A study of the statutes, regulations and judicial rulings impacting the access of service animals to the public schools

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ABSTRACT

A STUDY OF THE STATUTES, REGULATIONS AND JUDICIAL RULINGS IMPACTING THE ACCESS OF SERVICE ANIMALS TO THE PUBLIC SCHOOLS

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Northern Illinois University, 2015
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The use of service animals is growing in the United States. Since public schools are a microcosm of society, it is not surprising requests for service animals to attend public school are growing as well. In the absence of a Supreme Court decision on service animals attending public schools, a systematic review of disability legislation, governing agencies’ interpretation, and court decisions helps school officials develop appropriate policies and procedures for allowing students to attend school accompanied by a service animal.

This study involved an extensive search for historical and current litigation and legislation addressing issues related to the regulation of service animals within public schools. This area of the law is evolving. Three federal statutes govern public school students with disabilities: The Rehabilitation Act of 1973, the American with Disabilities Act (ADA), and the Individuals with Disabilities Education Act (IDEA).

A service animal will typically be a reasonable accommodation for an otherwise qualified student with a disability. The animal needs to fit the DOJ service animal definition. In addition, the ADA’s fundamental alteration and undue financial burden arguments cannot be applied easily to schools. Each service animal request should be considered on a case-by-case basis. This
study found no judicial opinions or OCR complaints ruling a service animal was necessary in order to provide a FAPE as defined by the IDEA.

School officials must consider who will act as the service animal handler. Often the child is able to serve in this capacity. When the student already has a one-to-one aide or a good amount of adult support, school officials may just choose to train that employee as the service dog handler. When the student has no support personnel but cannot act as the handler, school officials need to decide who fill this role. Despite the OCR guidelines stating the employees of the facility are not required to care for the service dog, school officials need to apply an individual inquiry to determine if the handler would be necessary as part of the child’s IEP or §504 plan. The study concludes with recommendations regarding what should be included in policies and procedures addressing parental requests for their child to attend school with a service animal.
A STUDY OF THE STATUTES, REGULATIONS AND JUDICIAL RULINGS IMPACTING THE ACCESS OF SERVICE ANIMALS TO THE PUBLIC SCHOOLS

BY

JENELL A. MROZ

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A DISSERTATION SUBMITTED TO THE GRADUATE SCHOOL IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE DOCTOR OF EDUCATION

DEPARTMENT OF LEADERSHIP, EDUCATIONAL PSYCHOLOGY AND FOUNDATIONS

Doctoral Director:
Dr. Jon Crawford
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DEDICATION

To my husband Pete and my daughters, Katie and Annie, who have patiently and unconditionally supported me during this monumental task, never doubting that there would be a finished product.
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CHAPTER ONE:
INTRODUCTION TO THE STUDY

Background

Twenty million families in the United States have at least one family member with a disability.\(^1\) According to the U.S. Department of Education, in 2010-2011 nearly 6.4 million children from the ages of 3-21 receive special education and related services. This number represents 13% of all children enrolled in public schools.\(^2\)

The legislation protecting individuals with disabilities received its impetus from the civil rights movement of the 1960s.\(^3\) Since 1973, the federal government has passed and reauthorized three statutes protecting the rights of adults and children challenged by disabilities. These statutes include the Rehabilitation Act of 1973,\(^4\) the Americans with Disabilities Act of 1990,\(^5\)

\(^5\) Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101-213 (2000). In 2008, Congress amended the original Act and created the Americans with Disabilities Act Amendment Act. These amendments made some significant changes, not only to the ADA, but also to the Rehabilitation Act of 1973.
and the Individuals with Disabilities Education Act.  

Prior to the passage of these Acts, our Nation’s response to students with disabilities was generally segregation and exclusion. One could argue Aristotle’s philosophy, written over two thousand years ago in the third century B.C., provided a roadmap for including children challenged by disabilities in public schools. Aristotle believed children should be educated together with others unlike themselves. Aristotle envisioned common schooling permitting and encouraging children to be educated together. He believed this was more conducive to mutual goodwill and accepted societal outcomes than an educational approach that did not facilitate children coming to know each other.  

Groundbreaking legislation opened the public school doors to students with disabilities. Initially passed as the Education for All Handicapped Children Act and later renamed the Individuals with Disabilities Education Act (IDEA), this legislation was expressly written for children with disabilities and enabled them to receive special education and related services in public schools. In 2004, the 108th Congress wrote

Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring

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6 Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (2004). The original version of this Act was entitled the Education for All Handicapped Children Act of 1975. The Act was reauthorized in 1990 and again in 1997, when the name was changed to the Individuals with Disabilities Education Act. The current 2004 authorization actually changed the name to the Individuals with Disabilities Education Improvement Act, however, most of the population still refer to it as the IDEA.
7 RANDALL R. CURREN, ARISTOTLE ON THE NECESSITY OF PUBLIC EDUCATION, 9-10 (2000).
8 Id. at 140.
equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.\textsuperscript{11}

In addition to the IDEA, the ADA and the Rehabilitation Act both address the obligation of public schools to meet the needs of students challenged by disabilities. The ADA and the Rehabilitation Act were not written specifically for children unlike the IDEA. These Acts were more broadly designed to enable all people with disabilities to receive the same opportunities as people without disabilities. However, both Acts have sections applying to public schools: Title II and §504 respectively. Collectively, the Rehabilitation Act, the ADA and the IDEA form the legal framework for providing an appropriate education for students with disabilities in America’s schools.

Just as the IDEA opened the schoolhouse doors for students with disabilities, the Department of Justice opened those same doors to service animals 35 years later.\textsuperscript{12} Under the ADA’s Department of Justice regulations, a service animal is an example of a reasonable accommodation available to an individual challenged by a disability (e.g., a child attending a public school).\textsuperscript{13} Title II of the ADA requires public schools to make reasonable modifications of policies, practices or procedures when these modifications are necessary to avoid discrimination on the basis of disability.\textsuperscript{14} Allowing a service animal to attend public school represents one type of change required for those policies, practices, and procedures.

\textsuperscript{11} Id.
\textsuperscript{13} Id.
The presence of service animals in public places has become more common in recent years. In the United States, as early as the 1920s, service animals were trained to help people who had vision difficulties. These animals were more commonly referred to as “seeing-eye dogs.” Over the years, the role of the service animal grew. The first use of a service dog to help a person with a hearing impairment was recorded in 1976.15 Today service animals are also used to support individuals with epilepsy, diabetes, mobility difficulties, and autism.

The scenario below is an example of what one might observe in any community. An older woman with a golden retriever wearing a service animal vest enters a local restaurant. The woman can be overheard explaining to employees she has diabetes, and the dog is trained to alert her to incorrect sugar levels. The woman is sitting with friends, talking and enjoying lunch, when the dog suddenly stands up, gives a small yip, and nuzzles the woman. The lady pets the dog, checks her blood sugar, and drinks some juice. The dog immediately quiets down.

Publicity about service animals, both positive and negative, is also increasing. On July 15, 2014, Fox News reported a story about Arkansas public school officials who forced a mother to pay a $125 a week for a handler to accompany her seven-year-old son’s service dog to school.16 The service dog was trained to alert others prior to the child having a seizure. Because the child was too young to act as the dog’s handler, an additional adult was required when the service dog accompanied the child. According to the child’s mother, once her son acquired his service dog, his medication requirement was reduced. The superintendent told the reporter the

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dog’s attendance was not necessary to the child’s education, so school officials would not pay for the handler. The superintendent reported the child could be appropriately educated either with or without the service animal because the school’s registered nurse served the needs of other students with this type of health concern. Since the dog provided services no human could perform, the mother believed the dog was essential for her child. The parents filed a complaint with the U.S. Department of Education Office for Civil Rights (OCR) claiming discrimination based on their child’s disability because school officials would allow the dog on campus only if the family paid for the dog’s handler. School officials claimed they were not violating any law and were acting in compliance with the ADA.

The topic of service animals has grabbed the interest of the general public as demonstrated by the September 2014, USA Weekend article. This Sunday supplement piece explained the tasks service dogs could be trained to perform, where service dogs are allowed, how service dogs are controlled, service animal etiquette, and how service animals differ from comfort animals. It is estimated between 10,000-30,000 people with disabilities currently use service dogs in the United States. These recent examples give credence to the perception of the rising use of service animals.

People challenged with disabilities often encounter difficulty utilizing service animals within their daily lives due to current lack of legal clarity. Entering the words “service

17 Id.
18 Id.
20 Huss, supra note 15, at 1166.
21 Id. at 1163.
animals” on a Google search yields 164,000 hits. For both school personnel and parents this translates into thousands of opportunities for misinformation or information overload. In addition, it is not unusual to see people mocking the use of service animals. These attitudes can cause additional issues for school officials.

Statement of Problem

A service animal accompanying a child challenged with a disability to public school setting presents challenges for school officials. While the idea of service animals is not new, the type of support these animals can provide to students with disabilities is growing. School leaders are faced with many decisions related to the formulation of procedures allowing service animals school access. These decisions also impact both other students and staff because the animal attends school on a daily basis just like the student.

Neither current statutes nor case law provide school leaders with sufficient guidance to confidently navigate these complicated waters. The fact three federal acts impacting the use of service animals intertwine and overlap further muddles school officials’ decision-making processes.

To date, state and federal courts have ruled in eight cases specifically addressing the presence of service animals in public schools. Six of these cases alleged school officials discriminated against the child based on §504 of the Rehabilitation Act and the other two cases alleged school officials were not following school code. The decisions resulted in parents prevailing in two cases involving §504 and both cases involving school codes. These four decisions required school officials to allow the child to attend school with a service animal. In
three of the remaining four cases, the courts did not require school officials to allow the child to attend school with a service animal.\textsuperscript{22} This interpretative variance among the federal courts further limits school officials’ ability to establish clear and appropriate courses of action for responding to parental requests for service animals to accompany their children to school.

Two additional factors make it more complicated to accommodate a service animal in a public school as opposed to other forums. First, a handler must be responsible for the animal regardless of the setting. Many children in public schools who request the use of a service animal are unable to act as the handler because of their age or the significant nature of their disability. Other public settings do not need to consider who the dog’s handler might be. The second complicating factor in a public school setting is the animal attends everyday, meaning if another student is fearful or a staff member has a significant allergy, there is no simple way for these individuals to avoid the service animal.

The U.S. Supreme Court has not issued a decision involving the attendance of a service animal in a public school. In the absence of this guidance, lower courts have applied varying analyses to formulate their (sometimes conflicting) decisions. Similarly, law reviews and other literature offer a variety of proposed (and again, conflicting) solutions or procedures for appropriately responding to the use of service animals in public schools, once again leaving school leaders searching for consistent guidance on how to respond. School officials do not want to be involved in expensive legal battles, OCR complaints or be featured in an unflattering article in the local or national news. For this reason, it is important school leaders receive reliable guidance to help them formulate solid policies and procedures regarding service animals.

\textsuperscript{22} To date, in the final case the court has only ruled on the District’s request to dismiss.
Purpose Statement

This study involved an extensive search for historical and current litigation and legislation addressing issues related to the regulation of service animals within public schools. This area of the law is evolving. Thus, this study summarized and analyzed the history and current status of legislation and litigation for the purposes of providing educational administrators with concise and understandable legal guidance regarding students with disabilities and the use of service animal in the public schools.

Research Questions

This study investigated the following questions:

1. What is the relevant legal history of federal statutes impacting disability discrimination as related to the presence of service animals within the public schools?

2. What is the current status of the law in the area of the presence of service animals within the public schools?

3. How can prior litigation addressing the presence of service animals in the public schools inform school officials’ procedures and practices?

Delimitation of the Study

This study primarily utilized judicial decisions focusing on public schools, though several parallel cases arising from accommodations provided to disabled individuals outside the public school setting were also considered. Furthermore, all published court and OCR decisions
involving service animals in the public schools were used in this study since the number of cases was small. The study also examines agency enforcements of the Individuals with Disabilities Education Act 2004\textsuperscript{23}, the Rehabilitation Act of 1973\textsuperscript{24}, the American Disabilities Act\textsuperscript{25}, the Department of Justice, the Office for Civil Rights, as well as state legislation.

Limitations of the Study

This study conducted an extensive search for litigation pertaining to public schools surrounding accommodations, related services, discrimination, and service animals. However, since not all court decisions are published, it is possible that there is additional case law on this subject.

CHAPTER TWO:  
REVIEW OF LITERATURE

The use of service animals is growing in the United States. Since public schools are a microcosm of society, it is not surprising requests for service animals to attend public school are growing as well. In the absence of a Supreme Court decision on service animals attending public schools, a systematic review of disability legislation, governing agencies’ interpretation, and court decisions helps school officials develop appropriate policies and procedures for allowing students to attend school accompanied by a service animal.

The first section of this chapter reviews the legislation protecting students with disabilities in the public schools. This review also includes a historical perspective of the legislation and the court decisions shaping the judiciary’s interpretation of the laws impacting the presence of service animals in public schools. The court decisions discussed this first section do not directly involve the use of service animals in the public schools but are tangentially related to service animal issues. The second section of this chapter reviews service animal regulations, the enforcement of the regulations, state statutes, and the few existing judicial opinions directly related to the use a service animal in public schools.

To date only three states, California, Illinois, and New Jersey, have enacted legislation addressing a student’s right to attend school with a service animal. However, there are three federal statutes that apply to public schools and also contain provisions addressing school officials’ responsibility to allow school-aged children challenged by disabilities to attend school

The ADA and §504 of the Rehabilitation Act often are grouped together because they offer similar protections to individuals with disabilities. This is true especially as it pertains to schools. The Rehabilitation Act was enacted as a civil rights law to prohibit agencies receiving federal funds from discriminating against individuals with disabilities; whereas the purpose of the ADA was to eliminate widespread discrimination against individuals with disabilities in all aspects of society. The ADA’s enactment did not provide any additional protections for students with disabilities attending public schools beyond those available through §504 and the IDEA. However, the 2008 amendments to the ADA and the Rehabilitation Act did impact public schools.

The IDEA differs from both §504 and the ADA because it applies only to public schools and provides states with a modicum of financial assistance for providing special education and related services to any child with a recognized disability.

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31 Wieselthier, *supra* note 3, at 765.
32 Id. at 764.
33 Id. at 765.
Federal Statutes Related to Disability Discrimination

The Rehabilitation Act of 1973 (§504)

The Rehabilitation Act of 1973 was the first federal law designed to protect disabled persons from discrimination.\textsuperscript{35} The Rehabilitation Act prohibits agencies receiving federal funds from discriminating against persons with disabilities.\textsuperscript{36} The Rehabilitation Act was generally considered to be effective, but since it only covered agencies receiving federal funds, broad areas of American life were not adequately addressed by this Act alone.\textsuperscript{37}

The Rehabilitation Act, initially proposed by a few senators, was passed with very little legislative attention.\textsuperscript{38} The Act received widespread Congressional support despite serious opposition from the business lobby.\textsuperscript{39} In Alexander v. Choate, the Supreme Court observed, “discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect.”\textsuperscript{40} Senator Cranston, acting chairman of the subcommittee that drafted §504, described the Act as Congress’ response to society’s neglect of the disabled.\textsuperscript{41} Because the proposed bill was designed

\begin{itemize}
\item[38] Michael Selmi, Interpreting the Americans with Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Did Not Care, 76 GEO. WASH. L. REV. 522, 531 (2008).
\item[39] Id. at 53.
\item[41] Id.
\end{itemize}
by a small number of legislators, it passed without “significant vetting or compromise.” The bill was adopted without any accompanying social movement or public input. People generally supported the rights of the disabled; however, there was ongoing concern over the cost of those rights. Cost was the main reason President Nixon vetoed the Rehabilitation Act twice before he signed it into law on September 26, 1973.

Statutory Definition of a Handicap

When the Rehabilitation Act was initially passed, it contained a vague definition of a handicap. During the subsequent year, a more complete definition was developed and incorporated into the Act via the 1974 amendments. The Rehabilitation Act defines an individual with disability as, “Any person who (A) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (B) has record of such an impairment, or (C) is regarded as having such an impairment.” It has been suggested this broad definition of a disability may have been the product of a desire to de-stigmatize the concept of disability. The thought was by labeling more people as disabled, it might change public attitudes regarding what it means to be disabled.

42 Selmi, supra note 38, at 531.
43 Id. at 534.
44 Id.
45 Id.
46 The word “handicap” was the accepted term in 1973 but was later changed to “disability.” Selmi, supra note 38, at 532.
The terms “physical impairment” and “major life activities” are further defined by the Act’s implementing regulations. These regulations describe a physical impairment as “any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; …”

Section 504 of the Rehabilitation Act mandates recipients of federal financial assistance not to discriminate against otherwise qualified individuals with disabilities. Public schools, as entities receiving federal funding, must comply with this mandate. Section 504 of the Rehabilitation Act was patterned after, and is almost identical to, the antidiscrimination language of §601 of the Civil Rights Act of 1964 addressing race, color or national origin, and §901 of the Education Amendments of 1972 (Title IX) addressing gender.

According to §504, if a reasonable solution or accommodation allows a disabled student to be more mobile, communicate better, learn more, perform self-care, or perform other manual tasks, school officials should provide that accommodation. A reasonable accommodation is defined as a common-sense solution to an access request. Every accommodation request should be decided on an individual basis. Regardless of the accommodation chosen, school

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51 Schoenbaechler, supra note 26, at 456.
54 Schoenbaechler, supra note 26, at 456.
56 Id.
officials must provide the student access to a public education.\textsuperscript{57} Because the Rehabilitation Act did not contain any funding, it was virtually ignored until the passage of the Americans with Disabilities Act of 1990.\textsuperscript{58}

**Rehabilitation Act Cases Prior to Passage of the ADA**

There were early concerns regarding §504’s broad definition of disabled individuals.\textsuperscript{59} Initially, only a few cases reviewed by the courts under the Rehabilitation Act sought to expand the definition of disability to cover more non-traditional disabilities, and generally these lawsuits failed.\textsuperscript{60} In order to bring a case alleging discrimination under §504, the plaintiff must meet the following four conditions. (1) The plaintiff must be disabled as determined by §504. (2) The plaintiff must be otherwise qualified for the benefit or services sought. (3) The plaintiff must have been denied benefit or services solely by reason of the disability. (4) The agency or program denying access or services receives federal financial assistance.\textsuperscript{61} If the plaintiff satisfies all of these requirements, the burden of proof to refute the claims falls to the agency or program.\textsuperscript{62} If the agency or program can demonstrate the requested accommodation cannot

\textsuperscript{57} Id.


\textsuperscript{59} Selmi, *supra* note 38, at 534.

\textsuperscript{60} Id. at 537.


\textsuperscript{62} Id.
reasonably be made, the burden shifts back to the plaintiff to produce evidence the accommodation is, in fact, practical (i.e., reasonable).\textsuperscript{63}

The first §504 cases decided by the U.S. Supreme Court developed this four-prong test. Two of these decisions also provided insight into the Court’s views on the scope of 504’s coverage and how this coverage could be applied to the discussion of service animals. These two cases are reviewed in the next section along with a public school §504 case filed on behalf of a student.

\textit{Southeastern Community College v. Davis}\textsuperscript{64} The first case the Supreme Court decided regarding the Rehabilitation Act involved a deaf student who sought accommodations from her college’s nursing program. Although suffering from a serious hearing impairment, Ms. Davis desired training to become a registered nurse.\textsuperscript{65} During the 1973-74 school year, Davis enrolled in a program at Southeastern Community College. Southeastern was a state institution receiving federal funds.\textsuperscript{66} Davis hoped to earn an associate’s degree in Southeastern’s nursing program, thereby making her eligible for state certification as a registered nurse.\textsuperscript{67}

During an interview with a member of the nursing faculty, it became apparent Ms. Davis had difficulty understanding questions. Davis admitted to both her history of hearing problems and dependence on a hearing aid.\textsuperscript{68} She was advised to consult an audiologist. An examination at Duke University Medical Center diagnosed Davis with a bi-lateral sensori-neural hearing loss. A change in hearing aids was recommended. This improved her ability to hear sounds but did not

\textsuperscript{63} \textit{Id.}
\textsuperscript{64} \textit{Se. Cmty. Coll. v. Davis, 442 U.S. 397 (1979)}.
\textsuperscript{65} \textit{Id.} at 400.
\textsuperscript{66} \textit{Id.}
\textsuperscript{67} \textit{Id.}
\textsuperscript{68} \textit{Id.}
allow her to discriminate sound sufficiently enough to understand normal spoken speech. She continued to rely on lip-reading. 69

Southeastern consulted with the executive director of the North Carolina board of nursing, who relying upon the audiologist’s report, recommended Ms. Davis not be admitted to the nursing program. It was the executive director’s view that Ms. Davis’ hearing disability made it unsafe for her to practice as a nurse and would make it impossible for her to participate safely in the clinical training program. The modifications necessary to enable Davis’ safe participation would prevent her from realizing the benefits of the program. 70 These modifications included individual supervision when Ms. Davis was attending to patients and waiving the requirement for her to take certain classes.71 Ms. Davis asked the university to reconsider this decision. The entire nursing staff at Southeastern met with the executive director for the North Carolina board of nursing and deliberated. The staff voted to deny Ms. Davis admission to the nursing program. 72

Davis filed suit in the United States District Court for the Eastern District of North Carolina alleging a violation to §504 of the Rehabilitation Act of 1973 73 and a denial of her right to equal protection and due process under the 14th amendment of the U.S. Constitution. After a bench trial, the district court entered judgment in favor of Southeastern Community College. 74 The court confirmed the audiologist’s findings that even with hearing aids, Ms. Davis would not be able to understand speech except through lip-reading. The court further found in many hospital environments, doctors and nurses wear masks making lip-reading impossible. The court

69 Id. at 401.
70 Davis, 442 U.S. at 401-02.
71 Id. at 408.
72 Id. at 402.
74 Davis, 442 U.S. at 403.
concluded the disability prevented Ms. Davis from safely performing in both the training program and nursing profession. The court’s concern was for the potential danger to future patients. Based on these findings, the district court concluded Ms. Davis was not otherwise qualified to be a nurse and therefore not protected by §504. A person must be otherwise qualified in order to meet the second prong of the four-pronged test for §504 protection. Since this prong was not met, Ms. Davis did not prove §504 discrimination.

Ms. Davis appealed to the Court of Appeals for the Fourth Circuit and the district court decision was reversed. The appellate court did not dispute the district court findings of fact, but found the lower court had misconstrued §504. The appellate panel believed §504 required Southeastern to consider Ms. Davis’ application for admission to the nursing program based on her academic and technical qualifications regardless of her hearing ability. The panel further concluded the district court erred in its finding that Ms. Davis’ hearing difficulties caused her to be not otherwise qualified for the program. The appellate court also stated §504 required Southeastern to modify its program to accommodate the disabilities of applicants.

The Supreme Court granted certiorari. The Supreme Court looked to §504’s language and determined the statute did not compel educational institutions to disregard the disabilities of individuals or to make substantial modifications in their program to allow disabled persons to participate. Instead §504 required only that an “otherwise qualified handicapped individual” not be excluded from participation in a federally funded program “solely by reason of his

\[75\text{ Id.}\]
\[76\text{ Id.}\]
\[77\text{ Id. at 404.}\]
handicap.”\textsuperscript{78} In other words, the mere existence of a disability was not permissible grounds for assuming an inability to function within a particular context. The Supreme Court agreed with the district court’s original finding that an otherwise qualified person is one who is able to meet all of the program’s requirements in spite of his disability.\textsuperscript{79} The Supreme Court further noted the Department of Health, Education, and Welfare had observed, if taken literally, an otherwise qualified individual could be a blind person who qualified to drive a bus except for sight and could therefore be otherwise qualified to perform the job of driving. Clearly, Congress did not intend this result.\textsuperscript{80}

In response to the argument that Davis’ requested modifications would allow her to participate, the Supreme Court noted it would only be with individual supervision from the nursing faculty that Ms. Davis could safely participate in the clinical portion of the program. If Ms. Davis did not participate in the clinical portion of the program, this would constitute a fundamental alteration to the program far exceeding §504’s modification requirements.\textsuperscript{81} The Supreme Court also noted the Rehabilitation Act’s language and structure made a distinction between evenhanded treatment of a qualified disabled person and affirmative efforts to overcome the disabilities.\textsuperscript{82}

The Supreme Court found Southeastern did not violate §504 by concluding Ms. Davis did not qualify for admission to its program. Neither §504’s language nor history indicated

\begin{itemize}
\item \textsuperscript{78} \textit{Id.}
\item \textsuperscript{79} \textit{Id.} at 405-06.
\item \textsuperscript{80} \textit{Davis}, 442 U.S. at 407.
\item \textsuperscript{81} \textit{Id.} at 410.
\item \textsuperscript{82} \textit{Id.} Section 115(a) of the Rehabilitation , Comprehensive Services, and Developmental Disabilities Amendments of 1978 added to the 1973 Act a section authorizing grants for the purpose of providing support personnel such as interpreters for the deaf as may be necessary to assist in complying with the requirements of §504.
\end{itemize}
limitations to an educational institution’s ability to require applicants to possess reasonable physical qualifications.\textsuperscript{83} This meant Ms. Davis was not otherwise qualified for the benefit and services and therefore did not meet §504’s requirement for determining discrimination.

\textit{School Board of Nassau County v. Arline}\textsuperscript{84} Nearly ten years after the Supreme Court found Ms. Davis not to be otherwise qualified to be a nurse, the Court granted certiorari to a case involving whether public school employee was otherwise qualified to teach. This Supreme Court decision involved an employment complaint regarding the dismissal of an elementary public school teacher. Gene Arline was fired from her teaching position after she suffered a third relapse of tuberculosis within the span of two years.\textsuperscript{85}

From 1966 until 1979, Gene Arline taught elementary school in Nassau County Florida. Her employment was terminated in 1979 after she suffered a third relapse of tuberculosis within two years. She initially brought her case via state administrative proceedings, but this attempt failed. She then filed suit in federal court alleging a violation to §504 based on the school board’s decision to dismiss her due to her tuberculosis.\textsuperscript{86} A trial was held in the United States District Court for the Middle District of Florida. The medical evidence showed Mrs. Arline had been hospitalized for tuberculosis in 1957. For the next 20 years, the disease was in remission. In 1977, a culture revealed the tuberculosis was again active. Cultures taken in March of 1978 and November of 1978 were also positive.\textsuperscript{87} After her second relapse in the spring of 1978 and her third relapse in the fall of 1978, school officials suspended Arline with pay for the remainder of

\textsuperscript{83} Davis, 442 U.S. at 404.
\textsuperscript{84} Selmi, \textit{supra} note 38, at 537.
\textsuperscript{85} Gilman, \textit{supra} note 37, at 1200.
\textsuperscript{87} \textit{Id.} at 273.
At the end of the 1978-1979 school year, the school board discharged Mrs. Arline because of the reoccurrence of her tuberculosis. Mrs. Arline argued the school board dismissed her on the basis of her illness, and since the illness qualified her as a person with a disability, her dismissal constituted a §504 violation. The district court found Mrs. Arline was not disabled under the statute. The court did not believe Congress intended a contagious disease to be included within the definition of a disability. The district court further concluded even if a contagious disease did qualify as a disability, Arline was not otherwise qualified to teach elementary school because of the contagion risk.

The United States Court of Appeals for the Eleventh Circuit reversed the district court decision. The appellate panel ruled a person with a contagious disease fell within §504’s coverage and remanded the case for further findings to determine whether the risks of infecting others precluded Mrs. Arline from being “otherwise qualified” for her teaching job and, if so, whether it was possible to make some reasonable accommodation that would allow her to teach or serve some other position in the school district.

The Supreme Court granted certiorari. In addition to reviewing §504’s wording, the Supreme Court looked at the regulations written by the Department of Health and Human Services because these regulations were drafted with approval of Congress. The Supreme Court’s review of Mrs. Arline’s medical records showed her 1957 hospitalization for tuberculosis established she had a record of impairment within the meaning of Rehabilitation

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88 Id. at 276.
89 Id.
90 Id. at 277.
91 Id. at 276.
92 Arline, 480 U.S. at 277.
The Supreme Court also found she was a person with a disability under the “regarded-as” prong of the definition of a “handicap” under the Rehabilitation Act. 94

School officials argued it had not released Arline from her teaching position because of her own diminished capacities caused by the illness, but rather because her relapses made her a threat to others.95 The Supreme Court rejected this argument reasoning it was unfair to allow an employer to distinguish between the effects of a disease on others and effects of the disease on a patient.96 The Supreme Court noted a person’s physical impairment that did not substantially limit an individual’s capabilities could nevertheless substantially limit the ability to work as a result of others’ negative reactions to the impairment.97 Under the “regarded as” definition, others’ unfavorable reaction to the impairment can limit a person’s ability to work.98 The Court pointed out Congress had acknowledged society’s myths and fears about disability and disease could be as handicapping to the individual as the impairment’s physical limitations. In addition, Justice Brennan pointed out few aspects of a handicap give rise to the same level of public fear as contagion. The Court concluded a person with a record of physical impairment, which was also contagious, was not reason to remove the person from §504’s coverage.99

The Supreme Court ruled a contagious disease, in this particular case tuberculosis, fell within the definition of a disability. The Court noted some people with contagious diseases may pose a threat to others but this did not exclude coverage under the Act of all persons with actual

93 Id. at 281.
94 Gilman, supra note 37, at 1200.
95 Arline, 480 U.S. at 281.
96 Id. at 282.
97 Id. at 282-283.
98 Gilman, supra note 37, at 1186.
99 Arline, 480 U.S. at 276.
or perceived contagious diseases. Each case must be considered on its own merits based on the
relevant medical information.\textsuperscript{100}

The remaining question was whether Mrs. Arline was otherwise qualified for the job as
an elementary schoolteacher. The Supreme Court ruled the district court case had not answered
the questions about the duration or severity of Arline’s condition nor whether she would be
likely to transmit the disease. In addition, the district court did not determine if school officials
could have accommodated Arline at the time of her dismissal. Because of the lack of information
on these issues, the Supreme Court remanded the case to the district court to determine whether
Mrs. Arline was otherwise qualified for her position.\textsuperscript{101} On remand, the district court found Mrs.
Arline was otherwise qualified for her position as an elementary school teacher.\textsuperscript{102} The court
ordered school district officials to pay Mrs. Arline full salary and benefits for four years to cover
the years she looked for a teaching position after she was fired. In addition, the court ordered
school officials to either rehire Mrs. Arline or pay her the equivalent salary until she retired.\textsuperscript{103}

The Arline case was decided while Congress was in the process of drafting the
Americans with Disabilities Act.\textsuperscript{104} The \textit{Arline} case was significant because it appeared to be one
of the reasons the Rehabilitation Act’s definition of a disability was incorporated into the ADA’s
definition.\textsuperscript{105}

\begin{flushleft}
\textsuperscript{100} Id. at 285. \\
\textsuperscript{101} Id. at 288–89. \\
\textsuperscript{103} Id. \\
\textsuperscript{104} Selmi, supra note 38, at 537. \\
\textsuperscript{105} Id.
\end{flushleft}
Thomas v. Atascadero Unified School District\textsuperscript{106} Section 504 was designed to protect not only public school employees but also its students. The courts affirmed this to be true in this case involving a public school student.

