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**CANINES IN THE CLASSROOM REDUX: APPLYING THE
ADA OR THE IDEA TO DETERMINE WHETHER
A STUDENT SHOULD BE ALLOWED TO BE ACCOMPANIED
BY A SERVICE ANIMAL AT A PRIMARY OR SECONDARY
EDUCATIONAL INSTITUTION**

*Rebecca J. Huss**

I. INTRODUCTION

Under the Individuals with Disabilities Education Act (hereinafter “IDEA”), every school district receiving federal funds is required to have policies in place to provide a free appropriate public education (hereinafter “FAPE”) to students with disabilities.¹ School districts are responsible for developing an individualized education program (hereinafter “IEP”) for each student with a disability.² One of the attributes of the IDEA is the requirement that administrative procedures must be exhausted prior to the filing of any lawsuit based on the violation of the IDEA—an issue that has been at the heart of many cases in this field of law.³

School districts are also subject to the Americans with Disabilities Act (hereinafter “ADA”), which prohibits discrimination on the basis of a disability, regardless of an individual’s age, by public entities and places of accommodation.⁴ ADA regulations require

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¹ 20 U.S.C. §§ 1400-1482 (2018); 20 U.S.C. § 1412(a)(1)(A) (2018). *See generally* LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §§ 2:3-2:5 (4th ed. 2018) (discussing the history of the IDEA).

² 20 U.S.C. § 1414(d)(1)(A)(i) (2018).

³ 20 U.S.C. § 1415(l) (2018). Rebecca J. Huss, *Canines in the Classroom Revisited: Recent Developments Relating to Students’ Utilization of Service Animals at Primary and Secondary Educational Institutions*, 9 ALB. GOV’T L. REV. 1, 15, 20-23 (2016) [hereinafter *Huss, Revisited*] (discussing some of the cases where exhaustion of administrative remedies was an issue).

⁴ *See generally* Title II, 42 U.S.C. §§ 12131-12165 (2018), and Title III, 42 U.S.C. §§ 12181-12189 (2018). Title II of the ADA applies to state and local governments. 28 C.F.R.

entities to “make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”⁵ One example of a modification is allowing an individual with a disability to utilize a service animal in a place where animals are otherwise prohibited.⁶

As courts grapple with applying the Supreme Court’s decision in *Fry v. Napoleon Community Schools*⁷ in the broader context of the intersection of the IDEA and the ADA, parents and school districts must continue to determine under what circumstances students are allowed to be accompanied by their service dogs in a primary and secondary school environment.⁸

§ 35.104 (2018). Title III of the ADA applies to a place of public accommodation, which includes “[a] nursery, elementary, secondary, . . . private school, or other place of education.” 28 C.F.R. § 36.104 (2018). In addition, Section 504 of the Rehabilitation Act provides “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, . . . be denied the benefits of . . . any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794 (2018). Entities receiving funds indirectly are covered under the Rehabilitation Act and, because all states receive federal funding for educational programming, local school districts would also be covered by the Rehabilitation Act. ROTHSTEIN & IRZYK, *supra* note 1, § 2.2. Because the Rehabilitation Act is commonly referenced secondarily to the IDEA and ADA, it will not be analyzed separately in this Article. However, occasionally the Rehabilitation Act may provide an important basis for a claim, especially in a dispute with a private school. *E.g.*, *Bardelli v. Allied Servs. Inst. of Rehab. Med.*, No. 3:14-0691, 2015 BL 61005 (M.D. Penn. Mar. 6, 2015). *See also* *Berardelli v. Allied Servs. Inst. of Rehab. Med.*, 900 F.3d 104, 120-25 (3d Cir. 2018) (remanding case for further proceedings and applying the ADA service animal regulations to the case involving the Rehabilitation Act). A private school that does not accept any federal funding would not be subject to the IDEA or Rehabilitation Act but would still be subject to the ADA.

⁵ 28 C.F.R. § 35.130(b)(7)(i) (2018) (setting forth language in Title II of the ADA regulations). Similar language is found in the Title III regulations. 28 C.F.R. § 36.302(a) (2018).

⁶ 28 C.F.R. § 35.136(a) (2018); 28 C.F.R. § 36.302(c)(1) (2018) (stating generally an entity “shall” modify its “policies, practices, or procedures to permit the use of a service animal by an individual with a disability”).

⁷ *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017).

⁸ *See, e.g.*, Rebecca Everett, *Determined Teen Finally Allowed to Bring Service Dog to School*, NJ.COM, http://www.nj.com/camden/index.ssf/2017/02/school_allows_service_dog_in_school_after_months_o.html (last updated Feb. 2, 2017, 10:38 AM) (providing illustration of recent dispute between a student and school district). In addition to allowing students to bring a service animal to school, school districts may need to allow students to be accompanied by their service animals on school buses. Melanie Velez, Regional Director, OCR Complaint #04-17-1114, *Letter to Shane Barnett, Superintendent, Cullman County Schools*, U.S. DEP’T EDUC., OFF. FOR C.R. (Sept. 19, 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/invest>

This short Article will highlight some of the issues impacting this decision-making process.⁹ It focuses on issues relating to students in primary and secondary schools after the Supreme Court's decision in *Fry*.¹⁰ This Article is limited to issues relating to federal law, although several states have laws that may provide additional rights to students.¹¹

Part II of this Article sets forth a brief background of the *Fry* case, including the Supreme Court decision, and analyzes some of the arguments made by the parties on remand at the district court level.¹² Part II also reports on cases relating to service animals in schools applying the analysis set forth in the *Fry* decision.¹³ Part III of this Article explains the relevant ADA regulations relating to service

igations/more/04171114-a.pdf (finding a violation of Title II of the ADA and discussing the implementation of a Resolution Agreement after a student was refused permission to bring his service animal on a school bus).

⁹ The author has written about the issue of service and assistance animals in previous articles. Readers interested in exploring this area of the law more fully are encouraged to read the author's work on this issue. Rebecca J. Huss, *Canines in the Classroom: Issues Relating to Service Animals in Primary and Secondary Educational Institutions After Fry v. Napoleon Community Schools*, 24 ANIMAL L. 53 (2018) [hereinafter Huss, *After Fry*]; Huss, *Revisited*, *supra* note 3; Rebecca J. Huss, *Canines in the Classroom: Service Animals in Primary and Secondary Educational Institutions*, 4 J. ANIMAL L. & ETHICS 11 (2011) [hereinafter Huss, *Classroom*]. Most of author's previous work can be accessed via the Social Science Research Network at <http://ssrn.com/author=330506>. This Article is focused on service and assistance animals partnered with individual students. A discussion of legal issues relating to the incorporation of therapy animals in a school environment can be found in Rebecca J. Huss & Aubrey H. Fine, *Legal and Policy Issues for Classrooms with Animals*, in HOW ANIMALS HELP STUDENTS LEARN: RESEARCH AND PRACTICE FOR EDUCATORS AND MENTAL-HEALTH PROFESSIONALS 27-37 (Nancy R. Gee et al. eds., 2017). This Article does not discuss the significant ethical and welfare issues involved in utilizing service animals as living accommodations. Some of the author's previous work relating to service and assistance animals has analyzed this issue. Huss, *Revisited*, *supra* note 3, at *4 n.6; Huss, *Classroom*, *supra*, at 18-19 (citing to the author's earlier work on ethical issues and providing additional references).

¹⁰ This Article does not analyze all the other circumstances in which the *Fry* decision impacts the intersection of the IDEA and the ADA. For example, there have been cases relating to school districts' obligations concerning the alleged mistreatment of students due to the use of a mechanical restraint and the refusal to allow a therapist to accompany a student in school. *P.G. v. Rutherford Cty. Bd. of Educ.*, No. 3:17-cv-01115, 2018 WL 2416230 (M.D. Tenn. May, 29 2018) (allegations of improper restraint require exhaustion of remedies under the IDEA); *K.M. v. Tehachapi Unified Sch. Dist.*, No. 1:17-cv-01431-LJO-JLT, 2018 WL 2096326 (E.D. Cal. May, 7 2018) (finding ADA claims relating to refusal of school to allow therapist are not subject to the IDEA exhaustion of administrative remedies requirement).

¹¹ See Huss, *Revisited*, *supra* note 3, at 38-46; Huss, *Classroom*, *supra* note 9, at 46-51 (analyzing state laws that may provide additional rights to students).

¹² See *infra* notes 17-88 and accompanying text (discussing *Fry* case).

