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19 IN THE UNITED STATES DISTRICT COURT
20 CENTRAL DISTRICT OF CALIFORNIA

21 C.C., by and through MILKA
CIRIACKS, his Guardian *Ad Litem*,

22 Plaintiff,

23 v.

24 CYPRESS SCHOOL DISTRICT, et al.,

25 Defendants.
26

Case No. CV 11-00352 AG (RNBx)

**STATEMENT OF INTEREST OF
THE UNITED STATES**

Date: June 13, 2011
Time: 10:00 a.m.
Courtroom: 10D
Judge: Hon. Andrew J. Guilford

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21 Dozens of Agreements Under Department’s Project Civic Access Program, at

22 www.ada.gov/civicac.htm.....10

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1 submits this Statement of Interest pursuant to 28 U.S.C. § 517² because this suit
2 implicates the proper interpretation and application of the ADA, Section 504, and
3 related statutory provisions, regulations, and technical assistance materials it has
4 issued, including its regulation defining the term “service animal,” 28 C.F.R.
5 § 35.104, and requiring public entities, including schools, to make reasonable
6 modifications in rules, policies, and practices that are necessary to avoid
7 discrimination, including reasonable modifications to permit the use of service
8 animals by individuals with disabilities. *Id.* §§ 35.130(b)(7); 35.136.³

9
10 regulations applicable to state and local governments); 42 U.S.C. § 12206
11 (authorizing Department to issue technical assistance under Title II); 28 C.F.R.
12 § 35.190 (authorizing Department to issue policy guidance to ensure consistent
13 interpretation of Title II and designating it as the agency responsible for Title II
14 enforcement for state and local government services, programs, and activities);
15 Leadership and Coord. Of Nondiscrim. Laws, Exec. Order 12,250 (Nov. 2, 1980)
16 (assigning leadership role to Department in the coordination and enforcement of
17 federal civil rights laws applicable to federally assisted programs, including
18 Section 504, and directing agencies to issue regulations and policy guidance
19 implementing the same (pt. 1-402); 28 C.F.R. pt. 41 (implementing Exec. Order
20 12,250, authorizing Department of Justice’s role in coordination of federal
21 disability rights laws involving federal assistance, and requiring federal agency
22 regulations under Section 504 to be consistent with this part).

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² “The Solicitor General, or any officer of the Department of Justice, may be sent
by the Attorney General to any State or district in the United States to attend to the
interests of the United States in a suit pending in a court of the United States, or in
a court of a State, or to attend to any other interest of the United States.”

³ The Department’s regulations and interpretation thereof are entitled to substantial
deference. *See Enyart v. Nat’l Conf. of Bar Exam., Inc.*, 630 F.3d 1153, 1160-61
(9th Cir. 2011) (affording Attorney General’s ADA regulations deference under
Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43
(1984) in granting preliminary injunction to blind law student seeking to use screen
reader during Multistate Bar Exam); *Armstrong v. Schwarzenegger*, No. 09-17144,
13479-13483 (9th Cir. Sept. 7, 2010) (deferring to Attorney General’s

1 **III. RELEVANT FACTS**

2 C.C. has autism, “a brain-based, neurobiological condition” that is part of a
3 spectrum, as “autism’s symptoms and severity vary widely between individuals, as
4 do the treatments that are most effective for particular individuals.” Shore Decl.
5 ¶¶ 13-14. C.C. is “functionally non-verbal” and has trouble with transitions and
6 new experiences. *Id.* ¶¶ 23-24. C.C.’s autism is severe, with manifestations of
7 shrieking, pacing, plugging his ears, laughing unsuitably, tooth grinding, stimming
8 (*i.e.*, flapping his arms), daily bouts of extreme anxiety, meltdowns, and eloping or
9 fleeing. *Id.* ¶ 14; Ciriacks Decl. ¶¶ 3-9. C.C.’s mother believes that much of his
10 frustration stems from his near inability to speak. Ciriacks Decl. ¶ 9.

11 C.C.’s life has been filled with isolation, anxiety, and fear, not just for C.C.,
12 but for his parents, too. *Id.* ¶¶ 14-25. C.C. became extremely anxious at everyday
13 places, such as the beach, aquarium, stores, or the airport. *Id.* Family outings with
14 C.C. required hyper-vigilance to ensure that the manifestations of his disability did
15 not result in injury. *Id.* After C.C. fled the house and required police assistance to
16 be located and returned home, his parents decided to get C.C. an autism service
17 dog, an investment that cost \$14,000, to protect C.C. and help him manage the
18 manifestations of his autism. *Id.* ¶¶ 12-13. Through Autism Service Dogs of
19 America (“ASDA”), C.C. was matched with Eddy, a golden retriever specially
20 trained as a service dog for children with autism. *Id.* Eddy completed an 18 month
21 training program, including 13 months of training on proper home and school
22

23
24 interpretation of Title II); *Olmstead v. L.C.*, 527 U.S. 581, 597-98 (1999) (“The
25 well-reasoned views of the agencies implementing a statute constitute a body of
26 experience and informed judgment to which courts and litigants may properly
27 resort for guidance.”); *Auer v. Robbins*, 519 U.S. 452, 461 (1977) (agency’s
28 interpretation of its regulations “controlling unless plainly erroneous or
inconsistent with the regulation”).

