

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

CHILD WITH DISABILITY and MOTHER,
and FATHER, individual and on behalf of their son,
a minor,

Plaintiffs,

Civil Action No.
15-CV-2903

-against-

(Feuerstein, J.)
(Lindsay, M.J.)

SACHEM CENTRAL SCHOOL DISTRICT BOARD
OF EDUCATION; SACHEM CENTRAL SCHOOL
DISTRICT; and JAMES NOLAN in his official
Capacity as Superintendent for Sachem Central
School District,

Defendants.

-----X

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

ROBERT L. CAPERS
United States Attorney
Attorney for United States of America
Eastern District of New York
271 Cadman Plaza East
Brooklyn, New York 11201

KELLY HORAN FLORIO
Assistant United States Attorney

(Of Counsel)

PRELIMINARY STATEMENT

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517,¹ in order to clarify the proper interpretation of Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12132 et seq. (“Title II of the ADA” or “Title II”) with respect to the issues raised by Defendants (Sachem Central Board of Education (“Board of Education”), Sachem Central School District (“School District”), and James Nolan) in the Memorandum of Law in Support of Defendants’ Motion to Dismiss (“Defendants’ Brief”). Plaintiffs (a 12-year-old child with a disability (“Child”), and his Mother and Father, both individually and on Child’s behalf) allege, among other things, that Defendants violated Title II of the ADA by refusing to allow Child’s service animal to accompany Child at school or school-related functions.

Defendants have moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) on the grounds that (1) allowing Child to use a service animal is not a reasonable modification under Title II of the ADA; (2) Plaintiffs’ ADA claims are foreclosed because Defendants provided Child with a free appropriate public education (“FAPE”) under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1401 et seq. (“IDEA”); and (3) Plaintiffs failed to exhaust their administrative remedies. Plaintiffs respond that: (1) their Complaint alleges sufficient facts to state a claim of discrimination under Title II of the ADA seeking both damages and injunctive relief; 2) Plaintiffs’ ADA claim is not foreclosed by Defendants’ provision of FAPE under the IDEA because the IDEA and ADA have separate legal standards; and (3) because Plaintiffs exhausted IDEA’s administrative hearing procedures, as required by 20 U.S.C. § 1415(l), they may pursue their ADA claims in this court.

¹ Under 28 U.S.C. § 517, “[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.”

As set forth below, the United States respectfully submits that Plaintiffs' Complaint is sufficient to survive Defendants' motion to dismiss. At the very least, Plaintiffs' Complaint asserts sufficient facts to state a Title II claim that Child requested a reasonable modification, i.e., to use his service animal at school, and that Defendants denied that request. Further, although the ADA and the IDEA provide complementary protections for many students with disabilities, those protections are not identical. Thus, a school district may still violate the ADA even where it has satisfied the IDEA's FAPE requirements. Finally, the Exhibits to Defendants' Brief demonstrate that Plaintiffs exhausted their administrative remedies required by 20 U.S.C. § 1415(l) because they raised their issues regarding Child's use of his service animal at school during the administrative proceedings.

**THE BACKGROUND OF TITLE II
OF THE ADA AND ITS SERVICE ANIMAL PROVISION**

In 1990, Congress enacted the ADA as a broad remedy to widespread discrimination against individuals with disabilities. See 42 U.S.C. § 12101(b); see also H.R. Rep. No. 101-485 (II), at 50 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 332. The ADA has a "sweeping purpose," and "forbids discrimination against disabled individuals in major areas of public life." PGA Tour, Inc. v. Martin, 532 U.S. 661, 675 (2001). As a remedial statute, the ADA "should be construed broadly to effectuate its purposes." Tcherepnin v. Knight, 389 U.S. 332, 336 (1967); see also Henrietta D. v. Bloomberg, 331 F.3d 261, 279 (2d Cir. 2003). Indeed, the ADA's "comprehensive character" is one of its "most impressive strengths." See PGA Tour, 532 U.S. at 675 (quoting the Hearings on S. 933 before the Senate Committee on Labor and Human Resources and the Subcommittee on the Handicapped, 101st Cong., 1st Sess., 197 (1989) (statement of the Attorney General)).

