



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

1244 SPEER BLVD., SUITE 310
DENVER, CO 80204-3582

REGION VIII

ARIZONA
COLORADO
NEW MEXICO
UTAH
WYOMING

September 18, 2023

By email only to jtapia@eaton.k12.co.us

Mr. Jay Tapia
Superintendent
Eaton School District RE-2
211 1st Street
Eaton, CO 80615

Re: OCR Case No. 08-23-1325
Eaton School District RE-2

Dear Superintendent Tapia:

This letter is to advise you of the outcome of the complaint that the United States Department of Education (Department), Office for Civil Rights (OCR) received against the Eaton School District RE-2 (District) on March 15, 2023. The Complainant alleged that the District discriminated against a student (Student) on the basis of disability when, beginning in January 2023, it 1) denied the Student access to [redacted content] School (School) when it disallowed the use of her service animal, and as a result, 2) denied the Student a free appropriate public education (FAPE).

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability by recipients of federal financial assistance. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 et seq., and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. Because the District receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over this matter pursuant to Section 504 and Title II.

I. Summary of Investigation and Conclusions

On April 18, 2023, OCR opened the allegations for investigation in accordance with OCR's *Case Processing Manual* (CPM). OCR's investigation included reviewing documents pertinent to the complaint allegations, including information, records, and data from the Complainant and District, and interviewing the District's Superintendent and Director of Student Services (Director). After carefully considering the information obtained during the investigation, OCR

found insufficient evidence to support a violation finding with regard to allegation #2. However, during the course of the investigation, OCR identified concerns related to the District's compliance with Section 504 and Title II regarding allegation #1. On August 25, 2023, the District expressed its willingness to resolve allegation #1 and OCR's compliance concern pursuant to Section 302 of the CPM. After carefully considering the information obtained during the investigation, OCR determined that it is appropriate to resolve the identified concerns through a Resolution Agreement (Agreement) under Section 302 of the CPM.

The following is a discussion of the information obtained by OCR during the investigation to date, the relevant legal standards, and the legal analysis that informed the development of the Agreement in this case.

II. Background

The District is a rural school district located in the northern part of Colorado and, according to the Colorado Department of Education, served approximately 2,000 students during the 2022-23 school year (SY), with approximately 586 students attending the School.¹ The District is also a member district of the Centennial Board of Cooperative Educational Services (BOCES) and contracts for the BOCES' services related to special education programming for students. The BOCES partners with the Sierra School of Weld County (Sierra School) as an alternative educational placement option for students.

The Student is a student with a disability and receives services pursuant to her individualized educational program (IEP). During the 2022-23 SY, the Student was [redacted content] years old and attended [redacted content]-grade at the Sierra School full-time, per her IEP, and earned all credits she attempted.

During the Student's IEP meeting on September [redacted content], 2022, that IEP team began planning the Student's transition from the Sierra School to her home school (*i.e.*, the School) by attending one class at the School during the second quarter of the 2022-23 SY, while remaining at the Sierra School for her other courses. Records demonstrate that the Student audited an art course at the School during the second quarter and attended six of twelve classes. The Student did not have a service animal in attendance with her when auditing the course at the School or while attending the Sierra School.

Following the second quarter audit, the IEP team reconvened on January 25, 2023, to discuss plans for the Student to attend part of her day at the Sierra School and take two elective courses at the School. However, prior to the convening, the Complainant contacted the Director to inquire about having the Student's service animal (Animal) attend classes with her at the School. During the email exchanges on January 11, 2023, the Complainant explained to the Director that the Student did not require the Animal at the Sierra School, but that the Animal was required for

¹ Colorado Department of Education, *SchoolView Data Center*, https://edx.cde.state.co.us/SchoolView/DataCenter/reports.aspx?jsessionid=3raFVr1vLNd7bPPtpkpV11nzigroK86XyovjkuAWDeycxy-PTQoP!1960436034?_adf_ctrl-state=pac20phbp_4.

the Student's disability and was trained to "stay with/near her during anxiety and panic attacks, and to keep her safe." On January 17, 2023, the Complainant followed up by email to confirm that the Animal would be attending the School with the Student when she returned. She described the Animal as helping the Student feel safe, giving her confidence, and serving as a "conversation starter." The Complainant also explained that the Animal "give[s] kisses if given the opportunity," that the Student did not have a lot of experience working with the Animal alone, and that she did not anticipate the Student "utilizing" the Animal every day at the School.

