

RESOLUTION AGREEMENT

Colorado Division of Vocational Rehabilitative Services Case Number 08-15-3004

- 1) The U. S. Department of Education, Office for Civil Rights (OCR), began investigating a complaint that Colorado Division of Vocational Rehabilitation (DVR) violated Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 C.F.R. Part 104, and Title II of the Americans with Disabilities Act and its implementing regulation at 28 C.F.R. Part 35. The Complainant has traumatic brain injuries and other disabilities.
- 2) Prior to the completion of OCR's investigation, DVR agreed to resolve the issues of this investigation pursuant to Section 302 of OCR's Case Processing Manual (CPM). This resolution has been entered into voluntarily between the parties and does not constitute a finding or admission that DVR is not in compliance with Section 504, Title II, and their implementing regulations. Accordingly, to ensure compliance with Section 504 and Title II and their implementing regulations and to resolve the issues of this investigation, DVR voluntarily agrees to take the actions set forth below.

Remedies and Reporting

- 3) General Remedies and Reporting.
 - a) ADA / Section 504 Coordinator. DVR will distribute a notice to current clients, DVR staff, and members of the public regarding the identity, contact information, and extent of authority of the agency's ADA / Section 504 Coordinator who handles non-employment matters. After DVR transitions to the Colorado Department of Labor and Employment (CDLE),¹ DVR will distribute an updated notice as necessary.

Reporting Provision (3)(a). By February 12, 2016, DVR will describe to OCR with specificity how, where, and to whom the clarification has been distributed, posted, and publicized. DVR will make a similar report to OCR within thirty (30) days after its transition to CDLE.

- b) ADA/Section 504 Grievance Process. DVR will provide for OCR's review and approval proposed revised grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by Section 504 and Title II, specific to DVR programs. Upon receipt of OCR's approval, DVR will adopt the grievance procedures and will distribute, post, and publicize them sufficiently broadly to provide adequate notice to current clients, DVR staff, and members of the public.

Reporting Provision (3)(b). By April 1, 2016, DVR will document to OCR that the approved grievance procedures have been adopted, subject to applicable public notice and comment requirements, and will describe with specificity how, where, and to whom they have been distributed, posted, and publicized; or, if DVR is still working through the approval process with OCR, it will note the current status in its April 1, 2016 report.

¹ DVR is currently anticipated to transition to CDLE in July 2016.

- c) Direct threat. DVR affirms that it does not and will not regard an individual's statement that he or she is going to file a complaint or otherwise exercise his or her legal rights under the ADA or Section 504 as posing a direct threat. "Direct threat" means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services. 28 C.F.R. § 35.104. In determining whether an individual poses a direct threat to the health or safety of others, 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. This Agreement does not require DVR to permit an individual to participate in or benefit from its programs, services, or activities when that individual poses an actual direct threat to the health or safety of others.
- d) Effective Communication. DVR hereby reaffirms its commitment to provide timely and appropriate auxiliary aids and services to ensure that applicants, clients, and members of the public with disabilities have effective communication of DVR's programs, benefits, and services, except where doing so would impose an undue burden or create a fundamental alteration. DVR is bound by the doctrine of "primary consideration" to honor the expressed choice of auxiliary aid or service of an individual with a disability, 28 C.F.R. § 35.160(b)(2), unless it can demonstrate that another aid or service will be equally effective, or that the requested aid or service would impose an undue financial or administrative burden or fundamental alteration. 28 C.F.R. § 35.164. Specifically, DVR acknowledges that people with disabilities affecting cognitive or neurological processing are entitled to primary consideration of their expressed choice of particular communication aids and services.
- i) Undue Burden and Fundamental Alteration. For any auxiliary aid or service regarding which DVR asserts would impose an undue burden or fundamental alteration, such assertion may only be made by the DVR Director or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion, including the expected cost of meeting the requirement, relevant limitations on available funding or other resources, and/or federal and state laws or regulations that limit DVR's discretion in the service, program, or activity at issue. 28 C.F.R. § 35.164. If such a determination is made, DVR will describe in the written statement how it will provide equally effective alternate access, *i.e.*, other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, the requesting individual receives the same benefits or services provided by DVR to other clients.
- ii) Proposed Plan Regarding How to Ensure Effective Communication. By April 1, 2016, DVR will submit to OCR for its review and approval a full set of proposed policies and procedures (Proposed Plan) to ensure that all persons with disabilities, including those with disabilities affecting cognitive or neurological processing, will receive appropriate auxiliary aids and services leading to effective communication, and how it will honor primary consideration, except where doing so would impose a fundamental alteration or

undue burden. The Proposed Plan will include provisions for how DVR will meet the needs of those with nonstandard requests for auxiliary aids and services and how people can file grievances if they believe they are not receiving timely and appropriate auxiliary aids and services. Communication with people with communication-related disabilities must be as effective as with those who do not have communication-related disabilities. 28 C.F.R. § 35.160(a)(1). The Proposed Plan will also address each of the subjects listed below.

