

## NOTE

### GROOMING DOGS FOR THE EDUCATIONAL SETTING: THE “IDEIA” BEHIND SERVICE DOGS IN THE PUBLIC SCHOOLS

#### I. INTRODUCTION

Service dogs traditionally have been used to guide people with visual impairments, acting as their “eyes” and helping them to independently perform daily functions.<sup>1</sup> However, service dogs are also valuable for people with other types of disabilities, including hearing impairments,<sup>2</sup> autism spectrum disorder,<sup>3</sup> seizure disorders,<sup>4</sup> and physical handicaps.<sup>5</sup> For students with disabilities, service dogs can help them become more independent,<sup>6</sup> improve their focus,<sup>7</sup> help them socialize,<sup>8</sup> and ensure their safety.<sup>9</sup> Despite the positive impact service

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1. See Rebecca J. Huss, *Why Context Matters: Defining Service Animals Under Federal Law*, 37 PEPP. L. REV. 1163, 1167 (2010).

2. See *Cave v. E. Meadow Union Free Sch. Dist.*, 480 F. Supp. 2d 610, 619 (E.D.N.Y. 2007) (noting the testimony of the plaintiff describing how a service dog may alert a child of sounds that he otherwise cannot hear).

3. Danny Schoenbaechler, *Autism, Schools, and Service Animals: What Must and Should Be Done*, 39 J.L. & EDUC. 455, 459-60 (2010) (describing how service dogs provide education and safety benefits for children with autism).

4. Michael Inbar, *School Bars 12-Year-Old Epileptic Boy's Service Dog*, TODAY (Jan. 4, 2011, 10:11:22 AM), [http://today.msnbc.msn.com/id/40907000/ns/today-today\\_health/](http://today.msnbc.msn.com/id/40907000/ns/today-today_health/) (discussing how a student with a rare and severe form of epilepsy uses a service dog to identify seizures and keep him safe while seizing).

5. Jennie Dapice, *Service Dogs and People with Limb Loss*, INMOTION, May-June 2007, at 26, available at [http://www.amputee-coalition.org/inmotion/may\\_jun\\_07/service\\_dogs.html](http://www.amputee-coalition.org/inmotion/may_jun_07/service_dogs.html) (noting that service dogs are helpful for individuals with limb loss).

6. See *Branson v. West*, No. 97 C 3538, 1999 WL 1186420, at \*4 (N.D. Ill. Dec. 10, 1999) (describing how a service animal helps a woman in a wheelchair be more independent by retrieving items and bracing for her when she transfers from her wheelchair to her bed).

7. See *Kalbfleisch v. Columbia Cmty. Unit Sch. Dist. Unit No. 4*, 920 N.E.2d 651, 656 (Ill. App. Ct. 2009) (describing how a service dog stopped a child with autism from “stimming by batting him with his nose,” allowing the child to maintain focus).

8. See Bonnie Mader et al., *Social Acknowledgements for Children with Disabilities: Effects of Service Dogs*, 60 CHILD DEV. 1529, 1531 (1989) (describing the results of a study indicating that children who were observed with service dogs received more social interaction by passersby than those children without a service dog).

9. See *K.D. v. Villa Grove Cmty. Unit Sch. Dist. No. 302 Bd. of Educ.*, 936 N.E.2d 690, 694 (Ill. App. Ct. 2010) (describing testimony about a dog who prevented an autistic child from running away); *Kalbfleisch*, 920 N.E.2d at 656 (discussing how a dog physically took a child down when he

dogs have on students with disabilities, many public primary and secondary schools across the country have refused to allow a service dog to accompany a student at school.<sup>10</sup> School districts argue that because a student with a disability is already receiving special services and accommodations pursuant to his or her individualized education program (“IEP”),<sup>11</sup> the service dog is unnecessary for the student to receive an “appropriate” education.<sup>12</sup> Although some students with disabilities have sought relief through administrative hearings and the court system to address this issue,<sup>13</sup> there is no clear test for schools to follow to determine whether a service dog is necessary for a student to receive an “appropriate” education.<sup>14</sup>

Under the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA”),<sup>15</sup> all children with disabilities must be provided a free appropriate public education (“FAPE”).<sup>16</sup> Determining whether the use of a service dog is “appropriate” for a student with a disability is difficult because it involves an analysis of whether the service dog provides an educational benefit.<sup>17</sup> This begs the question of where to draw the line between students with disabilities who need a service dog to receive a FAPE and those who can receive a FAPE by alternate means.

This Note will examine the history and purpose of both special education legislation and service dogs as a means of determining whether—or when—use of a service dog is “appropriate.” In Part II, this Note will discuss the history and development of special education law, including the IDEIA and the concept of a FAPE. In Part III, this Note

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attempted to run into traffic, and as a result, the child no longer ran into traffic).

10. See, e.g., *Cave v. E. Meadow Union Free Sch. Dist.*, 480 F. Supp. 2d 610, 615 (E.D.N.Y. 2007).

11. An IEP is “a written statement for each child with a disability that is developed, reviewed, and revised in accordance with [the Individuals with Disabilities Education Improvement Act].” Individuals with Disabilities Education Improvement Act, 20 U.S.C. § 1414(d)(1)(A)(i) (2006). The IEP is the “centerpiece” of the Individuals with Disabilities Education Improvement Act and is “designed to provide a road map for the child’s educational programming during the course of the coming year.” THOMAS F. GUERNSEY & KATHE KLARE, *SPECIAL EDUCATION LAW* 109 (3d ed. 2008).

12. See *infra* Part IV.D (discussing school districts’ arguments against permitting the use of service dogs).

13. See, e.g., *Cave*, 480 F. Supp. 2d at 615; *Bakersfield (CA) City Sch. Dist.*, 50 IDELR (LRP) 747, 747 (Dep’t of Educ., Off. of C.R. Jan. 25, 2008).

14. See *infra* Part IV.

15. See Individuals with Disabilities Education Improvement Act, 20 U.S.C. §§ 1400-1482.

16. 20 U.S.C. § 1412(a)(1)(A).

17. The Supreme Court has determined that an “appropriate” education is one that provides an educational benefit. See *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 201 (1982). Specialized educational services are not required to maximize the child’s potential. See *id.* at 198.

will discuss the purposes of using a service dog and the benefits experienced by students with disabilities who use service dogs. In Part IV, this Note will discuss and evaluate cases involving students who were not allowed to bring their service dogs to school. In Part V, this Note proposes that the related services definition of the IDEIA should be amended to include a service animal as a related service. By specifically recognizing service animals as a related service, schools will be compelled to consider whether a service dog is necessary for a student with a disability to receive an "appropriate" education. Further, this Note will propose that, independent of the IDEIA, modifications should be made to both state statutes and school policies to permit the use of service animals for students with disabilities that traditionally did not require use of service animals. Part VI concludes that, without these changes, students with disabilities will continue to face unwarranted challenges when seeking to bring their service animal to school. The proposed amendments will make it easier to show the educational benefit the service animal provides and how the student needs the service animal to receive a FAPE.

## II. THE ABCS OF SPECIAL EDUCATION LEGISLATION

Before 1975, students with disabilities were routinely excluded from schools because the states were not required to provide them with special education services.<sup>18</sup> Legislation protecting individuals with disabilities was a result of the civil rights movement.<sup>19</sup> In *Brown v. Board of Education*,<sup>20</sup> the Supreme Court articulated that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education" and that this "opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."<sup>21</sup> By establishing that American public schools were open to *all* students, *Brown* paved the way for students with disabilities to receive a public education.<sup>22</sup>

It was not until the early 1970s that progress was made in securing the right to receive a public education for students with disabilities.<sup>23</sup> In

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18. ALLAN G. OSBORNE, JR. & CHARLES J. RUSSO, *SPECIAL EDUCATION AND THE LAW: A GUIDE FOR PRACTITIONERS* 6 (2003).

19. See PAUL T. JAEGER & CYNTHIA ANN BOWMAN, *DISABILITY MATTERS: LEGAL AND PEDAGOGICAL ISSUES OF DISABILITY IN EDUCATION* 5-6 (2002).

20. 347 U.S. 483 (1954).

21. *Id.* at 493.

22. See JAEGER & BOWMAN, *supra* note 19, at 6.

23. GUERNSEY & KLARE, *supra* note 11, at 5.

*Pennsylvania Ass'n for Retarded Children v. Pennsylvania*,<sup>24</sup> the court held it was unconstitutional for students classified with mental retardation to be excluded from public school.<sup>25</sup> This groundbreaking decision established that all students must be provided a free appropriate education and inspired disability rights groups throughout the country to file similar suits against their state governments.<sup>26</sup> Following this decision, the court in *Mills v. Board of Education*<sup>27</sup> held that exclusion of children with disabilities from educational programming denied these children due process and equal protection of the law.<sup>28</sup> In addition, the *Mills* Court declared that insufficient resources must not be used as the basis for exclusion.<sup>29</sup> These two pivotal decisions were followed by the enactment of federal legislation providing educational rights for students with disabilities.

Section A of this Part will discuss the IDEIA and the laws that schools must follow when educating students with disabilities. Section B will address the No Child Left Behind Act<sup>30</sup> and its subsequent impact on the IDEIA. Section C will explore how federal legislation protecting individuals with disabilities, namely the Rehabilitation Act of 1973<sup>31</sup> and the Americans with Disabilities Act,<sup>32</sup> also impacted students.

#### A. *Individuals with Disabilities Education Improvement Act*

The IDEIA is the federal law that governs how states must provide special education to students with disabilities.<sup>33</sup> The purpose is “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.”<sup>34</sup> The IDEIA was originally passed in 1975 as the Education for All Handicapped Children Act.<sup>35</sup> The Education for All Handicapped

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24. 343 F. Supp. 279 (E.D. Pa. 1972).

25. *Id.* at 302.

26. See JAEGER & BOWMAN, *supra* note 19, at 6.

27. 348 F. Supp. 866 (D.D.C. 1972).

28. *Id.* at 875.

29. *Id.* at 876 (“The inadequacies of the District of Columbia Public School System, whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the ‘exceptional’ or handicapped child than on the normal child.”).

30. No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301-7916 (2006).

31. Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (2006).

32. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2006).

33. Individuals with Disabilities Education Improvement Act, 20 U.S.C. §§ 1400-1482 (2006).

34. 20 U.S.C. § 1400(d)(1)(A).

35. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773

Children Act established the standard of a FAPE for children with disabilities and created significant protections for the rights of students with disabilities.<sup>36</sup> The IDEIA defined "free appropriate public education" as:

[S]pecial education and related services that—(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program. . . .<sup>37</sup>

However, the IDEIA does not specifically define the term "appropriate."<sup>38</sup> Initially, it was unclear whether the intent was for students with special needs to receive the "maximum level of services possible" to reach the highest degree of educational progress or to provide "some lower level of services."<sup>39</sup>

The United States Supreme Court first addressed the meaning of an "appropriate" education in 1982 in *Hendrick Hudson Central School District Board of Education v. Rowley*,<sup>40</sup> ruling that denying Amy, a deaf student, a sign-language interpreter did not deprive her of a FAPE because Amy was succeeding academically without an interpreter.<sup>41</sup> The Court set forth a two-prong test for determining whether a student is receiving a FAPE: (1) has the State complied with the procedures set forth in the Act and (2) is the individualized education program is reasonably calculated to enable the child to receive educational benefits?<sup>42</sup> If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can do no more.<sup>43</sup> The

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(current version at 20 U.S.C. §§ 1400-1482 (2006)). When the Education for All Handicapped Children Act was amended in 1990, the name was changed to the Individuals with Disabilities Education Act and was later changed to the Individuals with Disabilities Education Improvement Act in 2004. See CTR. FOR EDUC. & EMP'T LAW, STUDENTS WITH DISABILITIES AND SPECIAL EDUCATION LAW 2 (27th ed. 2010); Andrea Kayne Kaufman, *Policy and Law of Individuals with Disabilities Education Improvement Act of 2004: Attempting No Student With Disabilities Left Behind to the Extent Enforceable*, in EDUCATING INDIVIDUALS WITH DISABILITIES: IDEIA 2004 AND BEYOND 39, 39 (Elena L. Grigorenko ed., 2008).

36. Education for All Handicapped Children Act, § 3(c).

37. 20 U.S.C. § 1401(9).

38. See OSBORNE & RUSSO, *supra* note 18, at 21.

39. MATT COHEN, A GUIDE TO SPECIAL EDUCATION ADVOCACY: WHAT PARENTS, CLINICIANS AND ADVOCATES NEED TO KNOW 101 (2009).

40. 458 U.S. 176 (1982).

41. *Id.* at 184-85, 210 (noting that Amy was provided an FM hearing aid, received instruction from a tutor for the deaf for one hour each day, and received instruction from a speech therapist for three hours each week, allowing her to advance from grade to grade).

42. *Id.* at 206-07.

