**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**
**CASE NO. 14-CIV-60085-BLOOM/Valle**

MONICA ALBONIGA, individually
and on behalf of A.M., a minor,

Plaintiff,
v.

THE SCHOOL BOARD OF BROWARD
COUNTY FLORIDA,

Defendant.
_____/

**ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT**

**THIS CAUSE** is before the Court upon the Motion for Partial Summary Judgment filed by Plaintiff Monica Alboniga ("Plaintiff"), individually and on behalf of her minor child, A.M., and the Motion for Summary Judgment, filed by Defendant The School Board of Broward County, Florida (the "School Board" or "Defendant"). The Court has reviewed the Motions, all supporting and opposing filings and submissions, the Statement of Interest of the United States of America, and the record in the case. For the reasons that follow, Plaintiff's Motion is granted.

## I. MATERIAL FACTS

This case involves Defendant's alleged violation of Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131, *et seq.* ("Tittle II" and the "ADA") by implementing practices, policies and procedures that have subjected the minor plaintiff to discrimination based on his disability, and violation of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Section 504") by failing to provide the plaintiff with a reasonable accommodation through its initial denial of the child's service animal access to his school and then by implementing procedural barriers to the use of that service animal in school.

In January 2012, the School Board began to develop policies and procedures regarding students and employees being accompanied by a service animal in School District facilities. These policies were made after reviewing the existing laws, regulations, Department of Justice guidance, and rules promulgated by other school districts in Florida, the Florida Department of Education, and other school districts across the country.

A.M. is a six year-old child with multiple disabilities who lives with his mother, Plaintiff Monica Alboniga, both of whom are residents of Broward County, Florida. A.M. lives with cerebral palsy, spastic quadreparesis, and a seizure disorder; is non-verbal and confined to a wheelchair; and needs care and support for all aspects of daily living and education. A.M. attends a public school in Broward County, Florida.

At some point prior to development of the May 15, 2013 Individualized Education Plan (IEP), Plaintiff determined that A.M. required a seizure alert and response dog to protect A.M. when he has seizures. Plaintiff paid to find and train a seizure alert and response dog for A.M. Plaintiff obtained a service animal, named Stevie, to assist A.M. Stevie received all training in accordance with Assistance Dog International Standards for training and behavior. Stevie was specifically trained to provide A.M. with assistance in the event of a seizure or medical emergency regardless of the environment in several specialized tasks. Those tasks include "cover," in which Stevie was trained to step up on A.M.'s wheelchair and lay across his lap in the event of a seizure. "Cover" provides A.M. with several benefits: Stevie can keep A.M.'s head up and prevent airway distraction or choking on saliva during a seizure episode; it helps calm A.M. during outbursts and helps disrupt abnormal behaviors or movements; and it provides A.M. with a tactile presence which can help arouse A.M. out of an episode. Stevie was also trained to "tell" or "alert" human responders in the event that A.M. was experiencing a medical crisis. This includes activating a sensor mat by stepping, jumping on or passing across the mat which sets off an alarm; going for help, physically alerting a human responder, and then returning to and staying with A.M.; or otherwise acting in a way to bring attention to the medical situation. Stevie was also equipped with a special vest which carried pertinent medical supplies and information important for the care of A.M. in an emergency. Plaintiff has submitted declarations, not controverted by Defendant, that Stevie and A.M. form a "service dog team." Separation of a service animal from the target member of its team is detrimental in diminishing the animal's responsiveness and effectiveness, reducing the animal's ability to respond and perform tasks for its target, and disrupting the animal-target bond that is important to the effective working connection between members of the service dog team. These negative effects carry over even when the service dog team is reconnected.

On or about May 15, 2013, Plaintiff spoke to Wladimir Alvarez from the Equal Education Opportunity Office of the School Board regarding her son being allowed to be accompanied by a service dog at school for the 2013/14 school year. On or about May 23, 2013, Mr. Alvarez mailed correspondence to Plaintiff, including a copy of a Request for Use of Service Animal in School District Facilities form. On or about July 22, 2013, the School Board received the completed Request for Use of Service Animal in School District Facilities form from Plaintiff, including a copy of the service dog's vaccinations. The School Board's policies and procedures requested information regarding liability insurance for the service animal, proof of which was not provided by Plaintiff. In addition, the vaccinations of the service dog listed on the information provided by Plaintiff did not correspond with the required vaccinations in the School Board's policies and procedures. The vaccinations required by the School Board mirror those applicable to dog breeders to ensure the health of the dog before its sale, *see* Fla. Stat. § 828.29, and exceed those related to the regulation of animals permitted in schools, *see* Fla. Stat. § 828.30, Fla. Admin. Code. 6A-2.0040.

