# CANINES IN THE CLASSROOM: ISSUES RELATING TO SERVICE ANIMALS IN PRIMARY AND SECONDARY EDUCATIONAL INSTITUTIONS AFTER *FRY V. NAPOLEON COMMUNITY SCHOOLS*

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*The Supreme Court's decision in* Fry v. Napoleon Community Schools *in February 2017 provides important guidance for advocates for students with disabilities partnered with service animals and school districts, however, areas of potential conflict remain. This Article reviews that Supreme Court decision and analyzes other recent cases to illustrate some of the complicated issues that may arise when students with disabilities want to be accompanied by their service animals in schools.*



## I. INTRODUCTION[1]

It may be inevitable that clashes will occur between advocates for students with disabilities and some school districts over the inclusion

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[1] As explained in the introduction to this series of papers, this Article is the result of a presentation at the Association of American Law Schools Annual Meeting in January 2017 for a panel titled *Animals as Living Accommodations*. This is the third article written by this author on the topic of service animals in primary and secondary educational institutions. The previous articles are: Rebecca J. Huss, *Canines in the Classroom: Service Animals in Primary and Secondary Educational Institutions*, 4 J.

of service animals—an environment that has not been asked to accommodate service animals to a great extent historically.[2] There is no definitive census but it appears the number of persons with disabilities partnering with service animals is growing.[3] The number of juveniles partnered with service animals also is estimated to be increasing.[4] The

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ANIMAL L. & ETHICS 11 (2011) [hereinafter Huss, *Classroom*]; 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 (2016) [hereinafter Huss, *Revisited*]. This Article focuses on issues that have arisen since the author's 2016 article on the subject and, due to page limitations allocated for this series of articles, it is narrow in scope. For example, this Article focuses on reported cases discussing federal law. Previous articles analyzed administrative decisions and the role state law plays in these disputes. Huss, *Classroom*, *supra*, at 46–51; Huss, *Revisited*, *supra*, at 27–35, 38–46. This Article does not discuss the use of therapy animals in a classroom environment. A discussion of some legal issues relating to that topic 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). Finally, this Article does not discuss the significant ethical and welfare issues involved in having service animals as living accommodations. The author's previous work has discussed this issue. Huss, *Classroom*, *supra*, at 18–19; Huss, *Revisited*, *supra*, at n.6 (citing the author's earlier work on ethical issues and providing additional references). Readers interested in this area of the law are encouraged to read this author's previous work on the issue.

[2] *See, e.g.*, Donna Jackel, *Parents Take on School Districts Refusing Service Dogs*, BARK, https://thebark.com/content/parents-take-school-districts-refusing-service-dogs [https://perma.cc/4FZ2-HX26] (accessed Jan. 19, 2017) (citing experts who state that over the previous five years the number of legal disputes has increased and one service dog organization estimates 10–20% of families have had issues with schools accepting service dogs); Diane C. Lore, *Service Dogs in the Classroom Pose a Challenge for City's Public Schools*, SILIVE.COM (Aug. 27, 2015), http://www.silive.com/news/2015/08/doe_has_no_policy_for_service.html [https://perma.cc/X37Y-RZNV] (accessed Jan. 19, 2017) (discussing how service animals in classrooms pose a challenge for principals and how in most of the cases in the district where students are accompanied by services animals the parents "have had to go to court to force compliance"). As discussed in a previous article, there is no way to determine the number of occurrences where there is conflict over a student being partnered with a service animal in school. Huss, *Revisited*, *supra* note 1, at 35–36.

[3] One estimate of the number of dogs that would meet the definition of service animal under the Americans with Disabilities Act regulations in the United States is 100,000 to 200,000. CAL. SENATE BUS. PROF. & ECON. DEV. COMM., FAKE SERVICE DOGS, REAL PROBLEM OR NOT?: HEARING ON THE POSSIBLE USE OF FAKE SERVICE DOGS AND FAKE IDENTIFICATION BY INDIVIDUALS TO OBTAIN SPECIAL ACCESS TO HOUSING, PUBLIC PLACES OR AIRPORTS/AIRLINES FOR THEIR ANIMAL, 2013–14 session, at 7 (2014), http://sbp.senate.ca.gov/sites/sbp.senate.ca.gov/files/Background%20Paper%20for%20Fake%20Service%20Dog%20Hearing%20%282-14-14%29.pdf [https://perma.cc/A5R6-4KNA] (accessed Jan. 19, 2017).

[4] Huss, *Classroom*, *supra* note 1, at 13–16 (discussing the increased demand for service animals for juveniles). As with service animals generally, there is no definitive census of the number of students requesting that they be allowed to bring a service animal to primary or secondary schools; however, the United States Department of Education's survey of special education teachers now asks whether a student has had the assistance of a service animal while at school. DEP'T OF EDUC., APPENDIX E: FOURTH-GRADE SPECIAL EDUCATION TEACHER QUESTIONNAIRES, at 13 (2011) www.reginfo.gov/public/do/DownloadDocument?objectID=56069501 [https://perma.cc/9BNR-ZABA] (ac-

focus of this Article is on students with disabilities who wish to be accompanied by their service animals in a primary and secondary school environment.[5] Although the Supreme Court decision in *Fry v. Napoleon Community Schools* in February 2017[6] provides some guidance on the resolution of one of the major issues that has arisen in the past, areas of potential conflict remain between advocates for students with disabilities and school districts.[7]

This Article first reviews the *Fry v. Napoleon Community Schools* case focusing on the Supreme Court process and decision.[8] It next analyzes other recent cases that illustrate some of the issues that are likely to continue to arise in these conflicts.[9] Finally, the Article concludes by discussing some of the challenges facing school districts and advocates involved with these cases.[10]

The *Fry* case illustrated the challenge facing advocates and school districts when multiple federal laws could apply to the same fact pattern.[11] Specifically, the case dealt with the intersection of the Individuals with Disabilities Education Act (IDEA)[12] and the Americans with Disabilities Act (ADA).[13] Section 504 of the Rehabilitation Act also applies to educational programs due to the federal financial assistance that such programs receive; however, because it is often referenced

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cessed Jan. 19, 2017). This is a survey that is part of the Department of Education's Early Childhood Longitudinal Study, Kindergarten Class of 2010–2011. *Id.* at 1, 3. Note that this survey only captures information about students who have an Individualized Educational Program. *Id.* at 3. Students utilizing service animals may not be receiving special education services and thus would not be included in this survey. However, over time, the results of this survey may allow for a better sense of the prevalence of service animals in schools.

[5] Note that issues relating to adult visitors to and employees of these institutions partnered with service animals will not be discussed in this Article. *See generally* Huss, *Revisited*, *supra* note 1, at n.230 (discussing visitors to schools); Laura Rothstein, *Puppies, Ponies, Pigs, and Parrots—Policies, Practices, and Procedures in Pubs, Pads, Planes, and Professions—Where We Live, Work, and Play, and How We Get There—Animal Accommodations in Public Places, Housing, Employment, and Transportation*, 24 ANIMAL L. 13 (2018) (discussing a 2017 case involving an employee's request to be allowed to bring her service dog with her to school).

[6] Fry v. Napoleon Cmty. Sch., 137 S. Ct. 743 (2017).

[7] *See infra* notes 102–72 and accompanying text (discussing issues relating to the ADA that arise in these cases).

[8] *See infra* notes 20–99 and accompanying text (discussing *Fry v. Napoleon Community Schools*).

[9] *See infra* notes 102–72 and accompanying text (discussing recent cases).

[10] *See infra* notes 172–79 and accompanying text (discussing challenges in these cases).

[11] *See supra* note 6, at 746 (discussing multiple federal statutes that protect the interests of children with disabilities).

[12] Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1482 (2012). *See* Rothstein, *supra* note 5, at 22 (providing more information about the IDEA); LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW § 2.7 (2009) (discussing the IDEA).

