RIGHT OF ACCESS: HOW ONE DISABILITY LAW DISABLED ANOTHER

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INTRODUCTION

Congress has enacted several laws within the last forty years that address the issue of discrimination against the disabled.[1] While the overarching theme of these statutes is to enable disabled Americans to achieve treatment and opportunities equal to their non-disabled American brothers and sisters,[2] for the purposes of this Comment these laws will be categorized as either statutes whose purpose is to ensure equal access to disabled Americans or statutes whose purpose is to ensure equal educational opportunities to disabled Americans. The acknowledgement of this distinction, or lack thereof, has resulted in two federal district courts reaching opposite conclusions on the same issue: whether a disabled student with a service dog should be granted access to a public school.[3]

Surprisingly, this issue has only been presented to the courts twice; once in the Eastern District of California in *Sullivan v. Vallejo*,[4] and once in the Eastern District of New York in *Cave v. East*

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[1] Julie M. Spanbauer, *Kimel and Garrett: Another Example of the Court Undervaluing Individual Sovereignty and Settled Expectations*, 76 TEMP. L. REV. 787, 804-06 (2003) (discussing the history of the disability rights movement and Congress' response and legislation, including, Vocational Rehabilitation Amendments to the Vocational Act of 1918; Architectural Barriers Act in 1968, Rehabilitation Act of 1973, and the American with Disabilities Act of 1990).

[2] *Id.* at 805.

[3] *See* Sullivan v. Vallejo City Unified Sch. Dist., 731 F. Supp. 947 (E.D. Cal. 1990); Cave v. East Meadow Union Free Sch. Dist. (*Cave I*), 480 F. Supp. 2d 610 (E.D.N.Y. 2007).

[4] *Sullivan*, 731 F. Supp. at 949.

Meadow Union Free School District.[5] In *Sullivan*, the district court concluded that to refuse access to a student with her service dog would violate section 504 of the Rehabilitation Act of 1974 ("section 504").[6] In *Cave*, the district court concluded that the plaintiff's claim was educationally-based and, consequently, not ripe for adjudication pursuant to the procedural requirements of the Individuals with Disabilities Education Act ("IDEA").[7] In its refusal to follow *Sullivan*, the district and circuit courts in *Cave* have set a precedent that endangers the progress Congress has attained in the struggle for the protection of the rights of disabled American citizens.[8]

This Comment analyzes the different approaches and results of these two cases and discusses the possible implications of the Second Circuit's decision.[9] Part I discusses the relevant statutes relating to this issue, including the American with Disabilities Act ("ADA"), section 504 of the Rehabilitation Act, and the IDEA.[10] Part II explores the various approaches utilized by the judiciary in interpreting these statutes. Part III discusses and analyzes *Sullivan v. Vallejo*, an Eastern District of California case, where the court held that the school district was required to accommodate the plaintiff's use of her service dog at school.[11] Part IV discusses and analyzes *Cave v. East Meadow Union Free School District*, a case decided in the Eastern District of New York and affirmed by the Second Circuit, with particular emphasis on how both courts erred in refusing to follow the precedent of *Sullivan*. In conclusion, this Comment discusses the potential consequences of the *Cave* decision and its affect on the present and future protection afforded by congressional legislation for the benefit of the disabled.

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[5] *Cave I*, 480 F. Supp. 2d at 615.

[6] *Sullivan*, 731 F. Supp. at 961.

[7] *See Cave I*, 480 F. Supp. 2d at 636-39.

[8] *See* Cave v. East Meadow Union Free Sch. Dist. (*Cave II*), 514 F.3d 240, 251 (2d Cir. 2008).

[9] *Sullivan*, 731 F. Supp. 947; *Cave II*, 514 F.3d at 240.

[10] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified in scattered sections of 42 U.S.C.A. and 47 U.S.C.A.) (West 2010); Rehabilitation Act of 1973 § 504, 29 U.S.C.A. § 794 (West 2002); Individuals with Disabilities Education Act, Pub. L. No. 91-230, 84 Stat. 175 to 188 (codified in 20 U.S.C.A. §§ 1400-1482 (West 2010).

[11] *Sullivan*, 731 F. Supp. at 961.

I. CONGRESSIONAL LEGISLATION FOR THE DISABLED

Since 1970, when the first piece of federal legislation dealing with the rights of the disabled was enacted, there have been several additional statutes and amendments enacted, which address the issue of preventing disability-based discrimination.[12] Indeed, the last century has witnessed remarkable legislation in the advancement of protecting the rights of the disabled.[13] The three federal statutes that are relevant to the current argument are the ADA, the IDEA, and section 504 of the Rehabilitation Act of 1973.[14] In order to interpret and analyze the application of these laws in the context of a disabled student who wishes to utilize her service dog in a public school, it is first necessary to briefly discuss these statutes and their antecedents.

A. Americans with Disabilities Act

In 1990, the ADA was enacted with the express purpose of establishing "a clear and comprehensive prohibition of discrimination on the basis of disability" in several specific environments.[15] This Act ensured that Americans with disabilities would receive the same treatment as those without disabilities.[16] One goal of the ADA, as noted in the congressional findings of the Act itself, is to provide legal recourse to redress discrimination experienced by the disabled.[17] In addition, Congress also found that some of the various forms of discrimination that individuals with disabilities encounter are "outright intentional exclusion, . . . overprotective rules and policies, failure to make modifications to existing . . . practices, [and] exclusionary qualification standards and criteria."[18] On the day of the Senate's passage of the ADA, Senator Tom Harkin, the bill's sponsor, stated that by enacting the ADA, "we as a society make a pledge

[12] Spanbauer, *supra* note 1, at 804-06.

[13] *Id.*

[14] *See generally* 42 U.S.C.A. §§ 12101-12213; 47 U.S.C.A. § 225; 20 U.S.C.A. §§ 1400-1482; 29 U.S.C.A. § 794.

[15] 136 CONG. REC. S9684-03, 1 (July 13, 1990).

[16] *Id.* at 10.

[17] *See* 42 U.S.C.A. § 12101(a)(4), in which Congress states that the ADA seeks to provide the same legal recourse to the disabled as other federal civil rights laws provide to those experiencing discrimination on account of their race, color, sex, national origin, religion or age.

[18] *Id.* § 12101(a)(5).

that every child with a disability will have the opportunity to maximize his or her potential to live proud, productive, and prosperous lives in the mainstream of our society."[19] Senator John McCain added, "[t]he ADA is a final proclamation that the disabled will never again be excluded, never again treated by law as second-class citizens."[20] Thus, it is clear that the legislative intent of the ADA was to protect people, including children, with disabilities from being excluded based upon overprotective rules, policies, standards and criteria, and to provide these Americans with the ability to redress such discrimination in federal court.