Robin and Judy Thomas brought action against the Atascadero Unified School District of California in the United States District Court of the Central District of California for excluding their son Ryan from kindergarten because he was infected with AIDS.\textsuperscript{107} Ryan had contracted AIDS as an infant from a contaminated blood transfusion he received to treat complications arising from his premature birth.\textsuperscript{108} He suffered from significant impairment of his major life functions as result of his illness.\textsuperscript{109} Prior to his diagnosis, Ryan had frequent pulmonary and middle ear problems and well as chronic swollen lymph nodes. These difficulties were attributed to his infection with the AIDS virus. In 1985, after the diagnosis and receipt of treatment, his medical condition improved.

In May 1986, the school board adopted an admission policy for students infected with communicable diseases including AIDS. This policy created a placement committee comprised of health professionals, parents, and school officials to advise the school board on the placement of children covered by the policy.\textsuperscript{110}

Because of his infection with the AIDS virus, the placement board considered whether Ryan should be placed in a regular classroom. Both of his treating physicians reported there were

\textsuperscript{107} Id. at 377.
\textsuperscript{108} Id. at 379.
\textsuperscript{109} Id.
\textsuperscript{110} Id. at 380.
no medical reasons indicating Ryan could not attend regular kindergarten. Therefore the placement committee recommended Ryan’s admission to a regular kindergarten classroom.

On September 8, 1986, during a skirmish with another child, Ryan bit the other child’s pant leg. No skin was broken. The superintendent instructed the parents to keep Ryan home after the incident until the placement committee could reconsider its previous recommendation in light of the incident to determine whether Ryan’s potential for biting other students posed a danger to other students in the class.

On September 12, 1986, the placement committee recommended a school psychologist evaluate Ryan. In late September, Dr. Shira, a psychologist employed by the San Luis Obispo County Board of Education, conducted this evaluation and predicted Ryan would behave “aggressively” in a kindergarten setting because his level of social/language skills and maturity was below those of his classmates. Dr. Shira could not forecast what form Ryan’s aggressive behaviors might take. Therefore, Dr. Shira could not assure Ryan would not bite another child. Based on this evaluation, the placement committee recommended Ryan not be allowed to return to the kindergarten classroom but instead should be provided with home tutoring for the remainder of the academic year. On October 6, 1986, the school board voted to exclude Ryan from attending school until January 1987, at which time Ryan would be reevaluated, and the decision to exclude him would be reconsidered.

111 Id. at 379.
113 Id.
114 Id. at 381.
115 Id.
116 Id.
The parents filed a complaint with the U.S. District Court for the Central District of California claiming the school officials had discriminated against Ryan based on his disability.\textsuperscript{117} On December 29, 1986, the district court ruled the School District was the recipient of federal funds and therefore fell under the jurisdiction of §504 of the Rehabilitation Act.\textsuperscript{118} The court further noted Ryan was an individual with a disability under the Rehabilitation Act’s definition. Ryan was also “otherwise qualified” to attend kindergarten under §504.\textsuperscript{119} Finally, the district court found Ryan had been subjected to different treatment than the treatment received by other kindergarten students, and school officials had excluded him from his kindergarten class because of his disability.\textsuperscript{120} The district court further found even though the school officials used the Center for Disease Control (CDC) and the American Academy of Pediatrics (AAP) guidelines concerning the education of children with AIDS, school officials presented no medical evidence indicating human bites could transmit the AIDS virus.\textsuperscript{121}

Therefore, according to the district court, school officials had not complied with the requirement that a child with a disability should be placed in a regular educational environment unless it was demonstrated the child could not be satisfactorily educated in the regular education environment with the use of supplementary aids and services.\textsuperscript{122} Based on these conclusions, the district court ruled Ryan had suffered irreparable injury as a result of his exclusion. School officials were prohibited from excluding Ryan from attending kindergarten and directed to allow him to return to his kindergarten classroom. The court further acknowledged Ryan could be

\begin{itemize}
  \item[] \textsuperscript{117} \textit{Id.} at 377.
  \item[] \textsuperscript{118} \textit{Thomas v. Atascadero}, 662 F. Supp. at 382.
  \item[] \textsuperscript{119} \textit{Id.}
  \item[] \textsuperscript{120} \textit{Id.}
  \item[] \textsuperscript{121} \textit{Id.} at 381.
  \item[] \textsuperscript{122} \textit{Id.} at 382.
\end{itemize}
suspended or expelled as a means of discipline in accordance with California Education Code; however, he was not to be excluded on the grounds that he posed a risk of transmitting the AIDS virus to classmates or teachers. In addition, the parents were awarded $42,387 in attorney fees and court costs. There was no appeal.

**Americans with Disabilities Act**

The Americans with Disabilities Act was passed by Congress in 1990 and signed into law by George H. W. Bush. The Act provides equal opportunities for people with disabilities to access programs, services, and facilities. The ADA is a comprehensive ban on discrimination not limited only to government agencies as is the case with §504 of the Rehabilitation Act. Although access for persons with disabilities is also aimed at governmental bodies, including townships, cities, counties, and states; the Act’s employment provisions were designed to provide job opportunities for the disabled in order to integrate them into the work environment. The statute not only prohibits discrimination but also requires employers and governmental bodies to provide reasonable accommodations to persons with a disability in order to increase their access to employment opportunities. One of the ADA’s goals is to

123 Id.
129 Selmi, *supra* note 38, at 522.
130 Id.
provide individuals with disabilities legal recourse to redress discrimination. The ADA evinces a legislative intent to protect children and adults with disabilities from being excluded and treated as second-class citizens. The ADA outlaws discriminatory practices and policies against people with disabilities regardless of federal funding.

The ADA was not intended to be an exclusive remedy or to preempt state law. The Act provided a floor limit on what covered entities must do but not a ceiling; thereby, inviting states and courts to impose greater obligations for employers and others covered by the Act. As a result, states may adopt legislation allowing expanded utilization of service animals within the public school setting.

The Americans with Disabilities Act was introduced and initially championed by members of Congress who had personal experience with disabilities either in their own lives or those of a relative. For example, Tony Coelho, the primary House sponsor, had epilepsy and experienced discrimination as a youth. In the senate, Tom Harkin, whose brother was deaf, took a leading role. Also Senator Ted Kennedy whose sister suffered from a cognitive disability, Senator Orin Hatch whose brother-in-law had polio, and Senator Bob Dole who lost use of his right arm in the military joined Senator Harkin in this endeavor. As a result, the ADA secured a quick adoption without a substantial social movement much like the Rehabilitation Act’s

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131 Mac Lagan, supra note 61, at 737.
133 Monroe, supra note 58, at 592.
135 Selmi, supra note 38, at 538.
136 Id.
137 Id.
adoption. Instead of adopting narrow language, these special interest groups opted for broad language similar to the wording of the Rehabilitation Act and designed to bring a much larger group of individuals under the statute’s coverage. Many of these individuals would not have been considered disabled before adoption of the ADA.

The ADA passed with almost unanimous support in both houses of Congress. The only significant Congressional ADA debates were over the potential costs associated with the accommodation provisions. Some viewed the lack of debate as a problem because the debates would have forced the advocacy community to justify the broad disabilities’ definition that included people who would not have been considered disabled prior to the enactment of the statute. Due to this lack of discussion, there was no consensus regarding whether society or the courts would support this broad definition of a disability.

Three features of the Rehabilitation Act correlate with the ADA’s passage. First, both were passed due to the efforts of handful of Senators with a deep interest in disabilities. These Senators were allowed to shape the legislation without much compromise. Second, the statues were adopted without much public input or societal commitment to the rights of the disabled. Finally, Title II of the ADA also included public schools just like §504 of the Rehabilitation Act.

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138 Id. at 526 (2008).
139 Id.
140 Id.
142 Id.
143 Selmi, supra note 38, at 543-44.
144 Id. at 544.
Act.\textsuperscript{145} In the school setting, these two Acts provide a basis for alternative remedies to the
Individual with Disabilities Education Act.\textsuperscript{146} Although there are subtle differences between the
ADA and §504 of the Rehabilitation Act, the standards adopted by Title II of the ADA for state
and local government services are generally the same as those under §504 for federally assisted
programs and activities.\textsuperscript{147}

In 2014, the Department of Education and Department of Justice issued a joint “Dear
Colleague” letter explicating the ADA’s effective communication requirements.\textsuperscript{148} Pursuant to
this letter, school officials must apply Title II analysis to IDEA-eligible students. This guidance
could also be applied to the use of service animals in public schools.

The “Dear Colleague” letter further stated, “Title II requires covered entities, including
public schools, to give ‘primary consideration’ to the auxiliary aid or service requested by the
student with the disability when determining what is appropriate for that student.”\textsuperscript{149} This means
when the public school officials determine providing a particular auxiliary aid or service would
result in a “fundamental alteration in the nature of the a service, program, or activity, or an undue

\textsuperscript{145} Monroe, supra note 58, at 592.
\textsuperscript{146} Id.
\textsuperscript{147} Tara A. Waterlander, \textit{Canines in the Classroom: When Schools must allow a Service Dog to
Accompany a Child with Autism into the Classroom under Federal and State Laws}, 22 GEO.
\textsuperscript{148} Vanita Gupta, Michael K. Yudin, and Catherine E. Lhamon, \textit{Dear Colleague}, U.S. Dept. of
Justice, Civil Rights Div., U.S. Dept. of Ed., Office for Civil Rights, Office of Special Ed. and
Rehabilitative Services, (Nov. 12, 2014),
\url{http://www2.ed.gov/about/offices/list/ocr/letters/colleague-effective-communication-201411.pdf}
(last accessed Feb 16, 2015).
\textsuperscript{149} Frequently Asked Questions on Effective Communication for Students with Hearing, Vision,
or Speech Disabilities in Public Elementary and Secondary Schools, U.S. Dept. of Justice and
U.S. Dept. of Ed., Office for Civil Rights, Office of Special Ed. and Rehabilitative Services,
\url{http://www2.ed.gov/about/offices/list/ocr/docs/dcl-faqs-effective-communication-201411.pdf}
(last accessed Nov. 2014).
financial and administrative burden; the school does not need to provide that auxiliary aid or service.” 150 The school official must consider all of the school district’s resources and provide a written explanation of the fundamental alteration or undue financial burden that would result if the accommodation were provided. The DOE and DOJ jointly caution, “In most cases, compliance would not result in undue financial or administrative burden.” 151

Public schools cannot charge parents for auxiliary aids or services they provide to students. 152 “Public schools must apply both the IDEA analysis and the Title II effective communication analysis in determining how to meet the communication needs of an IDEA eligible student with a hearing, vision, or speech disability.” 153 Title II and its regulations require public schools to ensure communication with students who have hearing, vision and speech disabilities is as effective as communication with non-disabled students. 154 If the special education and related services provided under the IDEA are not sufficient to ensure the student with a disability has access to and is able to participate in the school’s program at a level commensurate with non-disabled students, the student with disabilities may receive more service

150 Id.
151 Id.
152 Id.
and aids under Title II.155 “In some instances, in order to comply with Title II, a school may have to provide the student with additional auxiliary aids and services not required under the IDEA.”156

Statutory Definition

To receive ADA protection, an individual must meet at least one of the Act’s three definitions of “disabled.” An individual must have “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;”157 “(B) a record of such an impairment;”158 or “(C) be regarded as having such an impairment.”159

Generally, there is a basic understanding of traditional disabilities such as hearing, vision, and orthopedic challenges, but outside that core understanding there has been very little consensus regarding who is considered to be disabled.160 In addition, the assortment of disabilities causes difficulty in interpreting the statute. For example, a disability can be permanent, temporary, present at birth, stem from an accident, or develop later in life. Disabilities may be either visible or hidden and the same condition may affect people differently.

155 Id.
158 Id. at § 12102 (2)(B) (2006).
159 Id. at § 12102 (2)(C) (2006).
160 Selmi, supra note 38, at 529.
All of these factors complicate the notion of a disability and require effort to determine who is disabled.\textsuperscript{161}

The term “substantially limits” refers to individuals with a disability in comparison to most people in the general population.\textsuperscript{162} The impairment need not prevent or severely restrict the individual in performing a major life activity. Temporary non-chronic impairments of short duration with little or no residual effects are usually not considered disabilities.\textsuperscript{163} An example of this type of impairment is a broken limb. Although, the person might have difficulty performing major life activities while the limb is healing, there are usually no long-lasting difficulties.

\textbf{ADA Titles}

The ADA contains five titles.\textsuperscript{164} Title I of the ADA forbids employment discrimination by employers with fifteen or more employees.\textsuperscript{165} This is the same threshold applied by \textit{Title VII of the Civil Rights Act}.\textsuperscript{166} However, individual states may enact laws encompassing businesses with fewer employees.\textsuperscript{167}

Title II “applies to any state or local government, department, agency, special-purpose district or other instrumentality of state or local government.”\textsuperscript{168} This includes schools. If an

\textsuperscript{161} \textit{Id.}
\textsuperscript{163} \textit{Id.}
\textsuperscript{164} \textit{Id.}
\textsuperscript{165} \textit{Id.} at § 12111(5)(A).
\textsuperscript{166} Weber, \textit{supra} note 127, at 443.
\textsuperscript{167} Finnemore, \textit{supra} note 329, at 20.
entity has taxing authority, it falls under the auspices of Title II.\textsuperscript{169} The words “other instrumentality” in the clause refer to agents of a governmental entity.\textsuperscript{170} For example, a construction company performing a service at a public school district, a taxing body, needs to follow Title II just like the school district.

The ADA has specific rules for providing public access.\textsuperscript{171} Title II defines “discrimination” as “no qualified individual with a disability shall, by reasons of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”\textsuperscript{172} The ADA does not require states to employ any and all means to make services accessible or to compromise essential eligibility criteria for public programs. It requires only reasonable modifications that do not “fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service.”\textsuperscript{173}

Title III applies to private entities serving as public accommodations.\textsuperscript{174} Public accommodations include hotels, restaurants, theaters, stadiums, shopping centers, privately owned public transportation, museums, and other public services.\textsuperscript{175} Title IV requires telecommunications providers to enhance services for people who are deaf, hearing impaired, or speech impaired.\textsuperscript{176} Finally, Title V sets forth miscellaneous matters such as abrogation of state

\textsuperscript{169} Milzarski & Norris, \textit{supra} note 55, at 43.
\textsuperscript{170} \textit{Id.}
\textsuperscript{171} \textit{Id.}
\textsuperscript{173} \textit{Id.} at § 12182 (2)(A)(ii) (2009).
\textsuperscript{174} Bourland, \textit{supra} note 124, at 198.
\textsuperscript{175} \textit{Id.}
immunities, prohibitions on retaliation and coercion, and authorization of attorney’s fees.177 Other federal laws ban disability discrimination in public and private housing and air travel.178

*McDonnell Douglas v. Green*179

A court has several options for determining disability discrimination under the ADA. However, the *McDonnell Douglas* test is the standard most courts apply in ADA discrimination litigation.180

In this decision regarding Title VII of the Civil Rights Act of 1964,181 the McDonnell Douglas Corporation did not rehire Green, an aircraft mechanic, though there were open positions for which he was qualified. Green argued he was not rehired due to his race and his participation in civil rights activities. McDonnell Douglas argued the decision not to rehire Green was not related to his race but rather Green’s participation in the illegal activity of stalling his car on the main road to the factory in order to block the employee entrance to the McDonnell Douglas St. Louis facilities.182 In the initial ruling, the United States District Court for the Eastern District of Missouri dismissed Green’s racial discrimination claims and found the corporation’s refusal to rehire Green was based on his participation in the “stall in.”183 The Court of Appeals for the Eighth Circuit agreed. However, the appellate panel reversed the dismissal of

177 *Id.* at § 12205.
180 *Gilman, supra* note 37, at 1186.
181 *Id.*
182 *Id.*
183 *Id.* at 797.
the racial discrimination claim because Green had not been given an opportunity to present his case. The appellate panel remanded the case to the district court.184

The Supreme Court granted certiorari and formulated a test defining a prima facie case for racial discrimination. The test required the claimant carry the initial burden of proving the following: 1. The claimant belonged to a minority race. 2. The claimant applied for and was qualified for an open position. 3. The employer rejected the claimant. 4. Employer continued to seek a person to fill the position after the rejection.185 If the claimant met these prerequisites, the burden shifted to the employer to prove the existence of a legitimate nondiscriminatory reason for the adverse employment decision.186

The Supreme Court agreed with the Eighth Circuit’s decision that Green should have been allowed the opportunity to present his case on discrimination to the district court.187 The Court did not dispute McDonnell Douglas’ right to refuse to rehire a person who had engaged in illegal activities against the corporation. However, the court found Green had the right to demonstrate through evidence that the rejection was a pre-text for a racially discriminatory decision.188 The Supreme Court remanded the case to the district court.189 On remand both the district court and the appellate court later ruled Green had not been discriminated against based on his race.190

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184 Id. at 797-98.
185 Id. at 802.
187 Id.
188 Id. at 805.
189 Id. at 807.
190 Green v. McDonnell Douglas Corp, 528 F.2d 1102, 1105 (8th Cir. 1976).
When applying the McDonnell Douglas test to a disability claim, the plaintiff must satisfy three requirements to establish a prima facie case of discrimination. First, the claimant must prove he or she is a qualified individual. Under Title VII of the Civil Rights Act of 1964, an individual meets the criteria based on race, age, or gender. When the Court applies the McDonnell Douglas test to an ADA claim, the three definitions of disability are used to determine an individual is a disabled. For example, a claimant may establish he has a physical or mental impairment that substantially limits one or more major life activities, he has a record of having a disability, or show he is “regarded as having an impairment.” Under the last option, the person who allegedly discriminated against the claimant perceives the individual as having a disability, even if the person does not have the expected or disabling consequences related to the condition. Once the claimant has proven the existence of a disability, the second step in the McDonnell Douglas test is to determine whether the claimant is qualified to perform the necessary functions of the job either with or without accommodations. The third and final element requires showing the claimant suffered an adverse employment action.

The fundamental difference between antidiscrimination protection for the disabled and other antidiscrimination mandates is Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, and national origin. Unlike

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191 Gilman, supra note 37, at 1186.
192 Id.
193 Id. at 1187.
194 Id. at 1187-1188.
196 Gilman, supra note 37, at 1188.
197 Id. at 1187.
198 Id.
claims based upon race, gender, or age where the protected class is easier to identify, the issue of
disability protection begins with the question of who qualifies as being disabled.\textsuperscript{200} Historically,
this judicial question has led to controversy.\textsuperscript{201} In general, there is a core concept of the term
disability encompassing traditional disabilities. Beyond that, there is little consensus.\textsuperscript{202}

An intent of the ADA was to level the job market playing field. However, the legal
battles over the definition of “disabled” clouded the issue to the extent many people seeking
workplace accommodations because of mental or physical difficulties found themselves having
to prove they had a disability.\textsuperscript{203} In court, litigation often depended upon the plaintiff
demonstrating he or she was a person with a disability.\textsuperscript{204} The Supreme Court’s narrowed
approach to the ADA was designed to eliminate claims from people who were not disabled.
However, the result was elimination of a class of citizens intended to be covered, specifically
individuals whose disabilities were controlled with medication.\textsuperscript{205}

The ADA was designed to protect individuals with difficulty coping with the work
environment’s day-to-day stresses. However, court decisions oftentimes seemed to eliminate
those protections.\textsuperscript{206} For example, employees perceived as lazy or attempting to gain an unearned
workplace advantage angered employers. Ironically, the judiciary’s strict interpretation of the
term disability demonstrated more sympathy to employer interests than to employee claimants.\textsuperscript{207}

\textsuperscript{200} Selmi, supra note 38, at 529.
\textsuperscript{201} \textit{Id.}
\textsuperscript{202} \textit{Id.}
\textsuperscript{203} Finnemore, supra note 329, at 18.
\textsuperscript{204} Ligatti, supra note 35, at 150.
\textsuperscript{205} Selmi, supra note 38, at 527.
\textsuperscript{206} \textit{Id.} at 544.
\textsuperscript{207} \textit{Id.}
Several studies documented a low success rate for discrimination complaints filed in federal court.\(^\text{208}\) This lack of success has been attributed to a series of Supreme Court decisions limiting the ADA’s scope.\(^\text{209}\) Starting with *Sutton v. United Airlines*, the Supreme Court generally answered the question regarding whether an employee was disabled in a restrictive rather than broad fashion.\(^\text{210}\)

**Supreme Court ADA Decisions**

The following decisions are examples of the Supreme Court’s narrow perspective regarding whether a person met the ADA’s definition of a disability. These decisions became the impetus for Congress’ ADA amendments. Starting with *Sutton*, courts began requiring claimants to prove they were in fact disabled.

*Sutton v. United Airlines, Inc.*\(^\text{211}\) This case involved twin sisters working as commuter airline pilots who were denied the opportunity move up the professional ranks to fly commercial planes for United Airlines.\(^\text{212}\) The Sutton sisters both suffered from a vision deficit called myopia and did not satisfy the airlines qualification standard of having uncorrected vision of 20/100.\(^\text{213}\) When United Airlines rejected them based on their eyesight, the sisters sued arguing their condition rendered them disabled under the ADA, thereby requiring their employer to provide the reasonable accommodation of allowing the sisters to wear their corrective lenses while

\(^{208}\) *Id.* at 523.

\(^{209}\) *Id.*

\(^{210}\) *Id.* at 524.


\(^{212}\) Selmi, *supra* note 38, at 547.

\(^{213}\) *Id.* at 548.
flying.\textsuperscript{214} The sisters further argued if they were not considered disabled under the ADA, their employer regarded them as disabled because United was treating their eyesight as a substantial limitation.\textsuperscript{215}

The sisters had severe myopia resulting in each sister having uncorrected visual acuity of 20/200 or worse in the right eye and 20/400 or worse in the left eye. However, with the use of corrective lenses, each sister had vision of 20/20 or better. This meant without the corrective lenses neither sister could see well enough to conduct a number of activities such as driving a car or watching television. However, with glasses or contact lenses, both sisters could function the same as individuals without similar visual impairments.\textsuperscript{216}

In 1992, the sisters applied to United Airlines for employment as commercial airline pilots. They met the basic requirements for age, education, experience, and FAA certification.\textsuperscript{217} After submitting their applications, both were interviewed and administered flight simulation tests. During the interview both were told they did not meet the minimum vision requirement. The interviews were terminated and neither sister was offered a pilot position.\textsuperscript{218}

Because United Airlines provided a reason for denying employment, the sisters filed an ADA disability discrimination claim with the Equal Employment Opportunity Commission (EEOC). After receiving a “right to sue”\textsuperscript{219} letter, the sisters filed suit in the United States

\textsuperscript{214}\textit{Id.}
\textsuperscript{215}\textit{Id.}
\textsuperscript{216}\textit{Sutton v. United Airlines,} 527 U.S. at 475.
\textsuperscript{217}\textit{Id.}
\textsuperscript{218}\textit{Id.} at 476.
District Court for the District of Colorado, alleging United Airlines discriminated against them based on their vision disability. More specifically, they alleged the severe myopia was a limiting condition or alternatively, United Airlines regarded the impairment as limiting, thereby qualifying them as disabled under the ADA.²²⁰

The district court dismissed the complaint because the sisters could fully correct their visual impairments with glasses. Therefore, they were not substantially limited in any major life activity and had not proven they were disabled within the meaning of the ADA.²²¹

The Court of Appeals for the Tenth Circuit affirmed the district court’s decision.²²² The Tenth Circuit decision contrasted with other federal appellate court ADA rulings during this period. The Tenth Circuit ruled self-accommodations should not be considered when determining disability. New York State Bd. of Law Examiners v. Bartlett²²³ and HCA Health Services of Texas, Inc. v. Washington²²⁴ had ruled some disabilities should be evaluated in their uncorrected state. All three cases were appealed to the Supreme Court. The Court granted certiorari in Sutton.²²⁵

The Supreme Court did not review the statutory framework or guidelines issued by the EEOC and Department of Justice. Instead, the Court began by considering the question of whether the sisters had a disability recognized by the ADA. The sisters maintained the Court should defer to the EEOC and Department of Defense guidelines. These guidelines stated the

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²²⁰ Sutton v. United Airlines, 527 U.S. at 476.
²²¹ Id. at 476-77.
²²² Id. at 477.
²²⁵ Sutton v. United Airlines, 527 U.S. at 477.
determination of whether the impairment substantially limited a major activity should be made
without regard to mitigating measures.\textsuperscript{226}

United Airlines maintained the impairment did not substantially limit a major life activity
if corrected. United Airlines further argued the Court should not defer to the agency guidelines
because the guidelines conflicted with the ADA’s plain language.\textsuperscript{227}

The Supreme Court concluded United Airlines was correct and ruled the approach
adopted by the agency guidelines was an impermissible interpretation of the ADA. According to
the Court, the mitigation measures a person used must be taken into account in determining
whether a person was disabled under the ADA.\textsuperscript{228} According to the Supreme Court, the statute’s
wording “substantially limits” was intended to be read according to what actually existed and not
what might or could be substantially limiting if mitigating measures were not taken.\textsuperscript{229} The Court
believed the definition required disabilities be determined based upon whether the impairment
substantially limited the major life activities of the individual. Therefore, the ADA’s guidelines
requiring disabilities to be judged in their uncorrected state ran counter to the ADA’s
individualized inquiry. The guidelines required courts and employers to speculate about a
person’s condition and forced them to make a determination based on general information about
how an uncorrected impairment usually affects individuals rather than on the individual’s actual
condition.\textsuperscript{230}

\textsuperscript{226} Id. at 480.
\textsuperscript{227} Id.
\textsuperscript{228} Id. at 482.
\textsuperscript{229} Id.
\textsuperscript{230} Id. at 483.
The Court noted the use of a corrective device did not by itself relieve one’s disability, but if the person was still substantially limited even with the use of such device, then the person met the threshold to be considered disabled.\textsuperscript{231} Therefore on the issue of disability, the Supreme Court affirmed the court of appeals decision that the sisters did not meet the criteria for having a disability.\textsuperscript{232}

The sisters also argued United Airlines regarded them as having disability. The Court’s response focused on the two misperceptions an employer could have about an employee. First, the employer could believe the individual had a substantially limiting impairment that, in fact, did not exist. Second, the individual was impaired, but the impairment did not substantially limit the individual despite the employer’s contrary view. The sisters argued United Airlines regarded individuals who failed to meet the vision requirement as having a disability and excluded those individuals from eligibility for employment as a pilot.\textsuperscript{233} The Court’s response was the individual must be excluded from either an entire class of jobs or a board range of jobs in various classes in order to be excluded from work. The inability to perform a particular job did not constitute a substantial limitation on being able to perform other work.\textsuperscript{234}

The sisters failed to show that by establishing a vision requirement, the airlines regarded them as being substantially limited in the major life activity of working. Therefore, the Court again upheld the court of appeals’ finding that United Airlines did not regard the sisters as disabled.\textsuperscript{235}

\textsuperscript{231} Sutton v. United Air lines, 527 U.S. at 488 .
\textsuperscript{232} Id.
\textsuperscript{233} Id. at 490.
\textsuperscript{234} Id. at 491.
\textsuperscript{235} Id.
One of the primary issues presented in *Sutton* was whether the Court should consider mitigating measures or assess the plaintiff in an unmitigated state when determining whether an individual was disabled.\(^{236}\) Within the ADA’s original language was the question of what impact, if any, corrective measures such as hearing aids, prosthetic devices, and medication should have on potentially disabling conditions.\(^{237}\) The Court observed taking into account mitigating measures could exclude the very individuals Congress intended to shield with the ADA’s protection.\(^{238}\) For example, one of the ADA’s original sponsors Tony Coelho had epilepsy. The effects of this condition can often be mitigated by medication\(^{239}\) or by use of a service animal. On the other hand, the Court worried ignoring mitigating measures would open the courthouse doors to individuals not generally considered to be disabled.\(^{240}\) In deciding how to address the mitigating measures issue, the Court looked at three separate ADA provisions.\(^{241}\) First, the Court reasoned the phrase “substantially limit” applied to present time. Therefore, a person whose limitation was corrected by mitigating measures was not presently substantially limited.\(^{242}\) Next, the Court decided each case should be decided on an individual basis rather than by considering how a group of people with that same disability may be affected.\(^{243}\) Finally, in briefs and oral argument, it was repeatedly emphasized that as many as 100 million Americans used corrective

\(\text{\textsuperscript{236}}\) Selmi, *supra* note 38, at 549.  
\(\text{\textsuperscript{237}}\) *Id.*  
\(\text{\textsuperscript{238}}\) *Id.*  
\(\text{\textsuperscript{239}}\) *Id.*  
\(\text{\textsuperscript{240}}\) *Id.*  
\(\text{\textsuperscript{241}}\) Gilman, *supra* note 37, at 1193.  
\(\text{\textsuperscript{242}}\) *Id.*  
\(\text{\textsuperscript{243}}\) *Id.*
lenses, thus heightening the Court’s concern over the potential for opening the door for these individuals to be considered disabled.\textsuperscript{244}

As a result, the Supreme Court’s concern that undeserving plaintiffs would seek unfair advantage in the workplace was heightened.\textsuperscript{245} The Suttons already had good jobs and their vision could pose a safety issue to airline passengers if they were allowed to fly commercial airplanes.\textsuperscript{246} Indeed, even if the Suttons had been defined as disabled, they would have probably lost their claim because the ADA permitted employers to develop rules to ensure safety.\textsuperscript{247}

\textit{Toyota Motor Manufacturing, Kentucky, Inc. v. Williams}\textsuperscript{248} After ruling in \textit{Sutton}, the Supreme Court agreed to hear another ADA case in 2002 to again consider whether the defendant met the definition of disabled. However, once again, the Court applied a narrow view of the term disability. \textit{Toyota Motor Manufacturing, Kentucky, Inc. v. Williams} involved the firing of an employee with a condition not as prevalent as poor vision.

