Asthma and Pesticides in Public Schools: Does the ADA Provide a Remedy Where FIFRA Fails to Protect

Anne Rajotte
ASTHMA AND PESTICIDES IN PUBLIC SCHOOLS: DOES THE ADA PROVIDE A REMEDY WHERE FIFRA FAILS TO PROTECT?

ANNE RAJOTTE*

Abstract: For students suffering from asthma exacerbated or induced by chemical pesticide use, the Americans with Disabilities Act (ADA) may provide a remedy to enjoin the use of chemical pesticides in public schools. The ADA has been used as a remedy for environmentally-related disabilities with mixed results. There have been successful challenges to the ADA used in this context based on the comprehensive regulatory nature of many environmental statutes. This Note will argue that a student who suffers from pesticide-induced asthma is protected by the ADA. Further, the challenges that have precluded relief under other environmental statutes would fail in this context because the scope of regulation of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) is not wide enough to provide a private right of action. Because of this, the ADA provides a remedy that is not in conflict with FIFRA.

INTRODUCTION

In 1993, after treatment with the pesticides chlorpyrifos and dichlorvos at an Oregon school, at least sixty-five individuals, including infants, children, and teachers, became sick with nausea, vomiting, severe headaches, dizziness, and sore throats. The school was forced to close. While it reopened after the pesticides had been cleaned up, the school! closed early for the year when ongoing health problems were reported.2

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2 See id.
A misapplication of pesticides at a New York high school induced illness in students and faculty, forced the school to close for cleanup, and led to a lawsuit against the school.³

After an application of termiticide at a West Virginia junior high school, sixty-seven students, parents, and teachers filed a lawsuit against the school board for injuries due to exposure to the toxic pesticide.⁴

Pesticides are used widely in schools to control pests in the building and on the grounds. Although pest control is necessary, the chemicals used for this purpose can be harmful to humans, especially children. Pesticide exposure can trigger asthma, the most common chronic illness among children. Pest control in schools is vital, however, because pests themselves can also trigger asthmatic reactions. This Note establishes that students suffering from asthma triggered by pesticides or uncontrolled pest populations may have a claim against schools under the Americans with Disabilities Act (ADA), requiring them to provide effective, reduced-chemical pest control.

Part I of this Note looks at pesticide use and its health risks, focusing on how pesticides affect those who suffer from asthma. Part II discusses pesticide use in schools, including the laws that govern use, and Integrated Pest Management (IPM), an alternative method of control. Part III outlines the ADA, sovereign immunity challenges to the ADA, and how the ADA has been used both successfully and unsuccessfully to obtain a remedy for environmental problems. Finally, Part IV argues that a prima facie case can be made for relief under the ADA, and that there are alternatives to pest control available that would be considered a reasonable accommodation under the ADA.

I. PESTICIDE USE

A. Health Risks

No pesticide is used without risk to human health; chemicals that are designed to kill insects and rodents present potential harm to humans.⁵ Pesticide exposure has been linked to a number of chronic health problems, including cancer, birth defects, endocrine disruption, asthma, neurological disorders, and immune system.

deficiencies. Children face an even higher risk of harm because they are more susceptible to the dangers of pesticides.

Pesticides are used to control pests throughout schools, notably in classrooms, cafeterias, and on their grounds to maintain lawns, playing fields, and overall aesthetics. Pesticide use in schools is particularly troubling because of the different ways that pesticides affect children and adults. Because children are physically smaller than adults and have higher metabolic rates, they consume more air and water per pound of body weight. As a result, if the air or water is contaminated with toxins, children receive a larger dose of toxins in proportion to their body weight than do adults who come into contact with the same air or water. This problem is compounded because children are generally lower to the ground than adults and are more likely to play on floors and grassy areas. Chemical particulates settle on floors and grassy areas, even if they were not originally applied to these places.

B. Asthma

Asthma is the most common chronic illness in children, affecting approximately 4.8 million children in the United States under the age of eighteen. It is also an illness that is on the rise: the rate of asthma has more than doubled over the past century. Numerous scientific studies have linked asthma to pesticide use. Studies also show that some commonly used lawn and indoor pesticides are asthma triggers. Moreover, children who are regularly exposed to pesticides are

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6 SAFER PEST CONTROL PROJECT, supra note 1, at 1.
7 See Watnick, supra note 5, at 77-78.
8 See id. at 77.
9 See id. at 77-78; see also Phillip J. Landrigan et al., Environmental Pollutants and Disease in American Children: Estimates of Morbidity, Mortality, and Costs for Lead Poisoning, Asthma, Cancer, and Developmental Disabilities, 110 ENVTL. HEALTH PERSP. 721, 721 (2002) (stating that children are more vulnerable to many chemicals than adults because of disproportionately heavy exposures coupled with the biologic sensitivity of early development).
11 Watnick, supra note 5, at 77.
12 Cantor & Goldman, supra note 10, at 61; Watnick, supra note 5, at 77.
14 JONATHAN KAPLAN ET AL., supra note 13, at v; Landrigan et al., supra note 9, at 721.
15 JONATHAN KAPLAN ET AL., supra note 13, at v.
16 SAFER PEST CONTROL PROJECT, supra note 1, at 1.
more likely to suffer from infectious diseases of the respiratory tract because of an increased risk of immune suppression.\textsuperscript{17}

Inhalation is a common way for children to come into contact with pesticides, which further demonstrates a pesticide’s potential to be an asthma trigger.\textsuperscript{18} Because pesticides can move between buildings and throughout a room into the ambient air, they are present in areas other than those where they are applied.\textsuperscript{19} Eliminating pest control, however, would not relieve asthma sufferers—exposure to insects or rodents themselves can also trigger asthma.\textsuperscript{20}

Those suffering from asthma may react severely to the application of some of the most commonly used pesticides in public schools.\textsuperscript{21} For example, pyrethins, which are listed on a “green list” indicating that they are relatively safe—as compared to a “yellow list” or a “red list”—are most easily absorbed through ingestion or inhalation, causing severe reactions in people suffering from asthma.\textsuperscript{22} Organophosphates, which, along with carbamates, were used in all Texas schools surveyed in 1998, also cause severe reactions in children with asthma.\textsuperscript{23} Finally, in very large doses, abamectin has caused death from respiratory failure.\textsuperscript{24}

One of the top five pesticides used in California schools is Cyfluthrin, which may cause irritation of the nose, throat, and upper respiratory tract.\textsuperscript{25} The manufacturer of Cyfluthrin states on its label that “persons with a history of asthma, emphysema, or hyperactive airways disease may be more susceptible to exposure.”\textsuperscript{26} Considering that asthma-triggering pesticides such as these are used around many

