

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK
ROCHESTER**

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
GATES CHILI CENTRAL SCHOOL)
DISTRICT,)
)
Defendant.)

**UNITED STATES' MEMORANDUM
OF LAW IN OPPOSITION TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Civil Action No. 15 CV 6583 CJS

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**UNITED STATES' MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff United States of America offers the following Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment.

I. PRELIMINARY STATEMENT

This case is about D.P.,¹ an eight-year-old child with disabilities in need of some assistance from the school district so that she can attend school with her service dog—as it is her civil right to do. Since D.P. began working with her service dog, she has gone from being pulled in a wagon around school to walking upright independently with her dog. She has learned to communicate with the dog through hand gestures and signals, though she is nonverbal. Her service dog interrupts certain behaviors caused by her autism (such as meltdowns, wandering, and repeated body movements). Her service dog also alerts adults to oncoming seizures so they can take precautions before the seizure occurs. In short, with the help of her service dog, D.P. is both safer and more independent at school. But as an eight-year-old child with multiple disabilities, D.P. still needs the assistance of adults with certain activities, including tasks related to her service dog.

The assistance D.P. needs in handling her service dog at school is both minimal and intermittent. She needs help from time to time with untethering (unhooking) herself from her service dog when appropriate, such as for gym class. She may occasionally need to be reminded to issue a command to her service dog, which she does using hand signals, and

¹ Pursuant to Federal Rule of Civil Procedure 5.2, this Court's jurisprudence, and the United States' Motion to Seal, all references to D.P. and her mother have been redacted to provide only their initials. H.P.'s Affidavit and several of Plaintiff's supporting exhibits to this memorandum have also been redacted and/or filed under seal. Unredacted copies of H.P.'s Affidavit and Plaintiff's supporting exhibits will be filed under seal with the Court and provided to Defendant.

she sometimes needs assistance verbalizing certain commands, such as when she is having a seizure. In preschool, school staff provided the assistance D.P. needed to handle her service dog. But from kindergarten on, the Gates Chili Central School District has refused to provide D.P. with any assistance in handling her service dog, regardless of how reasonable the request—even though she is accompanied throughout the day by District staff, including a 1:1 aide and a 1:1 nurse.

Under Title II of the Americans with Disabilities Act (ADA), public entities, including school districts, are required to make reasonable modifications in their policies, practices, and procedures to provide equal access and benefits to people with disabilities, unless the entity can show that making such modifications would result in a fundamental alteration. Public entities also have specific obligations with respect to service animals. Here, D.P.'s mother repeatedly requested that the District assist D.P. in handling her service dog at school—assistance that is akin to the kinds of support and assistance provided by school staff to students in elementary schools day in and day out. Yet, the School District time after time refused to modify its strict “hands off” policy with respect to D.P.'s service dog and banned the dog from school unless D.P.'s parent provides a full-time handler to accompany them. As a factual matter, Defendant's refusal to provide D.P. with the minimal support that would ensure that she can continue to use her service animal at school is difficult to understand; as a legal matter, Defendant's actions violate Title II of the ADA.

In moving for summary judgment, Defendant asks this Court to hold that, under the ADA, school districts are excused from ever providing any assistance whatsoever to a student in using a service animal, no matter how small and reasonable the request might be. Such an interpretation cannot be squared with the express language of the ADA's

implementing regulation, the Department of Justice’s long-standing interpretation of the law, and the decisions of every federal court to address this issue under the ADA—all of which recognize that asking school staff to assist a student in handling her service dog is not, *per se*, unreasonable. Indeed, the Department has directly addressed this issue via its technical assistance,² explaining that “[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.” U.S. Dep’t of Justice, *U.S. Department of Justice: Frequently Asked Questions About Service Animals and the ADA*, Question 27 (July 2015) (attached hereto as Ex. A).

Of course, what assistance is reasonable to require of a school district is an inherently fact-specific question; Defendant’s efforts to dismiss the United States’ civil rights action by ignoring the material facts of this case should thus be rejected. As supported by the attached affidavits and exhibits, the facts show that the requested modification in this case—that District staff provide D.P. with intermittent support in handling her service dog—is reasonable and that the District has not shown that providing that assistance would result in a fundamental alteration. Because Defendant’s motion is premised on a fundamental misunderstanding of the ADA and its application to the facts of this case, summary judgment should be denied.

II. STATEMENT OF FACTS

D.P. is an eight-year-old student in the Gates Chili Central School District. H.P. Aff. ¶ 4. She lives with her mother, H.P., and sister in the basement of her grandparents’

² The ADA directs the Attorney General to issue technical assistance to assist covered entities in understanding their responsibilities under the ADA. 42 U.S.C. § 12206.

house. Her mother works full-time to support herself and her two daughters. *Id.* ¶ 18. D.P. has Angelman Syndrome, autism, epilepsy, asthma, and hypotonia.³ *Id.* ¶ 2. As a result of her disabilities, she is nonverbal. *Id.* When she is at home, D.P. is cared for by her family, as well as a caregiver or Medicaid attendant. *See id.* ¶¶ 10, 19-20; Horozko Aff. 1. While she is at school, the District provides D.P. with a 1:1 aide, pursuant to the Individuals with Disabilities Education Act (IDEA). H.P. Aff. ¶ 5; Horozko Aff. ¶ 1. Since 2014, the District has also provided D.P. with a 1:1 nurse. H.P. Aff. ¶ 14; Horozko Aff. ¶ 1.