43. *Id.* at 207. The Court also cautioned lower courts not to impose their views of "preferable

*Rowley* Court declared that “the requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child’s potential ‘commensurate with the opportunity provided to other children.’”<sup>44</sup> Thus, a school is not required to maximize the potential of a student with special needs—the school is only required to provide the student with an educational benefit.<sup>45</sup> This standard has been described as entitling students with disabilities to a “Chevrolet, not a Cadillac.”<sup>46</sup> The IDEA provides that receiving passing grades and advancing from year to year is not conclusive evidence that a student with disabilities is receiving a FAPE.<sup>47</sup> Court decisions following *Rowley* have deduced that an “appropriate” education enables a child to make progress in the general education curriculum as well as advance IEP goals.<sup>48</sup> Subsequent case law has also declared that “educational benefit” requires a meaningful benefit, not simply a minimal or “trivial benefit.”<sup>49</sup>

For a child to receive a FAPE, it may be necessary for the school to provide related services.<sup>50</sup> Related services are defined under the IDEA as “transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education . . . .”<sup>51</sup> Related services are required for a student with disabilities when the services are necessary for the student to gain access to a special education program, necessary for the student to physically remain in the educational program, or when the student cannot make meaningful progress toward IEP goals without

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educational methods” on school boards. *Id.*

44. *Id.* at 198.

45. *See id.* at 198, 201.

46. COHEN, *supra* note 39, at 101. *Rowley* established the minimum standard for a FAPE under federal law. OSBORNE & RUSSO, *supra* note 18, at 22. Individual states, such as North Carolina, New Jersey, Massachusetts, Michigan, and California, have higher standards. *Id.*

47. COHEN, *supra* note 39, at 102.

48. *See, e.g.,* Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 131-33 (2d Cir. 1998) (discussing that a student did not require residential placement to reach her maximum potential since current IEP placement allowed the student to receive more than a “trivial” academic benefit); Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 930 F. Supp. 83, 102 (S.D.N.Y. 1996) (finding that a student with dyslexia was not receiving an appropriate education because the IEP did not include the necessary services for the student to receive an educational benefit).

49. OSBORNE & RUSSO, *supra* note 18, at 22. A typical means of determining whether a child is receiving educational benefit is comparing his or her educational achievement test scores over time. *See* Pete Wright & Pam Wright, *Who is Responsible for Providing FAPE?: How to Document Your Concerns When You Disagree with the IEP Team*, WRIGHTSLAW (Sept. 8, 2008), <http://www.wrightslaw.com/info/fape.sped.failed.htm>.

50. Individuals with Disabilities Education Improvement Act, 20 U.S.C. § 1401(9) (2006).

51. 20 U.S.C. § 1401(26)(A).

the services.<sup>52</sup> The list of related services in the IDEIA includes: speech language pathology and audiology services; interpreting services; psychological services; physical and occupational therapy; recreation; social work services; school nurse services; counseling services; orientation and mobility services; and medical services.<sup>53</sup> However, the list of related services found in the IDEIA is not exhaustive.<sup>54</sup> Therefore, if the student requires a service that is not included within the statute, it must be provided by the school as long as the service is necessary for the student to be able to obtain an educational benefit from his or her special education.<sup>55</sup>

### B. Influence of No Child Left Behind Act

The IDEIA and the interpretation of what is considered an "appropriate" education have been greatly influenced by the enactment of the No Child Left Behind Act ("NCLB"). NCLB is a federal school reform law passed in 2002, which holds states accountable for student proficiency in various academic subjects.<sup>56</sup> While the IDEIA looks at the individual child and emphasizes developing an IEP and specific services for children with disabilities, NCLB emphasizes closing gaps in achievement and test scores for all students, with or without disabilities.<sup>57</sup>

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52. OSBORNE & RUSSO, *supra* note 18, at 49. In order for a student to receive the necessary related services, the services must be documented in the student's IEP. *See* 20 U.S.C. § 1414(d)(1)(A)(i)(IV). The IEP is developed by an IEP team, who is required to determine the needs of the student and to offer the student a FAPE. Susan G. Clark, *The Use of Service Animals in Public Schools: Legal and Policy Implications*, 254 EDUC. L. REP. 1, 12 (2010). The IEP must include: a statement of the student's present level of academic achievement or functional performance; a statement of secondary transition service needs and needed transition services for students; transfer of rights to student; special considerations; state or district-wide achievement testing accommodations; statement of how parents will be informed of student's progress toward annual goals; measurable annual goals; a statement of program modifications and support for school personnel; need for extended school year; a statement of specific special education, supplementary aids, and services to be provided to the student based on peer-reviewed research to the extent practicable; projected starting date and anticipated frequency, duration, and location of services; the extent to which the student will not be able to participate in general education programs; and the justification for placement. George Giuliani & Roger Pierangelo, *The Importance of Understanding Individualized Education Programs (IEPs) in Family Law*, N.Y. ST. B.A. FAM. L. REV., Winter 2009, at 16, 19-21. *See also* 20 U.S.C. § 1414(d)(1)(A) (setting forth the requirements for an IEP program).

53. 20 U.S.C. § 1401(26)(A). An assistive technology device is also a related service under the IDEIA. *See infra* Part V.B.

54. *See* GUERNSEY & KLARE, *supra* note 11, at 44 & n.79.

55. *See id.* at 45. Medical services, as a related service, are exempt unless they are specifically for diagnostic or evaluative purposes. 20 U.S.C. § 1401(26).

56. No Child Left Behind Act of 2001, 20 U.S.C. § 6301 (2006).

57. 20 U.S.C. § 6301(3). *See also* Nancy Lee Jones & Richard N. Apling, *The Individuals*

In reauthorizing the IDEIA in 2004,<sup>58</sup> President Bush explicitly urged Congress to follow NCLB as a “blueprint.”<sup>59</sup> The President’s Commission on Excellence in Special Education submitted a report declaring that “we must insist on high academic standards and excellence, press for accountability for results at all levels, ensure yearly progress, empower and trust parents, support and enhance teacher quality, and encourage educational reforms based on scientifically rigorous research.”<sup>60</sup> As a result, when the IDEIA was reauthorized in 2004, “the focus shifted from access to the schoolhouse and compliance with procedures to improved outcomes for children who receive special education services.”<sup>61</sup> This new focus on results has created a right to educational achievement within the IDEIA, elevating the standard from merely providing an “educational benefit” to improving outcomes.<sup>62</sup>

### C. Other Federal Legislation Applicable to Students with Disabilities

Students with special needs are also covered by two pieces of federal legislation that apply generally to all individuals with disabilities: the Rehabilitation Act of 1973<sup>63</sup> (“Rehabilitation Act”) and the Americans with Disabilities Act (“ADA”).<sup>64</sup> The Rehabilitation Act is a civil rights law that made discrimination against individuals unlawful by those who receive funds by federal subsidies or grants,<sup>65</sup> whereas the purpose of the ADA is to eliminate discrimination against individuals with disabilities.<sup>66</sup>

These statutes offer similar protections to individuals with disabilities.<sup>67</sup> Section 504 of the Rehabilitation Act (“Section 504”)<sup>68</sup>

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with Disabilities Education Act (IDEA): Implications of Selected Provisions of the No Child Left Behind Act (NCLBA), in INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): BACKGROUND AND ISSUES 129, 129 (2004).

58. The IDEIA was amended and reauthorized in 1990, 1994, 1997, and 2004. See CTR. FOR EDUC. & EMP’T LAW, *supra* note 35, at 2, 4; Kaufman, *supra* note 35, at 40.

59. Kaufman, *supra* note 35, at 40-41 (discussing NCLB’s influence on the 2004 amendments to the IDEIA).

60. *Id.* at 40. The Commission on Excellence in Special Education submitted this report, entitled “A New Era: Revitalizing Special Education for Children and Their Families,” in 2002. *Id.*

61. Wright & Wright, *supra* note 49.

62. See Mary Konya Weishaar, *The Law and Reality: Understanding the Individuals with Disabilities Education Improvement Act*, in EDUCATING INDIVIDUALS WITH DISABILITIES: IDEIA 2004 AND BEYOND 63, 80 (Elena L. Grigorenko ed., 2008).

63. Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (2006).

64. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2006).

65. See 29 U.S.C. § 701(b)-(c).

66. 42 U.S.C. § 12101(b)(1).

67. COHEN, *supra* note 39, at 34, 36-37.

68. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 394 (codified as amended at 29 U.S.C. § 794 (2006)).



provides that "[n]o otherwise qualified individual with a disability . . . shall, solely, by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ." <sup>69</sup> A student is covered under Section 504 if he or she has a physical or mental impairment that substantially limits a major life activity, such as learning. <sup>70</sup> Title III of the ADA addresses discrimination in places of public accommodation and applies to each "nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education" in addition to public schools. <sup>71</sup> For students with disabilities, the ADA did not add any protections that differed from what Section 504 and the IDEIA were already providing in the school setting. <sup>72</sup>

A student does not have to be classified as having a disability under the IDEIA to receive services, benefits, or protections under either Section 504 or the ADA. <sup>73</sup> Although a student with special needs seeking to bring a service animal to school has certain rights under both Section 504 and the ADA, this Note will focus on the right to use service animals in schools under the IDEIA, which is the federal statute specific to special education.

### III. YOU CAN TEACH AN OLD DOG NEW TRICKS: SERVICE DOGS

The regulations implementing the ADA define a service animal as:

[A]ny 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. . . . Examples of work or tasks [performed by a service animal] include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks

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69. 29 U.S.C. § 794(a). States and school districts are subject to Section 504 because they receive federal funds for a wide variety of activities. COHEN, *supra* note 39, at 34.

70. COHEN, *supra* note 39, at 34-35.

71. 42 U.S.C. § 12181(7)(J).

72. See JAEGER & BOWMAN, *supra* note 19, at 12.

73. See Adam Kasanof, *Bringing Service Dogs to School: Some Tips for Parents*, PSYCHIATRIC SERV. DOG SOC'Y, [http://www.psychdog.org/lifestyle\\_AdamKasanof1.html](http://www.psychdog.org/lifestyle_AdamKasanof1.html) (last visited July 3, 2011). For a student to be covered by the IDEIA, he or she must be classified within one (or more) of the thirteen categories of disability enumerated in the IDEIA. See *Individuals with Disabilities Education Improvement Act*, 20 U.S.C. § 1401(3)(A) (2006). The thirteen categories of disability, all defined within the IDEIA, are: mental retardation, hearing impairments, speech or language impairments, visual impairments, emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, specific learning disabilities, deaf-blindness, deafness, and multiple disabilities. COHEN, *supra* note 39, at 39.

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 impulse or destructive behaviors.<sup>74</sup>

To be considered a service animal, “there must be evidence of individual training and the animal . . . must be peculiarly suited to ameliorate the unique problems of the disabled individual.”<sup>75</sup> There are various types of service dogs, including assistance dogs, guide dogs, hearing and signal dogs, seizure alert dogs, and psychiatric service dogs.<sup>76</sup> These dogs undergo rigorous training,<sup>77</sup> typically starting at birth, before they are

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74. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56,250, 56,250 (Sept. 15, 2010) (to be codified at 28 C.F.R. § 36.104). The regulation was amended on September 15, 2010 to expand the definition of service animal to provide additional examples of the types of work or tasks a service animal performs. *Id.* Previously, the regulation defined a service animal as:

[A]ny guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items.

*Id.*

75. Bakersfield (CA) City Sch. Dist., 50 IDELR (LRP) 747, 747 (Dep’t of Educ., Off. of C.R. Jan. 25, 2008). In general, to be covered by the protections of the ADA, there must be a direct link between the task the service animal performs and the needs of the person with a disability. Sarah Price, *Service Animals Under the ADA*, EQUIP FOR EQUALITY, 3 (Sept. 2006), [http://www.equipforequality.org/resourcecenter/ada\\_serviceanimals.pdf](http://www.equipforequality.org/resourcecenter/ada_serviceanimals.pdf). See, e.g., Access Now, Inc. v. Town of Jasper, 268 F. Supp. 2d 973, 974, 977 (E.D. Tenn. 2003) (holding that a girl with spina bifida seeking a permit to keep a miniature horse at her residence was not protected by the ADA because she did not have a “genuine need to use her horse as a service animal . . . [since] [t]he horse does not perform tasks that are necessary to assist [her] in overcoming, managing, or dealing with [her] disability”). Despite this requirement, the ADA does not require service animals be identified with certification papers or a special harness or collar. Price, *supra*, at 5. In fact, policies and practices requiring proof of certification violate the ADA. *Id.* For further discussion of the ADA’s treatment of service animals, see Price, *supra*.

76. Lori Batcheller, *Service Dogs Help People with Disabilities Gain Independence*, DISABOOM, <http://www.disaboom.com/service-animals/service-dogs-help-people-with-disabilities-gain-independence> (last visited July 3, 2011).