\textsuperscript{17} Watnick, \textit{supra} note 5, at 80.
\textsuperscript{19} See C.G. Wright et al., \textit{Insecticides in the Ambient Air of Rooms Following Their Application for the Control of Pests}, 26 \textit{Bull. Envtl. Contaminative Toxicology} 548, 548 (1981).
\textsuperscript{20} See Ellen F. Crain et al., \textit{Home and Allergic Characteristics of Children with Asthma in Seven U.S. Urban Communities and Design of an Environmental Intervention: The Inner-City Asthma Study}, 110 \textit{Envtl. Health Persp.} 939, 941–42 (2002); see also Bann C. Kang et al., \textit{Experimental Asthma Developed by Rooms Air Contamination with Cockroach Allergen}, 111 \textit{Int'l. Archives Allergy & Immunology} 299, 299 (1995) (stating that cockroach allergen is known to induce asthmatic reactions).
\textsuperscript{21} Jonathan Kaplan et al., \textit{supra} note 13, app. at 26; Texan PIN/Consumers Union, \textit{The Integrated Pest Management Program for Texas Public Schools} 14 (1999) [hereinafter \textit{Texas Public Schools}],
\textsuperscript{22} Id. at 14.
\textsuperscript{23} Id. at 10, 14.
\textsuperscript{24} Id. at 14.
\textsuperscript{25} JONATHAN KAPLAN ET AL., \textit{supra} note 13, app. at 26.
\textsuperscript{26} Id.
children, it is not surprising that asthma is the leading cause for school absenteeism. In 1997, pediatric asthma was the cause of 10.1 million days of missed school. Environmentally-related exacerbation is estimated to account for one third of childhood asthma cases.

II. PESTICIDE USE IN PUBLIC SCHOOLS

A. Laws Governing the Use of Pesticides

Pesticides are designed and used to control or eliminate pests, including insects, rodents, weeds, bacteria, or fungi. Pesticide use in the United States is controlled under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA or the Act). FIFRA was originally adopted in 1947 as a licensing and labeling statute, and required that all pesticides be registered with the Secretary of Agriculture prior to sale into interstate commerce. FIFRA underwent changes in 1970, when the Environmental Protection Agency (EPA) took over the Department of Agriculture’s FIFRA responsibilities. In 1972, Congress adopted the Federal Environmental Pesticide Control Act, which changed FIFRA from a licensing and labeling statute into a comprehensive regulatory statute. FIFRA, as amended, regulates the use, sale, and labeling of pesticides, and provides for review, cancellation, and suspension of registration; it also gives EPA greater enforcement authority.

Under FIFRA, a pesticide must be registered in accordance with the statute if it is to be sold or distributed. A pesticide may be registered for general or restricted use. A pesticide is labeled for general

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27 Landrigan et al., supra note 9, at 723.
28 Id.
29 Id. “Environmentally-related” is defined as being caused by outdoor, nonbiologic pollutants from sources potentially subject to abatement. Id.
33 See Ruckelshaus, 467 U.S. at 991.
34 See id. at 991-92.
37 See id. § 136a(d) (1)(A).
use if EPA determines that, when the pesticide is applied in accordance with its directions and warnings, or in accordance with a commonly recognized practice, it will not "generally cause unreasonable adverse effects on the environment."\[38\] A pesticide is labeled for restricted use if EPA determines that when the pesticide is used in accordance with its directions or with common practice, it "may generally cause, without additional regulatory restrictions, unreasonable adverse effects on the environment, including injury to the applicator."\[39\] The statute defines "unreasonable adverse effects on the environment" as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide."\[40\] EPA uses studies of a pesticide's effects to make this determination.\[41\] Some of these studies assess the risks to infants and children.\[42\]

The labeling system under FIFRA does not always adequately protect children.\[43\] Although FIFRA generally regulates the use of pesticides in the United States, it does not treat application of pesticides at schools differently from application at other facilities, and there are no specific provisions in the Act about the use of pesticides in schools.\[44\] Around 3,000 pesticide labels—out of over 17,000—include instructions or information applicable to how, when, and where the pesticides can be used in schools.\[45\]

There are several reasons why FIFRA fails to adequately protect children in schools.\[46\] First, the method for labeling and licensing pesticides calls for a balance between the potential environmental harm and the benefit of the use of the pesticide.\[47\] The process of registration does not ensure any level of safety; chemicals that are meant to kill insects and rodents will present a risk to humans that come in contact with them.\[48\] Moreover, the method used to assess the risks to humans takes into account only the risks to adults, not the different

\[38\] Id. § 136a(d)(1)(B).
\[39\] Id. § 136(d)(1)(C).
\[40\] Id. § 136(bb).
\[41\] GAO, supra note 30, at 4.
\[42\] Id.
\[43\] See Watnick, supra note 5, at 86.
\[44\] GAO, supra note 30, at 1.
\[45\] Id. at 4.
\[46\] See Watnick, supra note 5, at 83–87.
\[47\] See FIFRA, 7 U.S.C. § 136(bb) (2000); Watnick, supra note 5, at 84.
\[48\] See Watnick, supra note 5, at 85.
ways in which pesticides can affect children.\textsuperscript{49} Second, FIFRA’s re-
quired ingredient statement calls for only the name and percentage
of active ingredients—the ingredients that kill the pests\textsuperscript{50}—accompa-
nied by a simple disclosure of the total percentage of all inert ingredi-
ents,\textsuperscript{51} not a specific listing of the inert ingredients.\textsuperscript{52} This does not
truly show the potential harm of the pesticide because inert ingredi-
ents can be just as toxic, if not more toxic, than active ingredients.\textsuperscript{53}
Third, FIFRA does not require that those who apply pesticides receive
even simple training with respect to the dangers of pesticides to the
environment and human health.\textsuperscript{54} In some instances, the Act
specifically prohibits a state from requiring a competency examine-
tion for private applicators.\textsuperscript{55}

The enforcement of FIFRA is the responsibility of EPA, which can
assess civil or criminal penalties, or stop the sale of, seize, or destroy
pesticides that are in violation.\textsuperscript{56} EPA may also delegate enforcement
authority to states through cooperative agreements.\textsuperscript{57} States may fur-
ther restrict the sale or distribution of a pesticide, as long as they do
not permit sale of a pesticide that FIFRA prohibits.\textsuperscript{58} The Supreme
Court ruled in \textit{Wisconsin Public Intervenor v. Mortier} that FIFRA does
not preempt local control of pesticides.\textsuperscript{59} Furthermore, the Court
concluded that the statute actually tips in favor of local regulation be-
cause of its enforcement authorization to the states.\textsuperscript{60}