Under Title II of the ADA, public entities, such as the School District, cannot exclude qualified individuals with disabilities from, or deny them the benefits of, the District's services, programs, and activities, and cannot otherwise discriminate against them. 42 U.S.C. § 12132. The Title II regulation found at 28 C.F.R. Part 35 implements the statute's broad nondiscrimination mandate and requires public entities to make reasonable modifications to policies, practices, and procedures where necessary to avoid discrimination unless the entity can demonstrate that making such modifications would fundamentally alter the entity's services, programs, or activities. See 28 C.F.R. § 35.130(b)(7). More specifically, regarding the requested modification in this case, the Title II regulation states that "[g]enerally, a public entity shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability." 28 C.F.R. § 35.136(a). Providing a specific application of a public entity's reasonable modification obligation regarding the use of a service animal by an individual with a disability, 28 C.F.R. § 35.136 provides guidance with respect to assorted issues that may arise in its application and sets forth, among other things the requirement that individuals with disabilities 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 . . . are allowed to go" (§ 35.136(g)). The Department of Justice has also issued technical assistance, pursuant to 42 U.S.C. § 12206, to help individuals with disabilities and covered entities understand their rights and responsibilities with respect to the ADA's service animal requirements. See, e.g., "U.S. Department of Justice: Frequently Asked Questions About Service Animals and the ADA," July 2015, available at http://www.ada.gov/regs2010/service_animal_qa.html. As explained therein, such reasonable modifications may include the school or similar entity providing some assistance to enable a

particular student to use or handle his or her service animal in the school, or similar settings. See id.

The ADA’s legislative history confirms that Congress specifically intended for the array of modifications to include permitting individuals with disabilities to remain with their service animals, even in schools. See 135 Cong. Rec. D956 (1989) (statement of Sen. Simon) (use of service animals is “protected by the [ADA], in public accommodations as well as public services (including schools)”²). The ADA’s service animal provision gives full force to Congressional intent by providing “the broadest feasible access . . . to service animals,” permitting their exclusion only “in rare circumstances.” 28 C.F.R. pt. 36, app. C § 36.302 at 916 (July 1, 2014) (discussing Title III regulation’s service animal provision); see id. pt. 35, app. A § 35.136 at 607 (Title II regulation’s service animal provision was intended to retain scope of its Title III counterpart). It also comports with Congress’s recognition that because “[a] person with a disability and his . . . [service] animal function as a unit,” involuntarily separating the two generally “[is] discriminatory under the [ADA].” 135 Cong. Rec. D956 (statement of Sen. Simon); see Tamara v. El Camino Hosp., 964 F. Supp. 2d 1077, 1087 (N.D. Cal. 2013) (separating an individual from his service animal can cause irreparable harm and deprive that individual of independence).

DISCUSSION
POINT I

PLAINTIFFS’ COMPLAINT ALLEGES SUFFICIENT FACTS

² See also H.R. Rep. No. 101-485(II), at 106 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 389 (“Refusal to admit [a] dog . . . is tantamount to refusing to admit the person who is in need of the dog.”); 28 C.F.R. Pt. 36, app. C § 36.302 at 916 (July 1, 2014) (Congress intended that “individuals with disabilities are not separated from their service animals”).

**TO ESTABLISH A TITLE II CLAIM AND SURVIVE DEFENDANTS’
MOTION TO DISMISS PURSUANT TO FEDERAL RULE 12(C)**

Judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) “is appropriate where material facts are undisputed and where a judgment on the merits is possible merely by considering the contents of the pleadings.”³ Sellers v. M.C. Floor Crafters, Inc., 842 F.2d 639, 642 (2d. Cir. 1988) (citation and internal quotations omitted). In evaluating a motion to dismiss based on the pleadings under Federal Rule of Civil Procedure 12(c), the court uses “the same standard applicable to Rule 12(b)(6) motions to dismiss or failure to state a claim for which relief can be granted, accept[ing] all factual allegations in the [C]omplaint as true and draw[ing] all reasonable inferences in [the nonmoving party’s] favor.” Vega v. Hempstead Union Free Sch. Dist., 801 F.3d 72, 78 (2d Cir. 2015) (internal quotations omitted). See also King v. American Airlines, Inc., 284 F.3d 352, 356 (2d Cir. 2002); Irish Lesbian & Gay Org. v. Giuliani, 143 F.3d 638, 644 (2d Cir. 1998) (“The test for evaluating a [Fed. R. Civ. P.] 12(c) motion is the same as that applicable to a motion to dismiss under Fed. R. Civ. P. 12(b)(6).”). To survive a Rule 12(b)(6) motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). This “plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.” Id. (citation omitted).

