



U.S. Department of Justice

Civil Rights Division

*Disability Rights Section - NYA
950 Pennsylvania Ave, NW
Washington, DC 20530*

April 13, 2015

VIA EMAIL:DOakes@HarrisBeach.com

David W. Oakes, Esq.
Harris Beach, PLLC
99 Garnsey Road
Pittsford, New York 14534

Re: Investigation of Gates-Chili Central School District, DJ No. 204-53-128

Dear Mr. Oakes:

We write concerning the United States Department of Justice's (Department) investigation of Gates-Chili Central School District's (District) service animal policies, practices, and procedures under title II of the Americans with Disabilities Act of 1990 (ADA), as amended, 42 U.S.C. §§ 12131-12134, and its implementing regulation, 28 C.F.R. pt. 35. The ADA prohibits discrimination against qualified individuals with disabilities by public entities, such as the District. Our investigation focused on the District's refusal to permit a student, D.P., to bring her service dog (Service Dog) to school unless D.P.'s mother (Parent) also provides a full-time handler.

In response to the complaint, the District asserts that D.P. cannot handle her own Service Dog, that the ADA does not require the District to act as the handler, and that therefore D.P. may only bring her Service Dog if the Parent provides a full-time handler. D.P.'s Parent counters that she is not asking the District to provide a full-time handler and, rather, asks the District to provide minimal and intermittent assistance to D.P., such that the child herself can handle her dog. Indeed, for years D.P.'s Parent has attempted to educate the District about her child, her Service Dog, and the minimal level of support or assistance D.P. would need with respect to using and benefitting from her Service Dog while at school. At the same time, having determined that D.P.'s Service Dog is critical to D.P.'s safety, autonomy, and independence, D.P.'s Parent has incurred costs in excess of twenty-five thousand dollars (\$25,000) to pay for a handler so that D.P. would not suffer any harm caused by being separated from her Service Dog.

There is no dispute that D.P. is a person with a disability or that the Service Dog is individually trained to perform tasks for the benefit of D.P. There also appears to be little dispute that D.P. is making strides in handling her Service Dog but, during the course of the

school day, requires intermittent assistance in tethering and untethering the dog when necessary or vocalizing a limited number of commands.

After investigation and consideration, the Department finds that the District is in violation of title II by failing to reasonably modify its policies, practices, and procedures to permit D.P. to handle her Service Dog with assistance from staff. Set forth below are the Department's findings of fact and conclusions of law under title II of the ADA, as well as minimum steps the District must take to meet its legal obligations and remedy the violations the Department has identified.¹

I. Background and Findings of Fact

This matter came to the Department's attention through a complaint filed by the Parent of D.P., a student attending elementary school in the District. D.P. has Angelman Syndrome, autism, epilepsy, asthma, and hypotonia.² The complaint alleged that the District refused to permit D.P.'s Service Dog in school unless the Parent provided a separate adult handler. In August 2013, the Department notified the District that we were opening an investigation of the District for alleged violations of title II of the ADA and, on September 19 and 20, 2013, we interviewed District staff, the Parent and the Handler, as well as observed D.P. with her service animal in the classroom. In addition, the Department reviewed documents provided by both the Parent and the District.

In January 2011, D.P. obtained a service dog. The Service Dog, a hypoallergenic breed selected to accommodate D.P.'s asthma, is trained to perform numerous tasks directly related to D.P.'s disabilities. It can detect an oncoming seizure before humans can and is capable of alerting others that D.P. is going to have a seizure. With regard to D.P.'s autism, the Service Dog is trained to prevent wandering (elopement), to apply deep pressure to prevent or limit meltdowns, and to disrupt stimming.³ In addition, the Service Dog provides mobility support for D.P.'s core body weakness.

¹ We note that students with disabilities enrolled in elementary and secondary school settings may be eligible for and thus entitled to a free and appropriate public education (FAPE) under the U.S. Department of Education's regulation implementing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 and 34 C.F.R. §§ 104.33-104.36, and a FAPE under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482. This letter does not address the District's obligations, or the remedies available to students and their parents, under these laws. Further, because the IDEA and ADA have different standards, whether or not the IDEA's requirements have been met does not determine whether a valid ADA claim would exist. 20 U.S.C. 1415(l); *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1098-99 (9th Cir. 2013) (rejecting argument that "the success or failure of a student's IDEA claim dictates, as a matter of law, the success or failure of her [ADA] Title II claim"); *Ellenberg v. New Mexico Military Inst.*, 478 F.3d 1262, 1282 (10th Cir. 2007) ("Even if plaintiffs conceded that [defendant] fully satisfied its IDEA obligations..., they could pursue claims under the ADA...").

² Angelman Syndrome is a lifelong disorder with manifestations that include developmental delay, lack of speech, seizures, and walking or balance disorders. Angelman Syndrome Foundation, "What is Angelman Syndrome?" <http://www.angelman.org/> (last visited February 2, 2015). Autism inhibits D.P.'s ability to perceive danger and she has a tendency to wander (elope). Hypotonia means decreased muscle tone. MedlinePlus Medical Encyclopedia, <http://www.nlm.nih.gov/medlineplus/ency/article/003298.htm> (last visited February 2, 2015). D.P. also has a history of prolonged grand mal seizures that, if allowed to progress to their full force, could be fatal.