77. Several organizations train and provide service dogs to individuals with various special needs. See, e.g., ALL PURPOSE CANINES, <http://www.allpurposecanines.com> (last visited July 3, 2011); *Our Dogs: Our Dogs for the Deaf*, DOGS FOR THE DEAF, <http://www.dogsforthedeaf.org/ourdogs.php> (last visited July 3, 2011); *Training Assistance Dogs*, CANINE COMPANIONS FOR INDEPENDENCE, [http://www.cci.org/site/c.cdKGIRNqEmG/b.4011115/k.644B/Training\\_and\\_Place\\_ment.htm](http://www.cci.org/site/c.cdKGIRNqEmG/b.4011115/k.644B/Training_and_Place_ment.htm) (last visited July 3, 2011). See also Todd Harkrader et al., *Pound Puppies: The*

matched with an individual with a disability.<sup>78</sup>

Because of their unique training, service dogs provide a wide range of benefits to individuals with disabilities that cannot be provided through other, more traditional means.<sup>79</sup> For individuals with autism spectrum disorder, service dogs assist with "impulsive running, pica,<sup>80</sup> self stimulation, self harming, [and] mood swings," among other issues.<sup>81</sup> For individuals with limb loss, a service dog can retrieve dropped items, turn light switches on and off, aid with dressing, and

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*Rehabilitative Uses of Dogs in Correctional Facilities*, CORRECTIONS TODAY, Apr. 2004, at 74, 76-77 (discussing that prisons have assistance dog training programs to teach inmates "responsibility, patience, [and] tolerance"); *Assistance Dog Training Program*, THE CHILDREN'S VILL., <http://www.childrensvillage.org/programs-dog-more.htm> (last visited July 3, 2011) (noting that service dog training programs are used to help at-risk adolescents).

78. *Through a Dog's Eyes* (National Productions and Partisan Pictures, Inc. television broadcast Apr. 21, 2010), available at <http://www.pbs.org/dogs-eyes/film>. Training typically begins when a dog is seven weeks old and lasts for about eighteen months. *Id.* During the training process, the dog is taught approximately 90 commands including how to open and close doors, push wheelchairs, retrieve dropped items, and turn on and off lights. *Id.* The service animal's effectiveness is influenced by its appropriate match to the user. S.A. Zapf & R.B. Rough, *The Development of an Instrument to Match Individuals with Disabilities and Service Animals*, 24 DISABILITY AND REHAB. 47, 48 (2002). Important factors to consider when matching the service dog to a user include the "user's expectations of the service animal[,] awareness of the animal's basic needs and behaviours. . . . [and] the owner's willingness to provide financial, psychological and physical support to the service animal. . . ." *Id.* at 48-49. Matching can be performed by tools such as the Service Animal Adaptive Intervention Assessment, which is "an assessment tool [used] to evaluate the need for service dogs as an adaptive intervention for individuals with physical disabilities." *Id.* at 49-50.

79. *See Autism and Service Dogs*, WILDERWOOD SERV. DOGS, <http://www.autism.wilderwood.org/> (last visited July 3, 2011) (discussing the unique commands the service dog performs in order to prevent behaviors such as impulsive running, self stimulation, and self harming). *But see* Wendy Owen, *Dog Helps Stabilize Autistic Boy's Life, But Hillsboro School Says Not in the Classroom*, OREGONLIVE.COM (Jan. 21, 2010, 9:50 AM), [http://www.oregonlive.com/washingtoncounty/index.ssf/2010/dog\\_helps\\_stabilize\\_an\\_autistic.html](http://www.oregonlive.com/washingtoncounty/index.ssf/2010/dog_helps_stabilize_an_autistic.html) (discussing how there are alternatives to using a service dog to calm a child such as having him or her wear a weighted vest or have an aide apply deep pressure by hugging the student).

80. Pica is an eating disorder characterized by persistent and compulsive cravings to eat nonfood items. *See* Mary L. Gavin, *Pica*, KIDSHEALTH.ORG (Jan. 2011), <http://kidshealth.org/parent/emotions/behavior/pica.html>. Between ten to thirty percent of children ages one through six have pica and most of those children having developmental disabilities such as autism and mental retardation. *Id.* Nonfood items typically craved and consumed by individuals with pica include dirt, clay, and chalk. *Id.* Consuming these nonfood items can put a child at risk for serious health problems depending on the items consumed, including lead poisoning, bowel problems, intestinal obstruction or perforation, dental injury, or parasitic infections. *Id.* Although the causes of pica are unknown, nutritional deficiencies, dieting, malnutrition, parental neglect, and developmental problems can increase a person's risk. *Id.*

81. Schoenbaechler, *supra* note 3, at 460. The service dog will physically interrupt self stimulation, pica, and self harming, alert parents by barking if the child awakes during the night, crawl onto the child's lap and calm them during a mood swing, and will retrieve the child to the parent if the child runs away. *See Autism and Service Dogs*, *supra* note 79. *See also* Owen, *supra* note 79 (noting that a service dog became a "social bridge" for a child with autism, who could speak but did not like to interact with others).

increase mobility and independence.<sup>82</sup> Service dogs are also able to detect a chemical change in an individual before he or she has a seizure—something humans cannot do.<sup>83</sup> Because of this ability, service dogs can alert others before a seizure occurs, lessen the duration of a seizure, and make sure the individual remains safe while unconscious.<sup>84</sup> Service dogs have also been shown to have significant positive psychological and social effects for individuals who use wheelchairs,<sup>85</sup> and to “facilitate social acknowledgement” for students with disabilities in the school setting.<sup>86</sup>

Similar to service dogs, therapy and emotional support dogs “offer a unique form of support to children’s learning, physical health, and emotional well-being,” in addition to motivating children to complete academic activities across the curriculum.<sup>87</sup> However, these support animals are not considered service animals under the ADA.<sup>88</sup> Despite helping a student develop communication skills<sup>89</sup> and easing anxiety, an

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82. Dapice, *supra* note 5, at 26.

83. See *Boy Can’t Bring His “Epilepsy Dog” to School* (HLN television broadcast Jan. 4, 2011), available at <http://www.cnn.com/video/data/2.0/video/bestoftv/2011/01/04/hln.epilepsy.service.dog.hln.html> [hereinafter HLN] (describing the ability for a service dog to detect a boy’s seizure before it happens and alerting his family and teachers by sniffing him). The service dog’s reaction time in detecting a seizure is five to six seconds, while a teacher may have a reaction time of thirty to forty-five seconds or more. Inbar, *supra* note 4.

84. See Inbar, *supra* note 4 (describing how a service dog will lick a child’s face in order to signal to others that the child is about to seize and will swipe a magnet in her collar over a nerve stimulator in the child’s chest to ease the severity of or forestall the seizure). Andrew, a student with a seizure disorder, does wear a helmet to protect himself, but his service dog ensures that he is safe when he becomes unconscious, guiding him away from walls or dangerous objects in his way. *Id.* Andrew’s service dog also has a magnet in its collar that is swiped over his chest when he begins to seize. *Id.* This action activates a magnet implanted in Andrew’s chest, sending a shock to his brain that will either prevent or lessen the duration of the seizure. *Id.*

85. See Karen Allen & Jim Blascovich, *The Value of Service Dogs for People with Severe Ambulatory Disabilities: A Randomized Controlled Trial*, 275 J. AM. MED. ASS’N 1001, 1002, 1004 (1996).

86. See Mader et al., *supra* note 8, at 1533-34.

87. Mary Renck Jalongo et al., *Canine Visitors: The Influence of Therapy Dogs on Young Children’s Learning and Well-Being in Classrooms and Hospitals*, 32 EARLY CHILDHOOD EDUC. J. 9, 10 (2004). In fact, some schools have instituted programs where students read to therapy dogs in order to improve their reading skills and confidence. See Robin Briggs Newlin, *Paws for Reading: An Innovative Program Uses Dogs to Help Kids Read Better*, SCH. LIBR. J., June 2003, at 43, 43; Shelley Bueche, *Going To the Dogs: Therapy Dogs Promote Reading*, READING TODAY, Feb.-Mar. 2003, at 46, 46.

88. The Department of Justice has declared that “animals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or promote emotional well-being are not service animals” and are excluded from ADA coverage. Huss, *supra* note 1, at 1177 (citations omitted). See also *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*, 75 Fed. Reg. 56,250, 56,250 (Sept. 15, 2010) (to be codified at 28 C.F.R. § 36.104) (“The provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of [defining service animal].”).

89. Karen Jones, *Therapy on Four Legs*, N.Y. TIMES, Nov. 11, 2010, at F10 (noting that the

animal whose sole function is to provide emotional support for a student with special needs does not confer an educational benefit under the IDEIA.<sup>90</sup> Additionally, there is no legal right for a therapy animal to be incorporated into an IEP when the school is providing a FAPE through other means.<sup>91</sup> If a student's IEP is reasonably calculated to provide a FAPE, there is no requirement that a comfort animal be one of those methods utilized to meet those needs.<sup>92</sup>

#### IV. CALL OFF THE DOGS: INVOLVEMENT OF THE COURTS AND ADMINISTRATIVE BODIES

In some situations where schools<sup>93</sup> have denied access to a service dog,<sup>94</sup> the student with a disability and the student's parents have sought redress<sup>95</sup> through administrative hearings<sup>96</sup> and/or the courts.<sup>97</sup> The

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interaction with a therapy dog helps a non-verbal student with special needs develop communication skills that are transferred to his relationships with peers and teachers).

90. *But cf. id.* (discussing therapy dogs that visit treatment centers and residential schools as a medium to achieve "pre-existing educational goals").

91. Clark, *supra* note 52, at 13.

92. *Id.* at 12-13 (discussing a New Mexico due process decision where the court concluded that the determination of whether to use a therapy dog was a choice of methodology but because the district's chosen methods conferred educational benefit, the decision not to use the student's therapy dog did not constitute a denial of a FAPE).

93. In addition to the school setting, individuals with disabilities have been denied use of their service dog in places of employment and in housing units. *See Assenberg v. Anacortes Hous. Auth.*, No. C05-1836RSL, 2006 WL 1515603, at \*1 (W.D. Wash. May 25, 2006) (discussing how a person suffering depression sought access for snakes he used as service animals in a federally subsidized housing unit); *Branson v. West*, No. 97 C 3538, 1999 WL 1186420, at \*7-9 (N.D. Ill. Dec. 10, 1999) (describing how a hospital employee who was confined to a wheelchair and used a service dog was informed by the hospital that she could not bring service dog to work because of the heavy foot traffic and congestion in the hallways and due to issues with fears, allergies, and asthma); *Clark Cnty. Sch. Dist. v. Buchanan*, 924 P.2d 716, 718 (Nev. 1996) (noting how a school did not allow a music teacher to bring into school the dog she was training to be a helping dog). *See also* Elizabeth Blandon, *Reasonable Accommodation or Nuisance?: Service Animals for the Disabled*, FLA. B. J., Mar. 2001, at 12, 12-14 (discussing whether the ADA requires housing providers to make exceptions to "no-pets" policies for individuals with disabilities using service animals, including individuals with disabilities not typically known for using service animals); Rebecca Skloot, *Creature Comforts*, N.Y. TIMES MAG., Jan. 4, 2009, at 34, 36 (explaining how a "growing number of people believe the world of service animals has gotten out of control").

94. Not all schools have denied access to service dogs. For example, in Auburn, New York, both a high school senior with Dravet Syndrome (a rare seizure disorder) and an elementary school student with autism brought their service dogs to school without any objections or setbacks from the school district. Kelly Voll, *Service Dogs Help Students Get Through First Day*, AUBURNPUB.COM (Sept. 8, 2010, 11:20 PM), [http://auburnpub.com/news/local/article\\_2d3ac2fc-baf6-11df-a422-001cc4c03286.html](http://auburnpub.com/news/local/article_2d3ac2fc-baf6-11df-a422-001cc4c03286.html). In fact, the mother of the student with Dravet Syndrome said that the school district was "very accommodating," allowing her son to have the same teacher and aide from one school year to the next so that the training with the service dog would only need to be done once. *Id.*

95. Before pursuing a legal course of action, parents typically have less adversarial meetings and negotiations discussing the situation at hand. *See, e.g., HLN, supra* note 83. Andrew Stevens, a

lawsuits have fallen into two categories: (1) those alleging discrimination under Section 504 and/or the ADA;<sup>98</sup> and (2) those alleging that the school code permits use of the service animal.<sup>99</sup> Although most lawsuits do not specifically allege a violation of the IDEIA,<sup>100</sup> in each case the court used the IDEIA in its analysis of whether the school must allow the student to use the service dog.<sup>101</sup> Unlike the lawsuits, in the administrative hearings, the issue of whether a service dog should be placed on the student's IEP to provide an "appropriate" education has been directly addressed.<sup>102</sup>

Section A will discuss the lawsuits alleging discrimination when a service dog was denied access to the school. Section B will discuss the lawsuits alleging school code violations. Section C will address administrative hearings and appeals in which the student disagreed with the school district's determination that a service dog was not necessary for a FAPE. Section D will consider the arguments school districts have made against permitting service dogs in school and methods to suppress the risks and problems a dog would pose when introduced into the school environment.

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student with a seizure disorder whose school will not allow his service dog to accompany him at school, has yet to begin exhausting his administrative remedies. *Id.* Instead, Andrew's parents are hopeful that they can continue negotiating with the school to work out the situation amicably. *Id.* The school district has also said that it wants Andrew to be in school with his service dog, but only if Andrew can handle the dog safely. Inbar, *supra* note 4.

96. See, e.g., Bakersfield City Sch. Dist., 51 IDELR (LRP) 733, 734 (Cal. State Educ. Agency Oct. 22, 2008); Gallia Cnty. Local Sch. Dist., 36 IDELR (LRP) 914, 915 (Ohio State Educ. Agency Feb. 18, 2002).