In 1990, Ella Williams began work on the assembly line at a Toyota plant in Georgetown, Kentucky. Thereafter, she developed pain in her hands, wrists and arms that doctors determined was carpal tunnel syndrome and tendonitis.\textsuperscript{249} Williams’ personal physician placed her on permanent work restrictions.\textsuperscript{250} The next two years Williams was assigned to various modified jobs, but she missed some work for medical reasons and filed a claim under the Kentucky

\begin{footnotes}
\footnotetext[244]{Selmi, \textit{supra} note 38, at 549.}
\footnotetext[245]{\textit{Id.} at 550.}
\footnotetext[246]{\textit{Id.}}
\footnotetext[247]{\textit{Id.}}
\footnotetext[249]{\textit{Id.} at 187.}
\footnotetext[250]{\textit{Id.}}
\end{footnotes}
Workers’ Compensation Act.\textsuperscript{251} In settling the Workers’ Compensation claim, Williams agreed to return to work.\textsuperscript{252} Upon her return, she initially performed inspection work that required no manual labor.\textsuperscript{253} Thereafter manual inspection was added to Williams’ job duties. Subsequently, Williams experienced pain in her neck and shoulders.\textsuperscript{254} She sought care from the plant’s in-house physician who diagnosed her with a number of conditions involving inflammation of muscles and nerves in Williams’ upper body.\textsuperscript{255} Williams requested reassignment to a job involving no manual labor.\textsuperscript{256} The parties disagreed about what happened next. According to Williams, Toyota denied her request and forced her to continue with manual inspections causing her greater injury. According to Toyota, Williams began missing work on a regular basis.\textsuperscript{257} December 6, 1996 was Williams’ last day at the plant before being placed under a no-work-of-any-kind restriction by her physicians.\textsuperscript{258} On January 27, 1997, citing her poor attendance as the reason, Toyota terminated Williams’ employment.\textsuperscript{259} Williams filed a charge of disability discrimination with the Equal Employment Opportunity Commission (EEOC) and thereafter filed suit against Toyota in the United States District Court for the Eastern District of Kentucky.\textsuperscript{260} Her complaint alleged Toyota had violated the ADA and the Kentucky Civil Rights Act by failing to reasonably accommodate her disability

\textsuperscript{251} \textit{Id.} at 188.
\textsuperscript{252} \textit{Id.}
\textsuperscript{253} \textit{Id.} at 189.
\textsuperscript{254} \textit{Toyota v. Williams}, 534 U.S. at 189.
\textsuperscript{255} \textit{Id.}
\textsuperscript{256} \textit{Id.}
\textsuperscript{257} \textit{Id.}
\textsuperscript{258} \textit{Id.} at 190.
\textsuperscript{259} \textit{Id.}
\textsuperscript{260} \textit{Toyota v. Williams}, 534 U.S. at 190.
and terminating her employment. Williams based her ADA disability claim upon the assertion her physical impairments substantially limited her performance of manual tasks such as housework, gardening, playing with her children, and lifting. Williams also argued she was disabled under the ADA because she had a record of a substantially limiting impairment and because she was regarded as having such impairment.

The court found in favor of Toyota stating Williams was not disabled as defined by the ADA. The court agreed she suffered from a physical impairment, but did not find this impairment had substantially limited any major life activity. Although the court agreed performing manual tasks, lifting and working were major life activities, it found insufficient evidence to substantiate Williams’ claim that these limitations were substantial. The court found no evidence Williams had a record of a substantially limiting impairment or Toyota regarded her as having this impairment. The court reasoned even if Williams was disabled at the time of her termination, her physician had restricted her from any work resulting in her not being a “qualified individual with a disability.”

Williams appealed. The Court of Appeals for the Sixth Circuit reversed the district court’s ruling on whether Williams was disabled at the time she sought an accommodation, but affirmed the rulings on wrongful termination claims. The appellate panel concluded in order for Williams to demonstrate she was disabled at the time she requested the accommodation of no manual labor, she had to show her disability restricted her ability to perform manual tasks at

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261 Id.
262 Id.
263 Id. at 191.
264 Id.
265 Id.
266 Toyota v. Williams, 534 U.S. at 191.
work. The panel believed Williams had satisfied this test because her ailments kept her from doing the work associated with manual assembly line jobs. The panel disregarded evidence of Williams’ ability to perform personal hygiene and household chores observing this evidence did not affect a determination of whether her impairment substantially limited her ability to perform the manual tasks associated with an assembly line job. Because the court found Williams to be disabled, it was not necessary to rule on whether she had a record of being disabled or had been regarded as disabled.

The Supreme Court of the United States granted certiorari to consider the proper standard for assessing whether an individual was substantially limited in performing manual tasks. The Court determined there were two potential sources of guidance for interpreting the definition: The Rehabilitation Act regulations and the EEOC regulations interpreting the ADA. Because no agency had been given the authority to issue regulations interpreting the term “disability” in the ADA, both parties had accepted the EEOC regulations as reasonable. Thereafter the Supreme Court saw no reason to rule differently. Accordingly, in order to be disabled under the ADA, an individual first had to be found to have a physical impairment. Second, the physical impairment must “substantially limit” a major life activity. The Department of Health, Education, and Welfare did not define the term “substantially limits;” however, the EEOC created its own definition. According to the EEOC, “substantially limited” meant “unable to

267 Id. at 192.
268 Id.
269 Id.
270 Id.
271 Id. at 194.
perform a major life activity that the average person in the general population could perform.”

According to the regulation, a person was considered to be either disabled or not based on the nature and severity of the impairment, the duration of the impairment, and the permanent or long-term impact resulting from the impairment.

The question before the Supreme Court was whether the Sixth Circuit properly determined Williams was disabled under the ADA’s disability definition at the time she sought the accommodation of removal from manual work. Neither party disputed Williams’ medical conditions constituted a physical impairment. Rather, the issue focused upon whether the physical impairment substantially limited Williams from performing the major life activity of manual tasks. The Supreme Court decided the ADA terms “substantially” and “major” must be interpreted strictly. Based on the number of people Congress had identified as disabled, the Supreme Court believed it was not Congress’ intent for everyone with a physical impairment to qualify as disabled. Therefore, the Court decided in order to be substantially limited in performing manual tasks, an individual must have an impairment that prevented or severely restricted the individual from doing activities of central importance to most people’s daily lives. The impairment also had to be either permanent or long-term. The Court believed it was insufficient for individuals attempting to prove disability status to merely submit evidence of a medical diagnosis of impairment. Instead, the Court concluded the ADA required evidence

272 Toyota v. Williams, 534 U.S. at 195.
273 Id. at 196.
274 Id.
275 Id.
276 Id. at 197.
277 Id.
278 Toyota v. Williams, 534 U.S. at 198.
proving the extent of the limitation was substantial and an accompanying case-by-case determination regarding whether an individual was viewed as disabled.\textsuperscript{279}

An individual assessment of the effect of impairment was also necessary in cases where the symptoms varied widely from person to person. The Court considered evidence on the effects of carpal tunnel syndrome from muscle atrophy to numbness and tingling and duration from two weeks to eight years and determined a diagnosis of carpal tunnel syndrome was not enough to determine whether the individual had a disability within the meaning of the ADA.\textsuperscript{280}

The court of appeals had addressed the fact Williams could not perform a “class” of manual tasks required in her job. The court applied the “class” description the Supreme Court set forth in \textit{Sutton} to Williams’ claim. The Supreme Court found the appellate panel had incorrectly applied \textit{Sutton}’s term “class” to the manual tasks for a particular job as opposed to the broader sense the Supreme Court intended where an individual would be excluded from a large “class” of differing positions. In addition, the court of appeals had not addressed whether Williams was unable to perform a variety of tasks central to most people’s daily lives as opposed to whether she was unable to perform the tasks associated with her specific job.\textsuperscript{281} The manual task the court of appeals relied upon was the repetitive movement of hands and arms that was part of her assembly line job and not part of the manual tasks central to the lives of most people.\textsuperscript{282} The lower court had erroneously disregarded the information that Williams could tend to her personal hygiene and daily household chores.\textsuperscript{283} Even though Williams reported she had to avoid or

\textsuperscript{279} \textit{Id.}
\textsuperscript{280} \textit{Id.}
\textsuperscript{281} \textit{Id.} at 200-01.
\textsuperscript{282} \textit{Id.} at 201.
\textsuperscript{283} \textit{Toyota v. Williams}, 534 U.S. at 201.
reduce certain activities, these changes didn’t to amount to such severe restrictions in activities of central importance to most people’s lives.\textsuperscript{284} Therefore, the Supreme Court reversed the decision of the Court of Appeals of the Sixth Circuit.\textsuperscript{285}

The United States district court had initially ruled an individual was not considered disabled unless the person was limited in performing tasks of “central importance to most people’s daily lives.”\textsuperscript{286} This was a crucial point because the specific tasks unique to a specific job are not necessarily important parts of most people’s lives.\textsuperscript{287} The Court concluded this was consistent with the intent of the ADA, not to supplant worker compensation or allow individuals with work-related injuries to seek accommodations in addition to the remedies available under workers’ compensation.\textsuperscript{288} In addition, the Supreme Court reasoned a medical diagnosis alone would not prove disability status; rather disability status must be based on the extent of the individual’s impairment.\textsuperscript{289}

\textit{PGA Tour, Inc. v. Casey Martin}\textsuperscript{290} This case demonstrates the importance of considering the severity and nature of a disability when determining a reasonable accommodation.

Professional golfer, Casey Martin, a requested the accommodation of using a golf cart during Professional Golf Association (PGA) tournaments. The PGA believed walking was an essential

\begin{itemize}
  \item \textsuperscript{284} \textit{Id.}
  \item \textsuperscript{285} \textit{Id.} at 203.
  \item \textsuperscript{286} Selmi, \textit{supra} note 38, at 557.
  \item \textsuperscript{287} Gilman, \textit{supra} note 37, at 1195.
  \item \textsuperscript{288} Selmi, \textit{supra} note 38, at 558.
  \item \textsuperscript{289} Gilman, \textit{supra} note 37, at 1195.
  \item \textsuperscript{290} PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001).
\end{itemize}
component of the game of golf. Therefore, the PGA denied Martin’s request believing a golf cart would provide him with a competitive advantage over other golfers.291

At birth, Casey Martin was diagnosed with a Klippel-Trenaunay-Weber syndrome, a degenerative circulatory disorder that obstructed the flow of blood from his right leg to the heart. The progressive disease caused severe pain and atrophied Martin’s right leg.

Casey Martin had won many tournaments as an amateur, competed on the Stanford University golf team, and won the 1994 NCAA championship.292 During the latter part of his college career, due to the progression of the disease, Martin could no longer walk an 18-hole golf course and the NCAA waived their rules requiring players to walk and carry their own clubs. The disease caused pain, fatigue, anxiety, in addition to a risk of hemorrhaging, developing blood clots, and fracturing his tibia so badly an amputation might be required.293 As a professional, Martin qualified for the Nike Tour in 1998 and 1999 and the PGA Tour in 2000.294

There were various ways a golfer gained entry into a PGA sponsored tournament. Any player, who won three Nike Tour events in the same year or who finished the year as one of the top 15 money winners, was admitted into the tournament. Also, a golfer could gain entry by successfully competing in qualifying rounds the week before the tournament. Most participants, however, earned playing privileges by qualifying in a three-stage tournament known as

292 PGA v. Martin, 532 U.S. at 668.
293 Id.
294 Id.
Qualifying School (Q-School). Any member of the public may enter a Q-School by paying the entry fee, in this case, $3000.

Golf carts were permitted in the first two stages of the Q-School, but prohibited in the final stage. Three separate sets of rules governed the PGA events. These included the Rules of Gold jointly written by the United States Golf Association and the Royal and Ancient Golf Club of Scotland. These rules did not prohibit the use of golf carts. The second set of rules, often called the hard card, applied specifically to the PGA professional tours. The hard card did not allow a golfer to use a cart during the third stage of Q-School. The third set of rules was issued for a particular tournament and covered the conditions for that specific event. These rules applied equally to all of the players in tour competitions.

When Martin turned professional and entered the Q-School, the hard card rules allowed him to use a cart during his first two stages. He made a request, supported by detailed medical records, for permission to use a golf cart during the third stage. The PGA Tour refused to review those records or to waive the walking rule for the third stage. Martin filed a lawsuit.

The U. S. District Court for Oregon entered a preliminary injunction making it possible for Martin to use a cart in the final stage of the Q-School and on the PGA and Nike Tour.

295 Id. at 665.
296 Id.
297 Id. at 666.
298 PGA v. Martin, 532 U.S. at 666.
299 Id. at 667.
300 Id.
301 Id.
Although not bound by the injunction, the United States Golf Association (USGA) voluntarily granted Martin a similar waiver in the events it sponsored, including the U.S. Open.\textsuperscript{302}

The United States District Court for the District of Oregon ruled Martin’s use of a golf cart would not fundamentally alter the PGA Tour game. Additionally, the district court entered a permanent injunction requiring the PGA to allow Martin’s use a cart during the tour and qualifying events.\textsuperscript{303}

The PGA Tour asked the district court to grant a summary judgment claiming exemption from coverage under Title III of the ADA. According to the PGA, since the tournament was held at a private club, the only places of public accommodation on the golf course during a tournament were the spaces open to the spectators.\textsuperscript{304} The district court ruled PGA Tour was a commercial enterprise operating in the entertainment industry for the economic benefit of its members. Furthermore, the court noted the ADA considered golf courses to be public facilities, and therefore the PGA could not designate portions of a golf club as being either private or public.\textsuperscript{305} At the trial, the PGA did not contest that Martin had a disability covered by the ADA or Martin’s claim the disability prevented him from walking the golf course. Instead, PGA officials argued walking was a substantive rule of the competition and waiving it for any reason would fundamentally alter the nature of the competition.\textsuperscript{306} The purpose of the rule was to inject fatigue into the shot-making skill, but the court found the level of fatigue walking added was not significant to most competitors. In addition, Martin presented evidence that even with the use of

\textsuperscript{302} Id. at 669.
\textsuperscript{303} Id. at 664.
\textsuperscript{304} PGA v. Martin, 532 U. S. at 669.
\textsuperscript{305} Id.
\textsuperscript{306} Id. at 670.
the cart he walked over a mile during an 18-hole round of golf, and the fatigue he suffered in
dealing with his disability surpassed the fatigue experienced by his of able-bodied
competitors.\footnote{Id. at 671-672.} He argued categorizing his use of a golf cart as a competitive advantage given the
nature and severity of his disability distorted what was really occurring.\footnote{Id. at 672.} The court concluded it
did not alter the nature of the PGA Tour’s game to accommodate Martin by allowing use of a
cart.\footnote{Id.}

On appeal to the Ninth Circuit, PGA Tour argued the tournament portions of the golf
course were not public because spectators had no right to enter the areas open only to
contestants. The appellate panel ruled the entire course was considered a public accommodation
even though some portions of the golf course were open to the general public and other areas
were more restricted. Despite the fact the tournament entrants excluded all but the nation’s best
golfers, the golf course was not exempt from being considered a public accommodation just as
the most highly selective universities are not exempt from being considered public
accommodations.\footnote{Martin v. PGA 204, F.3d 994, 999 (9th Cir. 2000).} The appellate court also found it reasonable to allow Martin to use a golf
cart based on the severity of his disability. The golf cart allowed him access to the competition,
and the evidence supported the district court’s findings of Martin’s inability to walk the
course.\footnote{Id. at 1000.} Finally, the appellate court denied the PGA Tour claim that using the golf cart gave
Martin an unfair advantage because it would fundamentally alter the nature of the competition

\footnotesize
\begin{itemize}
\item \footnote{Id. at 671-672.}
\item \footnote{Id. at 672.}
\item \footnote{Id.}
\item \footnote{Martin v. PGA 204, F.3d 994, 999 (9th Cir. 2000).}
\item \footnote{Id. at 1000.}
\end{itemize}
because fatigue was not determined an issue in the other golfers.\textsuperscript{312} The Ninth Circuit agreed with the trial judge’s findings that Martin’s use of a golf cart only granted him access to the golf tournament as opposed to giving him an unfair advantage over the other contestants.\textsuperscript{313}

After granting certiorari, the Supreme Court considered two issues. (1) Whether the ADA protected a qualified entrant with a disability access to PGA tournaments, and (2) Whether a disabled contestant could be denied the use of a golf cart because such use would fundamentally alter the nature of the tournament.\textsuperscript{314}

On the first issue, the Supreme Court ruled PGA tournament events fit within Title III of the ADA, stating these events occurred on golf courses, the type of places specifically designated by the Act as a public accommodation.\textsuperscript{315} As a result, denying Martin access to PGA tournaments on the basis of his disability was prohibited by the ADA.\textsuperscript{316}

In ruling on the argument of fundamentally altering the nature of the game, the Court pointed out golf rules did not prohibit the use of golf carts.\textsuperscript{317} Even assuming the fatigue factor was significant and could potentially affect tournament outcomes, the Court found the PGA failed to consider the nature and severity of Martin’s personal circumstances when deciding whether to accommodate his disability.\textsuperscript{318} The Supreme Court pointed out an individualized

\begin{footnotes}
\item \textsuperscript{312} \textit{Id.}
\item \textsuperscript{313} \textit{Id.}
\item \textsuperscript{314} PGA v. Martin, 532 U.S. at 664.
\item \textsuperscript{315} \textit{Id.} at 680.
\item \textsuperscript{316} \textit{Id.}
\item \textsuperscript{317} \textit{Id.} at 683.
\item \textsuperscript{318} \textit{Id.} at 687.
\end{footnotes}
inquiry was necessary in order to determine if the nature or severity of a particular person’s
disability would make an accommodation reasonable.  

The PGA also argued that any process where they were forced to make individualized
assessments of all qualified participants seeking accommodations due to a disability would be
unduly burdensome and was not required by the ADA. The Supreme Court noted this burden
was acceptable because the ADA did not state the reasonable modification requirement was only
applicable to requests that were easy to evaluate. The decision of the Ninth Circuit Court of
Appeals was affirmed.  

The Martin decision considered three questions: 1. Whether the requested modification
was reasonable? 2. Whether the modification was necessary for the individual with a disability?
3. Whether it would fundamentally alter the nature of competition?

Americans with Disabilities Act Amendments Act

The ADA Amendments Act of 2008 (ADAAA) was signed into law by President George
W. Bush on September 25, 2008, and became effective on January 1, 2009. The amendments
gained unanimous support in the U.S. Senate and also enjoyed support from business
organizations. The major purpose of the amendments was to expand the reach of the ADA’s
disability definition. This was Congressional response to federal court decisions narrowing

319 Id. at 688.
320 PGA v. Martin, 532 U.S. at 690.
321 Id. at 691.
322 Anderson, supra note 291, at 253.
324 Id.
325 Gilman, supra note 37, at 1197.
the ADA’s disability protections. The amendments came after five years of deliberations and were an attempt to override several Supreme Court rulings limiting the statute’s coverage.

The text of the amendments reflected Congress’ disappointment with the Supreme Court’s narrow interpretation of what qualified as a disability. Congress intended for the Rehabilitation Act of 1973’s broad interpretation of the definition of a disability to be extended to the ADA. The amendments were designed to explicitly reinstate a broader scope of protections.

The five major changes to the ADA applied to all of the titles as well as Title V of the Rehabilitation Act of 1973, which included §501 covering federal employment, §503 covering federal contractors, and §504 covering recipients of federal financial assistance and services and programs of federal agencies. The ADAAA represented progress from a claimant’s point of view.

Change One – Clarifying the Disability Definition

While the ADAAA did not change the three-part definition of a disability, it did clarify the terms used to define a disability to allow broader application. As a reminder, this three-part definition provides an individual must have “(A) a physical or mental impairment that

326 Seiner, supra note 323, at 95.
327 Id. at 107.
331 Finnemore, supra note 329, at 24.
substantially limits one or more of the major life activities of such individual;\"332 \"(B) a record of such an impairment;\"333 \"(C) be regarded as having such an impairment.\"334

Major life activities were defined as the basic activities the majority of the general public could perform.335 The revised statute incorporated the activities set forth in the EEOC regulations and appendix.336 A list of major life activities was added to the Act including:

…But are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.337

In addition, major bodily functions were added as major life activities, “including but not limited to functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”338

The most significant major life activity expressly addressed by the amendments was “working.” Previously, there was question as to whether working should be considered a major life activity. The Supreme Court left the question unanswered in Sutton.339 The inclusion of working as a major life activity was designed to clarify the ambiguity in both the original statute and case law.340 Congress wanted to shift the focus from whether an individual was covered by the statute to whether the employer discriminated against an individual with a disability.341

333 Id. at § 12102(2)(B).
334 Id. at § 12102(2)(C).
335 Finnemore, supra note 329, at 25.
336 Seiner, supra note 323, at 110.
338 Id. at § 4(a)(2)(B).
339 Seiner, supra note 323, at 110.
340 Id. at 111.
341 Id. at 112.
Change Two – Episodic Impairments

The second amendment added “an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”\textsuperscript{342} For example, epilepsy, hypertension, multiple sclerosis, asthma, diabetes, and bipolar disorder are all episodic impairments that can be considered disabilities.\textsuperscript{343}

Change Three- Mitigating Measures

Amendment three stated, “The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures.”\textsuperscript{344} Mitigating measures are designed to eliminate or reduce the impact or symptoms of impairment.\textsuperscript{345} The ADAAA provided a long list of examples of mitigating measures including medication, medical equipment, prosthetic limbs, hearing devices and cochlear implants, reasonable accommodations, and behavioral modifications.\textsuperscript{346} Eyeglasses or contact lenses were excluded from this list.\textsuperscript{347} This change was designed to reduce the inordinate amount of time and energy courts were allocating to evaluating evidence “…In order to determine whether, and to what extent, mitigating measures actually alleviate the effects of the disability-none of which is relevant to the questions of whether discrimination occurred.”\textsuperscript{348}

\textsuperscript{343} Finnemore, supra note 329, at 20.
\textsuperscript{345} Finnemore, supra note 329, at 24.
\textsuperscript{347} Id.
\textsuperscript{348} Collins, Michael. Statement to the U.S. House of Representatives, the Committee on the Judiciary, the Subcommittee on the Constitution, Civil Rights, and Civil Liberties. Hearing on
Change Four- A Broader Reading of Substantial Limitation

The fourth amendment provided, “An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.” This change addressed Congressional concerns over the Supreme Court’s interpretation of substantial limitation in *Toyota v. Williams* to mean prevent or severely limit. The new language reflected an intent for a broad reading of the phrase and rejected the narrow approach used by the Supreme Court and the EEOC’s interpretation of “substantially limited” to mean “significantly restricted.”

Change Five-Regarded as Disabled

Amendment five significantly changed the meaning of “regarded as disabled.” The ADAAA eliminated the requirement for an employer to perceive the impairment as substantially limiting. The plaintiff only needed to demonstrate that he or she had been discriminated against because of the perceived or actual impairment without regard to whether the impairment was perceived as substantially limiting.

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351 Seiner, supra note 323, at 111-12.


Beginning with *Sutton*, the Supreme Court began to interpret the definition of disability more narrowly.\(^{354}\) This shift favored business. Employers faced changes with the passage of the Americans with Disabilities Act Amendments Act.\(^{355}\) Almost immediately, the ADA again became a plaintiff-friendly statute due to the fact the federal law expanded the definition of disability.\(^{356}\) Passage of the ADAAA reclaimed the original intent of the ADA. \(^{357}\)

*Celeste v. East Meadow Union Free School District*\(^ {358}\)

In *Celeste v. East Meadow*,\(^ {359}\) the parents alleged the public school violated the ADA and discriminated against their child based on his disability. Domenick Celeste Jr. was a student with cerebral palsy who attended Woodland Middle School in the East Meadow Union Free School District in New York.\(^ {360}\) Domenick used either crutches or a wheelchair to navigate the school building and grounds. Domenick alleged the school’s architectural barriers forced him to take a ten-minute detour each way to reach and return from the athletic fields behind the school. This 20-minute delay reduced his participation time in the forty-five minute physical education class and also limited his participation as a manager for the football team.\(^ {361}\) In addition, he could not

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\(^{355}\) Finnemore, *supra* note 329, at 19.

\(^{356}\) *Id.* at 19-20.

\(^{357}\) *Id.* at 21.

\(^{358}\) *Id.*

\(^{359}\) Celeste v. E. Meadow Union Free Sch. Dist., 373 Fed.Appx. 85 (2d Cir. 2010).

\(^{360}\) *Id.* at 87.

\(^{361}\) *Id.* at 88.
access the bus depot at the school and was forced to disembark from the school bus at a location different from other students.\textsuperscript{362}

Domenick’s father filed a complaint on behalf of his son with the United States District Court for the Eastern District of New York alleging violations of the American with Disabilities Act and §504 of the Rehabilitation Act of 1973. A jury found the barriers to the athletic fields resulted in the school district being liable under Title II of the ADA and §504 and awarded monetary damages for Domenick’s emotional distress. However, the jury found in favor of the school district regarding the bus depot access question.\textsuperscript{363}

School officials appealed the decision to the United States Court of Appeals for the Second Circuit.\textsuperscript{364} On appeal, school officials argued the district court abused its discretion because Domenick failed to introduce any objective expert testimony and failed to suggest any plausible accommodations. Because of these errors, school officials argued Domenick’s claim should have failed as a matter of law. The appellate panel noted Domenick had testified before the jury about the amount of time it took him to travel to the athletic fields. This testimony allowed the district court to rule without conjecture as to whether Domenick had been denied meaningful access. Additionally, school officials had not offered a compelling reason as to why Domenick would need to present an expert witness.\textsuperscript{365}

The appellate court also ruled Domenick met the burden of showing the cost of the requested accommodations would not exceed the benefits. Domenick recommended the installation of additional curb cuts and the removal of fixed cleat cleaners because the school had

\textsuperscript{362} Id. at 89.
\textsuperscript{363} Id. at 87.
\textsuperscript{364} Celeste v. E. Meadow, 373 Fed.Appx. at 87.
\textsuperscript{365} Id. at 88.
portable ones they could place near the locker room. The court concluded these suggestions met the burden of providing a reasonable accommodation.\textsuperscript{366} Therefore, the court affirmed the lower court’s ruling.\textsuperscript{367}

East Meadow school officials also claimed the district court erred in refusing to vacate the jury’s damage award.\textsuperscript{368} The court of appeals concurred. Domenick had not presented evidence showing the limited access to the athletic fields caused him undue emotional distress.\textsuperscript{369}

Finally, Domenick’s father cross-appealed the decision regarding the bus depot stating the district court failed to consider the additional ADA standards applicable to facilities constructed after January 26, 1992. The bus shelter lacked a curb cut on the side where buses picked up and dropped off students. Therefore, a disabled student who required sidewalk access had no safe way to travel. The appellate court viewed these deficiencies as violations of the ADA’s accessibility expectations. The panel found the bus shelter violated the ADA. With respect to the sidewalk, school officials argued the school district did not own the property and therefore was not liable for the lack of access. However, the school district’s witness stated the district maintained the sidewalk. The panel concluded the claims regarding the sidewalk did not fall under Title II of the ADA, rather constituted a Title III claim. This conclusion prompted a remand of the case.\textsuperscript{370} There was no further information regarding the remanded findings.

\textsuperscript{366} Id.
\textsuperscript{367} Id. at 89.
\textsuperscript{368} Id.
\textsuperscript{369} Id.
\textsuperscript{370} Celeste v. E. Meadow, 373 Fed.Appx. at 90-91.
The social model of disability regards the views of society as a contributing factor to “disabling” a person with impairment much the same way other marginalized members of society have been limited by views on race or ethnicity. According to this model, physical or mental conditions do not by themselves disable; instead, the disability arises from a dynamic between a condition and the environment. A common example of the social model is a person who uses a wheelchair for mobility. This person might not be considered disabled were it not for the physical barriers of curbs and steps. However, even the removal of physical barriers would not allow the individual full participation in society if the negative and exclusionary attitudes of others kept the person from tasks he could perform.

A reasonable accommodation is a common-sense solution to an accommodation request. The basic reasonable accommodation query under the ADA and Rehabilitation Act is the same. A reasonable accommodation is intended to enable persons with a disability to participate in work, education, or public life to the same extent as their nondisabled counterparts. The range of possible accommodations is only limited by imagination.
Every accommodation request should be decided on an individual basis. An agency faced with deciding how to accommodate should ask the individual how he or she would like to be accommodated. Not all of these requests will be reasonable. If the accommodation is not reasonable, it is not the required solution. However, the government agency still must provide access wherever a reasonable accommodation is possible.\(^{378}\) For example, it may not be reasonable for a library to provide a book in Braille as opposed to an audio file to an individual who is blind due to the high cost of translating the book to Braille. The individual still has access to the book even though it was not the requested accommodation.\(^{379}\)

The courts have applied a four-prong test to judge reasonable accommodation claims. The test asks the following questions. First, is the plaintiff disabled? Second, did the defendant know of the disability? Third, did the plaintiff make a request for a reasonable accommodation needed to give the plaintiff an equal opportunity to use and enjoy the service, facility, or program? Finally, did the defendant deny this request?\(^{380}\) According to the courts, an accommodation may be considered “necessary” under prong three when it is shown the plaintiff requires the requested accommodation. Usually the defendant argues against the “reasonableness” because the accommodation either creates an undue financial burden or would fundamentally alter the nature of the service or program provided.\(^{381}\) The courts disagree as to whether the burden of proof regarding “reasonableness” lies with the plaintiff or if the defendant must prove undue burden or fundamental alteration.\(^{382}\)

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\(^{378}\) Milzarski & Norris, supra note 55, at 44.

\(^{379}\) Id. at 44.

\(^{380}\) Ligatti, supra note 35, at 140.

\(^{381}\) Id. at 149.

\(^{382}\) Id.
Just as it is not illegal to discriminate against a member of a protected class for a reason unrelated to the protected status, the ADA does not require an organization to provide accommodations not directly related to a person’s disability. The ADA Amendments Act of 2008 remained silent on whether the accommodation must be directly related to the disability. In addition, the Supreme Court has never addressed the issue of whether the accommodation must demonstrate a nexus to the disability, thereby leaving these decisions to individual discretion and judicial interpretation.

**Modification of Policies and Procedures**

The ADA’s language provided “no individual with a disability be excluded, denied services, segregated or otherwise treated differently… unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the… services… or would result in an undue burden.” This statutory language identified the two exemptions for accommodations, undue burden and the fundamental alteration of the nature of the service.