A. The Complaint Sets Forth the Necessary Elements of A Claim Under Title II

³ Defendants here have not moved in the alternative for summary judgment and the United States will not address the summary judgment standard in this Statement of Interest. If the Court chooses to consider the Exhibits attached to Defendants’ motion to dismiss and convert the motion to one for summary judgment, “all parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.” Federal Rule of Civil Procedure 12(d).

To establish a claim under Title II, a plaintiff must demonstrate that (1) he or she is a qualified individual with a disability; (2) he or she was either excluded from participation in or denied the benefits of some public entity's services, programs, or activities or was otherwise discriminated against; and (3) such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability. See Henrietta D. v. Bloomberg, 331 F.3d 261, 272 (2d Cir. 2003).

Assuming the facts alleged in the Complaint to be true, Plaintiffs have met the plausibility requirement necessary to survive a motion to dismiss. Plaintiffs have alleged that Child is a qualified individual with a disability. See Complaint at ¶¶ 13,17, 75 (alleging that Child is a 12 year old student with multiple disabilities which impair his major life functions of learning and communicating). In addition, Plaintiffs have alleged that Defendants Board of Education and School District are public entities for the purposes of Title II. See Complaint at ¶¶ 18, 19, 22, 29, 30, 76). Further, Plaintiffs have alleged that Child's doctor prescribed a service animal⁴ to assist Child with, among other things, certain disability-related behavioral issues that impact Child's ability to participate in and receive benefits from school and school-related activities. See e.g., Complaint at ¶¶ 31, 38-48, 52-53. Finally, Plaintiffs have alleged that Defendants' continued refusal to modify its policies and practices to permit Child's service animal to accompany him at school and school-related functions discriminates against Child and denies Child the benefits and services provided by Defendants on the basis of disability. See e.g., Complaint at ¶¶ 59-61 (alleging that Defendants could not manage Child's behavior at

⁴ In their Reply Memorandum of Law in Support of Defendants' Motion to Dismiss ("Defendants' Reply Brief"), Defendants dispute whether Child's service animal meets the ADA regulation's definition of "service animal." See Defendant's Reply Brief at pp. 2-4; see also 28 C.F.R. § 35.104 ("[s]ervice animal means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability . . .") (emphasis in original). This argument at most creates an issue of fact that requires discovery. Plaintiffs contradict Defendants' assertion in their Complaint, stating that the service animal was individually trained to perform myriad tasks to assist Child. See e.g., Complaint at ¶¶ 31-53.

school and refused to permit his service animal on the premises to assist Child); 83. With these allegations, Plaintiffs have sufficiently pled that Defendants violated Title II by denying Child the use of his service animal at school and school-related functions.

B. Defendants’ Offer of a 1:1 Aide in Lieu of a Service Animal Does Not Undercut the Sufficiency of Plaintiffs’ Title II Claim

Defendants argue that Plaintiffs’ Title II claim must fail as a matter of law because Child already has a 1:1 aide who, Defendants claim, gives him all the support he needs at school and because Child needs assistance in handling the service animal. See Memorandum in Support of Defendants’ Motion to Dismiss (“Defendants’ Brief”) at pp. 18-21.⁵ These arguments misconstrue both the law and the facts alleged in Plaintiffs’ Complaint.