By August 15, 2013, the School Board had not agreed to Plaintiff's request for accommodation for her son, and sent her a letter requesting additional vaccinations and liability insurance for a professionally trained service animal. The letter requested a certificate of current liability insurance covering the service animal and identifying the School District as an additional insured, with the amount of insurance coverage determined by the School District's Risk Management Department. It further requested proof the following vaccinations: Distemper, Hepatitis, Leptospirosis, Paroinfluenza,

Parvovirus, Coronatvirus, DHLPPC, and Bordetella. *Id*. Then, on August 16, 2013, the School Board informed Plaintiff that she needed to provide a "handler" for the dog.

A.M. began attending Nob Hill Elementary School ("Nob Hill") as a kindergarten student in August 19, 2013. Since Plaintiff obtained the service dog, at all times A.M. has attended school accompanied by his service dog. Plaintiff served as the "handler" for A.M.'s service dog from August 2013 until November 2013. She was not paid by the School Board for doing so, nor did she assist school staff with any care or activities regarding A.M. in the classroom. In November 2013, while continuing to maintain that it is not responsible for the care and supervision of A.M.'s service animal, which includes being the animal's "handler," the School Board made an administrative decision to provide an employee to be the "handler" for A.M.'s service dog. Since that time, the School Board has provided a "handler" for A.M.s' service dog. That "handler" is also the school's custodian. The "handler" received training from the same individual who initially trained Stevie. The "handler's" only responsibilities in school are the following: to walk Stevie alongside A.M. with a leash instead of allowing Stevie to be attached to A.M.'s wheelchair via a tether; to take Stevie outside of the school premises to urinate; and to ensure that other people do not approach, pet or play with Stevie while he is working as a service dog.. The "handler" does not have any duties regarding A.M.'s education or care. *Id*. At all times while at home and in other public places, Stevie is tethered to A.M. There is nothing preventing Stevie from going outside to urinate tethered to A.M. Stevie is trained to physically indicate when he needs to urinate. While at school, Stevie does not eat or drink. Nor does Stevie defecate or make stains, or require cleaning or exercise, while at school. Plaintiff attends to Stevie's daily feeding, cleaning and care needs.

The School Board employs an Exceptional Student Education (ESE) teacher and two paraprofessionals in A.M.'s classroom to aid A.M. in his activities, and has provided special training to school staff to ensure A.M.'s safety and treatment during a seizure. The ESE teacher and paraprofessionals have been trained to recognize seizure symptoms, seizure precautions and detection, as well as to provide care and emergency treatment for A.M. when he has a seizure. This includes lifting A.M. from his wheelchair, safely laying him on the ground, and administering a suppository to address the seizure. Currently, A.M. has seizures every other night. Stevie alerts Plaintiff approximately thirty to forty minutes prior to the seizure, and during the seizure, performs the "cover" task to assist A.M. No school staff at A.M.s' school has observed this behavior from the service dog.

At Plaintiff's request, a Section 504 meeting was held on September 19, 2013. While A.M. has had an IEP since he began as a pre-kindergarten student in the Broward County public school system, he has never has a Section 504 plan. At this meeting, a health care plan was developed outlining the School Board's responsibilities regarding care for A.M. if and when he had a seizure at school. The health care plan was incorporated into A.M.'s IEP. Neither A.M.'s health care plan nor his IEP includes his use of a service dog at school. During this meeting, the School Board expressed its position that it was not responsible for the care or supervision of a service animal, which includes handling the service animal.

## III. JURISDICTION

Defendant poses two challenges to the Court's jurisdiction over the instant action. First, Defendant maintains that Plaintiff has failed to exhaust her administrative remedies under the IDEA (as defined below), thereby divesting this Court of jurisdiction to resolve her claims under the ADA and Section 504. Second, Defendant argues that Plaintiff's claims are moot as the School Board has continuously permitted A.M. to attend school accompanied by his service animal. The Court will address each issue in turn.

**A. Exhaustion of Administrative Remedies**

While Plaintiff asserts claims under Title II of the ADA and Section 504, Defendant maintains that due to Plaintiff's failure to exhaust the administrative remedies available under Section 1415(f) of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (the "IDEA"), the Court lacks subject matter jurisdiction over the instant action. Plaintiff does not dispute that she has not undertaken the relevant administrative procedures but submits that they were not required here. The Court agrees.