Finally, in order to state a claim under the ADA, the plaintiff must make a prima facie showing that: "(1) she is a qualified individual with a disability; (2) she was excluded from participation in or otherwise discriminated against with regard to a public entity's services, programs, or activities, and (3) such exclusion or discrimination was by reason of her disability."[21] These requirements, which apply to all ADA claims, do not change if the plaintiff is a student and the defendant is a school district,[22] and therefore, for the purposes of this discussion, the ADA fits into the non-educational category of disability laws.

B. Section 504 of the Rehabilitation Act

Section 504 of the Rehabilitation Act of 1973 was enacted to prohibit disability-based discrimination by federally assisted programs and activities.[23] Public schools are specifically included in the list of 'activities' covered under this Act.[24] Under section 504, students whose disabilities create a substantial limitation on a major life activity, such as caring for oneself, hearing, and working, can qualify for accommodations.[25] In an action alleging discrimination under

[19] 136 CONG. REC. S9684-03, 15 (1990) (statement of Sen. Harkin).

[20] 136 CONG. REC. S9684-03, 1 (1990) (statement of Sen. McCain).

[21] *See* Lovell v. Chandler, 303 F.3d 1039, 1052 (9th Cir. 2002) (citing Weinreich v. Los Angeles County Metro. Transp. Auth., 114 F.3d 976, 978 (9th Cir. 1997)).

[22] *See, e.g.*, *Cave I*, 480 F. Supp. 2d at 639 (requiring a student to prove all three requirements in order to establish an ADA claim against the school district).

[23] DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN § 26:5 (rev. 2d ed. 2009).

[24] 29 U.S.C.A. § 794(b)(2)(B).

[25] Megan Roberts, *The Individuals With Disabilities Education Act: Why Considering Individuals One at a Time Creates Untenable Situations for Students and Educators*, 55 UCLA L. REV. 1041, 1056 (2008).

section 504, the plaintiff must show that: "(1) she is handicapped within the meaning of [section 504]; (2) she is otherwise qualified for the benefit or services sought; (3) she was denied the benefit or services solely by reason of her handicap; and (4) the program providing the benefit or services receives federal financial assistance."[26] If the plaintiff satisfies each of these elements, then the burden shifts to the defendant to refute the inference of discrimination.[27] However, if the defendant can show that accommodations cannot reasonably be made to enable the handicapped person to participate, then the burden shifts back to the plaintiff to produce evidence that an accommodation is in fact possible or practical.[28] In the following analysis, the plaintiffs, in both *Sullivan* and *Cave*, argue that their right to a federally-funded benefit, such as, access to a public school, has been violated based upon their use of service dogs.[29]

Since section 504 and the ADA create essentially the same rights and obligations, courts have applied the same analysis to determine whether the plaintiff has stated a claim for which relief can be granted under either Act.[30] This analysis determines whether the plaintiff has alleged that (1) "she is disabled under the Act, (2) she is 'otherwise qualified,' " (3) she was denied benefits or services, or otherwise subject to discrimination, "solely because of her disability," and (4) the defendant "receives federal financial assistance" (under section 504), "or is a public entity" (under the ADA).[31] Section 504 claims of the current discussion deal with disability-based discrimination claims that arise solely from access to a public school—and not with the quality of education provided by the school[32]—

[26] *Lovell*, 303 F.3d at 1052.

[27] Roberts, *supra* note 25, at 1056.

[28] *Sullivan*, 731 F. Supp. at 957.

[29] *Id.* at 949 (alleging that the school, in violation of the Rehabilitation Act of 1974 and the Unruh Civil Rights Act, prevented plaintiff from bringing her service dog to school); *see also Cave II*, 514 F.3d at 243 (alleging that the school violated the Americans with Disabilities Act of 1990 when it prevented plaintiff-student from attending school with his service dog).

[30] Zukle v. Regents of the Univ. of Cal., 166 F.3d 1041, 1045 n.11 (9th Cir. 1999) (indicating that "courts have applied the same analysis to claims brought under both statutes").

[31] *Id.* at 1045.

[32] *See id.* at 1046 (demonstrating that similarly to section 504, the ADA requires "a public entity 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 modification would fundamentally alter the nature of the services, program or activity") (internal quotations omitted).

section 504 fits into the non-educational category of disability laws.

C. Individuals with Disabilities Education Act

The legislative history of the Individuals with Disabilities Education Act began in 1970 when Congress took the momentous step of enacting legislation to protect the educational rights of students with disabilities in the Education of the Handicapped Act of 1970 ("EHA").[33] In 1975, Congress reauthorized the EHA as the Education for All Handicapped Children Act of 1975 ("EAHCA").[34] The EAHCA was later reauthorized as the Individuals with Disabilities Education Act of 1990 ("IDEA"), which was further reauthorized as the Individuals with Disabilities Education Improvement Act ("IDEIA") of 2004.[35] While these amendments have updated the original EHA to coincide with new understandings of what constitutes a disability and what is the best method of educating students with disabilities, the legislative intent has remained the same: ensuring all students with disabilities are provided with meaningful access to learning in schools.[36] When the IDEA was being amended in 2004, Representative Betty McCollum, of Minnesota, urged the House members "to support this important piece of bipartisan legislation that will move us forward in our goal to provide an equal, quality education for all students."[37] Therefore, since its primary objective has been the protection of a disabled child's right to an education, the IDEA fits into the educational category of disability law.

The federal government, with the passage of the EAHCA, has required "that all states receiving federal funding for education ensure that students not be denied an education as a result of their handicaps."[38] Although the EAHCA has been amended several times since its enactment, none of these amendments have altered the three basic requirements imposed upon states receiving federal funds: "(1) that children with disabilities receive Individualized Education Programs (IEPs); (2) that schools provide to students with disabilities a

[33] Roberts, *supra* note 25, at 1045 (discussing the struggles Congress faced over several years from the enactment of the EHA to the enactment of the IDEA).

[34] *Id.* at 1094 n.9.

[35] *Id.*

[36] *Id.* at 1047-48.

[37] 150 CONG. REC. E2183-01, 1 (2004) (statement of Rep. McCollum).