¹³ See *infra* notes 89-96.

animals and highlights some of the issues concerning the application of those regulations to disputes between advocates of students and schools.¹⁴ Part IV considers why the IDEA and its regulations might support a student's request to be accompanied by a service animal in school, even in the absence of such a right under the ADA.¹⁵ Part V concludes the Article by providing guidance for advocates and school districts given the challenges that can arise when incorporating service animals in a primary and secondary school environment.¹⁶

II. *FRY V. NAPOLEON COMMUNITY SCHOOLS*

About nine years from the time Ehlana Fry began training with her service dog Wonder, the Supreme Court issued a decision that remanded her case back to the Sixth Circuit for further proceedings.¹⁷ As of the writing of this Article, the case was ongoing.¹⁸

A. History of the Case

Service dog Wonder was trained to assist Ehlana,¹⁹ who has cerebral palsy, with mobility and physical tasks.²⁰ Ehlana's elementary school initially refused permission to allow Wonder at the school but then agreed to a trial period.²¹ After being informed by the

¹⁴ See *infra* notes 98-133 and accompanying text (discussing recent cases).

¹⁵ See *infra* notes 135-48 and accompanying text (discussing IDEA regulations that may support an argument a service animal should be included in a student's IEP).

¹⁶ See *infra* notes 149-52 and accompanying text (providing guidance to advocates and school districts).

¹⁷ *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 759 (2017); *Fry v. Napoleon Cmty. Sch.*, 788 F.3d 622, 624 (6th Cir. 2015) (en banc). Wonder had been retired from acting as Ehlana's service animal by the time of the Supreme Court's decision. Richard Wolf, 'Ruff' Justice: Supreme Court Rules for Disabled Girl, Service Dog, USA TODAY, <https://www.usatoday.com/story/news/politics/2017/02/22/supreme-court-disabled-girl-wonder-service-dog/98214948/> (last updated Feb. 22, 2017, 2:32 PM).

¹⁸ See *infra* note 88 and accompanying text (discussing the status of the case at the time of the writing of this Article).

¹⁹ No disrespect is intended by the use of the Ehlana's first name. It is being used merely to simplify the discussion of the case.

²⁰ *Fry*, 788 F.3d at 624. Ehlana was initially not able to handle Wonder independently, but Ehlana developed this ability. *Id.* The issue of whether a student is able to "handle" a service animal on his or her own has been raised as an issue in other cases, although it was not the basis for Napoleon Community Schools rejecting the Frys' request to allow Wonder at school. See *infra* notes 125-34 and accompanying text (discussing issues relating to an individual acting as the handler of a service animal).

²¹ *Fry*, 788 F.3d at 624.

school that Wonder would not be allowed back the following year, the Frys filed a complaint with the Office of Civil Rights at the Department of Education (hereinafter “DOE OCR”) under the ADA and Section 504 of the Rehabilitation Act.²² After the DOE OCR established the school violated the ADA for refusing to allow Wonder to accompany Ehlena, the school agreed to allow Ehlena to attend school with Wonder.²³ However, the next fall, the Frys enrolled Ehlena in a school district that had no opposition to Wonder.²⁴

In December 2012, the Frys filed suit against Napoleon Community Schools seeking damages under the ADA and Section 504 of the Rehabilitation Act based on failure to accommodate.²⁵ The school’s motion to dismiss was granted by the district court, which held the IDEA’s exhaustion of administrative remedies requirement applied to the Frys’ claims because Ehlena’s IEP would “certainly have to be modified in order to articulate the policies and practices that would apply to the dog.”²⁶

In affirming the district court’s judgment, the Sixth Circuit Court of Appeals cited to section 1415(*l*) of the IDEA that provides that plaintiffs are required to exhaust IDEA procedures, notwithstanding a lack of IDEA claims in the complaint, if the relief sought is “also available” under the IDEA.²⁷ The majority opinion

²² *Id.* For examples of other administrative decisions relating to service animals in schools, see Huss, *Revisited*, *supra* note 3, at 27-35. Some recent administrative actions are also included in the citations to this Article.

²³ *Fry*, 788 F.3d at 624.

²⁴ *Id.*

²⁵ *Id.* The following injuries were alleged:

denial of equal access to school facilities, denial of the use of Wonder as a service dog, interference with [Ehlena’s] ability to form a bond with Wonder, denial of the opportunity to interact with other students at Ezra Eby Elementary School, and psychological harm caused by the defendants’ refusal to accommodate [Ehlena] as a disabled person.

Id. The failure to accommodate allegedly occurred between fall 2009 and spring 2012. *Id.*

²⁶ *Id.* at 624-25.

²⁷ *Id.* at 625. The IDEA provision states:

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

found that the exhaustion requirement would apply because the Frys' suit turned "on the same questions that would have determined the outcome of IDEA procedures, had they been used to resolve the dispute."²⁸ In contrast, the dissenting opinion considered the claim noneducational in nature.²⁹ The dissenting opinion distinguished between the ADA and IDEA, stating "the ADA's focus is on ensuring access; the IDEA's focus is on providing *individualized* education."³⁰ The Supreme Court granted the Fry's request for certiorari.³¹

B. Supreme Court Decision³²

The Supreme Court's concise opinion began by describing the IDEA and the legislative history of section 1415(*l*).³³ It then set out the facts and history of the case.³⁴ The Court acknowledged section 1415(*l*) "requires that a plaintiff exhaust the IDEA's procedures before filing an action under the ADA, the Rehabilitation Act, or similar laws when (but only when) her suit 'seek[s] relief that is also available' under the IDEA."³⁵ It found in order "to meet that statutory standard,

20 U.S.C. § 1415(*l*). This provision was part of the Handicapped Children's Protection Act of 1986 which amended the law that is now referred to as the IDEA. Pub. L. No. 99-372, § 3, 100 Stat. 796, 797 (1986).

²⁸ *Fry*, 788 F.3d at 627.

²⁹ *Id.* at 631-32 (Daughtrey, J., dissenting). However, even if the accommodation sought was educational in nature, the dissenting opinion argued there were facts indicating that exhaustion of administrative remedies would have been futile in this case and thus exhaustion would be excused. *Id.* The dissenting opinion also cited to a school policy that did not permit a certified "service dog" but allowed a "guide dog" and stated the school could have honored the request "simply by modifying the school policy allowing guide dogs to include service dogs." *Id.* at 631-32, 634.

³⁰ *Id.* at 633.

³¹ *Fry v. Napoleon Cmty. Sch.*, 136 S. Ct. 2540, 2540 (2016). The Solicitor General was invited to file a brief in the action. Brief for the United States as Amicus Curiae at *1, *Fry*, 136 S. Ct. 2540 (2016) (No. 15-497), 2016 WL 4524537. In urging the Supreme Court to grant certiorari, the United States' brief stated "[t]he question presented raises an important and recurring issue that has significant consequences for children with disabilities who seek to vindicate their rights under federal anti-discrimination statutes." *Id.* at *11.

³² *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017). Justice Kagan delivered the opinion of the Court with Chief Justice Roberts, and Justices Kennedy, Ginsburg, Breyer, and Sotomayor joining the opinion. *Id.* at 748. Justice Alito, with Justice Thomas, concurred in the judgment and concurred in part. *Id.* at 748, 759. Justice Alito's concurrence asserted the Court provided misleading clues and these suggested clues "are likely to confuse and lead courts astray." *Id.* at 759 (Alito & Thomas, JJ., concurring). For analysis of the briefs and oral argument in the Supreme Court case, see Huss, *After Fry*, *supra* note 9, at 59-65.

³³ *Fry*, 137 S. Ct. at 748-50.

³⁴ *Id.* at 750-52.

³⁵ *Id.* at 752 (quoting 20 U.S.C. § 1415(*l*)).

a suit must seek relief for the denial of a FAPE, because that is the only relief the IDEA makes available.”³⁶

The Court attempted to address the concern about plaintiffs circumventing the statute through “artful pleading” by establishing a gravamen standard.³⁷ It emphasized the “use (or non-use) of particular labels and terms is not what matters.”³⁸ The Court distinguished between the focus of the statutes, with the coverage and goals of the IDEA being “individually tailored educational services” compared with the purposes of the ADA and Rehabilitation Act to ensure “non-discriminatory access to public institutions.”³⁹

In order to determine “whether the gravamen of a complaint against a school concerns the denial of a FAPE, or instead addresses disability-based discrimination,” the Court provided clues for lower courts to utilize.⁴⁰ For example, two hypothetical questions could be asked:

First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school—say, a public theater or library? And second, could an *adult* at the school—say, an employee or visitor—have pressed essentially the same grievance?⁴¹

In the event the answer to those two questions is yes, “a complaint that does not expressly allege a denial of a FAPE is also unlikely to be truly about that subject.”⁴² In contrast, if the answer to these questions is no, “then the complaint probably does concern a FAPE, even if it does not explicitly say so.”⁴³

³⁶ *Id.*

³⁷ *Id.* at 755 (stating what should matter is “the crux—or, in legal-speak, the gravamen—of the plaintiff’s complaint, setting aside any attempts at artful pleading”).