Defendants’ provision of a 1:1 aide does not obviate the Child’s service animal-related rights under the ADA. A school district is not entitled under the framework of the ADA to substitute its judgment for that of a student or parent with respect to the decision to use a service animal. See Alboniga v. School Bd., 87 F. Supp. 3d 1319, 1341 (S.D. Fla. 2015) (finding that school district violated Title II by refusing to assist student with his service animal because it preferred to substitute a different modification and noting that refusing a student’s request for a reasonable modification “in favor of one the School Board prefers is akin to allowing a public entity to dictate the type of services a disabled person needs in contravention of that person’s own decisions regarding his own life and care. . . . like refusing a blind person access for her service animal because, in the public entity’s view, a cane works fine. That result would be absurd.”) (emphasis in original). Indeed, Congress designed the ADA to respect the choices of individuals with disabilities and ensure their ability to live independently. See Hearing Before

⁵ Of note, Defendants have not argued that permitting the service animal at school and school-related functions would require a fundamental alteration to the nature of the service, program, or activity.

the S. Comm. on Labor & Human Resources, 101st Cong. 188 (1989) (statement of Sen. Harkin) (“[P]eople with disabilities are entitled to lead independent and productive lives, to make choices for themselves, and be integrated and mainstreamed into society.”); see also Tennessee v. Lane, 541 U.S. 509, 538 (2004) (Ginsburg, J., concurring) (ADA is Congress’s “barrier-lowering, dignity-respecting national solution”).

Defendants rely upon 28 C.F.R. § 35.136(c) to argue that the School District can exclude Child’s service animal because the District can give Child an opportunity to participate in school and school-related functions without his service animal. See Defendants’ Brief at p. 21. That provision, however, authorizes a school to provide such alternative modifications only after a service animal has been excluded for a permissible reason under the rule; either where (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. See 28 C.F.R. §§ 35.136(b), (c). Notably, Defendants do not allege that Child’s service animal met either of those criteria. See Defendants’ Brief at p. 21.

Defendants additionally assert that Child cannot handle the service animal on his own and that requiring school staff to provide assistance in handling the dog constitutes an unreasonable modification as a matter of law. This assertion is incorrect. While the Title II regulation contemplates that a service animal will be under the control of a handler, see 28 C.F.R. § 35.136(d), it is not, per se, unreasonable to require school staff to provide some assistance to a student in performing that role, i.e., in handling his service animal. See U.S. Dep’t of Justice Frequently Asked Questions at p. 6, Question 27 (2015) (“[i]n the school (K-12) context and in similar settings, the school or similar entity may need to provide some assistance to enable a particular student to handle his or her service animal”); see also Alboniga v. School Bd., 87 F. Supp. 3d 1319, 1341 (S.D. Fla. 2015) (permanently enjoining school district to

provide student with reasonable modifications to assist him with his service animal). Defendants already provide Child with a 1:1 aide to assist and escort him throughout the day. Depending upon the development of the facts in this case, it may be a reasonable modification for that aide (or other school staff) to assist Child in handling the dog.⁶

Regardless of the merits of any of Defendants' factual arguments regarding the reasonableness of the requested modification, for the reasons set forth above, Plaintiffs have alleged sufficient factual information in their Complaint which, if true, would establish the prima facie elements of their Title II claim. At best, Defendants' arguments are purported defenses to Plaintiffs' prima facie case, which are premature at this point and can only be evaluated after the parties develop the facts in discovery.

POINT II

A SCHOOL DISTRICT CAN VIOLATE THE ADA

EVEN WHERE IT HAS MET ITS OBLIGATIONS UNDER THE IDEA

Defendants contend that dismissal is appropriate because Plaintiffs cannot assert a Title II claim in this action without also raising an IDEA claim. Defendants also assert that a school district cannot violate Title II where it has provided FAPE to a student under the IDEA. Defendants are wrong. While the ADA and the IDEA both protect the rights of students with

⁶ In a matter similarly involving a student's request to use a service animal at school, the United States found that a school district violated Title II when it refused to permit school staff to provide some assistance to a student with a disability in handling her service animal. See www.ada.gov/briefs/gates-chili_lof.pdf (last visited on December 21, 2015). In that matter, the student was accompanied throughout the day by a 1:1 aide and a nurse, and the student's parent requested that the aide or other school staff assist the student in handling her service animal by tethering and untethering the dog when needed and by voicing some commands for the student. The United States found that the parent's request was reasonable and that the school district's refusal to provide the requested assistance – its refusal to reasonably modify its strict "hands off" policy with respect to the student's service animal – constitutes discrimination under Title II. See www.ada.gov/briefs/gates-chili_lof.pdf.

