Service Animals: Did the Department of Justice Go Too Far?
An Analysis of
Alboniga v. School Board of Broward County, Florida
as it relates to ADA, Section 504, and the IDEA

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When the Department of Justice (DOJ) amended Title II of the Americans with Disabilities Act (ADA) in 2011,[1] school boards across the nation were forced to develop new policies and procedures to comply with the amended regulations, specifically with regard to students and employees being accompanied by their service animals in schools. The School Board of Broward County, Florida (hereinafter "School Board" or "School District" or "BCPS") updated its policy and adopted it in August of 2014. Before that, beginning in January of 2013, the School Board's administrative staff responded to inquiries from students and employees regarding service animals using the draft policies.

Monica Alboniga, the parent of A.M., a Broward County Public Schools (BCPS) student, requested that her son attend school with his service animal just before the 2013-2014 school year began. At the time, A.M. was a six-year-old child. He had been diagnosed with cerebral palsy, epilepsy, muscular dystrophy, was visually impaired, and non-verbal. A.M. relied on his wheelchair for mobility and required assistance with all daily activities. Due to A.M.'s frequent epileptic seizures, Ms. Alboniga was able to obtain a service animal to alert and assist A.M. during his seizures.

Upon Ms. Alboniga's request, the School Board promptly gave her a "Request for Use of Service Animal in School District Facilities" form, which required that the service dog obtain

[1] Information and Technical Assistance on the Americans with Disabilities Act, http://www.ada.gov/ada_title_II.htm (last visited June 3, 2015).

certain vaccinations and liability insurance, pursuant to the School Board's policies. Although Ms. Alboniga timely submitted the form, she failed to provide proof of vaccinations or proof of liability insurance. Consequently, the School Board sent Ms. Alboniga a letter requesting that she provide: (1) a certificate of current liability insurance covering the service animal and identifying the District as an additional insured, with the amount of insurance coverage determined by the District's Risk Management Department; and (2) proof that the service dog had received Distemper, Hepatitis, Leptospirosis, Paroinfluenza, Parvovirus, Coronatvirus, DHLPPC, and Bordetella vaccinations. Despite the fact that these two requests were not met, the School Board allowed A.M. to attend school with his service animal at all times beginning with the first day of school for the 2013-2014 and throughout 2014-2015 school year.

Due to A.M.'s disability, the School District determined that A.M. could not function as his service animal's handler. Under its interpretation of § 35.136(d) & (e) of the Code of Federal Regulations,[2] the School Board maintained that it was not its responsibility to provide a handler

[2] 28 C.F.R. § 35.136 Service Animals
(a) General. Generally, a public entity shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability.
(b) Exceptions. A public entity may ask an individual with a disability to remove a service animal from the premises if—
(1) The animal is out of control and the animal's handler does not take effective action to control it; or
(2) The animal is not housebroken.
(c) If an animal is properly excluded. If a public entity properly excludes a service animal under § 35.136(b), it shall give the individual with a disability the opportunity to participate in the service, program, or activity without having the service animal on the premises.
(d) Animal under handler's control. A service animal shall be under the control of its handler. A service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (e.g., voice control, signals, or other effective means).
(e) Care or supervision. A public entity is not responsible for the care or supervision of a service animal.
(f) Inquiries. A public entity shall not ask about the nature or extent of a person's disability, but may make two inquiries to determine whether an animal qualifies as a service animal. A public entity may ask if the animal is required because of a disability and what work or task the animal has been trained to perform. A public entity shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. Generally, a public entity may not make these inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (e.g., the dog is observed guiding an

for A.M.'s service animal; and in turn, that it was the handler's responsibility to care or supervise the service animal. For this reason, the mother, Ms. Alboniga, acted as the handler for A.M.'s service animal. While attending school, Ms. Alboniga was limited to acting solely as the handler. A.M.'s teachers continued to care for A.M. and participated with A.M. in his daily classroom activities, as it was the District's duty to provide care concomitant with the IEP in order to provide FAPE. Additionally, the School Board never paid Ms. Alboniga for acting as the handler. After several discussions with Ms. Alboniga, the School Board made an administrative decision in November of 2013 to assign one of its employees to act as the handler for A.M.'s service animal. It still maintained as its legal position, however that it was not the School Board's responsibility to care for or supervise the service animal, which in the District's view, would include acting as the handler.

The assigned School Board employee was trained properly by the same individual who trained the mother and the service animal. Each day that A.M. attended school, the employee was trained to hold the service animal's leash while next to A.M. in his wheelchair, take the service animal outside to relief himself, and ensure that other children or persons did not approach the service animal to pet or play with him. A.M.'s service animal was not provided any food or drink while attending school, either when the parent or school employee acted as the handler.

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individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability).
(g) Access to areas of a public entity. Individuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a public entity's facilities where members of the public, participants in services, programs or activities, or invitees, as relevant, are allowed to go.
(h) Surcharges. A public entity shall not ask or require an individual with a disability to pay a surcharge, even if people accompanied by pets are required to pay fees, or to comply with other requirements generally not applicable to people without pets. If a public entity normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by his or her service animal.
(i) Miniature horses.
…
28 CFR §35.136.

Approximately a month and a half later, on September 19, 2013, Ms. Alboniga requested a meeting under Section 504 of the Rehabilitation Act of 1973 (Section 504) to discuss A.M. and his service animal. A.M. never had a Section 504 plan; however, he had an established IEP since beginning school with BCPS in pre-kindergarten. The school held a meeting with Ms. Alboniga at which a health plan was developed and added to A.M.'s IEP. The health plan outlined the School Board's responsibilities each time A.M. had a seizure at school. Significantly, neither the health plan nor the IEP mentioned the use of A.M.'s service animal at school. The IEP was even amended on January 31, 2014 and again on May 7, 2014 to include A.M.'s eligibility to receive special education services at home, yet the use of A.M.'s service animal as an accommodation was not included. It should be noted that throughout the entire process, the school staff never observed A.M.'s service animal alert A.M. prior to having a seizure or assist him on the few occasions a seizure occurred.

Then, on January 15, 2014, Ms. Alboniga served a complaint against the School Board, Alboniga v. School Board of Broward County, Florida, alleging that the School Board violated Title II of the ADA and Section 504. Specifically, the complaint alleges that the District failed to provide A.M. with reasonable accommodations by initially denying the service animal access to the school, by implementing procedural barriers for the use of the service animal during the day, and by not providing a handler for the service animal.[3] Further, it was alleged that the District's failure to make reasonable accommodations for the use of the service animal was discrimination based solely on A.M.'s disability.

Analysis

[3] The District never denied access, but had requested additional vaccinations and information regarding liability insurance, if available. The District also had asserted that it was not required to be the service animal's handler. It asked A.M.'s mother to provide a handler and sign a statement regarding the behavior of the handler in the classroom.

I. The Law

Once a school district receives a request from a student, employee, or other personnel to have a service animal attend school with him or her, the district needs to apply the relevant laws to determine whether it is proper for the service animal to attend school. In doing so, school districts are faced with the difficult task of trying to understand the interplay between the applicable laws: Section 504 of the Rehabilitation Act, Section II of the ADA, and the IDEA. To best understand the analysis that school districts should employ when dealing with service animals, it is imperative for the districts to understand the underlying themes of Section 504 and the ADA, and how the two statutes have been amended, and their interpretations have evolved through case law.

