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DOING THE RIGHT THING, THE RIGHT WAY, THE FIRST TIME: DECISION-MAKING IN PUBLIC AND PRIVATE ARENAS REGARDING THE USE OF SERVICE ANIMALS

Maureen E. Lally-Green, Annemarie Harr Eagle** & Bridget M. Green***[1]*

I. INTRODUCTION

If a dog is deemed a "man's best friend,"[2] a "service" dog is not only a best friend but a lifeline for an individual with disabilities in his or her academic study, career, or life in general. Over twenty-six percent of adults, forty percent of adults aged sixty-five years and older, in the United States have some type of disability.[3] Little statistical evidence exists about how many

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1. This Article is made possible through a generous grant from the PNC Foundation to Duquesne University's School of Law and School of Education. The purpose of this grant is to educate decision-makers, including educators and school administrators, about relevant federal and state laws that address the rights of persons with disabilities and to explore leadership opportunities for continuous improvement. The grant was also adapted to address significant impacts of COVID-19 on those with disabilities.

2. This phrase was first recorded as being made by King Frederick of Prussia. *Man's best friend*, WIKIPEDIA, https://en.wikipedia.org/wiki/Man%27s_best_friend (last visited June 7, 2022). Later, American Attorney George Graham Vest gave a powerful closing argument summarizing this relationship. *Id.* He said, "The one absolutely unselfish friend that a man can have in this selfish world, the one that never deserts him and the one that never proves ungrateful or treacherous is his dog." *Id.*

3. *Disability Impacts All of Us*, CDC, https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html#text-version (last visited June 9, 2022). By 2030, the number of adults aged sixty-five and over will outnumber children for the first time in U.S.

individuals with or without a diagnosed disability use a "service animal," an "emotional support animal" or a "therapy animal."[4]

This Article suggests ways in which decision-makers in private and public contexts can do the "right thing," the right way, the first time.[5] The Article has three foci: (1) the laws and regulations for use of "service animals" and unresolved issues relevant to litigations for violations of the same;[6] (2) the impact of COVID-19 on those with disabilities who use service animals and a number of "lessons learned";[7] and (3) appropriate decision-making about use of service animals by private or public employers as well as those with government, schools, or places of public accommodations, in the context of "getting the right things done" and in the right way, the first time.[8]

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history. *Older People Projected to Outnumber Children for First Time in U.S. History*, U.S. CENSUS BUREAU (revised Oct. 8, 2019), https://www.census.gov/newsroom/press-releases/2018/cb18-41-population-projections.html.

4. A "service animal," usually a dog, is trained to do work or perform specific tasks or jobs directly related to a person's disability. Jacquie Brennan & Vinh Nguyen, *Service Animals and Emotional Support Animals*, ADA NAT'L NETWORK, https://adata.org/guide/service-animals-and-emotional-support-animals (last visited June 9, 2022). These animals are used in public elementary, secondary, and post-secondary education and public services, programs, and places. *Id.* An "emotional support animal" is a pet prescribed by a licensed mental health professional to ease a person's anxiety, depression and certain phobias. *Id.* Emotional support animals do *not* qualify as "service animals" and, thus, emotional support animal users usually do not receive the same accommodations as service dog users, unless otherwise provided by state law. *Id.* According to the Mayo Clinic,

> Pet therapy is a: broad term that includes animal-assisted therapy and other animal-assisted activities. Animal-assisted therapy is a growing field that uses dogs or other animals to help people recover from or better cope with health problems, such as heart disease, cancer and mental health disorders. Animal-assisted activities, on the other hand, have a more general purpose, such as providing comfort and enjoyment for nursing home residents.

Pet Therapy: Animals as Healers, MAYO FOUND. FOR MED. EDUC. AND RSCH., https://www.mayoclinic.org/healthy-lifestyle/consumer-health/in-depth/pet-therapy/art-20046342 (last visited Aug. 14, 2022).

5. This phrase reflects indicia of great ethical leaders. Desmond Berghofer, *Doing the Right Thing*, INSTITUTE FOR ETHICAL LEADERSHIP, http://www.ethicalleadership.com/DoingRightThing.htm (last visited Aug. 14, 2022).

6. *See infra* Part II & III.

7. *See infra* Part IV.

8. *See infra* Part V. *See generally* PETER F. DRUCKER, THE EFFECTIVE EXECUTIVE: THE DEFINITIVE GUIDE TO GETTING THE RIGHT THINGS DONE (HarperCollins Publishers rev. ed. 2006) (1967). The authors hope this Article assists decision-makers in "getting the right things done" in matters involving the use of service animals.

II. THE LAWS

Three key federal laws are highly relevant to rights of individuals with disabilities: the Americans with Disabilities Act of 1990, as amended;[9] the Rehabilitation Act of 1973, as amended, and particularly its Section 504;[10] and, the Individuals with Disabilities Education Act, as amended.[11] The federal government also has promulgated regulations about the use of service animals.[12] And, a majority of the states have laws banning fraudulent representation of pets as service animals.[13]

A. The Americans with Disabilities Act

The Americans with Disabilities Act (ADA) was originally passed in 1990 and substantially amended in 2008.[14] This civil rights law was enacted "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[15] The 2008 amendments, among other things, clarified the meaning of "disability," "major life activities," and "regarded as having such an impairment."[16] Congress specifically stipulated that the definition of disability is "construed in favor of broad coverage of individuals."[17] The ADA has five titles: Title I–Employment;[18]

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9. *See generally* 42 U.S.C. §§ 12101–12213.
10. *See* 29 U.S.C. § 794.
11. 20 U.S.C. §§ 1400–1409.
12. *See* 28 C.F.R. §§ 35.136, 36.302 (2021).
13. As of 2022, thirty-three states have bans on such fraudulent representation. *Fraudulent Service Dogs*, ANIMAL LEGAL & HIST. CTR., https://www.animallaw.info/content/fradulent-service-dogs (last visited June 7, 2022).
14. *See generally* 42 U.S.C. §§ 12101–12213.
15. *Id.* § 12101(b)(1).
16. *See id.* § 12102. "Disability" is defined in 42 U.S.C. § 12102(1) as: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment (as described in paragraph (3))." Further, 42 U.S.C. § 12102(3)(B) provides that impairments that are transitory and minor are not covered, where a transitory impairment is one with an actual or expected duration of six months or less. "Major life activities" is defined in 42 U.S.C. § 12102(2)(A) to mean a broad range of activities including "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." "Regarded as having such an impairment" is defined in 42 U.S.C. § 12102(3)(A) to mean "the individual establishes that he or she has been subjected to [a violation of the ADA] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."
17. *Id.* § 12102(4)(A).
18. *See id.* §§ 12111–12117.

Title II–Public Services;[19] Title III–Public Accommodations;[20] Title IV–Telecommunications;[21] and Title V–Miscellaneous Provisions.[22]

1. Title I–Employment

a. Overview of Title I

Title I prohibits discrimination by a "covered entity" against a "qualified individual" with a disability on the "basis of disability" in regard to all facets of employment including hiring, working, dismissal and other terms, conditions, and privileges of employment.[23] A "covered entity" includes a private employer with fifteen or more employees.[24] A "qualified individual" with a disability is one "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[25] The Title I employer is also required to engage in an informal "interactive process"[26] in complying with its duty to make a "reasonable accommodation" that does not involve "undue hardship" but allows the individual to perform the essential functions of the job.[27]

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19. *See id.* §§ 12131–12165. The transportation provisions are not addressed in this Article.

20. *See* 42 U.S.C. §§ 12181–12189. Title III covers privately-owned places of public accommodations, such as restaurants, theaters, retail businesses, private schools, health and social service establishments and other businesses open to the public. *See id.* § 12181(7).

21. *See* 47 U.S.C. §§ 255, 251(a)(2). These provisions are not addressed in this Article.

22. *See id.* §§ 12201–12213. These provisions are not addressed in this Article.

23. 42 U.S.C. § 12112(a).

24. *Id.* § 12111(2), (5). The Equal Employment Opportunity Commission includes State and local government agencies with fifteen or more employees in the definition of a Title I "employer." *The ADA: Your Responsibilities as an Employer*, EEOC, https://www.eeoc.gov/publications/ada-your-responsibilities-employer (last visited Apr. 29, 2022) [hereinafter *ADA: Your Responsibilities as an Employer*].

25. 42 U.S.C. § 12111(8).

26. The Title I "interactive process" is addressed in Title I regulations. *See* 29 C.F.R. § 1630.2(o)(3) (2021). The regulation provides that "[t]o determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the individual with a disability in need of the accommodation." *Id.* A Title I "interactive process" is not required for Title III public accommodations, as such process does not appear in implementing regulations to Title III. Tauscher v. Phoenix Bd. of Realtors, Inc., 931 F.3d 959, 964 (2019). The *Tauscher* court also noted that while Title III's regulations suggest that the public accommodation "consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication," the public accommodation itself is independently responsible for making "the ultimate decision as to what measures to take." *Id.* at 963 (quoting 28 C.F.R. § 36.303(c)(ii) (2021)). This appears to be the case even "if the individual requesting such measures fails to engage in a good faith exploration of what measures would provide effective communication." *Id.* at 964.

27. 42 U.S.C. § 12112(b)(5)(A). *See also id.* § 12111(10) ("'undue hardship' means an action requiring significant difficulty or expense, when consider[ing]" certain factors,

Remedies for discrimination by Title I employers include litigation costs and expenses, attorneys' fees, and compensatory and punitive damages.[28] Employers can avoid damages by demonstrating good faith efforts to accommodate the individual with a disability without undue hardship.[29] The Equal Employment Opportunity Commission (EEOC) is the agency that oversees Title I. The EEOC has a defined process for complaints of employment discrimination based on disability, which must be followed before cases may be litigated in court.[30]

b. Issues under Title I

Three issues not yet resolved by the Supreme Court exist for private litigants alleging discrimination by Title I employers. These issues usually probe what is a plaintiff's burden of proof for causation and whether a plaintiff is required to demonstrate an adverse employment action.

i. What is plaintiff's burden of proof for causation under Title I?

The Supreme Court has yet to announce the applicable test for proof of causation for Title I discrimination claims: is it the "but for" standard or the "motivating factor" standard? "But for" causation is the traditional standard of proof for ADA discrimination cases and requires that the plaintiff proves that the disability is "more likely than not" the reason for an adverse employment action.[31] The "motivating factor" standard is borrowed from Title VII of

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including the nature and cost of the required accommodations, "the overall financial resources of the facility" including the number of persons employed at such facility, "the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility," and the overall financial resources, type of operation, and size of the covered entity.).

28. *Id.* § 12205. Remedies for discrimination under the ADA are also provided in the Civil Rights Act of 1991. *Id.* §§ 1981a(a)–(b). Permitted awards of damages are capped as a function of the size of the employer, the number of employees, and the combined amount of compensatory and punitive damages. *Id.* § 1981a(b)(3)(A)–(D). Punitive damages are available for private actions under Title I. *Id.* § 1981a(a). Punitive damages, however, are *not* available for private actions under Title II or Section 504. *See* Barnes v. Gorman, 536 U.S. 181, 187–89 (2002) (since defendants in private actions under Title II and Section 504 are recipients of Federal funding, a "contract-law" analogy defines the scope of conduct for which they are responsible for money damages in private suits, which such analogy does not permit punitive damages).

29. 42 U.S.C. § 1981a(a)(3).

30. *Filing a Complaint with the Equal Employment Opportunity Commission*, U.S. DEP'T OF JUSTICE, https://www.ada.gov/filing_eeoc_complaint.htm (last visited Aug. 19, 2022).

31. *See, e.g.*, Serwatka v. Rockwell Automations, Inc., 591 F.3d 957, 963 (7th Cir. 2010), *superseded by statute* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, *as recognized in* Figueroa Guzman v. WHM Carib, LLC, 169 F. Supp. 3d 304, 308–09 (D.P.R.

the Civil Rights Act and its Section 703(m).[32] Section 703(m) provides that proof of a discriminatory "motive" is one of a number of factors in the causation analysis for alleged "status" discrimination based on race, color, sex, religion or national origin" and is a compensable damage.[33]

While most of the Federal Circuits that have addressed the issue use the "but for" causation standard, one has not.[34] Which test is the Supreme Court likely to choose? A disciplined guess is that the Supreme Court will adopt the "but for" standard based on rulings in two Supreme Court cases. In 2009, the Supreme Court, in *Gross v. FBL Financial Services, Inc.*, declined to extend the "motivating factor" causation standard to a claim arising under Age Discrimination in Employment Act (ADEA) because the text of the ADEA did not provide for the "motivating factor" test.[35] And, in 2013, the Court, in *University of Texas Southwestern Medical Center v. Nassar*,[36] refused to extend the "motivating factor" causation standard to retaliation claims under Title VII because "retaliation" is textually in a different section than the "status based" cause of action under Section 703(m).[37] While the Supreme Court has not yet ruled on this issue for discrimination under Title I,[38] it appears that "but for" causation is the standard, consistent with the Court's holdings in

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2016) (since "no provision in the governing version of the ADA is akin to Title VII's mixed-motive provision," employee did not show that her "perceived disability was a but-for cause of her discharge.") *See also infra* note 34.

32. 42 U.S.C. § 2000e-2(m).

33. *Id.*

34. The Second, Fourth, Seventh and Ninth Circuit Courts of Appeal have adopted the "but for" test for cases arising under the ADA. Natofsky v. City of New York, 921 F.3d 337, 348 (2nd Cir. 2019); Gentry v. E.W. Partners Club Mgmt. Co., 816 F.3d 228, 235 (4th Cir. 2016); Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 963 (7th Cir. 2010); Murray v. Mayo Clinic, 934 F.3d 1101, 1105 (9th Cir. 2019), *cert denied*, 140 S.Ct. 2720 (2020). The Eighth Circuit is the only circuit that has adopted the "motivating-factor" standard for ADA claims. Pedigo v. P.A.M. Transp., Inc., 60 F.3d 1300, 1301 (8th Cir. 1995). Due to the date of this case and two subsequent Supreme Court cases, *Pedigo*'s authority has likely diminished. *See infra* note 39.

35. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 185–86 (2009). Plaintiff's burden in a disparate-treatment claim under the ADEA is to prove, by a preponderance of the evidence, that age was the "but for" cause of the challenged adverse employment action. *Id.* The burden of persuasion does not shift to the employer where a plaintiff has produced some evidence that age was one motivating factor in that decision but failed to demonstrate that age is the "but for" cause. *Id.* at 176–77.

36. 570 U.S. 338 (2013).

37. *Id.* at 361 (referring to the protected categories as "status" groups).

38. The Supreme Court recently denied certiorari in a case that upheld the "but for" standard for Title I discrimination claims *Murray,* 934 F.3d 1101 (9th Cir. 2019), *cert denied*, 140 S.Ct. 2720 (2020) (the Ninth Circuit held ADA discrimination claims are not evaluated under a "motivating factor" causation standard).

Gross and *Nassar* because Title I does *not* expressly authorize the "motivating factor" standard for causation.[39]

ii. Does the burden of proof for a failure to accommodate claim require an "adverse employment action"?

Title I provides that the employer "discriminates" when it *fails* to make "reasonable accommodations" that do not amount to an undue burden.[40] The EEOC has promulgated guidance for requests for a "reasonable accommodation," which advises use of an "informal interactive process."[41] Yet, if the employer unreasonably denies the request, what is plaintiff's burden of proof? Federal courts generally agree that the cause of action for a "failure to accommodate" does *not* require the plaintiff to demonstrate that an "adverse employment action" occurred because the statutory text does not require so.[42] These courts reason that incorporation of an adverse-employment-action

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39. Two recent Supreme Court cases where the Court examined the statutory language are helpful. *See generally* Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009 (2020); Babb v. Wilkie, 140 S. Ct. 1168 (2020). The *Comcast* Court held that a plaintiff asserting race discrimination under 42 U.S.C. § 1981 of the Civil Rights Act of 1866 must prove that a contract, including employment relationships, would have been entered into or continued "but for" the plaintiff's race. *Comcast Corp.*, 140 S.Ct. at 1014. The *Babb* Court ruled that a government employee, who claimed age discrimination under the federal-sector provisions of the ADEA, need only prove that age bias crept into the employment decision, and expressly distinguished *Gross* and *Nassar* as containing different statutory language. *Babb*, 140 S.Ct. at 1175–77.

40. 42 U.S.C. § 12112(b)(5).

41. *See ADA: Your Responsibilities as an Employer*, *supra* note 24. The EEOC has provided guidance. EEOC ADA DIVISION, OFFICE OF LEGAL COUNSEL, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE ADA, EEOC-CVG-2003-1 (2002), https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada [hereinafter EEOC, *Guidance*]. Reasonable accommodations for job performance may include restructuring of the job, modifying work schedules and workplace policies, and reassignment. *Id.* The EEOC's guidance contemplates a process as follows: the employer is to consider the request for "reasonable accommodation" and may offer its own possible accommodation; the requestor may offer alternative suggestions; the employer can choose between two more possible reasonable accommodations based on less burdensome costs; and the employer has the "ultimate discretion to choose between effective accommodations." *Id.* (citing 29 C.F.R. § 1630.9 (1997)). *See also Accommodations*, DEP'T OF LABOR, https://www.dol.gov/agencies/odep/program-areas/employers/accommodations (last visited Aug. 22, 2022).

42. Nicole Buonocore Porter, *Adverse Employment Actions in Failure-to Accommodate Claims: Much Ado about Nothing,* 95 N. Y. UNIV. L. REV. ONLINE 1, 2 (2020). Great appreciation is acknowledged for this thoughtful, well-researched, and well-reasoned law review article. The cases cited by Professor Porter for the First, Second, Third, Fourth, Fifth, Sixth, Seventh, and Tenth Circuits are incorporated by reference in this Article. *Id.* at 8–14. Professor Porter also observes that cases are cited for the opposite proposition, but most can be distinguished on facts or are consistent with the "no adverse action needed" cases. *Id.*

requirement into a failure-to-accommodate claim is "squarely at odds" with the text, the views of the EEOC, and the cases and reasoning of sister circuits.[43]

iii. Is Use of a Service Dog a "benefit or privilege" of employment?

An Arkansas federal district court ruled on March 30, 2022, that a veteran who sought to use his service dog, as a reasonable accommodation under both Section 504 and Title I, could not legally claim that working without mental or psychological pain caused by post-traumatic stress disorder (PTSD) constitutes a "benefit or privilege of employment."[44] Plaintiff, a conductor on the railroad, suffers PTSD from his military service and requested an accommodation to work in the train's cab alongside his service dog.[45] Plaintiff admitted he was able to perform the "essential functions of the job."[46] He argued that the accommodation would allow him to enjoy "equal benefits and privileges of employment: of working without the burden and pain of his [PTSD]."[47] The federal trial judge ultimately ruled that plaintiff did not identify "a cognizable benefit or privilege of employment that he is entitled to as a reasonable accommodation."[48]

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43. *See* Exby-Stolley v. Bd. of Cnty. Comm'rs, 979 F.3d 784 (10th Cir. 2020) (*en banc*), *cert denied*, 141 S. Ct. 2858 (2021) (holding that failure-to-accommodate jury instructions given at trial, which stated the plaintiff must prove that she was "discharged from employment or suffered another adverse employment action," were in error and no such requirement exists for a failure to accommodate claim). In June 2021, the Supreme Court denied *certiorari* to the employer's request to hear the appeal in this case. Bd. of Cnty. Comm'rs v. Exby-Stolley, 141 S. Ct. 2858 (2021).

44. Hopman v. Union Pac. R.R., No. 4:18-cv-00074-KGB, 2022 WL 963662, at *5 (E.D. Ark. Mar. 30, 2022). In this 2022 case, the federal district court judge granted the railroad's renewed motion for judgment as a matter of law pursuant to Federal Rules of Procedure 50, 39, and 52. *Id.* at *1. The judge had initially denied the railroad's earlier motion for judgment as a matter of law and allowed the matter to proceed to a jury trial. *Id*. In July 2021, a jury ruled in favor of the plaintiff. *Id*. at *2–3. Thereafter, the judge granted the railroad's renewed motion for judgment as a matter of law. *Id* at *35. In granting the renewed motion for judgment as a matter of law, the judge reversed the jury verdict and found in favor of the defendant. *Id*. at *38.

45. *Id*. at *2.

46. *Id*.

47. *Id*.

48. *Id.* at *35.

2. Title II ADA–Public Services

a. Overview of Title II

Title II prohibits a public entity from discriminating against a "qualified individual with a disability by reason of the disability" in access to its services, programs, or activities.[49] A "qualified individual with a disability" is one who "with or without reasonable modifications to rules, policies, or practices . . . or the provision of auxiliary aids and services meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."[50] A "public entity" includes "any State or local government[, or] any department, agency, special purpose district, or other instrumentality of a State or States or local government."[51] The Department of Justice (DOJ) is the regulatory agency for Title II and Title III, but not including transportation.[52] In this regard, the DOJ has issued regulations for the use of service animals in these entities.[53] The "service animal" regulations apply in Section 504 cases, as one Circuit Court of Appeals has ruled.[54]

b. Issues under Title II

Two unresolved issues under Title II probe whether a State's sovereign immunity bars private lawsuits for damages against the State and, assuming no sovereign immunity, whether private lawsuits for employment discrimination by Title II entities are justiciable under Title II.

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49. 42 U.S.C. § 12132. Title II defines a "qualified individual with a disability" in terms of "equal access" to public services and programs; however, Title I defines a "qualified individual with a disability" in terms of the ability to perform the essential functions of the employment position. *Compare id.* § 12131(2), *with id.* § 12112(a).

50. *Id.* § 12131(2).

51. *Id.* § 12131(1). Where an entity appears to have both public and private features, the Department of Justice has set out several factors to consider in determining if it is a "public entity." *See* U.S. DEP'T OF JUSTICE, AMERICANS WITH DISABILITIES ACT TITLE II TECHNICAL ASSISTANCE MANUAL §§ II-1.2000, II-1.3000 (1993) [hereinafter *DOJ Title II TAM*].

52. *See DOJ Title II TAM*, *supra* note 51, at § II-1.1000; U.S. DEP'T OF JUSTICE, AMERICANS WITH DISABILITIES ACT TITLE III TECHNICAL ASSISTANCE MANUAL § III-1.2000 (1993) [hereinafter *DOJ Title III TAM*].

53. *See* 28 C.F.R. §§ 35.136, 36.302(c) (2021).

54. *See* Berardelli v. Allied Servs. Inst. of Rehab. Med., 900 F.3d 104, 118 (3d Cir. 2018) (even though the Rehabilitation Act does not have an explicit "service animal" regulation, the "mandate" of that Act of "reasonable accommodations" is consistent with ADA's mandate of "reasonable modifications" so that individuals with disabilities are to be permitted to use service animals as "reasonable" accommodations).

i. Does Sovereign Immunity Bar Actions under Title II for damages?

States are protected by sovereign immunity from private lawsuits under the Eleventh Amendment,[55] unless certain conditions vitiate the immunity. Those conditions include whether:

- The State consented to the suit or waived sovereign immunity because the State has received Federal financial assistance;[56]
- The State validly abrogated sovereign immunity in its state laws;[57]
- The State has voluntarily removed the case to federal court after waiving sovereign immunity in state court;[58]
- The lawsuit is against State officials, but not the State *per se,* and the private litigant's claim is that the officials are attempting to enforce an unconstitutional law that harms the litigant.[59]

The United States' Congress has the power to abrogate States' sovereign immunity where Congress unequivocally expresses such an intent in the law and Congress appropriately uses a Constitutional power to provide private

55. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

56. Alden v. Maine, 527 U.S. 706, 714–16 (1999) (absent the State's consent or Constitutional violations, Congress does not have power under Article I to mandate that States surrender sovereign immunity for federal claims, unless the lawsuit is against lesser entities, such as municipal corporations, or against State officers for injunctive or declaratory relief, or for money damages to be collected from the officer personally and not from the State treasury). *See* Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999) (holding that federal courts have no jurisdiction to entertain suit because Florida's sovereign immunity was neither validly abrogated by the Federal Trademark Remedy Clarification Act, 102 Pub. L. No. 542, 106 Stat. 3567 (1992), nor voluntarily waived).

57. *E.g.*, Nev. Rev. Stat. Ann. § 41.031 (West 2021).

58. Lapides v. Bd. of Regents of the Univ. Sys. of Ga., 535 U.S. 613 (2002) (State removed a professor's Section 1983 case to federal court, claiming Eleventh Amendment immunity from state tort claims but also admitting that it had waived the sovereign immunity claim in state court; the Supreme Court ruled waiver of immunity in state court was a waiver of immunity in federal court). *Lapides* is limited to state law tort claims as the Section 1983 action was invalid because the State is not a "person" for Section 1983 purposes. *See id.*

59. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 376 (2001), (Kennedy, J. concurring); *see also Ex parte* Young, 209 U.S. 123, 152 (1908) (holding that where government officials attempt to enforce an unconstitutional law, sovereign immunity does not prevent people whom the law harms from suing those officials in their individual capacity for injunctive relief because they are not acting on behalf of the State).

rights of action,[60] for example, Section 5 of the Fourteenth Amendment[61] or the Bankruptcy Clause.[62] The first requirement is met under the ADA as Congress *did* expressly abrogate the States' sovereign immunity from private actions under the ADA in 42 U.S.C. § 12202.[63]

The Court has addressed whether the ADA's abrogation is valid for private litigation under the ADA by examining whether Congress validly exercised its enforcement powers under Section 5 of the Equal Protection Clause and whether Congress' remedy was congruent and proportional. Title II has yet to be determined by the Supreme Court. The Court, however, has provided some guidance in three cases that addressed States' sovereign immunity under the ADA:

- In *Board of Trustees of the University of Alabama v. Garrett*, the Court held that Congress did not validly abrogate the State's sovereign immunity for private actions for money damages under Title I because a pattern of disability discrimination was not shown such that its Section 5 enforcement powers were validly used; [64]

- In *Tennessee v. Lane*, the Court held that Congress validly abrogated the State's sovereign immunity to permit private rights of action under Title II ADA when fundamental constitutional rights were at stake, such as access to the upper floors of certain state courthouses for those with disabilities; [65] and

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60. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 82 (2000). States' are not forced to surrender sovereign immunity in discrimination cases under the ADEA even though the ADEA provides for abrogation of sovereign immunity; Congress exceeded its valid exercise of Article I Commerce Clause power because age is not a "suspect" class under the Equal Protection Clause and the remedy of abrogation was disproportionate (i.e., the injury and legislative means were not congruent or proportional). *Id.*

61. U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."); *see also* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (action brought in federal court by male workers alleging sex discrimination in pay under Title VII of the Civil Rights Act could proceed because the State's sovereign immunity was validly abrogated under Congress' powers to enforce Section 5 of the Fourteenth Amendment).

62. Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 357 (2006) (States' cannot invoke sovereign immunity in bankruptcy proceedings because ratification of the Bankruptcy Clause of the Constitution, U.S. CONST. art. 1, § 8, cl. 4, itself involved a subordination of State sovereign immunity and "the power to enact bankruptcy legislation was understood to carry with it the power to subordinate state sovereignty, albeit within a limited sphere.").

63. 42 U.S.C. § 12202.

