AUTISM SERVICE DOGS IN THE CLASSROOM: THE TENSION BETWEEN THE IDEA AND THE ADA AND WHY THE ADA SHOULD COME OUT ON TOP

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INTRODUCTION

On November 3, 2010, Leslie Griffin was at work when she received the phone call she had been dreading ever since her son Sam had started third grade at Woodley Elementary in September—Sam was missing. After an altercation with a classmate on the playground, Sam took off, outrunning the teachers who chased after him. The last time anyone had seen Sam, he was running into a wooded area near the school’s playground. Leslie tried to remain calm as she received the news, but she was extremely frustrated with the school because she knew this situation could have been avoided if the school had allowed Sam to bring his service dog to school with him.

Sam and his service dog, Bear, had been working together for two years and Bear was trained to anchor Sam when he tried to run away. Sam was diagnosed with Autism Spectrum Disorder (ASD) when he was three years old and he bolted quite often prior to the introduction of Bear into his life. At the beginning of the school year, the principal of Woodley Elementary had denied Leslie’s request to allow Bear to accompany Sam while he was at school. The principal reassured Leslie that Sam would be under sufficient supervision at all times, and that

the dog would be an unnecessary and distracting addition to the school. Furthermore, the principal opined that Bear would not provide benefits to Sam that his teachers could not adequately provide him. Leslie appealed the principal’s decision to the school district’s board of directors, who sided with the principal. Leslie then appealed to the Office of Administrative Hearings (OAH) for the State of California. Leslie was waiting to hear back regarding Sam’s case with the OAH at the time he went missing.

After almost four hours, a police officer found Sam sitting on a curb outside a 7-Eleven convenience store over two miles from Woodley Elementary. Sam allegedly crossed a highway and three other busy roads to get there. A local attorney later heard about the Griffin family and offered to take on Sam’s case pro bono. Leslie filed for a permanent injunction against Woodley Elementary in federal court, barring any refusal of Sam’s access to school when accompanied by Bear. After months of hearing testimony, the federal court remanded the case to the OAH because Leslie failed to meet a requirement under the IDEA: exhaustion of all administrative remedies prior to filing suit in federal court.

This hypothetical serves as an example of the critical role a service dog plays in the life of a child with ASD. The use of an ASD service dogs is protected by both the Americans with Disabilities Act (ADA) and the Individuals with Disabilities Education Act (IDEA). Under current law, however, lawsuits involving requests to bring ASD service dogs to schools have often been dismissed for failure to exhaust administrative remedies, as is required for claims brought under the IDEA.

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2 Id.
This Comment argues that a dog trained to tether a child with ASD is an issue under the ADA rather than the IDEA. Requiring the IDEA’s exhaustion of administrative remedies is futile and serves no judicial purpose because the ADA offers sufficient protection for both the child and the school district. A parent should not have to prove these dogs serve an educational purpose and, therefore, required as part of a child’s Individualized Education Plan (IEP) under the IDEA. Instead, a parent should be able to bring a claim under the ADA because denial of these dogs is a barrier to access in violation of the ADA. This Comment begins in Part I by providing an overview of ASD and relevant federal legislation, namely the ADA and the IDEA. Part II of this Comment analyzes prominent case law involving service dogs in schools. Part III of this Comment argues that denial of ASD dogs to schools should be analyzed under the ADA because the ADA promotes fairness, justice, and efficiency for both children and school districts in this context better than the IDEA.

I. BACKGROUND

A. Overview of ASD

ASD involves “core abnormalities in social cognition and language, both of which are central to what makes us human.” Children with ASD have a difficult time with communication, social interaction, and repetitive behaviors. A child with ASD is often indifferent and incapable of understanding the thoughts, feelings, and needs of others, which make it difficult for him to form emotional bonds with others. Common repetitive restrictive behaviors include rocking or banging his head, or rigidly following patterns in his everyday

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A child with ASD is uncomfortable with social contact and may avoid it by throwing a tantrum or running away from people who attempt to interact with him. Bolting, elopement, and wandering are common among children with ASD.

Preliminary results from a study conducted by the Interactive Autism Network, the largest online research project in the United States, found that roughly half of parents of children with ASD report incidences of wandering or elopement. Of those children who went missing, nearly half went missing long enough to cause the parents to have a significant concern about safety. “More than one third of [those] children who elope are never or rarely able to communicate [his] name, address, or phone number verbally or by writing/typing.” The top five parent-reported motivations for bolting, wandering, and elopement in the study were “(1) Enjoys exploring (54%); (2) Heads for a favorite place (36%); (3) Escapes demands/anxieties (33%); (4) Pursues special topic (31%); and (5) Escapes sensory discomfort (27%).” Two out of three parents who reported missing children also reported that the child had a close call with traffic during the time he was missing, and thirty-two percent reported a close call with a possible drowning.