A. Section 504

Section 504 is a civil rights statute enacted to "end the virtual isolation of millions of children and adults from society."[4] Essentially, qualified individuals with a disability in the United States are protected from being "excluded from the participation in, … denied the benefits of, or … subjected to discrimination under any program or activity receiving Federal financial assistance," solely based on the individual's disability.[5] The Office for Civil Rights (OCR), Department of Education (DOE) is the agency responsible for enforcing and drafting Section 504's regulations,[6] which have "been interpreted to require federal grantees to modify or excuse non-essential requirements which impede a disabled person from participating in the grantee's federally

[4] Tara A. Waterlander, *Canines in the Classroom: When Schools Must Allow A Service Dog to Accompany A Child with Autism into the Classroom Under Federal and State Laws*, 22 Geo. Mason U. Civ. Rts. L.J. 337, 388 (2012) (quoting Beth Danon, *Emotional Support Animal or Service Animal for ADA and Vermont's Public Accommodation Law Purposes: Does it Make a Difference?*, 32 Vt. Bar J. 21, 22 (2006)).
[5] 29 U.S.C. § 794 (2014).
[6] 34 C.F.R. § 104.33 (2014).

funded program."[7] Under the Section 504 regulations, those K-12 schools that receive federal funding must provide free appropriate public education (FAPE) to each qualified handicapped person who attends a school's education program or activity.[8] If, for some reason, a recipient fails to reasonably accommodate the disabled individual, then generally such inaction is considered "unreasonable and discriminatory."[9] Public school districts fall within the purview of Section 504, as they are federally funded by the DOE.[10] Therefore, schools are required to comply with Section 504 by providing educational programs and activities to those with a disability just as they would to non-disabled children.[11] Section 504 is silent on the specific accommodation of the use of a service animal.

B. The ADA

Similar to Section 504, the ADA is also a civil rights statute that protects an individual from discrimination based on his or her disability.[12] The ADA was initially enacted in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[13] The ADA expressly "forbids discrimination against persons with disabilities in three major areas of public life: employment, which is covered by Title I of the statute; public services, programs, and activities, which are the subject of Title II; and public

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[7] *Sullivan ex rel. Sullivan v. Vallejo City Unified Sch. Dist.*, 731 F. Supp. 947, 950 (E.D. Cal. 1990).
[8] 34 C.F.R. § 104.33(a) (2014); Susan G. Clark, Ph.D., J.D., *The Use of Service Animals in Public Schools: Legal and Policy Implications*, 254 Ed. Law Rep. 1, 2 (2010) (confirming that "Section 504 may require the provision of a service animal as a related aid or service in order to provide access and a FAPE"); *but see* "The OCR-Created 'Right' To A Free Appropriate Public Education Under Section 504: Time for a Challenge," *Inquiry & Analysis*, January, 2013, available to COSA members at http://www.nsba.org/sites/default/files/reports/0113_InqAnalysisweb.pdf (arguing that neither Section 504 nor the case law supports OCR's position that the higher "FAPE" standard should apply to K-12 schools, while all other recipients of federal funds are held to the lower "reasonable accommodation" standard).
[9] *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 413 (1979); *see* 34 C.F.R. § 104.4 (2014).
[10] 29 U.S.C. § 794(b)(2)(B) (2014); *Sullivan*, 731 F. Supp. at 949–50 (explaining that the "regulations promulgated by the Department of Education make clear that educational institutions, including preschool, elementary and secondary schools that receive federal funds come within the ambit of the statute") (citing 34 C.F.R. §§ 104.31, *et seq.*).
[11] Clark, *supra*, note 6.
[12] 42 U.S.C. § 12101 (2014)
[13] 42 U.S.C. § 12101.

accommodations, which are covered by Title III."[14] Title II of the ADA defines a "public entity" as "(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government."[15] School districts are public entities and therefore are prohibited by the ADA from discriminating against an individual with a disability. Title II states, "no qualified individual with a disability shall, by reason of such 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." [16]

Although the ADA is silent regarding service animals, in 2012, the Department of Justice (DOJ), the governmental agency "responsible for issuing regulations to implement title II... [sic] of the [ADA and Americans with Disabilities Act Amendments At (ADAAA)],"[17] amended the regulations to define what constitutes a "service animal," as applied to public entities. Prior to its amendments, Title II's regulations were silent regarding service animals.[18] The DOJ expressly stated its "intent[] of providing the broadest feasible access to individuals with disabilities and their service animals" in its Notice of Proposed Rule Making (NPRM), similar to the intent of its comparable Title III regulations.[19] In drafting the Title II regulations, the DOJ opted to adopt Title III's definition of "service animal" and modeled much of its other regulations after the other Title III provisions.[20] According to the DOJ, a "service animal" is limited to

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[14] *See Tennessee v. Lane*, 541 U.S. 509, 516–17 (2004).
[15] 42 U.S.C. § 12131(1) (2014).
[16] 42 U.S.C. § 12132.
[17] The ADA and Department of Justice Regulations, 73 Fed. Reg. 34467 (June 17, 2008).
[18] Americans with Disabilities Act Title II Regulations, Part 35 Nondiscrimination on the Basis of Disability in State and Local Government Services, http://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.htm#suppinfo (last updated Dec. 7, 2012).
[19] *Id.*
[20] *Id.* (explaining "[t]he Department proposed creating a new § 35.136 addressing service animals that was intended to retain the scope of the 1991 title III regulation at § 36.302(c), while clarifying the Department's longstanding policies and interpretations, as outlined in published technical assistance"); 28 C.F.R. pg. 26, app. C § 36.302 at 916 (July 1, 2014) (discussing Title III regulation's service animal provisions); *see Id.* pt. 25, app. A § 35.136 at 607 (Title II regulation's service animal provision was intended to retain scope of its Title III counterpart).

> 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, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.[21]

The DOJ promulgated a regulation requiring public entities to "modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability,"[22] but further specified that such entities are "*not* responsible for the care or supervision of a service animal."[23] Interestingly, in its NPRM, the DOJ acknowledged that no comments were made regarding the "care or supervision" provision.[24] The DOJ, advocates, and other commentators seemed more occupied with clarifying whether a psychiatric or emotional service animal should constitute a service animal under the DOJ's regulations.

In the DOJ's judgment, the responsible party for controlling the service animal was its handler.[25] Nevertheless, the DOJ permits a public entity, such as a school district, to remove a service animal if it is "out of control and the animal's handler does not take effective action to

[21] 28 C.F.R. § 35.104 (2014).
[22] 28 C.F.R. § 35.136(a) (2014).
[23] 28 C.F.R. § 35.136(a), (e) (*emphasis added*).
[24] Americans with Disabilities Act Title II Regulations, Part 35 Nondiscrimination on the Basis of Disability in State and Local Government Services, http://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.htm#suppinfo (last updated Dec. 7, 2012).
[25] 28 C.F.R. § 35.136(d).

control it; or the animal is not housebroken."[26] Additionally, if making "reasonable modification in policies, practices, or procedures" would "fundamentally alter the nature of the service, program, or activity," then a public entity is not required to have the service animal in its facilities.

Moreover, the DOJ regulations forbid public entities from implementing any surcharges against an individual with a disability for use of his or her service animal while participating in the entity's educational program, service, or activity.[27] The regulations suggest that "any additional costs imposed should be factored into the overall cost of administering a program, service, or activity, and passed on as a charge to all participants, rather than an individualized surcharge to the service animal user."[28] That being said, public entities were granted the authority to charge individuals with a disability for damage caused by his or her service animal if such a charge would normally be imposed on a non-disabled individual.[29]

Because school districts are required to allow a service animal into their schools in most cases, and the case law regarding service animals is relatively scarce, it is imperative for school districts to be educated in how to apply the law to prevent the DOJ from further expanding the scope of the ADA beyond that which was intended.