[13] Equal Opportunity for Individuals with Disabilities, 42 U.S.C. §§ 12131–12165 (2012); 42 U.S.C. §§ 12181–12189 (2012).

secondarily to the ADA and IDEA, it will not be analyzed separately in this Article.[14]

The ADA requires public entities and places of accommodation (including schools) to grant access and make reasonable modifications for individuals with disabilities.[15] Under the IDEA, states are required to establish policies so an individualized education program (IEP) is established for each student with a disability in order to ensure that such student receives a free appropriate public education (FAPE).[16] Before an advocate for a student with a disability can file a lawsuit under the IDEA, administrative procedures set forth in that statute must be exhausted.[17] It has been quite common for this exhaustion of remedies argument to be raised by school districts when an advocate for a student with a disability requests that a service animal be allowed to assist the student in school.[18] The *Fry* case resulted in guidance for advocates and school districts dealing with that issue.[19]

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[14] Rehabilitation Act of 1973, 29 U.S.C. § 794 (2012). For more information about the Rehabilitation Act, *see* ROTHSTEIN & IRZYK, *supra* note 12, § 2.53 (discussing Section 504 of the Rehabilitation Act). Occasionally Section 504 of the Rehabilitation Act becomes more important, especially if the dispute is with a private school. In a recent Pennsylvania case the only two claims that survived to the trial verdict stage were allegations that the private school violated a student's rights under the Rehabilitation Act and was negligent under state law. Verdict Slip, Berardelli v. Allied Servs. Inst. of Rehab. Med., No. 3:14-0691, 2015 BL 61005 (M.D. Penn. Feb. 3, 2017). The jury found in favor of the school in this case. *See id*. (answering "no" to questions regarding a violation of the student's rights under the Rehabilitation Act and negligence). Some of the history of this case (note the plaintiff is sometimes referred to as Bardelli in court documents) is analyzed in one of the author's prior articles. Huss, *Revisited, supra* note 1, at 21–22. The allegations in this case did not relate to any of the issues highlighted as areas of concern below, *see infra* notes 102–72 and accompanying text, but focused on other issues relating to accommodations including concerns over a seizure alert service dog being distracting and issues with another student's allergies. Berardelli v. Allied Serv. Inst. of Rehab. Med., 2016 WL 5723724, at *1–2 (M.D. Penn. Sept. 30, 2016).

[15] *See generally* 42 U.S.C. §§ 12101–12213 (2012) (amended by the ADA Amendments Act of 2008, Pub. L. No. 110-325 (2008)) (providing requirements for public entities and places of accommodation in terms of assisting disabled individuals).

[16] 20 U.S.C. §§ 1412(a)(4), 1414(d)(1)(A)(i). Free appropriate public education is defined, in part, as "special education and related services that . . . include an appropriate . . . education in the State involved; and are provided in conformity with the individualized education program." 20 U.S.C. § 1401(9).

[17] 20 U.S.C. § 1415(*l*).

[18] *See* Huss, *Revisited*, *supra* note 1, at n.33–164 and accompanying text (discussing cases where this issue was raised by school districts).

[19] *See infra* notes 20–99 and accompanying text (discussing the *Fry v. Napoleon Community Schools* case).

## II. *FRY V. NAPOLEON COMMUNITY SCHOOLS*[20]

### *A. History of the Case*

The *Fry* case was closely watched by advocates for persons with disabilities.[21] Ehlena Fry began training with a service dog named Wonder in 2008.[22] By the time of the Supreme Court decision in February 2017, Wonder had been retired from his role as a service dog.[23] Ehlena[24] has cerebral palsy and Wonder was trained to assist her with mobility and physical tasks.[25] Initially, Ehlena's elementary school refused permission to allow Wonder to accompany her to school.[26] The school agreed to a trial period for a few months later in the school year but informed the Frys that Wonder would not be allowed back at the school the next academic year.[27] In response, the Frys filed a complaint with the Office of Civil Rights at the Department of Education (OCR DOE) under the ADA and Section 504 of the Rehabilitation Act.[28] In response to the OCR DOE's finding that the school violated the ADA for refusing to permit Wonder to accompany Ehlena, the school agreed to allow Ehlena to attend school with Wonder beginning in the fall of 2012.[29] The Frys decided to enroll Ehlena in a different school district the next fall that had no opposition to Wonder accompanying Ehlena.[30]

The Frys filed suit in December 2012 seeking damages under the ADA and Section 504 of the Rehabilitation Act based on the school's failure to accommodate between fall 2009 and spring 2012.[31] The district court granted the school's motion to dismiss, holding that the

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[20] A more comprehensive review of the history and lower courts' decisions can be found in a previous article. Huss, *Revisited*, *supra* note 1, at 8–13. For purposes of this discussion, the elementary school and school district will be referred to as the "school."

[21] Richard Wolf, *'Ruff' Justice: Supreme Court Rules for Disabled Girl, Service Dog*, USA TODAY (Feb. 22, 2017), https://www.usatoday.com/story/news/politics/2017/02/22/supreme-court-disabled-girl-wonder-service-dog/98214948/ [https://perma.cc/4AWR-XGGB] (accessed Jan. 19, 2017).

[22] Fry v. Napoleon Cmty. Sch., 788 F.3d 622, 624 (6th Cir. 2015). A request for rehearing this case en banc was denied on August 5, 2015. Order, *Fry*, 2015 BL 185839 (No. 14-1137).

[23] Wolf, *supra* note 21.

[24] Students' first names are used in this Article merely to simplify the description of the facts of the cases; no disrespect is intended.

[25] *Fry*, 788 F.3d at 624. At the time the dispute over allowing Wonder to accompany Ehlena to school arose, Ehlena was not able to handle Wonder on her own, but Ehlena would develop this ability in the future. *Id.* The initial inability of Ehlena to handle Wonder independently was not central to the issue in this case; however, as seen in *infra* notes 110–48 and accompanying text, this is an issue in other cases.

[26] *Id.* Wonder's training was completed in October 2009. *Id.*

[27] *Id.* The trial period began in April 2010. *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *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 Enza

IDEA's exhaustion of administrative remedies requirement applied to the Frys' claims because Ehlena's IEP, required under the IDEA, would "certainly have to be modified in order to articulate the policies and practices that would apply to the dog."[32]

The Sixth Circuit Court of Appeals affirmed the district court's judgment, citing to § 1415(*l*) of the IDEA that provides that plaintiffs are required to exhaust IDEA procedures—even if there are no IDEA claims in the complaint—if the relief sought is "also available" under the IDEA.[33] The majority opinion 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"[34]—essentially if the accommodation provided by the school was not sufficient.[35]

The dissenting opinion concluded that the claim was noneducational in nature, and, even if the accommodation sought was educational in nature, there were facts indicating that exhaustion of administrative remedies would have been futile in this case and thus exhaustion would be excused.[36] The dissenting opinion contrasted the obligations of the ADA and IDEA stating "the ADA's focus is on ensuring *access*; the IDEA's focus is on providing *individualized* education."[37] In response to the Court of Appeals' decision, the Frys appealed to the Supreme Court and certiorari was granted.[38]

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Eby Elementary School, and psychological harm caused by the defendants' refusal to accommodate [Ehlena] as a disabled person." *Id.*

[32] *Id.* at 624–25.

[33] *Id.* at 625. 20 U.S.C. § 1415(*l*) 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.". This provision was part of the Handicapped Children's Protection Act of 1986 that amended the law that is now known as the IDEA. Pub. L. No. 99-372, § 3, 100 Stat. 796, 797 (1986). For purposes of this Article, the relevant language will be referred to as the IDEA provision.

[34] *Fry*, 788 F.3d at 627.

[35] *Id.*

[36] *Id.* at 631–32 (Daughtrey, M., dissenting). The dissenting opinion cited to the school policy that permitted a "guide dog" but not a certified "service dog" at school and the fact that the school could have made "[t]hat wholly reasonable accommodation—accomplished by a few keystrokes of the computer." *Id.* at 631–32, 634.

[37] *Id.* at 633 (emphasis in original).