Sometimes the accommodation request requires modifications to policies or procedure in order for a person with a disability to have an equal opportunity. An example is allowing a disabled person extended time on a standardized test. The agency administering the test has a right to request documentation of the need for this accommodation. Once this verification is

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383 Supra note 36, at 1392.
384 Id. at 1394.
387 Milzarski & Norris, supra note 55, at 44.
provided, the agency must modify its testing procedures and policies to allow the individual an equal opportunity under the ADA.\(^{388}\) This does not mean that an agency must waive all of its procedures and policies. Safety concerns trump equal opportunity.\(^{389}\) If an accommodation request necessitates unreasonable alteration of policy or procedures, steps should be taken to maximize accessibility while maintaining practicality.\(^{390}\)

An example of policy and procedural change is granting access to an individual’s service dog to a facility with a “no dogs allowed” policy. The service dog has the same ADA protection as a tool or piece of equipment such as a wheelchair. The exception would be a place where the presence of a dog poses a safety risk.\(^{391}\)

The question becomes whether the requested accommodation is reasonable and whether the requested accommodation would create a fundamental alteration in the nature of services the school provides.\(^{392}\) Unreasonableness of accommodation is difficult to question in the public school setting because schools provide the setting for the major life activity of learning to many different types of students with different abilities and limitations. For school officials to say accommodating a student’s individual abilities or disabilities is “burdensome or an alteration of policy” is in contrast with the widely accepted belief that each student has different learning needs.\(^{393}\)

At some point the financial and administrative burden on school officials to provide individualized accommodations to each student under §504 or the ADA could outweigh the

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\(^{388}\) *Id.* at 43.  
\(^{389}\) *Id.* at 44.  
\(^{390}\) *Id.* at 43.  
\(^{391}\) *Id.* at 45.  
\(^{392}\) Smith & Bales, *supra* note 373, at 411.  
\(^{393}\) *Id.*
actual benefit the individual student receives. Financially and administratively, school officials struggle to find the resources to accommodate the variety and multitude of disabilities under §504 and the ADA. 394

**Individuals with Disabilities Education Act** 395

The third federal statute governing the duty of public school officials to provide a child with a disability the use of a service animal is the Individuals with Disabilities Education Act of 2004 (IDEA). 396 The IDEA is an important legal tool ensuring children with disabilities are provided access to a meaningful education. 397 Under the IDEA and its implementing regulations, the federal government provides states some financial assistance for the provision of special education and related services to children with disabilities. 398

**History of the IDEA**

After the Civil War, many communities began adopting polices regarding compulsory education; however, there were no provisions for educating students with disabilities. 399 During the Progressive Era of the late nineteenth and early twentieth century, some cities, such as Chicago, Boston, and Providence, provided special classes for children with cognitive

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394 *Id.* at 412.
396 *Id.*
398 Mayes & Zirkel, *supra* note 34, at 63.
399 Monroe, *supra* note 58, at 586.
disabilities. In 1911, New Jersey became the first state to provide special education classes. In the 1920s, while classrooms for students with cognitive disabilities became more common than in the past, there were still students considered to be uneducable who were excluded from public schooling. Decisions about whether to include or exclude students from public schools were typically based on intelligence tests.

Public schools did not just exclude students with disabilities. It was also common to see schools segregated by race with white students attending schools with many more resources than their black neighbors. The 1954 Supreme Court decision in Brown redefined public education in communities and states across the nation by requiring schools to allow students of all races to be educated together.

The Supreme Court landmark civil rights decision not only opened the school doors to black students but also gave parents of students with disabilities hope their children would also receive educational opportunities in the public schools. In Brown the Supreme Court addressed the question of whether black students could be excluded from publicly funded school that had traditionally served only white students. The plaintiffs believed segregation of black students violated the students’ right to equal protection under the U.S. Constitution’s Fourteenth Amendment. The Court unanimously ruled segregation based upon race deprived minority

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400 Id. at 587.
401 Id.
402 Id.
403 Id.
405 Id.
406 Id. at 487.
children equal educational opportunities.\textsuperscript{407} The Court held public school segregation based upon race violated the Fourteenth Amendment’s equal protection clause.\textsuperscript{408}

However, change for students with disabilities came slowly. Many states continued to exclude students with disabilities, and inappropriate programs often served those students who were included.\textsuperscript{409} The need to assist states in funding educational programs for the disabled was initially addressed in Title VI of the Elementary and Secondary Education Act of 1965 (ESEA)\textsuperscript{410} which provided the first federal grant program for special education services.\textsuperscript{411} In April 1970, Congress again amended the ESEA and renamed Title VI the Education of the Handicapped Act (EHA).\textsuperscript{412} The EHA created incentives encouraging states to develop educational programs to benefit students with disabilities.\textsuperscript{413} Part B of the EHA was designed to help states in either beginning special education programs or improving and expanding existing programs, but it did not specify how states were to spend their federal funds.\textsuperscript{414} Without specific mandates, the EHA did not significantly improve conditions for students with disabilities.\textsuperscript{415}

Parents of the disabled began to push their respective states to address this problem.\textsuperscript{416} Some states passed laws providing partial funding and required school boards to offer special

\begin{flushleft}
\textsuperscript{407} Id. at 493.
\textsuperscript{408} Id. at 495.
\textsuperscript{409} Monroe, supra note 58, at 587.
\textsuperscript{410} Pub. L. No. 89–750, 79 Stat. 27 (1966). These amendments to the Elementary and Secondary Education Act of 1965 moved the original Title VI to Title VII and added a new Title VI –The Education of Handicapped Children.
\textsuperscript{411} Id. at §601(a) (1966).
\textsuperscript{413} Id.
\textsuperscript{414} Id. at §611.
\textsuperscript{415} Monroe, supra note 58, at 591.
\textsuperscript{416} Id. at 587.
\end{flushleft}
educations services to children with disabilities.\textsuperscript{417} However, many of these laws were not enforced and the earmarked funds proved to be insufficient.\textsuperscript{418}

Because of this unresponsiveness, parents sought relief in federal courts.\textsuperscript{419} Two landmark cases provided the legislative impetus for what would eventually become the Individuals with Disabilities Education Act.\textsuperscript{420}

\textit{Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania}\textsuperscript{421} On January 7, 1971, the parents of thirteen mentally disabled children filed a civil rights class action lawsuit alleging certain Pennsylvania statues and practices denied due process and equal protection rights guaranteed by the Fourteenth Amendment of the U.S. Constitution to children challenged by mental retardation.\textsuperscript{422} According to the complaint, Pennsylvania officials relied upon four state statutes to exclude children with cognitive disabilities from attending public schools.

The first statute relieved the state board of education from any obligation to educate a child whom a public school psychologist certified to be uneducable. The burden of caring for such child was shifted to the Department of Welfare, an agency with no obligation to provide any educational services for the child. The second state statute allowed public school officials to indefinitely postpone admission of any child who had not attained a mental age of five. The third statute excused any child from compulsory school attendance whom a psychologist found unable to benefit from education. Finally, the fourth statute defined compulsory school age, but in the

\begin{footnotesize}
\textsuperscript{417} Id.
\textsuperscript{418} Id. at 588.
\textsuperscript{419} Id.
\textsuperscript{422} Id. at 1258.
\end{footnotesize}
case of students with cognitive disabilities, the statute was used to either postpone admission until age eight or the student remove from school at age 17.\textsuperscript{423}

A hearing date was set for June 15, 1971, however, the parties asked for an opportunity to settle the case amicably with regard to the due process portion of the complaint. The hearing date was postponed until August 12, 1971.\textsuperscript{424} During this interim, the parties reached a stipulated agreement. The District Court for the Eastern District of Pennsylvania approved the agreement, which guaranteed a hearing with a special hearing officer for any child who was cognitively impaired or thought to be cognitively impaired before determining the child’s eligibility as either a regular or special education student or before excluding the child from a public education. At the hearing, parents had the right to representation by counsel, to examine the child’s records, to compel the attendance of school officials who might have relevant evidence to offer, to cross examine witnesses testifying on behalf of the school, and to introduce evidence of their own.\textsuperscript{425}

In mid-August the court heard PARC’s evidence regarding the equal protection claims. Following testimony by educational experts, the parties expressed a desire to also settle the equal protection dispute by agreement rather than judicial determination.\textsuperscript{426}

On October 7, 1971, the parties signed a consent agreement that included the following provisions.\textsuperscript{427} The complaint was considered a class action on behalf of all cognitively disabled residents of Pennsylvania, who had been or might be denied access to free public education and

\textsuperscript{423} Id. at 1282.
\textsuperscript{424} Id. at 1284.
\textsuperscript{425} Id. at 1284-85. The wording in the stipulation is similar to the language found in the EAHCA, 20 U.S.C. § 1415(d).
\textsuperscript{426} PARC. v. Pennsylvania, 343 F. Supp. at 1285.
\textsuperscript{427} Id. at 1259.
training while they were less than twenty-one years of age.\textsuperscript{428} Immediate relief was granted to the entire class. Notice was sent to public school districts, and advertisements sent to newspapers in each county. The state recognized children with cognitive difficulties could benefit from education and training. Pennsylvania agreed to provide a free public education to all exceptional children between the ages of six and twenty-one and not deny any cognitively impaired child access to a free public program. State officials acknowledged placement in a regular public school class was preferable to placement in a special public class and placement in a special class was preferable to placement in any other type of program.\textsuperscript{429} The agreement made adjustments to certain sections of the school code precluding public school districts from barring students with disabilities from attending school. In school districts where preschool was offered, the agreement ensured programs designed to include children with disabilities below the age of six would also be offered. Tuition for day schools and residential schools became available for students considered cognitively impaired. However, if a school district provided a program of special education appropriate for the child, the district could deny or withdraw payments of tuition.\textsuperscript{430} Cognitively impaired students would be eligible for homebound instruction and training for at least five hours per week. However, the agreement recognized homebound instruction was the least preferable program of education and training. The Department of Welfare was required to abide by the same guidelines as public school districts for children who were a part of its system. Deadlines were established for when the agreement would be in effect.\textsuperscript{431} The district court

\textsuperscript{428} Id.
\textsuperscript{429} Id. at 1259-60.
\textsuperscript{430} Id. at 1260-62.
\textsuperscript{431} Id. at 1265-67.
approved the agreement and thereby avoided the constitutional question regarding the Fourteenth Amendment.

After numerous notices to the Pennsylvania public school districts, a hearing was held on December 15 and 16, 1971, to hear objections for the proposed settlement agreements. The complaints referenced the burdensome and impractical nature of the stipulations’ due process hearings. In addition, some challenged the district court’s jurisdiction over this case.432

Proponents of the settlement met with the objectors and modified the consent agreement and the stipulation in order to satisfy everyone involved. On May 5, 1972, the court approved the amended stipulation.433 The PARC decision and stipulated agreement contained language that would later be used as IDEA’s free appropriate public education (FAPE) and least restrictive environment (LRE) provisions.434 While the Pennsylvania federal district court was hearing PARC, a similar class action lawsuit was filed in the U. S. District Court for the District of Columbia against the Board of Education of the District of Columbia.

*Mills v. Board of Education*435 This lawsuit claimed school officials were denying poor minority students with mental impairments and behavior problems a free public education.436 The complaint alleged D.C. public school officials were failing to provide a public education to these children with disabilities and other “exceptional” children. The class action lawsuit also addressed the exclusion, suspension, expulsion, and transfer of “exceptional” children from

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433 *Id.* at 1302.
434 Monroe, *supra* note 58, at 588.
436 *Id.* at 868.
regular public school classes without a due process hearing.\footnote{Id.} The school board admitted they were obligated to provide this population of children an education including periodic review and the right to a due process hearing prior to changing a student’s educational placement. Furthermore, school officials admitted they had failed to meet this obligation.\footnote{Id. at 871.}

In December 1971, the parties agreed and signed a stipulation ordering school officials to provide a list of the students in the D.C. area who might be considered “exceptional.” In addition, school officials agreed to develop an action plan for evaluating and placing students with disabilities in public education programs.\footnote{Id. at 873.} The District of Columbia School Board made attempts to fulfill theses obligations but failed and on April 7, 1972, submitted documents the court did not find satisfactory.\footnote{Id. at 873.} Citing \textit{Brown v. the Board of Education}\footnote{Brown v. Bd. of Educ., 347 U.S. 483 (1954).}, the district court rejected the Board of Education’s argument claiming insufficient funding as an excuse for not fulfilling their obligations to students challenged by disabilities.\footnote{Mills v. Bd. of Educ., 348 F. Supp. at 873.} The court stated, “Constitutional rights must be afforded citizens despite the greater expense involved.”\footnote{Id. at 876.} The district court ordered no child eligible for public education would be excluded unless the child was provided an adequate alternative education. The court further directed school officials to adopt a written policy guaranteeing extensive due process hearing procedures to children prior to suspending them from school for disciplinary reasons.\footnote{Id. at 878-83.}
Both the PARC and Mills decisions prompted Congress to pass legislation enforcing the rights of the students with disabilities to receive a free appropriate public education.\footnote{Monroe, supra note 58, at 589.} Two years after the passage of the Rehabilitation Act of 1973, Congress authorized the Education for All Handicapped Children Act of 1975 (EAHCA)\footnote{Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975). This law is often referred to by its original statute number Pub. L. No. 94-142 as opposed to its name. In addition sources often use the EHC initials to refer to this Act as opposed to the original Education of the Handicapped Act, which was part of the Elementary and Secondary School Act of 1966.}\footnote{Monroe, supra note 58, at 581.} under its Spending Clause powers.\footnote{Monroe, supra note 58, at 581.} Former Senator Robert Stafford and Senator Edward Kennedy were the original co-sponsors of this Act.\footnote{Mitchel H. Rubinstein, Parents as Quasi-therapists under the Individuals with Disabilities Education Act, 76 U. CIN. L. REV. 899, 903-04 (2008).} At that time, the Bureau of Education for the Handicapped estimated only 3.9 out of eight million children with disabilities birth to age twenty-one were receiving an appropriate education. The agency further estimated 2.5 million children were receiving an inappropriate education and 1.75 million disabled children were not receiving any educational services.\footnote{S. Rep. No. 94-168, at 8 (1975), as reprinted in 1975 U.S.C.C.A.N 1432.} The purpose of the EAHCA was to provide students with disabilities a meaningful education by requiring states who accepted the Act’s federal funding to provide special education to all students with disabilities.\footnote{Monroe, supra note 58, at 581.} It established the requirement for states and school boards receiving these special education funds to provide a free and appropriate public education to a student with a disability in the least restrictive environment.\footnote{Id. at 592.} In Smith v. Robinson\footnote{Smith v. Robinson, 468 U.S. 992 (1984). In this case the Supreme Court ruled that even though the parents were the prevailing party, they were not entitled to an award of attorney fees because the EHC was silent on this matter. The parents could not be awarded attorney fees under}
Supreme Court described the EAHCA as a “comprehensive scheme set up by Congress to aid the States in complying with their constitutional obligations to provide public education for handicapped children.” There were four purposes listed within the Act for children with disabilities.

[1] A free appropriate public education which emphasizes special education and related services designed to meet their unique needs, [2] to assure that the rights of handicapped children and their parents or guardians are protected, [3] to assist States and localities to provide for the education of all handicapped children, and [4] to assess and assure the effectiveness of efforts to educate handicapped children. (numbering added)

The EAHCA contained five major sections tangentially affecting service animals. First the Act required provision of a free and appropriate education (FAPE) to all students with disabilities between the ages of three and twenty-one. A “free appropriate public education” (FAPE) was defined in the Act as:

Special education and related services which (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, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program…. 

Secondly, the Act called for a nondiscriminatory evaluation using “a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent” to determine 

§504 of the Rehabilitation Act because the plaintiff may not enlarge upon the remedies offered by the EHC.

453 Smith v. Robinson, 468 U.S. at 1009.
455 Id. at § 612(2)(B).
456 Id. at § 602(a)(18).
457 34 C.F.R. §300.304 (2012).
whether the child is eligible to receive special education and related services.\textsuperscript{458} Additionally, a student had to be evaluated in his or her native language using racially and culturally unbiased instruments.\textsuperscript{459} The list of disability categories that qualified a student for special education were mental retardation, speech or language impairments, visual impairments including blindness, serious emotional disturbance, hearing impairments, orthopedic impairment, other health impairment and specific learning disabilities.\textsuperscript{460}

Third, the EAHCA mandated each public school district create, review, and revise an Individualized Education Program (IEP) for each eligible student.\textsuperscript{461} The IEP was described as a written statement developed during a meeting attended by a representative of the local educational agency who was qualified to supervise the specially designed instruction, the child’s teacher, the parents/guardians, and whenever appropriate the child. The IEP was to include a statement of the present levels of educational performance, annual goals and objectives, the educational services to be provided, the extent to which the child was to participate in regular education, the projected dates for initiation and duration of the IEP, and criteria for determining whether the objectives are achieved.\textsuperscript{462}

Fourth, the EAHCA called for the State to establish procedures to assure students with disabilities were educated with their non-disabled peers. This provision is now commonly known as the “least restrictive environment”\textsuperscript{463} (LRE) mandate:

\textsuperscript{459} Id. at § 612(5)(C).
\textsuperscript{460} Id. at § 602(1).
\textsuperscript{462} Id. at § 602(a)(19).
…To assure that, to the maximum extent appropriate, handicapped children … are educated with children who are not handicapped and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.…\textsuperscript{464}

Restrictiveness is thereby defined as the degree a student with a disability interacts with students who do not have a disability.\textsuperscript{465}

Finally, the Act provided for procedural due process. If a parent believed the EAHCA was not being followed, the State was required to hear evidence to ensure the Act’s requirements were being met. The Congressional subcommittee developing this Act debated what an adequate due process procedure should involve. The intent was to guarantee the proceedings would remain as informal as possible prior parties filing suit in court. Congress believed an informal process with administrative hearings would not develop into a prolonged adversarial confrontation between the parents and schools.\textsuperscript{466} Congress sought a balance between an informal opportunity to work out a sound agreement regarding the appropriate education program for the child and a complete remedy including court review.\textsuperscript{467} The Act described the shared decision-making between parents and the school on issues related to educational programing.\textsuperscript{468}

On December 2, 1975, upon signing the EAHCA, President Gerald Ford stated while he approved the Act’s intentions, he believed the Act promised more than the federal government

\begin{footnotesize}
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\item \textsuperscript{464} Education for All Handicapped Children Act, Pub. L. No. 94-142, §612(5)(B), 89 Stat. 773 (1975).
\item \textsuperscript{465} Monroe, supra note 58, at 582.
\item \textsuperscript{466} Handicapped Children’s Protection Act of 1985, 131 Cong Rec H 9964 (1984).
\item \textsuperscript{467} Handicapped Children’s Protection Act of 1985, 131 Cong Rec H 9964 (1984). Mr. Jeffords, Representative of Vermont, reported this information as a member of the original committee who designed the EAHCA.
\item \textsuperscript{468} Education for All Handicapped Children Act, Pub. L. No. 94-142, § 612(7)(A), 89 Stat 773 (1975).
\end{itemize}
\end{footnotesize}
could deliver. He questioned if the law would accomplish its objective of educating the handicapped and asserted the law’s proposed funding levels would be difficult to meet.\(^{469}\)

President Ford found several sections of the law to be objectionable including the complex costly administrative requirements that inserted federal controls over local operations. He also objected to the use of taxpayers’ funds for administrative paperwork instead of educational programs.\(^{470}\)

The EAHCA required all states accepting the Act’s federal funding not deny any child an education as the result of a disability.\(^{471}\) None of the Act’s subsequent amendments changed the three original requirements the federal government imposed upon states in order to be eligible for federal funds. First, children with disabilities must have an Individualized Education Program (IEP). Second, public school officials must provide students with disabilities a free appropriate public education (FAPE). Third, this education must be provided to the child in the least restrictive environment (LRE).\(^{472}\).

*Board of Education v. Rowley*\(^{473}\) In 1982, the U.S. Supreme Court provided guidance on the EAHCA’s FAPE requirement. Amy Rowley, a deaf student and excellent lip-reader, attended regular kindergarten in Hendrick Hudson Central School District in Peekskill, NY, as agreed by her parents and school officials.\(^{474}\) Amy used an FM hearing aid to amplify words spoken into a wireless receiver by her teacher or fellow students. In addition, a teletype machine was installed

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\(^{470}\) *Id.*

\(^{471}\) Mac Lagan, *supra* note 61, at 740.

\(^{472}\) *Id.*


\(^{474}\) *Id.* at 184.
in the principal’s office to facilitate communication with Amy’s parents who were also deaf.\textsuperscript{475} Members of Amy’s special education team were provided instruction in sign language. Amy was also provided a two-week trial with a sign language interpreter during her kindergarten year. The interpreter reported Amy did not need his services at that time.\textsuperscript{476}

In preparing for first grade, it was determined Amy should continue to be educated in a regular classroom, use the FM hearing aid, receive instruction from a tutor for the deaf one hour each day, and instruction from a speech therapist for three hours each week.\textsuperscript{477} The Rowleys also wanted Amy to be provided a qualified sign-language interpreter in all of her academic classes. After consulting with Amy’s parents, the classroom teacher, others familiar with her academic and social progress, and an observation in a class for the deaf; school administrators concluded Amy did not need an interpreter.\textsuperscript{478}

When their request was denied, the parents requested a hearing before an independent examiner.\textsuperscript{479} The examiner agreed with school officials and ruled the interpreter was not necessary because Amy was successful without this assistance.\textsuperscript{480} The New York Commissioner of Education affirmed the decision upon appeal.\textsuperscript{481} The Rowleys appealed to the United States District Court for the Southern District of New York claiming the denial of the sign-language interpreter constituted denial of a FAPE.\textsuperscript{482}

\begin{flushright}
\textsuperscript{475} \textit{Id.} \\
\textsuperscript{476} \textit{Id.} \\
\textsuperscript{477} \textit{Id.} at 185. \\
\textsuperscript{478} \textit{Id.} \\
\textsuperscript{479} \textit{Rowley}, 458 U.S. at 185. \\
\textsuperscript{480} \textit{Id.} \\
\textsuperscript{481} \textit{Id.} \\
\textsuperscript{482} \textit{Id.}
\end{flushright}
The district court found, while Amy performed better than the average child in her class, she understood less than she would have if she were not deaf. This disparity between Amy’s achievement and her potential led the district court to conclude she was not receiving a free appropriate public education.483

The United States Court of Appeals for the Second Circuit affirmed this decision although the panel was divided.484 The Supreme Court granted certiorari and ruled the United States District Court of the Southern District of New York and the United States Court of Appeals for the Second Circuit were mistaken when they ruled the EAHCA required schools to maximize the potential of each disabled student commensurate with his or her non-disabled peers.485 The Supreme Court devised a two-part test to use for determining whether school officials had complied with IDEA’s FAPE requirement.486 The Court’s inquiry specified (1) if the procedural safeguards had been fulfilled, then the court’s role was to ascertain (2) whether the IEP was “reasonably calculated to enable the child to receive educational benefits.”487

The Court reversed the decision of the court of appeals and determined Amy received a FAPE without the sign-language interpreter because she was well adjusted and successful academically.488 The Court concluded school officials were not obligated to maximize the potential of students receiving special education services; but instead were only obligated to provide “personalized instruction … with sufficient supportive services to permit the child to

483 Id.
484 Id. at 198.
485 Rowley, 458 U.S. at 198.
486 Id. at 202.
487 Id. at 207.
488 Id. at 209-10.
benefit from the instruction.”489 The Court observed the IDEA’s intent “was more to open the
door of public education to handicapped children on appropriate terms than to guarantee any
particular level of education once inside.”490 Rowley introduced the phrase “basic floor of
opportunity”491 as applied to the special education services.

After Rowley, lower courts struggled to determine how much educational benefit would
be enough to provide an eligible child with some educational.492

Amendments to the EAHCA

The original EAHCA has been amended four times since its passage. The first
amendment, Handicapped Children’s Protection Act of 1986, allowed parents to be reimbursed
for attorney fees in special education disputes with school officials where they were the
prevailing party. This award was extended not only to cases that went to court but also for cases
decided at the administrative hearing level.493 Several congressmen voiced concerns about
extending the reimbursement to the hearing level. The tenor of this concern was reflected by
Vermont Senator Jim Jeffords’s comment, “I am convinced that we will be reversing our original
intent and interfering with a procedure that is working. Instead of informality and cooperation,
the process will become formal and adversarial.”494 Mr. Bartlett compared having lawyers’ fees

489 Id. at 188.
490 Id. at 191.
491 Rowley, 458 U.S. at 200.
492 Dixie Snow Huefner, Updating the FAPE standard under IDEA, 37 J.L. & EDUC. 367, 368
(2008).
recovered at the administrative hearing level to a “… fruit tree growing in a lawyers’ garden.” 495
There were 2,262 due process hearings in the school year 2011-12 with education officials reporting, “…hearings can be protracted, adversarial and costly.” 496

The Education for All Handicapped Children Act was reauthorized as the Individuals with Disabilities Education Act of 1990. 497 Mandates regarding a FAPE and LRE were basically unaffected by this reauthorization. 498 All references to “handicapped children” were replaced with the term “children with disabilities.” 499 The IDEA added autism 500 and traumatic brain injury 501 to the original list of eight disabilities that qualified a student to receive special education supports and services. 502

In 1997, the Individuals with Disabilities Education Act 503 was again amended and reauthorized with more substantial changes. A few of these changes tangentially relate to service animals.

First, the term related service was further defined as;

Transportation, and such developmental, corrective, and other supportive services (including speech-language pathology, occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, (except that such

495 Id.
498 Monroe, supra note 58, at 593.
501 Id. at § 300.5(12).
medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education.\footnote{Individuals with Disabilities Education Act, 20 U.S.C. §1401 (22) (1997).}

The 1997 amendments also established the IEP as the primary tool for enhancing a child’s progress and involvement in the general curriculum. These changes required school officials to include language in various parts of the IEP document specifically addressing the child’s progress in general education curriculum.\footnote{Id. at §1414(d)(A).} The 1997 IDEA amendments, for the first time, established high expectations for children with disabilities to achieve real educational results.\footnote{Id. at §1451(6)(A).} On June 4, 1997, President Clinton signed the Individual with Disabilities Act of 1997 into law.\footnote{Monroe, supra note 58, at 593.}

The 108th Congress completed another reauthorization of IDEA. On December 3, 2004, President George W. Bush signed into law the reauthorization of the as the Individuals with Disabilities Education Improvement Act of 2004, sometimes referred to as IDEA 2004.\footnote{Richard N. Apling and Nancy Lee Jones, Congressional Research Service, Individuals with Disabilities Education Act (IDEA): Analysis of Changes made by P.L. 108-446, (Jan 5, 2005), available at http://www.nasponline.org/advocacy/IDEACRSAnalysis.pdf (last accessed Feb. 16, 2015).} These updates coincided with new understandings regarding disabilities and best practices.\footnote{Mac Lagan, supra note 61, at 740.} Most of these changes do not relate to the use of service animals within the public schools. However, they evinced Congress’ desire to continue to increase the access of special education students to meaningful education with a focus on opportunities to access and benefit from general education and improved special education programming.
Autism

As of 2004, IDEA recognized a total of 13 disability categories. One of these disability categories was autism spectrum disorder (ASD). The importance of highlighting autism as a growing disability category is there is an increased use of service animals for students with autism. Due to the nature of autism, many children challenged by this disability are not able to effectively serve as handlers for their service dogs.

ASD is defined by certain behaviors appearing in any combination and with any degree of severity.\textsuperscript{510} Autism is a complex developmental disorder with no known cause, cure, or medical treatment for its symptoms.\textsuperscript{511} Research shows all children with autism demonstrate some degree of impairment in their social interactions, verbal and nonverbal communication skills, and interests or behaviors.\textsuperscript{512} Symptoms can include resistance to change, impairments in social interactions, communication impairments, restrictive interests, and repetitive behaviors.\textsuperscript{513} Many children with autism are socially withdrawn, lack appropriate social skills and exhibit detachment from their social environments.\textsuperscript{514} In addition, many children with autism engage in some form of repetitive behaviors such as rocking or twirling and self-injurious behaviors such as biting or head banging.\textsuperscript{515} Oftentimes children with autism also have medical issues including

\textsuperscript{510} Schoenbaechler, \textit{supra} note 26, at 459.
\textsuperscript{511} Waterlander, \textit{supra} note 147, at 344.
\textsuperscript{512} \textit{Id.} at 345.
\textsuperscript{513} Schoenbaechler, \textit{supra} note 26, at 459.
\textsuperscript{514} Waterlander, \textit{supra} note 147, at 345.
\textsuperscript{515} \textit{Id.}
sensitivity to light and noise or seizures.\textsuperscript{516} One of the many difficulties in helping students with autism is the wide variety and severity of ways it can affect an individual.\textsuperscript{517}

Research supports the most effective way to address the symptoms associated with autism is through educational and behavioral therapies to provide structure, routine and communication skills.\textsuperscript{518} Ninety percent of children with autism exhibit some type of behavior difficulty including the inability to regulate emotions, interpret social cues, and develop age appropriate communication skills.\textsuperscript{519}

Some advocates argue autism is not a disorder but rather an alternative wiring of the brain.\textsuperscript{520} This neurodiversity philosophy believes individuals with autism are not broken and do not require fixing.\textsuperscript{521}

According to a 2007 report by the United States Center for Disease Control and Prevention (CDC), 6.6 of every 1,000 eight year olds has a diagnosis of autism.\textsuperscript{522} Public concern has increased as the number of children diagnosed with autism continues to grow each year.\textsuperscript{523} In 2009, the CDC reported autism affects one in eighty-eight U.S. born children and one in fifty-four males.\textsuperscript{524}

\begin{flushleft}
\begin{footnotesize}
\textsuperscript{516} Id.
\textsuperscript{517} Schoenbaechler, supra note 26, at 459.
\textsuperscript{518} Waterlander, supra note 147, at 347.
\textsuperscript{519} Id.
\textsuperscript{521} Id.
\textsuperscript{522} Schoenbaechler, supra note 26, at 459.
\textsuperscript{523} Waterlander, supra note 147, at 342.
\textsuperscript{524} Id. at 346.
\end{footnotesize}
\end{flushleft}
Public awareness has grown as autism rates rise, and the provision of therapeutic services for children with autism spectrum disorders (ASD) has become a significant societal issue.\textsuperscript{525} ASD imposes enormous financial and personal burdens on families and society as a whole.\textsuperscript{526} As parents struggle to obtain costly therapies they believe represent the child’s only hope for a normal life, they turn to both school and insurance companies for support.\textsuperscript{527} Conflict is common between school officials and parents of an autistic child over necessary and appropriate treatments.\textsuperscript{528} The Special Education Expenditure Project estimated the cost for educating a child with autism in the year 2000 to be almost three times the cost of educating a non-disabled student.\textsuperscript{529} The high cost of treatments for students with autism may lead school officials to reject a program as unnecessary.\textsuperscript{530} The parents, on the other hand, argue the treatment is appropriate to address the child’s needs.\textsuperscript{531} In the last decade there have been 700 federal court cases involving autism and special education.\textsuperscript{532}

**IDEA Related Service Court Cases**

Rarely do parties spend the time and resources to litigate because they desire the same outcome. However, in special education law both parents and school officials strive to provide

\begin{footnotes}
\item[525] Holland, \textit{supra} note 520, at 1253-54.
\item[527] Holland, \textit{supra} note 520, at 1254.
\item[528] Waterlander, \textit{supra} note 147, at 347.
\item[529] Cohen \textit{et. al.}, \textit{supra} note 526, at 400.
\item[530] Waterlander, \textit{supra} note 147, at 348.
\item[531] \textit{Id}.
\end{footnotes}
the child with a disability an appropriate education. Often litigation arises from disagreements over the appropriate methods for achieving this outcome.533

The meaning of a FAPE and LRE are terms not always agreed upon by the courts.534 Generally the courts consider whether the procedural requirements for developing the IEP have been met, whether the IEP sets forth reasonable and attainable goals including aids, supports, and services, if the IEP was properly implemented in the classroom, and if parents were involved in the IEP’s creation.535

As a part of providing a FAPE, school officials must provide the related services required for a student with a disability to benefit from special education. The definition found in the IDEA’s text includes a list of items considered to be related services. It has not been clear whether this list is exhaustive or not. The following cases address individual services not specifically listed in IDEA and considers whether these are related services.