C. The IDEA

The IDEA was enacted by Congress to "promote the education of students with disabilities."[30] The IDEA requires schools that receive federal funds to provide their students with disabilities with free appropriate public education (FAPE),[31] meaning that schools are required to

[26] 28 C.F.R. § 35.136(b).
[27] 28 C.F.R. §§ 35.130(a) (2014), 35.136(h).
[28] Americans with Disabilities Act Title II Regulations, Part 35 Nondiscrimination on the Basis of Disability in State and Local Government Services, http://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.htm#suppinfo (last updated Dec. 7, 2012).
[29] 28 C.F.R. § 35.136(h).
[30] *M.P.G. ex rel. J.P. v. N.Y.C. Dep't of Educ.*, 2010 WL 3398256, at *1 (S.D.N.Y. Aug. 27, 2010).
[31] *See M.W. ex rel. S.W. v. N.Y.C. Dep't of Educ.*, 725 F.3d 131, 134–36 (2d Cir. 2013).

tailor the curriculum for students with disabilities so that the unique "needs of the child" are met.[32] To do so, an individualized education program (IEP)[33] is created, which is "a written statement that sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives."[34] In developing the IEP, the school and the student's parents work together to find the educational program that will "provide the child with some educational benefit."[35]

The United States Supreme Court established a two-part test to determine whether a school district has denied one of its students FAPE.[36] First, it must be determined "whether the School Board has complied with the procedural requirements of the IDEA," and second "whether the IEP was 'reasonably calculated to enable the child to receive educational benefits.'"[37]

D. Section 504, ADA, and the IDEA's Interlocking Relationship

Although Section 504 and the ADA each have their own "independent action," the two Acts are similar in that they "both are federal civil rights statutes that prohibit discrimination on the basis of disability; require covered entities to modify rules, policies, and practices so that a person with a disability may fully participate in or access services; and generally govern service

[32] *Hughes v. Dist. Sch. Bd. of Collier Cnty.*, No. 2:06-cv-629-FtM-29DNF, 2008 WL 4709325, at *1 (M.D. Fla. 2008) *report and recommendation adopted in part sub nom. Hughes v. Dist. Sch. Bd. of Collier Cnty.*, No. 2:06-cv-629-FtM-29DNF, 2008 WL 4661691 (M.D. Fla. 2008) (citing *M.M. v. Sch. Bd. of Miami-Dade Cnty.*, 437 F.3d 1085, 1095 (11th Cir. 2006).
[33] 20 U.S.C. § 1412 (2014).
[34] 20 U.S.C. § 1414(d); *R.E. ex rel. J.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 175 (2d Cir. 2012) (internal quotation marks omitted).
[35] *Hughes*, 2008 WL 4709325, at *1; *JSK ex rel. JK v. Hendry Cnty. Sch. Bd.*, 941 F.2d 1563, 1573 (11th Cir. 1991) (explaining under the IDEA, adequate benefits must be provided to the student, however, "maximum improvement is never required").
[36] *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 206–207 (1982).
[37] *Hughes*, 2008 WL 4709325, at *1 (citing *Rowley*, 458 U.S. at 207); *N.B. v. Hellgate Elementary Sch. Dist., ex rel. Bd. of Dirs., Missoula Cnty., Mont.*, 541 F.3d 1202, 1207 (9th Cir. 2008) (finding that school districts "must comply both procedurally and substantively with the IDEA").

animal access in public schools."[38] Therefore, Section 504 and the ADA are typically treated in tandem.[39] Nevertheless, the IDEA has an exhaustion requirement that requires parents of the student with a disability to file a request for a due process hearing prior to filing a complaint in federal or state court.[40] The exhaustion requirement promulgated under the IDEA "speaks to all federal statutes which may offer relief available under IDEA" meaning that if a claim arises under ADA or Section 504, but seeks relief available under IDEA, the claims are bound to IDEA's administrative process.[41]

II. Broward County School Board Case

A. Broward County School Board's Animal Policy

The School Board's service animal policy was officially adopted on August 4, 2014;[42] however, the administrative staff responded to inquiries from students and employees using its unadopted draft policy starting in January of 2013. The School Board's service animal policy reads, in pertinent part:

> IV. Responsibility of the service animal's handler/owner:
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> A. A service animal shall be under the control of its handler, at all times. A service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe effective performance of work or tasks, in which case the service animal must be otherwise under the handler's

[38] Tara A. Waterlander, *Canines in the Classroom: When Schools Must Allow A Service Dog to Accompany A Child with Autism into the Classroom Under Federal and State Laws*, 22 Geo. Mason U. Civ. Rts. L.J. 337, 359 (2012); *Bakersfield (CA) City School District*, 50 IDELR 169 (Jan. 25, 2008) (clarifying that "the responsibilities of a district to a student with a disability under Section 504 and Title II of the ADA may be satisfied through adherence to the Section 504 FAPE procedures set for in 34 C.F.R. §§ 104.33-.36").
[39] *Rodriguez v. City of N.Y.*, 197 F.3d 611, 618 (2d Cir. 1999).
[40] 20 U.S.C. § 1415(l) (2014).
[41] *Hope v. Cortines*, 872 F. Supp. 14, 20–21 (E.D.N.Y. 1995); *Babicz v. Sch. Bd. of Broward Cnty*., 135 F.3d 1420 (11th Cir. 1998) ("[A]ny student who wants relief that is available under the IDEA must use the IDEA's administrative system, even if he invokes a different statute."); *M.Y. v. Special Sch. Dist. No. 1*, 544 F.3d 885, 888 (8th Cir. 2008) (stating "the IDEA exhaustion requirement applies to claims brought under the Rehabilitation Act or other federal statutes to the extent that those claims seek relief that is also available under the IDEA").
[42] SBBC 4001.2 (2014).

control (e.g., voice control, signals, or other effective means). 28 CFR § 35.136(d).

B. A service animal is the personal property of the Student/Employee/Visitor

C. The School District is not responsible for the care, supervision or handling of the service animal. 28 CFR § 35.136(e).

D. In the case of a young child, Student/Employee/Visitor with disabilities who is unable to care for or supervise his/her service animal, the parent (or legal guardian, as the case may be) or the service animal's handler is responsible for providing care and supervision of the service animal.

E. The owner of the service animal must submit a health certificate or report of examination and appropriate vaccinations from a veterinarian licensed in the State of Florida, as required in the procedures for allowing service animals in school district facilities.

F. Owners of a service animal are liable for any harm or injury caused by the animal to other students, staff, visitors, and/or school board property.[43]

At the time of this case, the School Board's procedures, as mentioned in the policy above, referenced service animals in the schools, and stated, in relevant part:

> THE FOLLOWING INFORMATION/DOCUMENTATION MUST BE ATTACHED TO THE REQUEST FORM PRIOR TO ANY REQUEST BEING PROCESSED, REVIEWED AND/OR A DETERMINATION MADE.
>
> a. Service Animal (Dog)
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> A health certificate or report of examination from a veterinarian licensed in the State of Florida. The certificate/report must indicate the following vaccinations, (Distemper, Hepatitis, Leptospirosis, Parainfluenza, Parvovirus (DHLPP)), Bordetella, Roundworms, Hookworms and Rabies), had been secured and the service animal has a vaccination license and is free of disease.
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> Service Animal (Miniature horse)
>
> A health certificate or report of examination from a veterinarian licensed in the State of Florida. The certificate/report must indicate that the following vaccinations, Rabies, Tetanus, Encephelomyelitis, West Nile Virus,

[43] *Id.*

Rhinoneumontis, Influenza, and Strangles), had been secured and that the service animal has a vaccination license and is free of disease.