On January 21, 2023, the School's Principal (Principal) contacted the Complainant regarding the Student's start date and inquired whether the Student would start on January 23, 2023, with the support of a paraprofessional staff member or whether the Complainant preferred to wait until the Animal was approved. The Complainant confirmed that the Student would not attend the School without the Animal accompanying her. When OCR inquired about the District's Board Policy ADG (Animals in District Facilities and Vehicles), the Superintendent and Director explained that the site-based principals were expected to implement the policy, which includes the District's approval process for having service animals on campus; however, they also confirmed that no specific training had been provided to principals about the policy.

During the IEP meeting on January 25, 2023, the IEP team reviewed the Student's experience during quarter 2, proposed having a 1:1 paraprofessional to accommodate the Student's return to the School, and discussed the advantages and disadvantages of the Student attending the Sierra School and the School. The IEP team, including the Complainant, discussed the request to have the Animal attend school with the Student and could not reach an agreement on the request. The Complainant explained to OCR that she would not proceed with the IEP meeting without a decision and the meeting was terminated without making a change to the Student's IEP. The Prior Written Notice (PWN), issued to the Complainant on January 26, 2023, includes a notice of the Complainant's right to access a copy of the District's procedural safeguards and captures in writing the IEP team's intention to have the Student attend two classes at the School. It also indicates that, as a result of the disagreement over the Animal, the Student would continue to attend the Sierra School. The Complainant confirmed to OCR that the Student attended the Sierra School before and after the January 2023 IEP meeting.

The Complainant met with the Superintendent and the Director on Friday, February 3, 2023, to discuss the Animal. During the in-person meeting, the Superintendent inquired about the Animal's potential activities should it be tethered during one of the Student's classes, to which he told OCR the Complainant stated it would be the District's responsibility to "figure out." The Complainant explained that she brought videos of the Student working with the Animal in the community to the meeting, but that the Superintendent requested that the Student bring the Animal to the School so he could observe their interactions prior to approving the Animal. The Superintendent explained to OCR that while he requested the Student bring the Animal to School, the basis for the request was to clarify what the Animal was trained to do, because though the Complainant had explained the effect of the Animal on the Student, she had not sufficiently articulated the tasks the Animal was trained to do. When OCR inquired whether it would be standard for the District to have an animal demonstrate its tasks prior to granting

approval, the Superintendent explained he would like to update the District's policies to include such demonstration because it "makes sense to do it." The Complainant stated that no decision was made following the meeting on February 3, 2023, and that while it was unlikely the Student would want to return to the School during the remainder of the 2022-23 SY, she asked the Superintendent to make a decision so that plans could be made for the following school year.

On March 23, 2023, after the Complainant became aware of another student utilizing a service animal on campus at the School, the Complainant contacted the Superintendent, Director, and Principal by email and provided a copy of an "After Visit Summary" from one of the Student's medical visits. Another meeting was scheduled for April 5, 2023, with the Complainant, Superintendent, Director, and Principal. When scheduling the meeting, by email, the Complainant specifically requested the Director's presence at the meeting "due to ongoing discrimination." The Director explained to OCR that she brought a copy of the District's Board Policies, including Board Policy AC (Nondiscrimination/Equal Opportunity) and Board Policy AC-E-2 (Nondiscrimination/Equal Opportunity Complaint Form), to the meeting but that she neither reviewed nor provided the copies to the Complainant because she did not raise concerns about filing a complaint. The Superintendent confirmed to OCR that he recalled the Complainant's statement regarding discrimination but did not refer her allegations for investigation because she did not submit a complaint and because she knew where all the District's forms were located, should she have wanted to submit a complaint.

During the meeting on April 5, 2023, the Superintendent and Complainant discussed the Animal's training, as the Complainant had provided copies of a certificate in which she was identified as the Animal's handler. The Superintendent explained to OCR that he inquired whether the Complainant had the Animal "professionally trained," but ended this line of questioning when the Complainant stated she had trained the Animal. The meeting concluded with plans to have the Student visit the School campus with the Animal, but without a formal approval regarding its presence as a service animal. The District indicated that the Student was absent on the subsequent planned visits, therefore the Animal never attended campus before the conclusion of the 2022-23 SY.

The Complainant explained to OCR that throughout the conversations with District staff that they discussed "many different aides and things that could help [the Student] at the [S]chool," however, the Student expressed she does not feel safe to attend the School without the Animal.

III. Allegation #1: Inappropriate Denial of the Service Animal

The Complainant alleged that the District inappropriately denied the Student access to the School when it disallowed the use of the service animal.

Legal Standard

The Section 504 regulation, at 34 C.F.R. § 104.33, provides that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the

benefits of, or otherwise be subjected to discrimination under any program or activity that receives federal financial assistance. The Title II regulations create the same prohibition against disability-based discrimination by public entities.