Although FIFRA was expanded into a regulatory scheme in 1972,\textsuperscript{61}
the statute leaves large portions of pesticide use free from regulation.\textsuperscript{52}
FIFRA does not look to establish a permit scheme for pesticide use, and

\begin{footnotes}
\item[49] See \textit{id.}; discussion \textit{supra} Part II.A.
\item[51] An inert ingredient is defined as: “an ingredient which is not active.” 7 U.S.C.
§ 136(m).
\item[52] See \textit{id.} § 136(n).
\item[53] See Watnick, \textit{supra} note 5, at 85.
\item[54] See 7 U.S.C. § 136i(a)(1); Watnick, \textit{supra} note 5, at 86.
\item[55] See 7 U.S.C. § 136i(a)(1); Watnick, \textit{supra} note 5, at 86. A state may submit a plan to
EPA if it wishes to certify applicators. 7 U.S.C. § 136i(a)(1). If a state does not have an ap-
proved plan, EPA may conduct a program for certification, and this program “shall not
require private applicators to take any examination to establish competency in the use of
pesticides.” \textit{Id.}
\item[56] 7 U.S.C. §§ 136k, 136l.
\item[57] \textit{Id.} § 136u.
\item[59] See \textit{id.} at 616.
\item[60] See \textit{id.} at 608.
\item[52] See \textit{Mortier}, 501 U.S. at 613.
\end{footnotes}
it does not assert that licensing and labeling pesticides are an approval to use them without regard to regional and local factors.  

B. Integrated Pest Management

Integrated Pest Management (IPM) is an alternative to the traditional method of chemical pest control. IPM is a system of prevention, monitoring, and control that is designed to choose the most economical and environmentally friendly method of pest control. The primary benefits of IPM use in schools include reducing the risk of pesticide exposure and generally reducing the potential harm to children. IPM integrates various methods of pest control rather than using traditional chemical spraying.

The elements that make up IPM include: (1) biological control, or using beneficial organisms against pest organisms; (2) chemical control, which involves using pesticides in a responsible manner; (3) legal control, which is simply abiding by state and federal regulations that deal with pest control; and (4) cultural control, which uses methods such as sanitation and fertilization. When necessary, and usually as a last resort, target-specific, low-toxicity pesticides are applied in a way so that the effectiveness of pest management is maximized and exposure to humans and other non-target species is minimized.

Aside from diminishing health risks, IPM also enhances pest control in general, by providing long-term results, reducing the risk of pesticide resistance, and providing a written record of pest activities and control actions. There are, however, some barriers to implementing IPM: it can initially be more expensive to put into practice; it requires

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63 See id. at 613–14.
64 See FIFRA, 7 U.S.C. § 136r-1 (2000). “Integrated Pest Management is a sustainable approach to managing pests by combining biological, cultural, physical, and chemical tools in a way that minimizes economic, health, and environmental risks.” Id.
66 See id.
68 See id.
70 Id.
greater skill and knowledge than traditional pest control; there is additional paperwork; everyone at the facility, even students, must take an active role; and, it requires persistent attention, including the possibility of ongoing training.\textsuperscript{71} An essential component of IPM is consistently monitoring and inspecting for pests to determine the location and degree of infestation.\textsuperscript{72} Monitoring—which involves using traps, visual inspections, and interviews with staff members—can be incorporated into other activities, such as cleaning.\textsuperscript{73} Obtaining professional expertise and training the school staff in IPM procedures comprise a large portion of the start-up costs.\textsuperscript{74} Increased costs, however, are not permanent; within a year or two of the IPM program, the costs drop to a level that is equal to or below those of traditional pest-control programs.\textsuperscript{75}

A survey of twenty-one Pennsylvania school districts that have adopted IPM found that the programs are effective, and of equal or lower cost than using hazardous pesticides; the program may even reduce school absenteeism.\textsuperscript{76} Most school districts surveyed were able to control pests with little or no chemical spraying.\textsuperscript{77} The majority of districts reported little or no change in the cost of the pest-management program, and nearly a quarter reported reduced costs.\textsuperscript{78} Other examples of reduced costs include the Monroe County School District in Bloomington, Indiana, which was spending about $34,000 per year on pest management before adopting IPM in 1995; by implementing IPM, the school district is saving $13,600 per year.\textsuperscript{79} The Montgomery County, Maryland public school system, which consists of 200 sites, saves $1,800 per school each year, and $30,000 per year at its food service warehouse.\textsuperscript{80} Furthermore, the Montgomery County School District, which controlled pests with 5,000 chemical applications in 1985, did not need a single pesticide application four years later due to IPM.\textsuperscript{81}

IPM has been encouraged and endorsed within FIFRA: the statute mandates that the Secretary of Agriculture and EPA promote IPM

\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} GAO, supra note 30, at 10.
\textsuperscript{75} Id.
\textsuperscript{76} JONATHAN KAPLAN ET AL., supra note 13, at vi.
\textsuperscript{77} Id. at 8.
\textsuperscript{78} Id.
\textsuperscript{79} BEYOND PESTICIDES, supra note 65, at 19.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
and make information about it widely available. In addition, the standards for the certification of pesticide applicators include a provision to make IPM instructional materials available to applicators. The Act, however, specifically prohibits state certification plans from requiring instruction or competence in IPM.

III. THE AMERICANS WITH DISABILITIES ACT

A. Establishing a Prima Facie Case Under the Americans with Disabilities Act

The Americans with Disabilities Act (ADA) was enacted in 1990 with the purpose of: (1) providing a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"; (2) providing "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities"; (3) ensuring "that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities"; and (4) invoking the "sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." Public schools fall under Title II of the ADA, which defines public entity as: "(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government." A qualified individual under Title II is defined as an

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The Secretary of Agriculture, in cooperation with the Administrator, shall implement research, demonstration, and education programs to support adoption of Integrated Pest Management. The Secretary of Agriculture and the Administrator shall make information on Integrated Pest Management widely available to pesticide users, including Federal agencies. Federal agencies shall use Integrated Pest Management techniques in carrying out pest management activities and shall promote Integrated Pest Management through procurement and regulatory policies, and other activities.

83 Id. § 136i(c).

84 Id.


86 Id. § 12131(1).
[I]ndividual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.87

To succeed on a Title II ADA claim, the plaintiff must establish: (1) that the plaintiff is, or represents the interests of, a "qualified individual with a disability"; (2) that such individual was either excluded from participation in, or denied benefits of, some public entity’s services, programs, or activities, or was otherwise discriminated against; and (3) that such exclusion, denial of benefits, or discrimination was by reason of plaintiff’s disability.88

Disability is defined as a “physical or mental impairment that substantially limits one or more of the major life activities of [the] individual”; “a record of such an impairment”; or “being regarded as having such an impairment.”89 Under the Department of Justice’s regulations, a “physical or mental impairment” includes “any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: ... respiratory.”90 Asthma is considered a physical impairment for the purposes of the ADA.91

The ADA requires public entities to make reasonable accommodations to their usual policies, practices, and procedures when necessary to avoid discrimination on the basis of disability.92 These accommodations are required unless the entity can demonstrate that the modifications would fundamentally alter the nature of the service.93 The test for “reasonable accommodation” is made on a case-by-case basis.94 Factors in the determination include the cost of the modification, the budget of the program or activity, and the overall size and type of the program.95