The Eleventh Circuit has long held that "whether claims asserting the rights of disabled children are brought pursuant to the IDEA, the ADA, Section 504, or the Constitution, they must first be exhausted in state administrative proceedings" propounded under the IDEA. *M.T.V. v. DeKalb County School Dist.*, 446 F.3d 1153, 1158 (11th Cir. 2006). Where exhaustion of IDEA administrative remedies is required, a plaintiff's "failure to exhaust administrative remedies by requesting and participating in a due-process hearing will result in dismissal of the civil action." *Cherokee*, 218 F. App'x at 913 (explaining that "exhaustion is a prerequisite to the civil action"); Thus, if the relief sought by a plaintiff can be provided by the IDEA or relates to the provision of a FAPE or development of an IEP under the IDEA, the plaintiff's ADA or Section 504 claims will fail absent the plaintiff's exhaustion of administrative remedies.

However, a theory of ADA Title II or Section 504 liability need not be predicated on a denial of a FAPE or related to improper development of an IEP as required by the IDEA. Where a plaintiff's claims are not based on or potentially remedied by the IDEA, the IDEA's administrative exhaustion requirements do not apply. Plaintiff does not claim that A.M. has been denied a free and appropriate public education. Plaintiff does not claim that A.M.'s IEP is in any way deficient. Plaintiff does not claim that A.M.'s service animal is educationally necessary, or that the School Board's provision of A.M.'s education would be impacted by the presence of the service animal. Defendant, in point of fact, agrees.

Elsewhere in its submissions, Defendant argues that the service animal is not necessary for or relevant to A.M.'s educational experience – that the services provided by the animal are performed through other means by school staff in order to provide A.M. a FAPE in accordance with his IEP. Plaintiff asserts claims for violation of the ADA and Section 504 regardless of Defendant's compliance with the IDEA. The IDEA and its administrative scheme are simply not implicated by Plaintiff's claims here. As such, exhaustion of those procedures is not a prerequisite to this action.

**B. Mootness**

Defendant argues that there is no active case or controversy before the Court because the School Board has always and continues to allow A.M. to attend school with his service animal. Nevertheless, this case is not moot.

Here, the School Board has permitted A.M. to attend school with his service animal and has provided an employee to act as a handler for the service animal. This has been permitted solely by an administrative decision that is in derogation of its own policies and procedures. The School Board's policies implementing its interpretation of 28 CFR § 35.136 states that "[i]n the case of a young child or a student with a disability who is unable to care for and supervise his/her service animal, a handler provided by the parent is responsible for providing care and supervision of the animal." Finalized Policies at 5. They provide no discretion to the School Board to provide any accommodation or assistance. A change in government conduct by administrative fiat in violation of its own rules cannot constitute "unambiguous" or "consistent" termination of allegedly improper conduct. This Court need not address whether the School Board reversed-course because of negative publicity in local media, as Plaintiff suggests.

However, it is not at all clear that the complained of conduct will not recur once threat of a lawsuit is removed. *See Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1188 (11th Cir. 2007) (holding that defendant's new policy permitting access for service animals did not moot plaintiff's Title III ADA and Section 504 claims, explaining that "[defendant] has not met its 'formidable,' 'heavy burden' of meeting the Supreme Court's 'stringent' standard for mootness in a private voluntary cessation case – showing that it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur'"). Plaintiff's claims are not moot and this Court has jurisdiction to consider them.

## IV. ANALYSIS

### A. Title II, Section 504 and the Relevant Implementing Regulations

The ADA was enacted in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Congress found that "discrimination against individuals with disabilities persists in such critical areas as . . . education, . . . and access to public services" and "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of . . . overprotective rules and policies, [and the] failure to make modifications to existing . . . practices . . . ." *Id.* §§ 12101(a)(3), (5). Section 504 similarly prohibits such discrimination by entities that receive federal financial assistance. 29 U.S.C. § 794. Coverage broadly includes the countless programs, services, and activities of public schools and state and local education departments and agencies. *See* 42 U.S.C. § 12131; 28 C.F.R. § 35.104.

The relevant provision of the 1991 Title II regulation provides, in full:

> "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the

> modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7).