The Centers for Disease Control estimate that one out of every 110 children in America has ASD. It is believed that ASD “affects more American children than childhood cancer,

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8 Id.
9 Id.
11 Id.
12 Id.
13 Id.
14 Id.
15 Id.
diabetes, and AIDS combined.” One study, published in 2011, showed that the prevalence of ASD has multiplied by approximately ten times over the past forty years. There is some controversy surrounding the increased numbers of ASD, with some scientists attributing the drastic change to increased awareness and diagnoses rather than actual increase in children affected. Regardless of who is correct on this issue, it is still true that ASD is one of the most common childhood disorders facing society today. As a result, new methods to help children with ASD have developed over the years, including the use of a service dogs specifically trained to assist children with ASD.

B. Service Dogs and the Role Served in the Life of a Child with ASD

The ADA defines a service dog as: “any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.” The ADA states that “[t]he work or tasks performed by a service animal must be directly related to the individual's disability. Examples of work or tasks include . . . helping persons with . . . neurological disabilities by preventing or interrupting impulsive or destructive behaviors.” However, the ADA does not protect dogs that solely provide “emotional support, well-being, comfort, or companionship.”

17 Id.
20 Id.
23 Id.
The most important function of a service dog who accompanies a child with ASD is to improve the safety and security of the child at home and in public. The dog is often tethered to the child with a leash and belt system and is “trained to physically prevent the child from bolting into the street or away from [the adult responsible for him]”. “[T]he dog inhibits the child from bolting by physically anchoring the child. This delay gives the [adult] time to react to the situation and catch up with the child.” Secondary benefits of introducing a service dog into the life of a child with ASD include decreased anxiety, fewer tantrums or meltdowns, and dissipated anger.

C. The Americans with Disabilities Act

Title II of the ADA states: “No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” Public schools are considered public entities under the ADA, and thus, are subject to Title II regulations. A child with ASD is protected under the ADA because ASD is an impairment that substantially limits one or more major life activities. The ADA further provides that public entities “shall make reasonable modifications in policies, practices, or procedures when the

26 Id. at 49.
27 Id. at 49.
29 Id. at 1645.
33 Id.
modifications are necessary to avoid discrimination on the basis of disability . . . “34 One type of reasonable modification is a service animal.35

The ADA further provides: “no qualified individual . . . shall, because a public entity’s facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.”36 Known as the program accessibility standard, this requires that the program, when viewed in its entirety, is accessible to persons with disabilities.37 The public entity must remove barriers to access unless it can prove that doing so would cause undue financial and administrative burdens or would fundamentally alter the nature of its program.38 Furthermore, the ADA provides that an individual with a disability “shall be permitted to be accompanied by [his] service animal in all areas of a public entity’s facilities where members of the public, participants in services, programs or activities . . . are allowed to go.”39 The Department of Justice specifically explains in the 2010 Revised ADA Requirements that:

Allergies and fear of dogs are not valid reasons for denying access or refusing service to people using service animals. 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, for example, in a school . . . both should be accommodated by assigning [each], if possible, to different locations within the room or different rooms in the facility.40

35 Id.
Under Title II of the ADA, a public entity is allowed to make two inquiries to determine whether the dog qualifies as a service dog: (1) whether the dog is required because of a disability; and (2) what work or task the dog has been trained to perform.\textsuperscript{41} The public entity, however, may not make these inquiries “when it is readily apparent that the dog is trained to do work or perform tasks for an individual with a disability.”\textsuperscript{42} Additionally, a public entity may ask that a service dog be removed if it is out of control and the handler does not take effective action to control it, or if the dog is not housebroken.\textsuperscript{43}

A public entity does not have “to permit an individual to participate in or benefit from the service, programs, or activities of that public entity when the individual poses a direct threat to the health or safety of others.”\textsuperscript{44} To determine whether there is a direct threat, the public entity must make an individualized assessment to determine the nature, duration, and severity of the risk, the probability that the injury will occur, and whether reasonable policies, practices, or procedures will mitigate the risk.\textsuperscript{45} School officials may believe an ASD dog could be a direct threat to the health and safety of the child, other children, or teachers and faculty at the school.

D. \textit{Individuals with Disabilities Education Act}

The IDEA was enacted in response to Congressional findings that stated: “improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.”\textsuperscript{46} One express purpose of the IDEA is to “ensure that all children with disabilities have available to them a free appropriate public education that

\textsuperscript{41} 28 C.F.R. § 35.136(f) (2011).
\textsuperscript{42} Id.
\textsuperscript{43} 28 C.F.R. § 35.136(b) (2011).
\textsuperscript{44} 28 C.F.R. § 35.139(a) (2011).
\textsuperscript{45} 28 C.F.R. § 35.139(b) (2011).
emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.”

Parents have requested the use of a service dog as part of the child’s IEP to ensure the child receives a Free Appropriate Public Education (FAPE). However, these requests have often been dismissed by courts based on a failure by the parents to exhaust administrative remedies prior to filing a claim in a federal court.