1 behavior, including training in the classroom setting with children with autism.
2 Rule Decl. ¶¶ 11-21, 30-40. Eddy is trained by ASDA to (1) resist by tether when
3 C.C. attempts to elope or bolt; (2) redirect or ground his focus; (3) apply deep
4 pressure when C.C. begins stimming; (4) nudge, lick, or otherwise redirect C.C.’s
5 attention when he becomes anxious; (5) remain near C.C. to carry his
6 communications cards; and (6) assist C.C. in his ability to communicate and
7 socialize. Rule Decl. ¶¶ 25, 30-40.

8 Thanks to Eddy, the quality of life for C.C. and his family has dramatically
9 improved. Eddy enabled C.C. to visit the beach with his family, redirecting much
10 of C.C.’s anxiety. Ciriacks Decl. ¶ 17. Eddy also calmed C.C.’s customary
11 anxiety caused by a visit to the doctor. *Id.* ¶18. Even a trip to the airport, an
12 unfamiliar environment that would normally have triggered severe manifestations
13 of C.C.’s autism, occurred with little ordeal due to Eddy’s work. *Id.* ¶19. C.C.
14 himself makes clear that Eddy plays an important role in his life. After years of
15 indecipherable vocalizing, including the inability to say “Mom” or “Dad,” within
16 three months of being matched with Eddy, C.C. said “Eddy.” *Id.* ¶ 21.

17 After deciding to get C.C. a service dog, the Ciriacks notified Cypress and
18 asked permission for Eddy to accompany C.C. to his school, Vessels Elementary.
19 *Id.* ¶ 23. Cypress denied the request, without even observing C.C. and Eddy
20 together. *Id.* ¶ 30. During the week of June 7, 2010, as part of C.C.’s and Eddy’s
21 training, their ASDA trainer planned to conduct training for Cypress staff on
22 autism service dogs, in general, and C.C. and Eddy, in particular. *Id.* ¶ 31; Rule
23 Decl. ¶ 35. However, Cypress declined to permit Eddy into the school. Ciriacks
24 Decl. ¶ 31. The trainer has performed numerous in-school trainings with great
25 success in alleviating fears and speculation about a service dog in the classroom.
26 Rule Decl. ¶¶ 19-29. Because Cypress refused to allow Eddy in school, Cypress
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28

1 has no knowledge of how C.C. uses Eddy or how Eddy would behave in school.
2 *Id.* ¶ 54. C.C.’s classroom has one teacher and four aides for ten students,
3 establishing a 2:1 teacher ratio. Bodie Decl. ¶ 4.

4 Cypress’s commitment to keeping Eddy out of the school is apparent from
5 the Individual Education Program (“IEP”) Summary dated June 9, 2010, prepared
6 by Cypress staff. It states: “[T]he IEP team needs to discuss *if and how a dog is*
7 *not necessary for [C.C.] to make progress in his educational program; to receive*
8 *educational benefit and/or meet one of his unique needs educational program.*”
9 Snyder Decl., Ex. B at 36 (emphasis added). Notably, Cypress staff did not
10 consider how a service dog might benefit C.C. in other settings, supported by use
11 at school, and whether C.C. might have a civil right to use a service dog. In
12 August 2010, C.C.’s parents faced the Hobson’s choice of keeping C.C. home or
13 sending C.C. to school without his service dog and risking the loss of all progress
14 C.C. had made during the summer. Ciriacks Decl. ¶ 34. In the end, C.C. went to
15 school while Eddy stayed home, and the harm caused by this separation was
16 immediately apparent. *Id.* For example, in the first three days, Eddy fled from a
17 school aide and nearly succeeded in boarding the wrong school bus. *Id.* ¶ 41.
18 Moreover, since school began, the bond between C.C. and Eddy has deteriorated
19 because of the separation. *Id.* ¶ 36. C.C. is becoming more distant with Eddy and
20 requires more prompting. *Id.* Every school day, C.C. loses valuable time when he
21 could be continuing to work and bond with Eddy to increase his safety and quality
22 of life. Because C.C.’s work with Eddy is limited to after school, the bond
23 between the two is dissolving, making the assistance less effective. *Id.* ¶¶ 36-37.