This Documentation must be provided annually.

b. Written proof that all service animals have been spayed or neutered.

c. If the service animal's handler is not the student, the handler must have completed a Level II background screening.

d. In as much as owners of a service animal are liable for any harm or injury caused by the animal to other students, staff, visitors, and/or property, and the owner must provide proof of current liability insurance coverage as required by the Risk Management Department of The School Board of Broward County, Florida. (Failure to provide proof of liability insurance in and of itself is not a reason to deny access to school facilities)[44]

After the court issued its Final Order, the School Board amended its service animal policy and procedures.

B. The School Board's Position

In response to the claims brought by Ms. Alboniga alleging failure to accommodate and discrimination under ADA and Section 504, the School Board asserted that the DOJ exceeded the scope of its authority when it enacted the regulations codified in § 35.136, as they are inconsistent with the ADA. Section 35.136 *mandates* public entities, including school districts, to "make reasonable modification in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."[45] Consequently, school boards and other public entities are barred from applying the reasonable accommodation analysis otherwise available under the ADA to determine whether a service animal is appropriate.

[44] BCPS Procedures for Allowing a Service Animal in School District Facilities (2014).
[45] 28 C.F.R. 35.130(b)(6).

By mandating such reasonable modifications, the DOJ exceeds the scope of its authority, as it essentially created law, a power expressly granted to Congress.[46] Congress only granted the DOJ the authority to *regulate* public entities under the ADA to help enforce its goal "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,"[47] not to create new burdens on agencies. The DOJ's regulations burden school districts throughout the nation by requiring them to conduct a specific analysis under the ADA and Section 504, which is *different from* and *in addition to* the analysis required under the IDEA, whenever a student requests a service animal as an accommodation. Such a burden is detrimental to the IEP process, as it threatens its collaborative nature.[48]

Furthermore, when the DOJ adopted Title III's (public accommodation) service animal provisions to Title II (public services), it appears it failed to consider the complexity of a school setting, the time spent in a school, and the multitude of services and accommodations elementary and secondary schools provide to children with disabilities. For instance, when an individual with a disability walks into a public entity facility, such as a county office, courthouse or library, the individual may visit the public entity for only a brief time and in a more casual setting, coming and going as he or she pleases. Such an environment is remarkably different from a school, where a student with a disability may spend six to eight hours per day in a classroom with an average of 20 to 30 fellow students.[49] In *Cave v. East Meadow Union Free School District*, the court acknowledged that a school is much different from other public entities and found that "[i]t is

[46] U.S. Const. art. I, § 1.
[47] 42 U.S.C. § 12101(b)(1).
[48] *Schaffer v. Weast*, 546 U.S. 49, 53 (2005); *Winkleman v. Parma City Sch. Dist.*, 550 U.S. 516, 531 (2007).
[49] *Clark Cnty Sch. Dist. v. Buchanan*, 112 Nev. 1146, 1159 (Nev. 1996) (explaining that "[a]lthough at certain times certain locations within [an individual's] 'place of education' might properly become a 'place of accommodation,' [the individual's] classroom is not a place of public accommodation. Even if her classroom could be considered a place of public accommodation, [the individual] has not been denied 'admittance' to this place, she has merely . . . been told that she could not keep her dog with her during her classroom day").

widely recognized that students in public schools do not have the same rights and freedoms that adults do under other circumstances."[50] Further, the court "recognize[d] from the outset that, at least with respect to the rights of its students with disabilities" a public entity such as a school "is not necessarily the same as, for example, a courthouse or a public library."[51]

Accordingly, the DOJ should have given school districts discretion to determine whether a service animal accompanying a specific student with a disability is a reasonable accommodation under its Title II regulations, rather than mandating such an accommodation.

C. The DOJ's Statement of Interest of the United States of America

Prior to the Court issuing its Order on Cross Motions for Summary Judgment, the DOJ submitted a Statement of Interest to the Court on January 26, 2015. The DOJ contended that a public entity "'[g]enerally must permit individuals with disabilities to be accompanied by their service animals"[52] and asserted that it was within the purview of its authority to promulgate the regulations in the way that it did. The DOJ also continued to compare its Title II service animal provisions to that of Title III's service animal provisions.[53]

Congress granted the DOJ, specifically the Attorney General, the power to issue regulations under Title II of the ADA.[54] Typically, when Congress delegates its authority to an

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[50] 480 F. Supp. 2d 610, 633 (E.D.N.Y. 2007).
[51] *Id.* (Id. to all of it?)
[52] Brief for *Alboniga v. Sch. Bd. of Broward Cnty., Fla.* as Statement of Interest Supporting Title II of the ADA, 42 U.S.C. § 12131 *et seq.*, No. 0:14-cv-60085-BB [DE 48] (S.D.Fla. 2015); 28 C.F.R. § 35.136.
[53] In the DOJ's Statement of Interest, it stated that "the Title II regulation, which mirrors the service animal subsection (§35.302(c)) of the Title II regulation's reasonable modifications section" and "[t]he Department's regulatory Guidance makes clear that, like the Title III regulation, the new service animal provision is subject to the Title II regulation's reasonable modifications provision (§35.130(b)(7))," further solidifying that the DOJ adopted Title III's service animal provisions without considering the unique position of a school district. Brief for *Alboniga v. Sch. Bd. of Broward Cnty., Fla.* as Statement of Interest Supporting Title II of the ADA, 42 U.S.C. § 12131 *et seq.*, No. 0:14-cv-60085-BB [DE 48] (S.D.Fla. 2015).
[54] 42 U.S.C. §§ 12134, 12188(b); *Bartlett v. N.Y. State Bd. of Law Examiners*, 226 F.3d 69, 79 (2d Cir. 2000); *Barden v. City of Sacramento*, 292 F.3d 1073, 1077 (9th Cir. 2002).

agency "to make rules carrying the force of law," then substantial deference should be given to the agency that 'claim[s] deference was promulgated in the exercise of that authority.'"[55] Moreover, when Congress explicitly leaves "'a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation' . . . and ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance or manifestly contrary to the statute."[56] That said, regulations exist so that designated agencies may use their "body of experience and informed judgment" to regulate certain activities from statutes enacted by Congress.[57] Congress designated the Department as the responsible agency for "coordinating the compliance activities of public entities that administer '[a]ll programs, services, and regulatory activities relating to . . . the administration of justice, including . . . planning, development, and regulation.'"[58]

The DOJ enacted and codified regulations pertaining to service animals in 28 C.F.R. § 35.136. The regulations prohibit public entities from discriminating against an individual with a disability and requires that such an individual be permitted to the service animal accompany him or her while at a public entity.[59] The promulgated regulations, however, are not consistent with the ADA, codified in 42 U.S.C. § 12132 *et seq*. The ADA is broadly construed and instructs public entities that they cannot exclude a person with a disability from "participating in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination

[55] *U.S. v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *Miller v. California Speedway Corp.*, 536 F.3d 1020, 1028 (9th Cir. 2008) (finding the holding in "*Chevron* addresses what kind of deference we must afford an agency in the interpretation of the *statute* it has been charged with enforcing") (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (emphasis provided).
[56] *Mead*, 533 U.S. at 227 (citing *Chevron*, 267 U.S. at 843-44).
[57] *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–140 (1944); *see also Robbins v. Bentsen*, 41 F.3d 1195, 1198 (7th Cir. 1994) (stating that "regulations cannot trump the plain language of statutes, and we will not read the two to conflict where such a reading is unnecessary").
[58] 28 C.F.R. § 35.190(b)(6); *Yeskey v. Com. of Pa. Dep't of Corr.*, 118 F.3d 168, 171 (3d Cir. 1997) *aff'd sub nom. Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206 (1998).
[59] 28 C.F.R. §§ 35.130, 35.136.

by such an entity."[60] The DOJ regulations enacted for the ADA require public entities, including school districts, to "make *reasonable modifications* in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, *unless* the public entity can demonstrate that making the modifications would *fundamentally alter* the nature of the service, program, or activity."[61] But the regulation addressing service animals goes a step further, requiring a public entity to "modify its policies, practices, or procedures to permit the use of a service animal," unless the animal is out of control or not housebroken.[62] The reasonable modification/fundamental alteration analysis is absent.