Under the IDEA, if parents and the school district disagree about the child’s educational program or services received, a parent or a public agency may file a due process complaint. The complaint “must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint.” Exhaustion of administrative remedies is required under the IDEA before a dispute may be brought in a civil court. How onerous this process is depends on whether a state is a one-tier or two-tier state. In one-tier states, parties who have been unsuccessful in reaching an agreement at the local educational agency level may move the dispute into federal court. In two-tier states, the parties must first attempt to resolve the dispute through an impartial hearing conducted by the local educational agency or school district. After a decision is reached at that level, the unsuccessful party must seek a determination from the

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49 Id.
The main difference between one-tier and two-tier states is that two-tier states require review at a state level before filing in federal court. The purpose of this exhaustion requirement is to provide access to remedial relief and resolve disputes by parties who are closer to the problem before resorting to the courts. The exhaustion rule “permit[s] the exercise of agency discretion and expertise . . . allow[s] the full development of technical issues and a factual record prior to court review . . . [and] avoid[s] unnecessary judicial decisions by giving the agency the first opportunity to correct any error.”

During a dispute, the IEP of the child remains at the then-current educational placement unless all involved parties agree otherwise. The Supreme Court has directed that the exhaustion rule should not be applied inflexibly, and it is, therefore, not required if resorting to administrative remedies would be futile or inadequate. The futility exception applies in situations where exhaustion would be futile because administrative remedies would not provide adequate relief or because the agency was acting in violation of the law.

II. ANALYSIS

Shortly after the ADA was enacted in 1990, public schools showed resistance to allowing service dogs into classrooms. Although dogs used by blind children are now readily allowed

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57 Id. (citing Ass’n for Retarded Citizens of Alabama, Inc. v. Teague, 830 F.2d 158, 160 (11th Cir. 1987).
58 Ass’n for Retarded Citizens of Alabama, Inc. v. Teague, 830 F.2d 158, 161 (11th Cir. 1987).
61 Ass’n for Retarded Citizens of Alabama, Inc. v. Teague, 830 F.2d 158, 160 (11th Cir. 1987).
63 Id. at 159.
into schools, service dogs for children with ASD are now facing similar heightened resistance. The Department of Justice and some courts seem to be taking action to ensure access to service dogs for children with ASD. Complicating matters for the children with ASD even further, courts have held that administrative remedies under the IDEA must be exhausted prior to filing a claim in federal court. The exception to this rule is futility or inadequacy of administrative remedies.

Although the courts have required exhaustion of administrative remedies for claims involving service dogs in a school, this has not been required by the court outside the school setting. Furthermore, courts who have reached the question have held that a dog that is trained to tether is individually or specifically trained, and, therefore, qualified as a service dog. This section explores the early resistance to service dogs following enactment of the ADA and the response of the courts and legislature to this resistance.

A. Resistance to Service Dogs

In Sullivan by and Through Sullivan v. Vallejo City Unified School District, a high school student with cerebral palsy, learning disabilities, and partial deafness sued his school district under Section 504 of the Rehabilitation Act when the school district refused to allow her to

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66 Id.
68 This discrepancy is caused by application of the ADA outside the school setting and application of the IDEA within the school setting for similar claims involving service dogs.
70 Section 504 was the preface for the ADA and operates in a similar manner. The decision in this case was reached in 1990, so it may have been filed prior to official enactment of the ADA. Many individuals today file ADA claims in conjunction with Section 504 claims.
bring her service dog to school.\textsuperscript{71} The student’s primary teacher was allergic to dogs and the school officials argued that allowing the child to be accompanied by the service dog would cause a major inconvenience; specifically, the student would have to move to another classroom, which was difficult for the school because of the small size of the special education program.\textsuperscript{72} The court determined that this was a minor inconvenience, and that the balance of interests tipped in favor of the child because the usefulness of her service dog decreased with every day the two were separated, and this would ultimately lead to a great loss of the child’s independence.\textsuperscript{73} To establish a prima facie case under Section 504, the student had to prove that she was “(1) ‘handicapped,’ (2) ‘otherwise qualified’ to participate in the federally financed program and [had] been excluded from participation by reason of his or her handicap, and that (3) the relevant program receive[d] federal financial assistance.”\textsuperscript{74} The main contention of the school district under this claim was that the student was not excluded from participation, only her service dog was excluded, therefore, this was not discrimination under Section 504.\textsuperscript{75} The court explained that the purpose of Section 504 “is to increase the participation of handicapped persons in society,”\textsuperscript{76} and “to ensure that handicapped persons are not denied . . . benefits because of the prejudiced attitudes and ignorance of others.”\textsuperscript{77} The court reasoned that great deference must be shown to the manner in which a person with a disability chooses to overcome her limitation because a central purpose of Section 504 is to prevent discrimination based on public perception of that person’s disability.\textsuperscript{78} The court issued a declaratory injunction allowing the student to

\textsuperscript{72} Id. at 961.
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 957 (citing Doherty v. Southern College of Optometry, 659 F. Supp. 662, 671 (W.D. Tenn.), aff’d, 862 F.2d 570 (6th Cir. 1988)).
\textsuperscript{76} Id. (citing Alexander v. Choate, 469 U.S. 287, 300 (1985)).
\textsuperscript{77} Id. (quoting School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 284 (1987)).
\textsuperscript{78} Id.
bring her service dog to school temporarily, but deferred to administrative proceedings regarding permanent placement of the student with the stipulation that the school place the student in the least restrictive environment possible.\textsuperscript{79}