disabilities, they differ in scope, purpose, and rights afforded. Because the ADA and the IDEA are complementary, but not identical, a school district can still violate Title II of the ADA even where it provides a student with FAPE under the IDEA. See K.M. v. Tustin Unified Sch. Dist., 725 F.3d 1088 (9th Cir. 2013). The IDEA explicitly recognizes that “[n]othing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the ... Americans with Disabilities Act...,” except for the administrative exhaustion requirement discussed below. 20 U.S.C. 1415(*l*).⁷ The IDEA thus does not require, or even suggest, that Plaintiffs must bring IDEA claims in the same federal action as their Title II claim.

As long as IDEA exhaustion has occurred, a plaintiff can assert Title II claims in district court even if he does not assert claims under the IDEA for failure to provide FAPE. See Ellenberg v. New Mexico Military Institute, 478 F.3d 1262, 1281-1282 (10th Cir. 2007) (noting that plaintiffs could pursue discrimination claims under the ADA even if they conceded that a school had satisfied its IDEA requirements, stating that “[a]ny other interpretation of our case law would mean that a state educational institution that receives public funding could openly discriminate against applicants with disabilities” as long as it complied with its IDEA obligations toward that student).

A. The IDEA and ADA Provide Different Protections to Children With Disabilities

As described supra at pages 2 through 4, the ADA is a comprehensive civil rights and equal opportunity statute, which is designed to ensure that individuals with disabilities enjoy equal opportunity, full participation, independent living, and “economic self-sufficiency” in all aspects of civic life, including at school. See 42 U.S.C. § 12101(a)(3) (noting that discrimination persists in education); 42 U.S.C. § 12101(a)(7); see also Bledsoe v. Palm Beach Cnty. Soil &

⁷ At Point III, infra, the United States addresses Defendants’ argument that Plaintiffs failed to properly exhaust under this provision.

Water Conservation Dist., 133 F.3d 816, 821 (11th Cir. 1998) (purpose of Title II is to “continue to break down barriers to the integrated participation of people with disabilities”) (quoting H.R. Rep. No. 101-485(II), at 49-50 (1990), as reprinted in 1990 U.S.C.C.A.N. 445, 472-73).

The IDEA, however, is a special education statute intended to ensure that eligible children with disabilities have available a “free appropriate public education that emphasizes special education and related services designed to meet their unique needs. . . .” 20 U.S.C. § 1400(d)(1)(A); see 20 U.S.C. § 1401(3)(a); School Comm. of Burlington v. Dep’t of Educ. of Mass., 471 U.S. 359, 367 (1985).⁸ A “FAPE” under the IDEA must provide the student with a “meaningful” educational benefit. See Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 (2d Cir. 1998) (“the door of public education must be opened for a disabled child in a ‘meaningful’ way”) (citing Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 192 (1982)). The IDEA does not set out a substantive standard prescribing the level of education to be accorded to eligible children. See Rowley, 458 U.S. 176, 189 (1982). It does, however, require that an IEP developed for an eligible student is “reasonably calculated to enable the child to receive educational benefits.” Id. at 206-07. A plaintiff can establish a violation of the IDEA as it relates to a student’s educational program by demonstrating that the IEP will not provide the student with a FAPE, or that procedural violations resulted in denial of a FAPE. See T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 160 (2d Cir. 2014).

⁸A central element of the IDEA, and the means to provide a FAPE, is the development and implementation of an Individualized Education Program (“IEP”) for each eligible child with a disability. See 20 U.S.C. § 1414(d)(1)(A). The IEP must identify, among other things, the special education and related services that will address that child’s unique needs, including the child’s education and participation with children who do not have disabilities in the general education curriculum as well as in extracurricular and other nonacademic activities; the child’s present levels of academic achievement and functional performance; measurable annual goals; descriptions of progress measures and periodic reporting; and the child’s participation in regular or alternate State and districtwide assessments. 20 U.S.C. § 1414(d)(1)(A)(i).