On July 23, 2012, the Attorney General issued revised regulations under Title II and III of the ADA that "comport with the Department [of Justice]'s legal and practical experiences in enforcing the ADA since 1991." The revised regulations contain certain provisions enforcing the ADA with respect to the use of service animals in public entities, such as public schools and other public facilities. *See* 28 C.F.R. § 35.136. The regulation provides that "[g]enerally, a public entity shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability." *Id.* § 35.136(a). In further provides, in relevant part, as follows:

> (b) **Exceptions**. A public entity may ask an individual with a disability to remove a service animal from the premises if
>
> (1) The animal is out of control and the animal's handler does not take effective action to control it; or
>
> (2) The animal is not housebroken.
>
> (d) **Animal under handler's control**. A service animal shall be under the control of its handler. A service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (e.g., voice control, signals, or other effective means).
>
> (e) **Care or supervision**. A public entity is not responsible for the care or supervision of a service animal.
>
> (g) **Access to areas of a public entity**. Individuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a public entity's facilities where members of the public, participants in services, programs or activities, or invitees, as relevant, are allowed to go.
>
> (h) **Surcharges.** A public entity shall not ask or require an individual with a disability to pay a surcharge, even if people accompanied by pets are required to pay fees, or to comply with other requirements generally not applicable to people without pets. If a public entity normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by his or her service animal.

Id. §§ 35.136(b), (d), (e), (g) and (h). Plaintiff's Title II and Section 504 claims, and the parties' cross-motions, are predicated on whether the School Board adhered to the statute's relevant implementing regulations regarding A.M.'s use of his service animal at school.

### B. The Relevant Implementing Regulations Are Permissible and Consistent

The School Board contends that the DOJ exceeded its statutory authority in promulgating the Title II service animal regulatory provision, 28 C.F.R. § 35.136, and that that provision is inconsistent with, and impermissibly stricter than, the regulatory provision requiring that public entities make reasonable modifications to avoid discrimination on the basis of disability, 28 C.F.R. §

35.130(b)(7). The DOJ's regulations and interpretations thereof – which are entitled to significant deference here – are a permissible construction of the ADA. Furthermore, the Title II service animal regulatory provision is consistent with and a specific application of the reasonable modifications regulatory requirement. The regulations are, therefore, valid and are enforceable against the School Board in assessing its adherence to the ADA.

…

The regulation at issue – 28 C.F.R. § 35.136 – which honors the choice of an individual with a disability to be accompanied by a service animal in all aspects of community life, including at school, is a reasonable construction of the ADA because it promotes the statute's overarching goals of ensuring equal opportunity for, and full participation by, individuals with disabilities in all aspects of civic life. *See* 42 U.S.C. § 12101(a)(3) (noting that discrimination persists in education); *id*. § 12101(a)(7) (ADA's goals "are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency")

The ADA's legislative history confirms that the DOJ regulations are consistent with Congressional intent that individuals with disabilities generally and where reasonable not be separated from their service animals, including in schools. *See* H.R. Rep. No. 101-485(II), at 106 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 389 ("Refusal to admit [a] dog . . . is tantamount to refusing to admit the person who is in need of the dog."); 28 C.F.R. Pt. 36, app. C § 36.302 at 916 (July 1, 2014) (Congress intended that "individuals with disabilities are not separated from their service animals"); *see also Hearing Before the S. Comm. on Labor & Human Resources*, 101st Cong. 188 (1989) (statement of Sen. Harkin) ("[P]eople with disabilities are entitled to lead independent and productive lives, to make choices for themselves, and be integrated and mainstreamed into society."). This comports with Congress's recognition that because "[a] person with a disability and his . . . [service] animal function as a unit," involuntarily separating the two generally "[is] discriminatory under the [ADA]." 135 Cong. S.10,800 (1989) (statement of Sen. Simon).

Further, the thrust of the regulation at issue – that the ADA generally requires public entities to permit individuals with disabilities to be accompanied by their service animals – has enjoyed extensive judicial support, both before and after the DOJ added the specific service animal provision to its Title II regulations.

In sum, the DOJ's regulations implementing Title II of the ADA regarding the use by a disabled person of a service animal in a public entity, and the accommodation that entity must make to permit such use, are valid, internally consistent, and therefore enforceable against the School Board in the instant matter.

