



# SCHOOL & COLLEGE LEGAL SERVICES OF CALIFORNIA

A Joint Powers Authority  
serving school and  
college districts  
throughout the state.

5350 Skylane Boulevard  
Santa Rosa, CA 95403

Tel: (707) 524-2690  
Fax: (707) 578-0517  
santarosa@sclscal.org  
www.sclscal.org

General Counsel  
Carl D. Corbin

Attorneys  
Ellie R. Austin  
Monica D. Batanero  
Nancy L. Klein  
Damara L. Moore  
Jennifer E. Nix  
Steven P. Reiner  
Mia N. Robertshaw  
Loren W. Soukup  
Patrick C. Wilson  
Frank Zotter, Jr.

Of Counsel  
Robert J. Henry  
Margaret M. Merchat

## LEGAL UPDATE

March 14, 2017

**To:** Superintendents, Member School Districts (K-12)

**From:** Damara L. Moore *DM*  
Sr. Associate General Counsel

**Subject:** Supreme Court Decision Finds that Parents Have a Separate Avenue Outside of the IDEA to Pursue Some Discrimination Complaints Against School Districts  
Memo No. 09-2017

---

On February 22, 2017, the U.S. Supreme Court issued a decision, *Fry. v. Napoleon Community Schools* (“*Fry*”)<sup>1</sup>, which sets forth an analysis of when a disabled student may sue a local educational agency (“LEA”) directly in federal court without first proceeding with a due process hearing. The decision may increase the number of federal lawsuits brought by students with disabilities who claim the school district discriminated against them due to their disability.

### Summary of Case

The Individuals with Disabilities Education Improvement Act (“IDEA”) includes a provision that the U.S. Supreme Court recently scrutinized in *Fry*.

Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [“ADA”], title V of the Rehabilitation Act of 1973 [“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 this subchapter [of the IDEA], the procedures [pertaining to filing a due process complaint] shall be exhausted to the same extent as would be required had the action been brought under this subchapter.<sup>2</sup>

---

<sup>1</sup> (2017) 580 U.S. \_\_\_\_.

<sup>2</sup> 20 U.S.C § 1415(l).

The provision allows parents to pursue non-IDEA-based cases against a school district under laws “protecting the rights of children with disabilities,” such as the ADA and Section 504. But, it also requires “exhaustion” of IDEA claims prior to pursuing other claims under some circumstances. “Exhaustion” in special education cases is a legal doctrine requiring a plaintiff to first pursue relief through an administrative agency, which in California is the Office of Administrative Hearings (“OAH”), before seeking relief for an educational harm in federal court.<sup>3</sup>

The *Fry* case identified when claims must first be “exhausted” under the IDEA via due process hearing procedures, and when a plaintiff can skip the administrative agency and bring a claim directly to court. Noting that claims brought under the IDEA are necessarily claims of a denial of a free appropriate public education (“FAPE”), the Court sensibly stated that a party must first exhaust claims by pursuing a due process hearing if the lawsuit before the court “seeks relief for the denial of a FAPE.”

The facts of *Fry* illustrate when a student with a disability need not first exhaust his or her claims by filing a due process complaint with an administrative agency, e.g. OAH. Student E.F. is a child with a severe form of cerebral palsy that limits her mobility, among other impacts. E.F. has a trained service dog who assists her with various life activities, including retrieving items, helping with balance when using a walker, opening and closing doors, turning on and off lights, helping take her coat off and helping her transfer to and from the toilet. E.F. also has an Individual Education Program (“IEP”) which met these needs through a 1:1 aide. E.F. requested that her service dog be permitted access to her school to meet E.F.’s needs in school. The school asserted the aide met these needs. The parents did not dispute that and never filed a due process complaint. They did file a complaint with the Office of Civil Rights (“OCR”), which found the district discriminated against the student under Section 504 and the ADA. “OCR analogized the school’s conduct to ‘requir[ing] a student who uses a wheelchair to be carried’ by an aide or ‘requir[ing] a blind student to be led [around by a] teacher’ instead of permitting him to use a guide dog or cane.” *Id.* The parents then sued the school district in federal court for violating the ADA and Section 504.