B. A School District Can Comply with the IDEA and Still Violate the ADA.

Because the IDEA focuses on providing FAPE through the delivery of special education and related services while Title II of the ADA focuses on combatting discrimination, IDEA compliance does not automatically equate to Title II compliance. The Ninth Circuit recently addressed the interplay of these two statutes in a case involving the question of whether school districts' compliance with their obligations to deaf or hard-of-hearing children under the IDEA also necessarily establishes compliance with their obligations to those children under the ADA. See K.M. v. Tustin Unified Sch. Dist., 725 F.3d 1088 (9th Cir. 2013); see also Brief of the United States as Amicus Curiae Supporting Appellant and Urging Remand in K.M. v. Tustin Unified Sch. Dist., No. 11-56259, in the United States Court of Appeals for the Ninth Circuit, filed Jan. 24, 2012, available at <http://www.justice.gov/crt/about/app/briefs/kmtustinbr.pdf> (last visited December 23, 2015).

In Tustin, the district court granted summary judgment for the defendants, finding that they had satisfied the requirements of the ADA because they had fully complied with the IDEA. See id., 725 F. 3d at 1092. The Ninth Circuit disagreed, stating: “[w]e do not find in either statute an indication that Congress intended the statutes to interact in a mechanical fashion in the schools context, automatically premitting any Title II claim where a school’s IDEA obligation is satisfied.” Id. The Tustin Court recognized that the “IDEA and Title II differ in both ends and means,” noting that the IDEA set the “floor of access to education” to the children in that case, whereas Title II and its implementing regulations “require public entities to take steps towards making existing services not just accessible, but equally accessible to people with communication disabilities.” See id., 725 F. 3d at 1097 (original emphasis).

Tustin thus makes clear that the ADA is not merely repetitive of the IDEA's protections. Instead, as the Court there explained, the ADA's broad promise of equal opportunity may require school districts to take other measures to avoid discrimination against children with disabilities than the measures that are required under the IDEA.⁹ See id. ("Congress has specifically and clearly provided that the IDEA coexists with the ADA and other federal statutes, rather than swallowing the others"). See id.

Plaintiffs here, as in Tustin, are not claiming that Defendants have not offered Child the "basic floor of opportunity" that the IDEA requires. See Plaintiffs' Opposition to Defendants' Motion to Dismiss Pursuant to FRCP 12(c) at p. 10. Instead, Plaintiffs challenge the equality of that opportunity under Title II of the ADA, which explicitly recognizes the right of individuals with a disability to be accompanied by their service animals in virtually all aspects of their lives. See Complaint at ¶¶ 82-83. This claim is distinct from a FAPE claim under the IDEA. If Plaintiffs can establish the elements of their Title II claim, the Court should evaluate that claim independently, regardless of Defendants' IDEA compliance.

⁹ Defendants argue, as did the defendant school district in Tustin, that providing FAPE to Child under the IDEA precludes the possibility that a school district could discriminate against Child on the basis of his disability under Title II of the ADA. Defendants rely upon Dzugas-Smith v. Southhold School District, CV-08-1319, 2012 U.S. Dist. LEXIS 70773 (May 9, 2012) (Feuerstein, J.) to support that proposition. See Memorandum in Support of Defendants' Motion to Dismiss at p. 18. However, Dzugas-Smith does not support Defendants' position. In Dzugas-Smith, the court dismissed plaintiffs' ADA claim because the plaintiffs failed to sufficiently plead the necessary elements of an ADA claim and instead relied on conclusory assertions of FAPE denial, not because the provision of FAPE precludes discrimination under the ADA. See id. at *53-58.

POINT III

THE ADMINISTRATIVE RECORD DEMONSTRATES THAT PLAINTIFFS EXHAUSTED THEIR ADMINISTRATIVE REMEDIES

Defendants argue that Plaintiffs' ADA claim must be dismissed because Plaintiffs failed to exhaust administrative remedies with regard to that claim. See Defendants' Brief at p. 11. In making this argument, Defendants rely upon the IDEA's statutory provision at 20 U.S.C. §1415(l) that:

Nothing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, Title V of the Rehabilitation Act of 1973, or other federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this part.