64. *Garrett*, 531 U.S. at 374. The Court ruled that "in order to authorize private individuals to recover money damages against the States', there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation." *Id.*

65. 541 U.S. 509, 528, 533–34 (2004). Since the record reflected a great "volume of evidence" about "the nature and extent of unconstitutional discrimination against persons with

- In *United States v. Georgia*, the Court held Congress validly abrogated the State's sovereign immunity to permit private rights of action under Title II ADA when a constitutional right granted to the States through the Fourteenth Amendment was at issue, such as a paraplegic prisoner alleging disability discrimination due to prison conditions.[66]

These three cases reflect that Congress has the power to abrogate Eleventh Amendment immunity for the States where: (1) the constitutional right at stake triggers heightened scrutiny, such as race or gender, or is deemed "fundamental;"[67]and (2) where Congress finds a pattern of unconstitutional conduct, though not expressly forbidden by the text of the Fourteenth Amendment, and Congress' remedy of abrogation reflects "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[68]

An open issue is whether sovereign immunity is abrogated for private actions alleging discrimination because of a disability under Title II or Section 504, against State-run public schools or universities for a denial of equal access to public education or State-run public entities for a denial of equal access to programs and services, that may not be deemed "fundamental." The Eleventh Circuit has addressed both issues and ruled that Congress validly abrogated the State's sovereign immunity for the disability claims under Title II *regardless* of whether a fundamental right is implicated.[69] Time will tell

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disabilities in the provision of public services," Congress had properly exercised its authority under Section 5 to enforce the Fourteenth Amendment's substantive guarantee of the Constitution's right of access to the courts; Congress' remedy of abrogation of sovereign immunity to lawsuits for access to "services, programs, or activities" was both a congruent and proportional remedy for the targeted discrimination. *Id.*

66. 546 U.S. 151, 159 (2006).

67. *Lane*, 541 U.S. at 528–29 (reflecting that Congress has greater latitude to abrogate immunity pursuant to Section 5 of the Fourteenth Amendment with fundamental rights because it is "easier for Congress to show a pattern of state constitutional violations" that trigger a needed remedy).

68. *Garrett*, 531 U.S. at 365 (quotation omitted).

69. The Eleventh Circuit ruled that abrogation occurred in two public university cases alleging private rights of action for damages under Title II and Section 504 due to a denial of access for individuals with disabilities. The first case was *Ass'n for Disabled Ams., Inc. v. Fla. Int'l Univ.*, 405 F.3d 954 (11th Cir. 2005). Plaintiff's claim proceeded against the State-run university under Title II for failing to provide qualified sign language interpreters, note takers, and access to adequate auxiliary aids and services; ADA's abrogation of sovereign immunity was "congruent and proportional" when applied to State-supported higher education for these reasons: (1) the State's failure to provide "auxiliary aids" was a denial of "equal access*"* to public education and "access to public education" is a valid exercise of the enforcement power of Congress under Section 5 of the Fourteenth Amendment's Equal Protection Clause, *id.* at 957; (2) "education is perhaps the most important function of state and local governments" because the "constitutional right to equality in education, though not fundamental, is vital to the future success of our society," *id.* (quoting Brown v. Bd. of Ed., 347 U.S. 483, 493 (1954)); and (3) denying disabled persons access to that right "affects [their] future ability to exercise

what the Supreme Court will decide about Title II's abrogation of sovereign immunity, particularly in the arena of State-run post-secondary education.

ii. If no sovereign immunity, are actions under Title II for employment discrimination appropriate?

The Supreme Court in *Garrett* ruled that lawsuits by State employees to recover money damages from the State for employment discrimination under Title I are barred by the Eleventh Amendment.[70] However, even when the public entity is the State, sovereign immunity is not a complete bar to all lawsuits brought under Title I because *Garrett* addressed only private actions against the State for *money damages*.[71] Will the Supreme Court recognize a cause of action under Title II for employment discrimination by a Title II employer where the text of Title II does *not* expressly prohibit discrimination, but DOJ regulations expressly do?[72]

The Federal Circuits are divided as to whether plaintiffs can bring claims under Title II for employment discrimination against Title II entities. The older view is that Title II permits such lawsuits.[73] The recent view is that such claims must be raised under one of the two statutes that authorize such claims: Title I if the Title II employer has fifteen or more employees or Section 504(d), since the statutory language of Title II does not expressly authorize employment discrimination actions against the Title II entity.[74] Thus, the

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and participate in the most basic rights and responsibilities of citizenship, such as voting and participation in public programs and services." *Id.* at 959. The second case was *Nat'l Ass'n of the Deaf v. Fla.*, 945 F.3d 1339 (11th Cir. 2020), opinion vacated and superseded, 980 F.3d 763 (11th Cir. 2020). Plaintiff's claim proceeded against the State-run university under Title II and Section 504 for failing to provide captioning for live and archived videos of Florida legislative hearings because, without the captioning, people who are deaf and hard of hearing could not comprehend those videos. *Id.*

70. *Garrett*, 531 U.S. at 360.

71. Justice Kennedy, joined by Justice O'Connor, wrote, at *Garrett*, 531 U.S. at 374 n.9:

> Our holding here that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte* Young, 209 U.S. 123 (1908). In addition, state laws protecting the rights of persons with disabilities in employment and other aspects of life provide independent avenues of redress.

72. 28 C.F.R. § 35.140 (2021); *see also* 29 C.F.R. pt. 1630 (2021); 28 C.F.R. pt. 41 (2021).

73. *See* Bledsoe v. Palm Beach Cnty. Soil & Water Conservation Dist., 133 F.3d 816 (11th Cir. 1998) (Title II of the ADA applies to employment discrimination).

74. Brumfield v. City of Chicago, 735 F.3d 619 (7th Cir. 2013); Elwell v. Okla. *ex rel.* Bd. of Regents of the Univ. of Okla., 693 F.3d 1303 (10th Cir. 2012); Zimmerman v. Or. Dep't of Justice, 170 F.3d 1169 (9th Cir. 1999).

decidedly wiser course for plaintiffs' employment discrimination lawsuits against Title II employers is to, if possible, proceed under Title I or Section 504.

iii. Title III –Public Accommodations.

Title III prohibits discrimination on the basis of disability in the activities of places of public accommodations which are businesses that are open to the public and fall into one of twelve categories.[75] Title III also requires newly constructed or altered places of public accommodation and commercial facilities, including privately owned nonresidential facilities such as factories, warehouses, or office buildings that affect commerce, to comply with the ADA construction and alteration standards.[76] Further, Title III applies to any public accommodation, commercial facility, or private entity that offers examinations or courses related to applications, licensing, certification or credentialing for secondary or postsecondary education, and professional or trade purposes.[77]

Private party claims against Title III entities for "unequal access" may be possible because the Title III entity is not the State for purposes of sovereign immunity, however, available damages depend on both federal and state

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75. 42 U.S.C. §§ 12181–12189. *See also* 28 C.F.R. pt. 36 (2021), *and* 42 U.S.C. § 12182 (prohibiting disability discrimination by "places of accommodation" as follows: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.").

Also compare 28 C.F.R. §§ 36.102(b)–(c) (2021) (where the terms "public accommodations" and "commercial facilities" are referenced), *with id.* § 36.104 (defining "Public accommodations" as a "facility operated by a private entity whose operations affect commerce and fall within at least one of [twelve proscribed categories.]"). *See also id.* §§ 36.201, 36.202 (addressing Title III prohibitions.); 42 U.S.C. § 12184 (prohibiting discrimination in "specified transportation services provided by private entities."), *and* 28 C.F.R. § 36.103(a) (2021) (stating that except as otherwise provided in Title III, Title III is not to be construed to apply lesser standards than those of Title V of the Rehabilitation Act.).

76. 42 U.S.C. § 12183 (addressing the new construction and alterations in public accommodations and commercial facilities). *See also DOJ Title III TAM*, *supra* note 52, at § III-1.3000 (providing that Title III requirements that govern "new construction and alterations cover commercial facilities . . . whose operations affect commerce. This category sweeps under ADA coverage a large number of potential places of employment that are not covered as places of public accommodation. A building may contain both commercial facilities and places of public accommodation.").

77. 42 U.S.C. § 12189 (providing, "Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.").

law. The DOJ is the regulatory agency for most Title III entities and *expressly* addresses use of service animals by Title III entities.[78]

iv. Title V –Miscellaneous

Title V sets out miscellaneous provisions that are intended to apply broadly across all ADA Titles.[79] Title V provides, in relevant part, that *nothing* in the ADA is to be construed to:

- apply a lesser standard than the standards under the Rehabilitation Act or to limit rights or remedies of federal or state laws that give greater or equal protection than are afforded under the ADA;
- invalidate rights of any State providing greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter;
- require an individual with a disability to accept an accommodation the individual chooses not to accept;
- alter requirements of reasonable modifications without showing undue hardship or, if a post-secondary institution, without showing a fundamental alteration of academic requirements;
- give rights to an individual without a disability who claims discrimination because of the individual's lack of disability; or
- require a covered entity to provide reasonable accommodations or modifications to persons who meet the definition of qualified individual *solely* by being "regarded" as having an impairment.[80]

Title V also provides for the following:

- an *express* abrogation of a State's immunity under the Eleventh Amendment from actions in federal or state courts seeking remedies for violations of the ADA *to the same extent as* such remedies are available for ADA violations in actions against a public or private entity other than a State;[81]
- rights against retaliation of, and coercion, intimidation, or interference of, an individual who opposes acts unlawful under the ADA, who makes a charge, testifies, or participates in an investigation, proceeding, or

78. 28 C.F.R. § 36.302(c) (2021).
79. *See* 42 U.S.C. §§ 12201–12213.
80. *Id.* § 12201.
81. *Id.* § 12202.

hearing under the ADA or who aids or encourages the exercise of ADA rights;[82]

- extensive remedies and procedures under various sections of the ADA and the RA;[83] and

- application of the ADA to the U.S. Congress, making it the *only* branch of the federal government covered by the ADA.[84]

Although some of Title V's miscellaneous provisions may not appear in the other ADA Titles, they are intended to apply broadly across all the Titles that incorporate the ADA. In addition, many of these provisions are found in agency regulations implementing the ADA.

B. The Rehabilitation Act of 1973

Beginning in 1973, the Rehabilitation Act (RA) prohibits discrimination on the basis of disability vis-à-vis benefits, programs and activities, including education and employment, in three arenas: the Federal executive branch agencies (Section 501);[85] contractors with the federal government (Section 503);[86] and private and public recipients of Federal financial assistance, and post-secondary educational institutions (Section 504).[87] The focus here is on Section 504, and not on Section 501 or Section 503.

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82. *Id.* § 12203.

83. *Id.* §§ 12203, 12205.

84. *Id.* § 12209.

85. 29 U.S.C. § 791 prohibits Federal executive branch agencies from discriminating against qualified individuals because of disability and also requires such agencies to take affirmative action in the hiring, placing, and advancing of individuals with disabilities. Section 501 requires each agency to develop a plan for promoting equal opportunity for those with disabilities and to identify a senior employee to be responsible for the same. *Id.* Heightened affirmative action employment goals for those with "targeted" disabilities by agencies covered by Section 501 were announced in an EEOC final rule that amends the regulations implementing Section 501. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2017-4, QUESTIONS AND ANSWERS: THE EEOC'S FINAL RULE ON AFFIRMATIVE ACTION FOR PEOPLE WITH DISABILITIES IN FEDERAL EMPLOYMENT (2017).

86. 29 U.S.C. § 793, which codified Section 503, prohibits Federal contractors with contracts for $10,000 or more, and their subcontractors who have subcontracts satisfying the same criteria, from discriminating against qualified individuals because of disability and, likewise, requires affirmative action to employ and promote qualified individuals with disabilities. Section 503 is enforced by the U.S. Department of Labor Office of Federal Contract Compliance Programs. *Employment Rights: Who has Them and Who Enforces Them*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/odep/publications/fact-sheets/employment-rights-who-has-them-and-who-enforces-them (last visited Aug. 27, 2022).

87. 29 U.S.C. § 794.

1. Overview of Section 504

Section 504 addresses discrimination because of disability in relation to access to programs and services, education, and employment. Section 504(a) provides, in part:

No otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency . . . .[88]

The phrase "program or activity" is broadly defined and includes the following:

- operations or instrumentalities of a State or local government, including all government entities that distribute Federal financial assistance;[89]
- higher educational entities (i.e., colleges, universities, other postsecondary institutions, et cetera) and local educational agencies, vocational education, or other school systems;[90]
- an "entire corporation, partnership, other private organization, or sole proprietorship" if the Federal financial assistance is given to the entity as a whole or the entity is "principally engaged in the business of providing education, health care, housing, social services, or parks and recreation;"[91] and,
- any entity established by two or more of the above entities.[92]

a. Section 504 Regulations–Education

The U.S. Department of Education (DOE) implements Section 504 in programs and activities that receive Federal financial assistance from the DOE.[93] The DOE's Office for Civil Rights enforces Section 504 for recipients of Federal financial assistance, including public school districts, institutions of higher education, and other State and local education agencies.[94]

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88. *Id.*
89. *Id.* § 794(b)(1)(A), (B).
90. *Id.* § 794(b)(2)(A), (B).
91. *Id.* § 794(b)(3)(A). *See also id.* § 794(b)(3)(B) (providing an exception for individual facilities that are geographically separate from other parts of the organization).
92. *Id.* § 794(b)(4).
93. *See generally* 34 C.F.R. pt. 104 (2021).
94. U.S. DEPT. OF EDUC., FREE APPROPRIATE PUBLIC EDUCATION FOR STUDENTS WITH DISABILITIES: REQUIREMENTS UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973 (2010). As discussed above, Title II prohibits State and local governments from discriminating because of disability regardless of whether Federal financial funding is involved. *Id.* The DOE

Section 504 regulations require school districts to provide "free appropriate public education" (FAPE) to each qualified student with a disability in the school district's jurisdiction by providing regular or special education, related aids, and services designed to meet the student's individual educational needs *as adequately as* the needs of nondisabled students are met.[95] This is different from the Individuals with Disabilities Education Act (IDEA) FAPE which requires an Individualized Education Plan (IEP).[96] Section 504 FAPE involves the development of an individualized plan, referred to as a "Section 504 Plan."

b. Section 504(d)–Employment

Section 504(d) *explicitly* prohibits employment discrimination of "otherwise qualified individuals with disabilit[ies]" by the above-identified recipients of Federal financial assistance.[97] Section 504 states that the standards of the ADA under Titles I and V are to be used.[98] Individuals with disabilities claiming employment discrimination under Section 504 may file complaints with the office of civil rights at the relevant agency[99]and may seek redress through a private right of action.[100]

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enforces "Title II in public elementary and secondary education systems and institutions, public institutions of higher education and vocational education (other than schools of medicine, dentistry, nursing, and other health-related schools), and public libraries." *Id.*; *see also* 34 C.F.R. § 104 (2021).

