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SERVICE ANIMALS IN THE K–12 SCHOOLS: A LEGAL UPDATE [a1]

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A previous *Education Law Into Practice* article synthesized the legal developments concerning service animals for individuals with disabilities in K–12 schools. [1] In light of continuing controversy concerning this issue, [2] the purpose of this similarly concise article is to provide an update of the legal developments in the intervening five–year period. [3]

***555** The three applicable legal frameworks, as traced in the predecessor article, are (1) the Individuals with Disabilities Education Act (IDEA); [4] (2) THE CORRESPOnding pair of federal civil rights acts, section 504 oF the Rehabilitation Act (§ 504) [5] and the Americans with Disabilities Act (ADA); [6] and (3) the relatively few states laws, such as the pertinent provision in Illinois' education code. [7] The predecessor article reported that the respective legal developments were largely limited (1) to an unsuccessful hearing officer decision under the IDEA; [8] (2) the applicable regulations under Title III of the ADA [9] and a series of court decisions based largely on the exhaustion doctrine; [10] and (3) relatively successful rulings, to the extent of preliminary injunctions, under the Illinois law. [11]

IDEA

The more recent developments under the IDEA have similarly been limited to hearing and/or review officer decisions that follow a case–by–case individualized approach based on the core requirement of a free appropriate public education (FAPE). First, in an Illinois case in 2014, the hearing officer ruled that the district denied FAPE to a child with a seizure disorder by failing to convene the IEP team to consider whether access for the child's ***556** service dog should be included in the IEP per state law. [12] Second, in a New York case the following year, the review officer reversed a hearing officer decision that had been in favor of the child, concluding that the service dog was not necessary for FAPE for this particular child. [13]

§ 504/ADA

The more explicit and general federal support of the disability discrimination framework, particularly in light of specifically pertinent ADA regulations, [14] has served as the springboard for more extensive developments via both agency and judicial enforcement. In the leading agency action, the U.S. Department of Justice (DOJ) concluded, as the result of a complaint investigation, that a New York school district violated the ADA by refusing access to the service dog of a child with multiple disabilities, including autism. [15] In reaching this conclusion, DOJ found that the district has not established any of the permissible reasons for exclusion, i.e., the dog being out of control or not housebroken (or a direct threat), and that the modest necessary staff assistance—without a parent–provided handler—was reasonable. As corrective action, the DOJ orders included (1) permitting the child to be the handler' (2) requiring direct staff assistance

amounting to reasonable modifications; [16] (3) paying compensatory damages, including pain and suffering; and (4) providing training to district staff. During this updated period, the U.S. Department of Education's Office for Civil Rights (OCR) responded to series of complaints from both students with service animals and parents with service animals by enforcing, largely via voluntary resolution agreements, the ADA regulatory provisions, particularly the following aspects: [17]

• ***557** the limited exceptions: out of control or not housebroken [18]

• the limited permissible inquiries: a) whether the animal at issue qualifies as a service animal (but not requesting documentation), and b) whether the animal is required because of a disability and, if not obvious, what task(s) it has been trained to perform [19]

• the extent of access: wherever the participants, the public, or the invitee are allowed to go [20]

• the more general exception for "direct threats to the health or safety of others" [21]

At the court level during this updated period, the exhaustion doctrine [22] continued to deflect a judicial determination of the merits in some cases. [23] ***558** However, the relatively limited line of cases that reached the merits increased, with the trend in the plaintiffs' favor.

First during this updated period was *C.C. v. Cypress School District* in which a federal district court in California issued a preliminary injunction in favor of a student with autism. [24] The defendant district did not raise the exhaustion defense, probably because the parent had first sought an impartial hearing under the IDEA, which resulted in dismissal for lack of jurisdiction. [25] The court concluded that the plaintiff was likely to succeed on the merits because (1) his dog, although providing a comforting effect, met the ADA definition of service animal due to his performance of tasks that prevented or interrupted impulsive or unsafe behaviors, [26] and (2) the necessary accommodations—an available staff member's learning and use of a few commands plus holding the dog's leash only when student moved to another part of the school —were reasonable modifications rather than fundamental alterations. [27]