- (1) Equally Effective Alternatives. When fundamental alteration or undue burden defenses apply, the Proposed Plan will detail the protocol by which DVR staff provide equally effective alternatives when it does not provide an individual's requested communication auxiliary aid or service. The protocol will specify the procedures by which DVR will determine when a requested auxiliary aid or service presents an undue financial or administrative burden or fundamental alteration. The Proposed Plan will require DVR to ensure that, to the maximum extent possible, individuals with communication-related disabilities receive the same benefits or services as individuals without communication-related disabilities. To provide equally effective alternate access, alternates are not required to produce the identical result or level of achievement for individuals with and without communication-related disabilities, but must afford individuals with communication-related disabilities equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the individual's needs.
- (2) Quality Assurances and Commitment of Resources. The Proposed Plan must include sufficient quality assurance procedures, backed by adequate personnel and financial resources, for full implementation.
- (3) Communication Log. The Proposed Plan will require DVR to establish and maintain a Log that reports any effective communication request made by a client or potential client that is out-of-the-ordinary or is denied by DVR. The Proposed Plan will describe examples of the types of requests that are to be considered "ordinary" and, as such, would not need to be logged unless denied. The Log documentation will include: the requested auxiliary aid or service, the DVR staff member who received and responded to the request, and whether the request was honored, denied or modified. If the request was denied or modified, the Log will reflect whether an alternative auxiliary aid or service was offered and, if so, whether the alternative was accepted. The Log will also reflect the same information regarding all complaints made to DVR regarding effective communication issues and how those complaints were resolved.
- (4) Alternate Format Materials. The Proposed Plan will set out a list of standard client-facing documents that DVR will make available in alternate formats including large print, screen reader-accessible electronic formats, and Braille. The Proposed Plan will state in which alternate formats these standard documents will be available and timelines for making such alternate formats available. The Proposed Plan will specify how DVR will inform current and prospective clients of their right to request alternate format materials, as needed, and indicate that case deadlines will be stayed and

extended, within the limits of DVR's available discretion under law, while necessary materials are being converted to the individual's alternate format.

- iii) Approved Plan Adoption and Implementation. Within thirty (30) days of receiving OCR's comments on the Proposed Plan, DVR will meaningfully incorporate OCR's comments, officially adopt, and fully implement an Approved Plan, subject to applicable public notice and comment requirements.

Reporting Provision (3)(d):

- By April 1, 2016, DVR will submit to OCR for its review and approval the Proposed Plan.
 - By April 1, 2016, DVR will report to OCR a list of all documents that are readily available in alternate formats.
 - By May 6, 2016, or within 30 days of receiving OCR's comments on the Proposed Plan, whichever is later, DVR will submit to OCR the specific wording of the Approved Plan's amended policies and procedures, evidence of their adoption and distribution, subject to applicable public notice and comment requirements, a description of resources that have been reserved to fulfil requests for auxiliary aids and services, and a description of how the Approved Plan is being fully implemented.
 - On a quarterly basis (January 1st, April 1st, July 1st, and October 1st), for the life of the Agreement (starting on July 1, 2016), DVR will provide OCR with a copy of the Log.
- e) Reasonable Modifications of Policies and Procedures: DVR hereby reaffirms its commitment to exercise its discretion to its fullest extent under federal and state law to make reasonable modifications to its policies and procedures, in order to ensure that applicants, clients, and members of the public with disabilities, including those with disabilities affecting cognitive or neurological processing, have an equal opportunity to enjoy its programs, services, and activities.

Reporting Provision (3)(e): On a quarterly basis, starting on July 1, 2016, DVR will report to OCR the requests it has received for reasonable modifications of policies and procedures. For each such report, DVR will describe with specificity what was granted. Where a request was denied, DVR will explain why the request was denied, what alternatives, if any, were provided, whether the person appealed or otherwise filed a grievance based on DVR's actions, and, if applicable, the status of such appeal or grievance.

4) Remedies for the Complainant.