[38] 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 Amici Curiae, *Fry*, 2016 WL 4524537, at *1 (No. 15-497). The brief for the United States as amici curiae on the petition for the writ of certiorari argued that the court of appeals erred in its holding that the Frys' claims were properly dismissed and "deepens an entrenched circuit split over the proper interpretation of [20 U.S.C. § 1415(*l*)]." *Id.* at *11. In urging the Supreme Court to grant certiorari the United States' brief continued by stating "[t]he question presented raises an important and recurring issue that has significant conse-

### B. Supreme Court Case

#### 1. Petitioners' and Respondents' Briefs

The Petitioners' Brief on the Merits reviewed the legislative history of the IDEA provision at issue and argued that under the "plain terms, [the] text requires exhaustion only when a plaintiff who has filed a non-IDEA claim actively demands a form of relief that the IDEA actually empowers its administrative proceedings to provide."[39] The Petitioners' Brief on the Merits pointed out that a violation of the IDEA does not support money damages—which was the relief sought by the Frys in this case.[40] Further, the Petitioners' Brief on the Merits argued the Sixth Circuit disregarded the statutory text by hypothesizing about the relief the Frys "could have" sought rather than the relief actually sought in the complaint.[41] The Petitioners' Brief on the Merits concluded by addressing the Sixth Circuit's assertion that the questions in the case "would have determined the outcome of IDEA proceedings."[42] Instead, the Petitioners' Brief on the Merits argued that the claims brought did not require analysis of educational-policy questions; it was simply the question of whether a person with a disability was denied the right "to be accompanied by her service dog in a public facility."[43]

The Brief for Respondents also reviewed the legislative history of the statutory provision at issue highlighting the responsibility and role of local and state agencies under the IDEA.[44] The Brief argued that the IDEA exhaustion requirement "turns on the substance and not the form of plaintiff's request for relief."[45] The Brief asserted that the IDEA's due process procedures could easily be circumvented by a formalistic construction of the language because petitioners could merely frame a prayer for relief as a request for damages.[46] It cited to a Ninth Circuit case that cautioned that plaintiffs "cannot avoid exhaustion through artful pleading."[47] The Brief contended that the Frys were required to exhaust their claims because some categories of the relief are

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quences for children with disabilities who seek to vindicate their rights under federal anti-discrimination statutes." *Id.*

[39] Petitioners' Brief on the Merits, *Fry*, 2016 WL 4473465, at *8–9, *16 (No. 15-497).

[40] *Id.* at *24, *43–45. The Frys also sought ancillary relief of attorney's fees and a declaration stating that the defendants violated plaintiffs' rights under the ADA and Rehabilitation Act. *Id.* at *44.

[41] *Id.* at *24. The Petitioners' Brief on the Merits also analyzed the futility exception to the exhaustion requirement. *Id.* at *28–37.

[42] *Id.* at *45–46.

[43] *Id.* at *47–48. The Petitioners' Brief on the Merits asserted that the case did not seek a change to Ehlena's IEP. *Id.* at *48–49.

[44] Brief for Respondents, *Fry*, 2016 WL 5667526, at *3–10 (No. 15-497).

[45] *Id.* at *14.

[46] *Id.* at *25–27. The Brief for Respondents reviewed circuit court decisions that supported its claim that the substance rather than the form of relief should be used in applying § 1415(*l*). *Id.* at *26–27.

[47] *Id.* at *28 (citing Payne v. Peninsula Sch. Dist., 653 F.3d 863, 877 (9th Cir. 2011)).

available under the IDEA, including reimbursement of costs for homeschooling, the declaratory judgment would "effectively undermine that a component of [Ehlena's] IEP is unlawful and must be changed," and the Frys requested "all other appropriate relief."[48]

The Petitioners' Reply Brief on the Merits ("Reply Brief") focused on the relief available under the IDEA.[49] The Reply Brief asserted that the Frys never sought reimbursement or changes to Ehlena's IEP.[50] Instead, the Reply Brief argued that the damages for emotional distress the Frys requested are "different in substance from the relief available under the IDEA."[51] The Reply Brief distinguished between the specific relief available under the IDEA of money damages for compensatory education and the substitute relief of damages to compensate for pain and suffering.[52]

*2. Amici Curiae Briefs*

There were eight amici curiae briefs in support of the Petitioners and one brief in support of the Respondents in this case.[53] The United States filed one of the amici curiae briefs in support of the Petitioners.[54] The amicus curiae brief of the United States ("United States Brief") argued the plain meaning of the text of the statutory provision should result in exhaustion being required only if the action "seek[s] relief" that is "available" under the IDEA.[55] The United States addressed the concern that plaintiffs would be able to circumvent the IDEA exhaustion procedures by asserting that such plaintiff would have to "forego any effort to obtain relief under the IDEA."[56] The United States Brief continued by stating:

> As a practical matter, the plaintiffs who are likely to make that choice are those who either (1) do not believe that the IDEA was violated, (2) have already reached a resolution with the school providing them with whatever

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[48] *Id.* at * 44. The Brief for Respondents also maintained that the Frys waived any exception to exhaustion based on futility because it had not been argued in the lower court. *Id.* at *53–57.

[49] *See* Petitioners' Reply Brief on the Merits, *Fry*, 2016 WL 6216131, at *2 (No. 15-497) (highlighting the language of the Respondents' brief that the Sixth Circuit holding "goes too far.").

[50] *Id.* at *2.

[51] *Id.* at *9.

[52] *Id.* at *12.

[53] *Infra* notes 53–72 and accompanying text (discussing amici curiae briefs). Given the space limitations for this Article, only a very brief description of the arguments of the amici curiae briefs is provided.

[54] *See* Brief for the United States as Amici Curiae, *supra* note 38, at *11 ("[Section 1415(*l*)] does not require a plaintiff bringing a Title II or Section 504 claim to exhaust the IDEA's administrative process unless that process is capable of providing the plaintiff with the relief that he actually seeks. The decision below should therefore be reversed."). Given that the United States supported the Supreme Court's grant of certiorari and argued that the Sixth Circuit erred in its dismissal of the Frys' claims, this is not a surprise. *Id.* at *1.

[55] *Id.* at *16.

[56] *Id.* at *32.

> IDEA relief they may be entitled to receive, or (3) no longer seek IDEA services from the school district for the child at issue. These are precisely the plaintiffs who should not be forced to exhaust a potentially burdensome, adversarial administrative process as a prerequisite to filing an inevitable civil action in court.[57]

The United States Brief asserted that, because the Frys did not seek relief available under the IDEA's administrative processes, the exhaustion requirement should not have been triggered.[58]

The remaining amici curia briefs in support of the Petitioners each took their own approach to the issue.

The Brief of Amicus Curiae Autism Speaks raised concerns over the long delays that may occur with the administrative exhaustion process and also requested that the Supreme Court reiterate the ability of courts to waive the exhaustion requirement if such administrative processes would be futile or if irreparable harm would occur.[59] A brief filed by the Council of Parent Attorneys and Advocates and Advocates for Children of New York also raised concerns regarding the time involved in the IDEA due process hearings when there is discrimination but no IDEA claims.[60] This brief also asserted that the concern that plaintiffs would circumvent the IDEA's exhaustion requirement by including a claim for damages ignored practical realities and lacked empirical support.[61] Three former United States Department of Education officials responsible for special education policy filed a brief that also addressed this matter arguing because parents are "first and foremost concerned that their children receive services that will effectively address their children's needs" they have no incentive to bypass the IDEA's administrative procedures.[62]

Former United States Senator Lowell Weicker, Jr., who was instrumental in enacting the statutory provision at issue, also filed a brief in support of the Frys.[63] Senator Weicker's brief focused on the legislative history of the provision, emphasized the narrow wording in the language, and encouraged the Supreme Court to construe the pro-

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[57] *Id.* at *32–33.

[58] *Id.* at *33. The United States' Brief also addressed the Respondents' assertion that the request for "any other relief this [c]ourt deems appropriate" would implicate relief available under the IDEA by referring to such request as boilerplate and one that "cannot be reasonably construed as seeking relief available under the IDEA" given Ehlena had successfully integrated into a new school outside of the Respondents' district. *Id.* at *34.

[59] Brief for Autism Speaks as Amici Curiae Supporting Petitioners, *Fry*, 137 S. Ct. 743 (No. 15-497), 2016 WL 4771955, at *5–12.

[60] Brief for the Council of Parent Attorneys and Advocates and Advocates for Children of New York as Amici Curiae Supporting Petitioners, *Fry*, 137 S. Ct. 743 (No. 15-497), 2016 WL 4547900, at *2.

[61] *Id.* at *4.

[62] Brief for Professor Thomas Hehir, et al. as Amici Curiae Supporting Petitioners, *Fry*, 137 S. Ct. 743 (No. 15-497), 2016 WL 4524539, at *1, *12.