A month before she turned four years old, D.P. obtained a service dog⁴ to help manage the manifestations of her disabilities. H.P. Aff. ¶ 3. The service dog, Hannah, is trained to perform numerous tasks directly related to D.P.'s disabilities. Denyer Aff. ¶ 7; Pl.'s Ex. H. For example, Hannah can detect an oncoming seizure and alert others. *Id.* With regard to D.P.'s autism, Hannah is trained to prevent wandering (elopement), to apply deep pressure to prevent or limit meltdowns, and to disrupt stimming (repetitive body movements). *Id.* In addition, Hannah provides mobility support for D.P.'s core body weakness caused by her hypotonia. *Id.*

In January 2011, during D.P.'s first year of preschool, her service dog, Hannah, began to accompany D.P. on the school bus and at school. H.P. Aff. ¶¶ 3, 5. As indicated in D.P.'s Individualized Education Program (IEP) during preschool, with Hannah's assistance, D.P. began making great progress: "[Hannah] is providing support that provides

³ The District does not dispute that D.P. is a qualified individual with a disability entitled to the protections afforded by the ADA. Def.'s Statement of Facts ¶ 2, ECF No. 10-1.

⁴ As defined in the ADA implementing regulation, a "service animal" is limited to a dog. 28 C.F.R. § 35.104. Accordingly, the terms "service animal" and "service dog" are used interchangeably throughout this brief.

[D.P.] with much more autonomy. . . . Hannah is helping [D.P.] make transitions smoothly, helping to support her in walking through the halls. [D.P.’s] demeanor is of a content little girl who is able to access instruction more easily.” Pl.’s Ex. B at 9. Indeed, D.P. began walking independently with her service dog instead of being pulled in a wagon. H.P. Aff. ¶¶ 6-7; Horozko Aff. ¶ 4. Hannah prevented D.P. from eloping. *Id.* She also alerted District staff when D.P. was going to have a seizure so they could take precautions. Horozko Aff. ¶ 6. Four months after Hannah began accompanying D.P. to school, D.P.’s improvement and growing independence was documented in District records: “Hannah is creating an experience that [D.P.] wouldn’t have had otherwise. [D.P.] has flourished and her independence has grown since Hannah joined the team.” Pl.’s Ex. B at 2. During this period of time, when D.P. needed help handling Hannah, her 1:1 aide provided by the District would assist. H.P. Aff. ¶ 5. This practice worked successfully from January 2011 until September 2012, when D.P. started kindergarten and the District implemented its current “hands off” policy with respect to Hannah. *See id.* ¶ 9; Horozko Aff. ¶ 5.

The amount of assistance D.P. needs with Hannah during the school day has always been minimal, but it has diminished even more over the three and half years since preschool—while the benefits the service dog provides have continued. Horozko Aff. ¶ 7. Hannah is trained to go through the school day without needing to be walked, eat, or relieve herself. Horozko Aff. ¶ 8; Denyer Aff. ¶ 14. D.P. can, and does on occasion, pour water into a bowl for Hannah if she needs it. *Id.* Hannah is well-trained and has been well-behaved throughout the five years she has attended school with D.P.; Hannah has never been “out of control” while at school. Horozko Aff. ¶ 8. In recent years, D.P. has grown more independent and learned to communicate using gestures, as noted in her July 2015

IEP. Pl.'s Ex. C at 4-7. As a result, D.P. is now able to handle Hannah with less assistance than in preschool. Previously, Hannah was untethered and tethered by an adult; D.P. now tethers herself to Hannah, though she sometimes needs prompting to do so. Horozko Aff. ¶ 7. Previously, an adult issued approximately five commands to Hannah during the school day; D.P. can now issue commands to Hannah herself using a series of hand gestures or signals. *Id.* ¶¶ 6, 8. For example, D.P. will pull up on or jiggle the handle of Hannah's harness to indicate "let's go," put her hand out in front of Hannah to indicate "wait" or "settle," touch Hannah's posterior area to get her to sit, and pat the ground or push down on Hannah's head to get her to lay down. H.P. Aff. ¶ 17; Horozko Aff. ¶ 8. D.P. sometimes needs prompting to issue these commands, and may still require someone to verbalize certain commands on occasion, but she is making steady progress on this front.

After completing preschool, D.P. was assigned to begin kindergarten in a special education classroom in a new school. H.P. Aff. ¶ 8. At this school, D.P. remained subject to the policies, practices, and procedures of the Gates Chili Central School District. *Id.* At a meeting on September 4, 2012, the day before the start of kindergarten, the District informed D.P.'s mother, H.P., that the District would no longer permit staff to assist D.P. in handling her service dog, and that D.P. could no longer bring Hannah to school unless H.P. provided an adult "handler" to assist D.P. with the service dog during the school day. *Id.* ¶ 9; Horozko Aff. ¶ 5. If she refused, the service dog would be banned from school. *Id.* H.P. objected to the District's actions, but, having determined that the service dog is critical to D.P.'s safety and autonomy, H.P. hired an adult, Jennifer Horozko, to accompany D.P. and her service dog to school every day. H.P. Aff. ¶ 10; Horozko Aff. ¶ 5.