³ Stimming refers to repetitive body movements or repetitive movement of objects (e.g., flapping arms over and over). Center for Disease Control and Prevention, Autism Spectrum Disorder, Signs and Symptoms, <http://www.cdc.gov/ncbddd/autism/signs.html> (last visited January 30, 2015).

With the assistance of the Service Dog, the quality of D.P.'s life significantly improved and she began to gain independence. Because of her core body weakness and inability to perceive danger, D.P., prior to having her Service Dog, had to constantly hold the hand of an adult and be transported long walking distances (to the school bus, for example) using a wheelchair or being carried. Today, D.P. walks herself to the bus holding the harness of her Service Dog, which provides both guidance and support. The pair is also connected by a leash, or tether.⁴ If D.P. attempts to wander or elope, the Service Dog sits down and prevents D.P. from moving forward. D.P.'s history of prolonged grand mal seizures has been significantly mitigated by the presence of her Service Dog. The Service Dog sleeps next to D.P. and alerts her Parent to oncoming seizures during the night. The same is true during school hours. Documents provided by the District establish that the Service Dog has effectively notified school staff of seizure activity on numerous occasions, enabling a nurse to administer emergency seizure medication early enough to prevent the seizure from progressing.

Preschool

During the 2011-12 school year, the Service Dog began to accompany D.P. on the school bus and at school. Her teacher's written comments that year stated, "... [the Service Dog] is providing support that provides [D.P.] with much more autonomy, and keeps everyone[']s hands from constantly handling her. [The Service Dog] is helping [D.P.] make transitions smoothly, helping to support her in walking through the halls."⁵

Kindergarten and First Grade

After completing preschool in the spring of 2012, D.P. was scheduled to begin school in the fall of 2012 at Terry Taylor Elementary. At a meeting with the Parent on September 4, 2012, the District told the Parent that it would not allow staff to assist D.P. in handling her Service Dog despite having done so in the past. The District also informed the Parent that D.P. could no longer bring her Service Dog to school unless the Parent provided a separate adult handler. As a result, the Parent hired a handler (Handler). Beginning in September of 2012 and continuing through the present, the Parent has paid the Handler approximately \$1,400 a month to accompany D.P.'s Service Dog to school.

D.P.'s Service Dog is trained to go through the school day without needing to be walked, eat, or relieve itself. The Handler tethers and untethers the Service Dog from D.P. and assists D.P., who is nonverbal, in issuing commands to the Service Dog. The Handler reported that there are at most five commands used with the Service Dog during the school day: "down," "down hold," "let's go," "wait," and, very rarely, "bring her." The Handler estimated that she primarily uses two commands during the school day ("down" and "let's go") approximately 15

⁴ When working, service dogs often have a harness with a handle as well a leash. *See* 28 C.F.R. 35.136(d). Some individuals use the harness, some the leash, and some use both. In this case, D.P. uses both. The harness provides D.P. with the support she requires to ambulate independently and the leash is used to tether D.P. to her Service Dog to prevent her from eloping.

⁵ March 1, 2012, document provided by Gates-Chili Central School District.

times a day and that issuing a command takes about three seconds. The Service Dog is untethered and tethered about 15 times day (during gym, for example), which takes approximately three seconds each to accomplish.

Throughout the school day, D.P. is always accompanied by her 1:1 Aide (provided by the District). When D.P. goes to various places on school grounds, she is also accompanied by the Service Dog, and the Handler. As noted above, the Service Dog has proven effective in alerting school personnel that D.P. is going to have a seizure. The Nursing Notes provided by the District indicate that the Service Dog has alerted that D.P. was having seizure activity on numerous occasions, enabling the District to follow the proper seizure protocol in a timely manner. D.P.'s 1:1 Aide ensures that the seizure protocol is followed. The District's seizure protocol instructs staff to ensure D.P. is safe by, among other things, issuing the command "snuggle" to the Service Dog to encourage it to stay close to D.P.⁶

Since the Service Dog started accompanying D.P. to school, D.P. is learning nonverbal ways to issue commands. For example, D.P. can: (1) jiggle the Service Dog's collar to indicate, "let's go;" (2) put out her hand to indicate "wait" or "settle;" and (3) touch its posterior area to tell it to "sit." D.P. gives the Service Dog rewards when she performs her tasks. D.P. is also learning to use an iPad and a Dynavox - - a device that allows D.P. to respond to or express messages ("yes, please," "no, thank you," "more, please," "my turn").⁷ Currently, the Dynavox includes the commands, "go to gym," and "go to cafeteria" for use with the Service Dog. The District also works with D.P. to develop communication skills for handling the Service Dog.