24 The use of service dogs can substantially increase independence,
25 participation, and opportunity for persons with disabilities. *See, e.g.,* Milan,
26 *Quality of Life of Service Dog Partners*, U. Pitt. (2007); PBS, *Through a Dog’s*
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1 *Eyes* (Apr. 21, 2010). Research establishes that the use of service dogs by children
2 with autism “dramatically increases safety, social skills and abilities, independence
3 for [] children and their families, motor skills, [and results in] increased attention,
4 fewer meltdowns, and an overall increase in the welfare of the children and their
5 families.” Adams Decl. ¶ 15; *Sentinels of Safety: Service Dogs Ensure Safety and*
6 *Enhance Freedom and Well-Being for Families with Autistic Children*, Qual.
7 Health Research (2001) (Oct. 27, 2008). Autism service dogs also have been
8 found to increase the positive acknowledgement of children with autism, and their
9 communication opportunities and abilities, thus reducing social isolation. *See*
10 *Social Acknowledgements for Children with Disabilities: Effects of Service Dogs*,
11 60 *Child Develop.* 6 (Dec. 1989); *Dogs as Catalysts for Social Interactions:*
12 *Robustness of the Effect*, 91 *Brit. J. Psych.* 61-70 (2000); *What a Dog Can Do:*
13 *Children with Autism and Therapy Dogs in Social Interaction*, 38 *J. Society Psych.*
14 *Anthropology* 1 (2010).

15 Among the most important considerations in the effective use of service
16 animals to maximize independence, participation, and opportunity, including
17 autism service dogs, is maintaining the relationship – often referred to as the bond
18 – between the child or adult with a disability and the service dog. Adams Decl. ¶
19 17; *see also* United States’ Brief as Amicus Curiae at 6, *Crowder v. Kitagawa*, 81
20 F.3d 1480 (9th Cir. 1994) (No. 94-15403) (noting evidence that quarantine and use
21 of service animals only at certain times during the day over four month period
22 undermined guide dogs’ training and blind individuals’ ability to use guide dogs
23 effectively). The purpose of an autism service dog, and C.C.’s use of his service
24 dog, extends beyond the classroom or receiving public education. *Id.* ¶ 22.5. In
25 order for service dogs to be effective, the dog must consistently spend time with
26 the person being assisted. *Id.* ¶¶ 18-20. C.C. may choose to use a service animal
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1 for the rest of his life, and his ability to continue to form a successful bond is thus
2 key to his development.

3 C.C.'s pediatrician, Dr. Thomas Lin, summarizes the concern with Cypress'
4 ongoing discrimination: "We need to utilize each and every tool we have at our
5 disposal to treat autism. It is not fair to C.C. to deny him access to a tool such as a
6 service dog that is so obviously beneficial . . . I cannot think of any rational reason
7 to deny C.C. access to Eddy during school hours." Lin Decl. ¶¶ 9-12. Eddy's
8 trainer, Katie Rule-Witko echoes: "[F]or children with autism, school is the most
9 stressful part of the day. . . If C.C. and Eddy are separated during school hours, the
10 bond between the two will be significantly decreased . . . Essentially, the bond will
11 deteriorate to the point that Eddy and C.C. will have to start from scratch." Rule
12 Decl. ¶¶ 47-48.

13 **IV. A PRELIMINARY INJUNCTION SHOULD ISSUE**

14 To obtain a preliminary injunction, a plaintiff must establish that: (1) he is
15 likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the
16 absence of preliminary relief, (3) the balance of equities tips in his favor, and (4)
17 an injunction is in the public interest. *Winter v. Nat'l Res. Def. Council*, 555 U.S. 7,
18 24-25. 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). In making the determination, the
19 court "should balance the relative hardship to the parties that would result from
20 granting or denying a preliminary injunction. If the balance tips decidedly toward
21 plaintiffs, and if plaintiffs have raised questions serious enough to require
22 litigation, the injunction should issue." *Aguirre v. Chula Vista Sanitary Serv. &*
23 *Sani-Tainer, Inc.*, 542 F.2d 779, 781 (9th Cir. 1976).

24 ***A. Plaintiff Should Prevail on the Merits.***

25 The Ninth Circuit provides that a *prima facie* case of discrimination is made
26 under Title II if a plaintiff shows that he has a disability and is qualified for, and
27

1 has been discriminated against in, the program, service, or activity at issue.

2 *Simmons v. Navajo County*, 609 F.3d 1011, 1021 (9th Cir. 2010).⁴

3 1. Cypress Must Permit C.C. to Use His Service Dog at School.

4 The ADA was enacted in 1990 “to provide a clear and comprehensive
5 national mandate for the elimination of discrimination against individuals with
6 disabilities.” 42 U.S.C. § 12101(b)(1). Congress found that “discrimination against
7 individuals with disabilities persists in such critical areas as . . . education, . . . and
8 access to public services” and “individuals with disabilities continually encounter
9 various forms of discrimination, including outright intentional exclusion, the
10 discriminatory effects of . . . overprotective rules and policies, [and the] failure to
11 make modifications to existing . . . practices” *Id.* §§ 12101(a)(3), (5).