In a letter to the District dated December 19, 2012, H.P. again requested that the

District permit D.P. and her service dog to attend school without a separate handler. H.P. Aff. ¶ 11; Pl.'s Ex. D. H.P. asked the District to permit D.P.'s 1:1 aide to assist D.P. in issuing commands and tethering and untethering the service dog (as District staff had done successfully in preschool). *Id.* The District refused. H.P. Aff. ¶ 11; JS Aff. in Supp. Def.'s Mot. Summ. J. ¶¶ 14-15, ECF No. 10-2. Another time, when Ms. Horozko was ill and anticipated missing a week or two of work, H.P. asked if D.P. and her service dog could attend school without a separate handler on a very temporary basis. H.P. Aff. ¶ 12; Pl.'s Ex. E. Again the District refused. H.P. Aff. ¶ 11; Pl.'s Ex. F. As a result of the District's policy, D.P. missed six full days and five half days of school. H.P. Aff. ¶ 12; Pl.'s Ex. G.

The District continues to refuse any request for school staff to assist D.P. with Hannah, no matter how minimal the assistance, and maintains that H.P. must provide an adult handler or Hannah will not be allowed in school. *See* ECF 10-2, at ¶¶ 14-15, 18. To date, this has cost H.P. over \$25,000 out-of-pocket, as well as loss of sleep and emotional distress. H.P. Aff. ¶¶ 18-20.

III. STATUTORY AND REGULATORY BACKGROUND

A. The ADA's Nondiscrimination Mandate Requires Reasonable Modifications For Students With Disabilities

Under Title II of the ADA, public entities, such as the 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. In enacting this landmark civil rights law, Congress found that individuals with disabilities continually encounter various forms of discrimination in such critical areas as education and access to public services, including outright intentional exclusion and

failure to make modifications to existing practices. *See id.* § 12101(a)(3), (a)(5). Congress thus enacted Title II of the ADA as a broad remedy to widespread discrimination against individuals with disabilities in public services. *See id.* § 12101(b), 12132. And, as directed by Congress, the Attorney General promulgated a regulation that implements Title II's broad nondiscrimination mandate. *Id.* § 12134; 28 C.F.R. pt. 35. The Title II regulation fulfills the ADA's goal to eradicate discrimination against individuals with disabilities by not only prohibiting *outright* discrimination, but going further to require "modifications to existing facilities and practices" to accommodate individuals with disabilities. 42 U.S.C. § 12101(a)(5); 28 C.F.R. § 35.130(b)(7). In doing so, the Title II regulation delivers the ADA's promise of equal opportunity for, and full participation by, individuals with disabilities in all aspects of civic life, including at school. *See* 42 U.S.C. § 12101(a)(3), (a)(7).

Specifically, the Title II regulation found at 28 C.F.R. Part 35 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. 28 C.F.R. § 35.130(b)(7). This general requirement applies to a broad range of state and local government entities and reflects Congressional recognition that even facially neutral policies and practices can create unnecessary barriers for people with disabilities. *See* 42 U.S.C. § 12101(a)(5). Given its scope, application of the reasonable modification obligation and any fundamental alteration defense is highly fact- and context-specific. *Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144, 153 (2d Cir. 2013). Thus the modifications required of a school district or a child care provider may differ from those considered to be reasonable for a city hall or public park, for example. This regulatory framework furthers Congress's

intent to eliminate all forms of discrimination against people with disabilities, while simultaneously ensuring that public entities need not make modifications that are unreasonable or would fundamentally alter their programs and services.

B. The Service Animal Provision Of The Title II Regulation Applies The Reasonable Modification Requirement But Does Not Supplant It

Since the Title II regulation was first promulgated in 1991, it has been the Department's longstanding view that public entities generally must make modifications to permit individuals with disabilities to use their service animals pursuant to the reasonable modification requirement of Title II discussed above. 28 C.F.R. pt. 35, app. A § 35.104 at 598-99 (2014) (citing 28 C.F.R. § 35.130(b)(7)); *see also id.* pt. 35, app. A § 35.136 at 607; 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)"). In 2010, the Department issued a revised Title II regulation that "comport[ed] with [its] legal and practical experiences in enforcing the ADA since 1991." 75 Fed. Reg. 56,164 (Sept. 15, 2010). Based on the Department's determination that covered entities were "confused regarding their obligations under the ADA with regard to individuals with disabilities who use service animals," the Department added a service animal provision (§ 35.136) to the Title II regulation, which codified and clarified public entities' existing obligations with respect to service animals. 28 C.F.R. pt. 35, app. A §§ 35.104, 35.136 at 599, 607.