### C. Assessing Plaintiff's Reasonable Accommodation Claim

#### 1. Framing Plaintiff's Claim For Failure to Accommodate

"[F]ailure to accommodate is an *independent* basis for liability under the ADA." "In order to state a Title II claim, a plaintiff generally must prove (1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) that the exclusion, denial of benefit, or discrimination was by reason of the plaintiff's disability." *Bircoll v. Miami-Dade Cnty.*, 480 F.3d 1072, 1083 (11th Cir. 2007)

The parties do not dispute that A.M. is a qualified individual under the first prong. Nor do they dispute that the School Board is a "public entity" or Stevie a "service animal" within the meanings established by the statute and relevant regulations. As to the third prong, "[i]f establishing discrimination by failure to make reasonable accommodation, a plaintiff who satisfies the first two prongs meets the last prong merely by showing that a reasonable accommodation was not provided." *Pardo v. Napolitano*, 2009 WL 3448181, at *2 (S.D. Fla. Oct. 26, 2009). The ADA imposes only a "but-for" causation standard for liability, rather than a proximate causation standard. *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1077 (11th Cir. 1996). The third prong would thus examine whether, but for his disabilities, A.M. would have been subjected to the alleged discrimination, *i.e.*, the lack of reasonable accommodation on his use of his service animal. The policies implemented by the School Board pertain specifically to the use of service animals. Their impact on A.M. can only be because of his disabilities and consequent need to utilize a service animal. The current dispute therefore centers on the second prong – whether the School Board has discriminated against A.M. by failing to provide him a reasonable accommodation.

As embodied in 28 C.F.R. § 35.130(b)(7), "[t]he ADA's 'reasonable modification' principle . . . does not require a public entity to employ any and all means to" accommodate an individual with disability, "but only to make 'reasonable modifications' that would not fundamentally alter the nature of the service or activity of the public entity . . . ." *Bircoll*, 480 F.3d at 1082. Here, the School Board has not argued that the accommodation – permitting A.M. to attend school accompanied by his service dog without forcing him to pay for a separate handler and other attendant charges, such as additional liability insurance – would "fundamentally alter" the nature of the educational services it provides. How could it? After all, the School Board has temporarily permitted that accommodation throughout the pendency of this action without experiencing any disruption to its educational activities.

As such, the case turns on whether the School Board's policies constitute a failure to provide A.M. a reasonable accommodation – or conversely, whether the School Board's polices are, in fact, a reasonable accommodation – as articulated in 28 C.F.R. § 35.136. At this point, it pays to spell out exactly what accommodations Plaintiff is requesting. Plaintiff asks that the School Board permit A.M. to attend school accompanied by his service dog without having to provide a separate "handler" for the dog and without having to pay for additional liability insurance and additional vaccinations. Considering A.M. the dog's "handler," Plaintiff further asks the School Board to accommodate him by accompanying A.M. and the animal outside of the school premises when it needs to urinate. Whether those accommodations are reasonable requires the Court to apply the specific facts of this case to the explicit language of the relevant regulatory provisions.

**2. Reasonableness of the Requested Accommodations**
**b. Insurance and Vaccination Requirements**

The School Board's requirement that Plaintiff maintain liability insurance for A.M.'s service animal and procure vaccinations in excess of the requirements under Florida law is a surcharge prohibited by 28 C.F.R. § 35.136(h). The School Board's policies require what amounts to an extra upfront fee charged to Plaintiff in order for A.M. to use his service animal at school. The insurance costs are over and above what other students are required to expend in order to attend

school. Moreover, the vaccinations exceed those ordinarily required under Florida law regarding the regulation of animals permitted in schools. Those requirements, therefore, constitute an impermissible discriminatory practice.

**c. Control, Care and Supervision of the Service Animal**

The closer question is whether 28 C.F.R. §§ 35.136(d) and (e) render the accommodations sought by Plaintiff reasonable or unreasonable.

**i. Analytic Background**

The Title II service animal regulations direct the Court to start with the overarching proposition that permitting a disabled person use of a service animal is generally reasonable. *See* 28 C.F.R. § 35.136(a). That is, in the vast majority of cases, an accommodation requested by a disabled person of a public entity to permit use of a service animal will be considered reasonable. This is especially so once the possibility that the accommodation would "fundamentally alter" the entity's activities are removed. This is the case here.

The Court is also guided by the basic premise that while not every accommodation chosen by a disabled person is "reasonable," a public entity is not permitted to survey the universe of possible accommodations or modifications and determine for the individual what, in its estimation, is the best or most "reasonable," approach. On this point, a recent in-District case decided under the Fair Housing Act, 42 U.S.C. § 3601, *et seq.* ("FHA"), is particularly illustrative. *See Sabal Palm Condominiums of Pine Island Ridge Ass'n, Inc. v. Fischer*, 6 F. Supp. 3d 1272 (S.D. Fla. 2014). In *Sabal*, the plaintiff sought to keep a service dog in her condominium as a reasonable accommodation under the FHA; the condominium association, which maintains a no-pets policy, refused her request for accommodation. *Id*. at 1275-76. The FHA forbids discrimination "against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap." 42 U.S.C. § 3604(f)(2).