[63] Brief for Hon. Lowell P. Weicker, Jr. as Amici Curiae Supporting Petitioners, *Fry*, 137 S. Ct. 743 (No. 15-497), 2016 WL 4578836, at *1.

vision consistent with Congress's intent to expand the right of a plaintiff to bring a non-IDEA claim.[64] A brief filed by the States of Illinois and Minnesota also focused on the narrow exhaustion requirement of Section 1415(*l*) and argued that issues relating to the use of service animals in schools are "better suited to resolution under the ADA than within the IDEA's processes" because the "administrative process and reliance on educational expertise that are the hallmarks of the IDEA are neither required for nor suited to service animal decisions."[65]

A brief filed by organizations concerned with barriers encountered by users of service dogs focused on the non-educational nature of mobility service dogs.[66] Another brief filed by organizations representing students with disabilities, who were previously prevented from seeking relief under civil rights laws because of what the organizations alleged as a misinterpretation of the IDEA provision, provided examples of similar cases across the country.[67]

The one amici curiae brief filed in support of the Respondents did not address the specific facts of the *Fry* case but raised concerns about a decision that would undermine the collaborative system set up for the IDEA.[68] It reiterated the concern that plaintiffs could attempt to "circumvent the IDEA's cooperative and remedial scheme through artful pleading."[69] This brief asserted that the Petitioners' position would "have consequences that harm more than help,"[70] and it argued that the IDEA procedures typically do not become unduly delayed[71] and are aimed at easing the burdens for parents by supporting the informal resolution of disputes.[72]

### *3. Oral Argument*

One of the most notable aspects of the oral argument was Justice Kennedy's use of the phrases "artful form of the complaint" and "artful pleading" to address the concern that merely careful drafting of the relief requested in the pleading would allow for circumvention of the

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[64] *Id.* at *20.

[65] Brief for the States of Illinois and Minnesota as Amici Curiae Supporting Petitioners, *Fry*, 137 S. Ct. 743 (No. 15-497), 2016 WL 4547901, at *18, *22.

[66] *See* Brief for Psychiatric Service Dog Partners, Inc. et al. as Amici Curiae Supporting Petitioners, *Fry*, 137 S. Ct. 743 (No. 15-497), 2016 WL 4547899, at *8–12, *20–30 (focusing on the specifics of this case and containing an analysis of the functions that Wonder performed on behalf of Ehlena and the impact of the school's refusal to allow Wonder to accompany Ehlena to school).

[67] Brief for Nat'l Disability Rights Network et al. as Amici Curiae Supporting Petitioners, *Fry*, 137 S. Ct. 743 (No. 15-497), 2016 WL 4524541, at *18–25.

[68] Brief for Nat'l Sch. Bds. Assoc. et al. as Amici Curiae Supporting Respondents, *Fry*, 137 S. Ct. 743 (No. 15-497), 2016 WL 6081729, at *6–15.

[69] *Id.* at *8.

[70] *Id.* at *27.

[71] *Id.* at *17.

[72] *Id.* at *22–27.

IDEA exhaustion requirement.[73] Chief Justice Roberts also questioned whether accepting the Petitioners' argument would result in school districts being subject to two separate tracks of dispute resolution at the same time—under the IDEA's administrative procedures and litigation claiming a violation of the ADA.[74] Another issue the Chief Justice initially raised was confusion over what was at the core of the petitioners' arguments that exhaustion of administrative remedies was not required—was it because of the type of damages requested (such as emotional distress damages not available under the IDEA) or because the parties agreed the school district provided a free and appropriate public education.[75]

The Respondents' representative focused his oral argument on the relief that had been requested and that such relief was available under the IDEA.[76] The Respondents' representative also emphasized the limited amount of time that the IDEA exhaustion process would require.[77]

*4. Decision*

The Supreme Court vacated and remanded the case back to the Sixth Circuit in a concise opinion.[78] The Supreme Court opinion began with a description of the IDEA and the legislative history of Section 1415(*l*).[79] It continued with a recitation of the facts and history of the case.[80]

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[73] Transcript of Oral Argument at 4, 24, *Fry*, 137 S. Ct. 743 (No. 15-497) (citing Justice Kennedy's questions to Mr. Bagenstos representing the Petitioners and Mr. Martinez representing the United States). *See supra* notes 46, 68, and accompanying text (discussing the Brief of the Respondents and amici curiae brief supporting the Respondents utilizing the same terminology).

[74] *Id.* at 10–11, 25–26 (citing Chief Justice Robert's questions to Mr. Bagenstos and Mr. Martinez). The Chief Justice also referenced the leverage this two-track approach would provide to parents advocating on behalf of their children. *Id.*

[75] *Id*. at 6, 13–17, 26–27 (citing Chief Justice Robert's and Justice Kagan's questions to Mr. Bagenstos and Mr. Martinez). Justice Kagan articulated that this case actually met both arguments, though Mr. Bagenstos' response was that the position of the Petitioners was that only meeting one of these standards would be necessary. *Id.* at 14–17.

[76] *Id.* at 29–33, 48 (citing Mr. Katyal's, representing the Respondents, opening remarks and responses to questions).

[77] *Id.* at 51, 55 (citing Mr. Katyal's references to the 105-day process).

[78] *Fry*, 137 S. Ct. at 759 (2017). Justice Kagan delivered the opinion of the Court. Chief Justice Roberts, as well as Justices Kennedy, Ginsburg, Breyer, and Sotomayor joined the opinion. *Id.* at 748. Justice Alito, with Justice Thomas, concurred in part and concurred in the judgment. *Id.* at 748, 759. Justice Alito's concurrence asserted the Court provided misleading clues for the lower courts. *Id.* at 759. A description of the clues provided by the Court is found *infra* notes 87–92 and accompanying text. The first clues that Justice Alito found troubling were the references to circumstances where there would not be any potential overlap between the IDEA and ADA. *Id.* The second instance Justice Alito raised as a concern is when the Court suggests that lower courts consider whether parents initially pursue but then discontinue formal procedures under the IDEA. *Id.* Justice Alito expressed the opinion that these suggested clues "are likely to confuse and lead courts astray." *Id.*

[79] *Id.* at 748–50.

[80] *Id.* at 750–52.

The Court reiterated that 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."[81] The Court held that "to meet that statutory standard, a suit must seek relief for the denial of a FAPE, because that is the only 'relief' the IDEA makes 'available'."[82] The Court then concluded "in determining whether a suit indeed 'seeks' relief for such a denial, a court should look to the substance, or gravamen, of the plaintiff's complaint."[83]

The Court attempted to address the concern over "artful pleading" by utilizing a gravamen standard.[84] The Court emphasized the "use (or non-use) of particular labels and terms is not what matters."[85] The opinion continued by distinguishing between the coverage and goals of the IDEA ("individually tailored educational services") and the ADA and Rehabilitation Act ("non-discriminatory access to public institutions").[86]

The Court provided clues to determine "whether the gravamen of the complaint against a school concerns the denial of a FAPE, or instead addresses disability-based discrimination."[87] The Court suggested that 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?[88]

If 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."[89] If the answer to the questions is no, "then the complaint probably does concern a FAPE, even if it does not explicitly say so."[90]

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[81] *Id.* at 752.

[82] *Id.*

[83] *Id.*

[84] *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.").

[85] *Id.* Using as an example the omission of 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.*

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

[87] *Id.*

[88] *Id.* (emphasis in original).

[89] *Id.*

[90] *Id.* The Court provided two examples. *Id.* In the first, a student using a wheelchair sues a school for discrimination under the ADA because of a lack of ramps to access a building (with no allegations of a denial of a FAPE). *Id.* In this circumstance exhaustion under § 1415(*l*) would not be required. *Id.* In the second example, the Court emphasized the challenge of transplanting the complaint to other contexts by using a hypothetical of a student with a learning disability suing under the ADA because of a failure to provide remedial tutoring in an academic subject. *Id.* at 756–57. In that situation, § 1415(*l*)'s exhaustion requirements would apply. *Id.* at 757.

The Court provided additional guidance by stating that courts could consider the history of the case:[91]

> [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 between 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.[92]

Because the Sixth Circuit did not determine whether the gravamen of the Frys' complaint sought relief for the denial of a FAPE, and the Court lacked information regarding the history of the proceedings, it remanded the issue back to the lower court.[93]

### *C. Case on Remand*

The Plaintiff-Appellant brief (the Frys) articulated that the issue was whether the Sixth Circuit Court of Appeals could "determine whether the substance of the complaint filed by [Ehlena] 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?"[94]

The Frys contended that the Sixth Circuit Court of Appeals cannot make this determination because, at the time of the original dismissal of the suit, there were no allegations in the complaint and no factual record for the court to rely upon regarding whether the Frys pursued administrative remedies under the IDEA prior to commencing the suit alleging a violation of the ADA.[95] Because the Court of Appeals has access to the same limited information regarding the issue that the Supreme Court had, the Frys urged the Court of Appeals to reverse the lower court's grant of the motion to dismiss and remand the case for further discovery.[96]

The Defendants-Appellees argued the history of the proceedings supports a finding that the Frys sought relief for denial of a FAPE thus exhaustion of administrative remedies under the IDEA is required.[97]

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[91] *Id.* at 757.