The primary purpose of the exhaustion requirement is to allow the School District, and other educational experts, to have the first opportunity to identify educational errors and for school districts to have the opportunity to take prompt corrective action. See Polera v. Board of Educ. of Newburgh, 288 F.3d 478, 487, 489 (2d Cir. 2002); see also Scaggs v. New York State Dep't of Educ., 06-CV-0799, 2007 U.S. Dist. LEXIS 35860, *17 (E.D.N.Y. May 16, 2007)(Bianco, J.) (“[t]he primary reason for an exhaustion requirement is to utilize the expertise of administrators who are familiar with resolving issues relating to the education of disabled students”) (citations and internal quotations omitted); Intravaia v. Rocky Point Union Free Sch. Dist., 919 F. Supp. 2d 285, 291 (E.D.N.Y. 2013)(Hurley, J.) (“Courts have noted that the purpose of the exhaustion rule is to channel disputes related to the education of disabled children into an administrative process that could apply administrators' expertise in the area and promptly resolve grievances”) (citations and internal quotations omitted).

In New York, the administrative review process consists of two phases: (1) an initial hearing before an Independent Hearing Officer (“IHO”); and, if necessary (2) an appeal to a State Review Officer (“SRO”) for the New York State Education Department. See 20 U.S.C. §§ 1415 (f)-(g); N.Y. Educ. Law § 4404(1)-(2); 8 N.Y.C.R.R. §§ 200.5(j)-(k); see also Intravaia, 919 F. Supp. 2d at 291 (explaining the administrative review process)(citations and internal quotations omitted). Defendants assert that Plaintiffs failed to exhaust their administrative remedies with respect to their Title II claim because Plaintiffs did not specifically reference in their administrative cross-appeal the IHO’s one-sentence note that Defendants did not discriminate against Child or deny Child access to general education activities. See Defendants’ Brief at p. 11. However, the record demonstrates that the SRO considered and set aside Plaintiffs’ service animal-related claim, noting that Plaintiffs’ “cross-appeal about the district’s allowance of the assistance dog on school property rests on legal claims arising under the ADA and Section 504 but not under the IDEA.” See SRO decision attached as Exhibit B to Defendant’s Brief at p. 20.¹⁰ Accordingly, Plaintiffs exhausted their administrative remedies with respect to their Title II claim because the parties placed that claim before the IHO and SRO.¹¹

¹⁰ The United States interprets 42 U.S.C. § 1415(l) to require only that Plaintiffs place the relief sought (some assistance with the use of a service dog) before the administrative reviewers to exhaust their administrative remedies, not that Plaintiffs need to specifically articulate that they are alleging an ADA claim. However, even if § 1415(l) did require Plaintiffs to identify their claim as brought under the ADA in order to exhaust it, the administrative record appears to indicate that Plaintiffs did so.

¹¹ Defendants’ reliance on the cases of M.A. v. New York Department of Education, 1 F. Supp. 3d 125 (S.D.N.Y. 2014) and P. v. Greenwich Board of Education, 929 F. Supp. 2d 40 (D.Conn. 2013) to support their position that the ADA claims here were not exhausted administratively is misplaced. Both of those cases involved situations where the actual claims at issue were either not presented or not reasserted during the administrative review process. In this case, the SRO’s

CONCLUSION

The United States respectfully submits this Statement of Interest for the Court's consideration in deciding the pending Motion to Dismiss. For the reasons discussed supra, the Court should deny Defendants' motion.

Dated: Brooklyn, New York
December 23, 2015

Respectfully submitted,

ROBERT L. CAPERS
United States Attorney
Eastern District of New York
271 Cadman Plaza East
Brooklyn, New York

By: *Kelly Horan Florio*
KELLY HORAN FLORIO
Assistant United States Attorney
(718) 254-6007
kelly.horan@usdoj.gov

decision suggests that both levels of the administrative process addressed the ADA claims at issue.