Later, in \textit{Cave v. East Meadow Union Free School District}, the school district presented testimony of a physician who specialized in allergens to support the contention that a hearing-impaired child’s service dog should not be allowed to accompany him to school.\textsuperscript{80} The physician explained how individuals with allergies may be negatively impacted by a dog in the building, positing that allergens could cause asthma, shortness of breath, and lung damage.\textsuperscript{81} The physician further argued that according to statistical evidence, “if the school building had 900 students and 100 teachers, there could be up to [fifty] people with dog allergies in that building.”\textsuperscript{82} In this particular case, there was another child in the special education class who was severely allergic to dogs.\textsuperscript{83} The court found that based on the physician’s testimony the balance of hardships tipped in favor of the school.\textsuperscript{84}

In addition to the concern over allergies, schools worry that service dogs will interfere with the education process because the dog may be a distraction for the children.\textsuperscript{85} Anecdotal evidence has shown, however, that this is not the case.\textsuperscript{86} In Colorado, Vale Elementary School took a different approach to the issue of allowing a service dog in the classroom to assist a child with ASD.\textsuperscript{87} Rather than fighting the student and his parents, this school welcomed nine-year-

\begin{thebibliography}{99}
\item \textit{Id.} at 961.
\item \textit{Id.} at 622.
\item \textit{Id.} at 622-23.
\item \textit{Id.} at 623.
\item \textit{Id.} at 622-23.
\item \textit{Id.}
\item \textit{Id.}
\end{thebibliography}
old Simon Yarbrough and his dog, Lolita, with welcome arms. The school district stated that Simon and Lolita were settling well into the classroom, and that the other students had become accustomed to Lolita’s presence because “the newness [had] worn off.” Yarborough’s teacher also reported that Lolita had not been a distraction to the educational atmosphere of the classroom. This anecdotal evidence suggests that service dogs can care for the needs of the child without being a hindrance. If the dog does act inappropriately at school, the ADA allows public entities to refuse access to a service dog that cannot be controlled by its handler. Thus, under the ADA, school officials have the ability to exclude a service dog should the dog become a distraction because the dog is unable to be kept under control.

B. Exhaustion of Administrative Remedies under the IDEA

Although service dogs are protected by the ADA and Section 504—claims that may immediately be brought in federal court following an alleged violation—a child with ASD who wishes to bring his service dogs to school often faces additional hardships under the IDEA. Even in the absence of an IDEA claim, ADA and Section 504 claims may not be filed in federal court until the IDEA’s exhaustion of administrative remedies requirement has been satisfied. It is as if a constructive IDEA claim is created simply because the claim arose within a school.

In Hughes v. District School Board of Collier County, a middle school student sued under the IDEA, ADA Title II, and Section 504 because he wanted to bring his service dog to school with him to assist with problems associated with seizures and ASD. Claims under Title II of

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88 Id.
89 Id.
90 Id.
91 Id.
93 See generally 28 C.F.R. § 35.136 (b) (2011).
95 Id.
the ADA and Section 504 were dismissed for failure to exhaust administrative remedies according to requirements under the IDEA prior to initiating a formal lawsuit. The court remanded this case, however, to the administrative law judge to determine whether the student was entitled to bring a service dog to school.

In Cave v. East Meadow Union Free School District, a hearing impaired student sued under the ADA, Section 504, and various state laws after he was denied entry to school facilities because he was accompanied by his service dog. The court held that administrative requirements of the IDEA were applicable to claims under the ADA and Section 504 even when no IDEA claim was brought because the situation was one in which the parent could have brought a claim under the IDEA. The court remanded the case back to the district court with directions to dismiss without prejudice for lack of subject matter jurisdiction. The court alluded that the student would probably lose anyways because the school’s Section 504 teams had determined that the student “enjoyed full access to the district’s special education programs and facilities and that he currently did not need a service dog at school because he was functioning satisfactorily under the approved IEP.”

In A.S. ex rel. Leonel S. v. Catawba County Board of Education, the adopted parents of a child with extensive conditions ranging from developmental delay to sensory integration difficulties brought suit under the IDEA, the ADA, and Section 504 because the child was denied the ability to bring her dog to school. The dog was registered in the state’s Service Animal

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97 Id. at *7.
98 It should be noted that the court may have felt the seizure disorder, not the ASD, was what entitled the student to bringing his service dog to school. Hughes v. Dist. Sch. Bd. of Collier Cnty., 2008 WL 4709325, at *7 (M.D. Fla. Sept. 22, 2008).
100 Id. at 250.
101 Id.
102 Id. at 244.
Registry that was maintained by the Department of Health and Human Services, yet the school officials questioned whether the dog was in fact a service animal. \(^{104}\) The court determined that because the parents failed to exhaust administrative remedies and had time before the school year started to pursue such administrative remedies such that no severe harm would be caused, the case had to be dismissed without prejudice. \(^{105}\)