[38] Roberts, *supra* note 25, at 1048-49.

free and appropriate public education (FAPE); and (3) that this education occur in the least restrictive environment (LRE) appropriate."[39]

The precise meaning of a FAPE, as well as the meaning of what constitutes the LRE, has yet to be agreed upon by the many courts that have handled cases alleging violations under the EAHCA and its progeny.[40] Generally, courts will consider: (1) whether the "procedural requirements for the IEP have been met," (2) whether the IEP "sets forth attainable and reasonable goals with the necessary supplemental aids and services," (3) whether the IEP is adhered to in the classroom setting, and (4) whether the parents were involved in the creation of the IEP.[41] The United States Supreme Court, in *Board of Education v. Rowley*,[42] stated that a FAPE requires that the IEP be "reasonably calculated to enable the child to receive educational benefits."[43] Several courts have used this reading of the Act as the basis of its analysis of whether a student has been provided a FAPE in a LRE.[44]

In order to guarantee parents an equal opportunity to be heard regarding disputes over whether the services provided to the student provide a FAPE in a LRE, Congress included certain procedural safeguards in the IDEA, one of which is the administrative remedy.[45] Although in limited circumstances exhaustion of administrative remedies under an IDEA claim may be excused,[46] the IDEA generally requires exhaustion prior to bringing a civil suit based on the notion that "the needs of children with disabilities are best accommodated by the mutual efforts of parents and school district officials who work together to formulate" the child's IEP.[47]

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[39] *Id.* at 1049 (footnote omitted).

[40] *See id*. at 1057-58 (noting that courts have used various tests in their determinations resulting in inconsistent interpretations leading to "unpredictable outcomes in the law").

[41] *Id.* at 1053.

[42] 458 U.S. 176 (1982).

[43] *Id.* at 206-07.

[44] *See* Roberts, *supra* note 25, at 1054-55.

[45] Susan G. Clark, *Administrative Remedy Under IDEA: Must It Be Exhausting?*, 163 EDUC. L. REP. 1, 1 (2002).

[46] *See* Meehan v. Patchogue-Medford Sch. Dist., 29 F. Supp. 2d 129, 133 (E.D.N.Y. 1998) (describing the three situations where exhaustion is not required prior to commencing a civil action as: "(1) where it would be futile to use the due process procedures; (2) where an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law; or (3) where it is improbable that adequate relief can be obtained by pursuing administrative remedies").

[47] Clark, *supra* note 45, at 2.

However, courts have noted that if a plaintiff can articulate some distinction between the ADA claim and the IDEA claim, then a plaintiff may be able to avoid the IDEA's exhaustion requirement.[48] For example, in *Franklin v. Frid*,[49] the district court noted that "a disabled child who asserts a constitutional claim having some relationship to education but no nexus to the IDEA is not required to pursue administrative remedies under the IDEA before filing suit under § 1983."[50] Although the *Franklin* court found the plaintiff's claim of verbal abuse by his teacher to have such a nexus (pointing out that the complaint itself referred to the IDEA),[51] the court cited several teacher-student abuse cases which involved "acts having no relationship to the appropriate education of a disabled child . . . [and therefore, did] not come within the purview of the IDEA."[52]

Thus, if a complaint alleges misconduct on the part of a school official or school district, and the misconduct has a nexus to the educational goals of the IDEA, then the plaintiff shall be required to exhaust the administrative remedies of the IDEA.[53] The purpose of the administrative exhaustion requirement of the IDEA is based on the idea that "the needs of children with disabilities are best accommodated by" having the parents and the school district officials "work together to formulate individualized plans for each" disabled child's education.[54] Thus, when faced with a non-IDEA claim that seeks relief that is educationally-based, it is wholly appropriate for the court to impose the requirements of the IDEA.[55] However, if the relief sought is not educationally-based and the court imposes the require-

[48] *See, e.g.*, Hoekstra v. Indep. Sch. Dist. No. 283, 916 F. Supp. 941, 947-48 (D. Minn. 1996) (noting that a plaintiff bringing suit under the ADA who seeks a type of relief, for example, money damages, that is not available under the IDEA will not enable the plaintiff to avoid the exhaustion requirement of the IDEA when the plaintiff had previously raised the issue at bar at an IDEA hearing), *aff'd*, 103 F.3d 624 (8th Cir. 1996).

[49] 7 F. Supp. 2d 920 (W.D. Mich. 1998).

[50] *Id.* at 925.

[51] *See id.* (holding that "the gravamen of the claim is that Defendants deprived Craig of his right to an appropriate public education under the IDEA").

[52] *Id.* (citing Campbell v. Nye County Sch. Dist., No. 94-15747, 1995 WL 597706, at *2 (9th Cir. Oct. 10, 1995); Webb v. McCullough, 828 F.2d 1151, 1159 (6th Cir. 1987)).

[53] *See id.* (noting that pursuit of administrative remedies is not required in a constitutional claim regarding education so long as it has "no nexus to the IDEA").

[54] Clark, *supra* note 45, at 2.

[55] *See Franklin*, 7 F. Supp. 2d at 925 (indicating that the required administrative remedies under IDEA claims are not required in other non-IDEA related educational claims brought under the Constitution).

ments of the IDEA, it results in the court frustrating the purposes of the ADA.[56] Whereas the goals of the IDEA and ADA are similar, in that both statutes seek to protect the rights of people with disabilities, they are not identical.[57] The ADA's goal of enabling people with disabilities to receive the same opportunities as people without disabilities is distinct from the IDEA's goal of enabling students with disabilities to receive the same educational opportunities as non-disabled students.[58] While this educational/non-educational distinction exists, because both categories involve protecting the rights of the disabled, varied and inconsistent holdings by the judiciary have resulted.[59]

II. THE JUDICIARY'S INTERPRETATION OF DISABILITY LAWS

While Congress has done its part in the fight against discrimination toward the disabled, American courts have been faced with a multitude of cases in which they have had to interpret existing disability laws.[60] Here, as with most areas of legislation, some decisions of the courts have resulted in clear rules of law, while other decisions have resulted in inconsistent and, at times, contradictory interpretations of federal statutes.[61] One area where this result has been common is when the courts have been asked to apply multiple laws to a single situation, such as a discrimination suit alleging simultaneous violations of the ADA, section 504, and the IDEA.[62] When faced

[56] *Id.* (stating that acts that do not relate to the proper education of a disabled child do not fall within the scope of IDEA).

[57] S. N.H. Univ., I.D.E.A. vs ADA/Section 504, http://www.snhu.edu/1363.asp (last visited Nov. 1, 2009) (stating that IDEA "[p]rovides funding to states to ensure provision of free appropriate public education for children with disabilities," while ADA is a "Civil Rights statute protecting persons with disabilities from discrimination").

[58] *Id.*

[59] *See, e.g.*, *Franklin*, 7 F. Supp. 2d at 925 (deciding that it was necessary for plaintiffs to exhaust the administrative process under IDEA); *Sullivan*, 731 F. Supp. at 951 (deciding that "the issue of whether the service dog enhance[d] plaintiff's educational opportunities, which is central to the EHA inquiry, is . . . irrelevant under section 504. [Therefore] plaintiff need not exhaust the EHA administrative remedies, and defendants' motion to dismiss the federal claim for lack of subject matter jurisdiction must be denied").