97. See, e.g., Cave v. E. Meadow Union Free Sch. Dist., 480 F. Supp. 2d 610, 615 (E.D.N.Y. 2007); Sullivan v. Vallejo City Unified Sch. Dist., 731 F. Supp. 947, 949 (E.D. Cal. 1990).

98. See Cave, 480 F. Supp. 2d at 615-16; Sullivan, 731 F. Supp. at 949.

99. See 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. No. 4, 920 N.E.2d 651, 654 (Ill. App. Ct. 2009).

100. In *Hughes*, a student with autism and a seizure disorder was denied use of his service animal by the school and alleged a violation of the IDEIA in addition to violations of civil rights statutes like the ADA. See *Hughes v. Dist. Sch. Bd. of Collier Cnty.*, No. 2:06-cv-629-FtM-29DNF, 2008 WL 4709325, at \*1, \*3 (M.D. Fla. Sept. 22, 2008). This case has yet to be decided on the merits, however, the student survived a motion to dismiss for mootness. *Id.* at \*6. The school argued that the case was moot because the student moved to a different school district where he is permitted to use his trained service dog. *Id.* at \*5. The court rejected this argument because the student still maintained a residence in the district and planned to return to the school when the school permits the service dog and provides him with a FAPE. *Id.* at \*6.

101. See, e.g., Cave, 480 F. Supp. 2d at 633-35; Sullivan, 731 F. Supp. at 949, 951.

102. See Bakersfield City Sch. Dist., 51 IDELR (LRP) 733, 734 (Cal. State Educ. Agency Oct. 22, 2008); Gallia Cnty. Local Sch. Dist., 36 IDELR (LRP) 914, 915 (Ohio State Educ. Agency Feb. 18, 2002).

A. *Cases Alleging Discrimination under Section 504 and ADA*

Before an individual can sue under the IDEIA, administrative remedies must be exhausted.<sup>103</sup> The process of exhausting administrative remedies can be time consuming<sup>104</sup> and burdensome, causing individuals to file suit alleging claims only under Section 504 and/or the ADA, which do not have exhaustion requirements.<sup>105</sup> This litigation strategy will not be fruitful, however, if the relief sought under Section 504 and/or the ADA would be available through the IDEIA.<sup>106</sup> The IDEIA explicitly provides that:

[B]efore the filing of a civil action under [the ADA, Section 504, or other federal laws protecting the rights of children with disabilities] seeking relief that is also available under [the IDEIA], the procedures . . . shall be exhausted to the same extent as would be required had the action been brought under [the IDEIA].<sup>107</sup>

Thus, if the relief sought would also be available through the IDEIA, its exhaustion requirement is applied and the lawsuit will be dismissed if administrative remedies were not previously exhausted.<sup>108</sup>

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103. See Individuals with Disabilities Education Improvement Act, 20 U.S.C. § 1415(l) (2006).

104. Filing administrative complaints can be a lengthy process. See Wendy Owen, *After Three-Year Legal Fight, 10-Year-Old Hillsboro Boy Gets His Autism Service Dog In Class*, OREGONLIVE.COM (Apr. 26, 2011, 1:21 PM), [http://www.oregonlive.com/hillsboro/index.ssf/2011/04/after\\_three-year\\_legal\\_fight\\_10-year-old\\_hillsboro\\_boy\\_gets\\_his\\_autism\\_service\\_dog\\_in\\_class.html](http://www.oregonlive.com/hillsboro/index.ssf/2011/04/after_three-year_legal_fight_10-year-old_hillsboro_boy_gets_his_autism_service_dog_in_class.html). Scooter Givens, a child with autism, had to wait more than one year before the U.S. Department of Justice completed its investigation and informed the school district that it must allow Scooter's service dog in school in order to avoid a federal lawsuit. *Id.* During the time that Scooter battled the school district, including waiting for an answer from the U.S. Department of Justice, Scooter's parents feared that, by the time a decision would be rendered, it would be too late for Scooter to have benefitted educationally from the service dog. See Wendy Owen, *A Year After Federal Civil-Rights Complaint Filed, a Hillsboro Boy with Autism Continues Classes Without His Service Dog*, OREGONLIVE.COM (Nov. 13, 2010, 1:05 PM), [http://www.oregonlive.com/hillsboro/index.ssf/2010/11/a\\_year\\_after\\_federal\\_civil-rights\\_complaint\\_filed\\_a\\_hillsboro\\_boy\\_with\\_autism\\_continues\\_classes\\_with.html](http://www.oregonlive.com/hillsboro/index.ssf/2010/11/a_year_after_federal_civil-rights_complaint_filed_a_hillsboro_boy_with_autism_continues_classes_with.html).

105. See Kasanof, *supra* note 73.

106. See 20 U.S.C. § 1415(l). See also *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 488 (2d Cir. 2002) (holding that "[t]he fact that [] damages [were sought] in addition to relief that is available under the IDEA does not enable [plaintiff] to sidestep the exhaustion requirements of IDEA").

107. 20 U.S.C. § 1415(l).

108. See, e.g., *Cave v. E. Meadow Union Free Sch. Dist.*, 480 F. Supp. 2d 610, 638-39 (E.D.N.Y. 2007); *Gaudiello v. Del. Cnty. Intermediate Unit*, 796 F. Supp. 849, 853 (E.D. Pa. 1992). Cf. Scott B. Mac Lagan, Comment, *Right of Access: How One Disability Law Disabled Another*, 26 *TOURO L. REV.* 735, 757-58 (2010) (discussing how the application of the IDEIA's exhaustion requirements to suits alleging ADA and/or Section 504 claims when a service dog is denied access to a school threatens the progress the federal government has made in the effort to end disability-based discrimination).

*Sullivan v. Vallejo City Unified School District*<sup>109</sup> was the first case in which a court addressed the issue of whether a school's denial of a service dog violated a student with a disability's civil rights secured by Section 504.<sup>110</sup> In *Sullivan*, a student with cerebral palsy, learning disabilities, and right side deafness who used a wheelchair was not permitted to bring her trained service dog to school.<sup>111</sup> The service dog allowed the student to increase her physical independence.<sup>112</sup> The school argued that the court lacked jurisdiction to adjudicate the student's Section 504 claim because administrative remedies were not exhausted pursuant to the Education of the Handicapped Act.<sup>113</sup> The court rejected the school's argument, finding no connection between the student's Section 504 claim and the possibility that the student could achieve her objective of bringing her service dog to school through the IEP process pursuant to the Education of the Handicapped Act.<sup>114</sup> The court emphasized that the student's claim was not whether the service dog was educationally necessary but that the school discriminated against her because of her handicap by refusing her access if the service dog accompanied her.<sup>115</sup> Despite the distinction, the court ordered the school to draft a new IEP that allowed the student to be accompanied by her service dog.<sup>116</sup>

Eighteen years later, this distinction did not persuade the court in *Cave v. East Meadow Union Free School District*.<sup>117</sup> In *Cave*, the school declined access to the service dog used by John Cave, Jr., a student with a hearing impairment.<sup>118</sup> The service dog helped limit the effect of John's disability by alerting him to sounds that he did not always hear.<sup>119</sup> Additionally, John claimed that it was necessary for him and the service dog to be together on a continuous basis for the dog's training to be maintained.<sup>120</sup> The lawsuit sought a preliminary injunction based upon

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109. 731 F. Supp. 947 (E.D. Cal. 1990).

110. *See id.* at 949.

111. *Id.* at 948-49.

112. *Id.* at 958. The *Sullivan* Court compared this choice to "choosing to use a wheelchair to increase . . . mobility rather than a pair of crutches." *Id.*

113. *Id.* at 949. The Act referred to in *Sullivan* is a predecessor to the IDEIA. *See supra* note 35 and accompanying text.

114. *Sullivan*, 731 F. Supp. at 951.

115. *Id.*

116. *Id.* at 962.

117. 480 F. Supp. 2d 610 (E.D.N.Y. 2007), *aff'd*, 514 F.3d 240 (2d Cir. 2008). *See also* Gaudiello v. Del. Cnty. Intermediate Unit, 796 F. Supp. 849, 853 (E.D. Pa. 1992) (distinguishing *Sullivan* to dismiss a Section 504 claim because the student failed to exhaust administrative remedies pursuant to the IDEIA).

118. *Cave*, 480 F. Supp. 2d at 615.

119. *Id.* at 619.

120. *Id.* at 621.



alleged violations of the ADA, Section 504, and several New York State statutes.<sup>121</sup> The court determined that IDEIA's exhaustion requirement was applicable to this lawsuit because the type of relief requested was available under the IDEIA.<sup>122</sup> The court expressly rejected the holding of the *Sullivan* Court, stating, "[t]he fact that the *Sullivan* court recognized that this relief implicated the plaintiff's IEP in a very direct manner reaffirms this Court's conclusion [that] this relief was available under the [IDEIA], and should have first been pursued according to the requirements of that statute."<sup>123</sup> It was further held that John did not establish a clear likelihood of success on the merits because the school already provided him with reasonable accommodations, allowing him to be successful in school.<sup>124</sup>

### B. Cases Alleging Violation of School Codes

Students with disabilities seeking to bring their service animal to school have also faced obstacles due to the state's legal definition of a service animal.<sup>125</sup> Some states have statutory definitions for "service animal," in addition to specific laws regarding discrimination of service animals.<sup>126</sup> In Illinois, for example, the definition is part of the Illinois School Code.<sup>127</sup> The Illinois School Code states that "[s]ervice animals such as guide dogs, signal dogs or any other animal individually trained to perform tasks for the benefit of a student with a disability shall be permitted to accompany that student at all school functions, whether in

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121. *Id.* at 615-16.

122. *Id.* at 638-39.

123. *Id.* at 638.

124. *Id.* at 641-42 (noting that John was provided with a sign language interpreter, an FM transmitter, a student note taker, extra time to take tests, and a daily one-on-one session with a teacher for the deaf and hearing impaired). *See also infra* Part IV.D (discussing the school district's arguments and the balancing test applied by the court).

125. *See* 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 (Ill. App. Ct. 2009).

126. *See, e.g.*, ARIZ. REV. STAT. ANN. § 11-1024(J)(5) (2001 & Supp. 2010); N.Y. EXEC. LAW § 296(14) (McKinney 2010); N.D. CENT. CODE § 25-13-01.1 (2002 & Supp. 2009) (effective Aug. 1, 2009); TEX. HUM. RES. CODE ANN. § 121.002(1)(A)-(B) (West 2001); VA. CODE ANN. § 51.5-44(E) (2009); W. VA. CODE ANN. § 5-15-3(c) (West 2002). In Virginia, the law was prompted by a situation where a student suffering from X-linked hydrocephalus was prevented from bringing his service dog to school with him. Chelyen Davis, *Gov. Kaine Signs Bill Allowing Service Dogs into State Schools*, FREDERICKSBURG.COM (May 7, 2008, 12:15 AM), <http://fredericksburg.com/News/FLS/2008/052008/05072008/377534>. The Virginia bill clarified that schools are places of public accommodation and therefore must comply with all of the requirements of the ADA and the Virginians With Disabilities Act. *Id.*

127. 105 ILL. COMP. STAT. ANN. 5/§ 14-6.02 (West 2006).

or outside the classroom.”<sup>128</sup> A problem arises when the school interprets the code to exclude access to a service animal because the school does not believe the animal provides any benefit for the student with a disability.<sup>129</sup>

Two similar cases have come before the Illinois Appellate Court where it was determined that, pursuant to the Illinois School Code, a student with autism can receive benefits from a service dog, and therefore, must be permitted to bring the dog to school.<sup>130</sup> In *Kalbfleisch v. Columbia Community Unit School District Unit No. 4*,<sup>131</sup> Carter Kalbfleisch, a student with autism, sought a preliminary injunction to compel the school to permit him to bring his service dog to school pursuant to the Illinois School Code.<sup>132</sup> Carter’s service dog, Corbin, minimized the number of tantrums he had per week and substantially reduced his recovery time, prevented him from taking off and running into dangerous situations like traffic, helped him sleep through the night without his mother in the room, and stopped him from stimming.<sup>133</sup> Additionally, when Carter and Corbin are separated, their working relationship is harmed, causing Carter to have more tantrums and Corbin to forget commands.<sup>134</sup> The court noted that “[t]he language of the [Illinois] statute does not include the term ‘educational benefit, [and] we should not attempt to read a statute other than in the manner in which it was written.’”<sup>135</sup> Thus, the benefits Corbin provided, whether educational in nature or otherwise, satisfied the School Code’s definition of a service animal.<sup>136</sup> Ultimately, the *Kalbfleisch* Court held that, although an educational benefit is not required under the statute, Corbin

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128. *Id.*

129. When there is a definition of “service animal” in a school code, the issue of an “educational” benefit only arises if the definition requires the animal to provide an educational benefit. In Illinois, the statute only requires a benefit, not an educational benefit. *See id.*; *see also Kalbfleisch*, 920 N.E.2d at 660-61 (refusing to read “benefit” in the statute as “educational benefit”).

130. *See K.D.*, 936 N.E.2d at 700; *Kalbfleisch*, 920 N.E.2d at 661.

131. 920 N.E.2d 651 (Ill. App. Ct. 2009).

132. *Id.* at 654.