The Department's guidance, issued with the regulation, makes clear that the 2010 service animal provision of Title II is subject to the existing reasonable modification provision of the regulation (§ 35.130(b)(7)):

[T]itle II entities have the same legal obligations as title III entities to make reasonable modifications in policies, practices, or procedures to allow service

animals when necessary in order to avoid discrimination on the basis of disability, unless the entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

28 C.F.R. pt. 35, app. A § 35.104 at 598-99 (citing 28 C.F.R. § 35.130(b)(7)); *see also 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); *id.* pt. 36, app. C § 36.302 at 916 (2014) (discussing requirement under Title III regulation's service animal provision to "take the necessary steps to accommodate service animals" unless it would result in a fundamental alteration). The guidance further explains that the Department did not include the fundamental alteration defense in the service animal provision "because the Department believes that this exception is covered by the general reasonable modification requirement contained in § 35.130(b)(7)." *Id.* pt. 35, app. A § 35.136 at 608. It follows that, while the service animal provision is a specific application of the reasonable modification requirement contained in § 35.130(b)(7), it does not supplant the general provision; rather, both apply.

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. This technical assistance further clarifies how the general reasonable modification provision and the specific service animal provision work together. *See* Ex. A. As explained therein, reasonable modifications may include a school or similar entity providing some assistance to enable a particular student to use or handle his or her service animal in the school setting. Ex. A, Question 27. The Department's technical assistance thus demonstrates that, while the service animal provision of the regulation was intended to provide greater clarity as to the requirements of public entities with respect to individuals with disabilities who use

service animals, it does not address every possible modification that may be required under Title II with respect to service animals. Rather, where the regulation is silent on a particular modification, the general reasonable modification analysis and defenses apply.

C. There Are Limited Exceptions To The General Presumption That Public Entities Must Make Modifications To Permit The Use Of Service Animals

The Title II regulation enumerates limited exceptions to the general requirement that public entities permit individuals with disabilities to be accompanied by their service animals. These exceptions establish that, while allowing individuals with disabilities to use their service animals *generally* is reasonable (*i.e.*, reasonable in the run of cases), there are certain circumstances when requiring public entities to permit their use would not be reasonable. *See* 28 C.F.R. §§ 35.104, 35.136(a)-(b). As an initial matter, the general requirement applies only to dogs that are “individually trained to do work or perform tasks for the benefit of an individual with a disability.” *Id.* § 35.104 (definition of “service animal”). Further, a service animal may be properly excluded if it “is out of control and the animal’s handler does not take effective action to control it,” or if the animal “is not housebroken.” *Id.* § 35.136(b). With respect to “control” of the service animal, the regulation further provides that a service animal must be under the control of its handler, using a harness, leash, or other tether or—where these devices interfere with the service animal’s work or the person’s disability prevents use of these devices—using voice, signals, or other effective means. *Id.* § 35.136(d).

In a separate subsection, the regulation makes clear that a public entity is not responsible for the “care or supervision” of a service animal. 28 C.F.R. § 35.136(e). The regulatory guidance lists walking and feeding the service animal as examples of care and

supervision. *See* 28 C.F.R. pt. 35, app. A § 35.136 at 609. Department of Justice technical assistance about service animals and the ADA further explains that “caring for and supervising the service animal . . . includes toileting, feeding, and grooming and veterinary care.” Ex. A, Question 9.

While these are the only exceptions provided in the service animal provision of the Title II regulation, the general defenses to the broader reasonable modification requirement under Title II also apply to service animals. For example, as noted above, a public entity need not allow an individual to use her service animal if it would fundamentally alter the nature of the entity’s service, program, or activity, or if it would pose a direct threat to the health or safety of others. 28 C.F.R. §§ 35.130(b)(7), 35.139; *see* 28 C.F.R. pt. 35, app. A §§ 35.104, 35.136 at 600, 608. That said, in most settings, the presence of a service animal will not result in a fundamental alteration. Ex. A, Question 26. Similarly, the direct threat defense only applies in limited circumstances where a particular service animal behaves in a way that poses a direct threat to the health or safety of others, or has a history of such behavior. Ex. A, Questions 23 & 24.

IV. STANDARD OF REVIEW

Summary judgment should only be granted if the record and affidavits show that “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. Rule 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The parties may support their positions by citing to the record, including, *inter alia*, documents, affidavits, or declarations, or by showing that the materials cited by the other party do or do not establish the absence of a genuine dispute. Fed. R. Civ. P. 56(c). An issue is genuine if “a reasonable jury could return a verdict for the nonmoving party.”

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); *see also Mitchell v. Shane*, 350 F.3d 39, 47 (2d Cir. 2003). A fact is material if it “might affect the outcome of the suit under the governing law.” *Anderson*, 477 U.S. at 248.

The moving party shoulders the initial burden of setting out the basis of its motion and showing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once met, the burden then shifts to the nonmoving party who, in order to defeat a motion for summary judgment, “may not rely on mere conclusory allegations nor speculation, but instead must offer some hard evidence showing that its version of the events is not wholly fanciful.” *D’Amico v. City of New York*, 132 F.3d 145, 149 (2d Cir. 1998). Even so, “[t]he Court must draw all inferences in favor of the non-moving party.” *Id.* “A court may grant summary judgment only when no rational jury could find in favor of the non-moving party.” *Id.*

V. ARGUMENT

The Title II regulation implements the ADA’s broad nondiscrimination mandate, and each section and provision of the regulation must be construed in connection with each other so as to produce a harmonious whole. *See F.T.C. v. Mandel Bros. Inc.*, 359 U.S. 385, 389 (1959); *Miami Heart Inst. v. Sullivan*, 868 F.2d 410, 413 (11th Cir. 1989). Accordingly, both the reasonable modification provision and the service animal provision of the Title II regulation work in concert to define the scope of the District’s responsibilities with respect to a student with a service animal; one provision does not supersede or supplant the other. When read as a cohesive whole, it is clear that the Title II regulation may require the District to provide some assistance to enable D.P. to use or handle her service animal at school, and that such a request is not inherently unreasonable. To determine whether the

specific request for assistance in this case is reasonable and required by Title II requires an analysis of the facts.