[92] *Id.* The Court recognized that this analysis would be fact-dependent but stated the "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.*

[93] *Id.* at 758. The Court considered that the Frys' complaint alleging disability-based discrimination would have answered the first set of questions regarding the nature of claim as yes, but it found the record "cloudy" as to the facts regarding the history of the remedies sought by the Frys. *Id.*

[94] Brief of Plaintiffs-Appellants Stacy Fry, Brent Fry, and Ef, a Minor, by Her Next Friends Stacy Fry and Brent Fry, *Fry*, 2017 WL 2222829, at *v (No. 14-1137).

[95] *Id.* at *6. The original dismissal was the result of a motion under Rule 12(c), a motion for judgment on the pleadings. *Id.*

[96] *Id.* at *12.

[97] Defendants-Appellees' Supplemental Brief, *Fry*, 2017 WL 2629921, at *3 (No. 14-1137).

The Defendants-Appellees cited to the Frys' request that Ehlena be allowed to be accompanied by her service animal specifically to help her "*develop* independence" and the Frys' participation in an IDEA mediation process to illustrate their contention that the gravamen of the complaint is a denial of a FAPE.[98]

In July 2017, the Court of Appeals remanded the case to the district court for resolution citing to the "factual nature of the relevant information."[99]Although the intersection of the IDEA and ADA and the exhaustion of administrative remedies issue frequently has arisen in past cases, the test set out in *Fry* should enable advocates for students with disabilities and school districts to determine whether advocates can move to litigation under the ADA more quickly going forward.[100] Even before the exhaustion of administrative remedies issue was addressed, there were other common issues arising in these cases based on the ADA regulations covering service animals.[101]

## III. AMERICANS WITH DISABILITIES ACT ISSUES

The ADA provides that public entities, including school districts, may not subject qualified individuals with disabilities to discrimination or deny such individuals the benefit of the programs or activities of such entities.[102] The ADA regulations mandate such entities "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 mod-

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[98] *Id.* at *1–2 (emphasis in original). The Defendant-Appellees' brief discusses that the development of independence is a term of art under the IDEA and aspects of the IDEA that relate to service animals. *Id.* at *19–22. The Defendants-Appellees filed a motion to request that the Appellate Record be reopened to allow additional documentation to be included in the record including material from Ehlena's IEP, related correspondence, and the mediation settlement agreement. Defendants-Appellees' Motion to Supplement the Appellate Record, *Fry*, 2015 BL 254405, at *4–5 (No. 14-1137).

[99] *Id.* at *1.

[100] Note that existing cases may also be impacted by the *Fry* decision. *See generally* Doucette v. Jacobs, 2018 WL 457173 (D. Mass. 2018) (applying the analysis from the *Fry* case and finding a purported Rehabilitation Act claim relating to access to a service dog was in essence a claim under the IDEA and exhaustion of administrative remedies was required). *See also* Order, Riley v. Sch. Admin. Unit #23, No. 15-CV-152-SM, 2016 BL 10669 (D.N.H. Mar. 10, 2017) (requiring plaintiffs to provide a legal memorandum to show why the case "should not be stayed pending exhaustion the IDEA's remedies, or dismissed for failure to exhaust those administrative remedies" in light of the opinion in the *Fry* case).

[101] *See infra* notes 102–72 and accompanying text (discussing issues under the ADA).

[102] 42 U.S.C. § 12132 (citing Title II of the ADA); 28 C.F.R. § 35.130(a) (2016) (citing ADA regulations). There is parallel language in the ADA and its regulations that apply to public accommodations, including schools (Title III of the ADA). 42 U.S.C. § 12181; 28 C.F.R. § 36.201 (2016) (citing ADA regulations). This Article only cites to the Title II (public entity) sources; however, previous articles by the author have provided parallel citations for the code and regulations applicable to Title III entities. *See, e.g.*, Huss, *Canines on Campus*, *supra* note 1, at 417.

ifications would fundamentally alter the nature of the service, program or activity."[103]

The ADA regulations specifically address the issue of service animals.[104] Although there are exceptions,[105] "[g]enerally, a public entity shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability."[106] Three issues relating to the regulations concerning service animals have been raised multiple times in cases and are likely to continue to be the subject of litigation in the future.[107] All these issues can be considered as part of the analysis of whether the modification (interchangeably referred to as accommodation in case law) is reasonable.[108] Sometimes an advocate for a child with a disability believes that the entity is not doing enough to permit the use of a service animal and other times a school district is asking a parent to provide something that a parent does not believe is necessary.[109]

### *A. Under the Control of a Handler*

The ADA regulations state a "service animal shall be under the control of its handler."[110] Although generally control of a service animal would occur through the use of a harness, leash or tether, a handler may use voice commands, signals or other effective means of control.[111] An issue that is sometimes related to this analysis is the fact that the ADA regulations provide that entities are "not responsible for the care or supervision of a service animal."[112] This topic will be discussed separately below.[113]

The Department of Justice (DOJ) issued technical assistance relating to the need to make reasonable modifications for service ani-

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103 28 C.F.R. § 35.130(b)(7)(i).

104 28 C.F.R. § 35.136.

105 The exceptions allow an entity to request removal of a service animal if "(1) The animal is out of control and the animal's handler does not take effective action to control it; or (2) The animal is not housebroken." 28 C.F.R. § 35.136(b) (2016).

106 28 C.F.R. § 35.136(a).

107 *See infra* notes 110–48 and accompanying text (discussing cases).

108 28 C.F.R. § 35.130(b)(7) (requiring reasonable modifications).

109 The analysis in this section is limited to recent cases that have had one or more reported decisions. For information regarding other cases, including administrative actions, *see* Huss, *Revisited*, *supra* note 1, at 20–35 (discussing exhaustion of administrative remedies, fundamental alternation of program arguments, the Department of Justice Civil Rights Division, and the Department of Education, Office for Civil Rights).

110 28 C.F.R. § 35.136(d).

111 *Id.* (stating the use of voice commands, signals, or other means of control would apply if "the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks.")

112 28 C.F.R. § 35.136(e) (2016).

113 *See infra* notes 149–54 and accompanying text (discussing care and supervision requirement).

mals.[114] In that technical assistance, the DOJ reiterated the ADA requires service animals to be under the control of their handlers; however, in the context of primary and secondary education, "the school or similar entity may need to provide some assistance to enable a particular student to handle his or her service animal."[115] Multiple cases have dealt with this issue and it is likely to continue to occur because each student with a disability has his or her unique needs and educational plan.[116]

The *Alboniga v. School Board of Broward Cty., Florida* case illustrates several of the issues likely to face parties in these cases.[117] An order in response to a motion for summary judgment dealt with the issue of whether a student, who can be tethered to but who does not otherwise manage the dog, could be considered the service dog's "handler."[118] At the time of the first order, Anthony was six years old and was partnered with a service dog named Stevie.[119] Anthony is confined to a wheelchair, is non-verbal, and has multiple disabilities, including a seizure disorder and cerebral palsy.[120]

The parties in *Alboniga* cross-moved for summary judgment.[121] The requested accommodation was that Anthony be permitted to at-

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114 U.S. DEP'T OF JUST., FREQUENTLY ASKED QUESTIONS ABOUT SERVICE ANIMALS AND THE ADA (2017), https://www.ada.gov/regs2010/service_animal_qa.html [https://perma.cc/EG9A-PEWA] (accessed Jan. 19, 2017) [hereinafter US DOJ ADA FAQ].

115 *Id.* at Q27.

116 *See, e.g.*, Nuran Alteir, *Trained Autism Service Dog Goes to School with His Boy, Thanks to a Volunteer Helper*, OREGONIAN (May 22, 2015), http://www.oregonlive.com/sherwood/index.ssf/2015/05/stranger_steps_forward_to_acco.html [https://perma.cc/5455-8STF] (accessed Jan. 19, 2017) (discussing a dispute where a school district is requiring a family to provide a trained handler to accompany a student with autism and the subsequent filing of a civil rights complaint with the Department of Justice regarding the issue).