- a) Invitation. DVR will issue a letter (in 14-point non-serif font, with lines spaced at 1.2) to the Complainant inviting her to re-enter the DVR program as soon as she desires.

Reporting Provision (4)(a): Within 10 days of the effective date of this Agreement, DVR will provide to OCR for review and approval a draft of the offer letter. Within three (3) days of

receiving OCR's comments, it will incorporate those comments and issue the letter to the Complainant by regular, first class (not certified) mail, with a courtesy copy to OCR.

Special Master. By April 1, 2016, DVR will identify for OCR approval at least three (3) individuals who are not employees of the State of Colorado and who are willing and available to be considered for a Special Master position; all costs associated with the Special Master will be borne by DVR. Each potential Special Master will be knowledgeable and experienced in working with people who have traumatic brain injuries and psychological disabilities; will have extensive knowledge about Section 504, Title II, and the federal regulations covering DVR; will be skilled at conflict resolution; and will be familiar with the terms of this Agreement. DVR will describe each potential Special Masters' qualifications for the position to OCR. OCR will review the information and when it is satisfied all three have the requisite skills and knowledge, it will convey the names and qualifications to the Complainant, and invite her to select a Special Master among the nominees. If the Complainant fails to select a Special Master from among the nominees within twenty (20) days of OCR's invitation to do so, OCR will select one of the nominees. Once the Special Master has been selected, DVR will contract with the Special Master.

- i) Following the finalization of the contract with DVR, the Special Master will offer to meet with the Complainant² to reach a better understanding of her communication needs, how she learns, and her testing data.
- ii) The Special Master will then hold one or more initial meetings³ with the Complainant and DVR to work through the following issues:
 - (1) Determining concrete steps and a communication protocol to ensure all of the Complainant's effective communication needs will be met, subject to primary consideration and to the undue burden and fundamental alteration defenses described above;
 - (2) Determining the identity of DVR personnel who will be working with the Complainant;
 - (3) Determining how much technical assistance DVR personnel will provide throughout the process to ensure the Complainant is able to exercise informed choice;
 - (4) Determining what alternate format DVR materials will be provided to the Complainant and when;
 - (5) Setting interaction ground rules founded in mutual respect and intended to empower the Complainant to make full use of DVR services for which she is eligible and to allow her to exercise appropriately informed choice throughout the process;

² The Complainant may bring with her any individual she prefers, at no additional expense to DVR.

³ The meetings may be held over the telephone or in person, as the parties agree, provided the Complainant's effective communication needs are met.

- (6) Setting out concrete steps, a timeline for, and an agreement regarding conducting a new comprehensive assessment for the Complainant (including reaching a mutual understanding of what the comprehensive assessment will entail);
 - (7) Setting out concrete steps, a timeline for, and an agreement regarding developing an IPE and/or self-employment business plan for the Complainant;⁴
 - (8) Setting reasonable, individualized deadlines for the Complainant's completion of key steps towards her job readiness (or readiness for self-employment); and
 - (9) Any other topics either party wishes to raise.
- iii) The Special Master will continue to meet at least quarterly with the Complainant and DVR personnel, unless the Complainant indicates no such meeting is necessary, to address any areas of tension or contention that appear to be arising between the Complainant and DVR personnel, until the Complainant has successfully completed the DVR program or has been exited from the program for nondiscriminatory, non-retaliatory reasons. The Special Master's goal will be to help the Complainant and DVR personnel work through conflicts that are impeding progress towards their mutual goal of self-employment for the Complainant. The Special Master is not authorized to make decisions regarding what substantive DVR services are due to the Complainant, or how those services should be provided, but he or she may consult with the parties regarding what is legally required by or prohibited under Federal law and may suggest appropriate next steps for the parties' consideration. DVR will provide a full transcript and summary of the meetings to the Complainant and OCR within 2 business days of each such meeting.
 - iv) In its contract with the Special Master, DVR will authorize the Special Master to report any concerns regarding DVR's compliance with Section 504, Title II, or this Agreement to OCR without seeking DVR or State of Colorado clearance.

Reporting Provision (4)(a): On a quarterly basis (January 1st, April 1st, July 1st, and October 1st, beginning on July 1, 2016), until December 31, 2018, or until the Complainant attains her employment goal or otherwise exits the DVR program, whichever comes first, DVR will provide OCR with a detailed report of the Special Master's actions and decisions, as well as any agreements reached between DVR, the Complainant, and the Special Master.