C. The Exception to Exhaustion: Futility or Inadequacy of Administrative Remedies

Although exhaustion of administrative remedies is required under the IDEA, an exception was first noted in 1975 by Senator Harrison Williams—who was the author and floor manager of the Senate bill—when he stated: “exhaustion of the administrative procedures established under this part should not be required for any individual complainant filing a judicial action in cases where such exhaustion would be futile either as a legal or practical matter.” \(^{106}\) The futility exception has been carved out for situations where exhaustion would be futile because administrative remedies would not provide adequate relief \(^{107}\) or when pursuit of the administrative remedies would be futile because the agency was acting in violation of the law. \(^{108}\)

In Kalbfleisch ex rel. Kalbfleisch v. Columbia Community Unit School District, the parents of a child with ASD sought a preliminary injunction to allow the student to bring his service dog to school. \(^{109}\) The relevant portion of the Illinois statute read: “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

\(^{104}\) Id. at *1.

\(^{105}\) Id. at *4-8.


\(^{107}\) Id.

\(^{108}\) Id. at 159.

functions, whether in or outside the classroom." The court examined the evidence on the record to determine if the dog qualified under this statute, and found that he was qualified because he understood seventy commands, was able to assist the child with impulse running, tantrums, night awakenings, and was specifically trained to stop the child from eating dangerous objects. The court reasoned that the administrative remedies would have been a lengthy process and the child would have been susceptible to irreparable harm because separating the child and his dog would greatly harm the working relationship and would cause the dog to become an expensive pet rather than a service animal. Because of the possible irreparable harm to the child, the court did not dismiss the case for failure to exhaust administrative remedies nor remand it for an administrative hearing.

In *K.D. ex rel. Nichelle D. v. Villa Grove Community Unit School District*, the court again examined requirements of the Illinois School Code when the parents of a child with ASD sued under the same section at issue in *Kalbfleisch* without exhausting administrative remedies. The school district’s main contention was that the student’s dog was not a service dog within the meaning of the School Code because the dog was specifically trained to ignore commands from the student. Although the dog was trained to respond to thirty commands, the school officials felt that because the student was unable to command the dog himself, the dog did not fall within the meaning of the statute. The parents argued that in addition to these

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110 105 ILCS 14-6.02 (West 2008).
112 *Id.* at 1110.
113 *Id.* at 1113.
116 *Id.* at 1065, 1072.
117 *Id.* at 1065.
commands, the dog was also trained to stand his ground when tethered to the child to prevent him from running away; this, the parents argued, gave the child more of a sense of independence because he could move around without being held onto by an adult. The court concluded, on the evidence of the record, that the dog was qualified under the statute because he was individually trained to perform tasks for the benefit of the child and the court did not require exhaustion of administrative remedies.

D. ADA and Section 504 Claims for Dogs Outside the Classroom

ADA and Section 504 claims for service dogs outside the classroom have been handled quite differently compared with those inside the classroom. “Establishments that sell or prepare food must allow service animals in public areas even if local health codes prohibit animals on the premises.” Furthermore, people with disabilities who use service animals may not be isolated from other patrons or treated any differently than other patrons, and a business who charges a fee for pets must waive such a fee for service animals. “A person with a disability cannot be asked to remove his service animal from the premises unless: (1) the dog is out of control and the handler does not take effective action to control it or (2) the dog is not housebroken.” The only inquiries a public entity is allowed to make are whether the dog is required because of a disability and what work or task the animal is trained to perform.

118 Id.
119 Id. at 1073.
122 Id.
In *Bottila v. Madison Police Department*, a person with documented authorization for use of a service dog was denied access to a public park by police officers.\(^{125}\) The court determined that he had stated sufficient facts to state a claim under the ADA and allowed him to proceed on his claim without prepaying the costs of filing his action.\(^{126}\) The court further noted that he would have to prove that the service dog was a reasonable accommodation under the ADA.\(^{127}\) The IDEA was not applicable in this setting, so the person was able to immediately bring the claim in federal court under the ADA without first exhausting administrative remedies.\(^{128}\)

In *Vaughn v. Rent-A-Center, Inc.*, a court denied a motion for summary judgment made by a store that had allegedly discriminated against a person with a disability using a service dog.\(^{129}\) The court reasoned that the person with a disability had stated sufficient facts supporting his claim that he had been denied access by the store, so long as a jury found his version of the facts credible at a trial and denied the store’s motion for summary judgment.\(^{130}\) Like *Bottila*, because this case arose outside the school context, the IDEA was not applicable so it was not necessary to exhaust administrative remedies.\(^{131}\)

E. **ASD Dogs Found to be Individually Trained**

One important function of a dog for a child with ASD is to tether the child when he elopes or bolts.\(^{132}\) The few courts that have addressed the question of whether or not a dog


\(^{126}\) *Id.* at *3*.