By prohibiting public entities from conducting such an analysis, the DOJ has created a conflict between a school district's obligation to provide reasonable accommodations and to provide students with FAPE under Section 504 (and ADA) on the one hand, and to provide a FAPE under the IDEA's IEP process on the other. For instance, in *Alboniga*, the School Board maintained that, under the IDEA, A.M.'s service animal should not be on A.M.'s IEP because it was not necessary for A.M. to receive FAPE. Additionally, Ms. Alboniga supported how A.M.'s IEP goals and objectives were being met. Therefore, in *Alboniga*, there was no dispute under the IDEA. Nevertheless, under the ADA, a reasonable accommodation analysis involving the interactive process should have been conducted to determine whether the service animal was an appropriate accommodation based on A.M.'s disability. Instead, due to the DOJ's regulations, the School Board was barred from conducting such an analysis and was forced to allow A.M.'s service animal to accompany him to school.

[60] 42 U.S.C. § 12132.
[61] 28 C.F.R. § 35.130(b)(7) (*emphasis added*).
[62] 28 C.F.R. § 35.136(a) and (b).

The DOJ asserted in its Statement of Interest that "the School Board fundamentally misunderstands the Title II regulation"[63] and that a reasonableness analysis must still be conducted.[64] Nevertheless, the Statement of Interest did little to clarify the issues the School Board had with the DOJ's drafting of Title II's service animal regulation. First, the DOJ maintained that it does not mandate public entities, such as school districts, to use service animals as an accommodation, but instead asserted that the School Boards "*generally* must make modifications to permit individuals with disabilities to use their service animals,"[65] subject to a few enumerated exceptions.[66] Second, the DOJ justified the language of the regulations by declaring that "the regulation is a reasonable construction of the ADA because it promotes the statute's overarching goals of ensuring equal opportunity for, and full participation by, individuals with disabilities in all aspects of civic life,"[67] yet it failed to explain how such a black-and-white rule fits into a school environment. Third, the DOJ concluded its Statement of Interest by stating, "as the author of the regulation, the Department submits that its longstanding interpretation—that the service animal provision directly applies to the regulation's reasonable modifications requirement—is entitled to deference,"[68] yet it failed to acknowledge that the reasonable accommodation analysis is abrogated altogether in its Title II regulations. As such, the DOJ continues to ignore and overstep the

[63] Brief for *Alboniga v. Sch. Bd. of Broward Cnty., Fla.* as Statement of Interest Supporting Title II of the ADA, 42 U.S.C. § 12131 *et seq.*, No. 0:14-cv-60085-BB [DE 48], at *1 (S.D.Fla. 2015).
[64] *Id.* at *11.
[65] *Id.* at *5 n. 5 (*emphasis added*).
[66] 28 C.F.R. § 35.104 (determining that only those dogs that are "individually trained to do work or perform tasks for the benefit of an individual with a disability" may qualify as a service animal); 28 C.F.R. § 35.130(b)(7) (allowing a public entity to exclude a service animal if it would "fundamentally alter the nature of the entity's service, program, or activity"); 28 C.F.R. § 35.136(b) (permitting a public entity to "ask an individual with a disability to remove a service animal from the premises if (1) the animal is out of control and the animal's handler does not take effective action to control it; or [t]he animal is not housebroken").
[67] Brief for *Alboniga v. Sch. Bd. of Broward Cnty., Fla.* as Statement of Interest Supporting Title II of the ADA, 42 U.S.C. § 12131 *et seq.*, No. 0:14-cv-60085-BB [DE 48], at *6 (S.D.Fla. 2015).
[68] *Id.* at *12.

authority granted to it by Congress, as it instructs all school districts and other public entities that they *must* require service animals to accompany a student with a disability.

D. The Final Order

i. Summary of the Final Order

On February 10, 2015, the United States District Court for the Southern District of Florida issued an Order On Cross Motions for Summary Judgment in favor of Ms. Alboniga and A.M., finding that the School Board violated Title II of the ADA and Section 504.[69] The Court found that the School Board

> is permanently enjoined to provide the minor plaintiff A.M. reasonable accommodation in assisting him with use of his service animal, . . . from, by general policy or otherwise, requiring Plaintiff to maintain additional liability insurance for A.M.'s service animal . . . [and] requiring that Plaintiff obtain vaccinations for A.M.'s service animal in excess of those normally required under Florida law in connection with the regulation of animals permitted in schools.[70]

The Court also held that the Plaintiffs were entitled to compensatory damages and reasonable costs and attorneys' fees.[71] In so holding, the Court conceded much of the DOJ's position in its Statement of Interest. The Court found that (1) the DOJ regulations call for a reasonableness analysis; (2) in the vast majority of cases, an accommodation requested by a disabled person of a public entity to permit use of a service animal will be considered reasonable.; (3) A.M. was capable of being his service animal's "handler;" (4) the School Board was required to assist A.M. by taking A.M. outside to relieve himself during the school day; (5) the School Board must amend its policies and procedures regarding its vaccination requirements and proof of liability insurance; and (6) Ms.

[69] *Alboniga v. Sch. Bd. of Broward Cnty., Fla.*, No. 14-civ-60085, 2015 WL 541751, at *23 (S.D. Fla. 2015).
[70] *Id.*
[71] *Id.*

Alboniga did not have to exhaust the administrative remedies available under the IDEA before filing her lawsuit.[72]

First, in determining that the DOJ's amended regulations do in fact impose a reasonableness analysis, the Court stated:

> …the School Board interprets the service animal provision to forego that reasonableness analysis. Rather, 28 C.F.R. § 35.136 directly applies the section 35.130(b)(7) framework, and presents the DOJ's holistic view, in enforcing the ADA, of when it is reasonable, and when it is unreasonable to require public entities to accommodate the use of service animals.[73]

While it is true that § 35.136 applies 35.130(b)(7)'s framework, § 35.136's language is much more restricting than § 35.130(b)(7). In § 35.130(b)(7), the DOJ requires a public entity to "make reasonable modification in its policies, practices, or procedures" in order to avoid discriminating against a disabled person based on his or her disability and provides a general exception for when such a modification would "fundamentally alter the nature of the service, program, or activity."[74] In contrast, § 35.136(a) expressly requires a public entity to "modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability" and only provides two (2) narrow exceptions in § 35.136(b).[75] The first exception allows a public entity to "remove a service animal from the premises if . . . [t]he animal is out of control and the animal's handler does not take effective action to control it."[76] The second exception permits such a removal if "[t]he animal is not housebroken."[77] Consequently, by providing only a few narrow exceptions, the regulation prevents public entities from conducting a reasonableness analysis and instead requires a school to allow a qualified individual with a disability to attend school with his or her

[72] *Id.* at 5–23
[73] *Id.* at 14.
[74] 28 C.F.R. §§ 35.130(b)(7), 35.136(a).
[75] 28 C.F.R. § 35.136(a)–(b).
[76] 28 C.F.R. §35.136(b).
[77] *Id.*

service animal. Thus, according to the DOJ, in only a limited amount of circumstances may a school district find a request for the accommodation of a service animal unreasonable.