[60] *See Franklin*, 7 F. Supp. 2d at 925; *Sullivan*, 731 F. Supp. at 951.

[61] *See Franklin*, 7 F. Supp. 2d at 925; *Sullivan*, 731 F. Supp. at 951.

[62] *See, e.g.*, *Cave II*, 514 F.3d at 243 (holding that the district court did not have jurisdiction over plaintiff's motions for injunctive relief under the ADA, section 504, and other federal claims since the plaintiffs "failed to exhaust the administrative remedies provided by the [IDEA]").

with a claim involving combinations of these federal laws, courts have wrestled with how to enforce the spirit of these laws while abiding by the different requirements proscribed in the different statutes.[63] For example, the IDEA's administrative exhaustion requirement has resulted in courts consistently holding that, *inter alia*, while section 504 can be used to enforce educational rights, the administrative procedures required by the IDEA must be exhausted before relief can be granted.[64]

In *Gabel* ex rel *L.G. v. Board of Education*,[65] the court held that while section 504 is designed to prohibit denial of access to an appropriate educational program on the basis of a disability, the IDEA is designed to remedy dissatisfaction with the content of a student's IEP.[66] While recognizing that the "IDEA and section 504 are complementary" regarding educational obligations to children with disabilities, the court in *Gabel* found that the two Acts "address different injuries and thus require different proof," noting that "[s]ection 504 offers relief from discrimination, whereas IDEA offers relief from inappropriate educational placement, regardless of discrimination."[67] Therefore, the question becomes: what is the proper ruling on a motion to dismiss if the complaint does not allege a violation of the IDEA?

The courts have established a rule that a plaintiff cannot sidestep the exhaustion requirement by omitting an IDEA claim from her complaint if the remedy sought is available under the IDEA.[68] While this conclusion has been upheld in several circuits, the *Sullivan* court and the *Cave* courts have been presented with a slightly different issue: a complaint alleging a violation of both the ADA and section 504, with a concession by the plaintiff that there has not been a violation of the IDEA.[69] The *Sullivan* and *Cave* courts have reached op-

[63] *See id.*

[64] Clark, *supra* note 45, at 2 (citing Drinker v. Colonial Sch. Dist., 888 F. Supp. 674 (E.D. Pa. 1995)).

[65] 368 F. Supp. 2d 313 (S.D.N.Y. 2005).

[66] *Id.* at 333 (citing Wenger v. Canastota Cent. Sch. Dist., 979 F. Supp. 147, 152 (N.D.N.Y. 1997)).

[67] *Id.*

[68] Clark, *supra* note 45, at 4-5 (citing Hayes v. Unified Sch. Dist. No. 377, 877 F.2d 809, 814 (10th Cir. 1989)).

[69] *Cave II*, 514 F.3d at 243 (holding that the district court did not have subject matter jurisdiction over appellants' federal claims since appellants failed to exhaust all administrative remedies before filing suit, as required under IDEA); *Sullivan*, 731 F. Supp. at 949 (denying

posite conclusions based upon each court's approach to analyzing the plaintiffs' disabilities, their claims, and the remedies sought.[70] The *Sullivan* court used an approach in which it viewed the plaintiff as a disabled person seeking access to a public school, while the *Cave* courts used the approach of viewing the plaintiff as a disabled student seeking access to a free appropriate public education.[71] While on the surface these two approaches may appear indistinguishable, they have resulted in conflicting holdings.

III. SULLIVAN V. VALLEJO CITY UNIFIED SCHOOL DISTRICT

In 1988, Christine Sullivan, a sixteen year old student with cerebral palsy, learning disabilities, and right-side deafness, obtained a service dog from Canine Companions for Independence ("Canine Companions") and sought permission from Vallejo City Unified School District ("Vallejo District") to bring the service dog to school.[72] After the Vallejo District rejected Sullivan's request, Sullivan filed a complaint in the Eastern District Court of California, alleging the Vallejo District had violated her rights under section 504 and under several state civil rights statutes.[73] The Vallejo District moved to dismiss the claim based upon the plaintiff's failure to exhaust available administrative remedies under the IDEA.[74] The Vallejo District argued that because the plaintiff could request an IEP hearing to obtain a change in her IEP that would include the use of her service dog, the IDEA's requirement of exhaustion of administrative remedies barred the district court's jurisdiction over the plaintiff's claim.[75]

However, the district court rejected this argument and pointed

the defendants' motion to dismiss plaintiff's Rehabilitation Act claim for failure to exhaust administrative measures was denied and holding that the school officials violated section 504 by not allowing the student to bring her service dog to school).

[70] *See Cave II*, 514 F.3d at 243; *Sullivan*, 731 F. Supp. at 949.

[71] *Sullivan*, 731 F. Supp. at 949 (describing how defendants refused to allow a high school student suffering from cerebral palsy to bring her service dog to school); *Cave II*, 514 F.3d at 244 (defendants refused to allow a high school student suffering from hearing impairment to bring his service dog to school because they believed he was functioning satisfactorily under his IPE).

[72] *Sullivan*, 731 F. Supp. at 948-49.

[73] *Id.* at 949.

[74] *Id.*

[75] *Id.* at 951.

out that the plaintiff had neither contended that the Vallejo District had created an inadequate IEP, nor had she argued that the service dog was educationally necessary.[76] Rather, according to the district court, the plaintiff's claim was that the "defendants ha[d] discriminated against her on the basis of her handicap by arbitrarily refusing her access if she [was] accompanied by her service dog."[77] While the district court acknowledged the importance of whether the service dog could enhance the plaintiff's educational opportunities would be central to the IDEA analysis, the court, nevertheless, determined it was completely irrelevant because the plaintiff was asserting that the defendants had discriminated against her in violation of section 504 by failing to make reasonable accommodations for her use of a service dog.[78] The district court stated that if the plaintiff could show that the use of the service dog was "reasonably related to her disability," then the sole issue under section 504 would be whether the defendants were "capable of accommodating plaintiff's choice to use a service dog."[79] The district court concluded that since the relief sought by the plaintiff, an order restraining the Vallejo District from excluding her service dog, was not educationally-based, it would be erroneous to find the plaintiff's requested relief available under the IDEA.[80] Thus, the district court held that the plaintiff was not required to fulfill the IDEA's requirement of exhaustion of administrative remedies.[81]

The district court quickly found that the first and third criteria of the section 504 claim were satisfied—Sullivan was disabled and the school received federal funds.[82] Thus, the court moved on to the plaintiff's contention that the second element—she was discriminated against based upon her disability—was satisfied by the Vallejo District's refusal to grant her access to the public school when she was accompanied by her service dog.[83] The district court refused to ac-

[76] *Id.*

[77] *Sullivan*, 731 F. Supp. at 951.