Second and foremost, in terms of being conclusive and favorable, was the recent, published court decision in *Alboniga v. Broward County Board of Education*. [28] In this case, the child was a kindergartner with multiple physical disabilities, with the service dog primarily performing tasks for the child's seizure disorder. The district's two defenses were exhaustion and mootness. In response, the court ruled that exhaustion was inapplicable because the issue was access, not FAPE, [29] and that mootness did not apply because although the district had been allowing access, its provision of a handler was contrary to its policies and procedures. [30] Proceeding to the merits, the court first determined that the ADA service–animal regulations were a permissible interpretation of the statute, thus meriting judicial deference. [31] Finally, the court ruled that the school district's policy and procedures, which required the parents to provide particular liability insurance and vaccinations as well as a separate "handler" for the dog, constituted failure–to–accommodate violations. [32] More specifically, the court concluded the liability insurance and vaccination requirements beyond those generally applicable under the state's law constituted a prohibited surcharge [33] and, thus, impermissible discrimination. ***559** For the " closer question" of the handler, [34] the court concluded that the limited task of assisting the child to lead the dog, who is tethered to him (and, thus within his control), outside the school to urinate is not within the care and supervision (i.e., routine overall maintenance) exclusion. [35]

Third and conversely, in *Riley v. School Administrative Unit #23*, the federal district court in New Hampshire denied the plaintiff–parents' motion for a preliminary injunction to allow access of the service animal, which was a seizure–alert dog, to accompany a student with multiple disabilities, including a seizure disorder. [36] As a threshold matter, the court agreed with *Alboniga* that the IDEA's exhaustion agreement was inapplicable based on the factual contours of this case. [37] As to the probability of success on the merits, the court distinguished *C.C.* and *Alboniga* for the reason that "because [this student] cannot be tethered to [his service dog], use voice commands, or hold [the dog's] leash at any time throughout the day, he cannot be a handler." [38] For the same reason, the court found likely that the parents' request for the district to have an employee provide these functions would constitute supervision in violation of the applicable regulations. [39] Finally, the court found that the regulations' prohibitions against district imposing "surcharges" or "personal services" were unlikely to apply. [40] In sum, within the limits of preliminary injunctions, the court found no conflict with *C.C.* and *Alboniga*, concluding that the plaintiff's modification requests in this situation went distinguishably beyond the reasonable level in those other cases.

State Law

The case law under the applicable state statutes during the updated period was limited to the Illinois Court of Appeals' affirmance of the trial ***560** court decision covered in the predecessor article. [41] More specifically, relying on Illinois' relatively straightforward and strong law and the narrow issue in the case, the court rejected the applicability of IDEA exhaustion and concluded that the child's dog, based on its training and functions, met the definition of a service animal. [42]

Concluding Recommendations

Although consulting with legal counsel is warranted for specific situations, initial general recommendations based on the foregoing syntheses are offered for consideration:

• become familiar with the relevant subsections of the ADA regulations [43] and any applicable state law [44]

• consider whether the animal qualifies under the applicable definition of service animal, [45] but be careful to limit questioning to permissible inquiries [46] and not to confuse educational necessity with discriminatory access [47]

• make an individualized, knowledgeable–team assessment of the application of the permissible exclusions, [48] including a narrow interpretation of the direct threat [49] and fundamental alteration; [50] for example, do not allow others' fear or allergies to be controlling considerations [51]

• in the usual situations where access is warranted, make sure it extends to all areas and activities accessible to other students [52] and without any sort of surcharge not applicable to other students, including additional insurance or vaccinations [53]

• finally, carefully make an objectively defensible fact–based determination whether any additional services that the child with a disability needs to control and maintain the service animal are reasonable modifications, [54] not either fundamental alterations or care and supervision. [55]

Footnotes

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1 Perry A. Zirkel, *Service Animals in Public Schools*, 257 Ed. Law Rep. 525 (2010). The definition of "service animal" under the leading applicable federal regulations is as follows:
any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability.... Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non–violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well–being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.
28 C.F.R. § 35.104 (2014).

2 In addition to the court decisions and agency actions summarized infra, see, e.g., *ACLU of Indiana Files Suit for Students with Disabilities to Bring Service Dogs to School* (Aug. 20, 2013), https://www.aclu.org/news/aclu–indiana–files–suit–students–disabilities–bring–service–dogs–school. At the wider level and on a different side of the controversy, see *Sorry, No Kangaroos: Service Animal Impostors Face Crackdown* (Feb. 22, 2016), http://www.wcvb.com/news/sorry–no–kangaroos–serviceanimal–impostors–face–crackdown/38121664 (reporting legislation in Florida and proposed laws in approximately five other states punishing persons who fraudulently claim that their dogs are service animals).