The United States anticipates that, based on the facts before the Court, construed in the light most favorable to the United States, a judge or jury would find that the minimal, intermittent assistance requested in this case is a reasonable modification required by the ADA to accommodate D.P.'s disabilities and permit her to use her service dog at school. As supported by the attached affidavits and exhibits, D.P. is tethered to her service dog throughout most of the school day. She issues commands to her service dog using hand signals and requires only intermittent assistance in handling her service dog. Indeed, the only assistance D.P. requires in handling her service dog is occasionally untethering the student from her service dog and issuing, or prompting the student to issue, a few commands to the service dog during the course of the school day. This is less assistance than District staff successfully provided to D.P. in preschool, thus belying any contention that providing such assistance is unreasonable or would result in a fundamental alteration of its program. As such, Defendant's refusal to provide D.P. with assistance in handling her service dog, and exclusion of the service dog absent H.P. providing an adult handler, is discrimination in violation of the ADA. The United States has proffered hard evidence in support of its position and, at the very least, Defendant has not met its burden of establishing that no rational judge or jury could find in favor of the United States. Defendant's motion should thus be denied.

Defendant's Motion for Summary Judgment contends that, no matter how minimal or how reasonable the requested assistance might be, it does not have to assist a student in handling her service animal under any set of facts. Defendant's argument relies on an

interpretation of the ADA regulation that conflates separate and distinct regulatory provisions and artificially narrows the reach of the reasonable modification provision in situations involving a service animal. We thus ask this Court to deny Defendant's motion.

A. Under The ADA, School Districts May Need To Assist Students With Disabilities In Handling A Service Animal

Defendant argues that the ADA does not require a school district to assist a student with a disability in handling her service animal in any way—no matter how minimal and reasonable the assistance requested. Def.'s Notice of Mot. & Mot. Summ. J. 2, ECF No. 10; Def.'s Mem. Law in Supp. Mot. Summ. J. 1, 17, ECF No. 10-5. Such an interpretation of Title II runs counter to the plain language of the regulation, the regulatory guidance, the Department's technical assistance and enforcement efforts in this area, and federal case law. Defendant's interpretation is also contrary to fundamental principles of statutory and regulatory construction.

1. Defendant's reading of the Title II regulation is contrary to established principles of regulatory interpretation and leads to untenable results.

Consistent with well-established principles of regulatory construction, and as interpreted in the Department's regulatory guidance and by federal courts, the Title II service animal provision (§ 35.136) does not supplant the Title II reasonable modification provision (§ 35.130(b)(7)). First, it is well-settled that a regulation must be read as a "harmonious whole" in order to give force and effect to each of its provisions. *Mandel*, 359 U.S. at 389; *Miami Heart*, 868 F.2d at 413 (citation omitted). Applying this principle, Defendant's reliance on selective service animal subprovisions so as to read out its more general obligations must fail. Indeed, given the wide range of contexts and entities to which the provision applies, it would be nearly impossible and certainly impractical for the service

animal provision of the regulation to address every possible modification that may be required under Title II with respect to service animals and those who use them. Rather, where the regulation does not specifically address a requested modification, courts and entities alike must apply the reasonable modification framework of § 35.130(b)(7) and § 35.136(a), together as a harmonious whole, to determine whether the request is reasonable and would not result in a fundamental alteration.

Second, the Department's regulatory guidance underscores that the specific service animal provision of Title II is subject to the reasonable modification provision contained in the general nondiscrimination provisions of the regulation. For example, in discussing the definition of "service animal" in the 2010 Title II regulation, the Department's guidance cites the general reasonable modification provision at § 35.130(b)(7)—rather than the specific service animal provision—to clarify that Title II entities must make reasonable modifications to allow service animals unless it would result in a fundamental alteration. *See* 28 C.F.R. pt. 35, app. A § 35.104 at 598-99. And in addressing why the Department did not include the fundamental alteration defense in the 2010 service animal provision, the guidance explains that to do so would have been superfluous, because "this exception is covered by the general reasonable modification requirement contained in § 35.130(b)(7)." *Id.* pt. 35, app. A § 35.136 at 608. The clear implication is that both provisions of the Title II regulation work in harmony to protect the rights of individuals using service animals. With regard to the specific question of whether a public school needs to provide assistance to a student in handling a service animal, the Department of Justice has further clarified in its technical assistance that such a modification may be reasonable and required under Title

