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June 30, 2015

Nancy Hall, Executive Vice President
West Gilbert Charter Elementary School, Inc.
18052 North Black Canyon Highway
Phoenix, Arizona 85053

Re: West Gilbert Charter Elementary School, Inc.
OCR Case Number: 08-14-1282

Dear Ms. Hall:

We have concluded our investigation of the above-referenced complaint filed on September 29, 2014, against West Gilbert Charter Elementary School, Inc. (the Recipient), alleging discrimination on the basis of disability. Specifically, the complainant alleged that the Recipient discriminated against her son (the Student) by failing to take appropriate steps to protect the Student, who is allergic to dogs and has allergy induced asthma, following the introduction of a service animal to the school environment, to which the Student is allergic.

We conducted an investigation under the authority of Section 504 of the Rehabilitation Act of 1973 and its implementing regulation, which prohibit discrimination on the basis of disability in programs and activities funded by the U.S. Department of Education; and Title II of the Americans with Disabilities Act and its implementing regulation, which prohibit discrimination on the basis of disability by public entities. The Recipient is subject to Section 504 and Title II because it is a recipient of Federal financial assistance from the Department and a public entity.

Based on the allegation raised in the complaint, we investigated the following issue: Whether the Recipient failed to evaluate the Student for Section 504 eligibility as required by 34 C.F.R. § 104.35 and 28 C.F.R. § 35.130(a).

During the investigation, we reviewed documentation provided by the Recipient and the Complainant. We also interviewed the Complainant and staff at Imagine West Gilbert Elementary. We find that the preponderance of the evidence supports that the Recipient violated Section 504 and Title II as alleged. This letter explains our findings. We thank the Recipient for entering into a Resolution Agreement, which when fully executed, will resolve our compliance concerns.

Background Information

Imagine Schools West Gilbert is part of the Imagine Network of schools, which operates 70 schools in 12 states. The campus serves students in grades Pre-Kindergarten through 8. The school is a charter school authorized by the Arizona State Board for Charter Schools. The charter for the elementary grades at the school is held by West Gilbert Charter Elementary School, Inc. In this letter, we refer to West Gilbert Charter Elementary School, Inc. as the Recipient, and to Imagine Schools West Gilbert as the School.

The Student attended XX grade at the School during the 2014-15 school year. He has attended the School since XX. The Student has an Individualized Education Program (IEP). XX – Four sentences describing IEP omitted – X.

Factual Findings

The issues that led to the allegation in this case began when a student with a disability who uses a service animal (a dog) applied for enrollment at the School for the 2014-15 school year. The School, pursuant to its obligations under the Title II regulations, admitted the student, along with her service animal.

In a meeting held the week before school started, the School notified the Student's parents that the service animal would be present at the School.¹ The meeting was attended by the principal, the special education teacher, and the parents. Also during this meeting, the School informed the parents that it planned to employ two resource room teachers rather than one. One teacher would instruct students in grades K through 4, while the other worked with students in grades 5 through 8. The student with a service animal is in sixth grade, and would not be in the same classroom as the Student. The meeting notes indicate that the School would take steps to ensure the students did not pass in the hallway. The notes also reflect that the parents expressed concerns about the Student's allergies, and would discuss the matter with their doctor.

After school began, the complainant sent a number of emails to School staff regarding her concerns with the service animal. On August 18, 2014, the complainant reported that the Student passed the service animal in the hallway. The special education director contacted the complainant via email to share that the School would be implementing a new drop-off and pick-up schedule to ensure that there were no future encounters.

Later in August, the complainant again contacted the School with continued concerns. At this time, the complainant stated that she believed the School was not legally required to accept the student with the service animal. In an email dated October 1, 2014, the special education director explained that the law requires the School to allow service animals in the building.

A meeting was held on October 9, 2014. During the meeting, the School reviewed the "accommodations" that had been put into place to address the Student's allergies. The complainant provided the School a copy of a note from the Student's physician. The note stated

¹ The School was made aware that the Student was allergic to dogs, among other things, when the Student initially enrolled in the School.

that the Student “has allergic asthma which can be triggered by his exposure to dogs. Such exposure can cause him to experience dry, red eyes; cause hives; possible breathing problems; could possibly lead to behavior issues from irritation or agitation from allergy symptoms, etc.”

After learning about the Student’s allergy-induced asthma, the School inserted information about the Student’s allergies (as well as several other new diagnoses) into the Student’s IEP.

According to the Recipient’s response to OCR, “the School took prompt and effective steps to ensure that Student’s IEP was updated to include information relating to Student’s allergies . . . , as well as included accommodations put into place since the beginning of the 2014-15 school year to eliminate and/or minimize Student’s allergy symptoms.”