3 For the sake of brevity, the coverage does not extend beyond the K–12 school context except to the limited extent that the cited cases rely on such decisions. For a recent example of excluded case, see *Anderson v. City of Blue Ash*, 798 F.3d 338 (6th Cir. 2015) (ruling that child's miniature horse qualified as a service animal but reserved for further proceedings whether the residential accommodations for the animal at the family's home were reasonable or, instead, fundamental alterations). Moreover, within the K–12 school context, the coverage does not extend to related issues that are beyond the child's direct interest. *See, e.g., Williams v. Gwinnett Cnty. Pub. Sch.*, 425 Fed.Appx. 787, 270 Ed.Law Rep. 82 (11th Cir. 2011) (ruling that teacher's e–mail objecting to allowing service dogs inside the school was not of public interest and, thus, protected expression under the First Amendment, despite brief statements regarding his and possibly others' allergies). Finally, the limited and inconclusive case law concerning the rights of other students is not within the scope of this analysis. For an example, see *Student with a Disability*, 116 LRP 2576 (N.Y. SEA 2015) (ruling that New York's review–officer tier does not have jurisdiction for § 504 issues—hearing officer decided that district had made reasonable efforts to accommodate the plaintiff–student, who was allergic to dogs).

4 20 U.S.C. §§ 1400–1419 (2012).

5 29 U.S.C. § 794 (2012).

6 42 U.S.C §§ 12101–12110 (2012).

7 105 ILL. COMP. STAT. 5/14–6.02 (2013). For other examples specific to the public school context, see N.J. REV. STAT. § 18A:46–13.2 (2013); WASH. REV. CODE § 28A.642.010 (2013). More frequently applicable statutes extend to broader contexts, such as public places or places of public accommodation. See, e.g., ALA. CODE § 21–7–4 (2013); ARIZ. REV. STAT. § 11–1024 (2013); COLO. REV. STAT. § 24–34–803 (2013); MONT. CODE ANN. § 49–4–214 (2013); NEV. REV. STAT. § 651.075 (2013); N.M. STAT. ANN. § 28–11–3 (2013).

8 Zirkel, *supra* note 1, at 532 (citing *Bakersfield City Sch. Dist.*, 51 IDELR ¶ 142 (Cal. SEA 2008).

9 *Id.* at 526–27 (citing 28 C.F.R. §§ 36.104 and 36.302(c)).

10 *Id.* at 528–31 (citing, e.g., *Cave v. E. Meadow Union Free Sch. Dist.*, 514 F.3d 240, 229 Ed.Law Rep. 349 (2d Cir. 2008)). These exhaustion decisions were based on the IDEA provision that allows for claims on non–IDEA bases but only after exhausting the IDEA impartial hearing mechanism. 20 U.S.C. § 1415(*l*) (2013). For the application of this provision more generally, including its limited exceptions, see, e.g., Louis Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Federal Courts' Jurisdiction under the Individuals with Disabilities Education Act*, 29 J. NAT'L ADMIN. L. JUDICIARY 349 (2009). The limited exception for a decision on the merits was *Sullivan v. Vallejo City Unified School District*, 731 F.Supp. 947, 59 Ed.Law Rep. 73 (E.D. Cal. 1990), granting the plaintiff's motion for a preliminary injunction.

11 Zirkel, *supra* note 1, at 532–33 (citing, e.g., *Kalbfleisch v. Columbia Cmty. Unit Sch. Dist.*, 920 N.E.2d 651, 252 Ed.Law Rep. 918 (Ill. App. Ct. 2009).

12 *In re Student with a Disability*, 65 IDELR ¶ 57 (Ill. SEA 2014). The legal analysis was questionable to the extent that the hearing officer attributed the aforementioned (*supra* note 11) state court decision to the Seventh Circuit and failed to clearly apply the cited two–prong analysis for procedural FAPE.

13 *In re Student with a Disability*, 115 LRP 20747 (N.Y. SEA 2015). This analysis was much more on target in terms of the pertinent IDEA standard, although the Illinois case was arguably distinguishable in terms of relying in critical part on a strong Illinois law.

14 In addition to the aforementioned (*supra* note 9) regulation applicable to private schools, the ADA regulations have parallel provisions applicable to public schools. 28 C.F.R. §§ 35.104 and 35.136(a)–(*l*). For example, for the definition of service animal, see *id.* § 35.104. Although all of the agency and court cases herein are specific to dogs, miniature horses may qualify under limited circumstances. *Id.* § 35.136(i). In any event, a specified prerequisite is that "[a] service animal shall be under the control of its handler." *Id.* 35.136. Additionally, "[a] public entity is not responsible for the care or supervision of a service animal." *Id.* § 35.136(e).