117 *See* Alboniga v. Sch. Bd. of Broward Cty., Fla, 87 F. Supp. 3d 1319, 1323 (S.D. Fla. 2015) ("This case involves Defendant's alleged violation of Title II of the [ADA] . . . by implementing practices, policies, and procedures that have subjected the minor plaintiff to discrimination based on his disability, and violation of Section 504 of the Rehabilitation Act by failing to provide the plaintiff with a reasonable accommodation . . . and then by procedural barriers to the use of [the] service animal in school."). The history of this case is analyzed in more detail in one of the author's previous articles. *See* Huss, *Revisited*, *supra* note 1, at 14–19 (discussing issues such as jurisdiction, failure to accommodate and reasonableness of accommodation, and validity of service animal regulations in the case).

118 *See Alboniga*, 87 F. Supp. 3d at 1341–42 ("Given the specific facts here, having Stevie tethered to A.M. in school would constitute control by A.M. over his service animal as the animal's handler within the meaning of the regulation.").

119 *Id*. at 1323. Anthony was described as A.M. in court filings, but his name was disclosed in media reports about the case; s*ee e.g.*, Carol Marbin, *In Fight Over Boy's Service Dog, Broward School Board Is Brought to Heel*, MIAMI HERALD (Feb. 20, 2015), http://www.miamiherald.com/news/local/community/broward/article10782953.html [https://perma.cc/8UEV-7NP4] (accessed Jan. 19, 2017) (referring to Anthony by his first name).

120 *Alboniga*, 87 F. Supp. 3d at 1323.

121 *Id.* at 1322, 1330. In addition to the analysis regarding whether the requested accommodations were reasonable, the court in *Alboniga* determined that it was not nec-

tend school accompanied by Stevie without his family being required to provide a separate handler for the dog.[122] The *Alboniga* court acknowledged there was little guidance in cases regarding the interpretation of a handler being in control of a service dog.[123] The district court cited to an analogous case that interpreted the ADA's handling provision as a specific prohibition on leaving a service animal unattended.[124] The *Alboniga* court also focused on the explicit language in the regulation referencing tethering as handling.[125] Because it was undisputed that Stevie would be tethered to Anthony at all times during the school day, the *Alboniga* court found this would constitute control by Anthony as Stevie's handler.[126]

The Western District Court of New York district court also addressed the issue of whether a student was acting as a handler.[127] In *United States of America v. Gates-Chili Central School District* the Western District of New York denied the school district's motion for summary judgment because it found there was a material issue of fact regarding whether the student could handle her service dog.[128] In this case, the school district required a separate adult dog handler to be with the student (Devyn) if Devyn is accompanied by her service dog, Hannah.[129] This requirement for the parent to provide an adult handler for the dog was the basis of the complaint by the United States that the school district was violating Devyn's rights under the ADA.[130]

The court in *Gates-Chili* agreed with the school district that the more specific service animal regulation that the animal be "under con-

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essary to exhaust the IDEA's administrative remedies and the case was not moot. *Id.* at 1330.

[122] *Id.* at 1338. The school board's policy in this case also would require additional liability insurance and vaccinations for Stevie. *Id.* at 1324.

[123] *Id.* at 1342.

[124] *Id.* (citing Shields v. Walt Disney Parks & Resorts US, Inc. 279 F.R.D. 529, 547 (C.D. Cal. 2011)). The *Alboniga* court further stated the "implication is that the opposite of a service animal being under 'control' of a 'handler' is its being unattended." *Id.*

[125] *Id.*

[126] *Id.*

[127] *See* U.S. v. Gates-Chili Central Sch. Dist., 198 F. Supp. 3d 228, 229 (W.D.N.Y. 2016) ("At issue is whether the District's rule that the student . . . who is accompanied by a service dog, Hannah, must also bring to school, as well as on the school bus, an adult dog handler.").

[128] *Id.* at 235.

[129] *Id.* at 230. Deyvn was referred to as D.P. in this case but was identified along with her service dog in media reports; *see, e.g.*, Lynette Adams, *Fundraiser Aims to Help Cover Costs of New Service Dog for Chili Girl*, WHEC-TV (June 9, 2017), http://www.whec.com/news/service-dog-cost-chili-girl-fundraiser/4509543/ [https://perma.cc/GW4K-F249] (accessed Jan. 19, 2017) (identifying Devyn by her first name). Devyn has Angelman Syndrome, which is "like a severe form of autism and epilepsy." *Id.* In addition to alerting when Devyn is going to have a seizure, Hannah has been trained to provide mobility support, prevent Devyn from eloping and to apply deep pressure to prevent or disrupt negative behaviors. *Gates-Chili*, 198 F. Supp. 3d at 231. The court found that Devyn was a qualified individual with a disability and there was no allegation that Hannah was not a service animal under the ADA. *Id.* at 229–30.

[130] *Gates-Chili*, 198 F. Supp. 3d at 233.

trol of the handler at all times" would trump the more general regulation that the school district must "permit the use of a service animal."[131] The *Gates-Chili* court acknowledged that neither the ADA nor its regulations "require the District to provide handling services for the dog."[132]

The parties in the case made concessions regarding the extent to which Devyn needed assistance with Hannah and the school district's willingness to provide such assistance.[133] The United States agreed Devyn "requires intermittent assistance with verbal commands and tethering and untethering."[134] The school district conceded during oral argument that "it had no issue with assisting [Devyn] to untether herself from Hannah."[135]

Ultimately the New York District Court determined that the issue was whether Devyn should be considered to be in control of Hannah.[136] If the school district is required to "actually issue commands to Hannah, as opposed to occasionally reminding her to do so, then [Devyn] cannot be considered in control of her service dog."[137] However, using the logic from the *Alboniga* case and given the school district's concession during oral argument, if Devyn is tethered to Hannah and the only assistance is untethering, Devyn would be in control of Hannah.[138]

The *Riley v. School Administrative Unit #23* ("SAU") case in New Hampshire, the student, A.R., partnered with the service dog, who is primarily non-verbal with multiple disabilities.[139] A.R. was partnered

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131 *See id.* at 234 ("[T]he District maintains that if the individual is unable to handle the service dog, then he or she, and not the District, is responsible for providing one who can. [T]he Court agrees with the District, and finds that neither the statute, nor the regulation, require the District to provide handling services for the dog.").

132 *Id.*

133 *Id.* at 234, 235 ("Plaintiff concedes that D.P. cannot untether herself from her service dog and that D.P. 'requires intermittent assistance with verbal commands and tethering and untethering.' . . . During oral argument, the District conceded it had no issue with assisting D.P. to untether herself from Hannah.").

134 *Id.* at 234 (citing Compl. of U.S. as Plaintiff at ¶ 23).

135 *Id.* at 235.

136 *Id*.

137 *Id.*

138 At the time of the writing of this Article, this litigation was ongoing. The United States filed a Statement of Interest in another New York case that was described as "very, very similar" to the *Gates-Chili* case. U.S. DEP'T OF JUST., OPEN DIALOGUE WITH THE DISABILITY RIGHTS SECTION (2016). In the Statement of Interest, the United States reiterated the DOJ guidance that "it is not, per se, unreasonable to require school staff to provide some assistance to a student in performing that role, i.e., in handling his service animal." Statement of Interest of the United States of America at 9, Child with a Disability v. Sachem Cent. Sch. Dist. Bd. of Educ., No. 2:15-CV-02903 (E.D. N.Y. 2015). This case settled under seal in March 2017. Stipulation of Settlement and Order of Dismissal, *Child with a Disability*, No. 2:15-CV-02903 (E.D. N.Y. 2015).