According to the Recipient, this is a complete list of the “accommodations” put in place:

- Additional cleaning at the end of each day in the areas where the service animal had been during the day, as well as the Student’s main classroom.
- Adjustment of student traffic patterns so the Student and the service animal would not be in the same room or hallway at the same time.
- Installation of a HEPA air filter in the Student’s main classroom.
- Ensuring that the Student’s classroom is not on the same air circulation zone as the classroom where the service animal would be present.
- Adjustment of drop-off-and pick-up routines to ensure the Student did not encounter the service animal.
- Adjustment of class schedules to ensure that the Student and the service animal are not in specials classes at the same time.
- Ensuring that the service animal is not located near the Student for events such as assemblies and holiday performances.

The complainant does not dispute that the School took measures to attempt to manage the Student’s allergies. She believes that the measures were not sufficient to allow the Student to safely attend school, and that the best solution would be for the service dog to be prohibited from the building.

OCR confirmed that the School has not conducted any formal testing of the Student to determine if his allergies or asthma constituted disabilities, and if so, whether he requires special education or related services as a result. In our interview with the principal, we learned that the School did not consult with any individual with specialized knowledge regarding allergies, and the measures the School took to manage the Student’s allergies were based on “common sense.”

Legal Standards and Analysis

The complainant believes that the service animal posed a direct threat to the Student’s health, and as a result, the Recipient could have barred the service animal from the school. We first address why this is an incorrect analysis of the Recipient’s obligations.

The Title II regulation states that “generally, a public entity shall modify its policies, practice, or procedures to permit use of a service animal by an individual with a disability.” 28 C.F.R.

§ 35.136. A service animal is defined in the regulation as “any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychological, or other mental disability.” 28 C.F.R. § 35.104. The question of whether the dog involved in this matter is a bona fide service animal is not an issue in this case.

Under the Title II regulation, persons with disabilities have the right to be accompanied by service animals in all parts of facilities where the public, participants in programs and activities, or invitees are allowed. The DOJ’s guidance on service animals specifies that “[a]llergies and fear of dogs are not valid reasons for denying access or refusing service to people using service animals. When a person who is allergic to dog dander and a person who uses a service animal must spend time in the same facility, for example, in a school classroom or at a homeless shelter, they both should be accommodated by assigning them, if possible, to different locations within the room or different rooms in the facility.”²

The complainant argues that the service animal should be excluded because it poses a direct threat to the Student. Under the Title II regulation, a public entity is not required “to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others.” 28 C.F.R. § 35.139(a). It is clear from the DOJ’s guidance that a service dog should not be considered a direct threat to an individual with a dog allergy or a fear of dogs. However, the complainant alleges that because the Student has allergy-triggered asthma, as well as anxiety about the dog related to Autism, the service animal is a direct threat.

Even if the direct threat analysis were appropriate in this case,³ the regulation requires that a public entity “must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.” 28 C.F.R. § 35.139(b).

If the entity wishes to exclude an individual as a direct threat, it must make an assessment of the risk prior to doing so. However, if the entity is not seeking to exclude the individual, nothing in the regulation requires an entity to initiate a direct threat assessment at the request of a third party.

While the Recipient correctly allowed the service animal to be present at the school, its knowledge of the Student’s allergies raised additional obligations to the Student.

Any person with an impairment that substantially limits a major life activity, including breathing, is a person with a disability. 28 C.F.R. § 35.104; *See also* 34 C.F.R § 104.3(j)(1) & (2)(ii). Section 504 requires public elementary schools to identify and locate every qualified person with

² http://www.ada.gov/service_animals_2010.pdf, viewed June 25, 2015.

³ The direct threat analysis is typically a defense raised by a public entity in response to an allegation that it excluded an individual with a disability; it is not used offensively by a third party to force a public entity to exclude an individual with a disability.

a disability within its jurisdiction and take appropriate steps to notify parents of this obligation. 34 C.F.R. § 104.32. Additionally, public elementary schools shall conduct an evaluation of any person who needs or is believed to need special education or related services before taking any action with respect to initial placement of the person in regular or special education. 34 C.F.R. § 104.35. Public elementary schools shall provide a free appropriate public education (FAPE) to each qualified individual with a disability within its jurisdiction, regardless of the nature or severity of the person's disability. 34 C.F.R. § 104.33(a).

The complainant did not request an evaluation of the Student for his allergy or asthma related needs. However, a school's obligation to evaluate a student for a suspected disability does not depend on a parental request. The Recipient is obligated to identify and locate every qualified person with a disability within its jurisdiction. It is contrary to the requirements of Section 504 to require a parent to request an evaluation before a recipient will consider whether a student may need special education or related services.

OCR considered whether the School suspected that the Student had a disability and may need special education or related services as a result. Being enrolled in the Recipient's School, the Student was in the Recipient's jurisdiction. The preponderance of the evidence further shows that the School suspected the Student had a disability related to allergies or asthma and needed related services, but failed to conduct an evaluation as required.