II of the ADA. Ex. A, Question 27.⁵

Third, the few federal court cases to address this issue agree with the Department's longstanding interpretation of the interplay between these two regulatory provisions. In *Alboniga v. School Board*, 87 F. Supp. 3d 1319 (S.D. Fla. 2015), for example, the district court found that "the Title II service animal regulatory provision is consistent with and a specific application of the reasonable modifications regulatory requirement." *Id.* at 1333, 1335. The court held that "[t]his interpretation of the interaction between sections 35.130(b)(7) and 35.136, which is in any event clear on the face of the regulations, is endorsed by the DOJ itself," and that the regulations and the Department's interpretation thereof were "entitled to significant deference." *Id.* at 1333, 1336. In deciding cross motions for summary judgment, the court thus applied the reasonable modification framework of the Title II regulation to determine whether a request that the school district assist or monitor a student with a disability in using his service dog was reasonable, and whether the district's refusal to do so was discrimination under the ADA. *Id.* at 1337-38. Denying defendant's motion for summary judgment and granting plaintiff's motion for partial summary judgment, the court held that the assistance requested by plaintiff under the circumstances was reasonable within the meaning of the Title II regulation. *Id.* at 1344-45; *see also C.C. v. Cypress Sch. Dist.*, 2011 U.S. Dist. LEXIS 88287, *8-16 (C.D. Cal. June 13, 2011) (applying the reasonable

⁵ The Department's guidance and technical assistance interpreting its own regulation is entitled to deference. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (holding an agency's interpretation of its own regulation "controlling unless 'plainly erroneous or inconsistent with the regulation'") (citation omitted); *United States v. Larionoff*, 431 U.S. 864, 872 (1977) ("In construing administrative regulations, 'the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'") (citation omitted); *New York v. Lyng*, 829 F.2d 346, 349-50 (2d Cir. 1987) (same).

modification analysis of Title II to determine whether a school district needed to assist a student with his service animal under the ADA).

More recently, a district court in New Hampshire addressed a similar question on a motion for a preliminary injunction. *Riley v. Sch. Admin. Unit #23*, No. 15-CV-152-SM (D.N.H. Jan. 14, 2016). Though a different procedural posture and legal standard than on a motion for summary judgment, the court again applied the Title II reasonable modification framework to decide the likelihood of success on the merits of a request for a school district to assist a student with his service dog. Report & Recommendation of U.S. Magistrate Judge at *23-24, 26, *Riley*, No. 15-CV-152-SM, ECF No. 39. The court's analysis is presented in a report and recommendation from a U.S. Magistrate Judge. *Id.* While reaching a different conclusion than in *Alboniga* or *Cypress* based on the unique facts of the case and the demanding legal standard on a motion for preliminary injunction (which the court characterized as an "extraordinary and drastic remedy"), the report cites both cases and applies a similar legal framework. *Id.* at *11, 35-37, 42. The report also notes that the defendant school district's existing service animal policy supports district personnel assisting a student using a service animal "in particular instances," including occasionally "taking a service animal outside to relieve itself" or "tethering or untethering a service animal during the day." *Id.* at *37 (internal quotation marks omitted). Due to the parties' failure to object to the report, the Magistrate Judge's recommendation was adopted by the district court without review. Order at *1, *Riley*, No. 15-CV-152-SM, ECF No. 42.

Here, though Defendant acknowledges that it must make "modifications in policies that would otherwise preclude an individual from being permitted to bring a service dog" to school, it nevertheless does not interpret that requirement to include providing assistance to

a student to enable her to bring her service dog to school. *See* ECF 10-5, at 10. In so arguing, Defendant invents a limitation on its ADA obligations to students who use service animals that simply does not exist. All children need assistance with daily activities in school from time to time, and schools routinely provide this assistance—whether escorting children in the hallway, putting on coats and boots, prompting a child to act appropriately, or tying shoes. There is no material difference—in terms of time or resources—between assisting a child in tying her shoes and assisting D.P. by untethering a leash, or between prompting a child to act appropriately and verbalizing an occasional command. Defendant’s attempt to carve out a “service animal exception” to the ADA’s well-established reasonable modification framework has no basis in the regulation. And where applied, as here, to impede a family’s choice to use a service animal to help manage a child’s disability, such an exception contravenes principles of self-determination and independence that go to the heart of the ADA.

Moreover, contrary to Defendant’s assertions, the United States has consistently maintained that both the reasonable modification provision of the regulation in § 35.130(b)(7) and the service animal provision in § 35.136(a) apply to this case and this set of facts; it is not a question of either-or. The United States’ interpretation of the interplay between these two sections of the Title II regulation has been clearly and consistently articulated in regulatory guidance,⁶ legal briefs,⁷ and technical assistance materials.⁸ This

⁶ *See* 28 C.F.R. pt. 35, app. A §§ 35.104, 35.136 at 598-99, 607-08; *id.* pt. 36, app. C § 36.302 at 916.

⁷ *See* U.S. Statement of Interest, *Child with Disability v. Sachem Cent. Sch. Dist.*, No. 15-CV-2903 (E.D.N.Y. Dec. 23, 2015); U.S. Statement of Interest, *Alboniga*, 87 F. Supp. 3d 1319

interpretation is also faithful to the plain language of the regulation and the principles of regulatory construction. Defendant's regulatory interpretation should thus be rejected.

2. Defendant conflates distinct legal terms in the regulation to argue it is exempt from assisting a student with her service animal, even if reasonable, but no such exception to the rule exists in the regulation.