139 *See* Riley v. Sch. Admin. Unit #23, No. 15-CV-152-SM, 2015 WL 9806795, at *1 (D. N.H. Apr. 29 2015) ("A.R. . . . has been diagnosed with developmental delays, hypotonia . . . , hearing loss, dysphagia . . . epilepsy, and cortical blindness.").

with a multipurpose service animal ("Carina").[140] One of the tasks Carina was trained to do is alert if A.R. is going to have a seizure.[141] Initially the school district agreed that A.R.'s one-on-one aide would act as Carina's handler but later withdrew its agreement on that issue.[142]

The Rileys made a motion for a preliminary injunction alleging that the SAU violated the ADA and the Rehabilitation Act by failing to provide reasonable accommodations in connection with A.R.'s use of a service animal.[143] Specifically, the Rileys requested that the school district "pay for a District employee to issue verbal commands to Carina, hold Carina's leash when she accompanies A.R., and use Carina in accordance with A.R.'s seizure protocol."[144]

The *Riley* case is particularly challenging because in other judicial opinions considering the issue of the role of a handler, the students have been able to be tethered to the service dogs.[145] In this case A.R. cannot be tethered to Carina: A.R. is unable to safely utilize a leash with Carina, and, as A.R. is primarily nonverbal, he cannot provide voice commands.[146] The district court found the Rileys had not met their burden establishing a strong likelihood that they would prevail in the case at the preliminary injunction stage.[147] In October 2017, a district court judge held, in dismissing the Rileys' complaints without prejudice, that "[t]o the extent that the relief sought by plaintiffs might be available at all, it is only available under the IDEA. Accordingly plaintiffs' claims fall within the reach of the IDEA, and *Fry* requires that they be dismissed for failure to first exhaust available administrative remedies."[148]

An issue that school districts have raised often in connection with whether a student is truly a handler of a service animal is the consid-

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140 *Id.*

141 *Id.*

142 *Id.* at *1–2. The Rileys filed a complaint through the U.S. Department of Education's Office for Civil Rights in 2012 and that complaint was resolved through a Voluntary Resolution Agreement in 2013. *Id*. at *2.

143 *Id.* at *1.

144 *Id*. at *8. In addition, the Rileys requested that the school district pay for a trainer to travel to the school district and conduct training for the school district's personnel. *Id*.

145 *See id.* at *10 ("In the cases cited by the plaintiffs, *Alboniga* and C.C., the courts found that the students were the handlers because the service animals were tethered to the students throughout the school day.").

146 *Id.*

147 *Id.* at *13. In October 2017, a district court judge held, in dismissing the plaintiffs' complaints without prejudice, that "[t]o the extent that the relief sought by plaintiffs might be available at all, it is only available under the IDEA. Accordingly plaintiffs' claims fall within the reach of the IDEA, and *Fry* requires that they be dismissed for failure to first exhaust available administrative remedies." *Riley*, 2015 WL 9806795, at *6.

148 *Riley*, 2015 WL 9806795, at *6. The Rileys filed a Notice of Appeal on November 7, 2017. *Id.*

eration of who is responsible for the care and supervision of the service dog.

### *B. Responsibility for Care and Supervision of Service Animals*

Entities are "not responsible for the care or supervision of a service animal" under the ADA regulations.[149] What actions would be considered "care or supervision" has also been disputed by school districts.[150] This was one of the issues raised by the school board in the *Alboniga* case.[151] The district court in that case interpreted the provision as relating to routine animal care "such as feeding, watering, walking or washing the animal."[152] Because the accommodation requested only asked that Anthony receive assistance in leading Stevie outside to urinate, the court found that the school board was being asked to accommodate Anthony—not to care for the dog—and thus the request was reasonable.[153] Some school districts have also implemented service animal policies that include provisions advocates argue should be considered an impermissible surcharge on the person with a disability utilizing a service animal.[154]

### *C. Prohibition on Surcharges*

The ADA regulations prohibit entities from asking or requiring "an individual with a disability to pay a surcharge, even if people accompanied by pets are required to pay fees, or comply with other requirements generally not applicable to people without pets."[155]

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149 28 C.F.R. § 35.136(e) (2016).

150 *See, e.g.*, *Alboniga*, 87 F. Supp. 3d at 1342 ("The definition of 'care or supervision' is in dispute.").

151 *See id.* ("The School Board maintains that leading Stevie outside to urinate constitutes care or supervision, for which it cannot be made responsible.").

152 *Id.* at 1343. The *Alboniga* court also looked to Florida state law and Florida Department of Education guidelines that do not require school districts to provide food, curbing, removing excrement, training, and healthcare. *Id.* The district court also cited to an ADA case in the area of employment that found that supervision or care "means looking after the service animal in the owner's absence." *Id.* (citing McDonald v. Dep't of Envtl. Quality, 214 P.3d 749, 763 (Mont. 2009)).

153 *Id.* at 1344. The parties in the *Alboniga* case settled and there was a media report that stated that for the next school year, "school staffers will be responsible for keeping other children away from the dog and taking Stevie out when he needs to urinate." Final Order of Dismissal with Prejudice, *Alboniga*, 87 F. Supp. 3d 1319 (No. 14-CIV-60085); Karen Yi, *Mom Wins Suit to Allow Boy's Service Dog in School*, SUN SENTINEL (May 31, 2015), http://www.sun-sentinel.com/news/education/fl-mom-wins-service-animal-lawsuit-20150529-story.html [https://perma.cc/WL85-FZA3] (accessed Jan. 19, 2017).

154 *See infra* notes 155–60 and accompanying text (discussing prohibition on surcharges); s*ee also* Huss, *Revisited*, *supra* note 1, at 30–32 (discussing other cases with allegations of surcharges).

155 28 C.F.R. § 35.136(h). An individual with a disability "may be charged for damage caused by his or her service animal" if an entity "normally charges individuals for the damage they cause." *Id.*

The *Alboniga* case also illustrates what would be considered an impermissible surcharge.[156] DOJ guidance states that service animals are "not exempt from local animal control or public health requirements."[157] Thus city ordinances that require all dogs be vaccinated can be applied to service animals.[158] However, in the *Alboniga* case, the school district required proof of "additional vaccinations" in addition to "a certificate of current liability insurance covering the service animal."[159] The *Alboniga* court determined that both the additional vaccinations (which exceeded those required under Florida law) and liability insurance requirement constituted a discriminatory practice and an impermissible surcharge.[160]

### *D. Other Issues*

A school board has unsuccessfully argued that the DOJ exceeded its statutory authority in promulgating the service animal regulation.[161] The district court in *Alboniga* found that the DOJ's regulations would be entitled to judicial deference under established administra-

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156 *See Alboniga*, 87 F. Supp. 3d at 1339 ("The School Board's requirement that Plaintiff maintain liability insurance for A.M.'s service animal and procure vaccinations in excess of the requirements under Florida law is a surcharge prohibited by 28 C.F.R. § 35.136(h)"). Note that in the *Riley* case, discussed *supra* notes 139–48 and accompanying text, one of the plaintiffs' arguments was that requiring them to pay for an adult handler for Carina would be an illegal surcharge under the ADA regulations. *Riley*, 2015 WL 9806795, at *11. The *Riley* court found, that until it is determined whether the school district is required to provide a handler for Carina, the surcharge subsection is inapplicable. *See id.* ("Therefore, this subsection is inapplicable until final disposition on the merits of the plaintiffs' preliminary injunction."). The court pointed out that by reading two of the regulations together it would be reasonable to "conclude that if the defendants were required to provide a handler for Carina, they could not charge the plaintiffs for the service." *Id.*

157 DOJ ADA FAQ, *supra* note 114, at Q18.

158 The DOJ has also stated that service animals "are subject to local dog licensing and registration requirements" but "[m]andatory registration of service animals is not permissible under the ADA." *Id.* at Q20.

159 *Alboniga*, 87 F. Supp. 3d at 1324. The plaintiffs in the case provided evidence of Stevie's vaccinations. *See id.* ("[T]he School Board received the completed Request for Use of Service Animal in School District Facilities form from Plaintiff, including a copy of the service dog's vaccinations."). However, the school board requested proof of the following vaccinations: "Distemper, Hepatitis, Leptospirosis, Paroinfluenza, Parvovirus, Coronatvirus, DHLPPC, and Bordetella." *Id.* At the time of the writing of this Article, Broward County, Florida ordinances only required dogs be vaccinated against rabies. BROWARD CTY., FLA., CODE §§ 4-10, 4-11 (2017).