87 42 U.S.C. § 12131(2).
89 42 U.S.C. § 12102(2).
90 7 C.F.R. § 15b.3(j) (2002).
92 42 U.S.C. § 12182(b) (2) (A)(ii).
93 Id. § 12182(b) (2) (A)(iii).
94 28 C.F.R. § 42.511(c) (2002).
95 Id.
Persons with disabilities have found that Title II of the ADA may serve as a vehicle to extend protections of environmental and health laws by using the remedies of the ADA to obtain relief that would not be available under environmental statutes.\(^96\) Individuals who have disabilities related to issues such as pesticide use or air pollution may be able to obtain remedies under the ADA that are beyond the scope of the remedies contained within the statutes that largely control these areas.\(^97\) Obstacles exist, however, to gaining relief under the ADA: there have been successful challenges to the ADA’s constitutionality, and ADA remedies have been foreclosed by comprehensive remedial schemes that are contained in some environmental statutes.\(^98\)

**B. The Eleventh Amendment and the ADA**

The constitutionality of the ADA has been successfully challenged, at least with respect to damage awards under Title I.\(^99\) Title I of the ADA makes it unlawful to engage in employment discrimination against individuals with disabilities.\(^100\) In *Board of Trustees of the University of Alabama v. Garrett*, the Supreme Court held that Congress had not validly abrogated state sovereign immunity in enacting Title I of the ADA.\(^101\) Congress may abrogate state sovereign immunity only if: (1) it states unequivocally that it intends to do so; and (2) the waiver constitutes a valid exercise of its authority under Section 5 of the Fourteenth Amendment.\(^102\) Congress can validly exercise this power under Section 5 where it is necessary to protect the Due Process and Equal Protection rights guaranteed under Section 1 of the Fourteenth Amendment.\(^103\)

The Court in *Garrett* found that Congress had not made legislative findings of a pattern of unconstitutional discrimination against

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\(^97\) See id. at 330.
\(^98\) See discussion *infra* Parts III.B, III.D.
\(^99\) Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 360 (2001).
\(^100\) ADA, 42 U.S.C. § 12112(a) (2002).
\(^101\) Garrett, 531 U.S. at 374.
\(^102\) Id. at 363–64; Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55 (1996).
\(^103\) Garrett, 531 U.S. at 364–65. Section 1 of the Fourteenth Amendment reads:

*No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

U.S. CONST. amend. XIV, § 1.
the disabled by the states, and as a result did not show that Title I was necessary to protect Due Process and Equal Protection rights; therefore Congress could not effectively abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment.\footnote{See \textit{Garrett}, 531 U.S. at 372.} It further found that, even if there were such a pattern, there was a "congruence and proportionality" problem with respect to a complete waiver of sovereign immunity; that is, there was not congruence and proportionality between the injury to be prevented and the remedy adopted.\footnote{See \textit{id.} at 365, 372.} Although the Court in \textit{Garrett} found that suits to recover money damages for a state's failure to comply with Title I are barred by the Eleventh Amendment, it noted that this did not eliminate all federal remedies against discrimination.\footnote{See \textit{id.} at 374 n.9.} Individuals who have been discriminated against on the basis of their disability may still bring suit for injunctive relief; \textit{Garrett} only barred suits for monetary damages.\footnote{Id.}

The Garrett Court specifically declined to address whether the Eleventh Amendment bars suit under Title II of the ADA, which has separate and distinct remedial provisions.\footnote{Id. at 360 n.1.} Although there is no question that Congress clearly stated its intent to abrogate immunity under Title II of the ADA, federal courts disagree as to whether there has been an effective waiver of state sovereign immunity under Title II.\footnote{ADA, 42 U.S.C. § 12202 (2000). "A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State Court of competent jurisdiction for a violation of this chapter." \textit{Id.}; see \textit{Garrett}, 531 U.S. at 364; Patricia N. v. Lemahieu, 141 F. Supp. 2d 1243, 1248–49 (D. Haw. 2001).}

The Ninth Circuit has held that abrogation under Title II of the ADA was a valid exercise of Congress's power.\footnote{Clark v. California, 123 F.3d 1267, 1270 (9th Cir. 1997).} In \textit{Clark v. California}, the Ninth Circuit further held that even in the absence of abrogation of state sovereignty under Section 5 of the Fourteenth Amendment by Congress, states that have accepted federal funds under § 504 of the

\textit{Id.} (emphasis added).

\textit{Id.} at 360 n.1.

Our holding that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief.\ldots

\textit{Id.} at 360 n.1.
Rehabilitation Act\textsuperscript{111} have waived sovereign immunity and therefore may be subject to suit on that basis.\textsuperscript{112}

Conversely, in Biggs v. Board of Education, the United States District Court for the District of Maryland held that Congress had not validly abrogated sovereign immunity for Title II of the ADA.\textsuperscript{113} The court noted that "the enforcement power granted to Congress under Section 5 is limited to remediying violations of constitutional rights and may not be used to define the substance of those rights."\textsuperscript{114} The court, citing Garrett, went on to say that where Section 5 legislation reaches "beyond the scope of § 1's actual guarantees [it] must exhibit congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."\textsuperscript{115} The disabled are not a suspect or quasi-suspect class under the Supreme Court's equal protection jurisprudence.\textsuperscript{116} Because of this, the court reasoned that the duty to accommodate under Title II reached beyond the actual rights guaranteed in Section 1 of the Fourteenth Amendment.\textsuperscript{117}

Because the court determined that the accommodations reached beyond the actual rights guaranteed under Section 1, it next examined: "(i) whether 'a pattern of irrational state discrimination' in public services against the disabled exists, . . . and (ii) whether Title II is 'appropriate' § 5 legislation."\textsuperscript{118} Legislation is appropriate if there is a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."\textsuperscript{119} Following Garrett, the court in Biggs concluded that the legislation was not appropriate because the obligations imposed by Title II of the ADA went beyond the obligations imposed by the Fourteenth Amendment; therefore, there was not congruence and proportionality between the targeted harm and means adopted to remedy the harm.\textsuperscript{120} Accordingly, the Biggs court found that Congress did not validly abrogate the states' Eleventh Amendment immunity under Title II of the ADA, and, as a

\textsuperscript{111} Rehabilitation Act, 29 U.S.C. § 794 (2000). Section 504 of the Rehabilitation Act was the predecessor of Title II of the ADA, and case law for section 504 is generally applicable to Title II of the ADA. See Biggs v. Bd. of Educ., 229 F. Supp. 2d 437, 440 n.1 (D. Md. 2002); Patricia N., 141 F. Supp. 2d at 1249 n.2.