The Supreme Court found that there was no need for E.F. to first “exhaust” the IDEA remedies, because the case in no way sought relief for a denial of FAPE. The Court determined this after looking at the substance of the complaint and noted two clues to look for when assessing whether a case filed first in federal court alleging a student suffered from disability-based discrimination should have first “exhausted” remedies available in a due process hearing. First, ask, “Could the plaintiff have brought

---

<sup>3</sup> “Exhaustion of the administrative process allows for the exercise of discretion and educational expertise by state and local agencies, affords full exploration of technical educational issues, furthers development of a complete factual record, and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children. The Sixth Circuit has summarized the IDEA’s exhaustion rationale as follows: States are given the power to place themselves in compliance with the law, and the incentive to develop a regular system for fairly resolving conflicts under the [IDEA]. Federal courts—generalists with no experience in the educational needs of handicapped students—are given the benefit of expert factfinding by a state agency devoted to this very purpose.” *Hoelt v. Tucson Unified Sch. Dist.* (9<sup>th</sup> Cir. 1992) 967 F.2d 1298, 1303. [citations omitted]

essentially the same claim if the alleged conduct occurred at a public facility that was not a school, such as a library?” Second, ask, “Could an adult at school – such as an employee or visitor – have brought the same grievance?” Where the answer is yes to both of these questions, then the complaint probably does not concern a FAPE, and therefore exhaustion is not required.

## Analysis

This case relates not only to the exhaustion requirement but is part of a trend in the courts drawing distinctions between the ADA, Section 504 of the Rehabilitation Act, and the IDEA. Not only is the IDEA distinct, some courts are finding that the ADA is a more stringent mandate. The ADA’s regulations require public entities to provide multiple types of specific accommodations, including allowing service dogs in public settings.<sup>4</sup> A district risks violating the ADA, and paying for damages, if it denies a service animal as an accommodation, whether the request is made by an employee or student. Just because a student’s individual special education needs may be met under the IDEA through an alternative accommodation does not mean that an accommodation is not required under another law. Another mandated accommodation under the ADA requires public entities to provide “effective communication” to those with communication disabilities.<sup>5</sup> In a California case, the Ninth Circuit explained how the IDEA differed from the ADA, thusly:

[T]he IDEA sets only a floor of access to education for children with communications disabilities, but requires school districts to provide the individualized services necessary to get a child to that floor, regardless of the costs, administrative burdens, or program alterations required. Title II [of the ADA] and its implementing regulations, taken together, require public entities to take steps towards making existing services not just accessible, but equally accessible to people with communication disabilities, but only insofar as doing so does not pose an undue burden or require a fundamental alteration of their programs.<sup>6</sup>

Under *Fry*, it is now clear that an educational rights holder may sue a district in federal court without first going through a due process hearing, if the plaintiff is not asserting a denial of FAPE. A federal case is generally more expensive to resolve, more time consuming, and includes various discovery rights, such as depositions, which are not available to parties to a due process case. Moreover, the ADA and Section 504 allow a plaintiff to sue for damages beyond those of an “educational loss,” and therefore generally come with increased monetary damages. Some parents may prefer to limit their case non-IDEA claims and proceed directly to federal court.

---

<sup>4</sup> 28 C.F.R. § 35.136(a).

<sup>5</sup> “A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.” 28 C.F.R. § 35.160(a)(1).

<sup>6</sup> *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.* (9<sup>th</sup> Cir. 2013) 725 F.3d 1088, 1097.



## Recommendations

It is important for local educational agencies to be aware that a student's request for an accommodation does not begin and end with an IEP team's determination of how the student's needs can be met. Familiarize yourself with the distinct mandates of Title II of the ADA and Section 504 of the Rehabilitation Act. And, when settling a special education case under the IDEA, be aware that separate and distinct claims exist under other laws and include a waiver of those claims in settlement agreements, whenever possible.

Please contact our office with questions regarding this Legal Update or any other legal matter.

*The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.*

© 2017 School and College Legal Services of California

*All rights reserved. However, SCLS grants permission to any current SCLS client to use, reproduce, and distribute this Legal Update in its entirety for the client's own non-commercial purposes.*