Prohibited discrimination includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a disabled person an] equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B). In rejecting the plaintiff's request, the association determined that she had not substantiated her need for a service dog. *Sabal*, 6 F. Supp. 3d at 1277. The association also argued that even if a dog was reasonable or necessary in order to secure for plaintiff an equal opportunity to use and enjoy her dwelling as required under the FHA, a dog over 20 pounds (which the plaintiff's dog was) was not reasonable or necessary. *Id*. at 1282. The Court concluded that the plaintiff was disabled within the meaning of the FHA, and that her requested accommodation was necessary to afford her an equal opportunity to use and enjoy her home. *Id*. at 1281. It then explained its determination that the plaintiff's requested accommodation was reasonable as follows:

> [T]he most fundamental problem with the argument that a dog over 20 pounds was not necessary is that it gets the law wrong. [The association]'s implied argument – that even if a dog is reasonable or necessary for [plaintiff], a dog 20 pounds or under

> would suffice – is akin to an argument that an alternative accommodation (here, a dog under 20 pounds), would be equally effective in meeting [plaintiff]'s disability-related needs as a dog over 20 pounds. . . . There may be instances where a provider believes that, while the accommodation requested by an individual is reasonable, there is an alternative accommodation that would be equally effective in meeting the individual's disability-related needs. In such a circumstance, the provider should discuss with the individual if she is willing to accept the alternative accommodation. However, providers should be aware that persons with disabilities typically have the most accurate knowledge about the functional limitations posed by their disability, and an individual is not obligated to accept an alternative accommodation suggested by the provider if she believes it will not meet her needs and her preferred accommodation is reasonable. . . . Since a dog over 20 pounds is a reasonable accommodation, [plaintiff's] (commonsense) belief that a dog over 20 pounds – in particular, a dog of [her dog's] size – is better able to assist her renders the need to evaluate alternative accommodations unnecessary as a matter of law. That a blind person may already have a cane or that he or she could use a cane instead of a dog in no way prevents the blind person from also obtaining a seeing-eye dog as a reasonable accommodation under the FHA. A contrary result is absurd.

*Id*. at 1282-83.

The situation here is analogous. The School Board argues that A.M.'s ESE-trained educators can and do provide him with the same seizure detection and care measures provided by his dog, Stevie. That may be. But refusing Plaintiff's requested accommodation if it is reasonable in favor of one the School Board prefers is akin to allowing a public entity to dictate the type of services a disabled person needs in contravention of that person's own decisions regarding his own life and care. As the *Sabal* court reasoned, it would be like refusing a blind person access for her service animal because, in the public entity's view, a cane works fine. That result *would* be absurd. The analysis, under Title II of the ADA as under the FHA, must focus only on whether the requested accommodation is reasonable under the specific circumstances particular to the individual in question.

In addition, in assessing the reasonableness of Plaintiff's requested accommodation, there is no factual dispute that separating A.M. from his service animal during the school day would have a detrimental impact on the human-animal bond and would diminish the animal's responsiveness and effectiveness outside of the school setting. Neither does the School Board contest the medical and other benefits Stevie provides A.M. outside the school setting. The importance of a service dog team has further been recognized by courts and Congress in the context of the same rights Plaintiff asserts here. *See Tamara v. El Camino Hosp.*, 964 F. Supp. 2d 1077, 1087 (N.D. Cal. 2013) (finding that separating an individual from his service animal can cause irreparable harm and deprive that individual of independence); *Lentini v. California Ctr. for the Arts, Escondido*, 370 F.3d 837, 845 (9th Cir. 2004) (public accommodation was required to modify its policies by admitting plaintiff's service animal; in part due to human-dog bond, modification was "necessary" even though plaintiff could be "accompanied by an able-bodied companion, and even though the defendant offered the assistance of specially-trained staff"); 135 Cong. Rec. S.10,800 (1989)

(statement of Sen. Simon) ("[a] person with a disability and his . . . [service] animal function as a unit" such that separating the two generally "[is] discriminatory under the [ADA]").

### ii. Handler and Control Under 28 C.F.R. § 35.136(d)

Turning to the specific regulatory provisions at issue, 28 C.F.R. § 35.136(d) provides that "[a] service animal shall be under the control of its handler." 28 C.F.R. § 35.136(d). By implication, requiring a public entity to act as handler for and to control the service animal would not be a reasonable accommodation mandated by the ADA. On that basis, the School Board argues that it cannot be required to provide a handler for Stevie. It further maintains that A.M., due to his disabilities, cannot act as the dog's handler. Therefore, it concludes that, even if it is required to permit A.M. access for Stevie during school, Plaintiff is responsible for acting as or providing for a handler. The undisputed facts presented here do not bear out that conclusion.