³⁸ *Id.* As an example, a party could omit the terms FAPE or IEP in the complaint. *Id.* The Court continued “a ‘magic words’ approach would make § 1415(l)’s exhaustion rule too easy to bypass.” *Id.*

³⁹ *Id.* at 756. The Court acknowledged there is overlap in coverage and some conduct would be a violation of all the statutes. *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* The Court also provided examples to guide courts. *Id.* In one, a student using a wheelchair, who is not alleging a denial of a FAPE, sues a school for discrimination under the ADA because of a lack of ramps to access a building. *Id.* Using the Court’s analysis, exhaustion under § 1415(l) would not be required in that case. *Id.* In another example, the Court used a hypothetical of a student with a learning disability alleging the failure to provide

The Court also indicated the history of a case could also be considered by courts.⁴⁴

[A] court may consider that a plaintiff has previously invoked the IDEA’s formal procedures to handle the dispute—thus starting to exhaust the Act’s remedies before switching midstream. . . . A plaintiff’s initial choice to pursue that process may suggest that she is indeed seeking relief for the denial of a FAPE.⁴⁵

The Court remanded the case back to the Sixth Circuit given it did not have sufficient information about the history of the proceedings and the Sixth Circuit had not determined whether the gravamen of the Frys’ complaint sought relief for the denial of a FAPE.⁴⁶

C. Case on Remand

1. Remand to the Sixth Circuit Court of Appeals

As with any standard established by the Supreme Court, the application of such tests can be complicated by the factual record.⁴⁷ After all, the Frys and the school district did not have the benefit of the standard at the time the underlying events occurred and litigation began.⁴⁸ On remand the Frys argued the issue was can the Sixth Circuit Court of Appeals “determine whether the substance of the complaint filed by [Ehlana] for violation of the Americans With Disabilities Act and the Rehabilitation Act seeks redress for the Defendants-Appellee’s denial of a free and appropriate public education?”⁴⁹ The Frys urged the Court of Appeals to remand the case for further discovery in order to establish the factual record.⁵⁰

remedial tutoring suing under the ADA. *Id.* at 756-57. The exhaustion requirement in § 1415(l)’s would apply in that case. *Id.* at 757.

⁴⁴ *Id.*

⁴⁵ *Id.* The Court stated “prior pursuit of the IDEA’s administrative remedies will often provide strong evidence that the substance of a plaintiff’s claim concerns the denial of a FAPE, even if the complaint never explicitly uses that term.” *Id.*

⁴⁶ *Id.* at 758.

⁴⁷ *See infra* notes 53-82 and accompanying text (discussing filings at the district court level based on activities of the parties prior to the Supreme Court decision).

⁴⁸ *See supra* notes 19-30 and accompanying text (discussing history of the case).

⁴⁹ Brief of Plaintiffs-Appellants Stacy Fry, Brent Fry, and Ef, a Minor, by Her Next Friends Stacy Fry and Brent Fry at 7, *Fry*, 137 S. Ct. 743 (2017) (No. 14-1137), 2017 WL 2222829, at *v.

⁵⁰ *Id.* at *12.

The school district argued exhaustion of administrative remedies under the IDEA was required because the history of the proceedings would support a finding the Frys sought relief for denial of a FAPE.⁵¹ Citing to the “factual nature of the relevant information,” the Court of Appeals remanded the case to the district court in the summer of 2017 to determine “whether ‘the Frys invoked the IDEA’s dispute resolution process before bringing this suit.’”⁵²

2. *District Court Filings*

i. **Motions for Summary Judgment**

Back at the district court level, all the parties filed motions for summary judgment.⁵³ The Frys moved to dismiss the defendants’ affirmative defense of failure to exhaust administrative remedies.⁵⁴ The Frys argued the issue is that the gravamen of their complaint sought relief for discriminatory acts committed by the defendants under ADA Title II and Section 504 of the Rehabilitation Act and thus such claims are not subject to the exhaustion requirements of the IDEA.⁵⁵

The Frys’ motion for summary judgment utilized language in the Supreme Court’s opinion to support their argument that the gravamen of their claim was not the denial of a FAPE.⁵⁶ They

⁵¹ Defendants-Appellees’ Supplemental Brief at 11, *Fry*, 137 S. Ct. 743 (2017) (No. 14-1137), 2017 WL 2629921, at *3. Among other things, to support its contention that the gravamen of the complaint is a denial of a FAPE, the school district cited to the Frys’ participation in an IDEA mediation process. *Id.* at *1-2.

⁵² *Fry v. Napoleon Cmty. Sch.*, No. 14-1137, 2017 WL 10129249, at *1 (6th Cir. July 21, 2017) (citing to 137 S. Ct. at 758) (reversing and remanding the case to district court).

⁵³ Plaintiffs’ Motion for Partial Summary Judgment to Dismiss Defendants’ Affirmative Defense of Failure to Exhaust Administrative Remedies, *Fry v. Napoleon Cmty. Sch.*, No. 12-15507 (E.D. Mich. Feb. 9, 2018) [hereinafter Plaintiffs’ February 2018 Motion for Summary Judgment]; Defendants Napoleon Community Schools, Jackson County ISD and Pamela Barnes’ Motion for Summary Judgment, *Fry v. Napoleon Cmty. Sch.*, No. 12-15507 (E.D. Mich. Feb. 12, 2018) [hereinafter Defendants’ February 2018 Motion for Summary Judgment].

⁵⁴ Plaintiffs’ February 2018 Motion for Summary Judgment, *supra* note 53, at 2.

⁵⁵ *Id.* at 8.

⁵⁶ *Id.* at 16. The language cited to from the Supreme Court’s decision included that the complaint “contains no allegation about the denial of a FAPE or about any deficiency in E.F.’s IEP . . . [nor does it] accuse the school even in general terms of refusing to provide the educational instruction and services E.F. needs” and “nothing in the nature of the Frys’ suit suggests any implicit focus on the adequacy of E.F.’s education.” *Id.* (citing to *Fry*, 137 S. Ct. at 758).

reiterated that the Supreme Court's decision supported the premise that the Frys' claim met the initial questions presented using the gravamen test.⁵⁷ The Frys articulated the question for the district court is whether, given the first parts of the gravamen test were resolved in their favor, "the Frys' initial participation in IDEA administrative procedures convincingly establishes the gravamen of the case actually is rooted in the denial of a FAPE."⁵⁸

The Frys acknowledged they initially participated in the IDEA's administrative procedures prior to their shift to litigation but articulated three reasons their claim was not about denial of a FAPE.⁵⁹ The Frys argued that the Napoleon Community Schools admitted all accommodation requests for special education were funneled through the IDEA process, even if there was no claim for denial of a FAPE, and thus the Frys did not invoke the IDEA's administrative procedures.⁶⁰ The Frys also argued they previously testified "that their participation in the IDEA mediation process simply was a means to continue the conversation with the school about granting E.F. access to her service animal at Ezra Eby, not an attempt to alter the contents of the IEP."⁶¹ Finally, the Frys argued other courts applying the Supreme Court test to "similar cases have determined that exhaustion of the IDEA's administrative procedures was not required."⁶² Given these arguments, the Frys reasoned the district court should "hold the Frys' claim is not subject to the IDEA's exhaustion requirements, and

⁵⁷ *Id.* at 15-16. *See supra* note 41 and accompanying text (setting forth the first two questions in the Supreme Court's decision).

⁵⁸ Plaintiffs' February 2018 Motion for Summary Judgment, *supra* note 53, at 17.

⁵⁹ *Id.* at 18.

⁶⁰ *Id.* The Frys presented as evidence the letters that were submitted requesting access rights for the service dog and the deposition by the Superintendent supporting the Frys' premise that any accommodation request was funneled through the IEP process. *Id.* at 18-23.

