *Sherrard Superintendent Defends Decision to Appeal Service Dog Dispute*, WQAD8 (Apr. 15, 2015, 4:43 PM), <http://wqad.com/2015/04/15/sherrard-superintendent-defends-decision-to-appeal-service-dog-dispute/> (reporting that the school district was continuing to appeal and that the legal fees for the school district to date were about \$100,000).

<sup>288</sup> N.J. STAT. ANN. § 18A:46-13.2 (West 2015).

<sup>289</sup> N.J. STAT. ANN. § 18A:46-13.2 (West 2015).

<sup>290</sup> N.J. STAT. ANN. § 18A:46-13.2 (West 2015); see N.J. STAT. ANN. § 18A:46-13.2 Editors’ Notes (West 2015) (Governor Chris Christie’s statement upon signing Senate Bill No. 1797—L.2011. c.156).

The DOJ has clearly stated concerns over allergies or fear of dogs are not valid reasons to deny access to an individual utilizing a service animal under the ADA.<sup>291</sup> In the event there is an individual with allergies (whose condition rises to the level that it is considered a disability) in the same location as an individual utilizing a service animal, the DOJ has asserted that both individuals must be accommodated.<sup>292</sup>

The New Jersey provision was revised to add “school buses” (effective March 23, 2015) and currently states a “student with a disability, including autism, shall be permitted access for a service animal in school buildings, including the classroom, on school buses, and on school grounds.”<sup>293</sup> The New Jersey legislation includes language that parallels the ADA regulations in many ways; however, it also provides that school officials may require:

“(1) certification from a veterinarian that the service animal is properly vaccinated and does not have a contagious disease that may harm students or staff; and

(2) documentation that any license required by the municipality in which the student resides has been obtained for the service animal.”<sup>294</sup>

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<sup>291</sup> Dep’t of Justice, Civil Rights Div., *ADA Requirements, Service Animals*, ADA.GOV [http://www.ada.gov/service\\_animals\\_2010.htm](http://www.ada.gov/service_animals_2010.htm) (last visited June 25, 2015).

<sup>292</sup> *Id.* A possible accommodation in a school environment would be to assign the individuals to different rooms within the facility. *Id.* A redacted Resolution Agreement with the DOE OCR supports this analysis by requiring:

the District will revise its Service Animal Policy to ensure that it complies with the requirements of Section 504 and Title II by including the following: (a) Allergies and fear of dogs is not a valid reason(s) for denying access or refusing service to persons with service animals. For example, in a classroom, they both should be accommodated by assigning them, if possible, to different locations within the room or different rooms in the facility.

Resolution Agreement Between Department of Education, Office for Civil Rights and XXX County School District (OCR Docket Number 04-13-1318) (April 2, 2014),

<http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/04131318-b.pdf> (last visited June 26, 2015). See generally Huss, *Classroom*, *supra* note 3, at 19–22 (discussing the issue of allergies in a school environment).

<sup>293</sup> N.J. STAT. ANN. § 18A:46-13.3(a) (West 2015).

<sup>294</sup> N.J. STAT. ANN. § 18A:46-13.3(b) (West 2015). The remaining statutory language is:

The service animal shall be under a handler’s control at all times by use of a leash, tether, voice control, signal, or other suitable means. The school shall not be responsible or liable for the care or supervision of the service animal. The school shall provide reasonable accommodations to allow the handler to provide for the care and feeding of the service

### 3. Alabama

Alabama law provides language that directly addresses the issue of whether an aide for a student may assist the student in handling the service animal.<sup>295</sup> The Alabama law states:

Every person with a disability, including a person who is totally or partially blind, hearing-impaired, or diagnosed on the autism spectrum shall have the right to be accompanied by a service animal in any public place, including a public or private school, . . . . In the case of a disabled child, including a child diagnosed on the autism spectrum, any aide assigned to assist the child shall be trained with the service animal in basic commands in order to assist the child as a team.<sup>296</sup>

### 4. Georgia

One of the challenges of utilizing a state law is that the covered class of persons with disabilities may be narrower than in the ADA.<sup>297</sup> For example, the general accommodation provision of the Georgia law, states: “[i]n addition, if such totally or partially blind person, physically disabled person, or deaf person is a student at a private or public school in this state, such person shall have the right to be accompanied by a guide dog or service dog.”<sup>298</sup> State laws can also narrow accommodation of service dogs in other ways. Georgia law requires that the “guide dog or service dog must be identified as having been trained by a school for seeing eye, hearing, service, or guide dogs.”<sup>299</sup>

The recent adoption of state laws specifically allowing students

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animal while on school grounds or at a school function.

N.J. STAT. ANN. § 18A:46-13.3(c) (West 2015).

<sup>295</sup> ALA. CODE § 21-7-4 (2011).

<sup>296</sup> ALA. CODE § 21-7-4(b) & (e) (2011).