133. *Id.* at 656. Stimming refers to repetitive body movements or repetitive movements of objects. Stephen M. Edelson, *Autism Spectrum Disorders Fact Sheet, Self-Stimulatory Behavior (Stimming)*, AUTISM-HELP.ORG, <http://www.autism-help.org/behavior-stimming-autism.htm> (last visited July 3, 2011). Examples of stimming include repetitive blinking, hand-flapping, snapping fingers, making vocal sounds, scratching, rocking front-to-back or side-to-side, licking objects, smelling objects, and smelling people. *Id.* This behavior is most common in individuals who have autism but is also exhibited by individuals with other developmental disabilities. *Id.*

134. *See Kalbfleisch*, 920 N.E.2d at 661.

135. *Id.* (internal citations omitted). Additionally, because no determination of educational benefit was necessary because Carter would have been subjected to irreparable harm and any other process other than relief through the court system would be inadequate, Carter was not required to exhaust administrative remedies pursuant to the IDEIA. *See id.* at 658, 661.

136. *Id.* at 661.

does provide Carter with an educational benefit by drawing him out of stimming and reducing his tantrums, allowing him to focus more on completing tasks at school.<sup>137</sup>

In a similar case, *K.D. v. Villa Grove Community Unit School District No. 302*,<sup>138</sup> K.D., a student with autism, filed a complaint for injunctive relief alleging that denying him use of his service animal violated the Illinois School Code.<sup>139</sup> That court stated that, "despite the inevitable impact a service animal's presence at school will have on a student's individualized education plan, the School Code requires school districts admit the service animal with the student as long as the animal meets the definition set forth in [the statute]."<sup>140</sup> Evidence was presented that K.D.'s service dog, Chewey, was tethered to K.D. to prevent him from running off into dangerous situations and aided K.D. during transitional periods at school by applying deep pressure with his head or paw upon command.<sup>141</sup> The deep pressure Chewey applied also caused K.D.'s sleep to improve from two to three hours to six to eight hours per night, led to less difficulty transitioning from home to school, and helped him focus more easily on his homework.<sup>142</sup> The court ruled that this evidence established that Chewey provided some benefit to K.D., educational and otherwise, as required by the statute.<sup>143</sup>

In both *Kalbfleisch* and *K.D.*, the courts recognized that it is possible for a service dog to provide an educational benefit to a student with a disability.<sup>144</sup> These holdings are significant in the battle to allow service dogs in school because it indicates to other courts and administrative bodies that school districts should embrace service dogs as a tool to provide students with a FAPE.

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137. *Id.*

138. 936 N.E.2d 690 (Ill. App. Ct. 2010).

139. *Id.* at 692. The school district argued that the suit must be dismissed because administrative remedies were not exhausted. *Id.* at 692, 697. As in *Kalbfleisch*, the court rejected this argument because exhaustion is not required if the administrative agency's expertise is not involved. *Id.* at 697-98. Here the issue was one of statutory interpretation, making the educational benefit the service dog provided to K.D. irrelevant. *Id.* at 698.

140. *Id.*

141. *Id.* at 693-94.

142. *Id.* at 699.

143. *See id.* at 699-700. Additionally, the court concluded that the element of the statute requiring the dog to accompany K.D. was satisfied, despite K.D. requiring an adult handler to control the dog. *Id.*

144. *See id.* at 699; *Kalbfleisch v. Columbia Cmty. Unit Sch. Dist. Unit No. 4*, 920 N.E.2d 651, 661 (Ill. App. Ct. 2009).

### C. Administrative Hearings Addressing FAPE

The IDEIA gives parents the right to request an impartial due process hearing on any matter concerning the delivery of a FAPE to their child, including when a school denies access to their child's service dog or when a school refuses to put a service dog on the child's IEP.<sup>145</sup> In *Gallia County Local School District*,<sup>146</sup> the Ohio State Educational Agency upheld an Impartial Hearing Officer's determination that a student with separation anxiety disorder and social phobia needed to be accompanied by her service dog in order to receive a FAPE.<sup>147</sup> The student could only attend school if accompanied by someone or something to which she developed a strong emotional attachment.<sup>148</sup> Alternatives suggested by the school district, such as creating a quiet place and providing access to the school psychologist and peer/friend support, were deemed unsuccessful and not appropriate.<sup>149</sup> Since using the service dog was the only means of getting the student to attend school, the service dog was necessary for the student to receive a FAPE in the least restrictive environment.<sup>150</sup> The State Level Review Officer

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145. Individuals with Disabilities Education Improvement Act, 20 U.S.C. § 1415(f)(1)(A) (2006). The impartial due process hearing is to be "conducted by [either] the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." *Id.* According to the IDEIA, when there is a:

[P]rocedural violation, a hearing officer may find that the child did not receive a [FAPE] only if the procedural inadequacies—(I) impeded the child's right to a [FAPE]; (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a [FAPE] to the parents' child; or (III) caused a deprivation of educational benefits.

20 U.S.C. § 1415(f)(2)(E)(ii). When the initial hearing is conducted by a local educational agency, either party has the opportunity to appeal the findings and decisions to the State educational agency. 20 U.S.C. § 1415(g)(1). The decision of the State educational agency is final, except that an aggrieved party has the "right to bring a civil action . . . in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy." 20 U.S.C. § 1415(i)(1)(A)-(2)(A). The IDEIA enumerates the specific rights of both parents and school districts concerning due process and appeals as well as the proper procedure to be followed. 20 U.S.C. § 1415(f)-(i).

146. 36 IDELR (LRP) 914, 914 (Ohio State Educ. Agency Feb. 18, 2002).

147. *Id.* at 917.

148. *See id.*

149. *Id.*

150. *Id.* The "least restrictive environment" means that:

To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A). Schools are required to provide a continuum of alternative placements for each student with a disability, ranging from full inclusion in a regular education classroom with

determined that the student showed, by a preponderance of the evidence, that she needed the service dog to attend school and that this need outweighed the school district's concern that the service dog would cause disruptions in the school environment.<sup>151</sup> This decision was revolutionary, recognizing how essential a service dog can be for a student with a disability to benefit from his or her education and that assisting the student with a disability is more important than any potential risks the service dog may pose.

In *Bakersfield (CA) City School District*,<sup>152</sup> a student with autism was denied use of his service dog, Thor.<sup>153</sup> The student filed a complaint with the United States Department of Education, Office for Civil Rights, alleging that the school district had the responsibility to consider his service dog as an element of an "appropriate" education.<sup>154</sup> The Office for Civil Rights found that, although the matter of the service dog was discussed at an IEP meeting, the school district failed to consider the service dog's impact on the student's safety, adaptive behavior, and ability to develop and meet social and behavioral goals.<sup>155</sup> Because of this, the Office for Civil Rights sought the school district's agreement to adopt and implement a specified process for determining whether the student should be able to bring his service dog with him to school.<sup>156</sup> In addition to setting forth the proper procedure to follow and factors to consider in determining whether Thor is a service animal,<sup>157</sup> the Office for Civil Rights provided a list of factors to be included in the school district's determination of whether continuous attendance of a service

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an aide (least restrictive) to partial inclusion (student splits time between regular classroom and resource room), a special education school, a hospital, homebound instruction, or a residential placement (most restrictive). OSBORNE & RUSSO, *supra* note 18, at 21.

151. See *Gallia*, 36 IDELR at 916-17.

152. 50 IDELR (LRP) 747, 747 (Dep't of Educ., Off. of C.R. Jan. 25, 2008).

153. *Id.* at 748-49.

154. *Id.* at 747.

155. *Id.* at 751.

156. *Id.* at 751-53. The school district agreed to adopt and implement the Office for Civil Rights' two-step process for determining whether the student could bring his service dog to school on a continuous basis. *Id.* at 752. The first step was for the school district to convene a meeting with the family to determine whether the student's service dog falls under the ADA's definition of a service animal. *Id.* Second, if the school district determined that the student's service dog did not fall within the ADA definition, the school district would convene an IEP meeting to consider whether the student's service dog's presence at school was necessary for the student to receive a FAPE. *Id.*

157. The determination of whether the student's service dog was considered a "service animal" under the ADA was to be made at a meeting where the family would have the opportunity to present information for the school district to consider. *Id.* If the school district determined that the dog fit within the ADA definition, the school district was required to promptly arrange for the student to attend school with the dog on a continuous basis, unless it was determined that the dog posed an unacceptable risk to the health and safety of other people in the school building. *Id.*

animal should be part of the student's IEP.<sup>158</sup> The factors to be considered ranged from how the service dog would assist the student, the impact of the service dog's presence in the school environment, and how use of the service dog would affect the student's placement.<sup>159</sup>

After the meeting ordered by the Office for Civil Rights was held, the school district determined that the student's service animal did not fall within the ADA definition and that Thor's presence was not necessary for the student to receive a FAPE.<sup>160</sup> The student initiated a hearing before the California State Educational Agency to determine whether he was denied a FAPE because the school offered him a one-to-one aide instead of allowing him to use his service dog.<sup>161</sup> The Administrative Law Judge determined that the evidence supported the school district's position that Thor was not needed for the student to receive a FAPE.<sup>162</sup> This determination was based upon a lack of persuasive empirical evidence<sup>163</sup> that the service dog could help with the student's education and the IEP team's conclusion that the service dog was not a necessary service for the student's "successful functioning" at school.<sup>164</sup> Additionally, the Administrative Law Judge found a lack of evidence that the use of the service dog, as opposed to a one-to-one aide, would allow the student to be educated in the least restrictive environment.<sup>165</sup>

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158. *Id.* at 752-53.

159. *See id.* *See also infra* Part V.A (listing the factors). Although the Office for Civil Rights set forth these factors, they did not apply them to the case at hand—the school district was only instructed to reconsider the student's use of the service dog pursuant to the factors. *See Bakersfield (CA) City School District*, 50 IDELR (LRP) 751, 751 (Dep't of Educ., Off. of C.R. Jan. 25, 2008).

160. *See Bakersfield City Sch. Dist.*, 51 IDELR (LRP) 733, 734 (Cal. State Educ. Agency Oct. 22, 2008).

161. *Id.* at 734.

162. *Id.* at 740.

163. *Id.* The student's parents presented evidence from Bob Taylor, the person who trained Thor. *Id.* at 739. Taylor discussed the dog's training, how a service dog assists a child with autism, and his observations of the successful relationship between the student and Thor. *Id.* However, Taylor did not know if such use of a service dog had been endorsed by autism experts or if there were any peer reviewed studies endorsing the use of service dogs for children with autism. *Id.* The Administrative Law Judge found it significant that there was a lack of persuasive empirical evidence that service dogs can help children with autism with their education. *Id.* The lack of peer reviewed studies and empirical evidence was critical to the Administrative Law Judge's decision because of the principle that special education and related services should be supported by strong, research-based evidence of effectiveness to the extent practicable. *See id.* at 739, 744. *See also* Individuals with Disabilities Education Improvement Act, 20 U.S.C. § 1414(d)(1)(A)(i)(IV) (2006) (noting an IEP must include "a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable"); COHEN, *supra* note 39, at 120 (explaining that the peer-reviewed research requirement was first introduced in the 2004 amendments of the IDEIA).

164. *Bakersfield*, 51 IDELR (LRP) at 744.

165. *Id.* The Administrative Law Judge explained that a human aide would be less restrictive

#### D. *Balancing the Interests of Both the Student and the School*

In most of the situations where an adjudicative body is faced with a student whose service dog has been denied access to his or her school, a balancing approach is employed—weighing the benefits the service dog would provide for the student against the impact the service dog would have on the school environment. In most of the cases,<sup>166</sup> the school did not permit the student to bring his or her trained service dog to school primarily because of the potential problems and risks that would arise if a service dog were present.<sup>167</sup> Although schools have presented legitimate concerns, many of the potential problems can be greatly reduced or mitigated, allowing the service dog to safely enter the school environment.<sup>168</sup> For example, in *Cave*, the school successfully argued that: 1) the potential health risks to dog-allergic and asthmatic students and teachers; 2) the administrative burden of rearranging John's schedule; and 3) the detriment to his education by bringing the service dog to school required him to be removed from a mainstream program and thus, outweighed any benefit the service dog would provide.<sup>169</sup> The court agreed with the school's balancing approach<sup>170</sup> and found that, since John was already provided special education and related services through his IEP, the additional benefit from the service dog was

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because the aide can judge when to "back off" from the student and provide him the opportunity "to interrelate with his typically developing peers without any interference." *Id.*

166. See *supra* Part IV.A-C (discussing the breadth of administrative hearings and lawsuits addressing this issue).

167. *But c.f.* Schoenbaechler, *supra* note 3, at 462 (remarking how it would be a disservice to a student with a disability to be denied the benefits created by his or her service animal simply because it is unusual for an animal to be present in the classroom).

168. Further, the burdens associated with having a dog enter the school environment are no different if a student has a cognitive disability as opposed to a more visible disability, such as a visual impairment or a disability requiring use of a wheelchair. See *id.* at 463.

169. *Cave v. E. Meadow Union Free Sch. Dist.*, 480 F. Supp. 2d 610, 616 (E.D.N.Y. 2007).