\(^{127}\) *Id.* at *2*.

\(^{128}\) *Id.* at *1-3*.


\(^{130}\) *Id.*

\(^{131}\) *Id.* at *1-13* (S.D. Ohio Mar. 16, 2009)

trained to tether qualifies as individually trained under the ADA and similar legislation have typically answered this question in the affirmative.\textsuperscript{133}

In \textit{J.C.B. v. Collier County School Board}, parents of a child with ASD brought administrative claims under Section 504 and the ADA.\textsuperscript{134} The dog in this case was trained to prevent elopement and wandering of the child.\textsuperscript{135} The administrative judge found that this dog met the criteria for a service dog under the ADA, although it did not specifically address the issue of being individually trained.\textsuperscript{136}

In \textit{K.D. ex rel. Nichelle D. v. Villa Grove Community Unit School District No. 302}, parents of a child with ASD brought claims under the school code, which provided similar coverage as the ADA, including requirements that the dog be specifically trained.\textsuperscript{137} The court explained that the dog was trained to tether the child and “keep[] the child from running away on a whim.”\textsuperscript{138} The court held that this dog was individually trained pursuant to the school code and was, therefore, a service dog that must be permitted to attend school with the child.\textsuperscript{139}

In addition to examples from these cases, the Department of Justice has supported the idea that tethering qualifies as individually trained.\textsuperscript{140} In June of 2011, the Department of Justice filed a Statement of Interest in support of a preliminary injunction allowing a child with ASD to bring his service dog to school.\textsuperscript{141} In this statement, the Department of Justice set out the specific tasks the dog was trained to do, including “resist by tether when [the child’s] attempts to


\textsuperscript{134} \textit{Id.}

\textsuperscript{135} \textit{Id.} at 22.

\textsuperscript{136} \textit{Id.} at 22.


\textsuperscript{138} \textit{Id.} at 1069.

\textsuperscript{139} \textit{Id.} at 1073.


\textsuperscript{141} \textit{Id.}
elope or bolt.” 142 Three days after this statement was filed, the court granted the motion for a preliminary injunction and issued an opinion agreeing with the Department’s position. 143

III. ARGUMENT

When a school official denies access to an ASD dog, he is constructively denying the child access to the school’s programs. This constructive denial is analogous to a school official who refuses to install a ramp for a child who uses a wheelchair. To best promote justice, fairness, and efficiency, claims involving ASD dogs in schools should be analyzed under the ADA rather than the IDEA because the ADA is concerned about access to programs while the IDEA is mostly concerned about educational benefits.

A. Denial of ASD Dogs Should be a Barrier Issue Under the ADA Rather than an IEP Issue under the IDEA

The ADA requires that to qualify as a service dog, the dog must be individually trained to perform tasks for a person with a disability. 144 ASD dogs are individually trained 145 and should be protected under the ADA without being subjected to the exhaustion provision of the IDEA. When school officials deny access to a child’s service dog, it is constructively barring access to the child because without the ASD dog, the child is unable to fully enjoy the benefits and services the school provides. 146 Denying access to an ASD dog is similar to a school official refusing to install a ramp for a child in a wheelchair because in both cases the school official is effectively creating a barrier to access. Although denying an ASD dog access to a school is not

142 Id. at 3.
an actual physical barrier like in the wheelchair ramp analogy, the result of the school official to act or fail to act is the same—the child is denied the full benefits and services of the school.

Similar to the wheelchair ramp, an ASD dog is not part of a child’s IEP under the IDEA, but instead an access issue under the ADA. A school is a public entity under Title II of the ADA just like a city run pool. 147 A city pool would not be allowed to categorically deny access to a child accompanied by an ASD dog; likewise, a school should not be allowed to categorically deny access to a child accompanied by his ASD dog. To comply with the ADA, school officials should be required to allow access to an ASD dog if the dog is trained to tether unless the school official can provide sufficient evidence that supports one of the defenses under the ADA.

Prior to recent revisions of the ADA, it was not clear whether allergies of other interested parties were a legitimate reason for a school official to deny a student with a service dog access to the school. 148 However, recent guidance from the Department of Justice states: “[a]llergies and fear of dogs are not valid reasons for denying access or refusing service to people using service animals.” 149 Thus, school officials should no longer be able to use the fear of allergies as a factor in balancing the interests of a child with a disability against the rest of the student body.

The ADA protects dogs that are individually trained to perform tasks for the benefit of the individual with a disability. 150 The few courts who have addressed whether or not an ASD dog is individually trained have answered in the affirmative 151 and ASD dogs should be protected under the ADA. The ADA has been sufficient for analyzing cases outside the school

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147 28 C.F.R. § 34.104 (2011).
context and analysis of the legal question should not change based solely on the situation arising in a school. School officials have sufficient defenses available to deny access under the ADA in appropriate circumstances.