95. *See* 34 C.F.R. § 104.33 (2021).

96. The IDEA is found at 20 U.S.C. §§ 1400–1500, with IDEA FAPE addressed at 20 U.S.C. § 1412(a)(1)(A)). *See also* 34 C.F.R. § 300.101 (2021) ("free appropriate public education").

97. *See* 29 U.S.C. § 794(a).

98. *Id.* § 794(d). See generally the DOJ's regulations in 28 C.F.R. pt. 42 (2021), with discrimination prohibition addressed at 28 C.F.R. § 42.503 (2021). *See also* 29 C.F.R. § 1640.8 (2021). Section 504(d) provides that the standards applicable under Title I of the ADA and other provisions of the ADA apply to Section 504(d). 29 U.S.C. § 794(d).

99. Agencies are responsible for issuing Section 504 regulations prohibiting disability discrimination in their federal assisted and federal conducted programs. 29 U.S.C. § 794(a) (2021); 28 C.F.R. § 41.4 (2021). Executive Order 12250, Leadership and Coordination of Nondiscrimination Laws, states that the Attorney General has the authority to coordinate the implementation and enforcement of Section 504. Exec. Order No. 12,250, 43 Fed. Reg. 2,132 (Jan. 13, 1978) *amended* 46 Fed. Reg. 40,686–87 (Aug. 11, 1981). The Assistant Attorney General for Civil Rights is responsible for the coordination. 28 C.F.R. § 0.51 (2021).

The DOJ's regulation in 28 C.F.R. § 41.4 (2021), addresses the mandates of Executive Order 12250 §1-402 (codified as 28 C.F.R. § 41.3) with respect to Section 504. The DOJ is also to provide technical assistance to ensure consistency in the implementation of Section 504 and certain provisions of the ADA, including Title I and Title II. *See* 42 U.S.C. 12206(c).

100. 29 U.S.C. § 794a(a)(2); 42 U.S.C. § 12133. *See also* Fry v. Napoleon Cmty. Schs., 580 U.S. 154, 160 (2017) (the Court stated that both the ADA and Section 504 "authorize individuals to seek redress for violations of their substantive guarantees by bringing suits for injunctive relief or money damages.").

Remedies for Section 504 violations include a broad array of costs, damages, and attorney fees as provided, in appropriate cases, under Title VI and Title VII of the Civil Rights Act.[101] Punitive damages, though, are not available.[102] Also, emotional damages are not recoverable in a private action to enforce Section 504.[103]

c. Section 504 and service animals

In Part II, the DOJ regulations respecting service animals are addressed. They do not specifically cover Section 504 recipients; however, Section 504 recipients may be covered to the same extent as Title II or Title III entities because DOJ regulations for service animals are *per se* a reasonable accommodation for Section 504 covered entities.[104]

2. Issues for Private Litigants under Section 504

The following probes two related issues for private litigants under Section 504.

a. Must a plaintiff exhaust administrative remedies under another statute before bringing suit under Section 504?

Exhaustion of administrative remedies under another statute, such as the IDEA, may not be required when the "gravamen" of the pleading involves "access" to services under Section 504. The Supreme Court so ruled in *Fry v. Napoleon Community Schools*, [105] a service animal case, discussed *infra* in Part Two.

b. How broad is Congress' waiver of a State's sovereign immunity in Section 504 cases?

While the Federal Government retains sovereign immunity against money damages in Section 504 cases, States often do not. In 1996, the Supreme Court ruled that Congress did *not* waive the Federal Government's

101. Remedies and attorney fees are addressed in 29 U.S.C. § 794a, providing that remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964), as amended, are available to persons aggrieved by any act or failure to act by any recipient of federal assistance or federal provider of such assistance under Section 794 (i.e., Section 504).

102. Barnes v. Gorman, 536 U.S. 181, 193 (2002).

103. Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1571–72 (2022).

104. *See infra* note 163 and accompanying text (examining Berardelli v. Allied Servs. Inst. of Rehab. Med., 900 F.3d 104 (3rd Cir. 2018).

105. *Fry*, 580 U.S. at 158.

sovereign immunity against monetary damages with respect to Section 504.[106] The Court did, however, rule that Congress has the power to condition Federal education funds on non-discrimination in funded programs.[107] While some Circuits do allow waiver of sovereign immunity, reasoning that Congress has the power to condition receipt of Federal funding on non-discrimination in funded programs, such waivers are limited to an agency's department and not to the entire agency.[108] The Supreme Court has yet to rule on this theory. In the meantime, a State and its instrumentalities apparently can avoid Section 504's waiver of sovereign immunity by accepting Federal funds for some departments of its agencies and declining them for others.

Also, the Supreme Court has yet to address the breadth of Section 1003 of the Rehabilitation Act Amendments of 1986,[109]which abrogates a State's immunity from suit in federal court for violations of "the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance."[110] The Supreme Court recently denied a petition for *certiorari* in a case where the circuit court had ruled that the State had abrogated its sovereign immunity under Section 1003 by its receipt of Federal funds under the Patient Protection and Affordable Care Act (ACA), even though the ACA did not explicitly provide for a State's abrogation of immunity.[111]

C. The Individuals with Disabilities Education Act

1. Overview

The Individuals with Disabilities Act (IDEA) is a federal civil rights law that makes FAPE available to eligible children with disabilities and ensures special education and related services to those children, including reasonable

106. Lane v. Pena, 518 U.S. 187, 200 (1996) (After Department of Transportation (DOT) expelled a student from the U.S. Merchant Marine Academy because he was diagnosed with diabetes, the student sued DOT alleging its action violated Section 504. The Court held that Congress did not waive the Federal Government's sovereign immunity for damages for Section 504(a) violations.)

107. *See,* e.g., Lau v. Nichols, 414 U.S. 563, 569–70 (1974) (upholding Congress' power to condition Federal education funds on non-discrimination in the funded programs where school policy caused disparate impact). *See also* Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (holding private rights of action under Title VI of the Civil Rights Act require proof of intentional discrimination and cannot rest on proof that school policies cause a disparate impact).

108. Jim C. v. U.S., 235 F.3d 1079, 1080–82 (8th Cir. 2000).

109. 42 U.S.C. § 2000d-7(a) ("A State shall not be immune under the Eleventh Amendment . . . from suit in Federal court for violation of section 504 . . . or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.").

110. *Id.*

111. Kadel v. N.C. State Health Plan Tchrs. & State Emps., 12 F.4th 422 (4th Cir. 2021), *cert. denied*, 142 S. Ct. 861 (2022).

accommodations for the child's disability.[112] The IDEA governs how States and public agencies provide early intervention, special education, and related services to eligible infants, toddlers, children, and youth with disabilities through twelfth grade.[113] The IDEA requires States to issue regulations that provide for the protections of the IDEA and that guide the IDEA's implementation.[114]

A school meets its IDEA FAPE obligations by designing and implementing an IEP to assure the student is making progress in the educational setting.[115] IDEA-eligible students have rights under the IDEA, which are to be enforced by the school districts and can be asserted by parents and students through a State administrative process.[116] After exhausting the available administrative processes, litigants can pursue rights in federal court.[117]

2. Issues under IDEA

a. What is an appropriate IEP?

Two Supreme Court cases clarified what a school district is required to provide and implement in an IEP under IDEA: *Board of Education v. Rowley* [118] and *Endrew F. v. Douglas County School District*.[119] The *Rowley* Court held that public schools are to provide IDEA eligible students with an IEP

112. 20 U.S.C. §§ 1400–1500. The IDEA contains four parts: Part A. General Provisions (including the purpose of IDEA and the definitions used throughout the statute), *id.* §§ 1400–1409; Part B. Assistance for All Children with Disabilities (addressing formula grants that assist States in providing a free appropriate public education in the least restrictive environment for children with disabilities ages three through twenty-one), *id.* §§ 1411–1419; Part C. Infants and Toddlers with Disabilities (addressing formula grants that assist States in providing early intervention services for infants and toddlers from birth through age two and their families), *id.* §§ 1431–1444; and, Part D. National Activities to Improve Education of Children with Disabilities (addressing discretionary grants to support State personnel development, technical assistance and dissemination, technology, and parent-training and information centers), *id.* §§ 1450–1482.

See also About IDEA, U.S. DEP'T OF ED., https://sites.ed.gov/idea/about-idea/ (last visited July 26, 2022) [hereinafter *About IDEA*]. Congress reauthorized the IDEA in 2004 and most recently amended the IDEA through Public Law No. 114-95, Every Student Succeeds Act, in December 2015. *Id.*

113. *See About IDEA*, *supra* note 112.

114. *Id.*

115. *See* 20 U.S.C. § 1414.

116. The DOE's Office for Civil Rights does not enforce the IDEA; however, the Office for Civil Rights does enforce the RA, Section 504, and the ADA Title II rights of IDEA-eligible students with disabilities. *See About IDEA*, *supra* note 112.

117. 29 U.S.C. § 1415(l).

118. *See* Bd. of Educ. v. Rowley, 458 U.S. 176 (1982).

119. *See* Endrew F. v. Douglas Cnty. Sch. Dist., 137 S. Ct. 988 (2017).

"reasonably calculated to enable the child to receive educational benefits."[120] There, the student was in a regular education classroom, provided with accommodations, and was denied the requested additional service, a sign-language interpreter.[121] The Court held that the student was receiving IDEA FAPE even though the school refused to provide the student a sign-language interpreter because she was (1) receiving specially designed instruction and modifications designed to meet her individualized needs, (2) successfully earning higher than average grades in the class, and (3) advancing from grade to grade.[122]

The *Endrew* Court, in 2017, ruled that a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in consideration of the child's circumstances.[123] There, parents of a child with autism requested private school tuition reimbursement for an alleged denial of IDEA FAPE.[124] The Court addressed the proper standard for IDEA FAPE for a student who is not fully integrated into a regular classroom.[125] The Court ruled that a school must provide an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances and the progress is to be more than *de minimis* progress to meet the substantive obligations under the IDEA.[126]

An issue that arises is whether use of a service animal by an IDEA-eligible student with an IEP is "reasonably calculated to enable the child to receive educational benefits" or "to make progress appropriate considering the child's circumstances," or whether use of the service animal is about "access."[127]

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120. *Rowley*, 458 U.S. at 206–07. There, the Court stated: "a court's inquiry in suits brought under § 1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Id.*

121. *Id.* at 184–85.

122. The Court cautioned that since the IDEA placed the "primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs" with "state and local educational agencies in cooperation with the parents or guardian of the child, . . . it seems highly unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories in a proceeding conducted pursuant to § 1415(e)(2)." *Id.* at 207–08. The Court concluded that the "evidence firmly establishes that the child is receiving an 'adequate' education, since she performs better than the average child in her class and is advancing easily from grade to grade" and that she "was receiving personalized instruction and related services calculated by the . . . school administrators to meet her educational needs." *Id.* at 209–10 (quotation omitted).

123. *Endrew*, 137 S. Ct. at 999–1001.

124. *Id.* at 997.

125. *Id.* at 997–1001.

126. *Id*.

127. *See infra* Part III.B.1.

b. What are IDEA's requirements for transitioning high school students with disabilities into post-secondary life?

The IDEA, as well as other federal and state laws, provides that schools are to provide for transition planning in IEPs for students with disabilities in secondary education. Transition plans under the IDEA are designed to be within a "results-oriented process," that is "focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities," including post-secondary and vocational education, "integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation."[128]

Such goals often target the student's skills in self-advocacy, including requesting reasonable accommodations in a variety of post-secondary environments.[129] Transition services under IDEA can begin as soon as age fourteen in some states if the law permits or if deemed appropriate by the IEP.[130] IDEA protections cease after graduation from high school or after reaching age twenty-one.[131]

Transitioning services under the IDEA involve preparation of IDEA-qualified students to self-advocate, including advocacy about the student's use of a service animal. These services should address the application of relevant laws in college, the workplace, and life. For example, use of a service animal can be an "appropriate modification" under the ADA, a "reasonable accommodation" under Section 504, otherwise permitted by Title II, or a "reasonable accommodation" under Title I or Section 504. Since IDEA-

128. *See* 20 U.S.C. § 1401(34). See also 34 C.F.R. § 300.43(a) (2021), for further discussion of this statutory definition. IDEA has not been amended since 2004 and, thus, some transition-related services for students with disabilities have not been adequately provided, primarily due to funding. However, some relief came with the *Workforce Innovation and Opportunity Act of 2014,* Pub. L. No. 113-128, 128 Stat. 1554 (2014) (codified as 29 U.S.C. § 3209) (WIOA). The purpose of WIOA is to coordinate Federal workforce development and related programs with offerings of the States. 29 U.S.C. § 3101. Public schools receive funding for transition services for students with disabilities in their secondary years. *Id.* § 3209 (c)(3). Also, Title IV of WIOA amends the RA and authorizes funding for vocational rehabilitation services for individuals with disabilities, many of which relate to employment and independent living. *Id.* § 3343.