As a remedial statute, the ADA "should be construed broadly to effectuate its purposes." *See Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). In interpreting the Title II regulation, courts should not look at the words or phrases of the regulation in isolation, but rather read these words and phrases in their context and with a view to their place in the overall statutory scheme. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), *superseded by statute on other grounds*, 21 U.S.C. § 387a. Yet Defendant's legal argument seems to be largely based on a selective reading of dictionary definitions, removed from the context of the statute and regulation. *See* ECF 10-5, at 5-7. It also conflates distinct legal terms defined in the regulatory guidance and technical assistance, improperly equating "control" with "care and supervision." *See* ECF 10-5, at 3, 6-7, 12.

In refusing to provide any assistance to D.P. in handling her service dog, the District relies primarily on a strained reading of two subparagraphs in the Title II service animal provision. The first explains that a service animal must be under the control of its handler, which is typically the person with a disability but may also be a third party. 28 C.F.R. § 35.136(d). The second states that "a public entity is not responsible for the care or supervision of a service animal." *Id.* § 35.136(e). The District reads these provisions to

(No. 14-CIV-60085-BB); U.S. Statement of Interest, *Cypress*, 2011 U.S. Dist. LEXIS 88287 (No. CV 11-00352).

⁸ *See* Ex. A; U.S. Dep't of Justice, *Revised ADA Requirements: Service Animals* 1-2 (2011).

mean that if D.P. needs any assistance from school staff in handling her service dog, the service animal is not under her control as required by the regulation and the District is being compelled to provide “care and supervision” of the dog. *See* ECF 10-5, at 3-4. In reaching these conclusions, the District both misreads the service animal provision and ignores the broader regulatory and statutory context in which these terms and phrases appear.

With respect to “control” of the service animal, Defendant’s argument ignores the facts of the case, is purely speculative in nature, and raises a genuine issue of material fact. The regulation recognizes that a service animal must be under the control of its handler using a harness, leash, tether, voice, signals, or other effective means. 28 C.F.R. § 35.136(d). In this case, Hannah has never been out of control. *See* Horozko Aff. ¶ 8. This includes over a year and a half when Hannah attended school with D.P. without a separate adult handler. Moreover, D.P. is tethered to Hannah throughout most of the school day and is able to use hand signals to issue commands to Hannah.⁹ *Id.* ¶¶ 6-8. Defendant also offers no evidence that D.P. has ever failed to control Hannah; rather Defendant raises purely speculative concerns about future issues with control that have no grounding in the facts of this case. *See* ECF 10-5, at 11-12 (“A dog might at any time become agitated for any

⁹ In *Alboniga*, a school district refused to permit a student with multiple disabilities to bring his service animal to school because, in the district’s view, the student could not act as the dog’s handler. *Alboniga*, 87 F. Supp. 3d at 1343. The court held that the student could handle and control his own service dog within the meaning of § 35.136. *Id.* at 1342. Informed by the full text of § 35.136(d), the court concluded that so long as the service animal is tethered to the person with the disability, the dog is under the person’s control. *Id.* In *Riley*, the Magistrate Judge’s report and recommendation applied the same factors as *Alboniga* in analyzing the control requirement under Title II, explaining that, unlike in *Alboniga* and *Cypress*, the child was not tethered to his service dog, could not issue commands to the dog or hold its leash, and needed “a dedicated handler during the entire school day.” Report & Recommendation of U.S. Magistrate Judge at *28, 36, *Riley*, No. 15-CV-152-SM, ECF No. 39 (emphasis in original).

number of reasons, including by a scream, cry, or significant commotion among students, or the expected or unexpected presence of other animals, or an illness or injury to the dog.”). However, the Title II regulation does not permit the District to exclude a service dog based on fears or unfounded speculation about the service dog possibly being out of control in the future. And in any case, the question of whose control Hannah is under raises a genuine issue of material fact that cannot properly be decided on a motion for summary judgment.

With respect to “care and supervision,” Defendant’s argument fails for the same reasons: It is divorced from the facts of the case and is an issue of fact not properly decided on summary judgment. Defendant also misconstrues the meaning of “care and supervision,” ignoring the definitions provided in the Department’s regulatory guidance and technical assistance. In a separate subsection from the control requirement, the Title II regulation makes clear that a public entity is not responsible for the “care or supervision” of a service animal. 28 C.F.R. § 35.136(e). Defendant contends that providing the requested assistance to D.P. in handling her service dog amounts to “care and supervision.” However, “care and supervision” of a service dog is a distinct responsibility and different from handling. As explained in the regulatory guidance and Department of Justice technical assistance, “care or supervision” is a legal term of art that relates to a service dog’s health and wellbeing and includes such things as proper veterinary care, as well as feeding, walking, and grooming the animal. *See* 28 C.F.R. pt. 35, app. A § 35.136 at 607-11 (providing examples of care and supervision); Ex. A, Question 9; *see also Alboniga*, 87 F. Supp. 3d at 1343 (“The clear implication is that ‘care or supervision’ means routine animal

care—such as feeding, watering, walking or washing the animal.”)¹⁰ As such, the care and supervision of D.P.’s service dog is moot here, because Hannah does not require any walking, feeding, grooming, or veterinary care while D.P. is at school. Even if she did, this would raise a genuine issue of material fact regarding whether D.P. is able to provide that care and supervision if required. Either way, summary judgment should be denied.