Second, while it is true that an individual with a disability better understands his or her disability and may provide great insight as to what accommodations may be most beneficial, the school district is not required to provide each accommodation requested.[78] The school district also needs an opportunity to evaluate the accommodation requested to determine whether it is reasonable based on the individual's disability, and whether it is necessary to provide access to a student with disability. In order to find whether an accommodation is "reasonable," the ADA and Section 504 require an interactive process to occur between the student/family, and the school district.[79] In order to fully comply with the ADA's interactive process, the parties must "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[80] In other words, "*both parties* have a duty to assist in the search for appropriate reasonable accommodation and to act in good faith" when participating in the interactive process.[81]

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[78] *Alboniga*, 2015 WL 541751, at *18; *see U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 402 (2002); *Earl v. Mervyns, Inc.*, 207 F.3d 1361, 1365 (11th Cir. 2000) (finding "an employer is not required to accommodate an employee in any manner in which that employee desires"); *Cave ex rel. Cave v. E. Meadow Union Free Sch. Dist.*, 480 F. Supp. 2d 610, 640 (E.D.N.Y. 2007).

[79] Clark, *supra* note 6.

[80] *Id.*

[81] *Mengine v. Runyon*, 114 F.3d 415, 420 (3d Cir. 1997); *see also Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1137 (7th Cir. 1996) (explaining that "[o]nce an employer knows of an employee's disability and the employee has requested reasonable accommodations, the ADA and its implementing regulations require that the parties engage in an interactive process to determine what precise accommodations are necessary"); *Smith v. Midland Brake, Inc., a Div. of Echlin, Inc.*, 180 F.3d 1154, 1171-72 (10th Cir. 1999) (finding that "[t]he federal regulations implementing the ADA 'envision an interactive process that requires participation by both parties.'"); *Forbes v. St. Thomas Univ., Inc.*, 768 F. Supp. 2d 1222, 1231 (S.D. Fla. 2010) (finding that "[i]n the academic setting, 'reasonable accommodations' jurisprudence contemplates an interactive process between the student and the school, under which both sides have a responsibility. . .").

Typically, the ADA's interactive process begins when an individual with a disability asks for a specific accommodation.[82] When a student makes such a request, the school district, as a Title II entity, is required both under the ADA and Section 504, to engage in the interactive process with the student to determine what would be an appropriate and reasonable accommodation to enable him or her to participate in the programs or activities provided by the school.[83] Because a school setting is unique, and "academic faculties have a special understanding about which aspects of the educational experience can be modified, a school's decision about accommodations will be upheld unless it is plainly not based on professional judgment."[84] Thus, by mandating that a service animal be provided to an individual with a disability, the DOJ's regulations circumvent the interactive process required under the ADA to determine whether such an accommodation is reasonable.[85]

In *Alboniga*, the School Board was never given an opportunity to participate in any interactive process with Ms. Alboniga and A.M. Rather, Ms. Alboniga asked the School Board to permit A.M.'s service animal into the school as an accommodation to A.M.'s seizure disorder without consulting the School Board. Had the interactive process been initiated, Ms. Alboniga might have been content with the School Board's accommodations that it had already made, or the parties could have discovered other reasonable accommodations. Prior to Ms. Alboniga's service animal request, the School Board had already appointed a teacher and a paraprofessional to A.M.'s

[82] *Forbes*, 768 F. Supp. 2d at 1231 (determining that the student has the initial burden of identifying her disability and asking for a specific accommodation), citing *Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, 165 (5th Cir. 1996) (explaining "where either disability or necessary accommodations 'are not open, obvious, and apparent, the initial burden rests primarily on the [individual] to specifically identify the disability…and to suggest the reasonable accommodations'").
[83] *See Forbes*, 768 F. Supp. 2d at 1231; *Shurb v. Univ. of Tex. Health Sci. Ctr. at Houston-Sch. of Med.*, No. 4:13-CV-271, 2014 WL 5429307, at *6 (S.D. Tex. Oct. 24, 2014).
[84] *Forbes*, 768 F. Supp. 2d at 1231.
[85] 28 C.F.R. § 35.136(a).

classroom who was trained to ensure that A.M. remained safe in the event he had a seizure at school. The service animal was supposed to alert, but not prevent a seizure from happening.[86] Because A.M. was confined to a wheelchair and is non-verbal, blind and has very limited movement, the teacher and paraprofessional were trained to remove A.M. and carefully place him on the floor when he had a seizure. Although A.M.'s service animal potentially could alert the teacher or paraprofessional that A.M. was about to have a seizure, the teacher or paraprofessional still had to remove A.M. from his wheelchair and carefully lay him on the floor. In fact, the role of the teacher and paraprofessional did not change when A.M. had his service animal with him in the classroom. Nonetheless, the Court still condemned the School Board for "survey[ing] the universe of possible accommodations or modifications and determin[ing] for the individual, what, in its estimation, is the best or most 'reasonable,' approach."[87] The Court failed to recognize that the School Board was deprived of the opportunity granted to it under the ADA and Section 504 to engage in an interactive process with Ms. Alboniga on behalf of A.M. Even so, the School Board maintains that it made an effort to reasonably accommodate A.M. so that he had access to his education to the same extent as a non-disabled student.

Third, the Court determined that A.M. was capable of being his service animal's handler.[88] In so finding, the Court looked to the DOJ's regulations and the little precedent that exists to determine "what constitutes a 'handler' with 'control' over a service animal for purposes of these regulations."[89] The Court determined that as long as the service animal is not left unattended, then

[86] It should be noted that there has been no record of A.M.'s service animal providing A.M. with the care and protection he was trained to do during school hours.
[87] *Alboniga*, 2015 WL 541751, at *18.
[88] *Id.* at *20.
[89] *Id.*

the handler generally has control over it.[90] The DOJ regulations expressly indicate, however, that a handler has "control" of his or her service animal if it has

> a harness, leash, or other tether, *unless* either the handler is unable *because of a disability to use a harness, leash, or other tether, or the use of a harness, leash,* or other tether would interfere with the service animal's safe, effective performance of work or tasks, *in which case the service animal must be otherwise under the handler's control* (e.g., voice control, signals, or other effective means).[91]

A.M. is a child who suffers from cerebral palsy, epilepsy, and muscular dystrophy, and is visually impaired, and non-verbal. A.M. relies on a wheelchair for mobility and requires assistance with all of his daily activities. The nature of A.M.'s disabilities prevent him from moving to, speaking to, or controlling the service animal, rendering it "unattended." Although it is possible for the service animal to be "tethered to A.M. . . .[t]hroughout the school day" and the service animal "simply stay[] by A.M.'s side,"[92] A.M. still falls outside the ambit of section 35.136(d) requirement that a handler have "control" over his service animal. In finding that A.M. could be his service animal's handler, the Court underestimated the severity of A.M.'s disability. The Court reasoned that "even absent tethering, voice controls or signals between the animal and the disabled 'handler' can constitute 'control.'"[93] The fact of the matter is that A.M.'s disability leaves him totally dependent on adults in his environment. A.M. is incapable of ever being able to function independently because not only is A.M. immobile, due to his inability to control his movements enough to navigate on his own, and requires someone to push around his wheelchair, but he is also non-verbal. That is to say, A.M. has no ability to use his voice or signal to his service animal. Thus, although A.M. is capable of having his service animal tethered to his wheelchair, A.M. still has no ability to "control" his service animal.