⁶¹ *Id.* at 18-19. The agreement by the Frys to mediation came at the end of a meeting where the school had rejected the request to allow the service animal and the Frys were asked to check a box listing five options. *Id.* at 24. At Stacy Fry's deposition she stated "[w]e had to check a box and we wanted to continue the conversation. . . . [W]e always believed it was [E.F.]'s right independent of the education plan to have the service dog with her, but this was the only means for us to continue the conversation with the school." *Id.* at 24 (fourth alteration in original).

⁶² *Id.* at 19. The Frys acknowledged that a limited number of courts have had the opportunity to apply the test set out in *Fry*, but discussed two cases where plaintiffs initially participated in IDEA procedures but, like the Frys' case, the wrongs were "beyond the scope of the denial of a FAPE." *Id.* at 28-32.

strike the Defendants' affirmative defense of Failure to Exhaust Administrative Remedies."⁶³

The defendants' summary judgment motion argued the history of the proceedings supports a finding that the Frys sought relief for denial of a FAPE; therefore, exhaustion of administrative remedies was required.⁶⁴ The defendants focused on aspects of the IDEA that relate to students', in this case Ehlena's, development of independence.⁶⁵ Because Ehlena's qualification for special education services was only due to her physical disability, the defendants asserted the educational goals were connected with the issues in which she received services—to help her develop mobility and independence.⁶⁶ Essentially the defendants argued “[t]he request for a special education student to have access to a tool to ‘develop’ her ‘independence’ is indeed a request for [a] FAPE.”⁶⁷ This assertion that the request for the service animal was a related service to “develop independence” was supported by the defendants' citation to several regulations governing the IDEA.⁶⁸ The defendants distinguished between an entity merely granting access to a person with a service animal and one who demands assistance with “*developing* independence, and to provide therapy to learn to use an assistive device.”⁶⁹

The defendants also argued that language in written correspondence from the Frys and their representatives referenced the IDEA's requirements and the denial of a FAPE in connection with their

⁶³ *Id.* at 19.

⁶⁴ Defendants' February 2018 Motion for Summary Judgment, *supra* note 53, at 3-4. Even if the district court determines that relief was available under the IDEA and the ADA, the defendants argued the IDEA exhaustion provision would apply. *Id.* at 32.

⁶⁵ *Id.* at 20 (citing to testimony by Stacy Fry that a goal was to “develop independence in her movement, and to become independent in ‘utilizing the service dog’” (citing to Exhibit 12, at 12), and Brent Fry's testimony that an “‘educational goal’ [for E.F.] that year was ‘to be 100 percent independent when using Wonder’” (citing to Exhibit 13, at 14)). The defendants made similar arguments to the Supreme Court and on remand to the Sixth Circuit. Brief for Respondents at 43-44, *Fry v. Napoleon Cmty. Sch.*, 136 S. Ct. 2540 (2016) (No. 15-497), 2016 WL 5667526, at *47-48; Defendants-Appellees' Supplemental Brief at 27-32, *Fry*, 137 S. Ct. 743 (2017) (No. 14-1137), 2017 WL 2629921, at *19-24.

⁶⁶ Defendants' February 2018 Motion for Summary Judgment, *supra* note 53, at 26. The defendants also pointed out testimony that an educational goal was for Ehlena to use the dog independently—“to learn to use the service dog independently.” *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 26-30. See *infra* notes 135-48 and accompanying text (discussing IDEA regulations that could be applied to support including a service animal in an IEP).

⁶⁹ Defendants' February 2018 Motion for Summary Judgment, *supra* note 53, at 30.

request to have Ehlena be accompanied by her service animal at school.⁷⁰ The defendants contended that the Frys' attendance at an IEP meeting, where the service animal was the main issue of the IEP, and their disagreement with the results of that IEP meeting triggered the IDEA dispute resolution process, including the mediation process.⁷¹ If the Frys viewed the service animal request as distinct from the special education curriculum, the defendants asserted the Frys should have declined attendance at the IEP meeting and not participated in the IDEA mediation process.⁷²

ii. Responses to Motions for Summary Judgment

In their response to the Frys' motion for partial summary judgment, the defendants argued the facts of this case were the type of facts the Supreme Court raised concerns about, specifically shifting litigation strategies midstream.⁷³ They also reiterated that, given the full context of the services provided to Ehlena and the coverage of IDEA, the claim seeks relief for the denial of a FAPE.⁷⁴ The defendants also rejected the Frys' assertion that the Supreme Court had already determined the first clue (in the gravamen test)⁷⁵ in the Frys' favor, given the lack of a fact record in front of that court as well as the Supreme Court's lack of analysis on the definition of related services.⁷⁶

In the Frys' response to the defendants' motion for summary judgment, they argued the defendants essentially ignored the new standard set forth by the Supreme Court and the limited scope of the remand—to examine the history of the proceedings to determine

⁷⁰ *Id.* at 20-22.

⁷¹ *Id.* at 22-23.

⁷² *Id.* at 24-25.

⁷³ Defendants' Response to Plaintiffs' Partial Motion for Summary Judgment, Fry v. Napoleon Cmty. Sch., No. 12-15507 (E.D. Mich. Mar. 2, 2018) [hereinafter Defendants' Response, March 2018].

⁷⁴ *Id.* at 11. The defendants cited to the IDEA regulations discussed in their motion for summary judgment supporting the premise that "the IDEA requires schools to develop the student's ability to move around the environment as part of their special education program." *Id.* at 13. The defendants also asserted there was a significant volume of direct evidence supporting the argument that the Frys viewed allowing Wonder to accompany Ehlena as necessary to ensure she received a FAPE. *Id.* at 20-21.

⁷⁵ See *supra* note 36 and accompanying text.

⁷⁶ Defendants' Response, March 2018, *supra* note 73, at 25-26.

whether plaintiffs invoked the IDEA's administrative remedies prior to filing a lawsuit.⁷⁷ The Frys reiterated that the circumstances surrounding their participation in the IDEA procedures did not establish the gravamen of their complaint related to a denial of a FAPE.⁷⁸

The Frys also responded to the defendants' response to the Frys' motion for partial summary judgment.⁷⁹ The Frys reiterated some of the arguments in their response to the defendants' motion for summary judgment⁸⁰ and claimed that if the defendants' argument was adopted it would lead to perverse results—essentially it would allow schools to convene an IEP meeting any time a child receiving special education services requests an ADA accommodation, leading to the requirement of exhaustion of administrative remedies.⁸¹ The defendants' reply brief in support of their motion for summary judgment also reiterated the arguments set forth in their motion for summary judgment and refuted the claim by the Frys that adoption of its argument would have perverse results.⁸²

⁷⁷ Plaintiffs' Brief in Response to Defendants' Motion for Summary Judgment at 12-14, 28-29, Fry v. Napoleon Cmty. Sch., No. 12-15507 (E.D. Mich. Mar. 5, 2018).

⁷⁸ *Id.* at 18-28. In addition, the Frys argued the defendants would not be entitled to a judgment as a matter of law even in the event the defendants proved their allegations because of the application of the gravamen test. *Id.* at 17-18.

⁷⁹ Plaintiffs' Reply to Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment to Dismiss Defendants' Affirmative Defense of Failure to Exhaust Administrative Remedies, Fry v. Napoleon Cmty. Sch., No. 12-15507 (E.D. Mich. Mar. 16, 2018) [hereinafter Plaintiffs' Reply to Defendants' Response].

⁸⁰ *Id.* at 7-10. See *supra* notes 77-78 and accompanying text (discussing arguments, including that the defendants are not applying the Supreme Court's gravamen test).

⁸¹ Plaintiffs' Reply to Defendants' Response, *supra* note 79, at 11-12. The Frys also articulated a school could deny any ADA accommodation request on the basis it is "educationally unnecessary" rather than the standard of "unreasonable" under the ADA. *Id.* at 11.