Irving Independent School District v. Tatro.536 The first Supreme Court decision interpreting the IDEA’s related service expectations involved the question of whether school officials were required to provide catheterization to a child with a disability. Amber Tatro was born with spina bifida. As a result, she suffered from orthopedic and speech impairments and a condition preventing her from emptying her bladder voluntarily. This bladder condition required her to be catheterized every three to four hours to avoid injuring her kidneys.537 Clean intermittent catheterization (CIC) is a procedure involving inserting a catheter into the urethra to

533 Monroe, supra note 58, at 581.
534 Mac Lagan, supra note 61, at 741.
535 Id.
537 Id. at 885.
drain the bladder. It can be performed in a few minutes by a layperson with less than one hour’s training.\textsuperscript{538}

In 1979, when Amber was three and a half, the Irving Independent School District in consultation with Amber’s parents created an individualized education program (IEP) for Amber as required by the Education for All Handicapped Children Act of 1975.\textsuperscript{539} This IEP enabled Amber to attend early childhood classes and receive special services such as physical and occupational therapy. The IEP did not contain a provision for the school staff to administer CIC.\textsuperscript{540}

Amber’s parents unsuccessfully used the EAHCA’s administrative remedies to secure the CIC services for Amber. Amber’s parents sought a court injunction ordering school officials to provide Amber with CIC as a part of “a free and appropriate public education.”\textsuperscript{541} The parents argued CIC was a related service.\textsuperscript{542} Parents also claimed a violation of §504 arguing the denial of CIC resulted in Amber being improperly excluded from participation in a program receiving federal aid.\textsuperscript{543} The United States District Court for the Northern District of Texas denied the parents’ request for the injunctive relief.\textsuperscript{544} The court concluded CIC was not a related service under the \textit{Education of All Handicapped Children} because CIC did not service a need arising

\textsuperscript{538} \textit{Id.}

\textsuperscript{539} \textit{Id.}

\textsuperscript{540} \textit{Id.} at 885-86.


\textsuperscript{542} \textit{Tatro}, 468 U.S. at 886.

\textsuperscript{543} \textit{Id.} at 886-87.

\textsuperscript{544} \textit{Id.} at 887.
from educating Amber.\textsuperscript{545} The court also denied the §504 claim because health care was not generally recognized as a reasonable §504 accommodation at that time.\textsuperscript{546}

The United States Court of Appeals for the Fifth Circuit reversed the district court’s decision. The appellate court held CIC was a related service under the Education of All Handicapped Children Act because without the procedure Amber could not attend classes and benefit from special education. Secondly, the court held school officials’ refusal to provide the CIC effectively excluded Amber from attending a federally funded school program, ergo constituting a §504 violation.\textsuperscript{547} The case was remanded to the district court to develop a factual record and apply these legal principles.\textsuperscript{548}

On remand, the district court found under Texas law a nurse or other qualified individual could administer CIC services and therefore it constituted a related service for the purposes of the Education of All Handicapped Children Act.\textsuperscript{549} The court ordered Amber’s IEP to be modified to include the provision of CIC during school hours.\textsuperscript{550} The court of appeals affirmed, and the Supreme Court granted certiorari.\textsuperscript{551}

Under the EAHCA, states were required to provide eligible children a “free appropriate public education”.\textsuperscript{552} The Act’s FAPE expressly used the phrase “special education and related

\textsuperscript{545} Id.
\textsuperscript{546} Id.
\textsuperscript{547} Id.
\textsuperscript{548} Tatro, 468 U.S. at 887.
\textsuperscript{549} Id.
\textsuperscript{550} Id.
\textsuperscript{551} Id. at 888.
services.” 553 Related services included “transportation, and such corrective, and other supportive services as may be required.” 554 Supportive service expressly included medical and counseling service except medical service only required for diagnostic and evaluation purposes. 555

In determining if the CIC qualified as a related service, the Supreme Court asked two questions. The first was CIC was considered a “supportive service… required to assist a handicapped child benefit from special education?” 556 On this question, the Court agreed with the appellate panel. Amber was not able to attend school and benefit from special education without the CIC; therefore, this service met the Act’s definition of supportive services. 557 The second question was whether CIC should be excluded from the definition of a related service because it was a “medical service.” 558 The Court reviewed the Department of Education’s regulations, defining related services in part as “health services… provided by a qualified school nurse or other qualified person.” 559 Since a nurse could perform the CIC services, the court reasoned CIC fell in the category of health services and not medical services, meaning CIC was not an excluded service. 560 The Supreme Court affirmed lower court’s ruling that CIC was a related service under the EAHCA. 561

555 Tatro, 468 U.S. at 889-90.
557 Tatro, 468 U.S. at 890.
559 Tatro, 468 U.S. at 891 quoting 34 CFR § 300.13(a) and (b)(10) (1983).
560 Tatro, 468 U.S. at 892.
561 Id. at 895.
Cedar Rapids Community School District v. Garret F.\textsuperscript{562} Fifteen years after Tatro, the mother of an Iowa child once again challenged a district’s decision to deny services not specifically listed as a related service. Garret was ventilator-dependent and his Iowa public school district refused to provide him with continuous one-to-one school day nursing services he needed to remain in school.\textsuperscript{563} According to the Supreme Court, the main issue in the case was whether the definition of “related services” required a public school to provide a ventilator-dependent student with nursing services during the school day.\textsuperscript{564}

In the late 1980s, when Garret was four years old, his spinal column was severed when a motorcycle struck him.\textsuperscript{565} Although paralyzed from the neck down, Garret’s mental capacities were unaffected. He was able to speak, control his wheelchair with a puff and suck straw, and operate a computer using head movements.\textsuperscript{566} During his first five years of schooling, the family provided nursing services. During his kindergarten year, an aunt attended school with him and then for the next four years the family employed a licensed practical nurse using the insurance proceeds from the accident and other resources.\textsuperscript{567}

Garret’s needs required assistance catheterizing his bladder, suctioning his tracheotomy tube, shifting him to a reclining position for five minutes every hour, manually pumping air into his tracheotomy tube while his ventilator was checked, and assessing his ventilator for proper functioning.\textsuperscript{568}

\textsuperscript{563} Id.
\textsuperscript{564} Id. at 68-69.
\textsuperscript{565} Id. at 69.
\textsuperscript{566} Id.
\textsuperscript{567} Id. at 70.
\textsuperscript{568} Cedar Rapids v. Garret F., 526 U.S. at 69.
In 1993, Garret’s mother requested school officials to assume financial responsibility for providing Garret’s health care services during the school day. The district denied this request arguing the IDEA did not require assumption of this obligation. Garret’s mother challenged the denial and the Administrative Law Judge (ALJ) ruled in her favor. The ALJ noted school officials had not contended a licensed physician must provide Garret’s service. Instead the parties disagreed over the level of training required for a person providing care for a student who was ventilator dependent for life support.

School officials challenged the ALJ’s decision and both the U.S. District Court for the Northern District of Iowa and in the Eighth Circuit Court of Appeals affirmed the ALJ’s ruling. The appellate panel applied the *Irving Independent School Dist. v Tatro* two-step “related services” analysis setting forth a bright line test for determining if school officials were financially responsible for providing medical services. The Tatro test indicated services provided by a physician (other than for diagnostic and evaluation purposes) were subject to the IDEA’s medical services exclusion, but services provided by a nurse or qualified layperson were not exclusion services.

The first question the appellate panel considered was whether parentally requested services were included within IDEA’s phrase “supportive services.” The Act expressly defined supportive services as those “required to assist a child with a disability to benefit from special

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569 *Id.* at 70.
570 *Id.*
571 *Id.*
572 *Id.* at 71.
573 *Id.* at 72.
575 *Cedar Rapids v. Garret F.*, 526 U.S. at 72.
education.” The second question was whether the health services Garret required were excluded as support services because they needed to be performed by a physician. The appellate panel concluded Garret’s services met the definition of support services and were not excluded services because a layperson or nurse could perform them.

The Supreme Court granted certiorari. In their certiorari petition school officials argued the issue was the nature and extent of the service Garret required because it included one-to-one nursing. They recognized Garret could not remain in school without the one-to-one nursing and did not argue nursing services met the IDEA’s definition of supportive services. School officials asserted the court should consider whether the care was intermittent or continuous, whether current personnel could perform the care, the cost of the service, and the outcome if service was performed poorly. The Supreme Court determined the services Garret required due to his ventilator dependency were no more medical than the services required by Amber Tatro. Therefore, the Court found a school nurse or another trained person could perform the services.

School officials argued the nature and extent of Garret’s disability required additional personnel causing the district financial burden. Although the Court recognized school officials’ financial concerns, it noted the IDEA guaranteed a public education to qualified students without

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576 Id. citing 14 U.S.C. § 1401(a)(17)).
577 Cedar Rapids v. Garret F., 526 U.S. at 72.
578 Id.
579 Id. at 73.
580 Id.
581 Id. at 75.
582 Id.
regard to cost.\textsuperscript{583} In addition to finding a school nurse or other trained personnel could perform Garret’s services,\textsuperscript{584} the Court further noted Garret’s requirement of one-to-one nursing was necessary because death was the potential consequence if this level of care was not provided. The majority opinion noted “the district must fund such ‘related services’ in order to help guarantee that students like Garret are integrated into the public schools.”\textsuperscript{585}

The dissenting opinion written by Justice Clarence Thomas and joined by Justice Anthony Kennedy argued the Court made a mistake in Tatro when it focused on the provider of the services as opposed to the services themselves to determine if the services were medical.\textsuperscript{586} The dissenting opinion argued if Congress had intended for nursing services to be included as a related service, this would have been expressly included in the list of services.\textsuperscript{587}

\textbf{Intersection of the IDEA, ADA and §504}

Children covered by the IDEA also receive overlapping protections from both §504 and the ADA. In addition, §504 and the ADA also offer additional avenues for redress such as enforcement by the United States Department of Education’s Office for Civil Rights (OCR).\textsuperscript{588} Moreover, given their broader definition of disability, §504 and the ADA provide primary protection to a limited number of children with disabilities who are not covered by the IDEA.\textsuperscript{589}

\textsuperscript{583} Cedar Rapids v. Garret F., 526 U.S. at 77.
\textsuperscript{584} Id. at 75.
\textsuperscript{585} Id. at 72.
\textsuperscript{586} Id. at 81.
\textsuperscript{587} Id. at 82.
\textsuperscript{588} Mayes & Zirkel, supra note 34, at 66.
\textsuperscript{589} Id. at 66.
Finally, courts in some jurisdictions may grant compensatory and punitive damages to successful §504 and ADA litigants, while not granting similar relief under the IDEA.\textsuperscript{590}

The IDEA imposes an affirmative obligation on school districts to provide eligible children with a FAPE. The ADA and §504 prohibit discrimination against otherwise qualified individuals based on disability. This means adequate remedies under the ADA and §504 may not suffice under the IDEA.\textsuperscript{591} Courts often analyze ADA and §504 claims together in school cases, although both statutes afford the basis for independent action.\textsuperscript{592}

Section 504, ADA and IDEA goals are similar in seeking to protect the rights of children with disabilities.\textsuperscript{593} One of the goals of the ADA and §504 is to enable children with disabilities to receive the same opportunities as children without disabilities, whereas IDEA’s goal is to enable the more narrowly defined population of students with disabilities covered by the statute the same educational opportunities as non-disabled students. This distinction has resulted in inconsistent court rulings.\textsuperscript{594}

Section 504 does not specifically address procedural safeguards such as impartial hearings.\textsuperscript{595} However, the §504 regulations include a procedural safeguards provision requiring recipients of federal financial funding to provide an impartial hearing to aggrieved parties.\textsuperscript{596} There are no additional regulatory guidelines for the hearing. This is in direct contrast to the

\textsuperscript{590} Id. at 67.
\textsuperscript{591} Id. at 80.
\textsuperscript{592} Waterlander, \textit{supra} note 147, at 359.
\textsuperscript{593} Mac Lagan, \textit{supra} note 61, at 743.
\textsuperscript{594} Id.
\textsuperscript{595} Perry A. Zirkel, \textit{The Public Schools’ Obligation for Impartial Hearings under Section 504}, 22 WIDENER L. J. 135, 141 (2012).
\textsuperscript{596} Id. at 142.
IDEA.\textsuperscript{597} The §504 administrative agency for schools is the U.S. Department of Education’s Office for Civil Rights.\textsuperscript{598} In 1977, the OCR recommended, but did not require, the use of the IDEA model for impartial hearings.\textsuperscript{599} The §504 regulations do not prevent an IDEA hearing officer from deciding §504 issues. Independent IDEA hearing officers sometimes rule on a §504 claim intertwined with or incidental to an IDEA claim for students who are covered by both Acts.\textsuperscript{600} In some cases, there can be additional liability under §504. This serves as an incentive for plaintiff parents to pursue adjudication separately or in conjunction with IDEA claims.\textsuperscript{601} An example is the use of service animals within the public schools. Section 504 also provides potential litigation advantages over the IDEA, with respect to evidence, jury trials, expert witnesses, and monetary damages.\textsuperscript{602}

When asked to apply multiple laws to a single set of facts, courts sometimes struggle to determine how to enforce the spirit of each statute while abiding by differing statutory requirements.\textsuperscript{603} Generally, the courts do not allow a plaintiff to avoid the IDEA exhaustion requirement by omitting the IDEA claim from the complaint if the remedy sought is available under IDEA.\textsuperscript{604}

\begin{itemize}
\item \textsuperscript{597} Id.
\item \textsuperscript{598} Id. at 143.
\item \textsuperscript{599} Id.
\item \textsuperscript{600} Id. at 149.
\item \textsuperscript{601} Zirkel, supra note 595, at 175.
\item \textsuperscript{602} Id. at 175-76.
\item \textsuperscript{603} Mac Lagan, supra note 61, at 743-44.
\item \textsuperscript{604} Id.
\end{itemize}
Service Animals

Records describing attempts to systematically train dogs to help people with visual disabilities date back to the late 1700s.\textsuperscript{605} Formal techniques to train service animals were recorded in Germany after World War I with large-scale training of service animals for the blind.\textsuperscript{606} In the late 1920s, the United States used dogs as service animals to assist people with visual difficulties.\textsuperscript{607} The first use of a service animal to help a person with a hearing impairment occurred in the United States in 1976.\textsuperscript{608}

\textbf{Legal Requirements of a Service Animal}

The text of the American with Disabilities Act is silent with respect to service animals. However, the Department of Justice (DOJ), the agency in charge of ADA implementation, has regulations addressing the use of service animals.\textsuperscript{609} In 1991, the DOJ issued the first regulation requiring public accommodations and commercial facilities modify their practices to permit the use of a service animal by an individual with a disability.\textsuperscript{610}

\begin{footnotesize}
\begin{enumerate}
\item [605] Huss, \emph{supra} note 15, at 1166.
\item [606] \textit{Id.} at 1167.
\item [607] \textit{Id.}
\item [608] \textit{Id.} at 1166.
\item [609] Waterlander, \emph{supra} note 147, at 351.
\item [610] Robert L. Adair, Note, \emph{ADA Amendments Issue: Monkeys and Horses and Ferrets Oh MY! Non-Traditional Service Animals under the ADA}, 37 N. KY. L. REV. 415 (2010).
\end{enumerate}
\end{footnotesize}
After passage of the ADAAA, the DOJ published its final regulations for Title II and Title III on September 15, 2010. These final regulations included the definition of a service animal.

Service animal means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual’s disability. Examples of work or tasks include, but are not limited to, [1] assisting individuals who are blind or have low vision with navigation and other tasks, [2] alerting individuals who are deaf or hard of hearing to the presence of people or sounds, [3] providing non-violent protection or rescue work, [4] pulling a wheelchair, [5] assisting an individual during a seizure, [6] alerting individuals to the presence of allergens, [7] retrieving items such as medicine or the telephone, [8] providing physical support and assistance with balance and stability to individuals with mobility disabilities, and [9] helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal’s presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition (numbering added).

This definition became effective on March 15, 2011.

Under the ADA, service animals are allowed in state and local government facilities, businesses, and nonprofit organizations serving the public. In general, service animals are allowed in any location accessible to the public. However, service animals may be excluded from operating rooms or burn units where the animal’s presence may compromise a sterile environment. The ADA’s Title II regulations expressly provide:

614 Id
615 Id.
“Generally, a public entity\textsuperscript{616} shall modify its policies, practices or procedures to permit
the use of a service animal by an individual with a disability.”\textsuperscript{617}

Two exceptions allow removal of a service animal. First, the animal is out of control and the animal’s handler does not take effective action to control the animal. Second, the animal is not housebroken.\textsuperscript{618} If an animal is properly excluded, the facility shall give the individual with a disability the opportunity to participate without the service animal.\textsuperscript{619} A service animal must be under the control of a handler and wear a harness, leash, or other tether, unless the handler is unable, because of a disability, to use these items or tethering keeps the service animal from performing its work. In these cases, the service animal must be under a handler’s control either though voice, signals or other method.\textsuperscript{620} “The facility’s employees are not responsible for either the care or supervision of the service animal.”\textsuperscript{621}

A person with the disability may not be queried about the nature or extent of the disability. However two questions are permitted in order to determine whether an animal qualifies as a service animal. These questions include: Whether the animal is required because of a disability? and What work or task has the animal been trained to perform?\textsuperscript{622}

Allergies and fear of dogs are not valid reasons for denying a service animal access or refusing service to an individual using a service animal. When a person who is allergic to dog dander and a person who uses a service animal must spend time in the same room or facility,

\textsuperscript{616} A public entity is defined in Title II as any State or local government; any department, agency, special purpose district, or other instrumentality of a State local government.

\textsuperscript{617} 28. C.F.R. §35.136(a) (2010).

\textsuperscript{618} Id. at § 35.136(b).

\textsuperscript{619} Id. at § 35.136(c).

\textsuperscript{620} Id. at § 35.136(d).

\textsuperscript{621} Id. at § 35.136(e).

\textsuperscript{622} Id. at § 35.136(f).
such a classroom, both should be accommodated by assigning them to different locations within the room or assigning them to different rooms.\footnote{623}

The facility cannot require documentation of the service animal training or licensing or ask for a demonstration of the work the animal is trained to perform. In addition, when the individual’s disability or work the animal is trained to perform is obvious, the disabled person may not be asked about the disability or the animal’s training.\footnote{624} A facility is not permitted to enact a surcharge for the service animal. However, the individual with the disability may be charged for damage the service animal causes if the facility typically charges non-disabled persons for such damages.\footnote{625}

The ADA amended the provision of only allowing dogs to be used as service animals to include miniature horses.\footnote{626} Although there are many examples of individuals using other types of animals, such as monkeys, to assist with tasks of daily living, the ADA definition does not recognize these as service animals. Facility personnel must also make reasonable modifications to permit an individual’s use of a miniature horse if the animal has been trained to do work or perform tasks for the benefit of the individual with a disability. In order to determine whether modifications are reasonable, the facility must review whether it can accommodate the miniature horse’s type, size, and weight; whether the horse is under a handler’s control; whether the animal

\footnote{623}{\textit{Service Animals}, U.S. Department of Justice, Civil Rights Division, Disability Rights Section, \url{http://www.ada.gov/service_animals_2010.htm} (last accessed Sept. 15, 2014).}
\footnote{624}{28 C.F.R. § 35.136(f) (2010).}
\footnote{625}{Id. at § 35.136(h).}
\footnote{626}{Id. at § 35.136(i).}
is housebroken; and whether the miniature horse’s presence in a facility compromises legitimate safety requirements.\textsuperscript{627}

Although the following portion of the ADA did not specifically relate to service animals, the OCR used the language below when considering allowing a service animal access.\textsuperscript{628}

This part does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others.\textsuperscript{629}

In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur, and whether reasonable modification of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.\textsuperscript{630}

\textbf{Use of Service Animals}

There are many ways a person with a disability can use a service animal. The DOJ’s definition listed nine examples; however, the list was not intended to be exhaustive.\textsuperscript{631} Common examples of a service animal usage include a guide dog to assist people with visual impairments, an alert dog to assist the hearing impaired, and service animals to support individuals with mobility impairments.\textsuperscript{632} The use of service animals to benefit persons with neurologic and psychiatric disabilities is a relatively recent phenomenon that is growing in popularity.\textsuperscript{633}

\textsuperscript{627} \textit{Id.}
\textsuperscript{628} Bakersfield (CA) City Sch. Dist., 50 IDELR 169 (OCR 2008).
\textsuperscript{629} 28 C.F.R. §35.139(a) (2010).
\textsuperscript{630} \textit{Id.} at §35.139(b).
\textsuperscript{631} Waterlander, \textit{supra} note 147, at 364.
\textsuperscript{632} \textit{Id.} at 350.
\textsuperscript{633} \textit{Id.}
Specifically, the use of autism service animals is increasing as autism becomes more prevalent and the research shows various benefits a child with autism gains from having a service animal.\textsuperscript{634}

Miniature horses can be used to physically aid movement or as guide animals.\textsuperscript{635} Miniature horses are typically about two feet tall at the shoulder making it easier to keep them in a non-farm environment.\textsuperscript{636} Guide dogs continue to be the most common type of service animal, but miniature horses offer advantages over their canine counterpart.\textsuperscript{637} A lifespan of a miniature horse is thirty-five years or more compared to the average eight to ten year lifespan for a service dog.\textsuperscript{638} This reduces the frequency of replacing a trained animal and spares the individual with a disability the grief attendant to losing a companion.\textsuperscript{639} Miniature horses also provide an alternative to people who are allergic to dogs or for individuals such as Muslims who believe dogs are unclean.\textsuperscript{640} The disadvantages to using a miniature horse include the need to process waste more often than dogs and limited access to vehicles because miniature horses are unable to curl up like a dog.\textsuperscript{641}

The DOJ excluded emotional-support animals as service animals.\textsuperscript{642} The DOJ did not acknowledge emotional-support animals as service animals because the agency believed “some individuals with impairments –who would not be covered as individuals with disabilities-are

\textsuperscript{634} Id.  
\textsuperscript{635} Adair, supra note 611, at 430.  
\textsuperscript{636} Id.  
\textsuperscript{637} Id.  
\textsuperscript{638} Id.  
\textsuperscript{639} Id.  
\textsuperscript{640} Id.  
\textsuperscript{641} Adair, supra note 611, at 430.  
\textsuperscript{642} Bourland, supra note 124, at 204.
claiming that their animals are legitimate service animals, whether fraudulently or sincerely (albeit mistakenly), to gain access to accommodations.”

There are no specific requirements stipulating the type of training needed for an animal to be classified as a service animal, only that the service animal be “individually trained to do work and perform tasks.” The ADA does not require certification for a service animal. The ADA does not require certification for a service animal.646

"Businesses may ask if an animal is a service animal or ask what tasks the animal has been trained to perform, but cannot require special ID cards for the animal or ask about the person's disability.”

The DOJ did not have a reason for not requiring certification other than to suggest required certification could limit access to public accommodations. Many organizations oppose certification of service animals with objections falling into two main categories. First, it places a burden on the individual to obtain the certification and second, it violates the individual’s privacy.

Others have disputed these objections, believing the individual should not consider the process of certification burdensome since he or she is applying to receive assistance from the government. As such, the government should have a means to ensure the individual is eligible

644 Bourland, supra note 124, at 201.
645 Id. at 198.
647 Bourland, supra note 124, at 214.
648 Id.
for the service. This could be viewed as similar to obtaining a handicapped-parking permit, which has federally mandated requirements. In addition, current statutes allow the public accommodation to individually question the owner with regards to the animal’s training in order to determine whether the animal is a service dog. The use of certification would allow the individual to hand over the certification and avoid the embarrassing questions and the possible denial of access.

Since the first regulation was issued in 1991, the DOJ has faced the trend of individuals using wild, exotic or unusual species, many of which were untrained, as service animals. The greatest concern about people with disabilities using non-traditional service animals arose from concerns about dangerous animals.

Although public schools must generally permit service animals to accompany children with disabilities, school officials have no duty under the ADA to supervise or care for the animal and may refuse to allow the animal under limited circumstances. For example, a public school may deny a service animal if it “can demonstrate that making the modification would fundamentally alter the nature of the service, program, or activity.”

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649 Id.  
650 Id. at 218.  
651 Id. at 214.  
652 Id. at 215.  
653 Adair, supra note 611, at 415.  
654 Id. at 417.  
655 Waterlander, supra note 147, at 360.  
656 28 C.F.R. § 35.130(b)(7) (2010).
Rehabilitation Act Regulations Pertaining to Service Animals

The Rehabilitation Act of 1973 did not provide specific guidance on whether public schools must modify rules, policies, and procedures to allow a student with a disability to be accompanied by a service animal.\textsuperscript{657} However, the Department of Education (DOE) and the Office for Civil Rights (OCR) believe the Act requires accommodations such as service animals and has provided the following interpretation of §504 regarding service animal access to public schools.\textsuperscript{658}

If not allowing a student to bring a service dog into the classroom would effectively deny the student the opportunity or equal opportunity to participate in or benefit from the education program, then the recipient school would be in violation of Section 504 and its implementing regulations.\textsuperscript{659}

Many school districts have refused to allow service animals working for children with neurologic and psychiatric disabilities into elementary school classrooms because school officials perceive these animals to be comfort animals as opposed to ADA recognized service animals.\textsuperscript{660}

IDEA Provisions Pertaining to Service Animals

The IDEA did not explicitly address service animals or whether states and their public school districts must allow service animals in the classroom to provide a FAPE. This allows public school officials to exercise discretion in determining whether allowing a service dog is necessary for providing the child with a FAPE.\textsuperscript{661}

\textsuperscript{657} Waterlander, \textit{supra} note 147, at 358.
\textsuperscript{658} \textit{Id.}
\textsuperscript{659} Letter to Goodling, 17 IDELR 1027 (OCR 1991).
\textsuperscript{660} Waterlander, \textit{supra} note 147, at 350.
\textsuperscript{661} \textit{Id.} at 362.
Public schools are not obligated to accommodate an emotional support animal under either the ADA or §504 because both statutes specifically exclude emotional support animals. However, a public school may have an obligation to accommodate an emotional support animal under the IDEA if the child has a severe emotional or mental disability and the animal’s presence is necessary for the child to receive a FAPE.

State Statutes Governing Access for Service Animals

In addition to the three federal laws covering students with disabilities, there are also state statutes addressing service animal public school access for students with disabilities. Below are the only three state statutes addressing service animal access in public schools.

The Illinois School Code addressed the use of a service animal in public schools by a child with a disability.

Service animals such as guide dogs, signal dogs or any other animal individually trained to perform tasks for the benefit of a student with a disability shall be permitted to accompany that student at all school functions, whether in or outside the classroom.

New Jersey has similar legislation:

A student with a disability, including autism, shall be permitted access for a service animal in school buildings, including the classroom, and on school grounds. A school official may inquire as to whether the service animal is required due to a disability and what task or work the service animal has been trained to perform, unless the student’s disability and work or task that the service animal will perform are readily apparent. A school official may require: (1) certification from a veterinarian that the service animal is properly vaccinated and does not have a contagious disease that may harm students or staff; and (2) documentation that any license required by the municipality in which the student resides has been obtained for the service animal.

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662 Id. at 375.
663 Id.
664 105 ILCS 5/14-6.02 (2014).
In California, the statute referring to service animals addressed transportation:

Guide dogs, signal dogs, and service dogs trained to provide assistance to individuals with a disability may be transported in a school bus when accompanied by disabled pupils enrolled in a public or private school or by disabled teachers employed in a public or private school or community college or by persons training the dogs.666

Service Animals for Children with Autism

Children with autism derive many benefits from a service animal that are less obvious when compared to the benefits provided for students with other disabilities such as blindness or physical impairment.667 The primary benefit a child with autism gains from a service animal is safety.668

Children with autism are prone to elopement.669 A service dog may be tethered to the child using a leash and belt system in order to stop the child from running or wandering off.670 This tether system also allows the child to be more independent of adults.671 The use of a service dog may increase a child’s social awareness by improving he child’s mood and ability to focus.672 The service dog is trained to sense and mitigate a child’s anxiety attacks, reduce over-stimulation, provide stabilization, prevent tantrums through application of deep pressure by lying on top of the child and providing an outlet for the child to re-direct self-stimulatory behaviors.673

667 Waterlander, supra note 147, at 380.
668 Id. at 353.
669 Elopement is the act of leaving a safe area or safe premises. This term is often used to describe a child with autism running away or wandering off.
670 Waterlander, supra note 147, at 353.
671 Id. at 354.
672 Id.
673 Id.
To avoid disrupting the continuity of the relationship between the child with autism and the service dog, it is important for the dog to be allowed to attend school with the child.674

Service animals for children with autism are individually trained to address the unique needs of a specific child.675 A service animal trained to provide nontraditional supports maintains its status as a service animal even if it also serves as a physical and emotional anchor to a child with autism.676 This nontraditional support animal is distinguishable from emotional support animals by virtue of their training and work performed.677

Concerns Related to Service Animals in the Public Schools

Schools can legally deny access to service animals under §504 and the ADA if the animal’s behavior poses a direct threat to the safety of others or results in a fundamental alteration of the nature of the school program.678 In order to determine whether a service animal presents a risk to others, school officials must show they considered the nature, duration, and severity of the risk, the probability an injury may occur, and whether reasonable modifications could be made to mitigate the risk to an acceptable level.679

The management of a trained service animal in the schools is often minimal. The animal is trained not to need bathroom breaks during the school day, has minimal need of water, and the handler only needs to know between five and ten commands in order to direct the service

674 Id. at 354-55.
675 Id. at 381.
676 Waterlander, supra note 147, at 381.
677 Id.
678 Id. at 383.
679 Id. at 384.
animal. In addition, school officials should not assume a substantial disruption to the school day because a dog is an unfamiliar with the classroom. History generally shows students quickly adjust to having the service animal in a classroom and understand the work the dog is trained to perform.

Many organizations have set minimum behavior standards when a person encounters a service animal. These standards are referred to as service animal etiquette. These guidelines advise individuals against touching the service animal, making noises, feeding the service animal, or deliberately startling a service animal. Service animal etiquette policy can be included in an institution’s service animal policy. Staff and students need to be informed on the service animal etiquette.

Federal Cases Involving Service Animals in Schools

There are a limited number of federal cases involving service animals. All five of the following cases allege discrimination under §504 and/or the ADA as opposed to IDEA, even though the children were IDEA-eligible.