A student with a disability may be entitled to have a service animal at a public school under Title II's accessibility regulations. Under the Title II regulations, a public entity generally must modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability. A public entity may ask an individual with a disability to remove a service animal from the premises if: (a) the animal is out of control and the animal's handler does not take effective action to control it; or (b) the animal is not housebroken.

The Title II regulations, at 28 C.F.R. § 35.104, define "service animal" 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, psychiatric, intellectual, or other mental disability. ... The work or tasks performed by a service animal must be directly related to the handler'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 Title II regulations specifically exclude from the definition of "service animal" "the provision of emotional support, well-being, comfort, or companionship." In other words, if the dog's mere presence provides comfort, that would not be considered a service animal under the ADA.

However, the Title II regulation makes a distinction between emotional support animals and psychiatric service animals. Psychiatric service animals are trained to perform a variety of tasks that assist individuals with disabilities to detect the onset of psychiatric episodes and ameliorate their effects. Examples of such tasks include reminding the handler to take medicine, providing safety checks or room searches for persons with PTSD, interrupting self-mutilation, removing disoriented individuals from dangerous situations, and sensing that an anxiety attack is about to happen and taking a specific action to help avoid the attack or lessen its impact.

The Title II regulation does not require service animals to be professionally trained. People with disabilities have the right to train the dog themselves and are not required to use a professional service dog training program. Covered entities may not: (a) require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal, as a condition for entry; (b) require that the dog demonstrate its task; or (c) inquire about the nature of the person's disability.

A service animal may not be excluded based on assumptions or stereotypes about the animal's breed or how the animal might behave. However, if a particular service animal behaves in a way that poses a direct threat to the health or safety of others, has a history of such behavior, or is not under the control of the handler, that animal may be excluded.

If a particular service animal behaves in a way that poses a direct threat to the health or safety of others, has a history of such behavior, or is not under the control of the handler, that animal may be excluded.² In determining what constitutes a direct threat, 28 C.F.R. Section 35.139(b) provides 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.

Furthermore, “[a]llergies and fear of dogs are not valid reasons for denying access or refusing service to people using service animals.” If an individual is allergic to dog dander, the public entity has an obligation to accommodate that individual as well as the individual with the service animal.³

The Title II regulation, at 28 C.F.R. §35.136(f), also limits the extent of inquiry that may be made of an individual using a service animal. A public entity is prohibited from asking about the nature or extent of a person’s disability, and is limited to two permissible questions that may be asked in order to determine whether an animal qualifies as a service animal: (1) is the animal required because of a disability; and (2) what work or task the animal has been trained to perform. A public entity shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal.

Analysis

During OCR’s investigation, OCR identified concerns related to the District’s compliance with Section 504 and Title II concerning its decision to disallow the Animal on campus. As a threshold concern, OCR noted the lack of training for principals regarding Board Policy ADG, despite the expectation that principals receive and approve requests for a service animal to accompany a student on campus.

Though it appears the District initially limited its inquiry to the two allowable questions, in its apparent efforts to distinguish whether the Animal was considered a service animal or an emotional support animal, it delayed making a decision which resulted in additional, concerning inquiries. For instance, while the Superintendent’s suggestion to have the Student bring the Animal to campus and demonstrate its training may have been intended to evidence the Animal’s ability in the absence of a sufficient explanation of its training, Title II specifically restricts the District from requiring a service animal demonstrate the task it has been trained to perform.

² United States Department of Justice, Civil Rights Division, Disability Rights Section, “Frequently Asked Questions about Service Animals and the ADA,” available at: <https://www.ada.gov/resources/service-animals-faqs/> (July 2015).

³ United States Department of Justice, Civil Rights Division, Disability Rights Section, “ADA Requirements: Service Animals,” available at https://www.ada.gov/service_animals_2010.htm (July 2011).

Further, the Superintendent expressing a desire to adopt a policy which requires demonstrations by service animals as a condition of approval, indicate a lack of understanding of the Title II requirements. OCR also noted concerns about the Superintendent's inquiry regarding whether the Animal was professionally trained, which is not allowed, as Title II specifically provides that a person with a disability has the right to train the animal themselves. Finally, OCR appreciates that the Director was prepared to provide the Complainant with a copy of Board Policies AC and AC-E-2, but has concerns that the information was not actually provided to the Complainant, despite the Complainant raising concerns of "ongoing discrimination" by email to the Superintendent.