[78] *Id.*

[79] *Id.* (stating that although the defendants could not question the validity of the plaintiff's choice to use a service dog, the defendants could exclude the dog if they could show that no reasonable accommodations were available).

[80] *Id.*

[81] *Id.*

[82] *Sullivan*, 731 F. Supp. at 957-58.

[83] *Id.* at 958.

cept the defendants' argument that there was a distinction between refusing to grant access to the plaintiff and refusing to grant access to the plaintiff's service dog.[84] According to the district court, the letter and spirit of section 504 is "to increase the participation of handicapped persons in society" and to prohibit discrimination against the disabled based on public perception of the person's handicap.[85] To this end, the district court stressed the importance of giving "deference . . . to the manner in which [the disabled] person chooses to overcome the limitations [of] her disability," and therefore, "as long as th[ose] choices . . . are reasonable, [section 504] both protects those choices from scrutiny, and prohibits discrimination against the disabled person on the basis of those choices."[86] The district court compared the plaintiff's choice of using a service dog to increase her independence to the choice of using a wheelchair "rather than a pair of crutches," and thus categorized the Vallejo District's exclusion of the service dog as a request for "plaintiff to assume a different persona while she attends school, i.e., the persona of a disabled person without a service dog."[87] Therefore, the district court concluded that the plaintiff had met the second element of the section 504 claim.[88]

The district court found that the plaintiff successfully demonstrated that the defendants had "failed to make reasonable accommodations to her condition as a disabled person using a service dog."[89] While the district court acknowledged that an accommodation is not reasonable "if it . . . imposes an undue financial or administrative burden on the grantee, or requires a 'fundamental alteration in the nature of the program,' " the court did not find that the defendants carried that burden.[90] The court distinguished the failed defense used by the Vallejo District from the defense of avoiding a "fundamental alteration in the nature of a program," which was successfully used by

[84] *Id.*

[85] *Id.*

[86] *Id.* (emphasizing that section 504 of the Rehabilitation Act "requires accommodation to the plaintiff's handicap; it does not require that she accommodate to the views of the public about her condition").

[87] *Sullivan*, 731 F. Supp. at 958.

[88] *Id.*

[89] *Id.* at 958, 960 (concluding that plaintiff "demonstrated a clear probability of success on the merits of her federal handicap discrimination claim").

[90] *Id.* at 959 (quoting Se. Cmty. Coll. v. Davis (*Southeastern*), 442 U.S. 397, 410. 412 (1979); *see also* Sch. Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 288 (1987).

the defendants in *Southeastern Community College v. Davis*.[91]

In *Southeastern*, the plaintiff was denied admission into the defendant's nursing program and filed a suit in federal court alleging a violation of section 504.[92] The Court stated that the plaintiff would be unable to participate in the defendant's nursing program without a substantial lowering of the program's standards.[93] However, the Court concluded that section 504 "imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person," and therefore found in favor of the defendants.[94]

Additionally, the *Sullivan* court pointed out the absurdity of the defendants' argument that the school did not have to grant access to the service dog because the plaintiff did not require the use of the service dog "to attain access to [the] public facility," stating that "[u]nder this theory, a public facility could ban wheelchairs from its premises as long as it provided attendants to carry mobility impaired persons from place to place."[95]

The Vallejo District also argued that the rejection of the dog was justified on two grounds: (1) "the dog [was] unnecessary," and (2) "space and health concerns." [96] The district court disagreed with these arguments, stating that the dog served the necessary purpose of aiding the plaintiff in achieving "greater independence in all aspects of her life," and further stating that the state legislature determined that concerns over space and health concerns "may not override the right of a disabled person who uses a service dog to have full and equal access to public facilities accompanied by his or her dog."[97] While the Vallejo District argued that the plaintiff's IEP required her to be in a class taught by a teacher with severe allergies to dogs,[98] the district court concluded that because the plaintiff was a person who used a service dog as a matter of right under state law, section 504 required the defendants "to develop an IEP which incorporate[d] plaintiff's choice to use a service dog," and that any failure to do so

[91] *Southeastern*, 442 U.S. at 413. *But see Sullivan*, 731 F. Supp. at 959.
[92] *Southeastern*, 442 U.S. at 402.
[93] *Id.* at 413.
[94] *Id.*
[95] *Sullivan*, 731 F. Supp. at 959 n.11.
[96] *Id.* at 960.
[97] *Id.*
[98] *Id.*

would be a "fail[ure] in their obligation to ensure that plaintiff [had] meaningful access to [the school's] educational program." [99]

Finally, the district court determined that "the balance of hardships tipp[ed] strongly in [the] plaintiff's favor," because the school district would only have suffered the "minor inconvenience of having to restructure plaintiff's educational program in order to accommodate her service dog."[100] While the plaintiff was aware that, due to her teacher's allergies, the use of her service dog was likely to result in a change to her placement in school, the district court warned the school district that it was not permitted to "alter plaintiff's placement to accommodate the purely personal feelings of others . . . about dogs in the school environment."[101]

IV. CAVE V. EAST MEADOW UNION FREE SCHOOL DISTRICT

John Cave, Jr. ("John, Jr.") was a hearing impaired student at Clark High School in the New York school district of East Meadow ("East Meadow District").[102] John, Jr. had an IEP that included a one-on-one sign language interpreter, "individual sessions with a teacher of the hearing-impaired, a classroom note taker," an FM system that worked with his cochlear implants, extended time and separate locations for tests, preferential classroom seating, and closed captioning for video films shown in class.[103] In December 2006, John, Jr. sought the school district's permission to attend school accompanied by his service dog, stating that the service dog was an " 'independent life tool' " that would "increase his independence and limit the effects of [his] hearing impairment."[104] The East Meadow District, after holding a section 504 meeting, denied John, Jr.'s request based upon the section 504 team's determination that John, Jr.'s IEP already provided him with "full access to the district's special education program and facilities," and "because he was functioning satisfactorily" he did not need any additional services.[105]

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[99] *Id.* (citing Alexander v. Choate, 469 U.S. 287, 301 (1985)).

[100] *Sullivan*, 731 F. Supp. at 961.

[101] *Id.* at 961-62.

[102] *Cave II*, 514 F.3d at 243.

[103] *Id.*; *see also Cave I*, 480 F. Supp. 2d at 618.

[104] *Cave II*, 514 F.3d at 243-44 (internal quotations omitted).

[105] *Id.* at 244. The district court pointed out that, at this meeting, "[s]trangely, there was no express mention of the request to bring a dog into the high school." *Cave I*, 480 F. Supp.