12 Title II of the ADA prohibits discrimination on the basis of disability in *all*
13 of a public entity’s “services, programs, and activities.” *Id.* § 12132; 28 C.F.R.
14 §35.130(a). Section 504 similarly prohibits such discrimination by entities that
15 receive federal financial assistance. 29 U.S.C. § 794. Coverage broadly includes
16 the countless programs, services, and activities of public schools and state and
17 local education departments and agencies. 42 U.S.C. § 12131; 28 C.F.R. § 35.104.
18 Under Title II and Section 504, students, parents, guardians, teachers, and visitors
19 with disabilities all have rights to nondiscrimination, equal opportunity, and
20 program access. *Id.* §§ 12102, 12132; 29 U.S.C. § 794.⁵

21 _____
22 ⁴ Cypress admits that C.C. has autism and is an individual with a disability. Ans.
23 ¶¶ 1-8. Cypress does not contest that C.C. is “qualified” to attend school in a
24 special education classroom, the program at issue here. 28 C.F.R. § 35.104.

25 ⁵ Title II of the ADA was enacted to broaden the coverage of Section 504.
26 Congress explained that the ADA “shall not be construed to provide a lesser
27 standard than the standards applied under title V of the Rehabilitation Act of 1973
28 [which includes Section 504].” 42 U.S.C. § 12201(a); 28 C.F.R. § 35.103(a);

1 Under Title II and Section 504, public entities are required to make
2 exceptions to rules that would otherwise restrict the use of service animals in
3 schools and other public facilities. 28 C.F.R. §§ 35.130(b)(7); 35.136; *Crowder v.*
4 *Kitagawa*, 81 F.3d 1480 (9th Cir. 1994). While the Title II regulation sets this
5 requirement out in terms of “reasonable modifications of policies, practices, and
6 procedures” and Section 504 case law often uses the term “reasonable
7 accommodations,” the result here is the same. 28 C.F.R. §§ 35.130(b)(7);
8 *Alexander v. Choate*, 469 U.S. 287, 301-02, 105 S. Ct. 712, 83 L. Ed. 2d 661
9 (1985) (“reasonable accommodations” under Section 504); *Mark H. v. Hamamoto*,
10 620 F.3d 1090, 1096 (9th Cir. 2011). Contrary to Cypress’ characterization that
11 the reasonable modifications mandated by the ADA and Section 504 should be
12 “directed at helping a student overcome his or her disability,” Def.’s Opp. at 17,
13 they instead are directed at overcoming discrimination by public entities and
14 recipients of federal financial assistance. *Sullivan v. Vallejo Unif. Sch. Dist.*, 731
15 F. Supp. 947, 958 (E.D. Cal. 1990) (“Put simply, the statute requires
16 accommodation to the plaintiff’s [disability]; it does not require that she
17 accommodate to the views of the public entity about her condition.”) (decided
18 under Section 504).

19 On July 23, 2010, Attorney General Eric H. Holder, Jr. signed revised Title
20 II and III regulations under the ADA that “comport[] with the Department’s legal
21 and practical experiences in enforcing the ADA since 1991.” 75 Fed. Reg. 56,164-
22 358 (Sept. 15, 2010). Among other things, the regulations contain certain
23 provisions relating to the rights of individuals to use service animals in public
24 settings and facilities that were previously identified generally in the regulation and
25

26 *Sanchez v. Johnson*, 416 F.3d 1051, 1062 (9th Cir. 2005) (while some
27 requirements may be the same, on occasion they are different, but similar).

1 specifically in technical assistance materials. 28 C.F.R. §§ 35.130(b)(7); 35.136.⁶
2 The Title II regulation, at 28 C.F.R. § 35.130(b)(7), which has been in place since
3 1991, provides: “A public entity shall make reasonable modifications in policies,
4 practices, and procedures when such modifications are necessary to avoid
5 discrimination on the basis of disability, unless the public entity can demonstrate
6 that making the modifications would fundamentally alter the nature of the service,
7 program, or activity.” The regulation, at *id.* § 35.136, also now provides:
8 “Generally, a public entity shall modify its policies, practices, and procedures to
9 permit the use of a service animal by an individual with a disability.” Contrary to
10 Cypress’ claim that C.C.’s use of his service dog would be unreasonable, Def.’s
11 Opp. at 16, the Department has long explained that the use of a service dog is
12 reasonable, subject to certain considerations. *See, e.g.*, USDOJ, ADA Tool Kit,
13 Chapter 1: ADA Basics at 9 (2006) (providing the following example of a
14 reasonable modification under Title II: Permitting a service animal in a place
15 where animals are typically not allowed, such as a cafeteria or a courtroom.”); 75
16 Fed. Reg. 51,677; 28 C.F.R. § 35.136; *cf.* Title III TA Manual § III-4.2300 (1994).
17 Persons with disabilities have the right to be accompanied by service animals in all

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19 ⁶ The Department has extensive experience enforcing the obligation to make
20 reasonable modifications to permit service animals. *See, e.g.*, Brief as Amicus
21 Curiae, *Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1994) (reasonable
22 modification of animal quarantine rule for service animals); Dozens of Agreements
23 Under Department’s Project Civic Access Program (addressing service animal
24 access during emergencies and in domestic violence programs and shelters);
25 Consent Decree, *United States v. LeHouillier*, Civ. Action No. 1:09-cv-02582 (D.
26 Co. 2010) (redressing denial of service animal access by lawyer); Consent Decree,
27 *United States v. QuikTrip Corp.*, Civil Action No. 8:10-cv-00262 (D. Ne. July 23,
28 2010) (entity-wide service animal access); Settlement Agreement Between United
States and Wal-Mart Stores, Inc. (Jan. 16, 2009) (same); Settlement Agreement
Between United States and Blockbuster Inc. (July 19, 2010).