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680 Id. at 384-85.
681 Id. at 385.
682 Rebecca J. Huss, Canines on Campus: Companion Animals at Postsecondary Educational Institutions, 77 MO. L. REV. 417, 443 (2012).
683 Id.
684 Id.
685 Id. at 444.
686 Id.
Sullivan v. Vallejo City Unified School District\textsuperscript{687} framed the issue of whether school officials’ denial of a service dog violated a student with a disability’s civil rights as defined in §504.\textsuperscript{688} Sixteen-year-old Christine Sullivan, diagnosed with cerebral palsy, learning disabilities, and right-side deafness, used a wheelchair for mobility.\textsuperscript{689} In February 1988, Christine attended an intensive two-week training program organized by Canine Companions for Independence. At the conclusion of the training, Christine received a service dog.\textsuperscript{690} Christine’s parents requested Christine be allowed to attend school accompanied by the service dog, but school officials denied this request.\textsuperscript{691} Christine’s parents filed a lawsuit with the Eastern District Court of California claiming school officials’ refusal to allow Christine to bring her service dog to school was a violation of §504 and various provisions of the California Civil Code.\textsuperscript{692} The Vallejo City School District moved to dismiss the Rehabilitation Act claim arguing Sullivan had failed to exhaust the administrative remedies available under Individuals with Disabilities Education Act\textsuperscript{693} depriving the court jurisdiction over the case.\textsuperscript{694}

Christine’s parents sought a court order requiring school officials to allow their daughter to attend school with her service dog. School officials responded by claiming in order to achieve

\begin{itemize}
\item \textsuperscript{688} Wieselthier, supra note 3, at 765.
\item \textsuperscript{689} Sullivan v. Vallejo City, 731 F. Supp. at 948.
\item \textsuperscript{690} Id. at 949.
\item \textsuperscript{691} Id.
\item \textsuperscript{692} Id.
\item \textsuperscript{693} Individuals with Disabilities Education Act, 20 U.S.C. § 1400(a) (1990).
\item \textsuperscript{694} Sullivan v. Vallejo City, 731 F. Supp. at 949-50.
\end{itemize}
this goal, an IEP team must first determine whether Christine required a service dog to obtain a FAPE as guaranteed under the IDEA. 695

The district court denied school officials’ motion for dismissal of the complaint because the parents had neither contended school officials had created an inadequate IEP, nor claimed a service dog was necessary for Christine to receive a FAPE. 696 Instead the parents had argued school officials had violated §504 by arbitrarily refusing Christine access to the school when accompanied by her service dog. 697 The district court stated since the relief sought by the parents was not educationally based, it was not necessary to exhaust the IDEA’s administrative hearing requirements. 698

The court found the parents had met the first and second requirements of a §504 claim because Christine was a person with a disability who was otherwise qualified to attend public school. Christine also satisfied the fourth §504 requirement because the school district received federal funds. 699

Next the court moved to the third element necessary for a viable §504 claim, i.e., whether Christine had been discriminated against based on her disability. School officials argued they were not refusing Christine the ability to attend school, rather they were only denying her request to be accompanied by the service dog. The court rejected this argument. 700 The court noted as long as the person with a disability made reasonable choices about how to effectively address her problems, the Rehabilitation Act protected those choices from scrutiny and prohibited

695 Id. at 951.
696 Id.
697 Id.
698 Id.
699 Id. at 958.
discrimination against the person with a disability on the basis of those choices.\textsuperscript{701} The court further observed Christine used the service dog to increase her physical independence.\textsuperscript{702} The court found requiring Christine to select a different accommodation while attending school than she used outside of school constituted exclusion. Therefore, the court determined Sullivan had met the third element of a viable §504 claim.\textsuperscript{703}

Therefore the court found the Vallejo School District had not reasonably accommodated Christine when school officials denied her the use of a service dog.\textsuperscript{704} The court did not find the use of the service dog fundamentally altered the nature of the school program.\textsuperscript{705} Nor did the court conclude school officials could deny access based on the fact she did not require the use of a service dog to have access to the school.\textsuperscript{706} The court observed the dog provided Christine with greater independence.\textsuperscript{707}

School officials’ concerns about health and safety did not override Christine’s right to full and equal access to the public school accompanied by her service dog.\textsuperscript{708} Christine’s IEP resulted in her being placed in a special education class. However, Christine’s assigned teacher had a severe dog allergy. The court noted the necessary IEP adjustment constituted only a minor inconvenience.\textsuperscript{709} Christine’s parents were aware the use of the service dog would require a change in placement due to the teacher’s allergies. However, the court cautioned school officials

\begin{flushleft}
\textsuperscript{701} Id.
\textsuperscript{702} Id.
\textsuperscript{703} Id. at 959.
\textsuperscript{704} Id.
\textsuperscript{705} Id.
\textsuperscript{706} Sullivan v. Vallejo City, 731 F. Supp. at 958.
\textsuperscript{707} Id.
\textsuperscript{708} Id.
\textsuperscript{709} Id.
\end{flushleft}
not to change Christine’s placement to solely accommodate personal feelings of the others regarding dogs in the school environment.\textsuperscript{710}

\textit{Cave v. East Meadow Union Free School District}\textsuperscript{711}

This next service animal case was not heard until 17 years after \textit{Sullivan}. John Cave’s parents claimed discrimination based on §504 of the Rehabilitation Act and Title II of the ADA because school officials denied their son access to the public school when accompanied by his service dog.\textsuperscript{712} John Cave, Jr. was diagnosed with deafness at age three,\textsuperscript{713} and without amplification he had no hearing ability. John Jr.’s cochlear implants provided sufficient usable hearing to classify him as having a mild hearing loss.\textsuperscript{714} John Jr. attended W. Tresper Clark High School in the New York District of East Meadow\textsuperscript{715} and his IEP, developed in collaboration with his mother, included a wide range of special education and support services. John Jr.’s IEP enabled him to be fully mainstreamed and included the accommodations of a one-to-one sign language interpreter for all academic classes, a classroom note taker, an FM system that worked with his cochlear implants, individual sessions with a teacher of the hearing impaired, preferential classroom seating, and closed captioning for in-class videos.\textsuperscript{716}

In May 2005, when John Jr. was in middle school, Mrs. Cave contacted the principal requesting John Jr.’s service dog be allowed to accompany him to school. The middle school

\begin{itemize}
\item \textsuperscript{710}\textit{Id.}
\item \textsuperscript{711} Cave v. E. Meadow Union Free Sch. Dist., 480 F. Supp. 2d 610 (E.D.N.Y. 2007).
\item \textsuperscript{712} \textit{Id.} at 616.
\item \textsuperscript{713} \textit{Id.} at 617.
\item \textsuperscript{714} \textit{Id.} at 616.
\item \textsuperscript{715} \textit{Id.} at 615.
\item \textsuperscript{716} \textit{Id.} at 617-18.
\end{itemize}
principal informed Mrs. Cave dogs were not allowed in school. Mrs. Cave then contacted the superintendent who told her the district did not have a policy regarding service dogs. In 2006, John Jr. acquired a service dog named Simba, and he and his mother completed the necessary training for the dog’s effective use. Mrs. Cave contacted the new high school principal when she knew John Jr. had been matched with Simba, he again informed her dogs were not allowed in the school.

In December 2006, John Jr.’s parents requested permission in writing for John Jr. to attend school accompanied by Simba. His parents stated it would increase John Jr.’s independent functioning because Simba would alert him to things such as people calling his name or emergency bells. School officials denied the request stating the dog would be disruptive to John Jr.’s education because his class schedule and overall education program would need to be modified in order to avoid exposing allergic students and teachers to the dog. School officials invited the parents to a §504 team meeting. During this meeting, it was determined John Jr. did not require additional services or accommodations beyond his IEP. The parents did not attend the §504 team meeting, but were later notified of both the outcome and their right to request an impartial hearing if they disagreed with the determination.

School officials also held a Committee on Special Education (CSE) meeting in January that confirmed the §504 meeting results. The Caves attended the meeting and notified the

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717 Cave v. E. Meadow, 480 F. Supp. 2d at 618.
718 Id.
719 Id. at 619.
720 Id. at 630.
721 Id.
722 Id.
committee John Jr. was upset by the decision not allow him to bring the dog to school. The parents did not appeal the determination of the CSE meeting.\textsuperscript{723}

After a series of discussions with school officials, the parents filed a lawsuit in the United States District Court for the Eastern District of New York in February 2007 alleging violations of the ADA, §504 and several New York statutes. In their complaint the parents asked for preliminary and permanent injunctions allowing John Jr. access to the school when accompanied by his service dog.\textsuperscript{724}

The district court conducted a four and one half day hearing on the parents’ motion for preliminary injunction. The judge denied the motion because the parents did not show the denial of their motion would result in irreparable harm.\textsuperscript{725} The judge ruled in favor of the School District noting the parents had failed to exhaust the administrative remedies available to them under the IDEA\textsuperscript{726} and §504.\textsuperscript{727} The parents had relied on the Sullivan decision. However, in Sullivan, the court concluded the IDEA exhaustion requirement did not apply because the parents had not argued their daughter was being denied a FAPE.\textsuperscript{728}

The Cave court found Sullivan was not binding for three reasons. First, the evidence in Cave found John Jr. was independent in his functioning, which was not the case with Christine Sullivan. Second, the nature of the relief John, Jr. requested, i.e., bringing his service dog to school, was viewed by the Cave court as a modification to his IEP. Finally, the Sullivan court recognized bringing the service dog to school would require a change to Christine Sullivan’s IEP

\textsuperscript{723} Cave v. E. Meadow, 480 F. Supp. 2d at 630.
\textsuperscript{724} Id. at 615.
\textsuperscript{725} Id. at 630.
\textsuperscript{726} Id. at 635.
\textsuperscript{727} Id. at 639.
\textsuperscript{728} Id. at 636.
but did not consider this to be significant. In Cave, the court found a change in John Jr.’s IEP triggered the IDEA’s administrative requirements.\textsuperscript{729}

Also, in Cave, school officials did not dispute John Jr. was disabled and covered by both the ADA and the Rehabilitation Act. The question was whether he was denied the opportunity to participate in or benefit from services, programs or activities offered at the school.\textsuperscript{730} The Cave court pointed out school officials were not obliged to provide all accommodations, and noted the accommodations already being provided to John Jr. were extraordinary.\textsuperscript{731} The court further concluded the additional benefit afforded by the service dog was not substantial, particularly when compared to the resulting disadvantages attendant to allowing the service dog, e.g., allergies of others and a modification of John, Jr.’s schedule.\textsuperscript{732} In addition, John Jr. would need to leave class early in order to travel in the halls thereby forfeiting valuable instruction time.\textsuperscript{733} The court further concluded the parents failed to prove John, Jr. had been discriminated against based on his disability.\textsuperscript{734}

The parents appealed the district court decision to the United States Court of Appeals for the Second Circuit.\textsuperscript{735} The parents agreed they had not exhausted IDEA remedies, therefore the appellate panel had to first decide whether they were required to do so prior to filling the lawsuit.\textsuperscript{736}

\textsuperscript{729} Cave v. E. Meadow, 480 F. Supp. 2d at 637-38.
\textsuperscript{730} Id. at 640.
\textsuperscript{731} Id. at 641.
\textsuperscript{732} Id.
\textsuperscript{733} Id.
\textsuperscript{734} Id. at 642.
\textsuperscript{735} Cave v. E Meadow Union Free Sch. Dist., 514 F.3d 240, 245 (2d Cir. 2008).
\textsuperscript{736} Id. at 246.
The parents argued their claim did not involve an IDEA violation but instead was a claim of unlawful discrimination. They argued the service dog was “an independent life tool.” The parents urged the appellate panel not to view John Jr. as a student being deprived of an appropriate public education but as a person being denied access to a public facility by reason of his disability and his non-educational need for a service dog.

The appellate court rejected this argument. Instead the panel concluded attendant changes to John Jr.’s class schedule to accommodate the dog would affect his education. The court pointed out under the IDEA, education was not viewed as simply academics but rather as a program designed to meet a student’s needs and prepare them for adult life. This meant the use of a service animal fell within the scope of the IDEA. The appellate court agreed with the lower court’s decision.

John Jr.’s parents had not alleged an IDEA violation; therefore, they argued the IDEA’s exhaustion requirement did not apply to their claim. Unlike Sullivan, where the court recognized the distinction between the §504 claim and IDEA, in Cave, the district court treated the parents’ complaint as an IDEA claim covered by the exhaustion requirement. The court distinguished the parental claim in Cave from Sullivan because the relief sought for John Jr. necessitated modification of the IEP. The court in Cave concluded the addition of a service

737 Id.
738 Id. at 247.
739 Id. at 251.
740 Id.
741 Mac Lagan, supra note 61, at 750.
742 Id.
743 Id. at 751.
dog would require a modification of John Jr.’s IEP. The court also dismissed the §504 equal access claim concluding access to school was an educational-based activity. The court clarified its opinion by pointing out a public facility was not required to provide every requested accommodation. The court concluded dog allergies, the need to confine the dog during gym, and John Jr.’s need to leave class early to travel with the dog combined to render the requested accommodations unreasonable.

Even though the outcome in Sullivan and Cave were different, the work the service animal was trained to perform was traditionally recognized. The next case involved using a service animal trained to provide less traditional work.

*C.C. v. Cypress School District*

Six-year-old C.C. attended Cypress School District in California. C.C. had severe autism, was nonverbal, and cognitively delayed. These challenges caused C.C. great difficulty when interacting with others. When he became anxious C.C. would shriek, pace, plug his ears, laugh inappropriately, flap his arms, pinch or scratch people, and wet himself.

In May 2010, C.C. was paired with Eddy, a service dog trained by the Autism Service Dogs of America (ASDA). The training was specifically designed to prepare the dog to work

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744 *Id.*
745 *Id.* at 753.
746 *Id.*
748 *Id.* at *2-3.*
with C.C. The training included interrupting C.C.’s impulsive behavior, eliminating elopement, and intervening when C.C. felt anxious.\textsuperscript{749}

Once the service animal was paired with C.C., the mother asked the school officials to allow C.C. to attend school with his service dog, Eddy. School officials refused.\textsuperscript{750} The parents decided to keep C.C. at home the last two weeks of school fearing some of the benefits would be lost if he were separated from his service dog.\textsuperscript{751} During the 2010-2011 school year, C.C. attended school without Eddy. During that year, C.C. attended a class with ten autistic students, one teacher, and four trained assistants.\textsuperscript{752}

C.C.’s parents sued school officials claiming C.C. had been discriminated against on the basis of his disability. The parents claimed school officials’ refusal to allow the service animal to accompany C.C. to school violated §504 of the Rehabilitation Act, Title II of the ADA, and two California statutes.\textsuperscript{753} The district court granted C.C.’s motion for preliminary injunction\textsuperscript{754} recognizing the disruption of the bond between C.C. and his autism service dog posed a serious risk of irreparable harm.\textsuperscript{755}

The court noted C.C. met the first and third necessary elements of an ADA claim. C.C. was an individual with a disability, and if school officials had discriminated against C.C., it was

\textsuperscript{749} Id. at *3.  
\textsuperscript{750} Id.  
\textsuperscript{751} Id.  
\textsuperscript{752} Id.  
\textsuperscript{753} C.C. v. Cypress, 2011 U.S. Dist. Lexis at *4-5.  
\textsuperscript{754} A preliminary injunction is a provisional remedy issued before final disposition of the litigation. Its function is to preserve the status quo and prevent irreparable loss of rights before judgment.  
due to his disability. The second element, the basis for the School District’s defense, was whether school officials had discriminated against C.C.\textsuperscript{756}

School officials argued Eddy did not meet the ADA definition of a service animal because although Eddy had been trained, he only provided C.C. with comfort. The court disagreed noting Eddy’s calming function was complemented by the various other tasks he performed. These tasks included preventing C.C. from elopement and throwing tantrums. Thus the court found Eddy met the ADA definition of a service animal.\textsuperscript{757}

School officials also argued the service animal would fundamentally alter the nature of the school program. The court found the resulting programming changes were not unreasonable. The special education program the student attended was already designed to be highly flexible and tailored to meet the needs of individual students with disabilities. The court also observed no school with an ASDA dog needed to hire additional staff to take care of the animal.\textsuperscript{758}

The court also rejected school officials’ claim Eddy would impede C.C.’s educational progress. Instead, the court concluded educational opportunities were irrelevant under §504. Finally, in response to school officials’ claim there was no irreparable harm caused by C.C. attending school without Eddy, the court observed the bond between Eddy and C.C. deteriorated while C.C was in school thereby reducing the Eddy’s efficiency.\textsuperscript{759} As a result of these findings, the court granted the parents’ request for a preliminary injunction and C.C.’s service animal was

\begin{itemize}
  \item \textsuperscript{756} \textit{Id.} at *8.
  \item \textsuperscript{757} \textit{Id.} at *10-11.
  \item \textsuperscript{758} \textit{Id.} at *12-13.
  \item \textsuperscript{759} \textit{Id.} at *13-14.
\end{itemize}
allowed to accompany him to school. This next case also involves a more non-traditional use of a service animal.

A.S. v. Catawba County Board of Education

Four-year-old A.S. suffered from Fetal Alcohol Spectrum Disorder with symptoms including a mild developmental delay, sensory integration difficulties, sleep apnea, insomnia, and obsessive-compulsive traits. A.S.’s disabilities manifested as aggressive and self-injurious behaviors, hyperactivity, lack of impulse control, elopement, and other challenging behaviors. In the fall of 2009, A.S. enrolled in prekindergarten in the Catawba County Schools, and February 2010, the District determined A.S. was eligible for special education services and developed an IEP.

The child acquired a service dog in September 2009. The animal had been individually trained to redirect the child’s self-injurious behaviors through deep pressure and to perform other tasks designed to keep A.S. safe.

For more than a year, the District continually denied requests for A.S. to be allowed to attend school with his service animal. Initially, school officials questioned whether the dog was actually a service animal. Despite parents’ request, the IEP developed in February 2011,
determined the service dog was not necessary at school. The parents did not challenge the IEP nor did they request a due process hearing under the administrative remedies of the IDEA.\textsuperscript{768}

In March 2011, the parents filed a complaint with the U.S. District Court of the Western District of North Carolina, Statesville Division alleging discrimination based upon A.S.’s disability as prohibited by §504 of the Rehabilitation Act and Title II of the ADA.\textsuperscript{769} The parents requested A.S.’s service dog be allowed to attend school, monetary damages to compensate for the retraining the dog required after being separated from A.S., and attorney fees.\textsuperscript{770}

School officials claimed the district court did not have subject matter jurisdiction in this case because A.S.’s parents had not exhausted the administrative remedies available under the IDEA.\textsuperscript{771} The parents argued the IDEA administrative exhaustion did not apply because the complaint was not about the IEP but about discrimination.\textsuperscript{772} The court noted the IDEA addressed complimentary complaints being brought to court based on the ADA or the Rehabilitation Act in addition to the IDEA. The statute stated administrative procedures must be exhausted as if the complaint was originally brought under the IDEA.\textsuperscript{773}

The court found on behalf of the School District and ruled the parents needed to exhaust administrative remedies before pursuing a civil action. The court further noted, due to the timing of the ruling, A.S. and his service dog would not be separated during the next four weeks before

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\textsuperscript{768} Id. at *5-6.\textsuperscript{769} Id. at *6.\textsuperscript{770} Id. at *7.\textsuperscript{771} Id. at *8.\textsuperscript{772} Id. at *9.\textsuperscript{773} A.S. v. Catawba, 2011 U.S. Dist. LEXIS at *11.
\end{flushleft}
school started for the 2011-12 school year. This gave the parents an opportunity to pursue the IDEA administrative remedies prior to school starting.\textsuperscript{774}

\textit{M.T. and R. J. v. Evansville}\textsuperscript{775}

Unlike the other four cases, this case does not involve school officials’ refusal to allow the service animals to attend school. The parents’ complaints are in regards to the timeliness of school officials’ response to a request for a service animal to accompany a child to school. M.T. and R.J., two high school sophomores, attended different schools in the same school district. Both students were physically impaired and requested their service animals be allowed to accompany them to school. M.T. had severe diabetes and relied on her service animal to detect changes to her blood sugar levels. R. J. had a rare condition resulting in epilepsy and mobility impairment. She relied on her service dog to assist with mobility and balance and to assist her if she had a seizure. In May 2013, parents informed their respective schools service animals would accompany the students to school. On the first day of school in the fall of 2013, parents alleged school officials presented them with a copy of the newly enacted School District policy regarding service animals. According to the parents, the policy placed special burdens on students with service animals. The policy was subsequently amended in response to concerns expressed by M.T.’s parents.\textsuperscript{776}

The families maintained, notwithstanding the amendments, the policy still imposed special burdens including a requirement for the families to provide documentation to the school

\textsuperscript{774} \textit{Id.} at *18.
\textsuperscript{776} \textit{Id.}
board at least ten business days prior to bringing the service animal to school. The parents alleged their children were forced to attend school without their service animals. Due to R.J.’s mother’s insistence that requiring R.J. to attend school without her service animal caused her “great pain,” school officials allowed her service animal to attend school after two days despite the policy. M.T., on the other hand, was not permitted to bring her service animal to school between August 14, 2013, through August 29, 2013.

The parents of the students brought claims against the School District alleging violations of the ADA and §504. The School District filed a motion to dismiss claiming the parents had not exhausted the IDEA’s administrative remedies. The court ruled the motion to dismiss was an affirmative defense and therefore could not be used to prevent the court from hearing the case. As such, the affirmative defense would not be considered until school officials filed an answer to the complaint. Therefore, the School District’s motion to dismiss was denied. At this time, there is not additional information.

State Cases Involving Service Animals in Schools

Illinois is one of three states with school code provisions for service animals. Both of the following Illinois cases allege school code violations; and therefore are heard in state versus federal court.

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777 Id.
778 Id.
779 Id.
780 Id.
781 M.T. v. Evansville, 62 IDLER 79.
As with the case of C.C., this case involves an autism service dog. Christopher and Melissa Kalbfleisch filed a claim in the Circuit Court of the Twentieth Judicial Circuit, Monroe County located in southern Illinois. The Kalbfleisch alleged their local school district violated of Section 14-6.02 of the Illinois School Code. Specifically the parents alleged school officials refused to allow their five-year-old son Carter to attend school accompanied by his autism service dog. The school officials filed a motion to remove the case to a federal court. The circuit court found the claim lacked federal subject matter jurisdiction and denied the request.

Carter was diagnosed with moderate to severe autism when he was eighteen months old. He was prone to daily tantrums and had pica. Carter also eloped, refused to walk in public, did not speak, and had difficulty sleeping. After a two-year delay, Corbin, a hypoallergenic Bouvier, became Carter’s service dog. Mrs. Kalbfleisch described Corbin’s training, and the training she and her husband received prior to bringing Corbin home. In addition, an aide at the school received two hours of training. Mrs. Kalbfleisch indicated after Corbin’s arrival, many of Carter’s demonstrated autistic behaviors showed substantial improvement. She also described the regression that occurred when Corbin and Carter were separated for a few days as consequence of a family emergency.

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784 Id.
785 Pica is an eating disorder causing a person to consume non-food items.
786 Kalbfleisch v. Columbia, 396 Ill. App. 3d at 1108-10.
The family requested Carter be allowed to attend school with his service animal. Arguing the service dog did not provide Carter with any educational benefits, school officials denied the request. School officials also indicated there was another child in the class with a rare lung disease who was allergic to dogs. School officials also testified the service dog’s presence in the classroom would be a substantial distraction.

The parents requested a preliminary injunction claiming irreparable injury if Carter was not allowed to attend school with his service dog until the trial was complete. The court granted the preliminary injunction. School officials appealed to the Appellate Court of Illinois, Fifth District and argued the parents had failed to satisfy the requirements for injunctive relief because they had not proven Corbin was a service animal. The appellate court noted this proof was not requisite for granting of injunctive relief. The court pointed out Carter’s working relationship with the dog deteriorated significantly after a brief separation and affirmed the lower court’s conclusion Carter would suffer irreparable harm as a result of being separated from the dog during school hours. The appellate court also rejected school officials’ interpretation that the Illinois School Code only required access to service animals that provided an educational benefit because the term “educational benefit” was not found within the statute language. The court found Carter met the school code’s definition of a service dog and upheld the lower court’s injunctive relief allowing Carter to attend school with his service animal. About the same time

787 Id. at 1110-11.
788 Id. at 1111.
790 Id. at 1115.
791 Id. at 1012.
the Kalbfleisch’s filed their case in southern Illinois, another family filed a case in central Illinois.

**K.D. v. Villa Grove Community Unit School District**

As with the Kalbfleisch case, this family had acquired an autism service dog. The K.D.’s parents claimed the denial of their request to allow their child to attend school with his service animal violated the Illinois School Code. K.D., diagnosed with autism, attended Villa Grove Elementary School from the time he was six-years-old. Prior to applying for a service dog from Autism Service Dogs of America (ASDA) dog, K.D.’s mother informed the teachers she planned on obtaining a service dog. Thereafter, school officials informed K.D.’s mother they would not permit the dog to accompany K.D. to school.

In May 2009, ASDA provided K.D. a Labrador retriever named Chewey. Later school officials sent a letter stating Chewey would not be allowed to accompany K.D. to school. The parents continued to negotiate with school officials over this issue. However, on June 29, 2009, school officials informed the family Chewey would not be allowed to accompany K.D. during the upcoming extended school year program.

On July 9, 2009, K.D.’s parents filed a complaint with the Circuit Court of Douglas County against Villa Grove Community Unity School District No. 302 and the superintendent claiming denial of the request to allow K.D. to bring his service dog to school violated the

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793 Id. at 1064.
794 Id. at 1063.
795 Id. at 1066.
796 Id. at 1063.
797 Id. at 1064.
Illinois School Code. The lawsuit sought a temporary restraining order and a preliminary injunction so K.D could attend school with his service dog.

School officials filed an opposing motion to dismiss the parents’ motion for a temporary restraining order and preliminary injunction. School officials argued the parents had failed to exhaust IDEA administrative remedies before commencing their action with the trial court. In addition, school officials argued Chewey did not meet the Illinois School Code’s requirements for a service animal. After a hearing, the court denied the school officials’ motion and granted the parents’ motion for a temporary restraining order. As a result K.D. and Chewey started school together in August 2009.

In August 2009, the parents amended their complaint and requested four additional items related to Chewey’s school attendance with K.D. First, the parents wanted school officials to train at least one primary staff member and one backup staff member in service animal management and the necessary commands. Second, the parents wanted school officials to designate one primary staff member to hold Chewey’s leash during the school day. Third, a primary staff member would release K.D. from his tether to Chewey while K.D. used the restroom and during periods of heavy physical activity. Finally, school officials would allow Chewey access to water and an opportunity to relieve himself when appropriate during the

798 K.D. v. Villa Grove, 403 Ill. App. 3d at 1063.
799 Id. at 1064.
800 Id.
801 Id.
school day. \textsuperscript{802} School officials filed a motion to strike the additional requests. The court granted their motion finding the parents’ requests exceeded the scope of the School Code. \textsuperscript{803}

On November 10, 2009, the trial court conducted a hearing on the parents’ complaint. Chewey’s ASDA trainer testified ASDA dogs received sixteen months of training beginning when the dog was between six and eight months old. \textsuperscript{804} The trainer further testified when the service dog accompanied a child to school, it remained in a down-stay position to keep the child calm and safe. The dog did not move from this position unless commanded by its handler. Therefore, the handler was important to ensure the dog was behaving. \textsuperscript{805}

She also stated K.D. did not command Chewey because he did not function at a level where he could provide Chewey with a sense of control. In fact, Chewey was trained not to respond to K.D.’s commands and another individual had to issue commands to Chewey. Although Chewey knew up to thirty commands, a handler needed to know only five commands to mange Chewey in the school setting. Chewey’s main handler was K.D.’s mother, Nichelle. \textsuperscript{806} Nichelle received training from the ASDA prior to Chewey being placed with the family. After placement, Witko flew to the family’s home to teach Chewey how to apply his training to K.D. Typically, the training included the school setting, but because school officials had refused to allow Chewey in the school, this portion of the training was absent. \textsuperscript{807} However, when the trainer returned in August 2009, she was able to conduct training with K.D.’s speech teacher, his one-to-

\textsuperscript{802} Id. at 1064.
\textsuperscript{803} Id.
\textsuperscript{804} Id.
\textsuperscript{805} K.D. v. Villa Grove, 403 Ill. App. 3d at 1065.
\textsuperscript{806} Id.
\textsuperscript{807} Id.
one aide, the head of special education at Villa Park Elementary School, and some additional aides.\textsuperscript{808}

The trainer testified Chewey’s training taught him to stand his ground when tethered to K.D. thereby preventing K.D. from elopement. Tethering reassured family members and school staff the child would not run and allowed the child to participate in social activities. Chewey also aided K.D. during transitional periods by applying deep pressure with his head or paw upon command.\textsuperscript{809} The trainer also emphasized the importance of K.D. and Chewey working together at all times when outside the home. This allowed the child and the dog to form a bond.\textsuperscript{810}

K.D.’s mother reported K.D.’s autism caused him to run away from adults and to leave home during the night while the family slept. She reported K.D. had difficulty transitioning from the home to public places. Prior to Chewey’s arrival, K.D. adapted poorly to changes in his routine and slept only about two to three hours a night.\textsuperscript{811}

Nichelle testified she and her husband obtained Chewey to keep K.D. safe and calm. She reported after Chewey’s arrival, K.D. was upset for shorter period of time and slept for six to eight hours a night. K.D. was also able to transition between home and public places with less difficulty. Nichelle attributed these improvements to Chewey’s ability to apply pressure when commanded, to keep K.D. from eloping, and barking when K.D. left his bed.\textsuperscript{812}

K.D.’s one-to-one assistant testified the dog did nothing unless commanded to do so by an adult. She also testified she often had to repeat commands two or three times before Chewey

\textsuperscript{808} Id.
\textsuperscript{809} Id. at 1065-66.
\textsuperscript{810} Id. at 1066.
\textsuperscript{811} K.D. v. Villa Grove, 403 Ill. App. 3d at 1066.
\textsuperscript{812} Id.
responded. When other dogs were near the playground, Chewey barked and tried to go to the other dogs. Occasionally Chewey barked in school and sniffed the other students.\textsuperscript{813}

On cross-examination, the assistant admitted she knew the commands for correcting the dog’s inappropriate behavior and used them effectively. She also admitted she felt confident as Chewey’s handler. She indicated K.D.’s mother was supportive regarding problems the school was having with Chewey. The assistant also testified she had seen Chewey tethered to K.D. during transition periods, had commanded him to find K.D., and observed him applying deep pressure to K.D.\textsuperscript{814}

Another School District aide reported instances of Chewey barking at other dogs on the playground. She also testified K.D. had regressed in his independence skills.\textsuperscript{815} On cross-examination, the aide admitted she had not notified K.D.’s mother of Chewey barking at other dogs because it did not occur often.\textsuperscript{816}

The speech and language therapist had worked with K.D. both before and after Chewey arrived. Once, when K.D. was untethered and ran down the hallway, Chewey followed ignoring the aide’s commands to stop. The speech therapist stated she often needed to repeat commands two to three times.\textsuperscript{817}

\textsuperscript{813} Id. at 1067.
\textsuperscript{814} Id.
\textsuperscript{815} Id.
\textsuperscript{816} Id.
\textsuperscript{817} K.D. v. Villa Grove, 403 Ill. App. 3d at 1068.
She reported once Chewey began attending school, K.D. regressed in both academic and independent skills.\(^{818}\) On cross-examination, she also stated there were other changes between the two school years besides the addition of Chewey.\(^{819}\)

After the hearing, the trial court ruled in the parents’ favor finding the school officials violated the School Code. The court also found Chewey met the requirements of a service animal within the meaning of the statute because Chewey was individually trained to perform tasks for K.D.\(^{820}\) The court recognized the tasks had not been performed without problem, but this lack of perfection did not indicate the dog was not a service animal.\(^{821}\) The circuit court ordered school officials to continue to permit Chewey to accompany K.D. to all school activities.\(^{822}\)

School officials appealed to the Appellate Court of Illinois, 4\(^{th}\) District arguing the trial court erred in granting the parents injunctive relief because the parents failed to exhaust the IDEA’s administrative remedies. School officials further argued because of this failure, the trial court lacked jurisdiction over this case. Specifically, school officials argued the parents should have sought a special education due process hearing.\(^{823}\) The appellate court reviewed the single question of whether Chewey met the definition of a service animal as written in the Illinois School Code. The appellate panel found parents were not required to seek a due process hearing regarding this interpretation of the School Code.\(^{824}\) According to the panel, school officials were no more qualified to decide if an animal fit the definition than the courts because the school code

\(^{818}\) *Id.* at 1066.