The East Meadow District subsequently held a Committee on Special Education ("CSE") meeting in which the findings of the section 504 meeting were affirmed.[106] Despite these findings by the school district, in January 2007, John, Jr. attempted to gain access to school with his service dog, at which time the school officials refused to grant him access.[107] Although John, Jr. was aware of his rights to appeal the CSE and section 504 team's findings, John, Jr. did not pursue the administrative appeals process provided by the IDEA, but instead filed suit in federal district court seeking an injunction against the East Meadow District.[108]

The federal suit brought by John, Jr. alleged that the East Meadow District violated his rights under "the ADA, [s]ection 504, . . . § 1983, [and] several New York State statutes," when it refused to grant John, Jr. and his service dog access to the public school.[109] Thus, like the plaintiff in *Sullivan*, John, Jr. did not allege that the school district violated the IDEA, and therefore John, Jr. argued that he was not bound by the administrative exhaustion requirement of the IDEA.[110] In *Sullivan*, the court recognized this distinction and emphasized that "the substantive rights created by the [IDEA and section 504] are distinct," and in some areas, "section 504 creates greater substantive rights" for the plaintiff.[111] The *Sullivan* court concluded that the educational necessity of the service dog was not relevant to the plaintiff's claim that the "defendants . . . discriminated against her on the basis of her handicap by arbitrarily refusing her access if she is accompanied by her service dog."[112] However, unlike the court in *Sullivan*, the district court in *Cave* concluded that even though the plaintiff did not assert a claim under the IDEA, the plaintiff's claim would be treated as such; therefore, it would be subject to the administrative remedy exhaustion requirement.[113] Although the plaintiff in *Cave* relied heavily upon the holding in *Sullivan*, the district court in *Cave* provided three reasons why it was not persuaded by the *Sulli-*

2d at 630.

[106] *Cave II*, 514 F.3d at 244.

[107] *Cave I*, 480 F. Supp. 2d at 619.

[108] *Cave II*, 514 F.3d at 244; *Cave I*, 480 F. Supp. 2d at 626-27.

[109] *Cave II*, 514 F.3d at 244.

[110] *Id.* at 245, 247; *Sullivan*, 731 F. Supp. at 951.

[111] *Sullivan*, 731 F. Supp. at 950 (citing Smith v. Robinson, 468 U.S. 992, 1021 (1984)).

[112] *Id.* at 951.

[113] *See Cave II*, 514 F.3d at 246-49; *Cave I*, 480 F. Supp. 2d at 637.

van decision.[114]

First, the district court in *Cave* distinguished the plaintiffs in *Cave* from those in *Sullivan*, by finding that while Sullivan needed "the service dog to increase her physical independence," Cave was already "quite independent."[115] In doing so, however, it appears that the district court decided for itself the actual extent of John, Jr.'s disability with complete disregard for the classifications set forth in the ADA, section 504, and the IDEA.[116]

Second, the district court in *Cave* found fault with the *Sullivan* court's finding that Sullivan was not bound by the IDEA's exhaustion requirement because she did not claim a violation of the IDEA.[117] The district court in *Cave* stated that "the plain language of the IDEA and [the] Second Circuit case law" require the court to "look to the nature of the relief that the plaintiffs seek," rather than the plaintiffs' own characterization of their claim.[118] Specifically, the court cited to *Polera v. Board of Education of Newburgh Enlarged School District*[119] and *Hope v. Cortines*,[120] as its precedents.[121] Although both of these cases dealt with the administrative exhaustion requirement of the IDEA and plaintiffs that did not include an IDEA charge in their respective complaints, neither case is apposite to *Cave*.[122] In *Polera*, the Second Circuit found exhaustion to be required because the plaintiff's suit was based on the school district's failure "to provide her with appropriate educational services."[123] In fact, the plaintiff's complaint included claims under the ADA, section 504, the Fourteenth Amendment, and several state laws, and specifically alleged that the school failed to provide her with the FAPE, "including study materials, compensation for tutoring, and recognition

[114] *Cave I*, 480 F. Supp. 2d at 637. It is noteworthy that, in affirming the district court's dismissal of Cave's claim, the Second Circuit relegated its only mention of *Sullivan* to a footnote which stated, "[t]he district court also correctly pointed out that *Sullivan* . . . is not controlling here." *Cave II*, 514 F.3d at 248 n.3.

[115] *Cave I*, 480 F. Supp. 2d at 637.

[116] *See* 42 U.S.C.A. § 12102(2); Rehabilitation Act of 1973 § 504; 34 C.F.R. § 104.3(j) (2000); 20 U.S.C.A. § 1401(3).

[117] *Cave I*, 480 F. Supp. 2d at 637-38.

[118] *Id.* at 638 (emphasis omitted).

[119] 288 F.3d 478, 483 (2d Cir. 2002).

[120] 872 F. Supp. 14, 21 (E.D.N.Y. 1995).

[121] *Cave I*, 480 F. Supp. 2d at 638.

[122] *See Polera*, 288 F.3d at 483; *Hope*, 872 F. Supp. at 21.

[123] *Polera*, 288 F.3d at 488.

of academic achievements, to which she was entitled as a disabled student."[124] The *Polera* court held that the simple fact that the plaintiff sought "damages, *in addition to relief that is available under the IDEA*, [did] not enable her to sidestep the exhaustion requirements of the IDEA."[125] The *Polera* court repeatedly emphasized that the reason for this finding was that the plaintiff was claiming "deficiencies in . . . her education."[126]

In *Hope*, the plaintiffs brought suit under the ADA, Title VI of the Civil Rights Act, § 1983, and the Human Rights Law of the State of New York, alleging that the defendants "unlawfully engaged in discrimination on the basis of disability and race by . . . refusing to provide *appropriate educational services*."[127] The *Hope* court provided a detailed analysis explaining that if the relief sought under a section 504 or ADA claim is available under the IDEA, exhaustion is required.[128] This conclusion by the court was fatal to the plaintiffs in *Hope* precisely because the relief sought was an injunction requiring the defendants to provide educational services and accommodations.[129]

Therefore, by considering *Hope* and *Polera* as precedents, the district court in *Cave* focused on the fact that the plaintiffs in those cases sought relief available under the IDEA without including a violation of the IDEA in their respective complaints.[130] Unfortunately, the district court in *Cave*, as well as the Second Circuit on appeal, failed to acknowledge the fact that the relief sought by the plaintiff in *Cave* was not a correction to deficiencies in his education, nor was it appropriate educational services.[131] The plaintiff in *Cave*, just as the plaintiff in *Sullivan*, was seeking to gain access to public school with a service dog.[132] Therefore, *Cave* is distinguishable from the precedents cited in the district court's opinion in that the plaintiff not only failed to allege a violation under the IDEA, but he also failed to allege that the school district did not provide him with an FAPE in a

[124] *Id.* at 480.
[125] *Id.* at 488 (emphasis added).
[126] *Id.*
[127] *Hope*, 872 F. Supp. at 15-16 (emphasis added).
[128] *Id.* at 21.
[129] *Id.* at 21, 22.
[130] *Cave I*, 480 F. Supp. 2d at 638.
[131] *Cave II*, 514 F.3d at 247.
[132] *See id.*; *Sullivan*, 731 F. Supp. at 949.