1 parts of facilities where the public, participants in programs and activities, or
2 invitees are allowed. *Id.* § 35.136(g).

3 The civil right to use a service animal is subject to certain specific
4 exceptions: A public entity may ask an individual with a disability to remove a
5 service animal from the premises if – (1) The animal is out of control and the
6 animal’s owner does not take effective action, or (2) if the animal is not
7 housebroken. *Id.* § 35.136(b). Furthermore, while the regulation provides that a
8 public entity is generally not required to permit a service animal where the public
9 entity can prove its use is a direct threat to the health or safety of others or would
10 result in a fundamental alteration to the nature of a program, the Title II regulation
11 does not permit public entities to require that the use of a service animal be in the
12 best interests, or “educational necessity,” of persons with disabilities as a pre-
13 condition for the service animal to be used. *Id.* §§ 35.130(b)(7); 35.136; 35.139.

14 As the Ninth Circuit has noted, “[m]any barriers to full participation of the
15 disabled work their discriminatory effects due to the auxiliary aids upon which the
16 disabled rely, and not due solely to the disabling impairment.” *Crowder*, 81 F.3d
17 at 1484. As the Ninth Circuit has explained, “‘the general intent of Congress’ was
18 ‘to ensure that individuals with disabilities are not separated from their service
19 animals.’” *Id.* at 1485 (quoting Preamble to Department’s regulation, 28 C.F.R. pt.
20 36, App. B, at 616 (1994), and 135 Cong. Rec. D956 (Sen. Simon) (“[T]he use of
21 assistive animals is protected by the Americans with Disabilities Act, in public
22 accommodations as well as public services (including schools).”).

23 2. Eddy is a Service Animal According to the Regulatory Definition.

24 A “service animal” is “any dog that is individually trained to do work or
25 perform tasks for the benefit of an individual with a disability, including a
26 physical, sensory, psychiatric, *intellectual, or other mental disability.*” 28 C.F.R.
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1 § 35.104 (emphasis added). The Title II regulation provides *nonexhaustive*
2 examples of work or tasks, including but “not limited to, . . . providing non-violent
3 protection or rescue work” and “helping persons with psychiatric and neurological
4 disabilities by preventing or interrupting impulsive or destructive behaviors.” *Id.*
5 It is beyond dispute that Eddy is trained by ASDA to (1) resist when C.C. attempts
6 to elope or bolt; (2) redirect or ground his focus; (3) apply deep pressure when
7 C.C. begins stimming; (4) nudge, lick, or otherwise redirect C.C.’s attention when
8 he becomes anxious; (5) remain near C.C. to carry his communications cards; and
9 (6) assist C.C. in his ability to communicate and socialize. Rule Decl. ¶¶ 25, 31-32.
10 This training to perform tasks for C.C. qualifies Eddy as a service animal.

11 3. Students and their Parents Have a Right to Choose Whether a Student
12 Uses a Service Dog.

13 In connection with the obligation to make reasonable modifications to rules,
14 policies, practices, and procedures, 28 C.F.R. § 35.130(b)(7), public entities,
15 including schools, must “administer services, programs, and activities in the *most*
16 *integrated setting appropriate to the needs of qualified individuals with*
17 *disabilities.*” 28 C.F.R. § 35.130(d) (emphasis added); 28 C.F.R. § 41.51(d) (same
18 under Section 504). More than a decade ago, the Supreme Court explained:
19 “Unjustified isolation, we hold, is properly regarded as discrimination on the basis
20 of disability.” *Olmstead v. L.C.*, 527 U.S. 581, 597 (1999). The Court reaffirmed
21 what the Department had observed in the Preamble to its Title II regulation:
22 “Integration is fundamental to the purposes of the Americans with Disabilities
23 Act.” 28 C.F.R. pt. 35, App. A; *Arc of Wash. State Inc. v. Braddock*, 427 F.3d 615,
24 618 (9th Cir. 2005). This also reaffirmed Congress’ finding that “the Nation’s
25 proper goals regarding individuals with disabilities are to assure equality of
26 opportunity, full participation, [and] independent living.” 42 U.S.C. § 12101(a)(8).

1 Among other things, the integration mandate requires public entities to
2 provide programs to individuals in settings that are not unnecessarily restrictive to
3 their autonomy and exercise of their civil rights. Public schools must provide
4 programs and services in an integrated setting conducive to and accepting of the
5 aids, personal services, and technologies that individuals with disabilities use.
6 *Townsend v. Quasim*, 328 F.3d 511, 516 (9th Cir. 2003); *see also* Title II TA
7 Manual § II-3.4000 (“Individuals with disabilities must be integrated to the
8 maximum extent appropriate.”); *see also Sullivan*, 731 F. Supp. at 958 (noting that
9 modifications must be conducive to aids used by individual with the disability,
10 including service animals).