129. For example, the Pennsylvania Department of Education, in compliance with the IDEA, has Career Education and Work Standards. 22 Pa. Code § 4.11 (2022). These standards require that students have at least twenty opportunities to explore and assess careers in the K-12 general education setting. *Id.*

130. 34 C.F.R. §300.320(b) (2021) (provides that beginning at age sixteen an annual IEP must have appropriate measurable postsecondary goals, include transition services and courses of study, and include a statement that the child has been informed of the child's rights transferring at the age of majority under Section 300.520).

131. *See* 34 C.F.R. §§ 300.101, 300.102 (2021).

transitioning services end at high school graduation, educated self-advocacy skills can be critical for success in college and the workforce.

III. THE REGULATIONS FROM THE DEPARTMENT OF JUSTICE OF SERVICE ANIMALS FOR TITLE II AND TITLE III ENTITIES

Individuals with disabilities have rights to use service animals if such is required by the DOJ's regulations as a "reasonable modification" for Title II covered entities (State and local government services) and Title III covered entities (public accommodations and commercial facilities).[132] Entities subject to the DOJ regulations are *expressly* required to make modifications in their policies, practices, or procedures when necessary to accommodate people with disabilities using "service animals."[133] Also, public and private entities covered by Section 504 are *likely* subject to the same interpretations as the DOJ regulations for use of service animals.[134] The DOJ has issued guidance in this area.[135]

Notably, though, requests to use service animals by qualified individuals with disabilities of Title I employers or Section 504(d) employers, are not governed by DOJ regulations. These requests are addressed as requests for "reasonable accommodations" and an "informal interactive process."[136]

A. The DOJ Regulations

The following briefly overviews the DOJ regulations[137] in the context of Title II, Title III, and Section 504.

1. What is a Service Animal?

A "service animal" is defined as any dog or miniature horse that is individually trained to do work or perform tasks for the benefit of an individual with a disability.[138] While the service animal need not be professionally

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132. 28 C.F.R. § 36.302(c) (2021).

133. *Id.* §§ 35.136(a), 36.302(c) (2021).

134. *See* Berardelli v. Allied Serv. Inst. of Rehab. Med., 900 F.3d 104, 120 (3d Cir. 2018).

135. *See* U.S. DEP'T OF JUSTICE, AMERICANS WITH DISABILITIES ACT REQUIREMENTS: SERVICE ANIMALS (2020) [hereinafter *ADA Service Animal Reqs.*].

136. *See supra* notes 26–47 and accompanying text.

137. 28 C.F.R. §§ 35.136; 36.302(c) (2021).

138. 28 C.F.R. § 35.104 (2021), for Title II, and 28 C.F.R. § 36.104 (2021), for Title III, provide the following definition:

> Service animal means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the

trained, as persons with disabilities may train the animal themselves, the service animal must be trained in tasks directly related to the person's disability and to take a specific action when needed to assist the person with a disability.[139] A "service-dog-in-training" is not considered a "trained" service dog under the ADA, even though it may be under state or local laws.[140] Under one state law, for example, trainers of "service dogs" are entitled to equal opportunity in employment, education, and access to public accommodations.[141]

2. What are the Handler's Responsibilities?

The handler is responsible for the control of the service animal, which includes taking care of the needs of the service animal. "Control" means that service animals are harnessed, leashed, or tethered except when the individual's disability prevents the use of a harness, leash or tether because they interfere with the service animal's safe, effective performance of tasks, in which case the handler must maintain control of the animal through voice, signal, or other effective controls.[142] The handler also is responsible for caring for and supervising the service animal, which includes "toileting, feeding, and grooming and veterinary care."[143]

3. What are the Responsibilities of the Title II or Title III Entity?

Title II entities and Title III entities must permit service animals to accompany eligible persons with disabilities in all areas of a place of public

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> 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[,] . . . 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.

The regulations for "service miniature horses" are found at 28 C.F.R. § 35.136(i) (2021), for Title II, and at 28 C.F.R. § 302(c)(9) (2021), for Title III.

139. For example, such tasks may include "assistance" for the blind, deaf, or wheelchair bound, "alerting and protecting" persons who are having a seizure, reminding persons with mental illness to take prescription drugs, and "calming a person with Post Traumatic Stress Disorder (PTSD)." *See ADA Service Animal Reqs.*, *supra* note 135.

140. *Id.*

141. *See* 43 PA. STAT AND CONS. STAT. § 953 (West 2020) (providing that "individuals with disabilities who use guide or support animals, or trainers of such animals, are entitled to equal opportunity in all aspects of employment and education, as well as equal access to and treatment in all public accommodations, and any housing accommodation or commercial property without discrimination.").

142. 28 C.F.R. §§ 35.136 (d), 36.302(c)(4) (2021). *See ADA Service Animal Reqs.*, *supra* note 135.

143. 28 C.F.R. §§ 35.136(e), 36.302(c)(5) (2021).

accommodation where members of the public, program participants, clients, customers, patrons, or invitees, are allowed to go.[144]

Staff of these entities are limited in what they legally can and cannot do. Staff may inquire whether the animal is a "service animal" only when the answer is *not* readily apparent that an animal is trained to do work or perform tasks for an individual with a disability.[145] Staff may also ask what work or task the service animal is trained to perform.[146] On the other hand, staff are not permitted to inquire about the disability of the individual, demand documentation (e.g., medical documentation, special identification cards, or training documentation for the dog), or request the service animal to demonstrate its ability to perform the work or task.[147]

Staff is to "reasonably" accommodate more than one service animal. This issue can arise where one service animal assists with access and another is trained for seizure management. Staff may only ask the same two questions: are both animals "service animals" and what tasks are each trained to do. If both service animals can be accommodated, both should be permitted. If only one service animal can be accommodated, as with a small restaurant with aisle space limitations, then one is to be accommodated and the other service animal is to remain outside.[148]

Also, staff are not permitted to automatically deny access to the service dog because of allergies or fear of dogs.[149] Said another way, staff may have to accommodate the disability of more than one person. The ADA has no hierarchy of disability; therefore, where the presence of a service animal implicates another individual's disability, staff will need to reasonably accommodate the legitimate request to use a service animal as well as the other legitimate disability-related request.[150]

Staff may request removal of the service animal from the premises when the service dog is out of control and the handler cannot or does not take effective action to control it, or if the service dog is not housebroken.[151] Yet, even if a legitimate reason exists for the request of removal of the service

144. *Id.* §§ 35.136(g), 36.302(c)(7) (2021).
145. *Id.* §§ 35.136(f), 36.302(c)(6) (2021).
146. *Id.* §§ 35.136(f), 36.302(c)(6) (2021).
147. *Id.* §§ 35.136(f), 36.302(c)(6) (2021).
148. *See ADA Service Animal Reqs.*, *supra* note 135.
149. *Id.* The DOJ states, with respect to allergies from dog dander, that when a person is allergic to dog dander and a person who uses a service animal must spend time in the same room or facility, they both should be accommodated by assigning them, if possible, to different locations within the room or different rooms within the facility. *Id.*
150. *Id.* (e.g., an allergy or fear of an animal that creates a disability such as anxiety or PTSD).
151. 28 C.F.R. §§ 35.136(b)–(c), 36.302(c)(2)(i)–(ii) (2021) (requested removal is also appropriate if the service dog is a direct threat to people's health and safety.); *ADA Service Animal Reqs.*, *supra* note 135.

animal, the person with the disability must be offered the opportunity to obtain goods or services without the presence of the service animal.[152] Finally, staff are not required to permit animals whose "sole function" is to provide "emotional support" because the animals have not been trained to perform a specific job or task with respect to a disability.[153] Also, federal law or regulations may address the use of service animals in addition to the ADA.[154]

B. Recent Cases Involving Service Animals

1. Section 504 and the IDEA: Fry v. Napolean Community Schools

In *Fry v. Napolean Community Schools*,[155] the Supreme Court addressed whether "exhaustion" of administrative remedies under Section 1415(l)[156] of the IDEA was required when a public school denied a request by a student with disabilities to use her service dog. The plaintiff contended the school's denial violated the school's duties to provide "reasonable" modifications and accommodations under Title II and Section 504 for access to public elementary education.[157] Thus, she argued, she was spared having to exhaust administrative remedies under IDEA because the dispute was not about FAPE.[158]

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152. 28 C.F.R. §§ 35.136(c), 36.302 (c)(3) (2021).
153. *See ADA Service Animal Reqs.*, *supra* note 135.
154. *See, e.g.*, 38 U.S.C. 1714 (addressing service dogs for veterans).
155. 580 U.S. 154 (2017).
156. *Id.*; 20 U.S.C. § 1415(l) provides:
> Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution," the ADA, Title V of the Rehabilitation Act [including Section 504], 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 [the IDEA], the [IDEA's administrative procedures] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA].

157. *Fry*, 580 U.S. at 163.
158. In *Fry*, the plaintiff, a child with a severe form of cerebral palsy that "significantly limits her motor skills and mobility," had been using a trained service dog since the age of five as recommended by her pediatrician. *Id.* at 161–62. The service dog assisted the child to live as "independently as possible" by assisting her with various life activities. *Id.* at 162. The public school denied the parents' request to permit the service dog to accompany the child, stating that the child's existing IEP gave the child a human aide and one-on-one support during the day such that the service dog would be duplicative. *Id.* The plaintiff did not pursue an IDEA claim and reasoned that their dispute was not the provision of IDEA FAPE but was whether their child had been discriminated against because of her disability under Title II ADA and Section 504. *Id.* at 163–66. The plaintiff filed a complaint with the DOE's Office for Civil Rights claiming that the school's exclusion of the service dog violated the student's rights to access under Title II and Section 504, regardless of whether the use of a human aide satisfied FAPE; DOE's Office for Civil Rights agreed. *Id.* at 163. The plaintiff then filed suit in federal court against the school, the district, and the principal, and sought damages resulting from the

The *Fry* Court ruled that exhaustion of the IDEA'S administrative procedures is not necessary if the "gravamen" of the plaintiff's complaint involves something different than an alleged denial of the IDEA's guarantee of FAPE.[159] Here, the Court ruled, exhaustion of administrative remedies was not necessarily required because she sought *access* to school and not an educational service per the IDEA.[160] The Court reasoned that Section 1415(l) made clear that nothing in IDEA was to restrict or limit rights under the ADA or Section 504, except that relief *available* under IDEA is to be sought first.[161] The Court held that: "What matters is the crux—or, in legal-speak, the gravamen—of the plaintiff 's complaint, setting aside any attempts at artful pleading."[162]

2. *Section 504 and the DOJ Regulations: Berardelli v. Allied Services Institute of Rehabilitation Medicine*

The Third Circuit Court of Appeals ruled in *Berardelli v. Allied Services Institute of Rehabilitation Medicine*[163] that a request by a student with epilepsy and dyslexia to use a trained service dog at a public grade school was "reasonable" under Section 504 as a *matter of law* because it was a "reasonable accommodation" under the DOJ regulations for service animals under the ADA.[164] The court recognized that the RA and the ADA have "served as twin

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discrimination, including "emotional distress and pain, embarrassment, [and] mental anguish." *Id.* at 163–64.

159. *Id.* at 157.

160. *Id.* at 170–76. The Court clarified that the IDEA administrative process prevails when a student with disabilities seeks a benefit about IDEA FAPE. *Id.* The Court recognized that a school may meet its IDEA FAPE obligations by designing an IEP to assure the student is making progress in the educational setting, but it may violate Title II ADA and Section 504 for discrimination because of disability in access to programs and services available under Section 504. *Id.* at 170–71. In the latter case, exhaustion may not be required. *Id.*

161. *Id*. at 157.

162. *Id.* at 169.

163. Berardelli v. Allied Servs. Inst. of Rehab. Med., 900 F.3d 104 (3d Cir. 2018).

164. *Id.* at 122. In *Berardelli*, a child suffered from epilepsy and dyslexia and used a trained service dog, in which her parents requested the public school to permit the dog to accompany her at school; the school denied this request for two years, citing potential distraction to other students and a student's allergy. *Id.* at 110–11. During that time, the child was anxious and distracted without the dog and missed months of school. *Id.* at 111. In the child's third year, the principal permitted the dog to join her as long as the dog wore a shirt designed to limit allergens; however, the shirt overheated the dog and could not assist the child during seizures. *Id.* at 112. The child's parents sued the school under the RA, the ADA, and the Pennsylvania Human Relations Act, arguing the school failed to accommodate their child. *Id.* The district court allowed the RA claim to proceed to trial but instructed the jury that the child's parents had to prove the requested accommodation was reasonable *before* the school had to prove the use of the service dog was unreasonable and, also, did not instruct the jury on the ADA service

pillars of federal disability discrimination law:" the RA assures "meaningful access" to Federally funded programs; and, the ADA under Titles II and III provides for "full and equal enjoyment" of public services and private and public accommodations to persons with disabilities.[165]

The court then noted that a close relationship exists between the RA and the ADA as both aim to eliminate disability-based discrimination, assure equal participation, and address discrimination in education.[166] The court also observed that the RA's requirement of "reasonable accommodations" and the ADA's requirement of "reasonable modifications" are both "inextricably intertwined," and impose the same substantive standard of liability.[167] The court further stated that its holding is supported by case law as well as the DOJ's ADA's service animal regulations and guidance.[168] In *Berardelli*, since the plaintiff's request to use the service dog was *per se "*reasonable" for both the RA and the ADA, the burden was on the school to prove that the student's use of a service dog was "unreasonable."[169]

3. Title III and DOJ regulations: C.L. v. Del Amo Hospital, Inc.

In 2021, the Ninth Circuit Court of Appeals ruled in *C.L. v. Del Amo Hospital, Inc*.,[170] that an individual with a disability need not provide "certification" that her animal is a service animal under the DOJ regulations for Title III. The plaintiff, who has been diagnosed with post-traumatic stress disorder and other conditions, self-trained her dog to be her service dog.[171] The plaintiff sought inpatient treatment at a Title III entity, which denied her request in part because the dog was not certified.[172] The court held the ADA prohibits certification requirements because a service dog is defined "functionally" without reference to specific training requirements, the DOJ's regulations and guidance "consistently" reject certification requirements, and the goals of the ADA are supported by self-training of service animals, especially since certified training can be too expensive for the individual.[173]

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animal regulations. *Id.* at 113. The jury ruled for the school, but the appellate court disagreed. *Id.* at 110–14.