170. Despite this ruling, the New York State Division of Human Rights found that the balancing test the school employed internally to prohibit *Cave*'s use of a service animal violated the New York State Human Rights Law and could not be used. See N.Y. State, Div. of Human Rights v. E. Meadow Union Free Sch. Dist., Case No. 10115533, at 19-20 (Mar. 10, 2008), [http://www.dhr.state.ny.us/pdf/Commissioner%27s%20Orders/nysdhr\\_v\\_east\\_meadow\\_union\\_free\\_school\\_district.pdf](http://www.dhr.state.ny.us/pdf/Commissioner%27s%20Orders/nysdhr_v_east_meadow_union_free_school_district.pdf). Under New York State law, it is "an unlawful discriminatory practice for any person engaged in any activity covered by [the law] to discriminate against a blind person, a hearing impaired person or a person with a disability on the basis of his or her use of a guide dog, hearing dog or service dog." N.Y. EXEC. LAW § 296(14) (McKinney 2010). The school district appealed the decision to the Appellate Division, Second Department. *E. Meadow Union Free Sch. Dist. v. N.Y. State Div. of Human Rights*, 886 N.Y.S.2d 211, 211-12 (App. Div. 2009). The Second Department found that the statutory provision does not apply to the school district and vacated the State Division of Human Rights' determination. *Id.* at 212-13. The subsequent motion for leave to appeal was denied by the New York Court of Appeals. See *E. Meadow Union Free Sch. Dist. v. N.Y. State Div. of Human Rights*, 929 N.E.2d 1003, 1003 (N.Y. 2010).

outweighed by all of the potential problems and risks the service dog would pose.<sup>171</sup>

The school district in *Cave* is not alone in having these apprehensions.<sup>172</sup> Typically, schools that deny access to service dogs have had concerns with sanitation, allergies, fear of dogs, and classroom disruptions.<sup>173</sup> A primary concern of schools is the impact the dog would have on the health and safety of the students. There is a fear that the dog may be a host carrier of “zoonoses,” which are diseases and infections transmitted from animals to human beings.<sup>174</sup> Although transmission of zoonoses to humans is possible, a service dog’s presence in a school does not pose a substantial threat of contamination since simple measures can be taken to virtually eliminate any risk.<sup>175</sup> These measures include rigorous health care of the animal<sup>176</sup> and having individuals wash their hands before and after interacting with the dog.<sup>177</sup>

Another concern involves the danger the service dog may pose to both students and adults who are allergic to dogs. During the *Cave* trial, an expert specializing in providing clean, sterile, and particle-free environments testified that dander<sup>178</sup> is already in classrooms and, if one

171. *Cave*, 480 F. Supp. 2d at 645-46. Perhaps *Cave* was not the ideal case on this issue, since *Cave*’s mother testified at a hearing that the dog served no educational purpose. Reply Brief for Petitioner at 15 n.10, *E. Meadow Union Free Sch. Dist. v. N.Y. State Div. of Human Rights*, 886 N.Y.S.2d 211 (App. Div. 2009) (No. 2008-04815). Additionally, *Cave* informed a teacher that he needed his service dog in school only so that the dog would alert him if he did not hear his cell phone ring. *Id.* Therefore, since *Cave*’s service dog was not meant to provide any educational benefit such as the special education and related services he was already receiving, a service dog was not necessary for him to receive a FAPE. *See supra* Part II.A.

172. *See, e.g., Clark Cnty. Sch. Dist. v. Buchanan*, 924 P.2d 716, 718 (Nev. 1996) (discussing how a school denied a teacher’s access to dog she was training to be a helping dog due to concerns with allergic reactions and distractions); *Kalbfleisch v. Columbia Cmty. Unit Sch. Dist. Unit No. 4*, 920 N.E.2d 651, 664 (Ill. App. Ct. 2009) (noting that a school denied a service dog because it would be disruptive and because another student had severe allergies to dogs); *Bakersfield (CA) City Sch. Dist.*, 50 IDELR (LRP) 747, 751 (Dep’t of Educ., Off. of C.R. Jan. 25, 2008) (describing how a school excluded a dog because of a determination that it represented “an unreasonable risk to the health and safety of the Student or others”); *Gallia Cnty. Local Sch. Dist.*, 36 IDELR (LRP) 914, 916 (Ohio State Educ. Agency Feb. 18, 2002) (discussing a school concerned that a dog would create a disruption).

173. *See Jalongo et al., supra* note 87, at 11, 13. *But see Clark Cnty.*, 924 P.2d at 721 (“The presence of a helping dog . . . could not be more distracting than the caged rabbits, snakes, lizards, breeding gerbils, rats, and aquarium full of fish which are present in [other classrooms]—apparently without complaint!”).

174. *Jalongo et al., supra* note 87, at 11.

175. *See Sarah J. Brodie, et al., An Exploration of the Potential Risks Associated with Using Pet Therapy in Healthcare Settings*, 11 J. CLINICAL NURSING 444, 449 (2002).

176. *Id.* at 454.

177. *Jalongo et al., supra* note 87, at 11.

178. Dander is the term used for skin flakes that emanate from an animal, similar to dandruff on a person. *See Pet Allergies, ALLERGY BE GONE*, <http://www.allergybegone.com/about/petdander.html> (last visited July 3, 2011) [hereinafter ALLERGY BE GONE]. Dander and other



brings a dog into the classroom, the amount of dander and allergens in the room would increase by only a very small percentage.<sup>179</sup> Because the introduction of a dog introduces a negligible amount of additional dander and allergens, an individual's allergy should not be a barrier preventing a student with a disability from using his or her service dog.<sup>180</sup> As long as the school is made aware of another individual's allergy, the school can easily make accommodations by ensuring that the student with a service dog is not scheduled to be in the same classroom as a student or teacher with a serious allergy.<sup>181</sup> The accommodations would be similar to those already provided for students with peanut allergies.<sup>182</sup> Additionally, if a service dog is hypoallergenic, it is unlikely the service dog would affect a person with dog allergies.<sup>183</sup>

Similar accommodations could also be made for individuals who are afraid of dogs as long as the school is given notice of the individual's fear.<sup>184</sup> If a student is frightened, he or she should keep a distance.<sup>185</sup> However, because service dogs are carefully selected and trained, the

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allergens are collected by a dog's hair and can lead to an allergic reaction, such as sneezing, wheezing, and running eyes and nose. *Id.*

179. *Cave v. E. Meadow Union Free Sch. Dist.*, 480 F. Supp. 2d 610, 621 (E.D.N.Y. 2007). The expert also testified that, "with the amount of dander and other particles that's brought in on the clothing, on the body, on the hair, the potential for . . . reacting to this material is great . . . [i]t is always there." *Id.* at 621 (citation omitted). However, the expert did concede that introducing a dog into the school environment had the potential to adversely affect someone who is allergic. *See id.* *See also* ALLERGY BE GONE, *supra* note 178 (noting that allergens are easily transferred to places dogs have never been present, such as schools, through the clothing of pet owners).

180. *But cf.* Reply Brief for Petitioner at 16, *E. Meadow Union Free Sch. Dist. v. N.Y. State Div. of Human Rights*, 886 N.Y.S.2d 211 (App. Div. 2009) (No. 2008-04815) (arguing that it is not simple for a student to get up and leave his or her classroom if he or she cannot be in a room with a dog and that it is "virtually impossible to segregate students who are allergic to dogs from an airborne pollutant like dog dander").

181. School administrators should keep records of students with known animal-related allergies or anxieties in order to facilitate the process of making accommodations. *See Schoenbaechler, supra* note 3, at 462.

182. *See Marie Plicka, Note, Mr. Peanut Goes to Court: Accommodating an Individual's Peanut Allergy in Schools and Day Care Centers Under the Americans with Disabilities Act*, 14 J.L. & HEALTH 87, 105 (1999) (discussing how schools could provide a separately designated table within the cafeteria where no peanuts or peanut by-products would be consumed).

183. In *Kalbfleisch*, the court found that there was no evidence that students with allergies would be allergic to Carter's hypoallergenic service dog and that the school district was given enough time to accommodate both Carter and any individual with an allergy. *Kalbfleisch v. Columbia Cmty. Unit Sch. Dist. Unit No. 4*, 920 N.E.2d 651, 664 (Ill. App. Ct. 2009).

184. *See Clark Cnty. Sch. Dist. v. Buchanan*, 924 P.2d 716, 721 (Nev. 1996) (finding that moving a teacher's training dog to another classroom if a student were afraid or allergic to dogs was a viable solution to the school's problem with the dog being present in the classroom).

185. *Jalongo et al., supra* note 87, at 13.

risk of bites<sup>186</sup> is minimal;<sup>187</sup> another's fear of dogs should not prevent the service dog from being used in the school setting.<sup>188</sup>

In spite of the low risk of bites, it is understandable for a school to require assurance that the service dog will not pose any safety dangers, including evidence that the dog was trained by a reputable organization and that the student is a qualified handler for the dog.<sup>189</sup> For example, Fairfax County Public Schools has refused entry to Andrew Stevens' service dog because the school does not believe Andrew can safely handle his dog at school.<sup>190</sup> Andrew has Lennox-Gastaut syndrome, a rare and severe form of epilepsy, and his service dog Alaya, assists in detecting and preventing his seizures, making sure he is safe while he is seizing and unconscious, and by notifying others before Andrew is about to have a seizure.<sup>191</sup> The school allows service dogs<sup>192</sup> but has a policy that only permits service dogs trained by Assistance Dogs International.<sup>193</sup> Because Alaya was trained at Seizure Alert Dogs for Life, an organization unaffiliated with Assistance Dogs International, the school is not satisfied that the other students at school will be safe if Alaya is present.<sup>194</sup> Additionally, since Andrew is twelve years old and functions at a kindergarten to first grade level, the school is unsure if Andrew has the ability to handle the dog in a way that ensures the safety of the other students at the school.<sup>195</sup> Although the school's safety concerns are legitimate, the fact that Alaya was trained by a different—

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186. See *Dog Bite Liability*, INS. INFO. INST. (May. 2011), <http://www.iii.org/media/hottopics/insurance/dogbite/> (discussing dog owner liability for injuries caused by dogs).

187. Service dogs are trained not to bite. Inbar, *supra* note 4. *But cf.* Greg Groogan, *School Expels Life-Saving Service Dog*, MY FOX HOUSTON (Feb. 14, 2011, 8:57 AM), <http://www.myfoxboston.com/dpp/news/education/110207-school-expels-life-saving-service-dog> (discussing how a service dog was expelled from school for posing an unacceptable risk following an incident where the dog snapped at a student and bruised his thigh and another incident where the dog scratched another student in the abdomen).

188. See Brodie et al., *supra* note 175, at 454.

189. In fact, Texas' Human Resources Code requires that, for an animal to be considered an "assistance animal," it must be "used by a person with a disability who has satisfactorily completed a specific course of training in the use of the animal" and that the animal "has been trained by an organization generally recognized by agencies involved in the rehabilitation of persons with disabilities as reputable and competent to provide animals with training of this type." TEX. HUM. RES. CODE ANN. § 121.002(1)(A)-(B) (West 2001).

190. Inbar, *supra* note 4.

191. *Id.*

192. For Fairfax County Public Schools' service animal policy, see *Back to School 2020: Service Animals in FCPS Buildings*, FAMILYGRAM, <http://www.fcps.edu/mediapub/publicat/familygram/backtoschool2010/page2.html#Animals> [hereinafter FAMILYGRAM] (last visited July 3, 2011).

193. Inbar, *supra* note 4.

194. *Id.*

195. *Id.*

but comparable—organization should not prevent Andrew from having Alaya at school with him. Not only is Alaya's presence critical to Andrew's safety because he runs the risk of having a stroke at nearly any time,<sup>196</sup> but the person who runs Seizure Alert Dogs for Life has stated that Alaya is "'probably one of the most highly trained seizure response dogs in the world.'"<sup>197</sup> The fact that the organization which trained Alaya is different from the organization that the school recognizes as being a competent trainer should not be a barrier preventing Andrew, or any other student, from bringing his or her trained service dog to school.<sup>198</sup>

Introducing a dog into the school environment has the potential to introduce disease, allergens, safety risks, and incidences of disruption. A school should be concerned with these and other potential problems when a request is made for a service dog to accompany a student at school. Nevertheless, when balancing the collective interests of the student and the school, it is important that an analysis of the school's burdens include how potential risks and problems with a service dog can be reduced or eradicated. Without this consideration, a student whose service dog is disease-free, expertly trained, and whose presence is necessary for the student to receive an educational benefit, will be denied access based on unwarranted fears and apprehensions.

#### V. EVERY DOG HAS ITS DAY: WHEN A SERVICE DOG IS NECESSARY FOR A FAPE

As evidenced by the aforementioned cases, the balancing analysis that has been applied does not always tip in the student's favor. Typically, this determination is reached because the educational value and contributions of the service dog are not accepted as a necessary means to provide a FAPE and because methods for reducing the risks a service dog may pose remain unexplored. Although a service dog cannot provide all students with disabilities an educational benefit, in certain situations, the student with a disability will suffer irreparable harm if his or her service dog cannot accompany the student to school.<sup>199</sup> For these students, where use of a service dog is essential to their ability to benefit from their education, changes must be made to both the IDEIA and statutory definitions of service animals to make it easier for the student

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196. *Id.*

197. *Id.*

198. In this situation, there is ample evidence that Alaya does not present an unacceptable threat to the health and safety of the school environment. *See id.*

199. *See, e.g.,* Kalbfleisch v. Columbia Cmty. Unit Sch. Dist. No. 4, 920 N.E.2d 651, 664 (Ill. App. Ct. 2009).

to demonstrate the benefit the service dog provides and obtain permission to bring the service dog to school.