- b) Effective Communication. DVR will provide the Complainant with appropriate auxiliary aids and services to ensure communications with her are as effective as communications with others, subject to the obligation to honor primary consideration and to the defenses of undue burden and fundamental alteration. Unless and until altered by the Special Master or by the

⁴ Pursuant to Vocational Rehabilitation statutory provisions 29 U.S.C. §§ 722(b)(1)(A) and 722(b)(2)(C), which are not enforced by the Office for Civil Rights, the Individual Plan for Employment can be developed by the consumer, or by the consumer with support from someone else; it does not have to be developed by DVR personnel. However, the IPE must be approved by DVR.

Complainant's agreement, DVR will provide communication auxiliary aids and services according to the following protocol:

- i) The parties anticipate that typically, the Complainant will communicate with her DVR counselor and that counselor's supervisor on all matters related to her case. DVR will provide the Complainant with the contact information for her counselor and supervisor upon case opening and ensure both these staff are fully briefed and trained on the auxiliary aids and services listed below.
 - ii) DVR will inform the Complainant that if she wishes to communicate with other DVR staff, to ensure effective communication she should inform her counselor or the supervisor of her request so appropriate auxiliary aids and services can be provided seamlessly. If she does so, her counselor or the supervisor shall facilitate that communication such that the Complainant's auxiliary aids and services are provided. The DVR counselor and supervisor will not involve other DVR staff in direct communications with the Complainant, including by email, except with the Complainant's permission.
 - iii) In the event that the Complainant contacts other DVR staff without first involving her counselor or the supervisor, DVR staff will employ the general effective communication policies and procedures set out in the Approved Plan (or the Proposed Plan, if the parties are still working towards an Approved Plan). The parties acknowledge that if there is an unanticipated contact by the Complainant with a DVR staff member who is unfamiliar with the Complainant's requested auxiliary aids and services, DVR does not violate this Agreement if that staff member does not provide an auxiliary aid or service that the Complainant did not inform him or her of during their contact (for instance, if the staff member does not know to know to audio record a telephone conversation with the Complainant in anticipation of providing a transcript to her within two business days).
 - iv) DVR will provide the Complainant with transcripts and succinct summaries of meetings, verbal conversations, and voice mail messages (including, but not limited to, verbal grievances and progress reports) within two (2) business days. DVR will provide written agendas for scheduled meetings or conversations at least two (2) business days in advance, so long as the Complainant requests such a meeting or conversation at least four (4) business days before the scheduled time.
 - v) DVR will provide written communications to the Complainant, including email, in a 14-point non-serif font, with lines spaced at 1.2.
 - vi) DVR will provide the Complainant organizational assistance, such as incorporating tables of contents or highlighting relevant portions of longer documents, upon request.
- c) Provision of Services and Reasonable Policy Modifications. DVR will adhere to and reasonably modify its policies and practices where necessary and within the limits of federal and state law to ensure the Complainant has full and equal enjoyment of the DVR programs, services, and activities. Unless and until altered by the Special Master or by the Complainant's agreement, DVR will commit to the following:

- i) Accepting voice mail messages or verbal reports in lieu of written grievances and written progress reports, and providing appropriate auxiliary aids and services or other assistance to the Complainant regarding other submissions that are required to be in writing.;
 - ii) Reasonably modifying deadlines as needed to ensure she has equal access to DVR programs, services, and activities, provided that the Complainant cooperate with DVR in executing necessary deadline extensions to comply with federal and state law;
 - iii) As part of her IPE, affirmatively considering and, where appropriate under the Vocational Rehabilitation regulations, covering expenses for a broad range of vocational or other training or education to accommodate the Complainant's learning needs and disabilities which affect her neurological and cognitive processing including, but not limited to, educational services, learning aids, and methods of personalized instruction;
 - iv) Acknowledging each of the Complainant's voice mail messages or verbal communications and responding within two (2) business days with either a complete response or an anticipated date for a complete response; and
 - v) When sending hard copy correspondence or materials to the Complainant, avoiding the use of any delivery service, such as certified mail, that requires her to sign to acknowledge receipt.
- d) Reimbursement for Expenses. Within 10 days of the Complainant re-entering the DVR program, DVR will pay to the Complainant a sum equal to the amount of reasonable, documented expenses she incurred from January 2015 through December 2015 relating to vocational education classes she took in connection with her self-employment goal (including sewing classes and small business management classes). If the Complainant informs DVR she believes some educational expenses should have been covered that were not, DVR will invite her to appeal the decision through its regular appeal processes (mediation or the formal or informal appeals process), as she chooses.