15 *Gates–Chili Cent. Sch. Dist.,* 65 IDELR ¶ 152 (DOJ 2015). Additionally, DOJ reportedly has filed suit in federal court against the school district. Michelle Diament, *Obama Administration Sues School Over Service Dog*, Disability Scoop, Sept. 30, 2015, https://www.disabilityscoop.com/2015/09/30/obama–sues–service–dog/20840/

16 DOJ clarified more generally that, in contrast with fundamental alterations, "reasonable modifications, depending on the individual circumstances, include, but are not limited to, providing assistance to a student with a disability in tethering or untethering the service animal and escorting a student with a disability throughout the school or campus as he or she is accompanied by a service animal, and assisting a student with a communication disability in issuing commands to the service animal." Id. at *5.

17 *See, e.g., Ida (MI) Pub. Sch.*, 66 IDELR ¶ 259 (OCR 2015) (finding violation for restrictions on child's service animal's access during recess and at the school library – voluntary resolution); *Grand Rapids (MI) Pub. Sch.*, 115 LRP 10965 (OCR 2014) (reporting voluntary resolution for not allowing access of parent's service animal during visits to school based on student allergies or lack of service animal vest); *In re Student with a Disability*, 114 LRP 32429 (OCR 2014) (reporting voluntary resolution for not allowing child with peanut allergy to bring service dog to school – agreeing to conduct an individualized evaluation to determine whether a) the student requires the service animal to participate safely in the school's programs and activities and b) can demonstrate that she has control of the service animal, and, if so, to develop a plan for access including adjusted assignment of any student's allergic to the animal); *Putnam Cnty. (WV) Sch.*, 65 IDELR ¶ 184 (OCR 2014) (reporting voluntary resolution agreeing to convene IEP to determine whether the student requires the service animal to access the educational program and notify the parents of the determination); *Scott City (MO) R–1 Sch. Dist.*, 114 LRP 36301 (OCR 2014) (reporting mutual resolution that allowed parent to be accompanied by her service animal in all district buildings where the public is allowed); *Sch. Admin. Unit #23 (NH)*, 63 IDELR ¶ 65 (OCR 2013) (reporting voluntary resolution to provide a staff member for issuing commands as needed and to provide training for this purpose); *Cuyahoga Falls (OH) City Sch. Dist.*, 113 LRP 28151 (OCR 2013) (reporting resolution that allowed community member access with his service animal to school running track); *Catawba Cnty. (NC) Sch.*, 63 IDELR ¶ 234 (OCR 2013) (concluding that the district's IEP–conflict rationale "raises a compliance concern" by not meeting its burden to show a fundamental alteration); *cf. W. Gilbert (AZ) Charter Elem. Sch., Inc.,* 115 LRP 52095 (OCR 2015) (responding to complaint by a student with an allergy who sought to have the school

district stop allowing access of service animal of another student by a) rejecting the applicability of the direct threat exception, and b) finding that the district violated its child find obligation by not conducting an individualized evaluation to determine § 504 eligibility for the complaining child). *But cf. Pasadena Unified Sch. Dist*., 60 IDELR ¶ 22 (OCR 2012) (concluding that district personnel's expression of professional opinion in IEP meeting as to whether a student is a good candidate for a service animal does not violate the ADA).

18 28 C.F.R. § 35.136(b). These OCR analyses also cited the DOJ guidance that fear of or allergies to dogs are not valid reasons for denying access. *See, e.g.,* U.S. Dep't of Justice, *ADA Requirements: Service Animals*, http://www.ada.gov/service_animals_2010.htm

19 *Id*. § 135.36(f).

20 *Id*. § 135.36(g).

21 *Id*. § 135.39.

22 For the meaning of exhaustion in this context, see *supra* note 10.

23 *See, e.g., Fry v. Napoleon Cmty. Sch.*, 788 F.3d 622, 319 Ed.Law Rep. 43 (6th Cir. 2015); *M.T. v. Evansville Vanderburgh Sch. Corp.*, 62 IDELR ¶ 79 (S.D. Ind. 2013); *A.S. v. Catawba Cnty. Bd. of Educ*., 57 IDELR ¶ 67 (W.D.N.C. 2011). As an interim response to the parents' petition for certiorari in *Fry*, the Supreme Court in mid–January 2016 invited the U.S. Solicitor General to file a brief expressing the views of the Administration. *Fry v. Napoleon Cmty. Sch*., 2016 WL 207243 (U.S. S. Ct. Jan. 19, 2016).