<sup>297</sup> See, e.g., MISS. CODE ANN. § 37-7-342 (2015) (authorizing service animals utilized to detect illnesses such as diabetes and epilepsy in schools). The Mississippi statute also provides that school administrators should “develop a plan designed to educate other students of appropriate behavior in the presence of such dogs, as well and the proper handling of such dogs in the presence of those students who may have an allergic reaction to the dog . . . .” § 37-7-342

<sup>298</sup> GA. CODE ANN. § 30-4-2(b)(1) (2015). Note the Georgia statute provides that the person utilizing the service animal will be liable for “any damage done to the premises or facilities by such dog.” § 30-4-2(b)(1)

<sup>299</sup> § 30-4-2(b)(1) In contrast, the ADA only requires a service animal be individually trained and does not have any additional identification requirement. See *supra* notes 25–30 and accompanying text (discussing the definition of service animal in the ADA regulations); see also *Frequently Asked Questions About Service Animals*, *supra* note 131.

to be accompanied by their service animals illustrates the importance that these animals play in the lives of juveniles.<sup>300</sup> In jurisdictions where these laws can be used, advocates should consider bringing any claims based on the state, rather than federal, law.

#### CONCLUSION

As demonstrated by the recent cases, agency actions and legislation in this area of the law, the issue of allowing a student to be accompanied by a service dog in school remains complex. Parents and school officials should be aware of the continuing possibility of a barrier to access until the time that the IDEA administrative remedies have been exhausted—at least in some areas of the country. However, even in those geographic areas, at some point in time, exhaustion of administrative remedies will occur and the issue of whether a student utilizing a service animal must be accommodated under the ADA will need to be addressed.

Before parents and advocates acquire a service animal to assist a child with a disability, they should consider whether the placement is appropriate and safe for the animal both in the school and home environment.<sup>301</sup> Will such animal meet the definition of service animal set forth in the ADA? If an animal is not individually trained to do work or perform tasks for the child (instead acts “merely” as an emotional support animal) the dog does not meet the definition of service animal and it is not an ADA accommodation issue.<sup>302</sup> Advocates should be prepared to engage in a possible lengthy process to ensure the service animal is able to accompany the child to school.<sup>303</sup> Are the parents willing to give up their and their child’s privacy if media attention occurs and they believe it would be helpful to their cause?<sup>304</sup> Many school districts

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<sup>300</sup> See *supra* notes 271–99 and accompanying text.

<sup>301</sup> See Huss, *Classroom*, *supra* note 3 at 13–19 (discussing issues regarding partnering service animals with children).

<sup>302</sup> See *supra* notes 25–28 and accompanying text (providing the definition of service animal).

<sup>303</sup> See, e.g., *Alboniga v. Sch. Bd. Of Broward County Fla.*, 87 F. Supp. 3d 1319, 1323, 1324 (S.D. Fla. 2015) (discussing the multiple attempts over several years that the child’s mother took to assure that her son, a child with multiple disabilities, was receiving accommodation regarding his service dog).

<sup>304</sup> It is possible to keep the name of the child private; however, as seen in many of the cases and agency actions discussed herein, often the parents choose to personalize the story. See, e.g., *Miners*, *supra* note 279 (the full name of the child “Kaleb Drew” was allowed to be used in the media).

have established policies that set forth a process by which students may be accompanied by service dogs at school.<sup>305</sup> If a school district's policy is not consistent with the ADA regulations and it is not changed when problems are brought to its attention, advocates should consider making a complaint to the Department of Education's Office for Civil Rights or Department of Justice, Civil Rights Division before considering litigation.<sup>306</sup>

School districts should be proactive in putting policies in place that ensure that they are complying with the revised ADA regulations and carefully consider the federal agencies' interpretations of the extent to which service animals must be accommodated. It can be costly, from both a time and financial perspective, to deny a student utilizing a service animal access to a school. There is no doubt that ensuring all students receive a free appropriate public education is extremely challenging for school districts. However, as a representative of the DOJ's Civil Rights Division stated in 2014: "[t]he Civil Rights Division will vigorously enforce the ADA to ensure that students who use service animals have a full and equal opportunity to participate in all school activities with their peers."<sup>307</sup> Given the recent strong and consistent positions by the DOE and DOJ supporting allowing students to utilize service animals in schools, even in situations where the student at issue may need assistance in handling the service dog, school districts should evaluate whether it is more effective to make the accommodation rather than engage in a battle with a federal agency, in court and in the media.

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<sup>305</sup> *E.g.*, Fairfax County Public Schools, *supra* note 249 (setting for the policy regarding animals and service animals for Fairfax County Schools).

<sup>306</sup> See generally U. S. Dep't of Justice, Civil Rights Div., *How to File an ADA Complaint with the U.S. Department of Justice*, ADA.GOV, [http://www.ada.gov/filing\\_complaint.htm](http://www.ada.gov/filing_complaint.htm) (last visited Feb. 6, 2016) (describing procedure for complaints and subsequent department action); U.S. Department of Education *OCR Complaint Process*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/complaintprocess.html> (last visited Feb. 6, 2016) (providing information about the complaint process).

<sup>307</sup> Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, New Jersey School District to Adopt Service Animal Policies and Pay Fine to Resolve Justice Department Investigation, (June 24, 2014), <http://www.justice.gov/opa/pr/new-jersey-school-district-adopt-service-animal-policies-and-pay-fine-resolve-justice> (quoting Acting Attorney General for the Civil Rights Division Jocelyn Samuels in connection with the Delran Settlement Agreement discussed *supra* notes 190–200 and accompanying text).