11 The Title II regulation also reflects the principle that individuals with
12 disabilities may self-determine whether to exercise particular rights. A public
13 entity cannot deny an individual with a disability “the opportunity to participate in
14 services, programs, or activities that are not separate or different, despite the
15 existence of permissibly separate or different activities.” 28 C.F.R. § 35.130(b)(3).
16 Nor can a public entity “require an individual with a disability to accept an
17 accommodation, aid, service, opportunity, or benefit provided under the ADA or
18 this part which the individual chooses not to accept.” *Id.* § 35.130(e)(1).

19 Under the ADA and Section 504, school officials cannot dictate the use of
20 mobility aids, such as wheelchairs, walkers, crutches, or braces because they
21 believe it would be less burdensome, less risky, or more convenient to carry a
22 student than allow him to propel himself independently. *See id.* § 35.137(a).
23 Here, Cypress must accept the decision by C.C.’s parents that he will use use his
24 service animal in school even though school officials do not agree with the
25 decision or think that the use of a service animal is unnecessary for his educational
26 program or safety at school because “the area in which Student’s classroom is
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1 housed is double-fenced.” *See, e.g.,* Def.’s Opp. at 12, Harbottle Decl., Ex. D
2 (claiming C.C.’s tether would impede his ability to play with peers, climb, or
3 bounce on balls). The Eastern District of California has observed these principles
4 in a similar school scenario:

5 [P]laintiff and her parents have determined that the benefits to be
6 gained from plaintiff’s use of the service dog in all aspects of her life
7 outweigh any negative effects on the quality of her formal education.
8 This is a choice that belongs solely to the plaintiff and her parents, and
9 not the defendant school district.

10 *Sullivan*, 731 F. Supp. at 958, 961 (“By excluding her service dog,
11 defendants have asked plaintiff to assume a different persona while she
12 attends school.”).

13 4. Public Schools Must Make Reasonable Modifications to All Rules,
14 Policies, and Practices to Avoid Discrimination.

15 Cypress correctly notes the Title II regulatory proviso that public entities are
16 not required to provide for the “care and supervision” of service animals. 28
17 C.F.R. § 35.136(g). However, this limit on Cypress’ obligations does not
18 adversely affect C.C.’s likelihood of prevailing on the merits, because no such
19 “care or supervision” is at issue in this case. Rather, *at issue is Cypress’ obligation*
20 *to provide C.C. with attention and types of assistance that are comparable to the*
21 *attention and types of assistance it provides day in and day out to other elementary*
22 *school students. Notably, the Department has long explained that nursery schools,*
23 *summer programs, extended school day programs, and other entities that provide*
24 *some measure of child care must make reasonable modifications to provide*
25 *individualized assistance to integrate children with disabilities, such as the*
26 *provision of medication, diapering, assistance in removing leg and foot braces, and*

1 *the use of service animals*, notwithstanding the proviso that public entities are
2 *generally* (with exceptions) not required to provide personal services to individuals
3 with disabilities. *See* U.S. Dept. of Justice, *Commonly Asked Questions About*
4 *Child Care Centers*, Questions 7 and 11 (Oct. 1997), at
5 <http://www.ada.gov/childq%26a.htm> (providing (1) that “[m]ost children will need
6 individualized attention occasionally” and, therefore, providing a child with a
7 disability some individualized attention throughout the day can be a reasonable
8 modification, and explaining (2) “**Q:** We have a ‘no pets’ policy. Do I have to
9 allow a child with a disability to bring a service animal, such as a seeing eye dog?
10 **A:** Yes. A service animal is **not** a pet. The ADA requires you to modify your ‘no
11 pets’ policy to allow the use of a service animal by a person with a disability.”);
12 28 C.F.R. 35.135; *see also* 28 C.F.R. § 36.136; *Foothill Presbyterian Hosp. v.*
13 *Shalala*, 152 F.3d 1132, 1135 (9th Cir. 1998) (deferring to agency’s application of
14 its own various regulatory provisions).

15 A reasonable modification under 28 C.F.R. § 35.130(b)(7) in the
16 circumstances of this case would include assisting or monitoring C.C. in using his
17 service animal, in the same way that a school district might monitor or provide
18 intermittent assistance to a child with an insulin pump. This would include, for
19 example, assistance to C.C. in tethering and untethering his service animal,
20 escorting C.C. throughout the campus as he is accompanied by his service animal,
21 and assisting this nonverbal child in issuing commands to his service animal.
22 Teachers – even outside the context of special education – provide elementary
23 school students with significant personal services such as help donning coats or
24 boots or guiding a child around a school. In C.C.’s classroom setting – with its
25 specialized and individualized assistance, and optimal student-to-teacher/aide ratio
26 – providing this type of assistance to C.C. falls squarely within the scope of
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1 reasonable policy and practice modifications required by 28 C.F.R. § 35.130(b)(7).
2 *See generally* Bodie, McHale, and Snyder Decls.