⁸² Defendants, Napoleon Community Schools, Jackson County ISD and Pamela Barnes' Reply Brief in Support of Motion for Summary Judgment at 7-8, Fry v. Napoleon Cmty. Sch., No. 12-15507 (E.D. Mich. Mar. 19, 2018). The defendants argued that the IDEA administrative procedure is the most expedited process and puts the student and the student's education first with the least disturbance. *Id.* at 7. The defendants also contended that the Frys' approach would view accommodations narrowly, which is counter to the view of the Supreme Court that school districts should view special education services broadly. *Id.* at 8.

iii. Rulings on Motions for Summary Judgment

The district court denied both motions for summary judgment without prejudice.⁸³ In denying the motions, the district court cited to gaps in the evidence necessary to support facts alleged by the parties.⁸⁴ The district court agreed with the Supreme Court's application of the hypothetical questions relating to access⁸⁵ that the Frys' complaint is "not seeking relief for the denial of a FAPE," thus the history of the proceedings is the "clue" to be analyzed.⁸⁶ Because of the lack of evidence regarding the reasons the Frys "changed course" the district court determined "a summary judgment ruling is not appropriate at this time."⁸⁷ At the time of the writing of this Article, the parties had not settled this case, and, unless the district court grants a new motion for summary judgment, it appears likely the parties will continue the litigation until a conclusive decision by the district court.⁸⁸

D. Examples of Cases Involving Service Animals Applying the *Fry* Analysis

At the time of the writing of this Article, there were only a few cases relating to service animals in schools with reported opinions applying the *Fry* analysis.⁸⁹ In the *Doucette v. Jacobs* case, a Massachusetts district court dismissed the plaintiffs' federal claims relating to allowing a student to be accompanied by a service animal, concluding "that the gravamen of the Doucettes' federal claims are for the denial of a FAPE, and, therefore, that they had to exhaust their administrative remedies."⁹⁰ The *Doucette* court found the entire

⁸³ Opinion & Order Denying Motions for Summary Judgment Without Prejudice, *Fry v. Napoleon Cmty. Sch.*, No. 12-15507, 2018 WL 4030757, *1, *16 (E.D. Mich. Aug. 23, 2018).

⁸⁴ *Id.* at *8, *13.

⁸⁵ See *supra* note 41 and accompanying text (setting forth two hypothetical questions).

⁸⁶ *Fry*, 2018 WL 4030757, at *15.

⁸⁷ *Id.* at *16.

⁸⁸ Plaintiffs' Second Motion for Partial Summary Judgment to Dismiss Defendants' Affirmative Defense of Failure to Exhaust Administrative Remedies, *Fry v. Napoleon Cmty. Sch.*, No. 12-15507 (E.D. Mich. Sept. 25, 2018).

⁸⁹ See *infra* notes 90-96 and accompanying text (discussing cases applying the *Fry* analysis involving service animals in schools).

⁹⁰ *Doucette v. Jacobs*, 288 F. Supp. 3d 459, 472 (D. Mass. 2018). The federal claim relevant to the discussion in this Article was a claim of discrimination under Section 504 of the Rehabilitation Act based on the school's refusal to permit the student access to his service dog. *Id.* The Doucettes have appealed the district court decision. Brief of the Plaintiffs-Appellants,

complaint was based on the student's IEP in addition to citing to evidence that the plaintiffs utilized the IDEA's procedures to handle the dispute.⁹¹

The New Hampshire District Court also dealt with this issue in the *A.R. v. School Administrative Unit #23* (hereinafter "*Riley*") case.⁹² *Riley* dealt with a request, not to allow the service animal, but to provide a handler for the service animal while the student is at school.⁹³ A 2015 Report and Recommendation by a Magistrate Judge in the *Riley* case held the Rileys had not met their burden establishing a strong likelihood that they would prevail in their ADA and Rehabilitation Act claims at the preliminary injunction stage, but did not require exhaustion of administrative remedies under the IDEA.⁹⁴ The Rileys continued the litigation, and, after the *Fry* decision, the district court requested the parties provide memoranda addressing whether exhaustion of administrative remedies was required.⁹⁵ In October 2017 the district court issued an order finding "[t]o the extent the relief sought by the plaintiffs might be available at all, it is only available under the IDEA."⁹⁶

Notwithstanding the complicated history of the existing cases relating to the intertwined nature of the IDEA and ADA, there has been some clarification in recent years regarding the application of the

Rachel Doucette, for Herself and Minor Son, B.D.; Michael Doucette, for Himself and Minor Son, B.D., *Doucette v. Jacobs*, No. 18-1160 (1st Cir. June 4, 2018). The case was argued on September 6, 2018 before the United States Court of Appeals of the First Circuit.

⁹¹ *Doucette*, 288 F. Supp. 3d at 473. The *Doucette* court also found the plaintiffs were not excused from the IDEA exhaustion requirement for their federal claims on the basis of futility or undue burden. *Id.* at 475-77.

⁹² *A.R. v. Sch. Admin. Unit #23*, No. 15-cv-152-SM, 2017 WL 4621587 (D.N.H. Oct. 12, 2017).

⁹³ *Id.* at *1.

⁹⁴ *See Riley v. Sch. Admin. Unit #23*, No. 15-cv-152-SM, 2015 WL 9806795, at *7, *14 (D.N.H. Dec. 22, 2015); Order, *Riley v. Sch. Admin. Unit #23*, No. 15-cv-152-SM, 2016 WL 183525 (D.N.H. Jan. 14, 2016) (approving the Report and Recommendation). *See infra* notes 125-33 and accompanying text (discussing application of ADA regulations in a school environment regarding who controls the service animal).

⁹⁵ Order, *Riley v. Sch. Admin. Unit #23*, No 15-cv-152-SM (D.N.H. Mar. 10, 2017) (stating the "relief that is also (and perhaps only) available under the IDEA, thus requiring plaintiffs to first exhaust the IDEA's available administrative procedures" and requesting written memoranda to show cause why the case should not be stayed or dismissed).

⁹⁶ *A.R.*, 2017 WL 4621587, at *6. The Rileys have appealed this order to the First Circuit Court of Appeals. Brief of Appellants Jamie Riley and Allen Riley, No. 17-2106 (1st Cir. May 31, 2018).

ADA's service animal regulations in the context of the school environment.⁹⁷

III. ISSUES RELATING TO THE AMERICANS WITH DISABILITIES ACT SERVICE ANIMAL REGULATIONS

The ability to exclude service animals entirely is unlikely to be successful because the school district would need to show that it would be a fundamental alteration of the program or service to modify a no-animals policy.⁹⁸ Given the premise in the Titles II and III service animal regulations that “[g]enerally [an entity] shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability,” it is necessary for school districts to consider whether a particular aspect of the service animal regulations—including a contention that an animal does not meet the definition of service animal—supports an argument that an animal can be excluded.⁹⁹

This Part first sets forth the definition of service animal under Titles II and III of the ADA, then considers a few of the issues that have recently arisen in cases involving students who request their service animals be allowed to accompany them to school.¹⁰⁰ The

⁹⁷ See *infra* notes 98-134 and accompanying text (discussing ADA regulations and cases).

⁹⁸ 28 C.F.R. § 35.130 (2018); 28 C.F.R. § 36.302(a) (2018) (requiring modification unless the entity could demonstrate making such modification would fundamentally alter the program or service). An example of a situation where it could be a fundamental alteration in a program or service to allow service animals is a school for visually-impaired students that is based on a specific model called “nonvisual” where no visual aids are permitted (including service dogs because the student is then relying on the dog’s vision). *Dohmen v. Iowa Dep’t for the Blind*, 794 N.W.2d 295, 311-12, (Iowa Ct. App. 2010).

⁹⁹ 28 C.F.R. § 35.136(a) (2018); 28 C.F.R. § 36.302(c) (2018). A court rejected an argument by a school district that the DOJ exceeded its statutory authority in promulgating the service animal regulation. *Alboniga v. Sch. Bd. of Broward Cty. Fla.*, 87 F. Supp. 3d 1319 (S.D. Fla. 2015). The *Alboniga* court determined the Title II service animal regulations were “clearly a permissible interpretation of the ADA” and were “valid, [and] internally consistent.” *Id.* at 1334, 1337. Essentially the service animal regulations were a “specific application of the reasonable modifications [] requirement.” *Id.* at 1333. The same arguments are applied when a teacher requests a modification to allow a service animal in the classroom. *E.g.*, *Clark v. Sch. Dist. Five of Lexington & Richland Ctys.*, 247 F. Supp. 3d 734, 741 (D.S.C. 2017). See also Rebecca J. Huss, *Canines at the Company, Felines at the Factory: The Risks and Rewards of Incorporating Service Animals and Companion Animals into the Workplace*, 123 DICKINSON L. REV. 363, 381-83 (2019) [hereinafter Huss, *Workplace*] (discussing the *Clark* case).