LRE.[133]

Finally, the district court in *Cave* criticized the *Sullivan* holding, stating that the IDEA did not apply based on the *Sullivan* court's recognition that "in granting the plaintiff's preliminary injunction," the school was ordered "to convene for the purpose of modifying the plaintiff's existing IEP to ensure that she could be accompanied by her service dog."[134] The court in *Cave* concluded that because the addition of a service dog would require a modification of the IEP, the requested change was a form of relief available under the IDEA.[135] Thus, the court failed to distinguish between the relief sought and a possible secondary effect of that relief.

In *Cave*, the district court added that the court's recognition in *Sullivan* that "such a modification of the [plaintiff's] IEP could require placing the plaintiff at another school," distinguishes *Sullivan* from the facts and law in *Cave*.[136] However, this is an intellectually dishonest reading of the *Sullivan* decision. Although the *Sullivan* court does state that a change in schools could be a possibility, this is clearly dicta as the paragraph containing that idea begins by stating: "On the record before me, I cannot determine whether defendants may be able to accommodate plaintiff and her service dog . . . ."[137] In fact, the most significant statement of that passage is the final sentence which states: "In the final analysis, once plaintiff's right to be accompanied by her service dog is accepted as a given, decisions regarding an appropriate placement are educational decisions which are properly the subject of the [EHA] procedures."[138] Thus, although the district court in *Sullivan* abided by the legislative intent of the IDEA—leaving educational decisions to those best suited to make them[139]—and the legislative intent of the ADA—ensuring equal access to public facilities for people with disabilities[140]—the *Cave* court dismissed the equal access claim based on its conclusion that access to school is an educational-based activity.[141]

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133 *See Cave II*, 514 F.3d at 244.

134 *Cave I*, 480 F. Supp. 2d at 638 (citing *Sullivan*, 731 F. Supp. at 961, 962).

135 *Id.* at 638.

136 *Id.* (citing *Sullivan*, 731 F. Supp. at 962).

137 *Sullivan*, 731 F. Supp. at 962.

138 *Id.*

139 *See generally* 20 U.S.C.A. § 1415.

140 *See generally* 42 U.S.C.A. § 12101(b).

141 *See Cave I*, 480 F. Supp. 2d at 641, 642.

In its discussion of whether the East Meadow School District violated the ADA and section 504 by not providing a reasonable accommodation, the *Cave* court quoted Second Circuit cases and defined " 'reasonable accommodation' as 'one that gives the otherwise qualified plaintiff with disabilities 'meaningful access' to the program or services sought.' "[142] The court clarified this definition by stating that the defendant "is not required 'to provide every accommodation the disabled [person] may request, so long as the accommodation provided is reasonable.' "[143] However, although the ADA does not specifically include the issue of the use of a service animal as a reasonable accommodation,

> the Department of Justice, which promulgated the regulations enforcing the provisions of the ADA, interpreted the ADA to require a place of public accommodation to "modify [its] policies, practices, or procedures to permit the use of a service animal by an individual with a disability."[144]

The court, reciting the services provided for in John, Jr.'s IEP, concluded that the numerous "accommodations" provided to John, Jr. "were extraordinary."[145] The court then conducted a balancing test of the advantages and disadvantages to allowing access to the plaintiff and his service dog.[146] The court briefly acknowledged that John, Jr. will have the advantage of being alerted to sounds and alarms, in addition to having more time to train the service dog, using the phrase "he will be somewhat assisted."[147]

The court then went on to discuss at length the disadvantages of granting access to John, Jr. and his service dog, which included: dog allergies of faculty and students; the need to confine the dog during gym class; the possibility of needing to change John, Jr.'s sche-

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[142] *Id.* at 640 (quoting Henrietta D. v. Bloomberg, 331 F.3d 261, 282 (2d Cir. 2003)).

[143] *Cave I*, 480 F. Supp. 2d at 640 (quoting Fink v. N.Y. City Dep't of Pers., 53 F.3d 565, 567 (2d Cir. 1995)) (alteration in original).

[144] Beth A. Danon, *Emotional Support Animal or Service Animal for ADA and Vermont's Public Accommodations Law Purposes: Does It Make a Difference?*, 32 VT. B.J. 21, 21 (Summer 2006) (quoting 28 C.F.R. § 36.302(c)(1)) (alteration in original).

[145] *Cave I*, 480 F. Supp. 2d at 641.

[146] *Id.*

[147] *Id.*

dule; and the need for John, Jr. to leave his classes early.[148] The court concluded that the "situation with the service dog is, at best, unclear, and at worst, detrimental to John, Jr.'s best personal benefit."[149] In coming to this conclusion, the court intruded into the realm of how to best educate a child with disabilities, which the IDEA—and the *Sullivan* court—has clearly stated is not the proper role of the court.[150] This, however, is not the only problem with the court's balancing act. First, to state that a school's accommodating for allergies is unreasonable overlooks just how prevalent this issue is in today's society.[151] Second, the court expressed concern that John, Jr. would lose out on time in gym class, "apparently one of [his] favorites," because the dog would be confined elsewhere.[152] This statement reveals the court's lack of understanding and knowledge of the abilities of service dogs.

Although there are several different organizations that train service dogs for the hearing impaired, Canine Companions and Dogs for the Deaf were the organizations that provided the service dogs for the plaintiffs in *Sullivan* and *Cave*, respectively.[153] These organizations have rigorous training programs for their would-be service dogs with such high standards that approximately sixty percent of the dogs that enter the training programs do not graduate.[154] The dogs spend anywhere from six months to twenty-four months in initial training before graduating and being placed in a home, and are required to attend follow up training sessions for the lifetime of the placement.[155] In addition to being trained to alert their handler for common sounds,

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[148] *Id.*

[149] *Id.* at 642.

[150] *See* Clark, *supra* note 45, at 1-2 (noting that Congress intended for disputes over a child's special education to be resolved first between parents and school administrators before resort is made to a court); *Sullivan*, 731 F. Supp. at 951.

[151] *See* Marie Plicka, *Mr. Peanut Goes to Court: Accommodating an Individual's Peanut Allergy in Schools and Day Care Centers Under the Americans with Disabilities Act*, 14 J.L. & HEALTH 87, 88, 104-05 (1999-2000) (discussing methods in which schools may accommodate students with allergies).