3 5. Cypress Has Shown No Undue Burden or Fundamental Alteration.

4 Cypress’ claim that permitting the service animal in school amounts to an
5 undue financial and administrative burden and fundamental alteration reflects a
6 basic misunderstanding of these affirmative defenses. Cypress has not proved that
7 allowing C.C. to use his service animal at school would “fundamentally alter the
8 nature of its service, program, or activity,” which it must “demonstrate” to assert
9 the affirmative defense provided under 28 C.F.R. § 35.130(b)(7). *See, e.g., PGA*
10 *Tour, Inc. v. Martin*, 532 U.S. 661, 121 S. Ct. 1879, 149 L. Ed. 2d 904 (2001)
11 (shot-making, not walking, is an essential aspect of golf and while changing the
12 diameter of the hole might be a fundamental alteration, golfer’s use of cart during
13 PGA tour is not).

14 Cypress speculates – since it has not experienced Eddy’s presence in the
15 classroom – that presence of the service animal would fundamentally alter the
16 Individualized Education Programs of other students. This type of reasoning
17 would lead to the erroneous conclusion that a fundamental alteration in the nature
18 of a school’s special education program results whenever one student’s
19 circumstances are significantly modified, in an IEP or otherwise, such as a child
20 coming to school for the first time using a wheelchair. This wide-ranging
21 argument is not supported by the ADA. It is hard to imagine any alteration relating
22 to C.C.’s use of a service animal that might be so fundamental that it would alter
23 the nature of Cypress’ special education program, since the program is designed to
24 be highly flexible and tailored so as to meet the needs of individual students with
25 disabilities.

1 eliminated or reduced to an acceptable level by the public entity’s modification of
2 its policies, practices, or procedures. *Sch. Bd. of Nassau County v. Arline*, 480
3 U.S. 273, 287-88 (1987) (under Section 504); 56 Fed. Reg. 35,701 (same); Title II
4 TA Manual § II-2.8000. The Ninth Circuit has explained in the service animal
5 context that “it is clear that the entity asserting a ‘direct threat’ as a basis for
6 excluding an individual bears a heavy burden.” *Lockett v. Catalina Channel*
7 *Express, Inc.*, 496 F.3d 1061, 1066 (9th Cir. 2007) (citing *Bragdon v. Abbott*, 524
8 U.S. 624, 649-50, 118 S. Ct. 2196, 141 L. Ed. 2d 540 (1998)).

9 In schools as elsewhere, “[t]he public entity’s determination that a person
10 poses a direct threat to the health or safety of others *may not be based on*
11 *generalizations or stereotypes about the effects of a particular disability.*” 56 Fed.
12 Reg. 35,701 (emphasis added); *Arline*, 480 U.S. at 287-88. The same is true of the
13 aids upon which individuals with disabilities rely. Determination of direct threat
14 requires an individualized assessment relying on current medical or best available
15 objective evidence to assess: 1) the nature, duration, and severity of the risk; 2) the
16 probability that the potential injury will actually occur; and, 3) whether reasonable
17 modifications of policies, practices, or procedures will mitigate or eliminate the
18 risk. 28 C.F.R. 35.139; 56 Fed. Reg. 35,701; *Arline*, 480 U.S. at 287-88.

19 Cypress presents no medical or objective evidence in support of a direct
20 threat affirmative defense, nor could it, since this individual service animal has not
21 been permitted in C.C.’s classroom. Cypress presents only fear-based speculation.
22 In fact, C.C.’s pediatrician has found no direct threat, Lin Decl. ¶¶ 8-9, and his
23 teacher even admits that she is “unsure” how other students may react, because she
24 has not observed Eddy in the classroom, Bodie Decl. ¶ 5. Moreover, Cypress’
25 speculation of alleged threat is undermined by the fact that C.C.’s service dog was
26 trained in a public school setting, in a classroom with children with autism who
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1 had daily meltdowns and outbursts. Rule Decl. ¶ 31. Cypress’ heavy burden has
2 not been met.⁷

3 7. A Free Appropriate Public Education is Not Cypress’ Only Duty.