\textsuperscript{112} Clark, 123 F.3d at 1271.

\textsuperscript{113} See Biggs, 229 F. Supp. 2d at 440–41.

\textsuperscript{114} Id.

\textsuperscript{115} Id. at 442 (citing Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001)).


\textsuperscript{117} Biggs, 229 F. Supp. 2d at 442.

\textsuperscript{118} Id. (quoting Garrett, 531 U.S. at 368).

\textsuperscript{119} Id. at 443 (citing Garrett, 531 U.S. at 365).

\textsuperscript{120} Id.
result, the state may not be sued for monetary damages under Title II. The court noted, however, that as in Garrett this ruling did not preclude a party from bringing a suit for injunctive relief.

C. Asthma and the ADA

Asthma is a condition that is considered a disability under the ADA. Under the definition of "disability," a physical impairment includes a condition which affects a person's respiratory system. A person is considered to have a disability if he has a physical impairment which substantially limits one or more major activities, and has a record of that impairment, or is regarded as having that impairment. Asthma is a physical impairment and Department of Justice regulations define a "major life activity" to include breathing.

In Alvarez v. Fountainhead, Inc., the plaintiff used Title III of the ADA to obtain a reasonable accommodation to control his asthma. Title III prohibits a place of public accommodation from discriminating against an individual on the basis of disability. Under Title III, similar to Title II, "disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual." The court found that the plaintiff, who suffered from asthma, was a "person with a disability" and was entitled to the protections of Title III of the ADA. Discrimination is defined under Title III to include a denial of the opportunity to participate in, or benefit from, a public accommodation's goods and services.

Title III requires a public accommodation to make "reasonable modifications in policies, practices, or procedures when such

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121 Id.
122 See id. at n.6.
125 34 C.F.R. § 104.3(j) (1) (2002).
126 See Hunt, 963 F. Supp. at 850; 7 C.F.R. § 15b.3(k).
127 The plaintiff was a student at a private Montessori school, which falls under Title III of the ADA, while public schools fall under Title II. See 42 U.S.C. § 12181(7)(k); Alvarez, 55 F. Supp. 2d at 1051.
128 Alvarez, 55 F. Supp. 2d at 1051.
131 Alvarez, 55 F. Supp. 2d at 1051.
modifications are necessary" to ensure full and equal enjoyment of its services by individuals with disabilities. Nevertheless, the reasonable modifications requirement is subject to limitations. First, modifications are not required where they would "fundamentally alter" the nature of the public accommodation's goods and services. Second, modifications are not necessary if the entity can demonstrate that taking such steps would result in an undue burden. An undue burden is defined as a "significant difficulty or expense." In determining whether an action will be an undue burden, two factors are considered: (1) the cost and nature of the action; and (2) the overall financial situation of the site, including the number of employees, the effect on resources, and impact on the operation of the site. Third, an entity is not required to permit an individual to participate in or benefit from that entity where that individual poses a "direct threat" to the health or safety of others.

The plaintiff in Alvarez was attempting to obtain a preliminary injunction in order to mandate that teachers at his school administer his asthma medicine. In order for a plaintiff to obtain a preliminary injunction, he must demonstrate either: "(1) a combination of probable success on the merits and the possibility of irreparable injury; or (2) that serious questions of law are raised and the balance of hardships tips sharply in plaintiff's favor." The court found that requiring teachers to recognize symptoms of asthma and administer medication would not fundamentally alter the program, because the teachers were already required to be aware of signs of health problems in students. Furthermore, the court found that training teachers would not cause an undue burden on the school, as training

134 See Alvarez, 55 F. Supp. 2d at 1051.
136 See 42 U.S.C. § 12182(b)(2)(A)(iii); Alvarez, 55 F. Supp. 2d at 1051; see also Randolph v. Rodgers, 170 F.3d 850, 858 (8th Cir. 1999) (stating that a defendant may demonstrate that a requested accommodation would constitute an undue burden as an affirmative defense to an ADA claim); Hahn ex rel. Barta v. Linn County, Iowa, 130 F. Supp. 2d 1036, 1056 (N.D. Iowa 2001) (holding that it is the plaintiff's burden to establish that a reasonable modification exists; however, if such a modification exists, and the defendant shows the modification would fundamentally alter the requirement at issue, then the ADA does not require a modification).
138 See id.
139 See 42 U.S.C. § 12182(b)(3).
140 See Alvarez, 55 F. Supp. 2d at 1050.
141 Id. at 1050.
142 Id. at 1052-53.
would take a short amount of time. The court found that this accommodation would not pose a direct threat to the health and safety of other students if the medication was handled properly.

The court in Alvarez also considered the policy expressed by the Department of Justice’s (DOJ) regulations, emphasizing that: “reasonable modifications under the ADA should be ‘simple and common sense’ responses” to the needs of persons with disabilities. Furthermore, the DOJ announced a policy that educators should not discriminate against families of children with disabilities. Taking the type of modifications and public policy concerns into account, the court granted the plaintiff a preliminary injunction.

In addition to successfully obtaining a reasonable accommodation for asthma under Title III for a Montessori school, persons suffering from respiratory illnesses have also used the ADA to successfully obtain remedies outside of environmental statutes. In Heather K. v. City of Mallard, a child who suffered from severe respiratory and cardiac conditions as a result of her premature birth requested a temporary restraining order (TRO) pursuant to Title II of the ADA. The plaintiff suffered from a condition where she could not tolerate particulates, such as smoke, in the air she breathed without suffering symptoms such as increased respiratory rate, wheezing, and severe vomiting. The plaintiff requested a TRO to enjoin exceptions to the municipality’s ban on open burning, which specifically allowed for backyard burning of residential waste and other forms of open burning.

The court found that continued open burning posed a very real—and possibly mortal—health threat to the plaintiff, satisfying the irreparable harm element for a TRO. The plaintiff had no adequate remedy at law, since only restraining open burning could prevent the threatened harm to the plaintiff’s life and health; thus the irreparable

143 Id. at 1053–54.
144 See id. at 1054.
145 Id. at 1055 (quoting Amicus Brief for the Department of Justice at 12).
146 See Alvarez, 55 F. Supp. 2d at 1055 (citing Amicus Brief for the Department of Justice at 20).
147 See id. at 1055.
149 See id. at 1251–52.
150 See id. at 1252–53.
151 Id. at 1251.
152 See id. at 1260. The elements considered for a TRO are: (1) likelihood of success on the merits; (2) threat of irreparable harm; (3) balance of harms; and (4) the public interest. See id. at 1256–60.
harm factor tipped in favor of granting a TRO.\textsuperscript{153} Considering the balance of harms, the court found that denying the injunction would pose a real and immediate threat to the plaintiff, while granting relief would harm the municipality little, if at all.\textsuperscript{154} Furthermore, her right to health was threatened while no similar right of the defendant was at stake by a ban on open burning.\textsuperscript{155} The court also noted that there was no evidence that an alternative means of disposal would impose a significant potential economic harm upon the municipality.\textsuperscript{156}