The School had notice of the Student's dog allergy from the time he first enrolled, when the complainant listed the dog allergy on the Student's enrollment forms in August 2009. The complainant also indicated that the Student experiences asthma when he gets a bad cold. At that time, there was no additional indication that either the allergy or the asthma rose to the level of an impairment of a major life activity.

However, there are multiple indications during the 2014-15 school year that the School had notice that the Student may have a disability associated with the major life activity of breathing:

- The School first brought up the presence of the service animal during a meeting with the Student's parents related to special education.
- The complainant reported allergy symptoms following an incident in which the Student passed the service animal in the hallway.
- Following this incident, the School implemented new drop-off and pick-up routines for the students, which the Recipient describes in its response as implementing "additional accommodations." The word "accommodations" is used frequently to describe the measures the School took to address the Student's allergy. In OCR's experience, "accommodations" is a term of art in the field of elementary and secondary education that typically refers to related services that are provided to meet the individual educational needs of persons with disabilities. *See* 34 C.F.R. § 104.35(b)(1).
- After the complainant expressed continued concerns, the School scheduled a meeting to discuss her concerns. The Recipient's response indicates that the School "reiterated the accommodations that were put into place."
- The School received a letter from the Student's physician's office on October 9, 2014. The letter stated that the Student "has allergic asthma which can be triggered by his

exposure to dogs. Such exposure can cause him to experience dry, red eyes; cause hives; possible breathing problems; could possibly lead to behavior issues from irritation or agitation from allergy symptoms, etc.”

- After learning of the Student’s allergic asthma, the Recipient stated that the School “took prompt and effective steps to ensure that the Student’s IEP was updated to include information relating to the Student’s allergies . . . ,” and to include “the accommodations put in place since the beginning of the 2014-2015 school year to eliminate and/or minimize the Student’s allergy symptoms.” In an interview, the Recipient’s special education director asserted that the Student’s allergy was not listed as a disability in the IEP. While the allergy was not addressed in the same way as his primary disabilities of Autism and Speech and Language Impairment, it was clearly discussed by the IEP team and the “accommodations” were included within the IEP document.
- In an interview, when asked if the School considers the Student’s allergy a disability, the principal responded affirmatively.
- While the witnesses interviewed indicated that they had never observed the Student experiencing symptoms of an allergy flare-up, the complainant notified them that symptoms were appearing at home, and on one occasion sent pictures of the Student with red eyes to the School. The complainant also notified the School that she was treating the Student with allergy medication to alleviate his symptoms. For an impairment that is episodic in nature and mitigated with medication, the absence of symptoms during the school day is not dispositive of whether the impairment constitutes a disability.

Based on the above facts, we conclude that the School treated the Student as though his allergy was a disability, and in essence developed and implemented a Section 504 Plan⁴ for him – without conducting an evaluation. As a result, the measures the School took were based not on an assessment of the Student’s individual condition and educational needs, but rather on the so-called “common sense” of School personnel. The Recipient argues that school personnel informally evaluated the Student by holding meetings and developing a plan. However, without obtaining specific information about the Student’s condition and needs, they lacked adequate information to determine whether the plan was appropriate and likely to be effective.

As a result, we find that the Recipient failed to evaluate the Student for Section 504 eligibility as required by 34 C.F.R. § 104.35 and 28 C.F.R. § 35.130(a).

We note that OCR does not take a position on whether the Student’s allergy or asthma actually is a disability. That decision must be based on information obtained in an evaluation of the Student, conducted consistent with 34 C.F.R. § 104.35.

Conclusion

We brought the violation identified during this investigation to the Recipient’s attention for resolution. On June 12, 2015, the Recipient entered into a Resolution Agreement to resolve our

⁴ We note that the Section 504 regulation does not require a plan in writing, although it is encouraged. Even when plans are in writing, they may take a variety of forms, such as an Individual Health Plan or Allergy Response Plan, when developed to address an impairment of a major life activity. When a student already has an IEP, any additional services necessary under Section 504 may be incorporated into the IEP.

compliance concerns. We have determined that the Agreement, when fully implemented, will resolve the allegation in this case.

This concludes our investigation of the complaint and should not be interpreted to address the Recipient's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. We are closing the investigation of this complaint effective the date of this letter and will monitor the Recipient's implementation of the Agreement.

Please note that the complainant may have the right to file a private suit in federal court whether or not OCR finds a violation. Additionally, be advised that the Recipient may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the complainant may file another complaint alleging such treatment.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personal information, which if released, could constitute an unwarranted invasion of privacy.

If you have any questions about this letter, please contact XXX XXXX, Attorney Advisor, at (XXX) XXX-XXXX, or me at (303) 844-4506.

Sincerely,

/s/
Thomas E. Ciapusci
Supervisory Team Leader

cc: Kimberly Davis, Udall Shumway

Dianne Douglas, State Superintendent of Public Instruction

Enclosure