Reporting Provision (4)(b)-(f): On a quarterly basis (January 1st, April 1st, July 1st, and October 1st, starting on July 1, 2016), until December 31, 2018, or until the Complainant attains her employment goal or otherwise exits the DVR program, whichever comes first, DVR will provide OCR with a detailed report on the status of the Complainant's case. This report will describe, among other items, her requests for auxiliary aids and services, reasonable policy modifications, and alternate format materials (including those listed in this Agreement). For each such request, DVR will describe with specificity what was granted and, where a request was denied, it will explain why the request was denied, what alternatives, if any, were provided, whether the Complainant has appealed or otherwise filed a grievance based on DVR's actions, and, if applicable, the status of such appeal or grievance.

- e) Nothing in this agreement will be construed to require DVR to fund a service, create an Individualized Plan of Employment (IPE), or modify a program requirement in a manner that would violate federal or state statute or regulations, including the requirement that vocational rehabilitation services be necessary, appropriate, and at least possible cost to DVR. Nothing in this Agreement prohibits DVR from exiting the Complainant from the DVR program or denying,

reducing, or changing the vocational rehabilitation services it provides if DVR has met its relevant obligations under this Agreement, Section 504, and Title II, and the Complainant has failed to meet agreed-upon, reasonable, individualized deadlines for demonstrating adequate progress, or otherwise has failed to adhere to nondiscriminatory, non-retaliatory DVR policies (which are subject by law and this Agreement to disability-based requests for reasonable modification). Within the boundaries of federal and state law, DVR will exercise its full discretion to affirmatively consider the Complainant's requested vocational rehabilitation services and goal and support her path to employment and independence.

- f) Paragraph 4 of the Agreement expires when the CP attains her employment goal or otherwise exits the DVR program, or December 31, 2018⁵, whichever comes first.

5) Training.

By April 1, 2016, DVR will submit, for OCR's review and approval, training materials covering all aspects of Paragraph 3 of this Agreement (including the identity of and scope of authority for the ADA/Section 504 Coordinator; the ADA/Section 504 grievance procedures; what constitutes or does not constitute a direct threat; effective communication issues, including the concept of primary consideration; and reasonable policy modifications) and will identify and provide credentials for a proposed trainer. DVR will cooperate with OCR by revising and resubmitting proposed training materials and proposed trainers' credentials until achieving OCR approval.

- a) Within 30 days of OCR's approval of its training materials, and an ongoing annual basis, DVR will provide mandatory training to all of its personnel regarding its obligations under Section 504, Title II, and this Agreement. DVR may use online trainings to satisfy this requirement. All new DVR staff will receive the training as a component of pre-service training and orientation.
- b) DVR will provide individualized, timely, and appropriate training regarding the requirements of Paragraph 4 to personnel who are anticipated to work with the Complainant.

Reporting Provision (5): Within 30 days of OCR's approval of its training materials, and annually thereafter for the life of the Agreement, DVR will provide OCR attendance logs for the mandatory training sessions, including names, titles, and dates of training.

General

- 6) Monitoring. DVR understands that OCR will not close the monitoring of this Agreement until OCR determines that DVR has fulfilled the terms of this Agreement and is in compliance with the regulation implementing Section 504, at 34 C.F.R. Part 104, and Title II, at 28 C.F.R. Part 35, which were at issue in this case.

⁵ In the event that the Complainant is still eligible to receive DVR services on December 31, 2018, DVR will continue to provide such services to the Complainant as required by DVR operating guidelines. It is understood that nothing in this Agreement reduces the amount of services that DVR is legally expected to provide to the Complainant, when she is eligible to receive services.

- 7) Cooperation and Access. DVR also understands that by signing this Agreement, it agrees to provide data and other information in a timely manner in accordance with the reporting requirements of this Agreement. Further, DVR understands that during the monitoring of this Agreement, if necessary, OCR may visit DVR, interview staff, and request such additional reports or data, as are necessary for OCR to determine whether DVR has fulfilled the terms of this Agreement and is in compliance with the regulation implementing Section 504, at 34 C.F.R. Part 104.

- 8) Enforcement. DVR understands and acknowledges that OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of this Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10), or judicial proceedings to enforce this Agreement, OCR shall give DVR written notice of the alleged breach and a minimum of sixty (60) calendar days to cure the alleged breach.

- 9) Effective Date. The effective date of this Agreement is the date of the signature, below.

_____/s/_____
For Colorado Department of Human Services

__3/18/2016_____
Date