\(^{819}\) *Id.* at 1068.

\(^{820}\) *Id.* at 1069.

\(^{821}\) *Id.* at 1066.

\(^{822}\) *Id.* at 1069.

\(^{823}\) *K.D. v. Villa Grove*, 403 Ill. App. 3d at 1070.

\(^{824}\) *Id.* at 1071.
did not expressly include the words “educational benefit” in the service animal definition. Therefore, the decision as to whether Chewey was a service animal was within the circuit court’s jurisdiction.

School District officials also contended Chewey provided no tasks benefiting K.D., and any task Chewey did perform were done so on the handler’s command. The appellate panel disagreed with the school officials’ arguments because the witnesses’ testimony at the trial established Chewey did provide benefit to K.D. The appellate court further affirmed Chewey met the definition of a service animal. The trial court’s decision was affirmed and K.D. was allowed to continue attending school with Chewey.

OCR Investigations

The Office for Civil Rights (OCR) has investigated complaints involving school district policies on service animals. The students in these complaints were eligible for IDEA services even though the complainants challenged compliance with §504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990. The first two cases started as OCR complaints; however, after the OCR investigation and ruling, the families filed additional complaints.

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825 Id. at 1070.
826 Id. at 1071.
827 Id. at 1072.
828 Id. at 1073-77.
A student diagnosed with autism spectrum disorder was identified as an individual with a disability under IDEA. In 2002-2003, as a second grader, the child began receiving special education services with an IEP in the Bakersfield City School District. Over the next several years, there were multiple entries in the student’s IEPs and on other school documents regarding behavior concerns and the student’s difficulties with peers. In January 2007, when the student was in sixth grade, the IEP team recommended adding a personal assistant to the student’s IEP services for six hours per day.\footnote{Bakersfield (CA) City Sch. Dist., 50 IDELR 169 (OCR 2008).}

In March 2007, the family decided to obtain a service dog for the student and communicated this information to the elementary school. In April, after a month of training, the family brought the dog home. For three days from April 10-12, 2007, the student attended school with the dog. The family provided documentation regarding the service dog training to school officials and also to the special education office. During the three days the dog was in attendance, school staff noted a positive difference in the student’s behavior, concentration, work completion, self-confidence, and interaction with other students at recess. At the end of the day on April 12, school administrators informed the parents the dog could no longer attend school with the student citing concerns regarding the dog’s status as a service dog and his threat the health and safety of staff and students. The next day, the parents removed the student from school.\footnote{Id.}

\footnote{Id.}
The parents filed a complaint with the United States Department of Education, Office for Civil Rights on April 18, 2007, alleging school officials had discriminated against the student based on his disability. Specifically, they stated school officials had established discriminatory conditions or restriction on the student’s use of a trained dog as a service animal. On April 20, 2007, during the OCR investigation, school officials asked the parents to sign an agreement releasing the School District from all obligations to the student and from all potential liability arising from the dog. The proposed agreement referred to the dog as a “behavior therapy” dog. The parents refused to sign noting under the ADA the student had a right to attend school with a service animal. 834

On May 9, 2007, the school team held an IEP meeting but did not discuss whether use of the dog was necessary in order for the child to receive a FAPE. On May 25, 2007, the special education director sent a letter offering to reconvene the IEP to discuss whether the student needed a dog as a related service or supplementary support or service under the IDEA. The letter did not provide the parents with any information regarding the grievance process for Title II of the ADA. 835

In the fall of 2007, the parents attempted to enroll the student in a neighboring school district, but the neighboring school district had reached maximum capacity. While the parents appealed this decision, the Bakersfield City School District placed the child on an Independent Study Program. 836

834 Id.
835 Id.
836 Id.
James M. Wood, an OCR official, sent a letter to the Superintendent of Bakersfield School after conducting an investigation. The OCR gathered evidence through interviews and reviewed documents and records submitted by both school officials and the student’s parents.

The OCR found the School District violated Title II and Section 504 by excluding the dog from school. The OCR noted school officials had not conducted a specific inquiry as to whether the dog was appropriately trained as a service animal, or whether its function addressed the student’s disability needs. The OCR also criticized the School District’s failure to conduct a hearing regarding the dog’s status as a service animal prior to determining the dog posed a health and safety risk to students and staff. Even if school officials had concluded the dog did not qualify as a service animal, the OCR observed school officials should have considered whether the dog’s presence was necessary for the student to receive a FAPE under the IDEA. The OCR also noted the student’s behavior improved significantly when he brought his dog to class. There was no evidence either staff or other students complained about the dog’s presence. By failing to consider whether the dog was a necessary aid or service, the OCR concluded school officials had deprived the student of his procedural safeguards under the IDEA.837

The OCR also found although school officials discussed the service dog at the IEP meeting, they 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. School officials denied any violation but agreed to adopt a resolution to address the OCR’s findings. The OCR noted federal courts had not determined whether service animals should be analyzed from the equal access question under Section 504 /Title II or a FAPE question under IDEA. However, in this

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837 Bakersfield (CA) City Sch. Dist., 50 IDELR 169.
case the OCR reported school officials had failed to look at either question. School officials failed to perform any investigation to determine if the dog was a service animal as defined by the ADA. Furthermore, they did not provide the family with information about the complaint procedure if the parents disagreed with the District’s decision. Under IDEA, school officials were required to consider whether the dog was a necessary part of the student’s IEP. The factors they should have considered ranged from how the dog would assist the student, the impact of the animal’s presence in the school, and how the dog would alter the student’s placement. The OCR did not decide whether or not the dog was a service animal. They left this decision to the school officials.\textsuperscript{838}

The Bakersfield City School District subsequently determined the student’s animal did not fall within the ADA definition of a service animal and the dog’s presence was not necessary for the student to receive a FAPE. The parents initiated a hearing to determine whether school officials were denying a FAPE by assigning a one-to-one aide instead of allowing the dog to attend classes with the student.\textsuperscript{839}

At the hearing, the student’s parents presented evidence from the person who trained the dog regarding how a service dog assists a child with autism, and his observations of the successful relationship between the student and the dog. However, the trainer did not know if the 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.\textsuperscript{840} The Administrative Law Judge (ALJ) determined the evidence supported school officials’ position that the dog was not

\textsuperscript{838} Id.  
\textsuperscript{839} Bakersfield City Sch. Dist., 51 IDELR (LRP) 733, 734 (Dept’t of Educ., Off. Of C.R. Jan 25, 2008).  
\textsuperscript{840} Id. at 739.
needed for the student to receive a FAPE. The ALJ’s determination was based upon a lack of persuasive empirical evidence a service dog could help with the student’s education, and the IEP team’s conclusion the service dog was not necessary. Additionally, the ALJ found a lack of evidence indicating the use of the service dog as opposed to the one-to-one aide would have allowed the student to be educated in the least restrictive environment.

_E.F. v. Napoleon Community Schools_  

This case starts as an OCR complaint but eventually ends up in district court. During the 2009-2010 school year, a six year old with spastic quadriplegic cerebral palsy attended kindergarten at Ezra Eby Elementary School. The cerebral palsy significantly limited the child’s motor skills and mobility but did not impact her cognitively. The child also had been diagnosed with attention deficit hyperactivity disorder (ADHD) and had a history of seizures. The child’s IEP team placed her in a general education classroom with the special education supports of a one-to-one paraprofessional, occupational therapy, physical therapy, speech language services, extended school year, and resource program services.

In March 2009, the parent notified school officials of the family’s plan to obtain a service animal to accompany the child, E.F., to school during the 2009-2010 school year. According to the parent, the superintendent seemed supportive, and although the principal raised concerns

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841 _Id._ at 740.  
842 _Id._ at 744.  
843 _Id._  
about allergies and liability, it was her belief school officials would permit the service animal to attend school with the child. 846

The parent sent a letter to the principal on October 12, 2009, informing him the student would miss ten days of school for training with her service animal, Wonder. Additionally, the parent stated she expected Wonder would be allowed to attend school with E.F. upon her return. The parent also requested a copy of the School District’s policies regarding service animals. 847

The service animal had received ten to twelve months of training including training on the specific needs of this child. The child’s parent was trained as Wonder’s handler because E.F. was currently not physically strong enough to handle the service animal. The student was responsible for verbally commanding the animal, but her parent physically managed the service animal. The parent provided school officials with documentation of the service animal’s training, including a list of tasks the service animal had been trained to perform as well as the handler and service animal training certificates. In addition, she provided letters from the student’s doctors detailing information about the benefits of the service animal. 848 The tasks Wonder was trained to perform included, but were not limited to, retrieving dropped items, helping E.F. balance when she used her walker, opening/closing doors, turning off/on lights, helping E.F. take off her coat, and helping her transfer to/from the toilet. 849

Although school officials allowed the parent to drop off E.F. with her service animal on numerous occasions, at a meeting on December 11, 2009, attended by school administrators and the family, school officials cited various reasons for not allowing Wonder in the school,

846 Id.
847 Id.
848 Id.
849 Id.
including the fact E.F. did not need a service animal because she had an aide. The parent reported school officials threatened to remove the assignment of the aide from the E.F.’s IEP if she continued to bring the service animal to school. Thereafter school officials received a letter from another physician stating the service animal assisted E.F. with mobility issues with the goal of increasing her independent motor skills, but E.F. would continue to require an aide in addition to the service animal.\footnote{Id.}

On January 7, 2010, the IEP team met and considered whether the service animal was necessary to provide E.F. with a FAPE. The IEP team concluded E.F. was successful in the school without the service animal and all of her needs were being met by the program and services in place. The team further stated Wonder would not be beneficial to E.F. and therefore she was not entitled to utilize the service animal at school because an aide performed Wonder’s tasks. The parent agreed to mediation to solve the problem.\footnote{Id.}

As a result of mediation, school officials agreed to allow the service animal to attend school with E.F. on a thirty-day trial period until the end of the school year. The trial period allowed school officials to observe Wonder as well as the third party handler, the parent. The District observers wrote detailed notes during the trial period. These records indicated E.F. was prohibited from attending various school activities with Wonder. The handler and the service animal were required to sit in the back of the room away from E.F. The handler engaged in disruptive activities during the day, and Wonder was prohibited from performing certain tasks.\footnote{Id.}
On July 30, 2010, the OCR received a complaint from the parent against the Napoleon Community Schools and the Jackson County Intermediate School District. The complaint alleged the District excluded E.F. from, or limited her participation in, their educational programs and activities because they denied access to the service dog. As part of its investigation, the OCR reviewed the District’s policy on service animals and found numerous compliance concerns. As a general rule, the OCR does not review individual placement decisions or resolve disputes over the content of education plans as long as Section 504 regulations are met. However, in this case the issue involved different treatment, program exclusion, and failure to provide equal opportunity on the basis of a disability. 853

The U. S. Department of Justice had previously taken the position the ADA required schools to allow individuals with disabilities to be accompanied by service animals except for rare instances of the risk of direct threat or fundamental alteration of the program. Individualized assessment and reasonable judgment were to be used to ascertain the nature, duration, and severity of the risk and alteration, and whether reasonable modification could mitigate those concerns. In addition, the individual with the disability was not required to be the animal’s handler. 854

The OCR ruled Wonder met the definition of a service animal, and school officials had been provided sufficient information to make that determination. The OCR found school officials placed many restrictions on the use of the animal, thereby preventing the animal from actually serving the student. Furthermore, the OCR concluded school officials had violated the antidiscrimination requirement of Section 504 and Title II by insisting the student did not need

853 Id.
854 Id.
her service animal because they provided her a human aide. The OCR reasoned by limiting the ability of the student and the parent to choose the type of accommodation, school officials inappropriately inhibited the student’s independence and this resulted in discrimination. The example the OCR used was requiring a student who used a wheelchair to be carried around the school.\footnote{145}

The OCR noted one of Title II’s fundamental purposes was to increase the independence of individuals with disabilities. In addition, §504 supported providing a student with the opportunity to access programs as independently as possible. In this case, denying the student the use of the service animal in the school setting had a negative impact on the relationship and assistance the service animal provided the child outside of school. Based on all of these findings, the OCR determined school officials had violated Section 504 and Title II.\footnote{146}

School officials did not admit to any violation but agreed to a resolution allowing the student to return to school accompanied by her service animal at all school related activities, ensured full integration of the service animal into the school environment, provided for the training of staff and students, and revised the District service animal policies and procedures.\footnote{147}

The parents met with a District representative, Pamela Barnes, over the summer. Based upon this meeting, the parents concluded school officials resented E.F. The parents enrolled E.F. in a neighboring school district where Wonder’s attendance was allowed.\footnote{148}

Thereafter the parents filed a three-count complaint with the U.S. District Court, Eastern District of Michigan. The complaint alleged a violation of Section 504 and Title II against

\footnotesize{\textsuperscript{855} Id. \textsuperscript{856} Id. \textsuperscript{857} Jackson Cnty. 59 IDELR 172. \textsuperscript{858} E.F. v. Napoleon Cmty. Sch., 62 IDELR 201 (E.D. Mich 2014).}
Napoleon Community School District and Jackson County Intermediate School District. School officials filed a motion to dismiss based on the parents’ failure to exhaust the IDEA’s administrative remedies. The parents argued they were not required to adhere to the IDEA’s exhaustion requirement.\(^{859}\)

The court noted the IDEA’s exhaustion requirement was not limited to only IDEA claims. Thus when parents sought to enforce rights arising from the denial of a FAPE, it did not matter whether the denial occurred under the IDEA or under §504. The claim required an exhaustion of administrative remedies. The court viewed the parents’ request of an award of monetary damages not sufficient to render the exhaustion of administrative remedies unnecessary.\(^{860}\)

This federal district court reviewed the decision in the *Cave* case, which also involved a service animal. In that case, District representatives testified the child’s existing IEP would need to be changed to accommodate the service animal attending school. The parents in this Napoleon case argued the District’s obligation to satisfy Section 504 and Title II was entirely separate from the District’s obligation to provide a FAPE under the IDEA. The court disagreed with this argument and concluded the IDEA administrative exhaustion requirement was triggered. The court believed Wonder’s attendance would affect the IEP. Since the parents did not exhaust the IDEA’s administrative procedures prior to filing the case, the court granted the District’s motion to dismiss the case.\(^{861}\)

\(^{859}\) *Id.*  
\(^{860}\) *Id.*  
\(^{861}\) *Id.*
Colorado Springs (CO) School District # 11

While other cases mention individuals with allergies weighing into school officials’ decisions about allowing the service animal, the following case is the only one where school officials actually switch from allowing the student to attend with his service animal to denying access to the student’s service dog based on an allergy.

A freshman at Doherty High School in Colorado Springs District # 11 was covered by an IEP for a physical disability, cerebral palsy quadriplegia. The student had attended school with his service dog since second grade until November of his freshman year when the principal informed the parent the dog was banned from school because a teacher had significant allergic reactions to the dog. The principal made the decision after consulting with the District’s EEOC Ombudsperson/504 Coordinator.

The parent stated she requested an IEP meeting to consider adding the dog to her son’s IEP. School officials disagreed and reported the parent inquired about adding the dog to the IEP but did not expressly ask for an IEP meeting. No IEP meeting was held. However, staff members and the parent met on January 4, 2010 to discuss the issue. The special education administrator informed the parent that school officials would not consider whether to add a dog to the IEP because other school districts they had consulted reported not needing a service dog at school in order to meet student needs. On February 6, 2010, the superintendent sent a letter to the parent stating the dog would not be added to the IEP and the parent could request a hearing from the 504 Coordinator’s office regarding the dog’s exclusion from school. The parent received

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862 Colorado Springs (CO) Sch. Dist., 56 IDELR 52 (OCR 2010).
863 Id.
subsequent communication from both the principal and the superintendent reporting the decision to exclude the dog would stand. School officials and the parent, along with the parent’s attorney, participated in mediation. No agreement was reached. The parent withdrew her son from school and enrolled him in an online school.864

In the complaint, the parent alleged two violations: school officials failed to consider her child’s individualized educational needs and failed to provide due process before excluding the service dog. On the issue of due process, the OCR found school officials did not fail to provide the parent with due process rights as evidenced by the mediation attempt. On the issue of considering individual educational needs, the OCR found school officials failed when they did not convene an IEP meeting to determine whether the dog was necessary in order for the student to receive a FAPE. By relying on what other school districts did for students, school officials did not consider the facts in this particular situation. The OCR did not rule as to whether the dog in question was a service dog.865

In an effort to resolve the OCR issues raised, school officials agreed to draft policy and administrative regulations governing service animals. In addition, the OCR found a service dog might be included in a student’s §504 plan or IEP if the multidisciplinary team reached this conclusion. Finally, if the student returned to the school district, school officials agreed to convene an IEP meeting to consider information from a variety of sources, including doctors’ notes and other pertinent information regarding the student’s need for the dog. If the parent disputed the team’s decision, she would be able to pursue IDEA’s due process remedy.866

864 Id.
865 Id.
866 Id.
This New Hampshire complaint is the only one in which the OCR addressed the provision of school officials providing a handler for the service dog. The OCR closed this investigation without ruling on the parents’ §504 and Title II discrimination claim because school officials voluntarily agreed to resolve the complaint. The parents filed the complaint because their son was not allowed to attend school with his service animal unless the parents provided the handler. According to the parents, the child’s baby-sitter was serving as the service dog handler for the child’s seizure-alert dog.\textsuperscript{868}

School officials agreed to review and amend its service animal policies and disseminate the polices to all members of the school community so everyone would be aware of how to respond appropriately to the presence of service animals on School District premises and understand individuals with service animals may not be excluded from or discriminated against in any of the District’s programs, services or activities. Further, school officials agreed to provide training related to the student’s use of his service dog while in school.\textsuperscript{869}

The OCR required the District policy and procedure to include the following information.

1. The definition of service animal as “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

\textsuperscript{867} Sch. Admin. Unit # 23 (NH), 62 IDELR 65 (OCR May 22, 2013).
\textsuperscript{868} Id.
\textsuperscript{869} Id.
rescue work, pulling a wheelchair, or fetching dropped items"; alerting others in the event of a seizure. ⑧⁷⁰

2. School officials may ask an individual with a disability to remove a service animal from the premises if (a) the animal is out of control and the animal’s handler does not take effective action to control it; or (b) the animal is not house broken. ⑧⁷¹

3. Visitors to School District grounds and facilities accompanied by a service animal would be allowed access. Only in circumstances when a disabled student or staff member wishes to bring his/her service animal to school on a permanent bases, shall school officials require notice prior to the proposed use of the service animal on the premises.

The OCR noted a designated staff member or outside aide would be responsible for issuing necessary commands to the service animal. School officials would contract with a service dog trainer with experience in training seizure-alert dogs. The trainer would obtain the necessary information in order to develop a training program for the dog and the aide. The goal was to train the aide to be able to appropriately issue commands in order to allow the dog to accompany the student during the school day without interfering with the student’s movement, the student’s therapies, and without disrupting the classroom or school environment with excessive noise or distraction. If the trainer determined the dog was unable to function in the school setting, the parents would be allowed to pay for additional training or provide a handler at their own expense if they wished to continue to have the dog accompany the student to school. If a particular aide

⑧⁷⁰ Id.
⑧⁷¹ Id.
proved unable to master the skills necessary to handle the dog, the school officials would identify
and train another person.\textsuperscript{872}

\textbf{Catawba County (NC) Schools}\textsuperscript{873}

This next OCR complaint does not reference the district court case the parents filed
against the school district in \textit{A.S. v. Catawba County Board of Education}.\textsuperscript{874} The OCR
investigation is based on the complaint the parents filed following the district court’s decision
regarding the parents’ requirement to exhaust administrative remedies before filing a complaint
in district court.\textsuperscript{875} The following is the additional fact pattern from this effort to resolve the
families’ September 2012 OCR complaint.

In March 2012, school officials adopted a service animal policy. Under the policy,
individuals wishing to bring a service animal to school were required to work with school
personnel to create a plan addressing the presence of the service animal during the school day.
The plan would include appropriate training for school personnel and students in order for them
to interact with the service animal, how to address the presence of a handler who is not a school
district employee or student, and any necessary modifications to the educational program.\textsuperscript{876}

The policy also set forth four reasons the District could exclude a service animal.

1. The animal posed as direct threat to the health and safety of others that could not
be eliminated with reasonable modifications.

\textsuperscript{872} \textit{Id.}
\textsuperscript{873} Catawba Cnty. (NC) Sch., 61 IDELR 234 (OCR 2013).
LEXIS 87071, 8 (W.D.N.C. 2011).
\textsuperscript{875} Catawba Cnty., 61 IDELR 234.
\textsuperscript{876} \textit{Id.}
2. The animal was out of control and handler could not or did not take effective action to control the animal.

3. The animal was not housebroken.

4. The presence or behavior of the animal fundamentally altered the service, program, or activity of the school.\textsuperscript{877}

In June, pursuant to the new policy, the parents emailed the principal and incoming superintendent requesting a plan to facilitate the student’s use of his service dog in school during the 2012-13 school year when the student would be in second grade. The email explained the service animal’s eleven month training to do work and listed the various tasks the service animal was trained to perform.\textsuperscript{878}

A meeting was scheduled for early August but was later canceled by school officials when the parents indicated they had no additional information beyond what they had shared in the email. The principal sent an email to the parents indicating the service animal would not be allowed in the school because the presence of the animal would fundamentally alter the program and services of the school. The superintendent confirmed this decision in a letter dated August 3, 2012.\textsuperscript{879}

The OCR complaint referred to this most recent denial of parents’ request and alleged Startown Elementary School had discriminated against their student on the basis of his disability

\textsuperscript{877} Id.
\textsuperscript{878} Id.
\textsuperscript{879} Id.
by refusing to allow him to bring his service animal to school during the 2012-2013 school year.

The OCR investigated the complaint.\textsuperscript{880}

During the OCR interviews, neither the superintendent nor the principal could adequately explain why the service animal would undermine the IEP goal for the child to develop independence. The OCR reported it did not typically second-guess educational decisions; however, since the fundamental alteration was a legal standard, they reviewed the substance of the school district’s decision.\textsuperscript{881}

Upon reviewing the minutes from a meeting dated December 18, 2012 (after the complaint was filed),\textsuperscript{882} the OCR found the student had had an incident of aggression against another student and a teacher that could have resulted in criminal charges. In addition, school personnel were managing the child’s defiant behaviors by removing him from general education to a calming tent thereby separating him from general education. The service animal’s work was to lie next to the student and calm him to reduce incidents of aggression toward others. According to the OCR, the use of a service animal would have potentially increased the child’s independence and reduced the requirement of adult intervention.\textsuperscript{883}

The OCR noted although the policy school officials enacted complied with §504 and Title II, the implementation of the policy did not. The OCR noted the “fundamentally altered” language required a heavy burden of proof from the District in order to be used as a reason for deny access. School officials failed to meet this burden of proof; therefore, the OCR concluded

\textsuperscript{880} Id.
\textsuperscript{881} Catawba Cnty., 61 IDELR 234.
\textsuperscript{882} Parenthesis added by author.
\textsuperscript{883} Catawba Cnty., 61 IDELR 234.
the District failed to comply with Section 504 and Title II. The District agreed to a resolution allowing the child to attend school accompanied by his service dog.\textsuperscript{884}
CHAPTER THREE:

ANALYSIS

To begin unraveling the complexities regarding a parental request for their child to be allowed to attend public school accompanied by a service animal, this study analyzed applicable disability legislation, governing agency interpretations and court decisions. Since school officials are required to develop and implement policies and procedures to ensure adherence to each federal statute, the intent of this study is to provide guidance for accomplishing these important obligations. This chapter synthesizes some of the most important findings emerging from this study.

Understanding Who is covered by the Three Applicable Federal Disability Statutes

In order for a service animal to be allowed to accompany a student to a public school, the child must be an “otherwise qualified individual with a disability.” 885 This is the first inquiry a court will conduct in formulating a disability related ruling. As noted in Chapter Two, a student can qualify as disabled under either §504 of the Rehabilitation Act, Title II of the ADA, and/or the IDEA. Section 504 and Title II claims are generally considered together due to the statutory similarity in the definitions. Additionally, the ADA Amendments Act (ADAAA) applies to both §504 and Title II.

When investigating the 2008 Bakersfield (CA) City School District, the Office for Civil Rights (OCR) noted federal courts have not determined whether service animals should be analyzed from the equal access perspective pursuant to §504 /Title II or as a free appropriate public education (FAPE) issue under the IDEA. This lack of clarity reinforced the need for school officials to determine whether the student qualifies under any or all of the three applicable federal statutes and accompanying regulations.

The Rehabilitation Act of 1973 defines an individual with disability as “Any person who (A) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (B) has record of such an impairment, or (C) is regarded as having such an impairment.” The accompanying regulations further explicate the terms “physical impairment” and “major life activities”.

Any recipient of federal financial assistance including public schools must adhere to §504. According to §504 an “otherwise qualified handicapped individual” must not be excluded from participation in a federally funded program “solely by reason of his handicap.” In the school setting “otherwise qualified” refers an individual who meets the requirements for being enrolled in the public school. This includes both residency and age.

886 Bakersfield (CA) City Sch. Dist., 50 IDELR 169.
887 Id.
889 Selmi, supra note 38, at 532
891 Schoenbaechler, supra note 26, at 456.
892 Davis, 442 U.S. at 404.
Pursuant to the Americans with Disabilities Act\textsuperscript{893}, an individual must meet at least one of the Act’s three definitions of “disabled.” An individual must have “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such an impairment.”\textsuperscript{894} The term “substantially limits” refers to individuals with a disability in comparison to most people in the general population.\textsuperscript{895} The impairment need not prevent or severely restrict the individual in performing a major life activity.\textsuperscript{896}

The early Supreme Court’s §504 decisions \textit{Arline}\textsuperscript{897} and \textit{Davis}\textsuperscript{898} applied a broad definition of disability and thereafter, lower federal courts followed suit as demonstrated in \textit{Thomas}.\textsuperscript{899} Beginning with \textit{Sutton},\textsuperscript{900} the Supreme Court began to formulate ADA rulings using a narrow definition of disability. Congress, finding this restricted judicial interpretation did not align with their original intent, passed the ADAAA to make it easier for individuals to qualify as disabled under both the ADA and the Rehabilitation Act.\textsuperscript{901} While the ADAAA did not change the three-part disability definition, it did clarify the terms used to allow for broader application.\textsuperscript{902} The ADAAA added to the original list of major life activities,\textsuperscript{903} bodily functions,\textsuperscript{904} and conditions that are episodic or in remission.\textsuperscript{905} Impairments must be considered

\textsuperscript{897} \textit{Arline}, 480 U.S. at 273.
\textsuperscript{898} \textit{Davis}, 442 U.S. at 397.
\textsuperscript{899} \textit{Thomas v. Atascadero}, 662 F. Supp. at 379.
\textsuperscript{900} \textit{Sutton v. United Air lines}, 527 U. S. at 471.
\textsuperscript{901} Gilman, supra note 38 at 1197.
\textsuperscript{902} Finnemore, supra note 329, at 24.
\textsuperscript{905} Finnemore, supra note 329, at 24.
without regard to the ameliorative effects of mitigating measures. All of these changes resulted in more public school children qualifying as disabled under §504/Title II. School officials should be sensitive to this fact and carefully consider whether the child meets statutory definitional requirements.

In order for a child to qualify for a disability under the Individuals with Disabilities Education Act (IDEA), school officials need to conduct a nondiscriminatory evaluation of the child using “a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent” to determine whether the child is eligible to receive special education and related services. Additionally, a child must be evaluated in his or her native language using racially and culturally unbiased instruments. The IDEA sets forth thirteen specific disability categories for qualifying a child aged three through twenty-one for special education and related services.

Because the IDEA criteria are more stringent than §504 and Title II, a child who meets the IDEA eligibility requirements would also meet the eligibility requirements of §504 and Title II. On the other hand, a child who meets the eligibility requirements under §504 and Title II may not meet the IDEA’s eligibility requirements.

907 34 C.F.R. §300.304 (2012).
Understanding When an Animal Meets the Criteria for a §504/Title II Reasonable Accommodation

Definition of §504 and Title II Reasonable Accommodation

In order to determine whether a service animal meets the criteria to be considered a reasonable accommodation, school officials must have a clear understanding of what constitutes a reasonable accommodation. The definitions of a reasonable accommodation under §504 and Title II are essentially the same when applied to the public school setting.\footnote{Ligatti, supra note 35, at 148.} A reasonable accommodation is a common-sense alteration intended to enable persons with a disability to participate to the same extent as their nondisabled counterparts.\footnote{Three Formulations of the Nexus Requirement in Reasonable Accommodations Law, supra note 36, at 1393.} Not only should an accommodation be reasonable, it should also be necessary. According to the courts, an accommodation may be considered “necessary” when it is shown the individual challenged with the disability requires the requested accommodation.\footnote{Ligatti, supra note 35, at 149.}

Every accommodation request should be considered on an individual basis. An agency faced with deciding how to accommodate should ask the individual how he or she would like to be accommodated. Not all requests will be reasonable. If the accommodation is not reasonable, it is not the required solution. However, the government agency is still required to provide the person with a disability access and an opportunity to participate. Therefore, alternative reasonable accommodation options must be considered.\footnote{Milzarski & Norris, supra note 55, at 44.}
One option agency officials can use to decide if an accommodation is reasonable is to consider both the nature and severity of a disability. In *Martin*, the Supreme Court’s decision was based on the nature and severity of professional golfer, Casey Martin’s, individual disability. Martin’s requested accommodation, use of a golf cart during PGA tournaments, was weighed against the severity of his impairment. The Supreme Court found Martin’s requested modification was both reasonable and necessary.915

When investigating a parental request for a service dog to accompany their child to a Michigan public school, the OCR examined the nature of the requested accommodation. OCR officials reasoned by limiting the accommodation options, school officials inappropriately inhibited the student’s independence and thus discriminated against the student. The example the OCR used for comparison was requiring a student who requested a wheelchair to be carried around the school.916

**Fundamental Alteration**

Generally, there are two reasons an accommodation may not be reasonable. First, the requested accommodation would result in a fundamental alteration of the nature of either the services or program. The ADA’s language provides “no individual with a disability be excluded, denied services, segregated or otherwise treated differently… unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the… services… or would result in an undue burden.”917

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915 *PGA v. Martin*, 532 U.S. at 690.
916 *Jackson Cty.*, 59 IDELR 172.
School officials should exercise caution before asserting the presence of a service animal in the school setting would constitute a fundamental alteration. This current study identified four court cases wherein school officials argued the service animal would result in a fundamental alteration. The four cases were *Sullivan v. Vallejo City Unified School District*, 918 *C.C. v. Cypress School District*, 919 *A.S. v. Catawba County Board of Education*, 920 and *Cave v. East Meadow Union Free School District*. 921 In *Sullivan*, the court did not find the use of the service dog fundamentally altered the nature of the school program but rather afforded the student greater independence. 922 In *C.C.*, school officials also argued the service animal would fundamentally alter the nature of the school program. The court found the programming changes resulting from allowing the service dog to accompany the student were not unreasonable. The special education program the student attended was already designed to be highly flexible and tailored to meet the needs of individual students with disabilities. 923 In the investigation of Catawba County, the OCR stated the “fundamentally altered” language placed a heavy burden of proof on school officials to identify a credible reason to deny access. Catawba County school officials failed to meet this burden of proof; therefore, the OCR concluded the District failed to comply with §504 and Title II. 924

The *Cave* decision stands as an exception to this trend. Although the appellate panel ultimately ruled the parents’ failed to follow the IDEA’s administrative remedies, the panel also

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921 *Cave v. East Meadow*, 514 F.3d at 245.
924 *Catawba Cnty.*, 61 IDELR 234.
commented on the fundamental alterations to the student’s individual school program. The appellate panel concluded a service dog was unnecessary due to the negative impact of the needed changes to the student’s schedule when compared to the limited benefits derived from the service dog’s presence in school.\footnote{Mac Lagan, \textit{supra} note 61 at 753.} So even though the fundamental alteration argument carries a heavy burden of proof, when applied individually as stated by the Supreme Court stated in \textit{Martin}, a service animal accommodation may nonetheless constitute a fundamental alteration.