Turning to the plaintiff's likelihood of success on the merits, the court concluded that she was a qualified individual with a disability under the ADA and that nothing about her disability prevented her from meeting the essential eligibility requirements for receipt of the services, programs, or activities of the city.\textsuperscript{157} In addition, the court found that the plaintiff's desire to use the programs, services, or activities of the municipality would not pose a threat to the health or safety of others.\textsuperscript{158} Finally, the impediment was within the power of the municipality to eliminate; it had already undertaken to regulate open burning within its city limits, and therefore had the capacity to regulate such burning sufficiently to reasonably accommodate a person with the plaintiff's disability.\textsuperscript{159} The court concluded that, for the purposes of a TRO, the plaintiff had established sufficient likelihood of success on the merits, and granted the preliminary injunction.\textsuperscript{160}

\textbf{D. Foreclosure of ADA Claims by Other Federal Remedies}

Despite the plaintiff's success in \textit{Heather K.}, other plaintiffs have not been successful in attempting to obtain an ADA remedy where a remedy in an environmental statute already exists.\textsuperscript{161} The main reason for the failure of these attempts is the conflict between remedies un-

\textsuperscript{153} See id. at 1260.
\textsuperscript{154} \textit{Heather K.}, 887 F. Supp. at 1260.
\textsuperscript{155} Id. at 1261.
\textsuperscript{156} See id.
\textsuperscript{157} Id. at 1261–62. In determining eligibility for use of public facilities, the only requirement is that the individual be present in the city and seeking to use the public facilities. See id. at 1262.
\textsuperscript{159} See \textit{Heather K.}, 887 F. Supp. at 1262.
\textsuperscript{160} See id. at 1263.
der environmental statutes and remedies under the ADA. In \(\text{Save Our Summers v. Washington State Department of Ecology}\), plaintiffs who suffered from serious respiratory ailments brought suit under the ADA for a preliminary injunction to halt the pest management practice of burning wheat stubble. The court stated that if it had the jurisdiction to hear the case, it would find that all of the elements for a preliminary injunction were satisfied and a TRO would be issued; however, the court concluded that the comprehensive scheme of the Clean Air Act (CAA) precluded any ADA claims.

The court in \(\text{Save Our Summers}\) relied on a 1981 Supreme Court case, \(\text{Middlesex County Sewerage Authority v. National Sea Clammers Ass’n}\), which held that the Federal Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act did not provide a private right of action independent of their citizen suit provisions. Despite the fact that \(\text{Sea Clammers}\) dealt with a § 1983 claim rather than an ADA claim, the court in \(\text{Save Our Summers}\) applied the same reasoning to an ADA claim.

In \(\text{Sea Clammers}\), the Court looked at the remedial provisions of the statutes at issue, determining that “these Acts contain unusually elaborate enforcement provisions, conferring authority to sue for this purpose both on government officials and private citizens.” The Court continued, stating: “when the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits un-

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162 See \(\text{Save Our Summers}\), 132 F. Supp. 2d at 912; see also \(\text{Sea Clammers}\), 453 U.S. at 21; Heyl, supra note 88, at 338–40.

163 See \(\text{Save Our Summers}\), 132 F. Supp. 2d at 899, 907, 908.

164 \(\text{Id.}\) at 899.

165 See \(\text{Sea Clammers}\), 453 U.S. at 10–11.


Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable

167 \(\text{Id.}\) \(\text{Save Our Summers}\), 132 F. Supp. 2d at 903.

168 \(\text{Sea Clammers}\), 453 U.S. at 13.
The Court went on to say that it was unlikely that Congress meant to preserve a § 1983 cause of action when it had already created specific statutory remedies, including two citizen suit provisions; therefore, these statutory remedies foreclosed implied private actions and replaced any § 1983 remedies.170

Following the reasoning in Sea Clammers, the court in Save Our Summers noted that the CAA also has citizen suit provisions which allow any person to bring a civil action against the violator, EPA, or the state or federal government to enforce the standards of the CAA.171 It further stated that the presence of a citizen suit provision makes it less likely that Congress intended to allow other private rights of action.172 Allowing private remedies other than what is provided for in the statute can be problematic because it would effectively allow a party to bypass the procedural requirements of the comprehensive statute, and would in fact nullify the enforcement procedures crafted by Congress.173

Although the court in Save Our Summers disposed of the plaintiffs’ claims by concluding that they were foreclosed by the remedies in the CAA, it went on in dicta to explain why, if the claims had not been foreclosed, it would have granted a preliminary injunction.174 The court found that the plaintiffs satisfied the element of irreparable injury because of the risk of physical injury—exacerbation of their respiratory illnesses—resulting from the burning of wheat stubble.175 The court also found a likelihood of success on the merits, had the plaintiffs had a legal basis for bringing an ADA claim, as the plaintiffs met the requirements for a disability and were denied access to public areas because of the wheat stubble burning.176 Finally, the court found that the balance of hardships was in the favor of the plaintiffs: the risk to the plaintiffs’ health was greater than the injury to wheat farmers, who had other means of pest control, including IPM.177

The same court heard a motion to reconsider, and while it did not issue a TRO, it did change its position on the application of the holding of Sea Clammers to the case.178 Upon reconsideration, the court

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169 Id. at 20.
170 Id. at 20–21.
171 See Save Our Summers, 132 F. Supp. 2d at 901.
172 Id. at 902.
173 See id. at 903.
174 See id. at 908–09.
175 See id. at 905–06.
176 Id. at 906–07.
177 See Save Our Summers, 132 F. Supp. 2d at 908.
178 See id. at 910.
found that its previous reading of *Sea Clammers* had been too broad; it determined that *Sea Clammers* stood only for the proposition that § 1983 could not be used to provide remedies outside the scope of the CAA, not that it prevented claims under the ADA.\(^{179}\) The court made the distinction that § 1983 is a “[c]ongressional ‘vessel’” meant to enforce Fourteenth Amendment protections, while the ADA provides rights and remedies separate from other federal statutes.\(^{180}\) Though the court found that plaintiffs could properly bring an ADA claim in this case, it also found that because of the comprehensiveness of the CAA, the only remedies available were those that did not infringe on subject matter already included in the CAA. Therefore, the plaintiffs failed to show a likelihood of success on the merits.\(^{181}\) The court stated that plaintiffs were not permitted to use the ADA to obtain a result that would otherwise only be allowed under the CAA’s citizen suit provisions; if it were otherwise, the ADA would have “implicitly repealed the CAA with regard to air pollution affecting disabled persons.”\(^{182}\)