Section A discusses the criteria a school should consider when determining whether a service dog is necessary for a student to receive an “appropriate” education. Section B proposes amending the IDEIA’s non-exhaustive list of related services to include a service animal in order to facilitate the discussion of whether a service animal can be necessary for a student to receive a FAPE. Section C addresses changes that should be made to statutory definitions of service animals and school policies to reflect the benefits a service animal can provide to individuals with a wide range of disabilities.

A. *Using the Elevated Standard for “Appropriate” and the Bakersfield Test to Determine When a Service Animal is Necessary*

NCLB has elevated the IDEIA’s standard for what is appropriate<sup>200</sup> by requiring improved educational outcomes from students with special needs.<sup>201</sup> The IDEIA now incorporates a right to educational achievement,<sup>202</sup> focusing on “[h]igh expectations for *all* children.”<sup>203</sup> Because of this heightened requirement, a service animal is now necessary for certain students with disabilities to receive an “appropriate” education and reach the high expectations that have been set. For those students to be afforded their right to educational achievement, a service animal should be included in their IEP.<sup>204</sup>

In determining when a service dog is necessary for a student to receive an “appropriate education,” schools should mimic the analysis set forth in *Bakersfield*.<sup>205</sup> In *Bakersfield*, the school was required to take into consideration:

[ ]All academic and behavioral functions taking place in the school se[t]ting for which [the service dog] is trained to assist the [s]tudent and the degree to which these functions are or are not currently fulfilled in the school setting by other means. [ ]The impact of the presence or absence of [the service dog] upon the ability of the

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200. See Wright & Wright, *supra* note 49. See also *supra* Part II.B.

201. See Wright & Wright, *supra* note 49. See also Allison S. Owen, Note, *Leaving Behind a Good Idea: How No Child Left Behind Fails to Incorporate the Individualized Spirit of the IDEA*, 78 GEO. WASH. L. REV. 405, 414-15 (2010) (discussing the tensions between NCLB and the IDEIA).

202. See Weishaar, *supra* note 62, at 69, 80.

203. *Id.* at 80.

204. See *Sullivan v. Vallejo City Unified Sch. Dist.*, 731 F. Supp. 947, 962 (E.D. Cal. 1990) (holding that a school district modify a student’s IEP to reflect the student’s right to a service dog in school).

205. See *supra* Part IV.C (discussing how *Bakersfield* set forth specific factors the school must consider when determining if a service dog should be included in a student’s IEP).

[s]tudent to function successfully and independently in an environment of non-disabled peers. [T]he impact of the presence or absence of [the service dog] upon the social and adaptive behavior of the [s]tudent, including his ability to abide by the conduct expectations at the [school] and his ability to develop and maintain constructive social relationships with his peers. [And] [t]he degree, if any, to which the separation of the [s]tudent from [the service dog] during the school day would impair a transition to independent living skills in the [s]tudent.<sup>206</sup>

If, upon examining these criteria, the IEP team were to find "that [the service dog] should attend school with the [s]tudent on a continuous basis as an element of FAPE, including as a necessary related aid or service," then the analysis would shift to determining whether the service dog "poses an unacceptable risk or threat to the health and safety of others" in the school.<sup>207</sup> As long as the service dog does not endanger the health and safety of others, it should be incorporated into the student's IEP.<sup>208</sup>

The analysis described in *Bakersfield* provides a comprehensive and just means for schools to determine whether a service dog should be permitted to accompany a student with a disability. By following this framework, schools are compelled to consider the educational benefits the service dog brings to the student, whether the school can provide those benefits through other means, how the service dog would affect the student's placement, and what, if any, risks the service dog would pose to the school environment.<sup>209</sup> It may also be beneficial for the school to inquire about the service dog's training and speak with the trainer regarding the service dog's qualifications and capabilities.<sup>210</sup> Because the standard for an "appropriate" education has been enhanced, it is essential that schools use this framework when addressing the needs of a student with a disability seeking to bring his or her service animal to school.<sup>211</sup> Without placing all of these factors into consideration, the

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206. Bakersfield (CA) City Sch. Dist., 50 IDELR (LRP) 747, 752-53 (Dep't of Educ., Off. C.R. Jan. 25, 2008).

207. *Id.* at 753.

208. *See id.* at 752. As long as the service animal was trained by a reputable organization and its health is maintained, this element should be easy to satisfy. *See supra* Part IV.D.

209. *See* Bakersfield City Sch. Dist., 51 IDELR (LRP) 733, 752-53 (Cal. State Educ. Agency Oct. 22, 2008).

210. *See* Schoenbaechler, *supra* note 3, at 463.

211. Similarly, it has also been proposed that the IEP team:

[C]onsider the diagnosis of the specific disability; the needs that stem from it; consider the parent's request for the service . . . animal; identify and verify the need for such a service . . . animal; and directly address the function(s) that the service . . . animal is expected to perform in relation to the student's disability.

school will be in violation of the IDEIA's requirement to provide every student with a disability a FAPE.<sup>212</sup>

### B. Proposed Amendments to the IDEIA

A straightforward approach to assisting students who require a service dog in school is to amend the IDEIA to specifically include a service animal as a related service.<sup>213</sup> By including service animals within the non-exhaustive list<sup>214</sup> of related services, service animals will be congressionally recognized as a tool necessary to provide certain students with an educational benefit.<sup>215</sup>

A service animal is a related service because it is something required for a student to receive an educational benefit, similar to an assistive technology device.<sup>216</sup> The IDEIA defines an assistive technology device as "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability."<sup>217</sup> An assistive technology device, such as a pencil grip, a computer with a word processing program, or a keyboard

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Clark, *supra* note 52, at 12. More specifically, for students with autism, it has been suggested that school administrators explore:

[W]hether the impairment substantially limits any major school-related activities, whether there is a record of this impairment, what type of animal the student plans to bring, how the animal was trained, what benefits that animal provides, whether the animal's benefits are related to the student's disability, and whether the animal is essential to the student's education.

Schoenbaechler, *supra* note 3, at 463. See also Perry A. Zirkel, *Service Animals in Public Schools*, 257 EDUC. L. REP. 525, 534 (2010) (setting forth a flowchart-like analysis with tentative legal guidance for determining whether a service dog should be allowed in the school).

212. See Individuals with Disabilities Education Improvement Act, 20 U.S.C. § 1412(a)(1)(A) (2006).

213. See *supra* Part II.A (discussing related services).

214. See GUERNSEY & KLARE, *supra* note 11, at 44.

215. Congress has recognized the benefits of using technology, as evidenced by legislation to promote and improve the expanded utilization of technology included in existing laws and bills under consideration. See JAEGER & BOWMAN, *supra* note 19, at 153.

216. See Zapf & Rough, *supra* note 78, at 48 (labeling a service animal as an "assistive technology"). Although a useful and innovative technology, service animals differ from typical assistive technology devices because they are not purchased by the school nor property of the school district. See JAEGER & BOWMAN, *supra* note 19, at 151 (noting that a school is required by law to purchase any assistive technology devices listed on a student's IEP). Typically, because an assistive technology device is the property of the school, students are not allowed to take the device home with them or keep it upon graduation. *Id.* As a result, by categorizing a service animal as an assistive technology device, issues may arise concerning parents who request that the school purchase a service animal for their child. Issues would also arise because a service animal cannot be used interchangeably from one student to the next, such as an FM transmitter or computer software.

217. 20 U.S.C. § 1401(1)(A).

with tactile locator dots,<sup>218</sup> must be provided as a related service if the device is necessary for the student to receive an "appropriate" education.<sup>219</sup> These devices help increase the user's independence both within and outside of the educational setting.<sup>220</sup> Similarly, a service dog can create independence for a student, assisting them in completing tasks he or she could not do without the service dog's aid.<sup>221</sup>

A student's IEP determines whether an assistive technology device is needed.<sup>222</sup> Much consideration is given to assistive technology devices because they "have been shown to dramatically improve the functional capabilities of a student with a disability in terms of mobility, communication, employment, and learning."<sup>223</sup> The technology also allows many students to be educated in a less restrictive environment.<sup>224</sup> Because the definition of an assistive technology device is so broad, the IEP team has flexibility in determining what it considers an assistive technology device.<sup>225</sup>

A service animal is analogous to an assistive technology device because, like a keyboard with tactile locator dots, it is a piece of technologically advanced equipment which has the ability to increase, maintain, and/or improve a student with a disability's functionality and,

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218. *Definition of Assistive Technology Devices and Services*, GA. DEP'T EDUC., 1 (July 2007), <http://public.doe.k12.ga.us/DMGetDocument.aspx/Definition%20of%20Assistive%20Technology.pdf?p=6CC6799F8C1371F6B5A350C4F422D37B14FA76A2B2C4FB177CA3869EED08AF05&Type=D> [hereinafter GA. DEP'T EDUC.]. Assistive technology for visual impairments range from Braille printers, text translation systems, and tactile paging systems to large print books and magnifiers. JAEGER & BOWMAN, *supra* note 19, at 143. Students with motor impairments may require devices such as an alternative keyboard such as a trackball or joystick, page-turners, wheelchairs, and wheelchair accessories. *Id.* at 144. Students with hearing impairments may require visual icons that replace sound cues on the computer or video captioning. *Id.*

219. OSBORNE & RUSSO, *supra* note 18, at 62-63. However, the school district is not required to provide personal devices, like eyeglasses or hearing aids, which a student would require regardless of whether he or she attended school. *Id.* at 63.

220. See JAEGER & BOWMAN, *supra* note 19, at 152.

221. See *supra* Part III.

222. GUERNSEY & KLARE, *supra* note 11, at 46.

223. Giuliani & Pierangelo, *supra* note 52, at 22.

224. See *id.* (discussing how the use of assistive technology device allows some students to be educated in regular classrooms with non-disabled students). See also JAEGER & BOWMAN, *supra* note 19, at 142 ("For someone with a speech impairment or hearing loss, assistive technology can make the difference between being able to participate in classroom discussions or sitting on the sidelines.").

225. See GA. DEP'T EDUC., *supra* note 218, at 1 (explaining that "[a]most any tool can be considered to be an assistive technology device except for those assistive technology devices that are surgically implanted and have been excluded [under the IDEIA]"). In addition, a student who has an assistive technology device on his or her IEP may also require an assistive technology service, which is "any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device." Individuals with Disabilities Education Improvement Act, 20 U.S.C. § 1401(2) (2006).

for certain students, is necessary to receive a FAPE.<sup>226</sup> In addition, having a service dog in school will allow some students to be educated in a less restrictive environment, perhaps one where he or she is placed with his or her non-disabled peers to the maximum extent appropriate.<sup>227</sup>

With the addition of a service animal under the list of related services, an IEP team will have no excuse for failing to consider the educational benefit a service animal may provide to a student when developing his or her IEP.<sup>228</sup> By amending the IDEIA in this fashion, Congress would directly espouse its approval of this unique and valuable form of technology and signal to schools its desire to employ such an innovative means to provide an educational benefit to students with disabilities.<sup>229</sup>

### C. Proposed Amendments to Statutes and School Policies

An additional means to facilitate the process and demonstrate that a service animal is a tool necessary to provide an educational benefit is to amend state statutes and school policies.<sup>230</sup> Both state statutes and school policies should define “service animal” such that the definition

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226. See *supra* Parts III-IV (addressing the benefits a service animal can provide to increase a student’s physical and educational abilities).

227. See Inbar, *supra* note 4 (noting that a student currently has a more restrictive residential placement because a public school will not allow a service dog to accompany the student). *Contra* Bakersfield City Sch. Dist., 51 IDELR (LRP) 733, 744 (Cal. State Educ. Agency Oct. 22, 2008) (finding the use of a one-to-one aide less restrictive than having a service dog constantly present because the aide could “back off” and allow the student to be more independent while the service dog would always be present).

228. The IEP team should use the *Bakersfield* criteria, or a parallel framework, to draw a conclusion as to whether this type of a related service is necessary for the individual student to receive a FAPE. See *supra* Part V.A.

229. This addition to the IDEIA’s list of related services would also reflect the wide public support for the use of service dogs in school by students with special needs. See *Should Epileptic Boy’s Service Dog Be Allowed In School?*, TODAY, [http://today.newsvine.com/\\_question/2011/01/04/5763316-should-epileptic-boys-service-dog-be-allowed-in-school](http://today.newsvine.com/_question/2011/01/04/5763316-should-epileptic-boys-service-dog-be-allowed-in-school) (last visited July 3, 2011). A poll conducted by TODAY where 30,871 people answered the question “Should epileptic boy’s service dog be allowed in school?” resulted in 93.2% of people responding, “Yes. The boy has the right to an education, and he needs the dog to get it”; 2.8% responding, “No. The dog could be disruptive. An individual’s needs should not outweigh the group’s”; and 4% responding, “I’m not sure. Maybe the parents and school can reach a compromise.” *Id.* See also *Clark Cnty. Sch. Dist. v. Buchanan*, 924 P.2d 716, 719-21 (Nev. 1996) (discussing Nevada’s statute providing a person training a helping dog with the right to seek injunctive relief if denied access to a place of public accommodation and finding that the school district ignored the public’s interest in facilitating and training helping dogs because of the benefits helping dogs provide to individuals with disabilities).