¹⁰⁰ See *infra* notes 107-33 and accompanying text (discussing ADA cases). The author has written about several cases in previous articles and will not repeat the analysis provided

coverage of this Part of the Article is focused on regulations and litigation brought by parents on behalf of their children.¹⁰¹ However, as advocates and school districts are aware, the Department of Education (DOE) and Department of Justice (DOJ) both have jurisdiction to investigate complaints of disability discrimination allegedly occurring in the school environment.¹⁰²

A. Definition of Service Animal Under the Americans with Disabilities Act

The Title II and Title III ADA regulations regarding service animals essentially mirror each other.¹⁰³ Service animal is defined as “any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.”¹⁰⁴ The regulations provide examples of the type of work or tasks that can be performed by service animals and require such work or tasks to be “directly related to an individual’s disability.”¹⁰⁵ In addition, “the provision of emotional support, well-being, comfort, or

therein. Huss, *After Fry*, *supra* note 9, at 68-72; Huss, *Revisited*, *supra* note 3, at 14-27; Huss, *Classroom*, *supra* note 9, at 23-40.

¹⁰¹ See *supra* notes 103-33 and accompanying text (discussing regulation and issues raised in litigation).

¹⁰² *Information About Filing a Complaint with the U.S. Department of Justice, Civil Rights Division and U.S. Department of Education, Office for Civil Rights*, U.S. DEP’T JUSTICE, <https://www.justice.gov/sites/default/files/crt/legacy/2011/09/22/filecomp.pdf> (last visited Sept. 22, 2018) (discussing the mission, goals and processes of both agencies); *How to File a Complaint*, U.S. DEP’T JUSTICE, <https://www.justice.gov/crt/how-file-complaint> (last visited Sept. 22, 2018) (setting forth the work of the Educational Opportunities section of the DOJ); *How to File a Discrimination Complaint with the Office for Civil Rights*, U.S. DEP’T EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/howto.html> (last visited Sept. 22, 2018) (discussing the laws the Office for Civil Rights enforces). See also Huss, *Revisited*, *supra* note 3, at 27-36 (analyzing the jurisdiction by these government agencies and examples of administrative actions taken by them against school districts).

¹⁰³ 28 C.F.R. § 35.136 (2018) (Title II regulations); 28 C.F.R. § 36.302(c) (2018) (Title III regulations).

¹⁰⁴ 28 C.F.R. § 35.104; 28 C.F.R. § 36.104. Although an entity is required to use assessment factors to determine whether a miniature horse should be allowed into a facility, no other species of animal qualifies as a “service animal” under the Title II and Title III regulations. 28 C.F.R. §§ 35.104, 35.136(i); 28 C.F.R. §§ 36.104, 36.302(c)(9).

¹⁰⁵ 28 C.F.R. § 35.104; 28 C.F.R. § 36.104. It is clear in the regulations that service animals can be used by individuals with a wide range of disabilities including “helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors.” 28 C.F.R. § 35.104; 28 C.F.R. § 36.104.

companionship do not constitute work or tasks” under the Titles II and III regulation definition.¹⁰⁶

B. How “Individually Trained” Does a Service Animal Need to Be?

Both teachers and students have requested the ability to bring a service animal in training to school.¹⁰⁷ Because the ADA service animal regulation does not apply to service animals in training, the right of an individual to bring an animal in training to school is dependent on state law.¹⁰⁸ To be more specific, if the person training the animal is not an individual with a disability, a state law is the only

¹⁰⁶ 28 C.F.R. § 35.104; 28 C.F.R. § 36.104. *But see infra* note 137 and accompanying text (discussing how an animal providing emotional support may be allowed at school as part of a student’s IEP). The ADA Titles II and III definition of service animal is more restrictive than the likely interpretation of service animal under Title I of the ADA. Huss, *Workplace*, *supra* note 99, at 374-79. In addition, it is clear that the Department of Housing and Urban Development’s (hereinafter “HUD”) definition of “assistance animal” for purposes of accommodation under the Fair Housing Amendments Act includes emotional support animals. *Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs*, FHEO 2013-01, HUD OFFICE FAIR HOUSING & EQUAL OPPORTUNITY (Apr. 25, 2013), https://www.hud.gov/sites/documents/SERVANIMALS_NTCFHEO2013-01.PDF (defining assistance animal as one who “works, provides assistance, or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates one or more identified symptoms or effects of a person’s disability”).

¹⁰⁷ Christina Lorey, *Iowa Students Training Puppy as a Service Dog*, WQAD, <http://wqad.com/2017/09/20/iowa-students-training-puppy-as-a-service-dog/> (last updated Sept. 20, 2017, 8:27 PM) (providing an example of a school district that allows a teacher to bring in a service dog-in-training and how the students assist with the training); Jeffrey Solocheck, *Teacher Asks Pasco County School Board to Revise Its Policy on Service Animals*, TAMPA BAY TIMES (Apr. 18, 2018), <http://www.tampabay.com/blogs/gradebook/2018/04/18/teacher-asks-pasco-county-school-board-to-revise-its-policy-on-service-animals/> (providing an example of a request to allow a teacher to bring a service animal-in-training to school). *See also* Huss, *Classroom*, *supra* note 9, at 55-59 (discussing service animals-in-training in school environments, including describing a program supported by a school where students train service animals).

¹⁰⁸ *Frequently Asked Questions about Service Animals and the ADA*, U.S. DEP’T JUSTICE, C.R. DIVISION, at Q6, July 20, 2015, https://www.ada.gov/regs2010/service_animal_qa.pdf [hereinafter DOJ FAQ] (answering “no” to the question “[a]re service-animals-in-training considered service animals under the ADA”). *See also* Huss, *Classroom*, *supra* note 9, at 55-60 (analyzing issues relating to service animals-in-training in school environment); Rebecca J. Huss, *A Conundrum for Animal Activists: Can or Should the Current Legal Classification of Certain Animals Be Utilized to Improve the Lives of All Animals? The Intersection of Federal Disability Laws and Breed Discriminatory Legislation*, 2015 MICH. ST. L. REV. 1561, 1593-97 (2015) [hereinafter Huss, *Conundrum*] (analyzing the service animals-in-training issue). Most states have provided for individuals with service animals-in-training to have access to public accommodations under their state anti-discrimination laws. *Id.*

possible pathway to access.¹⁰⁹ State anti-discrimination laws may exclude schools from the list of public accommodations or entities that are covered by such laws.¹¹⁰

However, because the definition of service animal under the ADA only requires the animal to be “individually trained” to do work or perform tasks,¹¹¹ it is possible for disputes to arise regarding the minimum level of training for dogs partnered with students with disabilities.¹¹² Because service animals may need continued training during the time they are partnered with an individual with a disability, and the work or tasks a service animal performs may change, the initial focus would be on whether there is any work or task being performed by the service animal for the benefit of the student with a disability.¹¹³

¹⁰⁹ See, e.g., *Clark Cty. Sch. Dist. v. Buchanan*, 924 P.2d 716 (Nev. 1996) (analyzing the right of a teacher to bring a service animal-in-training to school under state law); *Naegle v. Canyons Sch. Dist.*, No. 2:17-cv-23-DB, 2018 WL 2376336, at *3 (D. Utah May 24, 2018) (holding “Utah law does not require a school district to allow a service animal in training accompanied by a non-disabled student”).

¹¹⁰ E.g., *Naegle*, 2018 WL 2376336, at *4 (finding the public places in the Utah statute requiring accommodations that would allow service animals-in-training “do not include a classroom” in a case where a non-disabled student requested to be allowed to bring a service animal-in-training to school).

¹¹¹ See *supra* notes 104-05 (providing definition of service animals); DOJ, FAQ, *supra* note 108, at Q6 (stating “[u]nder the ADA, the dog must already be trained before it can be taken into public places”). Individual training can come in a variety of forms. For example, in 2017 the DOE OCR found a school district violated Title II of the ADA by including in its policy a requirement that a service animal be provided individual training “even if group or some other type of training would be sufficient under the regulation.” Mary Beth McLeod, Program Manager, OCR Complaint #09-16-7004, *Letter to David Vierra, Superintendent, Antelope Valley Union High School District*, U.S. DEP’T EDUC., OFFICE FOR C.R. (May 4, 2017), at 5, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09167004-a.pdf> [hereinafter *Letter from Mary Beth McLeod*].

¹¹² For example, in 2015 a school district entered into a Voluntary Resolution Agreement with the DOE OCR due to a complaint arising after an individual described her service animal as “in training” and the school administrator was confused over whether the person with the animal was training the animal for use by another individual. Barbara Wery, Team Leader, *Letter to Kurt Hilyard, Superintendent, Union Gap School District No. 2*, U.S. DEP’T EDUC., OFFICE FOR C.R. (Aug. 28, 2015), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09167004-a.pdf>. See also Huss, *Revisited*, *supra* note 3, at 42-43 (describing a conflict that occurred when a teacher believed a student’s service dog was not properly trained).