**IV. ANALYSIS: USING THE ADA TO REDUCE THE USE OF CHEMICAL PESTICIDES IN SCHOOLS WHILE MAINTAINING ADEQUATE MANAGEMENT OF PESTS**

The use of pesticides in school settings is a potential health risk to all children, but especially to those who suffer from asthma.\(^{183}\) Similarly, allowing pest populations to build up to intolerable levels can also exacerbate asthmatic conditions.\(^{184}\) While some schools have adopted safer methods of controlling pests, the majority of states do not require programs such as IPM, and most pest control decisions are left to the school districts.\(^{185}\) Students affected by pesticide use in a way that sufficiently aggravates their asthma, preventing them from fully participating in school activities, may have a cause of action under the ADA to compel schools to reduce the use of chemical pesticides, while maintaining adequate pest control.\(^{186}\) The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) does not provide for this type of remedy, and its standards are not stringent enough to pro-

\(^{179}\) See *id.* at 910–11.
\(^{180}\) See *id.* at 910.
\(^{181}\) See *id.* at 911.
\(^{182}\) See *id.* at 911–12.
\(^{183}\) See discussion *supra* Parts I.A., I.B.
\(^{184}\) See Crain et al., *supra* note 20, at 941–42; Kang et al., *supra* note 20, at 299.
\(^{185}\) See GAO, *supra* note 30, at 4, 11.
\(^{186}\) See discussion *supra* Parts III.A, III.B.
tect children who suffer from asthma triggered by pests or pesticides. The ADA is an effective alternative remedy for private citizens who cannot obtain relief under traditional pesticide regulation.

A. ADA Claims Are Not Foreclosed by FIFRA Regulation

The difficulty in bringing ADA claims in instances where there is already environmental regulation poses questions about the effectiveness of the ADA with respect to those affected by pesticides in schools. The major barrier to stating an ADA claim for an environmental issue is that some other federal environmental statutes already contain a remedy for private citizens. These types of comprehensive regulatory statutes have detailed remedial schemes, the most important being the citizen suit provisions. Because of the citizen suit provisions, other remedies—such as ADA claims or § 1983 claims—are generally foreclosed by these built-in private remedies.

Pesticides, which are governed by FIFRA, are not regulated in quite the same way as other environmental issues, such as air pollution and water pollution. The rationale for foreclosing ADA claims under other environmental statutes does not apply to FIFRA. While

187 See FIFRA, 7 U.S.C. § 136 (2000); discussion supra Part II.A.
188 See discussion supra Parts III.B, III.D.
189 See discussion supra Part III.D.
190 See, e.g., Clean Air Act, 42 U.S.C. § 7604 (2000). The citizen suit provision of the Clean Air Act (CAA) reads:

Any person may commence a civil action on his own behalf—(1) against any person . . . who is alleged to have violated . . . or to be in violation of (A) an emission standard or limitation . . . or (B) an order issued by the Administrator or State with respect to such a standard or limitation, (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or (3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required.


192 See discussion supra Part II.A.
193 See discussion supra Part II.A.
FIFRA is considered a comprehensive regulatory statute for the labeling, licensing, use, and sale of pesticides, it lacks the elements that foreclose ADA claims for other statutes, as FIFRA: (1) does not encompass the entire field of pesticide regulation; (2) does not prescribe thorough remedial provisions for all violations; and (3) does not include citizen suit provisions. The enforcement of FIFRA is left entirely to EPA, or to the states who enter an agreement with EPA, through civil or criminal penalties; there is no private right of action under this statute. Although EPA has regulatory authority over virtually every part of pesticide manufacturing, FIFRA does not include remedies available to private citizens. Furthermore, FIFRA does not encompass the entire area of pesticide regulation in the way that the CAA and the Clean Water Act encompass the control of air and water pollution.

There is a strong emphasis on the citizen suit provisions in cases such as *Sea Clammers* and *Save Our Summers* because citizen suits are a built-in private remedy for regulatory schemes. In *Sea Clammers*, § 1983 was precluded because, as its function is to enforce the protections of the Fourteenth Amendment, it does not provide rights separate from other federal statutes. The ADA is different from § 1983 because it does create rights and remedies separate from other federal statutes, and therefore the court in *Save Our Summers* determined that the CAA only forecloses § 1983 claims. The ADA, however, could only be used to obtain a remedy that did not encroach on the subject matter of the CAA, and because the CAA is so broad, relief could not be obtained under the ADA. A remedy under the ADA would not encroach on the subject matter of FIFRA, which is largely concerned with the manufacture and labeling of pesticides. Rather,

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198 See discussion supra Part III.D.
199 *Save Our Summers*, 132 F. Supp. 2d at 910.
200 See id.
201 See id. at 911. “Although the comprehensiveness of the CAA may not entirely preclude Plaintiffs’ suit, it does preclude Plaintiffs from obtaining relief under the ADA or the Rehabilitation Act that would infringe upon subject matter governed by the CAA.” Id.
it would limit the use of pesticides at a specific site in order to accommodate students who could not tolerate the chemicals.\textsuperscript{203}

The comprehensive nature of FIFRA, as compared to the CAA, can be distinguished not only through its remedies, but also through its goals.\textsuperscript{204} The CAA was designed to address the problem of air pollution for the nation as a whole, and set national ambient air quality standards and air quality regions with the idea of maintaining an acceptable level of pollutants.\textsuperscript{205} This scheme requires consideration of existing pollutant levels and regional differences.\textsuperscript{206} FIFRA makes no such determination in regulating pesticides; it does not provide for permitting and does not recognize regional differences.\textsuperscript{207} Rather, it weighs the potential harm to human health against the benefits of using the pesticide to determine whether a pesticide can be sold and how it should be labeled.\textsuperscript{208}

The outcome of the Motion to Reconsider in Save Our Summers indicates that in dealing with a less comprehensive statute, especially one without a private remedy included, such as FIFRA, a court may find that an ADA claim is a potential remedy.\textsuperscript{209} An ADA claim would not encroach on the regulatory area of FIFRA, as it would have no effect on the criteria used to label and license, nor would it prevent the sale of pesticides approved by EPA.\textsuperscript{210} There is no regional or national consideration in licensing pesticides, so a successful ADA claim would not interfere with any kind of crafted regulatory scheme.\textsuperscript{211} An ADA claim brought to modify a school’s pesticide practices would only affect that particular school and would not be contrary to the goals or regulations of FIFRA.\textsuperscript{212}