4 Underlying Defendant’s Opposition is a claim that C.C.’s IEP Team – made
5 up of his teachers, administrators, experts, and parents – has not authorized the use
6 of a service dog *because Cypress believes* it is unnecessary for him to achieve a
7 free appropriate public education (“FAPE”) under the Individuals with Disabilities
8 Education Act (“IDEA”), 20 U.S.C. §§ 1400 *et seq.* Def.’s Opp. at 22-23. In
9 contrast to the Title II process requiring reasonable modifications to permit the use
10 of service animals, 28 C.F.R. §§ 35.130(b)(7), 35.136, and mobility devices, 28
11 C.F.R. § 35.130(b)(7); 35.137, and a vast array of other changes or exceptions to
12 policies, practices, and procedures, *id.* § 35.130(b)(7), the IEP process set out in
13 the IDEA requires agreement and collaboration about what “special education and
14 related services” go into an IEP. 20 U.S.C. § 1414(d). As explained herein, the
15 Title II and Section 504-based civil right to use a service animal cannot be subject
16 to school administrator discretion or veto. Otherwise, the plain language of the
17 Title II regulatory mandate and its processes would be rendered hollow. A school
18 district can meet its FAPE obligations under the IDEA, but still not comply with
19 the processes and rights set out in Title II and other parts of Section 504. *See, e.g.,*
20 Brief for the United States as Amicus Curiae, *Am. Nurses Assoc. v. O’Connell*, No.
21 S184583 (Cal. filed May 11, 2011) (school district may meet its FAPE obligations
22 under the Section 504 regulation, but fail to meet the remainder of Section 504 and
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24 ⁷ The Title II regulation likewise provides: “A public entity may impose legitimate
25 safety requirements necessary for the safe operation of its services, programs, or
26 activities. However, the public entity must ensure that its safety requirements are
27 based on actual risks, not on mere speculation, stereotypes, or generalizations
28 about individuals with disabilities.” 28 C.F.R. § 35.130(h).

1 the reasonable modifications requirements under Title II). All parties here agree
2 that Cypress is providing C.C. a FAPE, but the evidence shows that Cypress is also
3 violating Title II and Section 504.

4 ***B. Daily Disability Discrimination Irreparably Harms, and the***
5 ***Equities Support, the Plaintiff, and an Injunction Should Issue.***

6 Day in and day out, Cypress’s arbitrary decision separates C.C. from his
7 service animal, denying him daily opportunities to learn and develop his
8 independence at school and elsewhere as he and his parents see fit, and harming
9 the bond between him and his service dog – all things that extend beyond the walls
10 of, and C.C.’s time at, Vessels Elementary. *See* Ciriacks Decl. ¶¶ 34-44; Rule
11 Decl. ¶ 48. At base, the status quo of daily disability discrimination is irreparable
12 harm that cannot be remedied with money alone. *See Branson v. West*, No. 97 C
13 3538, 1999 U.S. Dist. LEXIS 19392, at **29-30 (N.D. Ill. 1999) (in granting
14 motion for preliminary injunction, the Court said: “Dr. Branson will suffer severe
15 irreparable harm absent permanent injunctive relief and has no adequate legal
16 remedy for the physical and psychological harm caused by her separation from her
17 service dog while at work as well as damage to her service dog’s skills.”); *Enyart*,
18 630 F.3d at 1165-66 (denying use of screen reader during Bar Exam irreparably
19 harms student by denying her “the chance to engage in normal life activity” and
20 “delay, even if only a few months, pending trial represents precious, productive
21 time irretrievably lost”); *Chalk v. U.S. Dist. Ct.*, 840 F.2d 701 (9th Cir. 1988).

22 In fact, the irreparable harm of disability discrimination is what gave rise to
23 the ADA and its remedies in the first place. Congress found that “the continuing
24 existence of unfair and unnecessary discrimination and prejudice denies people
25 with disabilities the opportunity to compete on an equal basis and to pursue those
26 opportunities for which our free society is justifiably famous.” 42 U.S.C.

1 § 12101(a)(9). For children, this begins in school where they spend most of their
2 days throughout the year – which, for C.C., is year-round. *See also Cotter v.*
3 *Desert Palace, Inc.*, 880 F.2d 1142, 1145 (9th Cir. 1986) (injunction appropriate
4 where harm cannot be redressed by money alone).

5 The equities overwhelmingly support C.C.’s decision to use his service
6 animal at school. The public interest in equal access and full participation is best
7 served where individuals with disabilities are permitted to use the aids, services,
8 and assistive technology they choose to maximize personal independence. *Enyart*,
9 630 F.3d at 1167 (holding that “the public clearly has an interest in the
10 enforcement of its statutes” and “[i]n enacting the ADA, Congress demonstrated its
11 view that the public has an interest in ensuring the eradication of discrimination on
12 the basis of disabilities”). If school officials are permitted to make arbitrary,
13 stereotypical, and paternalistic decisions on the use of assistive aids – such as
14 service animals – and it remained the status quo in protracted litigation, the public
15 interest, the ADA, and Section 504 would be severely undermined.⁸

16 In this case, “the balance tips decidedly toward plaintiff” and similarly
17 situated students with disabilities, the discrimination is “serious,” and “the
18 injunction should issue.” *Aguirre*, 542 F.2d at 781.

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25 ⁸ In weighing the equities, the Ninth Circuit considers the chilling effect a decision
26 denying a preliminary injunction may have on similarly situated individuals and
27 other enforcement efforts. *Garcia v. Lawn*, 805 F.2d 1400, 1402, 1405-06 (9th
28 Cir. 1986); *Holt v. Cont’l Group, Inc.*, 708 F.2d 87, 91 (2d Cir. 1983).