Under Title II of the ADA, a school official could deny access to an ASD dog if it could show that allowing such access would fundamentally alter the nature of the program. Some children with ASD are able to control the dog without assistance, others require the assistance of an aid to gain any benefit from the dog. The independent child would be able to command the dog on his own, but the less independent child would need a specially trained aid to give commands to the dog. Under the ADA, school officials may be able to deny access to those ASD dogs that require a special aid, especially if a parent requested that the school provide the aid. Under this circumstance, it may be easier for school officials to show that allowing access to the dog would fundamentally alter the service or cause an undue financial burden on the school. A school official will probably not be able to deny access to the ASD dog of a child who is able to command the dog on his own.

A school official may also be able to deny access if it could prove that the ASD dog would pose a direct threat to the health or safety of anyone at the school. The concerns are that the ASD dog might become agitated and growl at or bite other children and teachers or that

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154 Merope Pavlides, ANIMAL-ASSISTED INTERVENTIONS FOR INDIVIDUALS WITH AUTISM 34 (2008).
155 Id.
157 Id.
158 28 C.F.R. § 35.139(a) (2011).
the dog might urinate or defecate in the school.\textsuperscript{159} The first fear is unlikely to materialize because ASD dogs are chosen based on good temperament and go through extensive training to become certified as a service dog.\textsuperscript{160} Animals are not one-hundred percent predictable, but the chance of an ASD dog acting aggressively towards a human being is practically non-existent because submission is one of the most important traits trainers consider when choosing which dogs to put through training to become an ASD dog.\textsuperscript{161} Service dogs who go through similar training as ASD dogs and assist children with vision problems have successfully integrated into schools, suggesting that this is not as big of a concern as some believe.\textsuperscript{162} Regarding the concern of urination or defecation in the school, this potential health threat could be mitigated by the school officials making reasonable modifications to policies and procedures allowing the dog to go outside and ensuring a proper waste disposal option.\textsuperscript{163} Requiring the school officials to make this type of reasonable accommodation should occur after it has been determined that the ASD dog is neither a fundamental alteration to the services nor a direct threat. The ADA provides sufficient protection for both children and school districts and should, therefore, be used to analyze these types of cases rather than the IDEA.

B. **Treating ASD Service Dogs as a Barrier Issue Ensures Fair Treatment and Just Results**

When a parent brings a claim as an IEP issue under the IDEA, the parent\(^{164}\) bears the burden of proving that the IEP is an issue because the ASD dog should be included.\(^{165}\) Similarly, under the ADA, a parent\(^{166}\) bears the burden of proving that the ASD dog is a reasonable modification\(^{167}\) or that the dog is a plausible method of making the currently inaccessible programs of the school available to the child.\(^{168}\) Only after the parent makes this showing does the school official have to prove one of the ADA defenses.\(^{169}\)

Treating an ASD dog as a barrier issue under the ADA promotes fairness and justice. Although the parent technically bears the burden of proof under both statutes, the IDEA’s requirement of administrative exhaustion effectively heightens the burden placed on the parent. When this issue is analyzed under the IDEA in a one-tier state, parents are able to immediately file a claim in a federal court following an unsuccessful outcome at the local level.\(^{170}\) However, in a two-tier state, the parent faces the additional step of moving from the local level to the state level prior to filing a claim in a federal court.\(^{171}\) Administrative proceedings in both one-tier and two-tier states are potentially lengthy.\(^{172}\) Throughout this process, the stay-put provision of the IDEA retains the child’s IEP at status quo, so the child will probably not be able to bring his ASD dog to school.\(^{173}\) By shifting analysis from the IDEA to the ADA, the dispute will be

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\(^{164}\) See Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 51 (2005). The party seeking relief bears the burden under the IDEA. A parent—on behalf of a child—is the usual party who seeks relief in cases involving ASD dogs.


\(^{166}\) See Johnson v. Gambrinus Co./Spoetzl Brewery, 116 F.3d 1052, 1059 (5th Cir. 1997). Like the IDEA, it is the party seeking relief who typically bears the burden of proof. In cases involving ASD dogs, this is typically the parent of a child with ASD.

\(^{167}\) Id.


\(^{169}\) Id.


resolved more quickly because parents and school officials will not have to endure lengthy administrative proceedings prior to a federal case. This decreases the length of separation time for a child who should be allowed to bring his ASD dog to school with him. For a child who should not be allowed to bring his ASD dog to school, this decreases the length of time the parties are left wondering about the outcome of the case.

Furthermore, the rationale for exhaustion of administrative remedies is not applicable in cases involving ASD dogs. Opponents may argue that the IDEA is more appropriate than the ADA in cases involving ASD dogs because school officials needs to have the ability to exercise discretion and expertise in these cases.\textsuperscript{174} Under the ADA, school officials are still able to exercise discretion and expertise when deciding whether or not the ASD dog should be allowed to accompany the child in the school. In the context of the IDEA, it has been noted that “the school has better access to relevant information [and] greater control over the potentially more persuasive witnesses.”\textsuperscript{175} In essence, this gives the school officials an edge—even though it may be slight—over the parent who files an ADA claim in a federal court in response to the school refusing access to a child’s ASD dog. The main purpose of the IDEA’s IEP is to provide educational benefits to the child.\textsuperscript{176} While ASD dogs sometimes serve a benefit to the child’s education, it is more likely that the ASD dog provides a safety or health benefit to the child.\textsuperscript{177} The necessity of an ASD dog should not be analyzed within the child’s IEP because the IEP is designed to assess the educational benefits to the child, not the health and safety of the child.