¹¹³ Cf. *United States v. Dental Dreams, LLC*, 307 F. Supp. 3d 1224, 1249-50 (D.N.M. 2018) (acknowledging a service dog was still in training but finding evidence that the animal would perform some work for the benefit of the plaintiff in an employment dispute applying Title III of the ADA).

C. Impact on Others in the Classroom

It is not unusual for school districts to argue that allowing a service animal in the classroom would have a detrimental impact on others in the building.¹¹⁴ DOJ guidance articulates “[a]llergies and fear of dogs are not valid reasons for denying access . . . to people using service animals.”¹¹⁵ The DOJ guidance states if a person who is allergic to dogs and a person using a service animal must be in the same room, “they both should be accommodated by assigning them, if possible, to different locations within the room or different rooms.”¹¹⁶ This can be an especially complicated issue for school districts as there may be students with allergies to animals, but other students may use service animals to ensure that their environment is free of allergens (such as peanuts).¹¹⁷

A service animal can be excluded if the animal is “out of control and the animal’s handler does not take effective action to

¹¹⁴ *E.g.*, *C.C. v. Cypress Sch. Dist.*, No. SACV 11-352 AG (MLGx), 2011 U.S. Dist. LEXIS 88287 (C.D. Cal. June 13, 2011) (providing an example of a case where school district raised concerns about impact on other students if a student was accompanied by his service animal). Parents of children with allergies may also raise concerns. Thomas E. Ciapuci, Supervisory Team Leader, *Letter to Nancy Hall, Executive President, West Gilbert Charter Elementary School, Inc.*, U.S. DEP’T EDUC., OFFICE FOR C.R. (June 30, 2015), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/08141282-a.pdf> [hereinafter *Letter from Thomas E. Ciapuci*] (reporting on investigation triggered by parent of child with allergies who complained her child was negatively impacted by another student being allowed to bring a service animal to school). *Cf.* *Greene v. New England Suzuki Inst.*, No. 2:18-cv-00141-JAW, 2018 WL 3097320 (D. Me. June, 22 2018) (discussing dispute between parents of child with allergies to furred animals and summer camp allowing visiting animals).

¹¹⁵ *Service Animals*, U.S. DEP’T JUSTICE, C.R. DIVISION (July 12, 2011), https://www.ada.gov/service_animals_2010.htm [hereinafter DOJ, *Service Animals*].

¹¹⁶ *Id.* (using a school classroom as an example of this situation). Examples of other actions a school may take are additional cleaning, adjustment of traffic patterns, and installation of filters. *Letter from Thomas E. Ciapuci, supra* note 114, at 3. The West Gilbert Charter Elementary School, Inc., was found in violation, notwithstanding the measures it took to address concerns of a parent of a student with allergies, because it did not evaluate the student for eligibility for services under Section 504, although the DOE OCR did not take a position on whether the student with the allergy or asthma is a student with a disability. *Letter from Thomas E. Ciapuci, supra* note 114, at 6.

¹¹⁷ *Resolution Agreement, XXX County School Dist., OCR Docket Number 04-13-1318*, U.S. DEP’T EDUC., OFFICE FOR C.R. (Apr. 2, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/04131318-b.pdf> (providing an example of a Resolution Agreement entered into between the DOE OCR and a school district relating to a student who needs a peanut-free environment and utilizes a service animal and the actions that should be taken if others in the building are allergic to the animal).

control it.”¹¹⁸ Although there is no specific language in the Titles II and III regulations relating to when a service animal is a threat, there is a definition of “direct threat” in the regulations.¹¹⁹ Direct threat is defined as “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.”¹²⁰ In order to determine the risk, the regulations require an entity to make an individualized assessment using objective evidence.¹²¹ In addition, entities are required to consider the probability of an injury occurring and the “nature, duration, and severity of the risk.”¹²²

When considering whether a particular animal is a threat, school districts cannot exclude such animal from the premises merely based on the breed of a dog.¹²³ The DOJ’s guidance on the ADA

¹¹⁸ 28 C.F.R. § 35.136(b) (2018); 28 C.F.R. § 36.302(c)(2) (2018). A school district may also exclude an animal if the animal is not housebroken. *Id.* However, a rare “accident” by a service animal is likely insufficient to show an animal is not housebroken. Thomas A. Mayes, *ADA Regulations on Service Animals, Memorandum to the Division of Learning and Results, AEA Directors of Special Education*, IOWA DEP’T EDUC. (Sept. 19, 2013), at 3, <https://www.educateiowa.gov/sites/files/ed/documents/Service%20Animal%20Guidance.pdf> [hereinafter Mayes Memorandum] (stating “an individual’s IEP team may . . . determine that a comfort or emotional support animal is required to provide a FAPE to an eligible individual”).

¹¹⁹ When the DOJ was revising the service animal regulations, it considered adding language allowing for exclusion of the service animal if the animal posed “a direct threat to the health or safety of others”; however, the DOJ did not include this language in the final regulations, stating it believed the general “direct threat” language in the regulations was sufficient. Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56,164, 56,197 (Sept. 15, 2010) (codified at 28 C.F.R. pt. 35) [hereinafter Title II Regulation Guidance]; Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56,236, 56,271 (Sept. 15, 2010) (codified at 28 C.F.R. pt. 36) [hereinafter Title III Regulation Guidance] (providing guidance on and implementing the final regulations for Title II and Title III of the ADA).

¹²⁰ 28 C.F.R. § 35.104; 28 C.F.R. § 36.104.

¹²¹ 28 C.F.R. § 35.139; 28 C.F.R. § 36.208.

¹²² 28 C.F.R. § 35.139; 28 C.F.R. § 36.208.

¹²³ The DOJ’s guidance to the ADA Title II and Title III regulations states:

The Department does not believe that it is either appropriate or consistent with the ADA to defer to local laws that prohibit certain breeds of dogs based on local concerns that these breeds may have a history of unprovoked aggression or attacks. Such deference would have the effect of limiting the rights of persons with disabilities under the ADA who use certain service animals based on where they live rather than on whether the use of a particular animal poses a direct threat to the health and safety of others.

Title II Regulation Guidance, *supra* note 119, at 56,194; Title III Regulation Guidance, *supra* note 119, at 56,268 (implementing the final regulations for Title II and Title III of the ADA and providing guidance on changes in the regulations). *See also Frequently Asked Questions*

regulations addressed this issue, and it determined excluding an animal solely based on the breed of the dog is inconsistent with the ADA—in fact, it concluded such a restriction would “have the unintended effect of screening out the very breeds of dogs that have successfully served as service animals for decades.”¹²⁴

D. Responsibility for and Control of the Service Animal

The Title II and Title III regulations state an entity “is not responsible for the care or supervision of a service animal.”¹²⁵ Care and supervision has been interpreted by one court as “feeding, watering, walking or washing the animal.”¹²⁶ The ADA regulations also state “[a] service animal shall be under the control of its handler.”¹²⁷ The DOJ has provided limited guidance interpreting what being “under control” means.¹²⁸ The DOJ recognizes that generally “the handler will be the individual with a disability or a third party who accompanies the individual with a disability.”¹²⁹ In settings such as primary and secondary schools, DOJ guidance articulates “the school or similar entity may need to provide some assistance to enable a particular student to handle his or her service animal.”¹³⁰

Case law illustrating the extent to which a student must control an animal in order to be considered a handler has established a fairly

About Service Animals and the ADA, U.S. DEP’T JUSTICE, C.R. DIVISION (July 20, 2015), https://www.ada.gov/regs2010/service_animal_qa.html (stating the “ADA does not restrict the type of dog breeds that can be service animals . . . [and a] service animal may not be excluded based on assumptions or stereotypes about the animal’s breed or how the animal might behave”). See also Huss, *Conundrum*, *supra* note 108, at 1574-87 (analyzing why breed-discriminatory legislation cannot be applied to individuals utilizing service animals under the ADA).

¹²⁴ Title II Regulation Guidance, *supra* note 119, at 56,194; Title III Regulation Guidance, *supra* note 119, at 56,268 (citing to jurisdictions with laws restricting German Shepherds). The DOJ guidance also cites to regulations that prohibit animals over a certain weight that have the effect of restricting breeds even in the absence of an express breed ban. Title II Regulation Guidance, *supra* note 119, at 56,191; Title III Regulation Guidance, *supra* note 119, at 56,268.