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[90] *Id.*
[91] 28 C.F.R. § 35.136(d) (emphasis added).
[92] *Alboniga*, 2015 WL 541751, at *20.
[93] *Id.*

Fourth, the Court held that as an accommodation to A.M., the School Board is required to take A.M.'s service animal outside to relieve itself on a daily basis.[94] In so holding, the Court assumed that such a task does not require the School Board to "care or supervis[e]" the service animal, since a majority of the "care or supervision" is done by the handler, A.M.[95] The Court's interpretation of "care or supervision" is significant because the DOJ regulation expressly states that "a public entity is not responsible for the care or supervision of a service animal,"[96] yet it explains that

> there are occasions when a person with a disability is confined to bed in a hospital for a period of time. In such an instance, the individual may not be able to walk or feed the service animal. In such cases, if the individual has a family member, friend, or other person *willing* to take on these responsibilities in the place of the individual with disabilities, the individual's obligation to be responsible for the care and supervision of the service animal would be satisfied.[97]

The DOJ's interpretation of "care or supervision" indicates that such "occasions" would be sporadic and for a limited amount of time, and that such "care or supervision" may be handled by a person *willing* (i.e., volunteering) to take on such a role. The regulations also suggest that such an individual would have a relationship to the person with a disability and by no means indicates that a public entity is responsible for finding such a person to temporarily "care or supervise" the service animal.

Nonetheless, the Court ultimately interpreted "care or supervision" as principally the "routine or daily overall maintenance of a service animal,"[98] including "feeding, watering, walking or washing the animal."[99] The Court also referenced other jurisdictions' interpretation of "care or

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[94] *Id.* at *23.
[95] *Id.* at 21–23.
[96] 28 C.F.R. § 35.136(e).
[97] 28 C.F.R. PT. 35, App. A. (*emphasis added*).
[98] *Alboniga*, 2015 WL 541751, at *22.
[99] *Id.* at 21; *McDonald v. Dep't of Envtl. Quality*, 2009 MT 209, 351 Mont. 243 (Mont. 2009) (defining "care or supervision" of a service animal as "looking after the service animal in the owner's absence").

supervision" for guidance.[100] In its interpretation of "care or supervision," the Court said that A.M. was able to provide for his service animal while at school, despite all of his disabilities. It appears that the Court believed a School Board employee could momentarily "care and supervise" for A.M.'s service animal while it relieves itself. Due to his conditions, A.M. is unable to "lead his dog outside the school to relieve itself,"[101] therefore, the School Board is required to accommodate the accommodation, by supervising the service animal. Such a "temporary" double accommodation, however, requires the School Board to assign an employee to "care or supervise" A.M.'s service animal during the school day, a duty which the DOJ regulations expressly state is not the public entity's.[102]

In making its determination that the School Board does not "care or supervis[e]" A.M.'s service animal, the Court only analyzed the accommodation regarding the service animal's daily procedure of relieving itself. The Court failed to consider other issues that arise from allowing the service animal to accompany A.M. to school. For instance, a handler also must supervise the service animal around school grounds, including, but not limited to, in the classroom, hallways, recreational areas, and the cafeteria, while in the presence of others. Although a service animal is a specially trained dog, a dog is still a dog and children will still want to play with it. It is solely the handler's responsibility to ensure that the service animal behaves appropriately while at school.

Further, the DOJ and the Court provided an overbroad definition of "care," and gave school districts poor guidance with how to apply "supervision." Remarkably, the basic dictionary definition of "supervision" provides more guidance than the DOJ regulations, even when looking

[100] *See McDonald v. Dep't of Envtl. Quality*, 2009 MT 209, 351 Mont. 243, 214 P.3d 749 (Mont. 2009); *Tamara v. El Camino Hosp.*, 964 F. Supp. 2d 1077 (N.D. Cal. 2013); *Shields v. Walt Disney Parks & Resorts U.S., Inc.*, 279 F.R.D. 529 (C.D. Cal. 2011).
[101] *Alboniga*, 2015 WL 541751, at *22.
[102] 28 C.F.R. §35.136(e).

at "the DOJ guidance, similar regulatory provisions, and non-precedential authority."[103] Supervision is defined in the dictionary as "[t]he series of acts involved in managing, directing, or overseeing persons or projects."[104] Because the DOJ fails to define "supervision" in its regulations and guidelines, or even to reference it in its Statement of Interest, no interpretation of this term exists at this time; therefore, the substantial deference to which DOJ typically would be entitled to is inapplicable in this circumstance. The common meaning of the term as defined in the dictionary would apply. In construing the definition of "supervision," it appears that in this context, to "supervise" a service animal takes considerably more responsibility than the Court suggested by uniting the terms "care or supervision" together. To supervise a service animal properly, it can be inferred that a handler must also manage, direct, or oversee the service animal throughout the day. Accordingly, the Court's holding provides guidance to other school districts in how to interpret "caring," yet it leaves school districts on their own to determine what is considered "supervision." Such a distinction is critical, as the DOJ's regulations specifically relieve school districts from responsibility for the "care or supervision" of a service animal.[105]

Fifth, the Court held that the School Board could no longer require those requesting a service animal to provide proof of additional vaccinations or liability insurance.[106] The School Board was instructed to comply with Florida law.[107] A dog is required to get the following vaccinations in order to be *sold* in Florida: (1) canine distemper, (2) leptospirosis, (3) bordetella, (4) parainfluenza, (5) hepatitis, (6) canine parvo, (7) rabies, (8) roundworms, and (9)

[103] *Alboniga*, 2015 WL 541751, at *22.
[104] BLACK'S LAW DICTIONARY (10th ed. 2014), *available at* Westlaw; WEBSTER'S II NEW COLLEGE DICTIONARY 1107 (1995) ("[t]o direct and watch over the work and performance of").
[105] 28 C.F.R. § 35.136(e).
[106] *Alboniga*, 2015 WL 541751, at *18.
[107] *Id.* at 23.

hookworms.[108] The School Board's previous policy incorporated this list. Under Florida law, however, all dogs 4 months of age or older are required to receive only a rabies vaccination.[109] Therefore, the School Board's former service animal policies and procedures were overinclusive and have since been amended—in compliance with Florida law—to require only that a service animal has a vaccination license and is free of disease. In regards to the former proof of liability insurance, although the School Board specifically stated in its Policy that it would never deny a child a service animal for lack of liability insurance, the School Board has since amended its policies and procedures to make it clearer that such proof is not required in order to allow a service animal into a school. Currently, the School Board does caution that the owner of a service animal is liable for any harm or injury caused by the service animal to students, staff, visitors, and/or property. Thus, the School Board has complied with the Court's Order and has amended its policies and procedures accordingly.

Sixth, the Court determined that because "[p]laintiff does ***not*** claim that A.M. has been denied a free and appropriate public education . . . that A.M.'s IEP is in any way deficient . . . [or] that A.M.'s service animal is educationally necessary, … [t]he IDEA and its administrative scheme are simply not implicated."[110] In so holding, the Court failed to recognize the impact A.M.'s service animal would have in A.M.'s education. The court addressed these concerns in the case of *E.F. v. Napoleon Community Schools, Jackson County Intermediate School District*, finding that the student's service animal's presence would impact issues relating to the child's IEP.[111] The court explained:

[108] Fla. Stat. § 828.29(b) (2014) (*emphasis added*).
[109] Fla. Stat. § 828.30(1) (2014).
[110] *Alboniga*, 2015 WL 541751, at *8.
[111] No. 12–15507, 2014 WL 106624, at *5 (E.D. Mich. Jan. 10, 2014).

> the IEP would need to include plans for handling [the service animal] on the playground or in the lunchroom. Defendants (i.e., the school and school district) would also have to make certain practical arrangements – such as developing a plan for [the service animal's] care, including supervision, feeding and toileting – so that the school continued to maintain functionality. All of these things undoubtedly implicate [the student's] IEP and would be best dealt with through the administrative process.[112]

It is well founded throughout the case law among the circuits that the "[e]xhaustion of the IDEA's administrative process is also required in non-IDEA actions where the plaintiff seeks relief that can be obtained under the IDEA."[113] Consequently, the Court was misguided and should have required Ms. Alboniga to exhaust the administrative remedies provided under the IDEA because A.M.'s IEP would be implicated in some way by having A.M.'s service animal accompany A.M. to school.