Unfortunately, there is very little in the way of case-law guidance as to what constitutes a "hander" with "control" over a service animal for purposes of these regulations. One case had occasion to consider an identical provision with respect to public accommodations under the ADA. *See Shields v. Walt Disney Parks & Resorts US, Inc.*, 279 F.R.D. 529 (C.D. Cal. 2011). Resolving a motion to certify under Rule 23, the *Shields* court explained that the ADA regulations in question, 28 C.F.R. § 36.302(c)(4), which also provide that "[a] service animal shall be under the control of its handler," "specifically prohibit the practice of leaving a service animal unattended." *Id.* at 547. The implication is that the opposite of a service animal being under "control" of a "handler" is its being unattended.

The complete language of the regulatory provision itself – which explicitly permits tethering as handling – is also instructive. Further explaining its requirement that a service animal be under the "control" of a "handler," the regulation provides that "[a] service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (e.g., voice control, signals, or other effective means)." 28 C.F.R. § 35.136(d). Thus, normally, tethering a service animal to the wheelchair of a disabled person constitutes "control" over the animal by the disabled person, acting as the animal's "handler." And, even absent tethering, voice controls or signals between the animal and the disabled "handler" can constitute "control."

Here, it is undisputed that, at all times outside of school – including while at home and in other public places – Stevie is tethered to A.M. Stevie is fully trained. Throughout the school day, Stevie simply stays by A.M.'s side. The sole exception is when Stevie needs to urinate and Stevie is trained to physically indicate (*i.e.*, poke) when he so requires. Given the specific facts here, having Stevie tethered to A.M. in school would constitute control by A.M. over his service animal as the animal's handler within the meaning of the regulation. As such, permitting A.M. to attend school with Stevie tethered to him would be a reasonable accommodation required of the School Board.

### iii. Care and Supervision Under 28 C.F.R. § 35.136(e)

The final regulatory provision at issue provides that "[a] public entity is not responsible for the care or supervision of a service animal." 28 C.F.R. § 35.136(e). The definition of "care or supervision" is in dispute. The School Board maintains that leading Stevie outside to urinate constitutes care or supervision, for which it cannot be made responsible.

As noted above, an agency's interpretation of its own regulation is entitled to significant deference. *See supra*, § IV.B.3. The DOJ's guidance to the revised ADA regulations explains, with regard to the "care or supervision" sub-provision, that:

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

28 C.F.R. Pt. 35, App. A (emphasis added). The clear implication is that "care or supervision" means routine animal care – such as feeding, watering, walking or washing the animal. Similar regulatory provisions enacted at the state level confirm that interpretation. In defining "care or supervision" relevant to the rights of individuals with disability and the protection against discrimination of those using service animals, Florida law provides:

> The care or supervision of a service animal is the responsibility of the individual owner. A public accommodation is not required to provide *care* or *food* or a *special location* for the service animal or assistance with *removing animal excrement*.

Fla. Stat. § 413.08(3)(d) (emphasis added). In its "Guidelines for School Districts on the Use of Service Animals by Students with Disabilities," the Florida Department of Education has provided:

> A service animal is the personal property of the student. The district school board does not assume responsibility for *training, daily care, or healthcare* of service animals."

The upshot is that "care or supervision" equates to general upkeep and routine animal maintenance – such as feeding, curbing, training or healthcare.

In addition, there is some case law surrounding this issue. The Supreme Court of Montana – considering its opinion in accordance with the persuasive force its reasoning warrants – had occasion to directly and in detail consider the meaning of "care or supervision". *See McDonald v. Dep't of Envtl. Quality* (Mont. 2009). The *McDonald* court considered a request that an employer provide a nonskid floor surface (such as runners or carpeting) to permit a disabled employee to use her service animal to move freely about the employment space. The court first noted that the required accommodation "[wa]s analogous to requiring an employer to provide a ramp or widen a door so that an employee may use his wheelchair to travel from one part of the building to another. When an employer does the latter (e.g., widens a door), it is an accommodation to the employee using the wheelchair, not to the wheelchair itself." *Id*. It then determined "that 'supervising or

caring for' a service animal under § 36.302(c)(2) means looking after the service animal in the owner's absence." *Id.*

Also, the court in *Tamara v. El Camino Hosp.*, (N.D. Cal. 2013) considered a request by an individual with physical disabilities that a hospital facility permit her service animal to accompany her in the hospital's locked psychiatric ward. The *Tamara* court granted the plaintiff a preliminary injunction based in part on its determination that the hospital could have provided her the reasonable accommodations of "allow[ing] her to care for her dog's hygiene needs: allowing her, with supervision, out of the locked ward to take [the dog] into the hospital's outside area." *Id*. at 1086. Finally, *Shields*, suggests that the process of securing a service animal when not under their owner's control amounts to "care or supervision" under 28 C.F.R. § 36.302(c)(5).