165. *See also* 42 U.S.C §§ 12131–12134, 12182(a), (b)(2)(A)(ii); 28 C.F.R. §§ 35.136(a), (g), 36.302(c)(1), (7) (2021).

166. *Berardelli*, 900 F.3d at 116, 123.

167. *Id.* at 117.

168. *Id.* at 119–24.

169. *Id.* at 124.

170. 992 F.3d 901, 910 (9th Cir. 2021).

171. *Id.* at 905–07.

172. *Id.* at 907.

173. *Id.* at 910. For a very fine law review on the subject of "assistance" animals, *see* Rebecca Huss, *Pups, Paperwork and Process: Confusion and Conflict Regarding Service and Assistance Animals Under Federal Law*, 20 NEVADA L.J. 785 (2020). For a comprehensive

4. Message from these Cases

The message from these cases is that the use of service animals under Titles II, Title III, and Section 504 may all be guided by the DOJ regulations. *Berardelli* teaches that a "reasonable" modification or accommodation by a Section 504 entity may be guided, as *per se* reasonable, by the DOJ regulations on service animals.[174] Perhaps the DOJ regulations *may* be relevant in addressing the "reasonableness" of employment-related requests by individuals with disabilities seeking to use a service animal at a Title I employer by means of the interactive process.[175]

IV. COVID-19, INDIVIDUALS WITH DISABILITIES AND SERVICE ANIMALS

A new reality was born once COVID-19 was upon us in early 2020. Our society has had to deal with COVID-related deaths, serious illnesses, and the long-term impacts of COVID infections. The harsh impacts on the mental and emotional well-being of many, including those with disabilities, is evidenced by palpable fear, anxiety, and depression. The following probes issues related to this "pandemic," now evolving into an "endemic" reality.[176]

A. Overview

According to the U.S. Centers for Disease Control and Prevention, COVID variants may have degrees of contagiousness, severity of infection, and resulting hospitalizations and deaths.[177] Depending on the variant,

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legal brief, *see* Sharan E. Brown, *Legal Brief: Service Animals and Individuals with Disabilities Under the Americans with Disabilities Act*, ADA KNOWLEDGE TRANSLATION CENTER (2019), https://adata.org/sites/adata.org/files/files/Legal%20Brief%20-%20Service%20Animals%20and%20the%20ADA%20-%20final%20LP.pdf.

174. *Berardelli*, 900 F.3d at 116, 123.The RA's assurance of "meaningful access" to federally funded programs and the ADA's assurance under Titles II and III of "full and equal enjoyment" of public services and private and public accommodations for persons with disabilities likely signal that these statutes receive the same or quite similar judicial interpretations, applying the DOJ regulations as reasonable *per se*. *Id.* at 123.

175. *See generally id.* at 114–25.

176. Kim Dacey, *Doctor Thinks COVID-19 Will Transition to Endemic Status in 2022*, WBALTV (Jan. 19, 2022, 6:46 AM), https://www.wbaltv.com/article/johns-hopkins-doctor-says-covid-19-will-transition-to-endemic-status/38809087#. Doctors predict that COVID, in 2022, will likely shift from "pandemic" to "epidemic" as our society now has ways to address COVID, including monoclonal antibody treatments, antivirals, and vaccines. *Id.*

177. *SARS-CoV-2 Variant Classifications and Definitions*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/variants/variant-classifications.html (last updated April 26, 2022). *See also* Kathy Katella, *Omicron, Delta, Alpha and More: What To Know About the Coronavirus*

vaccinations appear effective in varying degrees at preventing severe disease and hospitalizations.[178] Yet, when the Delta variant appeared, "breakthrough" infections occurred in fully vaccinated and "boosted" individuals, in which the Centers for Disease Control and Prevention (CDC) recommended a "layered" approach to prevention.[179] "Breakthrough" means that fully vaccinated individuals can become infected with the virus, experience symptoms, and spread the virus to others.[180] The CDC recommended "layered prevention strategies" that includes staying up-to-date with vaccines, hand washing, mask wearing, and safe-distancing from one another.[181] Federal and State governments ordered mandates to prevent or inhibit transmission of the virus.[182] These "mandates" derived from State declarations of emergency and addressed restrictions on travel, mass gatherings, elective medical procedures, masking, and vaccinations.[183]

COVID had serious impacts on individuals with disabilities, including lost educational opportunities and services, lost workforce opportunities, intensified fear and anxiety, and increased responsibilities for handlers of service animals. Handlers of service animals quickly realized that their service animals had to be trained about COVID-related behaviors, including how to social distance and be in the presence of humans who were masked.[184]

B. The Present: Long COVID and Court Decisions

On March 17, 2022, the White House issued a National COVID-19 Preparedness Plan which tracked our nation's experience with COVID and set

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Variants, YALE MED. (July 5, 2022), https://www.yalemedicine.org/news/covid-19-variants-of-concern-omicron.

178. Katella, *supra* note 177.

179. *The Possibility of COVID-19 After Vaccination: Breakthrough Infections*, CDC , https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/why-measure-effectiveness/breakthrough-cases.html [hereinafter *CDC Breakthrough*]; *How to Protect Yourself & Others*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (last updated Feb. 25, 2022) [hereinafter *CDC Protect Yourself*].

180. *CDC Breakthrough*, *supra* note 179.

181. *CDC Protect Yourself*, *supra* note 179.

182. *COVID-19 Policy Dashboard*, MULTISTATE, https://www.multistate.us/research/covid/public (last visited June 6, 2022). This website provides a state-by-state listing of the various mandates each State imposed during the COVID pandemic. *Id.* The website tracked: each State's declaration of a state of emergency; travel restrictions; mass gathering restrictions; restrictions on elective medical procedures; masking mandates; and vaccination mandates. *Id.*

183. *Id.*

184. *Guidance for Handlers of Service and Therapy Animals*, CDC, https://www.cdc.gov/healthypets/covid-19/service-therapy-animals.html (last updated Mar. 2021).

out a plan for the future.[185] The Plan addresses four key goals: protect against and treat COVID; prepare for new variants; prevent economic and educational shutdowns; and continue to vaccinate the world.[186] Probed below is how the long-term impacts of COVID may require an adjustment as to how service animals and, perhaps, emotional support animals, are viewed as "reasonable accommodations," "reasonable modifications," or "appropriate services or adjustments" for entities covered by ADA Titles I, II, and III, Section 504, and the IDEA. Both service animals and emotional support animals assist in reducing anxiety, fear, and depression. Yet, while the law is rather clear about what is required for service animals, it is still murky for emotional support animals.

1. Long COVID

Some individuals who experienced COVID now experience "Long COVID," which is shorthand for long-term impacts of having had the health impacts of the virus. According to the CDC, persons with Long COVID have a "range of new or ongoing symptoms that can last four or more weeks, or months, after they are infected with the virus that causes COVID and that can worsen with physical or mental activity."[187] Examples of common symptoms of Long COVID include, among others: tiredness or fatigue; difficulty thinking or concentrating (i.e., "brain fog"); shortness of breath or difficulty breathing; headaches; dizziness on standing; fast-beating or pounding heart (i.e., heart palpitations); chest pain; cough; joint or muscle pain; fever; and depression or anxiety.[188]

The EEOC, DOJ, and Department of Health and Human Services Medicare and Medicaid (HHS) have all announced that Long COVID may constitute a "disability" for purposes of the ADA and the RA. On December 14, 2021, the EEOC published an enhanced guidance, a "Section N," that addresses Long COVID as a disability protected in employment by Title I of the

185. THE WHITE HOUSE, NATIONAL COVID-19 PREPAREDNESS PLAN (2022), https://www.whitehouse.gov/wp-content/uploads/2022/03/NAT-COVID-19-PREPAREDNESS-PLAN.pdf.

186. *Id*. at 6.

187. The CDC has an expansive listing of other terms defining Long COVID: "post-COVID," "long-haul COVID," "post-acute COVID-19," "long-term effects of COVID," or "chronic COVID." *Guidance on "Long COVID" as a Disability Under the ADA, Section 504, and Section 1557*, CDC, https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/guidance-long-covid-disability/index.html#footnote10_0ac8mdc (last visited July 26, 2021); *see also Long COVID or Post-COVID Conditions*, CDC, www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html (last updated July 11, 2022).

188. *Id.*

ADA and Section 504(d).[189] The DOJ and HHS published a guidance on July 26, 2021, that focuses on Long COVID in the context of Titles II and III of the ADA, Section 504, and Section 1557 of the ACA.[190]

2. COVID-Related Issues

a. Is having COVID itself an ADA-qualifying disability?

The few cases that have considered whether having COVID is an ADA-qualifying disability were dismissed because the plaintiffs failed to include sufficient factual assertions of a "disability"[191] or of a "substantial limitation" in a major life activity.[192] Consequently, while the recent regulatory guidance of the EEOC, and DOJ and HHS provide helpful direction with COVID and, particularly Long COVID, the case decisions are not very instructive.

b. What is a "reasonable accommodation" by a Title I employer to limit exposure?

Individuals with disabilities that have concerns about contracting COVID can make requests for accommodations to limit their exposure. One accommodation is remote working or "telework" in order to avoid a COVID

189. The EEOC issued guidance on March 19, 2020, and December 14, 2021, to address Long COVID. On March 19, 2020, the EEOC's guidance addressed strategies regarding the impact of COVID in the workplace. *See Pandemic Preparedness in the Workplace and the Americans With Disabilities Act*, EEOC, https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act (last visited June 13, 2022). On December 15, 2021, the EEOC published Section "N" to its guidance on Pandemic Preparedness. *See What You Should Know About Covid-19 and the ADA, the Rehabilitation Act, and Other EEO Laws: N. COVID-19 and the Definition of 'Disability' Under the ADA/Rehabilitation Act,* EEOC, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (last updated July 12, 2022).

190. *Guidance on 'Long COVID' as a Disability Under the ADA, Section 504, and Section 1557,* U.S. DEP'T OF HEALTH AND HUMAN SERVS. & U.S. DEP'T OF JUSTICE (July 26, 2021), https://www.ada.gov/long_covid_joint_guidance.pdf. The DOJ and HHS guidance focuses on Long COVID in the context of Titles II and III of the ADA, Section 504 of the RA, and Section 1557 of the ACA. *Id.*

191. Champion v. Mannington Mills, Inc., 538 F. Supp. 3d 1344, 1350 (M.D. Ga. 2021) (plaintiff, claiming "association discrimination," was terminated for coming to work after being with her brother who had tested positive for COVID; court held that her allegation that he "had to miss several days of work due to his COVID-19 infection," without more, does not rise to the level of *her* "disability" under the ADA).

192. Payne v. Woods Servs., Inc., 520 F. Supp. 3d 670, 678 (E.D. Pa. 2021) (plaintiff was ordered to return to work six days after testing positive for COVID but refused because he had not completed the medically advised fourteen-day quarantine, in which he was fired for abandoning the job; court dismissed the claim because plaintiff failed to allege symptoms of COVID that limited him in a substantial life activity or that his employer perceived him as disabled).

infection while continuing to work full time.[193] Courts that have addressed this issue found that Title I employers who denied requests of individuals with disabilities to telework faced "failure to reasonably accommodate" discrimination claims because they failed to assess individually and adequately the employee's situation,[194] failed to consider reassignment,[195] failed to apply policies equitably, or acted in a way that constitutes retaliation.[196]

It remains uncertain whether qualified individuals with disabilities will bring "failure to accommodate" suits seeking to use service animals or emotional support animals in the workplace to address Long COVID impacts of anxiety, fear, or depression. Also, it remains uncertain whether a court would view such assertion as a "reasonable accommodation" for qualified

193. Kim Parker, Juliana Menasce Horowitz, & Rachel Minkin, *How the Coronavirus Outbreak Has – and Hasn't – Changed the Way Americans Work*, PEW RSCH. CTR. (Dec. 9, 2020), https://www.pewresearch.org/social-trends/2020/12/09/how-the-coronavirus-outbreak-has-and-hasnt-changed-the-way-americans-work/.

194. Peeples v. Clinical Support Options, Inc., 487 F. Supp. 3d 56, 66 (D. Mass. 2020). The plaintiff in *Peeples*, a manager with moderate asthma, was approved to telework at the beginning of the pandemic, was able to perform all functions of the job remotely and, when ordered by employer to return in person, appropriately made requests to telework that were repeatedly denied. *Id.* at 60. Since asthma is a disability in the context of COVID and "[t]he risk of irreparable harm to Plaintiff – in the form of the possible serious consequences of an infection if they are not if they are not permitted to telework – cannot be discounted," *id.* at 65, the court found that the employer failed to conduct an individualized assessment of the plaintiff's situation. *Id.* at 66.