The Court's Order did little to clarify the numerous issues school districts must analyze when determining whether a service animal may attend school under the ADA and Section 504. As such, the Court continues to uphold the DOJ's expansive view of its authority.

ii. Unresolved Issues

The Court's Order touched only the surface of the issues contained in ***Alboniga*** and leaves many school districts in similar situations with little guidance on how they should comply with the DOJ's service animal regulations. Because there is little case law regarding these regulations under Title II, it is easy for other courts and the DOJ to continue to rely on ***Alboniga***'s outcome in similar cases. Therefore, in order for school districts to move forward, it is imperative to understand what the Order included versus what it did not.

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[112] *Id.*
[113] *Batchelor v. Rose Tree Media Sch. Dist.*, 759 F.3d 266, 272 (3d Cir. 2014).

The Order clearly determined that the School Board could not require additional vaccinations or proof of liability insurance in its process of admitting a service animal into one of its schools.[114] Additionally, the Order concluded that A.M., as a child with a disability, was qualified to act as his service animal's handler and that the School Board did not "care or supervis[e]" A.M.'s service animal when it took the service animal outside to relieve itself.[115] The Order did not, however, determine whether a school district must provide a handler for a disabled student or whether a school district is responsible for bearing the cost of hiring an additional employee to "care or supervis[e]" the service animal.

Interestingly, the Court conspicuously left out its interpretation of a "reasonable modification" and seems to give deference to the DOJ's interpretation of the two terms. In its Statement of Interest, the DOJ explained that it used the phrase "reasonable *modification*" instead of "reasonable *accommodation*" throughout its analysis "[b]ecause the regulation uses the word "modification[]."[116] Consequently, the Court and the DOJ seem to equate a "reasonable accommodation" and "reasonable modification:"

> The ADA defines "reasonable accommodation" as a term that
>
> > may include—(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[117]

Conversely, the DOJ fails to define "reasonable modification" in its regulations. If the DOJ interprets "reasonable modification" the same way it interprets "reasonable accommodation," then

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[114] *Alboniga*, 2015 WL 541751, at *23.
[115] *Id.* at *21–22.
[116] Brief for *Alboniga v. Sch. Bd. of Broward Cnty., Fla.* as Statement of Interest Supporting Title II of the ADA, 42 U.S.C. § 12131 *et seq.*, No. 0:14-cv-60085-BB [DE 48], at *3 n.1 (S.D.Fla. 2015); *see* 28 C.F.R. § 35.130(b)(7).
[117] 42 U.S.C. § 12111(9) (2014).

the DOJ does not appropriately apply a reasonable accommodation analysis in its regulations and, therefore, exceeds its authority. To determine whether a reasonable accommodation is appropriate "an informal, interactive process with the individual with a disability in need of the accommodation" should be conducted,"[118] as previously addressed.

Ms. Alboniga requested that her son be allowed to attend school with his service animal. The School Board was forced to allow A.M.'s service animal into the school, pursuant to the DOJ's regulations.[119] The School Board was prohibited from going through the interactive process to determine whether A.M.'s service animal was a reasonable accommodation for A.M.'s disability, and therefore, granting him access to the school's educational programs. If the School Board had the opportunity to engage in such a process, then the two parties may have discovered that A.M.'s service animal was not the only means of accessing the educational program. Due to A.M.'s disabilities, both A.M.'s teacher and paraprofessional cater to A.M.'s daily needs while he attends school. A.M.'s needs range from taking him out of his wheelchair when he has a seizure and issuing a suppository, feeding him, changing his diapers, and moving him around school, in addition to educating A.M. While it's true that the ADA was "designed to respect the choices of individuals with disabilities and ensure their ability to live independently,"[120] the ADA does not give a disabled individual unbridled discretion to choose the reasonable accommodation he or she would like.[121] The School Board should have had an opportunity to confer with Ms. Alboniga through the interactive process to determine whether it could have reasonably accommodated A.M. in any other way, which would be acceptable to Ms. Alboniga and A.M. Engaging in an interactive

[118] 29 C.F.R. § 1630.2(o)(3) (2014).
[119] 28 C.F.R. § 35.136(a).
[120] Brief for *Alboniga v. Sch. Bd. of Broward Cnty., Fla.* as Statement of Interest Supporting Title II of the ADA, 42 U.S.C. § 12131 *et seq.*, No. 0:14-cv-60085-BB [DE 48], at *8 (S.D.Fla. 2015); *see Hearing Before the S. Comm. On Labor & Human Resources*, 101st Cong. 188 (1989).
[121] *See U.S. Airways, Inc.*, 535 U.S. at 402.

process may have been beneficial, or at least, may have helped resolve certain issues between the parties. The DOJ's regulations deprived the School Board and the plaintiffs, Ms. Alboniga and A.M., from having such an interaction.

III. The Process to use when a Student with a Disability Requests a Service Animal

Addressing a request from a student to attend school with his or her service animal and deciding whether such an accommodation is appropriate can be a daunting task, especially because the DOJ regulations eliminate a reasonable accommodation analysis and there is little case law guiding school districts to make such a determination. Thankfully, Susan G. Clark, Ph.D., J.D. clarified the analysis and provided a succinct analysis in her article—*The Use of Service Animals in Public Schools: Legal and Policy Implications*—which gives school districts a valuable perspective of how to handle requests for a service animal to attend school with a disabled student. Dr. Clark states:

> [t]he analysis as to whether a service animal is required to assist a student with a disability on school grounds under the ADA and Section 504 nondiscrimination provisions for access begins with consideration of the person's need for accommodation, followed by an examination of the type of animal and whether the animal meets the definition of a service animal. School officials may then consider the function, work, or tasks to be performed by the animal and its training to do such work. Therefore, should a student request to be accompanied to school by an animal, consideration should be given as to whether a) the animal is not the sole means of providing access to the educational program and thus may not be required; b) the animal is excluded from the definition of service animal or poses a direct threat to the health or safety of others; c) the animal may not be individually trained to do work or to perform identifiable tasks for the student; d) the animal actually does work or perform any tasks for the student; or e) the animal is for the sole purpose of comfort and emotional support for the student without a need based on psychiatric, cognitive, or mental disability, regardless of its training.
>
> The process of making the decision as to the necessity of a service animal is an interactive process, and school officials would be wise to convene a meeting with the parents and key personnel upon receipt of such a request.[122]

[122] Clark, *supra*, note 6, at 8–9.

Specifically, school districts should determine (1) whether the student with a disability needs an accommodation, which should be determined through the ADA's interactive process; (2) determine what type of animal the student is requesting as an accommodation; and (3) determine whether the animal is a service animal proscribed in Title II of the ADA regulations.[123]

Conclusion

Since the holding in *Alboniga*, other courts have addressed the issue of exhaustion of administrative remedies, [124]and only one other case has dealt with exhaustion as it relates to the provision of a service animal.[125] However, as of the time of this writing, no other case has addressed the definition of care and supervision of a service animal under the DOJ regulations. This paper is intended to be a primer on the law in this area, and guidance to any other districts facing similar issues.

[123] *Id.*
[124] *J.Q. v. Washington Tp. School Dist.*, ___ F.Supp.3d ___, No. 14–7814, 2015 WL 1137865 (D.N.J. March 13, 2015) (holding that exhaustion of IDEA is required); *M.C. v. Perkiomen Valley Sch. Dist.*, 2015 WL 2231915 (May 11, 2015 E.D. Penn.); *C.L. v. Mars Area Sch. Dist.*, 2015 WL 3968343 (June 30 2015 W.D. Penn.)
[125] *Fry v. Napoleon Cnty. Sch.*,788 F.3d 622 (6th Cir. 2015) (holding that exhaustion of IDEA is required).