Taken together, the DOJ guidance, similar regulatory provisions, and non-precedential authority explain that "care and supervision" refers to routine or daily overall maintenance of a service animal. The pivotal question here is whether accommodating A.M. by assisting him to lead his dog outside the school to relieve itself is part of that routine overall maintenance. The Court finds that, under the undisputed facts here, it does not.

Recall, the only accommodation requested involves Stevie's urination. While at school, Stevie does not eat or drink. Nor, while at school, does Stevie defecate or make stains, or require cleaning or exercise. Plaintiff attends to Stevie's daily feeding, cleaning, training, and all other "care or supervision" needs, outside of school and on her own time and dime.

Here, the distinction drawn by the McDonald court is instructive. The School Board is not being asked to provide an employee to walk Stevie. Rather, the School Board is being asked to help A.M. do so. That is, the School Board is being asked to accommodate A.M., not to accommodate, or care for, Stevie. Requiring the School Board to hire an additional employee to allow Stevie to urinate outside school grounds may be a part of "care or supervision." Or, as Plaintiff suggests, it may be below the level of routine maintenance (i.e., not as involved or burdensome as curbing or feeding). But the Court need not decide that issue.

The question here is whether requiring the School Board to assist or monitor A.M. in using his service animal is a reasonable accommodation under the circumstances. In the same way a school would assist a non-disabled child to use the restroom, or assist a diabetic child with her insulin pump, or assist a physically disabled child employ her motorized wheelchair, or assist a visually disabled child deploy her white cane, or assist that same child with her seeing-eye dog – the accommodations here are reasonable.

**2. The Requested Accommodations Are Reasonable**

As explained in detail above, the accommodations requested by Plaintiff under the precise circumstances present here are reasonable within the meaning of the regulations implementing the ADA. With Stevie tethered to A.M., given Stevie's training and obedience, and A.M. thereby acting as Stevie's handler, the School Board is required to accommodate A.M. by (through its staff) assisting him and accompany Stevie outside of the school premises to urinate at the infrequent occasions when it is necessary to do so during the school day. The School Board may

not, by general policy or otherwise, require Plaintiff to maintain additional liability insurance for Stevie in respect of A.M.'s use of the dog in connection with his schooling. The School Board may not require, by general policy or otherwise, that Plaintiff obtain vaccinations for Stevie in excess of those normally required under Florida law in connection with the regulation of animals permitted in schools.

## V. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED and ADJUDGED** as follows:

1. Defendant's Motion for Summary Judgment, ECF No. [37], is **DENIED**.
2. Plaintiff's Motion for Partial Summary Judgment, ECF No. [35], is **GRANTED**, as specifically set forth herein.
3. Defendant's practices, policies and procedures have subjected the minor plaintiff A.M. to discrimination based on his disability in violation of Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131, *et seq.* and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794.
4. Defendant is permanently enjoined to provide the minor plaintiff A.M. reasonable accommodation in assisting him with use of his service animal, in the specific manner described herein, *supra* § IV.C.3.
5. Defendant is permanently enjoined from, by general policy or otherwise:
    a. requiring Plaintiff to maintain additional liability insurance for A.M.'s service animal in respect of A.M.'s use of the service animal in connection with his schooling; and
    b. requiring that Plaintiff obtain vaccinations for A.M.'s service animal in excess of those normally required under Florida law in connection with the regulation of animals permitted in schools.
6. No later than February 17, 2015, the parties shall request from Magistrate Judge Alicia O. Valle a date on which to schedule a settlement conference to resolve any remaining issues, including compensatory damages and reasonable costs and attorneys' fees. The parties shall further propose an expedited briefing schedule with regards to such issues. The settlement conference shall take place on or before **March 17, 2015.**

**DONE and ORDERED** in Fort Lauderdale, Florida, this 10th day of February, 2015.

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**BETH BLOOM**
**UNITED STATES DISTRICT JUDGE**

Copies to:
Counsel of Record