At bottom, neither subsection of the service animal provision—the control requirement nor the care and supervision exception—exempt the District from the reasonable modification requirement under the ADA or permit the District to exclude D.P.’s service dog under the facts in this case. Hannah has never been out of control and does not require care and supervision during the school day. Any dispute as to either point raises genuine issues of material fact. Defendant’s argument thus misses the mark, and summary judgment should be denied.¹¹

B. The United States Has Shown That The School District Is Required To Assist D.P. With Hannah Under The ADA

The essential question in this case is whether the assistance D.P. needs in handling

¹⁰ *But see* Report & Recommendation of U.S. Magistrate Judge at *30-31, *Riley*, No. 15-CV-152-SM, ECF No. 39 (misinterpreting “care and supervision” as two “co-equal” restrictions and looking to dictionary definitions to define each separately).

¹¹ Defendant argues that the personal devices and services provision of the Title II regulation (§ 35.135) further supports its argument that the District is not required to provide any assistance to a student in handling her service dog. *See* ECF 10-5, at 9-10. Section 35.135 is not applicable here, but is nevertheless consistent with the requirement that a school may need to provide assistance to enable a student to handle her service dog. For example, the Department has long explained that nursery schools, extended school day programs, and other entities that provide some measure of child care must make reasonable modifications to provide individualized assistance to children with disabilities, including assistance with medication, diapering, and the use of service animals—notwithstanding the proviso that public entities are generally (with exceptions) not required to provide personal services to individuals with disabilities. *See* U.S. Dep’t of Justice, *Commonly Asked Questions About Child Care Centers and the Americans with Disabilities Act*, Questions 7, 11, 14-16 (1997).

her service dog at school is reasonable and must be implemented under the law.

Defendant's motion attempts to brush the facts aside as "irrelevant" and present this as a pure question of law. *See, e.g.*, ECF 10-5, at 11-14. However, "the determination of whether a particular modification is reasonable involves a fact-specific, case-by-case inquiry." *Mary Jo C.*, 707 F.3d at 153 (internal quotation marks and citation omitted). "It is a factual issue 'whether [a] plaintiff[s] proposed modifications . . . amount to "reasonable modifications" which should be implemented, or "fundamental alterations," which the state may reject.'" *Id.* (quoting *Crowder v. Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1994)). Here, the United States has carried its burden to produce hard evidence showing that the assistance requested in this case is reasonable and required by the ADA.

Based on the evidence presented in the attached affidavits and exhibits, construed in the light most favorable to the United States, a judge or jury would likely find that the assistance D.P. needs to use her service dog at school is reasonable and would not result in a fundamental alteration. For example, in *C.C. v. Cypress School District*, 2011 U.S. Dist. LEXIS 88287 (C.D. Cal. June 13, 2011), the district court granted a motion for a preliminary injunction requiring defendant school district to assist a student with autism who was nonverbal with handling his service dog. *Id.* at *11-15. The court found that requiring an aide to issue commands, hold the dog's leash, provide the dog with water, and tether and untether the dog was not unreasonable and would not result in a fundamental alteration under Title II of the ADA. *Id.* The facts here are analogous.

As evidenced by the attached affidavits, D.P. successfully attended preschool with her service dog for over a year and half with assistance from District staff with tethering and untethering the dog when needed and voicing some commands. *See* H.P. Aff. ¶¶ 5, 11. The

affidavits further show that the assistance D.P. requires now is far less than she required in preschool. *See* Horozko Aff. ¶¶ 6-8. Indeed, the only assistance D.P. currently requires is with untethering herself from her service dog, verbalizing some commands, and being prompted to issue commands to her service dog on occasion. *Id.* Moreover, the District already provides D.P. with a 1:1 aide and a 1:1 nurse to assist and escort her throughout the school day. H.P. Aff. ¶ 14; Horozko Aff. ¶ 1. Shifting the few tasks currently assigned to the handler would involve only minimal effort by District staff but would permit D.P. to handle her service dog at school.¹² Moreover, any burden on the school is likely to diminish over time as D.P. continues to gain experience in handling her service dog.

The United States has thus carried its burden and laid bare that the District's refusals to provide the requested assistance and to reasonably modify its strict "hands off" policy with respect to D.P.'s service animal constitute discrimination under Title II of the ADA and violate D.P.'s civil rights. As a result, summary judgment should be denied.

VI. CONCLUSION

For all the foregoing reasons, the United States respectfully requests that the Court deny Defendant's Motion for Summary Judgment.

¹² Though Defendant raises several speculative arguments about potential liability and possible union issues, these are not valid defenses under the ADA and are contrary to the goals and purpose of the ADA. *See, e.g.*, 28 C.F.R. § 35.136(h) (prohibiting entities from requiring individuals who use service animals to pay a surcharge or to comply with requirements generally not applicable to people without pets); *see also Alboniga*, 87 F. Supp. 3d at 1344-45 ("The School Board may not, by general policy or otherwise, require Plaintiff to maintain additional liability insurance for [his service dog] in respect of [the student's] use of the dog in connection with his schooling.") Notably, Defendant also points to no evidence to support these speculative concerns. *See* ECF 10-5, at 12-13.

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