\textbf{Undue Burden}

The second reason an organization may determine an accommodation is not reasonable is if it presents an undue financial burden. In the 2014 “Dear Colleague” letter, the DOE and DOJ silenced the undue financial burden argument for public schools. The letter stated school officials must consider all of the school district’s resources and provide a written explanation of either the fundamental alteration or undue financial burden that would result if the accommodation were provided. However, the letter expressly cautioned, “In most cases, compliance would not result in undue financial or administrative burden.”\footnote{Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools, U.S. dept. of Justice and U.S. Dept. of Ed., Office fro civil Rights, Office of Special Ed. And Rehabilitative Services, \url{http://www2.ed.gov/about/officies/list/ocr/docs/dcl-faqs-effective-comunication-201411.pdf} (last accessed Nov. 2014).}

\textbf{Definition of a Service Animal Under §504 and Title II}

Once school officials have embraced the meaning of a reasonable accommodation under §504 and Title II, the next step is to understand the criteria for determining if an animal meets
the requisite criteria to be considered a service animal. The final DOJ regulations for service animals include the following definition.

Service animal means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual’s disability. Examples of work or tasks include, but are not limited to, [1] assisting individuals who are blind or have low vision with navigation and other tasks, [2] alerting individuals who are deaf or hard of hearing to the presence of people or sounds, [3] providing non-violent protection or rescue work, [4] pulling a wheelchair, [5] assisting an individual during a seizure, [6] alerting individuals to the presence of allergens, [7] retrieving items such as medicine or the telephone, [8] providing physical support and assistance with balance and stability to individuals with mobility disabilities, and [9] helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal’s presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition (numbering added).  

In addition to this definition, the DOJ further allows a miniature horse to be used as a service animal. This study did not find any published judicial decisions or agency rulings involving a miniature horse. This suggests service dogs are currently the more popular, but not only, choice.

In three of the eleven disputes involving service animals reviewed in this study, school officials argued the animal in question did not meet the criteria to be considered a service animal. These three complaints included C.C. v. Cypress School District, K.D. v. Villa Grove Community School District, and Bakersfield City School District OCR complaint. In the

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930 K.D. v. Villa Grove, 403 Ill. App. 3d at 1063.
931 Bakersfield (CA) City Sch. Dist., 50 IDELR 169.
first two cases, the courts ruled the dogs did meet the definition of a service animal. In K.D., the courts specifically addressed school officials’ complaints of the service dog’s misconduct by ruling the animal did not need to behave perfectly in order to be considered a service animal. In the Bakersfield complaint, although the OCR did not specifically rule on whether the dog was a service animal, the investigators chastised school officials for not conducting a specific inquiry as to whether the dog was appropriately trained as a service animal, or whether its function addressed the student’s disability needs. The OCR also criticized school officials’ failure to conduct a hearing regarding the dog’s status as a service animal prior to determining the dog posed a health and safety risk to students and staff.932

To recap the findings of these complaints, all three families provided school officials with documentation of the animal’s training and the work the animal was trained to perform. The OCR recommends school officials conduct a specific inquiry as to whether the dog has been appropriately trained. Finally, the animal’s behavior lapses should not be the sole reason for determining an animal is not a service animal.

To summarize, a service animal will typically be considered a reasonable accommodation for an otherwise qualified student with a disability. The animal needs to fit the definition of a service animal. However, the definitional standard is not especially rigorous. In addition, the fundamental alteration and undue financial arguments cannot be applied easily to the school setting. Each situation should be considered on a case-by-case basis.

932 Id.
Understanding When a Service Animal Meets the Criteria for Inclusion in a Child’s IEP

FAPE

School officials must understand the IDEA’s a free and appropriate education requirement.933 Once child is found eligible for services under the IDEA, school officials must provide a free and appropriate education (FAPE) as defined. The IDEA defines a FAPE as:

Special education and related services which (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, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program….934

The IDEA does not explicitly address service animals or whether public school officials must allow service animals in the classroom to provide a FAPE. This allows public school officials to exercise discretion in determining whether allowing a service dog is necessary for providing the child with a FAPE.935 The standard for including the use of a service animal in an IEP is relatively high. Therefore a service animal will rarely be found “necessary” to the child’s education.936 However, under the IDEA, school officials are required to consider whether the service dog is a necessary part of the student’s IEP in order for the child to receive a FAPE.

934 Id. at §602 (a)(18) (1975).
935 Waterlander, supra note 147 at 362.
936 Id.
Unlike §504 or Title II, a public school may have an obligation to accommodate an emotional support animal under the IDEA if the child has a severe emotional or mental disability and the animal’s presence is necessary for the child to receive a FAPE. 937

An example of the importance of considering whether the service dog is necessary is the 2008 Bakersfield OCR Complaint, wherein the OCR observed school official should have considered whether the dog’s presence was necessary for the student to receive a FAPE under the IDEA. 938 In addition, the OCR noted the factors school officials should consider range from how the dog would assist the student, impact of the animal’s presence in the school, and how the dog would alter the student’s placement. 939 In the Jackson County Michigan complaint, the OCR found the IEP team 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 set forth in the IEP. 940

The Administrative Law Judge (ALJ) in the Bakersfield Complaint determined the evidence supported the school district’s position that the dog was not needed for the student to receive a FAPE. 941 The ALJ’s determination was based upon a lack of persuasive empirical evidence a service dog could help with the student’s education, and the IEP team’s conclusion the service dog was not necessary. 942 Additionally, the ALJ found a lack of evidence indicating the use of the service dog as opposed to the one-to-one aide would have allowed the student to be educated in the least restrictive environment. 943

937 Id. at 175.
938 Bakersfield (CA) City Sch. Dist., 50 IDELR 169.
939 Id.
940 Jackson Cty., 59 IDELR 172.
941 Bakersfield City Sch. Dist., 51 IDELR at 740.
942 Bakersfield City Sch. Dist., 51 IDELR at 744.
943 Id.
In the E.F. v. Napoleon Community Schools OCR Complaint, the IEP team met and considered whether the service animal was necessary to provide the student with a FAPE. The IEP team concluded the student was successful in the school without the service animal and all of her needs were being met by the program and services in place. The team further stated the service animal would not be beneficial to the student and therefore concluded the student was not entitled to utilize the service animal at school because an aide performed the tasks the service dog would have performed.\footnote{Jackson Cty., 59 IDELR 172.} This is the type of consideration an IEP team needs to conduct in order to determine whether the service animal is necessary to provide FAPE.

**Related Service**

One of the ways a service animal may be found to be necessary under the IDEA is as a related service\footnote{Bakersfield (CA) City Sch. Dist., 50 IDELR 169.}. In 1997, the IDEA defined a related service as

> Transportation, and such developmental, corrective, and other supportive services (including speech-language pathology, occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, (except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education.\footnote{Individuals with Disabilities Education Act, 20 U.S.C. §1401 (22) (1997).}

School officials often rely on the actual list of related services and argue Congress did not intend there to be additional services because they are not included in the list. Two cases directly addressed this argument, \textit{Tatro}\footnote{Tatro, 468 U.S. at 883.} and \textit{Cedar Rapids}.\footnote{Cedar Rapids v. Garret F., 526 U.S. at 66.}
Prior to Tatro, public school employees were not required to provide nursing service a child with a medical condition requiring Clean Intermittent Catherization (CIC). However, in Tatro the Supreme Court established a bright line test and ruled CIC services qualified as a related service. In determining if CIC qualified as a related service, the Supreme Court asked two questions. First was CIC was considered a “supportive service… required to assist a handicapped child benefit from special education?” On this question the Court agreed with the appellate panel. The student was not able to attend school and benefit from special education without the availability of CIC; therefore, this service met the Act’s definition of supportive services.

The Supreme Court used this bright line test and elevated nursing services to the next level with Cedar Rapids. In this case, the student required assistance catheterizing his bladder, suctioning his tracheotomy tube, shifting to a reclining position for five minutes every hour, manually pumping air into his tracheotomy tube while his ventilator was checked, and assessing his ventilator for proper functioning. The Court ruled one-to-one nursing was a related service. In addition to finding a school nurse or other trained personnel could perform the student’s needed services, the Court also noted the student’s requirement of one-to-one nursing was necessary because death was the potential consequence if this level of support was not provided. The majority opinion reasoned “the district must fund such ‘related services’ in order to help guarantee that students like Garret are integrated into the public schools.”

949 Tatro, 468 U.S. at 883.
950 Tatro, 468 U.S. at 890.
951 Cedar Rapids v. Garret F., 526 U.S. at 69.
952 Id. at 75.
953 Id. at 72.
Undue Burden Under the IDEA

There is no undue burden argument under the IDEA. However, in *Cedar Rapids*, school officials argued both the nature and extent of the student’s disability required the employment of additional personnel and this constituted an undue financial burden. While acknowledging school officials’ financial concerns, the Court pointed out the IDEA guaranteed a public education to qualified students without regard to cost.\(^\text{954}\)

This study found no judicial opinions or OCR complaints ruling a service animal was necessary in order to provide a FAPE. This does not mean the school officials should not consider whether a service animal is necessary. Consider the OCR’s recommended topics of discussion as part of this determination. These topics include, but are not limited to: how the service dog would assist the student with physical, emotional, and adaptive safety; impact of the service animal’s presence in the school; and how the service animal would alter the student’s placement. Finally, *Tatro* and *Cedar Rapids* are examples of how related services and supplementary supports have been judicially interpreted in order to meet individual student needs. There is no evidence suggesting this trend will not continue. However, once an IEP team determines the service animal is necessary for a child to receive a FAPE, school officials would be agreeing the public school district would own the service animal in the same manner it owns other equipment students use.

As a final caution, a student who qualifies for IDEA services is also qualified for accommodations under §504/Title II. The DOJ and DOE “Dear Colleague” letter noted if special education and related services provided under the IDEA are not sufficient to ensure the student

\(^{954}\) *Id.* at 77.
with a disability has access to and is able to participate in the school’s program at a level commensurate with non-disabled students, the student with disabilities may receive more service and aids under Title II. Therefore, while it is important to formally consider the FAPE requirement under the IDEA when determining whether a parental request for a child to attend school accompanied by a service animal will be honored, §504 and Title II aids and accommodations may exceed the IDEA’s requirements.

Understanding the Obligation for Providing a Service Animal Handler

Pursuant to DOJ guidelines, a service animal must be under the control of a handler and wear a harness, leash, or other tether. However, if the handler’s disability prevents use of these items or the tethering keeps the service animal from performing its work, the service animal must be under a handler’s control either though voice, signals or other method. The handler’s role is to provide guidance thereby enabling the service dog to perform the tasks for which it was trained. These guidelines further state, “The facility’s employees are not responsible for either the care or supervision of the service animal.” The guidelines refer to any public facility and were not written specifically for public schools. If school officials relied solely on these DOJ guidelines, a service animal would be allowed to attend school with a student only if the child could act as a handler or if the parents provide an outside handler. As noted in the Chapter One

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957 Id. at § 35.136 (e).
Fox News example, Arkansas school officials expected the parents to provide the handler because the child was too young to control the animal. On the surface, it appeared Arkansas school officials were following the DOJ service animal guidelines. However, schools are unique environments and differ from other public facilities. In addition to reviewing DOJ guidelines, school officials should consider both judicial decisions and OCR recommendations in developing public school policies and procedures regarding a service animal’s handler.

First, if the student is able act as the service animal handler, then school officials do not have to consider whether they need to provide an additional handler. However, if the child is not able to act as a handler, the DOJ still requires the service animal be under control of a handler.

Courts have repeatedly ruled what is considered reasonable should be based upon the individual situation. For example, the Supreme Court ruled Casey Martin could participate in PGA Tour events with the unusual accommodation of the golf cart. This decision was based upon the nature and severity of Martin’s disability. The Supreme Court pointed out an individualized inquiry is necessary to determine if the nature or severity of a particular person’s disability would make an accommodation reasonable. School officials should apply this standard when addressing questions related to a service animal’s handler. For example, neither a young child nor a child challenged with severe disability may be able to act as a service dog’s handler. Conducting an individual inquiry to determine whether school officials should provide the handler aligns with Martin.

Much like the service animal, the handler could be considered a reasonable accommodation. However, if school officials are reluctant to view the handler as an

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958 *PGA v. Martin*, 532 U.S. at 688.
accommodation, they could consider the handler an auxiliary aid or service under §504 and Title II. The DOJ and DOE 2014 Dear Colleague letter stated, “In some instances, in order to comply with Title II, a school may have to provide the student with auxiliary aids and services that are not required under the IDEA.” 959 In addition, public schools cannot charge parents for an auxiliary aid or service school officials are obligated to provide students. 960

School officials may be tempted to use the §504/Title II undue burden defense when resisting a demand to assume the financial responsibility for a service animal’s handler. Once again, the Dear Colleague letter has made this a moot point. The school official must consider all of the school district’s resources and provide a written explanation of the fundamental alteration or undue financial burden that would result if the accommodation were provided. The DOE and DOJ bluntly stated, “In most cases, compliance would not result in undue financial or administrative burden.” 961

A total of four service animal cases and OCR investigations cited in this study addressed the handler topic either explicitly or within the context of the fact pattern.

961 Id.
In the Illinois case of *K.D.*, parents requested school officials train at least one primary staff member and one backup staff member to serve as the service dog handler. The Circuit Court of Douglas County found the parental request exceeded the scope of the Illinois statute. However, during the trial, witnesses testified the speech teacher, one-to-one aide, the head of special education, and some additional aides were trained to serve as the service dog’s handler during the school day.

In Michigan OCR investigation, the child’s parent was trained as the handler because the child was not physically strong enough to handle the service animal. The student was responsible for verbally commanding the animal, but her parent physically managed the dog. School officials were able to observe the parent serving as the handler during a trial period and noted numerous times when the parent caused a disruption by talking on her phone. The OCR investigator observed disruption to the school day is always a risk when school officials required the parents to provide a third party handler attend school with the service dog.

In the OCR investigation involving a New Hampshire district, school officials agreed to hire an outside trainer to train an aide to serve as the service dog’s handler during the school day. If the trainer determined the dog was unable to function in the school setting, the parents would be allowed to pay for additional training or provide a handler at their own expense if they wished to continue to have the dog accompany their child to school.

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963 *Id.*
964 *Id.* at 1065.
965 *Jackson Cty.*, 59 IDELR 172.
966 *Id.*
967 *Sch. Admin. Unit # 23 (NH)*, 62 IDELR 65.
968 *Id.*
Other information regarding service handlers notes the limited scope of the handler’s work. In addition to the small number of commands the handler needs to be responsible for, the service animal generally does not need to relieve itself during the school day. In *C.C.* the court noted no school with an Autism Service Dogs of America (ASDA) animal needed to hire additional staff to take care of the dog. In the Illinois case of K.D., even though the service dog knew up to thirty commands, a handler needed to know only five commands to effectively manage the service animal in the school setting.

Now consider the handler topic through an IDEA lens. As stated earlier, the IEP team needs to first meet and determine whether or not the service animal is necessary for the child to receive a FAPE. In cases where the IEP team makes the determination the service animal is necessary and the child is unable to serve as the handler, then it stands to reason the handler would also need to be added to the IEP.

If the IDEA-eligible child requested his service animal accompany him to public school as a reasonable accommodation under §504 or Title II, school officials could still opt to list the service animal handler as a related service on the child’s IEP. If the school exercises this option, then the responsibility of paying for the handler automatically falls to the school district as a component of providing a FAPE. School officials and their school attorney should weigh the pros and cons of adding the handler to the IEP.

To summarize, there are three different scenarios involving the topic of service animal handlers. First, in cases where the child is able to serve as the service animal handler, the topic is

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969 Waterlander, supra note 147 at 384-85.
971 *Id.* at *11-12.
not likely to come up. Second, in cases where the student already has a one-to-one aide or a good amount of adult support, school officials may just choose to have the aide or school employee trained to serve as the service dog handler. Finally, school officials will find the largest burden for providing a handler when the student currently has no support personnel. For example, consider a young child with diabetes or a seizure disorder. In these cases, school officials need to decide who will serve as the handler. Despite the DOJ guidelines stating the employees of the facility are not required to care for the service dog, school officials need to apply an individual inquiry to determine if the handler would be necessary as part of the child’s IEP or §504 plan based on the circumstances. When making this determination, school officials should consider the amount of work the handler would need to do and the impact a third party adult might have on the school environment. One item school officials cannot consider is the financial burden of providing the handler.

Parental Requirement to Exhaust Administrative Remedies Before Filing a Complaint

In three of the five\textsuperscript{973} federal cases involving service animal attending a public school, the courts ruled parents had failed to exhaust administrative remedies before filing their complaint with federal district court. \textit{Cave v. East Meadow Union Free School District} \textsuperscript{974} \textit{A.S. v. Catawba County Board of Education},\textsuperscript{975}

\textsuperscript{973} There was a sixth case, M.T. and R.J. v. Evansville Vanderburgh School. When this dissertation was finished, the court had only ruled on the School District’s motion to dismiss and had not heard the facts surrounding the case.
\textsuperscript{974} \textit{Cave v. East Meadow}, 480 F.Supp. 2d at 610.
\textsuperscript{975} \textit{A.S. v. Catawba}, 2011 U.S. Dist. Lexis at *1
and *E.F. v. Napoleon Community Schools*,976 highlight the following issues.

First, the students in each of these three cases were eligible for IDEA services even though the parental complaints alleged §504/Title II discrimination. Therefore, it is difficult to determine whether the courts might have decided differently if the students were not covered by all three statutes. Second, the outcome of these cases suggests parents are either unaware of the need to exhaust administrative remedies in §504 complaints or trying to circumvent the exhaustion requirement. Parents might try to circumvent the administrative remedies because monetary damages can be awarded in civil cases. However, since the IDEA does not mention service animals, parents may also mistakenly believe alleging §504 discrimination does not trigger the need to exhaust administrative remedies.

These three rulings suggest the courts are not interested in whether the complaint is filed pursuant the IDEA or §504. In *E.F. v. Napoleon Community Schools*977 the district court noted the IDEA’s exhaustion requirement was not limited to only IDEA claims. Thus when parents sought to enforce rights arising from the denial of a FAPE, it did not matter whether the denial occurred under the IDEA or §504. In *Napoleon*, the parents argued school officials’ obligation to satisfy §504 and Title II was entirely separate from IDEA’s obligation to provide a FAPE. However, the court believed the service dog’s attendance would affect the IEP. Therefore, the court ruled the parental claim required an exhaustion of administrative remedies.978

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977 *Id.*
978 *Id.*
Section 504 does not expressly address procedural safeguards such as impartial hearings. However, the §504 regulations include a procedural safeguards provision requiring recipients of federal financial funding to provide an impartial hearing to aggrieved parties. The §504 regulations do not prevent an IDEA hearing officer from also deciding §504 issues. Independent IDEA hearing officers sometimes rule on a §504 claim intertwined with or incidental to an IDEA claim for students who are covered by both statutes. In the Colorado Springs OCR complaint, the OCR specifically noted if the parent disputed the special education team’s decision regarding whether the service animal should be included in the child’s IEP or §504 plan, the parent would be able to pursue IDEA’s due process remedy.

There are two possible reasons why the three federal courts eschewed making a decision about the service animal and instead relied on the parental failure to exhaust administrative remedies. First, the courts have an ongoing desire to deny parents the opportunity to circumvent exhausting administrative remedies before seeking relief in civil court. On the other hand, the courts may be reticent to make decisions regarding service animals attending schools. School officials in these cases discussed the difficulties they faced when allowing an animal to regularly attend a public school. For example, student schedules change, special education placement changes and employee animal allergies all caused school officials to question whether the service dog benefits outweighed these concerns.

In Cave, even though the court ruled the parents failed to the exhaust administrative remedies; the court nonetheless proffered an opinion on whether the service animal should be

979 Zirkel, supra note 595, at 141.
980 Id. at 142.
981 Id. at 149.
982 Colorado Springs (CO) Sch. Dist., 56 IDELR 52.
allowed to attend school with the student. The district court observed school officials were not obliged to provide all parentally requested accommodations.\textsuperscript{983} The court further noted the additional benefit afforded by the service dog was not substantial, particularly in light of the resulting disadvantages attendant to allowing the service dog, e.g., allergies of others and a modification of the student’s schedule.\textsuperscript{984} The court further took notice the parents failed to prove their child had been discriminated against based on his disability.\textsuperscript{985}

In summary, the exhaustion of administrative remedies is an important issue for both parents and school officials. This importance is not just related to service animals but rather applies to any dispute involving an IDEA and/or §504/Title II complaint. School officials must make parents aware of the requirement to exhaust administrative remedies when initiating a §504 claim in the same manner required when filing an IDEA complaint. Parents should not file a civil case without first exhausting administrative remedies, particularly when their child is IDEA-eligible and the complaint alleges §504/Title II discrimination.

\textsuperscript{983} Cave v. East Meadow, 480 F. Supp. 2d at 641.
\textsuperscript{984} Id.
\textsuperscript{985} Id. at 642.
CHAPTER FOUR:
RECOMMENDATIONS

The preceding chapters portend the importance of school officials being prepared to respond when parents of a child with a disability request access for a service animal to their child’s public school. Even though the final decision regarding the requested access must be based on individual circumstances, the decision-making process will be easier if school officials have adopted a policy and procedures to guide this process. The first section of this chapter sets forth recommendations for what information should be included in these school district policies and procedures. The chapter’s final section cautions school officials to two potential pitfalls to avoid when formulating a response to a parental request for a service animal to accompany their child to school.

What to Include in Policy and Procedures for Service Animals

1. Provide a definition of disability based on both the IDEA and §504/Title II.
2. Provide a definition and description of a service animal found in the DOJ regulations. Also, include a description of what is not a service animal.
3. Identify examples from the DOJ regulations of the type of work or tasks the animal must be trained to perform. Include a listing of tasks not considered to be service animal work.
4. Explain the service animal must be under the control of a handler in some form either through a harness/tether, or through voice/signal.

5. List times when a service animal can be removed from the school setting. These conditions include the service animal being out of control of the handler and the handler does not take effective control of the animal, the animal is not housebroken, or the animal’s presence fundamentally alters the nature of the public school services, programs, or activities.

6. Identify the process parents should use when requesting a service animal to accompanying their child to school. This process will differ from a situation where for a person requesting to bring a service animal to an individual event, such as an athletic event, as opposed to a parental request for a service animal to accompany their child to school on a daily basis. Both processes should be identified.

7. The process for a parent to request daily access for their child’s service animal should identify how and to whom the request is made.

8. The process should require the parent to identify the following information:
   a. What work or tasks the animal has been trained to perform to support the person with a disability, and
   b. Specifically identify the service animal type.

9. The following information should also be required in order for school officials to ensure the health and safety of others:
   a. Documentation of vaccinations mandated by public safety guidelines.
   b. Documentation of the service animal’s training.
10. Animal owners must be informed of the ongoing requirements for having the animal at school. These are also related to the health and safety of others and require the owner’s signature of agreement.

   a. Owners are expected to keep the service animal clean and groomed, e.g., including being free of ticks and fleas and

   b. Owners of service animal should be informed they are liable for any harm or injury caused by the animal to other students, staff, visitors, and/or property.

11. Include information about who will make the decision regarding allowing the service animal access. If student is both IDEA-eligible in addition to §504/Title II -eligible, ideally both the IEP team and §504 team should make the determination. Consider whether the addition of the service animal will require any changes to the student’s educational program.

12. If school officials deny service animal access to the public school, the decision should be documented and provided to the parents along with information regarding both the IDEA and §504 process for challenging the decision.

13. If school officials allow the service animal access to the public school, the decision should be documented and include any adjustments to the child’s placement and schedule to accommodate the service animal.

14. Train staff and students regarding animal etiquette. If the school district is providing the handler, determine who is responsible for that training.

15. Consult with the school board’s attorney before implementing any policy or procedure.
Potential Pitfalls

Two potential pitfalls to which school leaders should be mindful when formulating a response to a parental request for a service animal to accompany their child to school are the changing legal landscape and narrow-minded view within the school community.

Even though school officials have identified allergies and/or health concerns of both staff and other students as a rationale for denying the service animal access, the courts have not yet addressed this concern. This is likely to change. The incidence of allergies and the accompanying health implications is rising. It is only a matter of time before either a student or an employee with a dog allergy asks the courts to rule on whether a parental request for a service animal to regularly accompany their child to school takes precedence over the right of the individual with the dog allergy to attend school without being exposed to the dog allergen.

It is important for school officials to stay abreast with the case law as parental complaints over service animal access to the public schools continues to be litigated. For example, a federal district court opinion issued after this dissertation defense was scheduled but prior to the actual defense date found school officials discriminated against a six-year-old boy for failing to provide the child with assistance in caring for his service animal at school. School officials denied the request for assistance arguing instead, the parents were expected to provide a handler. The judge compared the assistance needed for the service animal to the assistance school officials were obligated to provide a student with an insulin pump. Additionally, the judge noted school
officials could not require the animal to have vaccinations beyond what are required nor were the parents required to obtain additional liability insurance.\footnote{Alboniga v. Sch. Bd. of Broward Co., Fla., 115 LRP 5982 (S.D. Fla. 2015).}

As a microcosm of our society, public schools have allowed myths and fears to play a significant role in determining which individuals are welcome. Unfortunately, courts and legislation have had to intervene to force public school doors to be opened for students considered to be different. In 1954, the Supreme Court ruled in\footnote{Brown v. Bd. of Educ., 347 U.S. at 483.} Brown\footnote{Brown v. Bd. of Educ.} those doors needed to open for black students seeking to attend traditionally white schools. Many people were convinced this would not work.

Prior to the\footnote{Pa. Ass’n for Retarded Children v. Commonwealth of Pa., 334 F. Supp. at 1257.} PARC\footnote{Pa. Ass’n for Retarded Children v. Commonwealth of Pa.} and\footnote{Mills v. Bd. of Educ., 348 F. Supp. at 866.} Mills\footnote{Mills v. Bd. of Educ.} decisions, public schools did not universally allow students with cognitive disabilities to attend school. Society’s myths and fears convinced school officials these children were so different they could not be educated. Eventually, Congress stepped in and passed the Rehabilitation Act, the ADA, and the IDEA to protect children with disabilities. Even with these laws, society’s myths and fears have continued to prompt questions over who should be protected and whether they should be allowed full participation in public schools.

In\footnote{Arline, 480 U.S. at 273.} Arline\footnote{Arline}, the Supreme Court acknowledged society’s myths and fears about disability and disease by observing these could be as handicapping to an individual as the impairment’s physical limitations. At the core of school officials’ decision to fire Ms. Arline from her teaching position was a fear her tuberculosis was contagious. Writing for the majority, Supreme Court
Justice Brennan pointed out few aspects of a handicap give rise to the same level of public fear as contagion.\footnote{Id. at 276.}

The same was true for little Ryan Thomas. In 1986, when society’s fears about contracting AIDS reached a zenith, Ryan’s parents filed a suit against school officials for excluding their son Ryan based on his disability as an individual who was HIV positive.\footnote{Thomas v. Atascadero, 662 F. Supp. at 377.} The district court ruled school officials were to allow Ryan to attend kindergarten with his peers because there was not evidence he posed a risk of transmitting the AIDS virus to classmates or teachers.\footnote{Id. at 382.} The court once again stepped in and ruled the schoolhouse doors were to open to Ryan and other children like him.

Even after public schools were educating most students with disabilities, there were still children viewed as ineligible for all the services they needed. Two cases were \textit{Tatro}\footnote{Irving Indep. Sch. Dist. v. Tatro, 468 U.S. at 883.} and \textit{Cedar Rapids}\footnote{Cedar Rapids v. Garret F., 526 U.S. at 66.}. Prior to \textit{Tatro}, public school officials were not required to provide a child with nontraditional medical services. However, the Supreme Court’s \textit{Tatro} decision established a bright line test for determining the services qualifying as a related service. This bright line test for nursing services was moved to the next level by the \textit{Cedar Rapids} decision, wherein the Court viewed one-to-one nursing as a related service as well.

The social model of disability regards the views of society as a contributing factor to “disabling” a person with impairment much the same way other marginalized members of
society have been limited by views on race or ethnicity.\footnote{996} The negative and exclusionary attitudes of others may potentially bar a person challenged by disabilities from attempting tasks he is able to perform.\footnote{997} The narrow views of society can also impact the acceptance of service animals. For example, during workshops for school leaders, attorneys representing public schools are often unable to resist casting issues related to service animal access to public school in a humorous light. Unfortunately, such characterizations tend to marginalize rather than illuminate the importance of the issue thereby prejudicing public school officials against service animals who may, in many cases, actually be of great support to some students.

Public schools are once again being asked to open the schoolhouse doors a little wider, not to students with disabilities, but to the service animals who help and support them. There are true issues to be addressed when considering a parental request to allow a service animal access to public schools; however, school leaders should be mindful not to let society’s myths and fears be one of those issues.

\footnote{996} Weber, \textit{supra} 127, at 438.  
\footnote{997} \textit{Id.}