¹²⁵ 28 C.F.R. § 35.136(e); 28 C.F.R. § 36.302(c)(5).

¹²⁶ *Alboniga v. Sch. Bd. of Broward Cty. Fla.*, 87 F. Supp. 3d 1319, 1343 (S.D. Fla. 2015); see also Huss, *After Fry*, *supra* note 9, at 72 (discussing care or supervision requirement).

¹²⁷ 28 C.F.R. § 35.136(d); 28 C.F.R. § 36.302(c)(4).

¹²⁸ DOJ, FAQ, *supra* note 108, at Q27 (answering question “[w]hat does under control mean?”).

¹²⁹ *Id.*

¹³⁰ *Id.*

broad interpretation of the ADA regulation language.¹³¹ If a handler is unable to use a harness, leash or other tether, the handler can use other “effective means” such as voice control or signals to control the animal.¹³² However, when a student cannot be physically connected to the animal (such as via tether), and cannot otherwise control the animal, an issue arises whether the ADA regulation that the animal is under the handler’s control is being met.¹³³

If a student’s request to bring an animal to school can be denied because the animal does not meet the definition of service animal, or the circumstances are such that another of the ADA regulations would allow for the exclusion of the animal, the IDEA may be a way to use federal law to support the claim.¹³⁴

IV. WHY THE IDEA MAY SUPPORT A STUDENT’S REQUEST FOR A SERVICE ANIMAL EVEN IF THE ADA DOES NOT

Because of the exhaustion of administrative remedies requirement in the IDEA, advocates of students partnered with service animals logically would choose to argue the ADA, rather than the IDEA, is applicable to the request for modification of a no-animals-allowed policy at a school.¹³⁵ However, as discussed above, there are circumstances under which the ADA would not support a claim for access.¹³⁶

For example, during the process of developing an IEP, the IEP team may determine, even if an animal does not meet the definition of service animal under the ADA, it is appropriate for an emotional support animal to be allowed at the school in order for the student to receive a FAPE.¹³⁷

¹³¹ See Huss, *After Fry*, *supra* note 9, at 67-73.

¹³² 28 C.F.R. § 35.136(d); 28 C.F.R. § 36.302(c)(4).

¹³³ 28 C.F.R. § 35.136(d); 28 C.F.R. § 36.302(c)(4).

¹³⁴ See *infra* notes 135-48 and accompanying text (analyzing why allowing an animal may be part of an IEP or required to provide a FAPE). As discussed in previous articles, state laws may provide additional rights to students with disabilities. Huss, *Revisited*, *supra* note 3, at 41-46; Huss, *Classroom*, *supra* note 9, at 46-51.

¹³⁵ See *supra* note 26 and accompanying text (discussing the argument made by the defendants in the *Fry* case that the ability to bring Wonder to school was appropriately raised in the context of Ehlana’s IEP under the IDEA).

¹³⁶ See *supra* notes 107-34 and accompanying text (discussing issues under the ADA).

¹³⁷ Mayes Memorandum, *supra* note 118, at 2. See *supra* notes 104-05 and accompanying text (defining service animal).

As highlighted in defendants' arguments in the *Fry* case,¹³⁸ providing special education and related services to prepare students for independent living is listed as one of the purposes of the IDEA.¹³⁹ The definition of "special education" in the IDEA regulations includes "travel training."¹⁴⁰ Travel training is defined in the regulation as the provision of:

instruction, as appropriate, to children with significant cognitive disabilities, and any other children with disabilities who require this instruction, to enable them to— . . . (ii) [l]earn the skills necessary to move effectively and safely from place to place within that environment (e.g., in school, in the home, at work, and in the community).¹⁴¹

Related services in the IDEA regulations include orientation and mobility related services.¹⁴² This definition is specifically related to visually-impaired students; however, one example of note provided in the regulations is teaching children "[t]o use . . . a service animal . . . as a tool for safely negotiating the environment for children with no available travel vision."¹⁴³ Another "related service" defined in the IDEA regulations is physical and occupational therapy as well as other supportive services.¹⁴⁴ Occupational therapy includes "improving the ability to perform tasks for independent functioning if functions are impaired or lost."¹⁴⁵

¹³⁸ See *supra* notes 65–69 and accompanying text (discussing arguments made by the defendants on remand).

¹³⁹ 20 U.S.C. § 1400(d)(1)(A) (2018) (stating as a purpose of the chapter "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living").

¹⁴⁰ 34 C.F.R. § 300.39(a)(2)(ii) (2018).

¹⁴¹ *Id.* § 300.39(b)(4). Special education also includes instruction in physical education. *Id.* § 300.39(a)(1)(ii). Physical education is defined as "A) [p]hysical and motor fitness; B) [f]undamental motor skills and patterns; and . . . [includes] movement education." *Id.* § 300.39(b)(2).

¹⁴² *Id.* § 300.34(a), (c)(7).

¹⁴³ *Id.* § 300.34(c)(7).

¹⁴⁴ *Id.* § 300.34(a).

¹⁴⁵ *Id.* § 300.34(c)(6). An additional possible related service that might serve to support service animal access in order to receive a FAPE is the requirement for transportation that is necessary to assist a child with a disability to benefit from special education. *Id.* § 300.34(a). Transportation includes "[t]ravel in and around school buildings" as well as to and from school. *Id.* § 300.34(c)(16).

The DOE, while articulating the right of a student to use a service animal is independent of the student's ability to receive a FAPE, has acknowledged that "a student's receipt of a FAPE may be enhanced or supplemented by the use of a service animal, a service animal is not required in any way to enhance or increase the student's ability to receive or the actual receipt of a FAPE."¹⁴⁶

However, because a FAPE includes special education and related services, provided in conformity with an IEP, given how broadly special education and related services are defined, it is arguable in order to provide a particular student a FAPE (rather than enhance or increase the student's ability to receive a FAPE), allowing the student to be accompanied by a service animal may be required under the IDEA.¹⁴⁷ In addition, as illustrated in the *Riley* case, discussed *supra*, if providing a handler for a service animal is required in order for a student to receive a FAPE (even if access has already been granted), it could be required under the IDEA.¹⁴⁸

V. CONCLUSION

With the Supreme Court's decision in the *Fry* case, advocates for students and school districts now have a standard to apply when determining whether the ADA or IDEA applies to a claim by a student that he or she should be allowed to bring a service animal to school.¹⁴⁹ Over time disputes centered on whether advocates are required to exhaust administrative procedures under the IDEA should diminish as cases provide interpretations of the gravamen standard—if advocates are thoughtful about how to approach school districts with their requests for either access under the ADA or assistance in learning under the IDEA.¹⁵⁰

¹⁴⁶ Letter from Mary Beth McLeod, *supra* note 111.

¹⁴⁷ 20 U.S.C. § 1401(9) (2018).

¹⁴⁸ Brief of Appellee School Administrative Unit #23, a/k/a/ SAU #23 at 5, *Riley v. School Admin. Unit #23*, No. 17-2106 (1st Cir. June 7, 2018) (arguing that the dispute regarding a school district's obligation to provide a handler for a service dog is one of related services of educational support and thus IDEA exhaustion is necessary); *Mayes Memorandum*, *supra* note 118, at 7 (emphasizing that "providing the handler must be *necessary* to receive a FAPE, not merely beneficial, helpful, or advisable").

¹⁴⁹ *See supra* notes 37-44 and accompanying text (setting forth the standard established by the Supreme Court).

¹⁵⁰ *See supra* notes 135-48 and accompanying text (considering aspects of the IDEA that may support inclusion of a service animal at school).

School districts should also note the evolving analysis regarding the application of the ADA service animal regulations.¹⁵¹ As the focus of cases shifts from whether the IDEA exhaustion of administrative procedures is required to the substance of the requests, school districts need to ensure that they do not run afoul of the ADA by applying policies or procedures that do not reflect current legal standards.¹⁵²

¹⁵¹ See *supra* notes 98-134 and accompanying text (analyzing issues involving the ADA regulations).

¹⁵² E.g., Letter from Mary Beth McLeod, *supra* note 111, at 5 (providing an example of a school district that the DOE OCR determined violated Title II by including requirements in its policy not permitted by the ADA service animal regulations, such as a requirement for liability insurance and vaccinations in excess of state and local law); Huss, *After Fry*, *supra* note 9, at 73 (discussing a case interpreting a prohibition of surcharges regulation).