160 *Alboniga*, 87 F. Supp. 3d at 1339. The court had very little analysis regarding the liability insurance issue, simply stating "[t]he insurance costs are over and above what other students are required to expend in order to attend school." *Id.*

161 *See id.* at 1333 ("The DOJs regulations and interpretations thereof—which are entitled to significant deference here, are a permissible construction of the ADA."). The School Board of Broward County also argued that the service animal provision was "inconsistent with, and impermissibly stricter than" the general regulatory provision requiring entities to make reasonable modifications. *Id.*

tive law.[162] The DOJ regulations would be "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[163] The district court found that the "regulations regarding service animals are clearly a permissible interpretation of the ADA" and were "consistent with and a specific application of the reasonable modification regulatory requirement."[164]

Thus, the regulations would be valid and enforceable against the school board.[165] Because this was only a district court decision, it is possible for others to put forward a similar argument, although it seems improbable that this type of attack on validity of the regulations is likely to prevail.[166]

School districts may argue that allowing any service animal at all would be considered a fundamental alteration of their program.[167] However, unless there are very specific circumstances, this general argument is unlikely to be successful.[168] Of course, in order to bring an ADA action the student must be a qualified individual with a disability,[169] and the service animal must fit within the definition of service

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[162] *Id.* The district court found that Congress "left a gap for the agency to fill" and thus the standards set forth by the *Chevron* case applied. *Id.* (citing Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc., 467 U.S. 837, 843–44 (1984)).

[163] *Id.* (citing Chevron, 467 U.S. at 843–44).

[164] *Id.* at 1334–35.

[165] *Id*. at 1337.

[166] *See also* Berardelli, 2016 WL 5723724, *supra* note 14, at *10 (agreeing with the *Alboniga* court that regulations were entitled to significant deference); Sak v. City of Aurelia, 832 F. Supp. 2d 1026, 1039 (N.D. Iowa 2011) (discussing whether the ADA regulations should be given the degree of deference set forth in the *Chevron* case and determining the view of the DOJ would at a minimum "warrant respect").

[167] *See* 28 C.F.R. § 35.130(b)(7) ("A public entity shall make reasonable modifications . . . unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.").

[168] *See generally* Dohmen v. Iowa Dep't for the Blind, 794 N.W.2d 295, 316 (Iowa Ct. App. 2010) (citing language in the comments to the prior service animal regulations for public accommodations that in "rare circumstances, accommodation of service animals may not be required because a fundamental alteration would result . . ." in rejecting an argument by a visually impaired student that a special instruction should have been provided on her right not to be separated from her service animal in a situation where the program at issue was based on a theory that the students should be immersed in blindness and no visual aids of any type were allowed). The comments to the current service animal regulations state that the DOJ did not retain specific language regarding allowing exclusion of service animals if their presence or behavior fundamentally alters the nature of a program or service because the DOJ believed such exception would be covered in the general reasonable modification requirement found in § 35.130(b)(7). Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56164, 56197 (Sept. 15, 2010) (implementing the final regulations for Title II of the ADA and providing guidance on changes in the regulations).

[169] *See* 28 C.F.R. § 35.104 (2016) (defining qualified individual as "an individual with a disability who . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."); 28 C.F.R. § 35.108(a)(1) (defining disability).

animal under the ADA regulations.[170] Under the ADA regulations, service animals that are out of control or not housebroken can also be excluded from a facility.[171] School districts may also raise concerns over whether a service animal would be a distraction or could cause problems for people with allergies, but this appears to be less common with the DOJ's clear interpretation of the issue.[172]

## IV. CONCLUSION – FUTURE ISSUES

Although the decision in the *Fry* case provides guidance on the issue of when exhaustion of IDEA administrative remedies will be required,[173] some advocates and school districts are likely to continue having disputes over allowing a service animal to accompany a child to school based on the exhaustion of remedies argument. The issue is not as easily defined as simply considering the use of a service animal solely as an access issue under the ADA. For example, the IDEA's definition of "free appropriate public education" includes not only special

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[170] *See* 28 C.F.R. § 35.104 (defining service animal as "any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability . . ."). "The work or tasks performed by a service animal must be directly related to the individual's disability." *Id*. Providing "emotional support, well-being, comfort, or companionship [does] not constitute work or tasks for the purpose of this definition." *Id*. In the ADA regulations, entities are provided assessment factors to determine whether it would be a reasonable modification to allow a miniature horse into a facility as a service animal. However, no other species of animal, whether trained or not, meets the ADA definition of service animal. U.S. DEP'T OF JUST., ADA REQUIREMENTS, SERVICE ANIMALS, (2011), https://www.ada.gov/service_animals_2010.htm [https://perma.cc/6UEB-KD7S] (accessed Jan. 19, 2017).

[171] 28 C.F.R. § 35.136(b); A.P. v. Pennsbury Sch. Dist., No. 16-CV-2224, 2016 U.S. Dist. LEXIS 115762, at *29 (E.D. Penn. 2016) (allowing school to continue to exclude a service dog through a denial of a motion for preliminary injunction in a case where the service dog bit another student at the school); s*ee also* Huss, *Revisited*, *supra* note 1, at 42 n.284–85 (discussing dispute over whether a service dog was out of control at a Sherrard Illinois elementary school). That dispute was settled with the school district paying $95,588. Thomas Geyer, *Sherrard Service-Dog Matter Settled*, QUAD-CITY TIMES (Aug. 26, 2015), http://qctimes.com/news/local/education/sherrard-service-dog-matter-settled/article_33bdb027-ba64-5ab0-b388-812ca68c95e7.html [https://perma.cc/FRL3-9QWS] (accessed Jan. 19, 2017). An entity may not ask for removal of a service animal if a handler of a service animal that is out of control takes effective action to control the service animal. 28 C.F.R. § 35.136(b)(1).

[172] U.S. DEPARTMENT OF JUST., *supra* note 170, at 2 (stating"[a]llergies and fear of dogs are not valid reasons for denying access or refusing service to people using service animals. When a person who is allergic to dog dander and a person who uses a service animal must spend time in the same room or facility, for example, in a school classroom or at a homeless shelter, they both should be accommodated by assigning them, if possible, to different locations within the room or different rooms in the facility."). *Id; see also* Berardelli, 2016 WL 5723724, *supra* note 14, at *12 (discussing the impacts of students with allergies and service animals); Huss, *Revisited*, *supra* note 1, at 36–37 (discussing a dispute relating to a teacher's allergies in Ohio); Huss, *Classroom*, *supra* note 1, at 19–22 (discussing the issue of allergies).

[173] *See generally Fry*, 137 S. Ct. 743 (discussing at length the exhaustion of remedies analysis and creating a standard for determining when a plaintiff must exhaust IDEA remedies).

education but also related services.[174] Related services are supportive services that "may be required to assist a child with a disability" in order for the child to benefit from special education.[175] IDEA regulations defining "related services" regarding orientation and mobility "includes teaching children . . . as appropriate: . . . [t]o use . . . a service animal to supplement visual travel skills or as a tool for safely negotiating the environment for children with no available travel vision."[176] Another IDEA regulation includes "travel training" in the description of special education.[177] Thus the IDEA itself may require a school district to permit a student to be accompanied by a service animal if it is "required to assist [a] child [with a disability] to benefit from special education."[178] Specifically, the IDEA may require a school to teach a student with disabilities to use a service animal.[179]

Because one of the clues the Supreme Court provided for courts to consider in determining what constitutes the gravamen of the complaint includes whether a "plaintiff has previously invoked the IDEA's formal procedures to handle the dispute,"[180] representatives of children with disabilities will need to consider what they are really trying to accomplish when they initially advocate for the inclusion of a service animal in an educational environment.

Once the exhaustion of remedies issue is resolved, advocates and school districts may still disagree on whether the ADA requires the school to accommodate a specific service animal given the amount of assistance necessary for the student partnered with the animal. Resolution of the issue of the amount of assistance schools are required to provide to students with service animals will benefit from further judicial decisions interpreting the ADA regulations.

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174 20 U.S.C. § 1401(9). *See* Petitioners' Brief on the Merits, *supra* note 39, at *3 (defining free appropriate public education).

175 20 U.S.C. § 1401(26)(A); *see* Petitioners' Brief on the Merits, *supra* note 39, at *3 (defining related services).

176 34 C.F.R. § 300.34(c)(7(ii)(B) (2016).

177 34 C.F.R. § 300.39(a)(2)(ii). Travel training is further defined as "providing instruction, as appropriate, to children with significant cognitive disabilities, and any other children with disabilities who require this instruction, to enable them to—(i) [d]evelop an awareness of the environment in which they live; and (ii) [l]earn the skills necessary to move effectively and safely from place to place within that environment." 34 C.F.R. § 300.39(b)(4).

178 Petitioners' Brief on the Merits, *supra* note 39, at *4 (citing 20 U.S.C. § 1401(26)).

179 *Id*. at 46.

180 *Fry*, 137 S. Ct. at 757.