Analyzing cases involving ASD dogs under the ADA rather than the IDEA does not substantially impair the ability of the school to deny access in appropriate instances. Under Title

\textsuperscript{174} See generally Ass’n for Retarded Citizens of Alabama, Inc. v. Teague, 830 F.2d 158, 161 (11th Cir. 1987).
\textsuperscript{175} Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 64 (2005).
II of the ADA, a school may deny access to an ASD dog if it can show that allowing access would cause a fundamental alteration to the nature of the program\textsuperscript{178} or that the ASD dog would pose a direct threat to the health or safety of anyone at the school.\textsuperscript{179} These defenses under the ADA give school officials the ability to deny access in legitimate circumstances. Schools will not be required to provide the child or ASD dog anything more than what has been required under the IDEA, and the ADA specifically provides that public entities do not bear responsibility for such dogs even when access is required.\textsuperscript{180}

C. \textit{Treating ASD Service Dogs as a Barrier Issue Enhances Efficiency}

Analyzing ASD dogs under the ADA rather than the IDEA enhances efficient allocation of time and money for school districts and families. By applying the ADA to cases involving ASD dogs in schools instead of the IDEA, exhaustion of administrative remedies will not be required.\textsuperscript{181} Cutting out these administrative proceedings will expedite these cases so that a child who should be allowed to bring his ASD dog to school will be separated from his dog for a shorter period of time and a child who should not be allowed to bring his ASD dog to school will find out more quickly. Trained service dogs can cost from ten to twenty thousand dollars.\textsuperscript{182}

When a student and his ASD dog are separated for a substantial length of time, the dog may become wholly ineffective to the child.\textsuperscript{183} When the child and dog are separated for the length of a school day, parents have seen an increase in the child’s ASD symptoms and an overall decrease in the benefits the child gets from having an ASD dog.\textsuperscript{184} The child regresses to a point where


\textsuperscript{179} 28 C.F.R. § 35.139(a) (2011).

\textsuperscript{180} 28 C.F.R. § 35.136(e) (2011).


\textsuperscript{183} Kalbfleisch ex rel. Kalbfleisch v. Columbia Cmty. Unit Sch. No. 4, 396 Ill. App. 3d 1105, 1108 (2009).

\textsuperscript{184} Id.
the ASD dog is unable to provide benefits, essentially making the ASD dog a very expensive pet. When the ASD dog is no longer able to provide benefits, more responsibility is once again shifted back to the child’s caretaker—typically one or both of his parents. Thus, denying access for the ASD dog in a school has the effect of increasing the burden on parents even when the child is with his ASD dog at his home. During the entire lengthy process of exhausting administrative remedies under the IDEA, the child must go to school without his ASD dog.\footnote{20 U.S.C.A. § 1415(j) (2005).} By analyzing these issues under the ADA rather than the IDEA, the process will be somewhat expedited because administrative hearings will not be required. This will potentially decrease the amount of time a child is kept separated from his ASD dog while he is in school. This will also decrease the time it takes for school officials to know whether the denial of access was acceptable. Overall, this increases the opportunity for stable relationships between the school officials and the child and his parents.

A school official is in the position to deny access to an ASD dog, so he is in a position of greater power than the parent. To assure efficient allocation of resources, it is necessary to ensure the school does not have too much power. Removing the exhaustion requirement that would be applicable under the IDEA, the ADA gives parents the ability to immediately file a suit in federal court after a school has denied access to an ASD dog.\footnote{28 C.F. R. § 35 (2011).} If a school official knows that a parent can legally file a claim under the ADA without having to go through the administrative processes of the IDEA, that official is more likely to settle the dispute on an individual basis. Rebalancing the power between the school officials and parents by analyzing these cases under the ADA promotes overall efficiency.
CONCLUSION

ASD dogs can play an important role in the life of a child with ASD, but schools also have valid reasons for denying access to these dogs. The interests of both are important and it is essential to analyze these claims under the most appropriate law. In the past, courts have applied the IEP provision of the IDEA to determine whether or not the ASD dog should be allowed to accompany the child to school. This has not promoted fairness or efficiency, but has instead placed a large burden on the parent who wants her child to bring his ASD dog to school. In cases involving ASD dogs, the normal rationale for needing the exhaustion provision of the IDEA does not apply. The ADA does not have an exhaustion provision and also provides sufficient defenses for a school to deny access to an ASD dog if it would cause a fundamental alteration to the program or if it would be a direct threat to the health or safety of anyone at the school. The ADA is a better tool to analyze situations involving ASD dogs in schools because it is concerned with access rather than educational benefits and, therefore, it better promotes fairness, justice, and efficiency.