195. Madrigal v. Performance Transp., LLC, No. 21-cv-00021-VKD, 2021 WL 2826704, at *5 (N.D. Cal. July 7, 2021). In *Madrigal*, the plaintiff, a food delivery driver, was diagnosed with pneumonia and hospitalized in February 2020. *Id.* at *1. Upon his discharge, he took an extended medical leave due to his high-risk status with COVID relating to his diabetes. *Id.* In August 2020, plaintiff sought to return to work, requesting reassignment to a warehouse position with minimal contact with other people for a temporary period. *Id.* The employer denied the request and fired him, *id.* at *2, failing to engage in an interactive process that addresses the "reasonable" accommodation of reassignment. *Id.* at *5. Plaintiff brought an action against the employer under a California state law incorporating the ADA, and the court refused to dismiss the case. *Id.* at *7.

196. *See* Complaint, EEOC v. ISS Facility Servs., 21-CV-3708 (N.D. Ga. 2021) (filed Sept. 7, 2021) (EEOC brought this action on behalf of an employee, a health and safety manager, who had a pulmonary condition that caused her to have difficulty breathing and placed her at greater risk of contracting COVID. From March 2020 to June 2020, she worked remotely from home four days a week. When her workplace reopened in June 2020, she requested to continue remote work two days a week and to take frequent breaks while working on site. The employer refused and fired her even though the employer had permitted other employees in the same position to work remotely. The case involves both discrimination and retaliation claims.); *see also* Costa v. Genesis Admin. Servs, No. 2:20-cv-01851-JCJ, 2022 US Dist. LEXIS 60732 (E.D. Pa., March 30, 2022) (Plaintiff, an information technology employee, sought to work from home due to an anxiety disorder that could cause panic attacks, as supported by her physician's note. After the employer terminated her employment, she brought claims under the ADA and the Pennsylvania Human Relations Act for, among other things, a failure to accommodate. The court denied summary judgment on the failure to accommodate claim.).

individuals suffering from Long COVID who are able to perform the essential functions of the job but who are able to do so more effectively with a service animal. Would such be part of the "reasonable accommodation" analysis or shift into the "personal benefit" analysis of the court? Only time will tell.

c. COVID and IDEA's requirement of compensatory education

Another significant and complicated impact of COVID on K-12 students with disabilities has been the school system's inability to provide the instruction and services required by the student's IEP despite an obligation to provide "compensatory education" as well as "compensatory services."[197]

Both the DOE and many State departments of education have issued informal guidance in this area. The DOE addresses the school system's obligations under the IDEA and under Section 504.[198] This guidance advises that students are to be provided with FAPE during the pandemic "to the greatest extent possible" and that the school is to make "individualized determinations as to whether *compensatory services* are needed under applicable standards and requirements."[199]

While guidance from the DOE and State departments of education are helpful, many were issued before the reality that COVID and its variants

197. For an excellent discussion of this topic see Perry A. Zirkel, Covid-19 *Confusion: Compensatory Services and Compensatory Education*, 30 S. Cal. Rev. L. & Soc. Just. 391, 391–92 (2021) [hereinafter Zirkel, *Confusion*]. For a recent series of annotated compilations of the case law specific to compensatory education see Perry A. Zirkel, *Compensatory Education: The Latest Update of the Law*, 376 EDUC. L. REP. 850 (2020) .

198. *See* Zirkel, *Confusion*, *supra* note 197, at 392 n.5 (citing, U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON PROVIDING SERVICES TO CHILDREN WITH DISABILITIES DURING THE CORONAVIRUS 2019 OUTBREAK 2 (2020); U.S. DEP'T OF EDUC., OCR-000115, FACT SHEET: ADDRESSING THE RISK OF COVID-19 IN SCHOOLS WHILE PROTECTING THE CIVIL RIGHTS OF STUDENTS 3 (2020); U.S. DEP'T OF EDUC., OCR-000116, SUPPLEMENTAL FACT SHEET: ADDRESSING THE RISK OF COVID-19 IN PRESCHOOL, ELEMENTARY AND SECONDARY SCHOOLS WHILE SERVING STUDENTS WITH DISABILITIES (2020)).

199. *Id.* (quoting U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON PROVIDING SERVICES TO CHILDREN WITH DISABILITIES DURING THE CORONAVIRUS 2019 OUTBREAK 2 (2020)). One example of a State's approach is that of Pennsylvania's Department of Education. *Guidance and Answers to FAQs on Covid-19 Compensatory Services*, PA. DEP'T OF EDUC., https://www.education.pa.gov/K-12/Special%20Education/FAQContact/Pages/COVID-19-Compensatory-Services.aspx (last updated June 15, 2021). It defines "COVID-19 Compensatory Services (CCS)" as those services that the IEP determines are needed to:

> [R]emedy a student's skill and/or behavior loss and/or lack of progress that resulted from [a school system's] inability to provide [FAPE] while using alternative instructional models due to the COVID-19 pandemic. CCS should be considered only after the student receives services as set forth in their IEP for a period of time ("recoupment period"). This will give the student an opportunity to recoup the lost skills or behavior or to make progress to the level(s) determined appropriate prior to the extended school closure.

would be with us from early 2020 to the present. Many schools may still have to pivot from in-person to a hybrid or virtual delivery of services. The effectiveness of hybrid or virtual delivery of IDEA education or Section 504 services will likely involve long-term debate. In short, remedying the deficits students with disabilities experienced during COVID is a significant challenge.

d. Title II or Title III entities: Access and vaccinations, testing and masking mandates

i. "Access" to education

Students and schools have shouldered enormous challenges during COVID. Courts make clear that Title II entities are to base their decisions on whether to grant access on objective information, are to comply with statutory and regulatory requirements, including the DOJ's service animal regulations, and are to recognize barriers to education.[200]

ii. Vaccination mandates

The pandemic has yielded significant issues regarding the proper exercise of Federal executive powers to mandate vaccinations, masking, and testing requirements. In two Supreme Court cases, the challengers claim that the Federal executive branch exceeded its proper powers to require vaccinations

200. In *Brenner*, a student with Type I diabetes had a service dog that assisted with detecting changes in the student's sugar levels. Complaint ¶18, Brenner v. Shreveport Sch. of Progressive Educ., No. 20-cv-01203 (W.D. La. Oct. 23, 2020). When the student returned to school with the service dog during the pandemic, the school refused to permit the service dog access as the school was concerned the service dog could be infected with COVID and spread it to students. *Id.* ¶¶40-42. The student filed an ADA lawsuit. *Id.* The court granted a preliminary injunction, permitting the service dog to accompany the student. Order Granting Preliminary Injunction, Brenner v. Shreveport School of Progressive Educ., No. 20-cv-01203 (W.D. La. Oct. 23, 2020).

Similarly, in *Smith*, the plaintiffs challenged the university's system-wide "test-optional" policy, where students are not required to submit ACT or SAT scores but may do so for a "second look" or "plus factor" in admission applications. Settlement Agreement & Release of All Claims, Smith v. Regents of the Univ. of Cal., RG1904622, at 1 (Cal. Super. Ct. Alameda Cnty. Aug. 31, 2020). Among others, students with disabilities sued under a California state law incorporating the ADA and alleged that the policy discriminated against applicants with disabilities because of, among other things, the lack of accommodations for testing. *Id.* The court granted plaintiffs a preliminary injunction and ordered the university's schools to stop using ACT and SAT exams during pendency of the case. *Id.* The settlement requires these schools to not use ACT and SAT scores for admissions from Fall 2021 to Spring 2025. *Id.* at 2.

or be fired, in which such mandates could impact close to 100 million workers.[201]

On January 13, 2022, the Supreme Court issued a decision in *National Federation of Independent Business v. Department of Labor* that granted emergency relief on the Occupational Safety and Health Administration (OSHA) Emergency Temporary Standard (ETS) to the petitions of a number of States, businesses, and non-governmental organizations by staying the implementation and enforcement of ETS, and remanding the matter to the circuit court.[202] The ruling meant that the ETS no longer applies and businesses, regardless of size, are not required to comply with the ETS vaccine and test mandate.

That same day, the Supreme Court took a different approach in *Biden v. Missouri* regarding the mandate by the Centers for Medicare & Medicaid Services (CMS).[203] The CMS's vaccine mandate provided that, in order to receive Medicare and Medicaid funding, participating facilities must ensure that their

201. *See* Biden v. Missouri, 142 S. Ct. 647, 653–54 (2022) (addressing mandatory vaccination and testing requirements under the HHS); Nat'l Fed'n of Indep't Bus. v. Dep't of Labor, 142 S. Ct. 661 (2022) (addressing OSHA's mandate covering eighty-four million Americans as not a necessary, indispensable use of OSHA's extraordinary emergency power which should be narrowly circumscribed).

202. *See* Melissa A. Bailey, & John F. Martin, *Supreme Court Stays OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard,* OGLETREE DEAKINS, (Jan. 13, 2022), https://ogletree.com/insights/supreme-court-stays-oshas-covid-19-vaccination-and-testing-emergency-temporary-standard/. This remand to the Sixth Circuit Court of Appeals is for a determination of whether OSHA has the authority to promulgate the ETS. *Id.* Here, since a majority of the Supreme Court found that the plaintiffs are likely to be successful on the merits, the circuit court could, but is not required to, be guided by the Court's reasoning. *Id.* Realistically, since the ETS expires six months after issuance, the circuit court may not be able to hear the case and issue a decision before expiration, and thus, the matter may become moot. *Id.* As a result, all States can now issue regulations regarding COVID, whether or not they have an "OSHA approved" plan. *Id*. Twenty-two states have Federally approved OSHA plans (i.e., plans that comply with Federal OSHA requirements). *Id.* The Court's ruling means that these States can now adopt or choose not to adopt standards that are the same as the ETS. *Id.* And, for those States without OSHA-approved plans, the ETS prior preemption has no effect and these States can adopt or choose not to adopt standards; Texas is one such state. *Id.*

203. *Biden*, 142 S. Ct. at 653–54. In *Biden*, the Court lifted stays of the CMS mandate except in Texas, which was involved in a litigated case. *Id.* On January 19, 2022, six days after the Supreme Court's *Biden* decision, the district court in the Texas case issued an order dismissing the lawsuit without prejudice, allowing CMS to enforce the vaccine mandate nationwide. Jana S. Baker, & James M. Paul, *CMS Vaccine Mandate Update: Last, but Not Least, Texas Joins the Rest of the Country*, OGLETREE DEAKINS, (Jan. 21, 2022), https://ogletree.com/insights/cms-vaccine-mandate-update-last-but-not-least-texas-joins-the-rest-of-the-country/.

staff, unless exempt for medical or religious reasons, are vaccinated against COVID.[204] Time will tell the extent of States to mandate vaccinations.[205]

iii. Masking mandates: education

Masking mandates in schools have yielded legal challenges. Federal masking mandates for students with disabilities in public grade and high schools are addressed in a guidance from the DOE.[206] The DOE recognizes that a subset of students with disabilities cannot safely wear a mask due to a disability.[207] The CDC and DOE frequently issue letters and statements to provide timely information for students with disabilities.[208]

Some States *banned* universal masking mandates in public K-12 education.[209] Parents of students with disabilities and the Federal Government objected, arguing that a State's ban on masking violates the ADA and Section 504 because the ban excludes "access" to education by at-risk students with disabilities who have health conditions that increase their risk of serious complications or death from COVID.[210] The Federal Government responded with

204. *Biden*, 142 S. Ct. at 650. Neither Court decision *directly* impacts the September 9, 2021, Executive Order 14042. This Order imposes COVID related requirements on those involved in the procurement process with the federal government. Exec. Order No. 14042, 86 Fed. Reg. 50,985 (Sept. 14, 2021).

205. In the post-secondary education arena, vaccination mandates have been upheld when the plaintiff fails to allege a disability. *See generally* Klaassen v. Tr. of Ind. Univ., 549 F. Supp. 3d 836 (N.D. Ind. 2021) (students challenged the university's requirements that students be vaccinated or apply for a medical or religious exemption and require non-vaccinated students to wear masks, obtain negative tests, and socially distance; several students challenged this requirement, in which the court denied the requested relief).

206. The DOE's Office of Civil Rights published a guidance called Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment. *Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment*, U.S. DEP'T OF EDUC., OFF OF CIV. RTS. (May 13, 2021), https://www2.ed.gov/about/offices/list/ocr/docs/qa-reopening-. 202105.pdf. This guidance addressed, among other things, the rights and responsibilities of school districts, colleges, and students in relation to students that cannot safely wear a mask due to their disabilities. *Id.*

207. *Id.*

208. Additional links are available at the following website about how to best support students with disabilities during COVID. *Disability Rights*, U.S. DEP'T OF EDUC., *https*://www.ed.gov/coronavirus/factsheets/disability-rights (last modified Feb. 24, 2022). *See also Program Information: FAQs and Responses*, U.S. DEP'T OF EDUC., https://www.ed.gov/coronavirus/program-information#speced dealing with special education (last visited June 15, 2022).

209. *See* Eram Abbasi, *State by State Mask Mandates*, LEADING AGE (June 9, 2022), https://leadingage.org/regulation/state-state-face-mask-mandates.

210. Judicial decisions on mandatory mask mandates are not consistent. For example, the Eighth Circuit upheld in *Arc of Iowa v. Reynolds*, 24 F.4th 1162 (8th Cir. 2022), an injunction that barred State officials from enforcing a law prohibiting universal masking requirements in school districts where students with disabilities attend school, but not in all schools. The Fourth

investigations of those States that have enacted bans on mask mandates and lawsuits against States that refuse to implement Federal masking requirements.[211]

iv. Masking mandates: public transportation, public communications and Title III entities

On April 18, 2022, the White House announced that the mandatory mask requirement for public transportation was no longer in effect.[212] This announcement followed a ruling by a federal judge that the mask directive, in effect since January 29, 2021, was unlawful because the CDC had exceeded its authority with the mandate, had not sought public comment, and did not

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Circuit dismissed two State officials, South Carolina's governor and attorney general from the case in *Disability Rights S.C. v. McMaster*, 24 F.4th 893 (4th Cir. 2022); however, the lawsuit is still proceeding against other defendants. *Id.* at 904.