\textsuperscript{203} See 28 C.F.R. § 35.130 (2002).
\textsuperscript{204} See discussion supra Part II A.; Heyl, supra note 88, at 331–32.
\textsuperscript{205} See Clean Air Act, 42 U.S.C. § 7407 (2000); Heyl, supra note 88, at 332.
\textsuperscript{208} Id. § 136a(a), (bb).
\textsuperscript{211} See 7 U.S.C. § 136; Mortier, 501 U.S. at 613; cf Clean Air Act, 42 U.S.C. § 7401 (2000) (stating that a purpose of the CAA is to promote regional air pollution and control programs).
\textsuperscript{212} See 7 U.S.C. § 136r-l; 28 C.F.R. § 42.511(c) (2002). FIFRA includes a provision to promote IPM; modification of a school’s pest control program to IPM is not at all contrary to the principles of FIFRA. 7 U.S.C. § 136r-l. Determinations of "reasonable accommodation" are made on a case-by-case basis. 28 C.F.R. § 42.511(c).
B. Establishing a Prima Facie Case Under the Americans with Disabilities Act

Public schools meet the definition of "public entity" under Title II of the ADA.\(^213\) Under Title II, a plaintiff must establish that: (1) he is, or represents the interests of, a qualified individual; (2) he was either excluded from or denied benefits of a public entity's services, programs, or activities; and (3) the exclusion was by reason of his disability.\(^214\) An individual with asthma clearly meets the definition of a qualified individual.\(^215\) A student who is forced to miss certain activities in school or to miss school entirely because of an exacerbation of his asthma is being excluded from a public entity's services, programs, or activities.\(^216\) Finally, if a student's asthma is triggered or irritated by pesticides used on school grounds or by unacceptable levels of pests due to poor pest management, the denial of services is by reason of his disability.\(^217\)

A student who is able to show that pesticide use triggers his asthma and results in some sort of denial of the school's services would be able to make out a prima facie case under the ADA.\(^218\) Once this is established, the public entity could be required to make reasonable modification to its practices.\(^219\) Modifications are not required, however, if they would fundamentally alter the entity's services, place an undue burden on the entity, or pose a direct threat to the health or safety of others.\(^220\) A modification that would diminish a school's ability to control pests would not be proper because it would be injurious to the health and safety of others.\(^221\) Additionally, a modification that would cost a great deal or have a great impact on the school's operation would also not be required.\(^222\)

There are methods of pest control, however, that can greatly reduce the amount of chemical pesticide use and still meet the requirements for a reasonable modification, namely, Integrated Pest

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\(^{214}\) Id. § 12132.

\(^{215}\) See id. § 12102(2); 7 C.F.R. § 15b.3(k); discussion supra Part III.C.


\(^{217}\) See 42 U.S.C. § 12132.

\(^{218}\) See id. §§ 12102(2), 12132; Heather K., 887 F. Supp. at 1261–62; 28 C.F.R. § 35.104 (2002); discussion supra Part III.


\(^{220}\) See 42 U.S.C. § 12182(b)(2)(A)(iii), (b)(3); Alvarez, 55 F. Supp. 2d at 1051.

\(^{221}\) See 42 U.S.C. § 12182(b)(3).

\(^{222}\) See 28 C.F.R. § 36.104 (2002).
Management (IPM). Aside from the overall obvious benefits, such as being more environmentally friendly and less dangerous to human health, students suffering from asthma would largely be relieved of chemical exposure that may trigger or exacerbate their condition. Many schools that have implemented IPM have been able to control pests with little or no chemical spraying.

IPM would likely be considered a reasonable modification under the ADA. First, IPM would not fundamentally alter the nature of the school’s services. Schools already engage in some sort of pest control as part of the maintenance of their grounds and buildings, and IPM would only be a change in the method of pest control. Second, implementing IPM would not be an undue burden to schools. Putting IPM into practice at schools may involve increased expense at the beginning, such as staff training costs and obtaining professional expertise. School districts that have implemented IPM, however, have reported lessened costs after just a year or two of the program. Since any modification will put some sort of burden on an entity, a year or two of increased costs and training will likely not be considered “undue.”

Third, IPM will not pose a direct threat to the health and safety of others. On the whole, it will decrease the school population’s exposure to chemicals and help prevent incidents of chemical poisoning.

Implementing IPM as a remedy for an ADA violation does not violate any provisions of or policies driving FIFRA. In fact, FIFRA recognizes IPM and mandates EPA’s research and support of this method.

The overall reduction of chemical pesticide use at schools would be a

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223 Discussion supra Parts III.A, III.C; see 42 U.S.C. § 12182(b)(2)(A)(iii), (b)(3); Alvarez, 55 F. Supp. 2d at 1051.

224 See discussion supra Part II.B.

225 JONATHAN KAPLAN ET AL., supra note 13, at 8.


228 See Alvarez, 55 F. Supp. 2d at 1052-53. Teachers were already required to recognize health problems in students and recognizing asthma symptoms in a particular student would not fundamentally alter the program. Id.


230 GAO, supra note 30, at 10.

231 See id.; JONATHAN KAPLAN ET AL., supra note 13, at 8.

232 See Alvarez, 55 F. Supp. 2d at 1054 (stating that requiring teachers to have a one hour training on the use of an asthma inhaler would not pose an undue burden).

233 See 42 U.S.C. § 12182(b)(3); discussion supra Part II.B.

234 See discussion supra Part II.B.


236 See id.
benefit for all students because it would lower the risk of chemical poisoning and other potential health problems.\textsuperscript{237} For those who suffer from asthma triggered by pesticides, the need to reduce chemicals is a pressing one because, essentially, pesticides are preventing these students from fully participating in school.\textsuperscript{238} The ADA is an effective way to quickly reduce the amount of chemical pesticides used because it requires schools to make a reasonable accommodation for individuals with disabilities.\textsuperscript{239} Some states have already passed legislation requiring IPM at schools, but for those that have not, or have made IPM only voluntary, the ADA is an individualized response to this problem.\textsuperscript{240}

**Conclusion**

For a child suffering from asthma triggered by pesticides or insect allergens, the ADA could be a very effective method to reduce the amount of chemical pesticides used in schools, while still effectively controlling pests. FIFRA does not provide an adequate remedy for a private citizen, and its standards are not stringent enough to protect those who are more susceptible to adverse reactions to pesticides. IPM at schools—already mandatory in some states—is an ideal solution for schools with students who cannot tolerate chemical pest control. In addition, reducing the use of chemicals is beneficial to all the children in the school, not only minimizing the risk of chemical poisoning, but also taking steps to avoid some of the long-term health risks linked with pesticides, such as cancer.

A student who suffers from pesticide-induced asthma would likely be able to establish a claim under the ADA so that he or she can attend school without worry of an asthma attack. Furthermore, reduction in asthma attacks would increase the school attendance rate, and prevent what is essentially the denial of a vital public service—education.

\textsuperscript{237} See Watnick, \textit{supra} note 5, at 77–79.
\textsuperscript{238} See Landrigan et al., \textit{supra} note 9, at 723.
\textsuperscript{239} See discussion \textit{supra} Part III.A.
\textsuperscript{240} See GAO, \textit{supra} note 30, at 8; discussion \textit{supra} Part III.A.