As explained above, the District expressed an interest in voluntarily resolving allegation #1 and OCR's compliance concerns through a voluntary resolution agreement. Pursuant to Section 302 of the CPM, a complaint may be resolved when, before the conclusion of an investigation, a recipient expresses an interest in resolving the complaint and when OCR has determined that identified concerns can be addressed through a voluntary resolution agreement.

IV. Allegation #2: Failure to Provide a Free Appropriate Public Education

The Complainant alleged that, as a result of disallowing the service animal, the District denied the Student a FAPE.

Legal Standard

The Section 504 regulation requires recipient school districts to provide a FAPE to all students with disabilities in their jurisdictions. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of students without disabilities are met, and that are developed in accordance with the procedural requirements of Sections 104.34-36 pertaining to educational setting, evaluation and placement, and due process protections. OCR interprets the Title II regulations to require public school districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

A student with a disability may be entitled to have a service animal or an emotional support animal at school, if the animal is a reasonable accommodation necessary for the provision of a FAPE to the student. Generally, school districts must conduct an individualized inquiry to determine whether the animal's presence is necessary for the student to receive a FAPE.

Analysis

Though the Complainant alleged that the Student was denied a FAPE as a result of the District disallowing the Animal to accompany her on the School's campus, the evidence before OCR indicates that the Student's IEP was not updated to either incorporate a service animal as an accommodation or change the Student's schedule to a split schedule between the School and the Sierra School. Rather, the Student's IEP team convened in January 2023 and ultimately made no

changes to the Student's schedule and the Student subsequently continued to attend the Sierra School, as required by her IEP, full time for the remainder of the 2022-22 SY. While OCR appreciates the concerns raised by the Complainant about the Animal as it pertains to allegation #1, there is no evidence indicating that these concerns led to the Student's denial of a FAPE. Therefore, based on the foregoing, OCR determined that there is insufficient evidence to support a determination that the District failed to provide a FAPE to the Student.⁴

V. Conclusion

As noted above, OCR found insufficient evidence to support a violation finding related to the denial of FAPE as alleged in allegation #2. To fully resolve OCR's concerns related to the service animal in allegation #1, the District signed the enclosed Agreement. When fully implemented, the Agreement will resolve the remaining allegation raised in this complaint. The provisions of the Agreement are aligned with the allegation and issue raised by the Complainant and the information that was obtained during OCR's investigation, and the provisions of the Agreement are consistent with the applicable statute and regulations. OCR will monitor the District's implementation of the Agreement until the District is in compliance with the statutes and regulations at issue in the case. Failure to implement the Agreement could result in OCR reopening the complaint. OCR will promptly provide written notice of any deficiencies with respect to the implementation of the terms of the Agreement and will promptly require actions to address such deficiencies. If the District fails to implement the Agreement, OCR will take appropriate action, which may include enforcement actions.

OCR is closing the investigative phase of the case effective the date of this letter. The case is now in the monitoring phase. The monitoring phase of the case will be completed when OCR determines that the District has fulfilled all of the terms of the Agreement. When the monitoring phase of the case is complete, OCR will close case number 08-23-1325 and will send a letter to the Complainant and to the District stating that the case is closed.

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

⁴ Except in extraordinary circumstances, OCR does not review the result of individual placement decisions or other educational decisions so long as the District complies with the procedural requirements of Section 504 relating to identification and location of students with disabilities, evaluation of such students, and due process. Accordingly, OCR generally will not evaluate the content of a Section 504 plan or an IEP. Rather, any disagreement can be resolved either under Section 504, through a grievance or impartial hearing, or under the Individuals with Disabilities Education Act (IDEA), through a state complaint or due process complaint. In the instant case, the Student's IEP team convened on January 25, 2023, discussed the Student's potential need for a service animal, and ultimately concluded that the service animal was not required pursuant to the IEP. This placement decision is subject to the District's procedural safeguards, which were provided in the PWN issued to the Complainant on January 26, 2023. For additional information about filing a state complaint or due process complaint under the IDEA, the Complainant may visit the Colorado Department of Education's dispute resolution website, at www.cde.state.co.us/spedlaw.

the public. Complainants may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the District must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

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

Thank you for the District's cooperation throughout the processing of this case. If you have any questions, please contact Colleen Brooks, the OCR attorney assigned to this case, at 303-844-0196 or Colleen.Brooks@ed.gov.

Sincerely,

/s/

Angela Martinez-Gonzalez
Program Manager

Enclosures – Resolution Agreement (Signed)

Cc: Ms. Elizabeth Friel
Attorney
Caplan & Earnest LLC
By email only to efriel@celaw.com

Commissioner of Education Susana Córdova
Colorado Department of Education
By email only to cordova_s@cde.state.co.us

Complainant