230. The U.S. Department of Education has neglected to issue any guidelines or policies regarding the use of service dogs in schools, allowing for different states and different schools to use their own standards. Shana De Caro, *What the Disability Laws Say About Service Dogs*, BRAINLINE.ORG, <http://www.brainline.org/content/2009/08/ask-the-expert-what-the-disability-laws-say-about-service-dogs.html> (last visited July 3, 2011).



encompasses dogs trained to assist students with a wide range of disabilities and allows certain service animals to be present in the school building.<sup>231</sup> Currently, various states have statutes that define a service animal<sup>232</sup> and address discrimination related to service animals.<sup>233</sup> However, it is rare for a state statute to indicate the policies its schools must follow concerning providing access to a service animal.<sup>234</sup> Therefore, in the absence of further action by the states, schools should proactively enact or modify their policies regarding service animals to protect the school from legal liability for refusing access to a service animal for a student who may require the service animal to receive a FAPE.<sup>235</sup>

In order for school districts to formulate policies about service animals, it is essential that states expand the statutory definition of a service animal to provide the school district with some guidance. The current language used by many states is too narrow, limiting the number of service animals that will be recognized as such under the law. For example, the law in Arizona reads:

“Service animal” means any guide dog, signal dog or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing assistance in a medical crisis, pulling a wheelchair or fetching dropped items.<sup>236</sup>

Similarly, North Dakota’s statute states a:

“[S]ervice animal” means any guide dog, signal dog, or other animal trained to do work, perform tasks, or provide assistance for the benefit

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231. In doing so, the states would be updating the definition of a service animal similar to the way in which the ADA definition was amended on September 15, 2010. *See supra* note 74 and accompanying text.

232. *See, e.g.*, ARIZ. REV. STAT. ANN. § 11-1024(J)(5) (2001 & Supp. 2010); N.D. CENT. CODE § 25-13-01.1 (2002 & Supp. 2009); TEX. HUM. RES. CODE ANN. § 121.002(1)(A)-(B) (West 2001); VA. CODE ANN. § 51.5-44(E) (2009); W. VA. CODE ANN. § 5-15-3(c) (West 2002).

233. *See, e.g.*, N.Y. EXEC. LAW § 296(14) (McKinney 2010). Additionally, the law in Nevada extends to protecting those who train service animals from being denied access to places of public accommodation. *See Clark Cnty.*, 924 P.2d at 719.

234. *See* 105 ILL. COMP. STAT. ANN. 5/§ 14-6.02 (West 2006) (reflecting that Illinois School Code dictates the service dog policy for schools).

235. *See Clark, supra* note 52, at 14 (discussing how in *Bakersfield*, the school’s “decision-making may have been expedited had they had a school policy in place to guide their work”). Some schools, such as Fairfax County Public Schools, already have a service animal policy in place. *See also* FAMILYGRAM, *supra* note 192 (describing a school’s service dog policy). However, even though Fairfax County Public Schools has a policy permitting service animals in the building, one student’s request to use a service animal has been denied. *See HLN, supra* note 83.

236. ARIZ. REV. STAT. ANN. § 11-1024(J)(5).

of an individual with a disability. The term includes an animal trained to provide assistance or protection services to an individual with a disability, pull a wheelchair, lend balance support, retrieve dropped objects, or provide assistance in a medical crisis.<sup>237</sup>

Two issues arise from the language used in the Arizona and North Dakota statutes. First, the term “benefit” is vague and can be misconstrued, as evidenced by litigation over what the word means in the context of the Illinois School Code.<sup>238</sup> Second, the list of actions and services the animal is trained to provide is limiting. Because an animal’s classification as a service animal is contingent on its ability to confer a benefit, additional illustrative examples should be used to show what it means to provide a benefit.<sup>239</sup> Actions such as guiding individuals with vision impairments or pulling a wheelchair are specific to disabilities that are more visible—disabilities for which society has already accepted the use of service dogs.<sup>240</sup> The list does not include benefits such as detecting seizures, helping an individual focus, preventing an individual from eating non-food items, or other services that are beneficial to an individual with cognitive and less visible disabilities, such as autism spectrum disorder or seizure disorders.<sup>241</sup> Including some of the benefits a service dog provides to individuals with disabilities that historically have not used service dogs will send a clear message that trained dogs used for those purposes are also covered under the definition.<sup>242</sup> Additionally, replacing the word “includes” or “including” with the phrase “including, but not limited to,”<sup>243</sup> or ending the list with “or other

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237. N.D. CENT. CODE § 25-13-01.1.

238. See *supra* Part IV.B (discussing *Kalbfleisch* and *K.D.*, two cases involving a dispute over the Illinois School Code’s meaning of the word “benefit” in regard to service dogs).

239. See Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56,250, 56,250 (Sept. 15, 2010) (to be codified at 28 C.F.R. § 36.104) (amendment to the regulations defining “service animal” under the ADA contains more examples of the work or tasks performed by a service animal).

240. Cf. Schoenbaechler, *supra* note 3, at 461-62 (arguing that students without visual or mobility impairments cannot continue to be discriminated against because their disabilities are “more cognitive and less physically apparent”).

241. See *supra* Part III (discussing the wide range of benefits service dogs provide to individuals with disabilities).

242. Students with disabilities where benefits of a service animal appear to be less obvious, such as autism spectrum disorder, should not be discriminated against because their disability is cognitive and less physically apparent. Schoenbaechler, *supra* note 3, at 461-62.

243. This is the phrase used in the West Virginia statute. W. VA. CODE ANN. § 5-15-3(c) (West 2002). West Virginia’s statute states that:

A “service animal” means any guide dog, signal dog or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair or fetching dropped items.

such activities of service or support necessary to mitigate a disability”<sup>244</sup> would indicate that there are numerous functions a service animal can provide for several types of disabilities.<sup>245</sup>

With a more expansive definition in the state statute, schools will be better situated to determine whether a student’s claimed service animal actually provides a benefit and how those benefits can be applied to the educational setting. The school’s service animal policy should include a definition of a service animal that conforms to both the ADA and the state’s definition.<sup>246</sup> The policy should also outline what information a student must provide to the school when a request to use a service dog is made, procedures and restrictions the school will impose regarding the service dog, and how parents and students will be notified of the school’s policies about service animals.<sup>247</sup>

A prudent policy would require the student to submit documentation from a medical professional about the child’s disability and how the service animal either performs tasks to “alleviate the symptoms of the disability or [how it] provide[s] important disability-related assistance.”<sup>248</sup> This information will assist the IEP team in considering the *Bakersfield* factors<sup>249</sup> and determining whether the service dog is necessary for the student to receive a FAPE.<sup>250</sup> The student should also be required to provide written documentation from the dog’s trainer indicating that the dog has been specially trained or equipped to assist a person with a disability.<sup>251</sup> Additionally, there should be documentation from a veterinarian stating that the dog is in good health and has received the proper vaccinations.<sup>252</sup> The information from both the trainer and the veterinarian will provide evidence that the

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*Id.* (emphasis added).

244. This is the phrase used in the Virginia statute. VA. CODE ANN. § 51.5-44(E) (2009). This statute defines a “service dog” as “a dog trained to accompany its owner or handler for the purpose of carrying items, retrieving objects, pulling a wheelchair, alerting the owner or handler to medical conditions, or other such activities of service or support necessary to mitigate a disability.” *Id.* (emphasis added).

245. Similarly, New York’s Human Rights Law, in addressing unlawful discriminatory practices, prohibits discrimination against a “blind person, a hearing impaired person or a person with a disability on the basis of his or her use of a guide dog, hearing dog or service dog.” N.Y. EXEC. LAW § 296(14) (McKinney’s 2010). This language acknowledges that people with disabilities other than visual or hearing impairments use service dogs and are afforded the same protections under the law. *See id.*

246. Clark, *supra* note 52, at 14.

247. *Id.* at 14-15.

248. De Caro, *supra* note 230.

249. *See supra* Part V.A.

250. *See* Clark, *supra* note 52, at 12.

251. De Caro, *supra* note 230.

252. *Id.*

dog does not pose any health or safety risks to other individuals, alleviating the school's concerns about the dog introducing diseases into the school environment, biting people, or creating distractions.<sup>253</sup> Further, it is important for the student to demonstrate that he or she was trained and is qualified to handle the dog and that the dog's trainer was competent and reputable.<sup>254</sup>

The school's policy should also provide the school with certain protections, since having a dog in the school environment poses numerous risks.<sup>255</sup> Accordingly, the policy should reserve the school's right to remove a service animal from the premises at any time if the animal "pose[s] a direct threat to others" or "interfere[s] with educational and operational functions."<sup>256</sup> The policy should also give consideration to how the animal will be handled during evacuation procedures, state any restrictions as to areas where the service animal is not allowed, and set forth who will be responsible for supervising and caring for the service animal, including its access to water, walking, feeding, and cleaning the animal's waste.<sup>257</sup> It is important that the policy is clear regarding whether, and in what circumstances, the school or the student will be held legally liable for any damage or injuries caused by the dog.<sup>258</sup> Further, the policy should require the service animal to wear proper identification or tagging, such as a harness or colored leash, so that the animal is visibly identified as a service animal.<sup>259</sup> Having this identification will indicate to others that the animal is not a pet and should not be treated as such. When a service animal is introduced into

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253. See *supra* Part IV.D.

254. Because a service dog has the potential to pose many risks, Texas has declared that, in order for an animal to be considered an "assistance animal," there must be evidence that it is being handled by an individual trained to use it properly and that it was trained by a reputable and competent organization. TEX. HUM. RES. CODE ANN. § 121.002(1)(B) (West 2001).

255. See *supra* Part IV.D.

256. Clark, *supra* note 52, at 15.

257. *Id.* at 15-16.

258. See *id.* at 15. See also *Dog Bite Liability*, *supra* note 186 (discussing dog owners' liability and the types of laws states have imposing liability on owners). The issue of assigning liability should be further explored. Although the student should be held responsible for the dog's behavior, issues arise if the school's negligence contributed to an incident. See Groogan, *supra* note 187 (noting two incidents where a service dog harmed other students when aides assigned to work with the student with a disability and his dog were out of position and were not supervising them).

259. See Clark, *supra* note 52, at 15. This policy should be imposed regardless of whether the state's law requires service animals to wear identification. *Id.* See, e.g., VA. CODE ANN. § 51.5-44(E) (2009) (citing a Virginia law that requires a service dog to be adorned in certain types of harnesses and/or with a "blaze orange leash"). But see Price, *supra* note 75, at 5 (summarizing how the ADA does not mandate that a service animal wear any special form of identification).

the school environment, it would be in the school's best interest to hold an assembly or send a letter to inform students and parents of the service dog's presence, indicate how the dog does not present any health or safety threats, and to instruct students that a service dog is performing a job and should not be treated like a pet.

## VI. CONCLUSION

Over the past few decades, individuals with disabilities have been granted access to public schools and the opportunity to receive an education.<sup>260</sup> The IDEIA has established that all students with disabilities must be afforded a FAPE<sup>261</sup> and receive an educational benefit from their education.<sup>262</sup> While many advances have been made in the special education and related services available to these students,<sup>263</sup> new studies and technologies constantly emerge, creating new and more effective means for educating students with disabilities. Schools should not hesitate to explore new methods for providing an educational benefit and helping students with disabilities. In fact, use of a service dog might be necessary in order to meet the higher expectations the law now requires.<sup>264</sup>

When a student approaches his or her school looking to use an innovative technology such as a service dog, the school should give careful consideration to the unique benefits the service dog can provide to that individual student.<sup>265</sup> Students with disabilities face enough challenges trying to cope with their disability and learn in the classroom—these students should not be presented with an additional hurdle when seeking to bring a service animal to school. Without the proposed modifications to the IDEIA, state statutes, and school policies to indicate approval of this method of providing a FAPE, these students

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260. *See supra* Part II.

261. Individuals with Disabilities Education Improvement Act, 20 U.S.C. § 1400(d)(1)(A) (2006).

262. *See supra* Part II.A.

263. *See supra* Part II.A (discussing special education and related services that must be provided to students with disabilities pursuant to the IDEIA).

264. *See supra* Part V.A.

265. *See supra* Part V.A.

will continue to face opposition from their schools and may not receive the “appropriate” education they deserve.

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\* J.D. Candidate, 2012, Hofstra University School of Law. This Note is dedicated to all of the students with special needs who are struggling in their efforts to bring their service dogs to school. I hope that this Note provides guidance to school districts as to how vital a service dog can be for students with disabilities and encourages districts to allow service dogs for those students who will not receive a meaningful benefit from their education without them. Thank you to Dr. George Giuliani for inspiring me to research this legal issue and being my sounding board and to Professor Amy Stein for her guidance. I would also like to thank the members of Volume 39 for their insight and assistance during the writing and editing process and my family and friends for their continuous support and encouragement.