The Fifth Circuit granted the attorney general of Texas a stay pending appeal of the permanent injunction that bars him from enforcing Texas Governor Greg Abbott's Executive Order GA-38, which prohibits local governmental entities from imposing mask mandates. E.T. v. Paxton, 19 F.4th 760, 771 (5th Cir. 2021). The court concluded, among other things, that plaintiffs likely could not demonstrate "standing," the attorney general demonstrated a strong likelihood of success on the merits, the district court lacked jurisdiction because plaintiffs had not exhausted administrative remedies under the IDEA, the plaintiffs likely could not make out a prima facie case under the ADA or the RA due to other available accommodations, the ADA and the RA did not preempt E.O. GA-38, and the public interest favored a stay. *Id.* at 765–71.

The Supreme Court of Pennsylvania held in *Corman v. Acting Sec'y of the Pa. Dep't of Health*, 266 A.3d 452, 486 (Pa. 2021), as detailed in an opinion on December 23, 2021, that State legislative action dissolved the authority to issue mask mandates. The court explained that, in June 2021, the State legislature eliminated the governor's COVID emergency disaster declaration, *id.* at 458, and thus, also removed the legal justification for a school mask mandate. *Id.* at 486. The justices further explained that while state law gives the Department of Health broad authority to protect public health, it did not permit the department "to act by whim or fiat in all matters concerning disease" without specific regulations that empower a mask mandate. *Id.* at 477.

211. The DOE's Office of Civil Rights is conducting investigations. Andrew Atterbury, *Florida Bucks Bidens, Strips Federal Aid from Mask Mandate Schools*, POLITICO (Oct. 27, 2021 3:20 PM), https://www.politico.com/news/2021/10/27/florida-aid-mask-mandate-schools-517349. The Biden administration announced it would compensate local school districts that seek to comply with the Federal mandate. *Id.* The DOE filed a complaint on October 28, 2021, requesting an administrative judge to block Florida from withholding Federal funds from two school districts for implementing mask mandates. Erin Doherty, *Biden Admin Seeks to Block Florida's Penalties on School Mask Mandates*, AXIOS (Oct. 29, 2021), https://www.axios.com/biden-education-department-florida-masks-desantis-acacfdea-b56a-42e9-a4ab-6f1002cde3f1.html.

212. Jacob Gershman and Alison Sider, *Judge Throws Out Federal Mask Mandate for Public Transportation*, WALL ST. J, (Apr. 18, 2022, 10:14 PM), https://www.wsj.com/articles/judge-throws-out-federal-mask-mandate-for-public-transportation-11650306480.

adequately explain its decisions.[213] This ruling was one of a number of rulings against administration directives regarding vaccine or testing mandates for employers relevant to controlling the spread of COVID.[214]

Title II entities, and those entities covered by the RA, are required to provide auxiliary aids and services necessary to ensure effective communication for those with disabilities. During the COVID pandemic, Federal and State governments were challenged in court for failing to communicate effectively with those with disabilities because of no "in-time" sign interpreters for the deaf, a lack of internet access, or difficulty with English comprehension. Private rights of actions for injunctions were sustained in at least two cases.[215]

Title III entities were subject to masking mandates. Three lower court decisions addressed the mask mandates and the appropriate actions of three Title III entities.[216] A headwind for plaintiffs' lawsuits against Title III entities is whether plaintiffs have "standing" under Article III of the Constitution. While standing may exist for injunctive but not monetary relief,[217] plaintiffs

213. *See generally* Health Freedom Def. Fund v. Biden, No. 8:21-cv-1693-KKM-AEP, 2022 U.S.Dist. LEXIS 71206 (M.D. Fla. April 18, 2022).

214. Gershman & Sider, *supra* note 212. *See generally* Martinez v. Cuomo, 459 F. Supp. 3d 517 (S.D.N.Y. 2020) (deaf residents claimed Governor Cuomo's daily briefings on the pandemic had important yet inaccessible information due to no sign language interpretation; the court granted a preliminary injunction because government's denial of effective communication violated the ADA and Section 504, and other communication avenues were inadequate because of a lack of internet access or a deficiency in understanding English).

215. *Martinez*, 459 F. Supp. 3d. at 523–24; *see also* Yelapi v. DeSantis, 525 F. Supp. 3d 1371 (N.D. Fla. 2021); Nat. Assoc. of the Deaf v. Trump, 486 F. Supp. 3d 45 (D.D.C. 2020) (deaf individuals claimed President Trump's briefings on the pandemic had important yet inaccessible information because briefings lacked live sign language interpretation; the court held that the RA implied a private right of action against Federal executive agencies and granted a preliminary injunction that sign language interpreters had to be provided).

216. These three cases are: Pletcher v. Giant Eagle, Inc., No. 2:20-754, 2020 WL 6263916 (W.D. Pa. Oct. 23, 2020) (plaintiff seeking to enter store without a mask failed to provide medical evidence of a mental health impairment that face coverings caused breathing difficulties and severe anxiety; no modification by grocery store required because it reasonably accommodated people with disabilities by permitting full-face shields and providing alternatives to in-person shopping, such as curbside service, home delivery and personal shoppers); Giles v. Sprouts Farmers Market Inc., No. 20-cv-2131-GPC-JLB, 2021 WL 2072379 (S.D. Cal. May 24, 2021) (individual with disabilities denied entrance to a grocery store because she refused to wear a mask; the court held that the store acted reasonably as it conducted an individualized assessment of the direct threat posed by the plaintiff by her unwillingness to wear a face mask or face shield and, therefore, its policy did not constitute "discrimination" under Title III of the ADA); and Hernandez v. El Pasoans Fighting Hunger, No. EP21-CV-00055-DCG, 2021 WL 2763827 (W.D. Tex. July 1, 2021) (individual with asthma and PTSD sued a food bank for not allowing him inside without a mask; the court dismissed the plaintiff's lawsuit because the food bank offered a reasonable and effective accommodation, such as home delivery, and found that an exemption from the mask policy would pose a direct threat to the health or safety of others).

217. Cook Cnty. v. Wolf, 962 F.3d 208, 218–19 (7th Cir. 2020).

challenging the masking mandates rarely meet the pleading requirements for injunctions against Title III entities.[218]

3. Additional Responsibilities for Handlers of Service Animals in the COVID Pandemic

Individuals who use service animals experienced additional concerns and heightened challenges during the COVID pandemic. The CDC cautioned that "[p]eople can spread the COVID virus to animals, especially during close contact."[219] Also, the CDC advised that those who use a service or a therapy animal are to follow local guidance for acceptable business and social practices.[220] Further, handlers are to consider local levels of COVID transmission when evaluating the risk to self, animal, and people with whom the handler might come into contact with.[221] Finally, the CDC advised to avoid unnecessary contact with people or other animals outside the household.[222]

V. LOOKING FORWARD

What are strategies for doing "the right thing, the right way, the first time" when making decisions about use of service animals by a student or an individual with a disability? The proceeding should make clear that the analysis can depend on whether the decision-maker is a private or public employer, an administrator in public schools and public entities, or a supervisor in places of public accommodations. Set out below are some key features of well-made decisions.

A. Engage in Continuous Education about the Law

Understanding the legal rights and duties of the individual with disabilities and of the decision-maker, whether an employer, an administrator, or a

218. *See* Lewis v. Walmart Corp., No. 20-cv-2836, 2021 WL 963810 (N.D. Ill. Mar. 15, 2021) (court dismissed the claim against the Title III businesses finding that the plaintiffs did not have standing to bring a claim for injunctive relief); *see also* Lewis v. Pritzker, No. 20-cv-2836, 2020 WL 6581652 (N.D. Ill. Nov. 10, 2020) (two *pro se* plaintiffs sued Governor Pritzker, individual employees, and three private businesses under Title III after being denied entrance to private businesses for failing to wear masks, which they claimed they could not wear because of chronic asthma; the court dismissed the claims against Governor Pritzker, as he was not a place of accommodation, and against the Title III entity because plaintiffs failed to meet requisite pleading requirements).

219. *Guidance for Handlers of Serv. and Therapy Animals*, CDC, https://www.cdc.gov/healthypets/covid-19/service-therapy-animals.html (last updated Mar. 2021).

220. *Id.*

221. *Id.*

222. *Id.*

public accommodation vendor, is critical. This may encompass an understanding of federal, state, and local laws as well as rules and regulations. Further, this understanding also includes a knowledge of unresolved, legal issues and an appreciation of the angst of being involved in litigation.

Essential to resolution of many issues are well-reasoned policies and practices that are fairly and equitably administered and aligned with the relevant law and judicial decisions. This requires having decision-makers well-educated on the relevant law. Crucial to effective leadership is understanding that our realities can change, as with COVID and Long COVID, and implementing strategies that stay loyal to the commands of the law and respect the dignity of the individual.

B. Appreciate the Interrelationship of Law and the Significance of Governmental Guidance before Making Decisions

"Guidance" reflects an agency's suggestions. Judges can be persuaded by such guidance in the context of judicial deference.[223] Also, judges can be guided by decisions of an agency on relevant matters.[224]

C. Recognize the Value of Lessons Learned Over Time

Many lessons can be learned from our recent experience as a society dealing with COVID. In-person schooling stopped and went virtual or hybrid, and then resumed with government-mandated masking. Businesses were ordered to shut down, then permitted to open under rules conforming social distancing and masking. Government mandates concerning vaccines, testing, and masking caused social upheaval and countless lawsuits. These experiences will undoubtedly test the rationale of earlier decisions respecting individuals with disabilities about mandatory work in the office, virtual education, et cetera.

Following are some lessons learned that have withstood the test of time.

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223. Judicial deference is a concept of judicial review by which a federal court follows or is persuaded by a Federal administrative agency's interpretations. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844–45 (1984). Under *Chevron,* a federal court is to defer to an agency's interpretation of a statute the agency administers where the statute is not clear, and the agency's interpretation is reasonable. *Id.* at 866. Under *Auer v. Robbins*, 519 U.S. 452, 457 (1997), a federal court is to defer to an agency's interpretation of its own ambiguous regulation, unless those interpretations are plainly erroneous or inconsistent with the regulation. The Supreme Court narrowed the *Auer* defense in *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019). Under *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944), a federal court may defer an agency's interpretative rule to the extent they are persuasive.

224. *See* Berardelli v. Allied Servs. Inst. Of Rehab. Med., 900 F.3d 104, 121 ("Our holding today also finds support in the regulations and informal guidance of other agencies across the landscape of disability law."). *See supra* notes 163–74 for a discussion of this case.

1. Use Clear, Fair, and Complete Policies and Procedures and Equitably Administer them in a Coherent, Honest, and Sound Fashion

Clear, fair, and equitably administered policies and procedures appear key to effective decision-making.

- Clarity of language is critical. The general understanding of a "service animal" is a "working animal." Such does not include pets or emotional support animals. The DOJ service animal regulations and guidance are instructive.

- Fair and equitably administered policies and procedures is the backdrop of respect for the dignity of the individual and promotes trust. Trust is essential to the mission of the workplace or the relevant public sector.

- A Title I employer should clearly set out the policies and procedures applicable to the "interactive process." The EEOC has helpful guidance regarding what should be in these policies.[225] While employers can request documentation about the animal's training, employers *likely* cannot impose a requirement of "independent certification."

- Long COVID presents additional physical and emotional challenges for those with disabilities who have documented benefits of having a pet to relieve these symptoms.

In short, replacement of a "no pets" or "no animals" policy with a policy reflective of the mandates of the law and the DOJ regulations is advisable. Unanswered is whether an emotional support animal is a "reasonable accommodation" to enable persons with disabilities, including Long COVID to work.

2. Make Decisions with Respect for All

When a decision is contemplated, it is important to assure that it is well-vetted. This may involve engaging experts, treating physicians, lawyers, or government authorities. This may also mean listening, encouraging respectful dialogue, and behaving in a way that promotes trust within the workplace. For example, remote work is now not so much about COVID as it is the dynamics of the workplace. Failure to allow remote work post-COVID when remote work is still permitted for some but not others could result in discrimination claims by eligible employees with disabilities of favoritism. When a decision is made, timely communication with specific and valid reasons is vital.

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225. *See* EEOC, *Guidance*, *supra* note 41.

3. Be Clear about the Rights and Duties of the Handler and the Entity

Clarity about where the service animal may go and what is expected of the handler is advised in policies and procedures regardless of whether the entity is covered by the ADA or Section 504. The DOJ's expectations of a handler in the Title II or Title III arenas are relevant and *could* be relevant to the Title I arena for the employee-handler. The DOJ regulations provide that the handler of the service animal is to have the dog under his or her control, whether by leashing or through voice, signal, or other effective controls.[226] Further, staff are not required to provide care for or supervision of a service animal.[227] Similar expectations of the employee-handler in a Title I or Section 504 workplace would appear reasonable for the workplace.

Clarity in these policies is also important when the matter involves removal of the service animal. Similar to the DOJ regulation, these circumstances may arise where the animal is out of control and the handler does not take effective action to control it or if the animal is not housebroken. Finally, where the animal is not hypoallergenic, the request may properly be denied due to allergies of others when no reasonable alternative existed.[228]

VI. A PARTING THOUGHT

Our laws are designed to give persons with disabilities the *ability* to pursue academic, work, and life opportunities. A service animal often is, in both the private and public arenas of life, "[t]he one absolutely unselfish friend that a man can have in this selfish world, the one that never deserts him and the one that never proves ungrateful."[229] Decisions about the use of service animals by private or public employers, as well as those with government, schools, or places of public accommodations, are optimal when made in the context of doing the right thing, the right way, the first time.[230]

226. *See supra* Part II.
227. *See id.*
228. *See id.*
229. *Man's best friend*, *supra* note 2.
230. DRUCKER, *supra* note 8.