[152] *Cave I*, 480 F. Supp. 2d at 641.

[153] *See Sullivan*, 731 F. Supp. at 949.

[154] Jennie Dapice, *Service Dogs and People with Limb Loss*, 17 INMOTION 23 (2007), http://www.amputee-coalition.org/inmotion/may_jun_07/service_dogs.pdf.

[155] *See* Canine Companions for Independence, Training and Placement, http://www.cci.org/site/c.cdKGIRNqEmG/b.4011115/k.644B/Training_and_Placement.htm (last visited Sept. 8, 2009); *see also* Our Dogs: Dogs for the Deaf, http://www.dogsforthedeaf.org/our_dogs.php (last visited Sept. 8, 2009).

graduates have the ability to remain stationary, sitting or lying, until given a command and to refrain from relieving themselves in inappropriate locations.[156] Thus, it is hard to imagine that John, Jr. would lose out on time in his forty-five minute gym class to tend to his service dog that would be contained in a collapsible crate.

Third, the possibility of John, Jr.'s schedule being changed is a factor for John, Jr. and his parents to weigh, not the court. Finally, the court's concern over the need for John, Jr. to leave his classes early,[157] presumably to avoid congestion in the hallway, also reveals a lack of understanding and knowledge about the world of education on the court's behalf. Having been an educator in public schools for over a decade, I have had many students that have needed to leave class early to avoid congestion in the hallway. In my experience, this typically occurs when a student is on crutches or has some other medical condition, which her doctor feels is significant enough to avoid unnecessary contact. However, in John, Jr.'s case, because the service dog is a long-term life tool, it would seem counter-productive for John, Jr. to avoid hallway congestion. That is precisely the type of situation in which that tool is supposed to aid the disabled handler.[158] According to Dogs for the Deaf, in addition to the common sounds the dogs are initially trained to respond to, such as telephones and smoke alarms, the "[h]earing dogs can be taught to alert people to any repetitive sound that can be set up and practiced regularly."[159] However, "[i]f a sound is inconsistent . . . it is hard for the dog to learn to work it."[160] This justifies John, Jr.'s assertion that he wants to bring his service dog to school in order to develop the handler-service dog bond, and it supports the idea that John, Jr. and his service dog should travel the hallways under normal conditions.[161]

Under this analysis, the district court's balancing in *Cave* of

[156] In fact, these are the minimum standards for an assistance dog in public as set forth by Assistance Dog International, Inc., the organization which has accredited both Dogs for the Deaf and Canine Companions. *See* Assistance Dogs International, Inc., Assistance Dog in Public Standards, http://www.assistancedogsinternational.org/Standards/Assistance DogPublicStandards.php. (last visited Sept. 8, 2009).

[157] *Cave I*, 480 F. Supp. 2d at 641.

[158] *See id.* at 619 (noting that John, Jr.'s service dog was "an independent life tool used to limit the effects of [his] disability").

[159] Dogs for the Deaf: Hearing Dogs, http://www.dogsforthedeaf.org/hearing_dogs.php (last visited Sept. 8, 2009).

[160] *Id*.

[161] *See, e.g.*, *Cave I*, 480 F. Supp. 2d at 621.

the advantages and disadvantages of granting access to John, Jr. and his service dog appears to be flawed. The disadvantages stated by the court reveal the court's lack of knowledge of the advantages supplied by service animals, as well as a lack of knowledge of the functioning of the school environment. While the court emphasized that the IDEA's administrative exhaustion requirements were intended to leave the education-based decisions to those most knowledgeable in that field, the court nonetheless used its limited knowledge of the functioning of the school environment to refuse to grant a disabled student access to his school and the choice of how to best live with his disability.[162] Although this choice may not be the first choice of the school district officials, the district court, or Second Circuit, the letter and spirit of the disability laws places the priority of such a choice on the person with the disability.[163]

CONCLUSION

The last four decades have witnessed great strides in the fight for equal treatment for American's with disabilities.[164] While the federal government has put forth a determined effort to end disability-based discrimination, the 2007 decision by the Second Circuit to affirm the Eastern District Court's dismissal of John Cave, Jr.'s ADA and section 504 claims threatens to stop the progress Congress has made in the struggle for equal treatment for all Americans.[165] What is most surprising is that these courts used a federal law intended to guarantee a disabled student an equal education to his non-disabled peers by stripping that student of his federally guaranteed right of access to a public building.[166] Thus, these courts have decided that it is more important to ensure equal access to public education by a student with a disability than to ensure equal access to a public facility

[162] *Id.* at 636, 637.

[163] *See id.* at 636 (stating that Congress intended for parents and school administrators to determine the best educational choices for a handicapped child).

[164] *See* Arlene Mayerson, The History of the ADA: A Movement Perspective (1992), http://www.dredf.org/publications/ada_history.shtml (reviewing the history of disability rights legislation such as section 504 of the 1973 Rehabilitation Act).

[165] *See* Letter from Ed Eames, Ph.D., President, Int'l Ass'n of Assistance Dogs Partners, to Hon. Edward R. Korman, Chief Judge, U.S. Dist. Court, E.D.N.Y. (March 24, 2007), *available at* http://www.iaadp.org/cave2007.html ("Judge Spatt's decision [w]as a step back in time.").

[166] *See generally Id.*

by a person with a disability.

However, there is nothing in the legislative history of these various disability laws that indicates a court should enforce one at the expense of another. The *Sullivan* court read the disability statutes as complementary, and therefore, found that so long as the plaintiff's claim was not educationally based, the IDEA's administrative exhaustion requirement did not apply.[167] In contrast, the *Cave* courts read the disability statutes as exclusionary and found that if the plaintiff's claim has even an indirect effect on his education, the IDEA's administrative exhaustion requirement applies.[168] This strained reasoning of the *Cave* court's decision stands in stark contrast to the words spoken by Senator Orin Hatch the day of the passage of the ADA, that "[i]t is time that those in wheelchairs, those who have a hearing loss or sight impairment, be able to attend the theater or shop for their own groceries, or participate in the many facets of life which we in America are so privileged to have at our disposal."[169] The fact that there have only been two cases involving students seeking access to public schools with service dogs may be the result of a hesitation on the part of Americans with disabilities to utilize this life tool. The *Cave* decision, standing as the most recent precedent on this issue, has affirmed this hesitation to enter the mainstream of American life, and, indeed, has effectively enabled one disability law to disable another.

[167] *Sullivan*, 731 F. Supp. at 951.

[168] *Cave I*, 480 F. Supp. 2d at 637.

[169] 136 CONG. REC. S9684-03, 3 (1990) (statement of Sen. Hatch).