24 56 IDELR ¶ 295 (C.D. Cal. 2011).

25 *Id*. at *2. In the majority of states, including California, IDEA hearing officers do not have jurisdiction for § 504 issues. *See, e.g*., Perry A. Zirkel, *Impartial Hearings for Public School Students under Section 504: A State–by–State Survey*, 279 Ed. Law Rep. 1 (2012).

26 *C.C. v. Cypress Sch. Dist.,* 56 IDELR ¶ 295, at *4 (citing 28 C.F.R. § 35.104).

27 *Id*. at *4–5. Citing the aforementioned (*supra* note 10) preliminary injunction in *Sullivan*, the court distinguished between discriminatory access, which is controlling, and educational necessity, which is irrelevant. *Id*. at *5.

28 87 F.Supp.3d 1319, 321 Ed.Law Rep. 331 (S.D. Fla. 2015).

29 *Id*. at 1329–30. For earlier authority for this distinction, see *supra* note 27.

30 87 F.Supp.3d at 1330–31. Although the parent originally served as the handler, the district subsequently made the administrative decision to assign these limited duties to the school custodian. *Id*. at 1325.

31 *Id*. at 1334–35 (citing 28 C.F.R. § 35.136). The court similarly concluded that these regulations were internally consistent with the more general regulation regarding reasonable modifications and fundamental alterations. *Id*. at 1335–36 (citing 28 C.F.R. § 35.130(b)(7)).

32 *Id*. at 1337–44.

33 *Id*. at 1339 (citing 28 C.F.R. § 35.136(h)).

34 *Id*. at 1339 (citing 28 C.F.R. §§ 28.135.136(d)–(e), which concern handler's control and care/supervision). The court otherwise relied on service animal case law in other contexts. For this specific question, however, the court found "very little in the way of case–law guidance as to what constitutes a 'hander' with 'control' over a service animal for purposes of these regulations." *Id*. at 1342.

35 *Id*. at 1344. Carefully limiting its reasonable accommodation conclusion to "the precise circumstances present here," the court in dicta distinguished and declined to definitively address the broader question: "the School Board is being asked to

accommodate *[the child]*, not to accommodate, or care for, [the dog]. Requiring the School Board to hire an additional employee to allow [the dog] to urinate outside school grounds may be a part of 'care or supervision.' " *Id.*

36 116 LRP 1940 (D.N.H. Dec. 21, 2015), *adopted*, 67 IDELR ¶ 8 (D.N.H. 2016). In a previous development between the same parties, OCR reported a voluntary resolution agreement under which the district had agreed, inter alia, to provide training but with the following condition: "at the conclusion of the training, if the Trainer determines that [the dog] is unable to function in the school setting, the [parents] may opt to pay for any additional training needed, or in the alternative provide a handier, at their own expense, if they wish to continue to have [the dog] accompany the Student to school." *Sch. Admin. Unit #23* (NH), 62 IDELR ¶ 65, at *3–4 (OCR 2013).

37 *Riley v. Sch. Admin. Unit #23,* 116 LRP 1940, at *6. The court also distinguished the Sixth Circuit's ruling in *Fry* (*supra* note 23), concluding that "Any psychological or emotional 'bond' [this service dog] may have with [the student] is secondary to its primary health and safety service." *Id.* at *7.

38 *Id.* at *8.

39 *Id.* For the "care and supervision" regulation, see *supra* note 14.

40 *Riley v. Sch. Admin. Unit #23,* 116 LRP 1940, at *10–11 (citing 28 C.F.R. §§ 35.135 and 35.136(h)).

41 Zirkel, *supra* note 1, at 533.

42 *K.D. v. Villa Grove Cmty. Sch. Dist. No. 302*, 936 N.E.2d 690 (Ill. Ct. App. 2010). For an additional case during the updated period that relied, at least in part, on the Illinois law, see *supra* note 12 and accompanying text.

43 *See supra* notes 9 and 14.

44 *See supra* note 7.

45 *See supra* note 1; *see also supra* text accompanying notes 26 and 36.

46 *See supra* note 19 and accompanying text.

47 *See supra* note 27.

48 *See supra* note 18 and accompanying text.

49 *See supra* note 21 and accompanying text

50 *See supra* note 27 and accompanying text.

51 *See supra* notes 17–18.

52 *See supra* note 20 and accompanying text.

53 *See supra* note 33 and accompanying text.

54 *See supra* notes 34–35, 38 and accompanying text.

55 *See supra* notes 14, 35, 39 and accompanying text.

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