In a letter to the District dated December 19, 2012, the Parent requested that the District permit D.P. and her Service Dog to attend school without a separate adult handler. The Parent asked the District to permit D.P.'s 1:1 Aide to assist D.P. in issuing commands and tethering and untethering the Service Dog (two functions currently performed exclusively by the Handler). Since receiving the Parent's request, the District continues to refuse to allow the Service Dog at school or school-related activities without a separate adult handler provided by the Parent. The District also refuses to permit D.P. to use her Service Dog without a separate adult handler on her school bus, which, in addition to a bus driver, is staffed with a bus monitor and a nurse. We find that providing the requested assistance to D.P. falls well within the range of support and assistance that school staff provides to young children day in and day out. Accordingly, the District must reasonably modify its current "hands off" policy with respect to D.P.'s Service Dog.

II. Conclusions of Law and Recommended Remedial Measures

Discrimination on the basis of disability by public entities, such as local school districts, is prohibited by title II of the ADA. Specifically, title II mandates that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be

⁶ "Snuggle" is the command for the Service Dog to press its body against D.P.

⁷ Although not directly addressed in this analysis, the ADA's effective communication requirements also have relevance here. *See* 28 C.F.R. § 35.160.

denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. *See* 42 U.S.C. § 12132; 28 C.F.R. § 35.130(a). The title II regulation, set out at 28 C.F.R. pt. 35, reflects and implements the statute's nondiscrimination mandate. 42 U.S.C. § 12134 (directing the attorney general to promulgate regulations).

Under title II, local school districts must afford students with disabilities an equal opportunity to participate in or benefit from any aid, benefit, or service provided to others. *See* 28 C.F.R. § 35.130(b)(1). The District is specifically prohibited from providing a student with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others. 28 C.F.R. § 35.130(b)(1)(iii).

Public entities must make reasonable modifications to policies, practices, or procedures when necessary to avoid discrimination, unless the public entity can demonstrate that doing so would fundamentally alter the nature of the service, program, or activity. 28 C.F.R. § 35.130(b)(7). Moreover, as is the case here, a public entity shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability. 28 C.F.R. § 35.136(a). A public entity may properly exclude a service animal if: (1) the dog is out of control and the animal's handler does not take effective action to control it; or (2) the dog is not housebroken. 28 C.F.R. § 35.136(c). A service animal shall be under the control of its handler and shall have a harness, leash, or other tether unless because of a disability that is not possible, in which case the service animal must otherwise be under the handler's control (*e.g.*, voice control, signals, or other effective means). 28 C.F.R. § 35.136(d). A public entity is not responsible for the care or supervision of a service animal. 28 C.F.R. § 35.136(e).⁸

The District has not established that any of the permissible factors for exclusion of a service dog have been met. To the contrary, the District acknowledges that the Service Dog has never had an incident where it was out of control or exhibited any indication of not being house broken in the four years that it has been coming to school with D.P.

Moreover, the Parent's request that District staff assist D.P. in handling her Service Dog by performing the types of tasks described above is reasonable. D.P.'s 1:1 Aide already currently escorts D.P., her Service Dog, and the Handler around school property and ensures that D.P.'s seizure protocol is followed, including the Service Dog's role in that seizure protocol. And school staff already work with D.P. in learning how to communicate when handling her Service Dog. Staff assistance in issuing the few verbal commands necessary for D.P. to control the Service Dog would involve only minimal effort but would significantly further D.P.'s ability to use the assistance of the Service Dog.

⁸ Care and supervision is a distinct responsibility and different from handling. Care and supervision relates to the animal's health and wellbeing and includes such things as proper veterinary care as well as feeding, walking, and grooming the animal. *See* 28 C.F.R. §§ 35.136(e) and accompanying guidance at Appendix A § 35.136. The care and supervision of the Service Dog is not at issue here since the Service Dog does not require any walking, feeding, grooming, or veterinary care while D.P. is at school.

Following from the above, the District must permit D.P. to bring her Service Dog to school without also having to provide a separate adult handler. The ADA mandates that students with disabilities be afforded the same access to, and enjoy the same benefits of, the services, programs, and activities as students without disabilities and the District has not established that the provision of reasonable modifications to assist D.P. would fundamentally alter the nature of the service, program, or activity. 42 U.S.C 42 § 12132; 28 C.F.R. § 35.130(b)(1) and (b)(7).

To remedy the violations discussed above and to protect the civil rights of D.P., the District must take the following minimal steps:

- Permit D.P. to act as the handler of her Service Dog.
- Direct staff assigned to D.P.'s classroom and on the bus (i.e., the bus monitor) to provide reasonable modifications and to work with the communication-related aids and services (iPad or Dynavox) already being provided to D.P. as she handles her Service Dog, including but not limited to tethering and untethering D.P.'s Service Dog, issuing the commands used with the Service Dog during the school day, escorting D.P. throughout the school grounds when accompanied by her Service Dog; and using the Service Dog in accordance with D.P.'s seizure protocol.
- Pay compensatory damages, including damages for pain and suffering, in an appropriate amount for injuries suffered as a result of the District's failure to comply with the ADA.
- Make reasonable modifications to District policies, practices, and procedures where necessary to avoid discrimination against a student with a disability who uses a service animal unless the District can show that making the modifications would fundamentally alter the nature of the service, program, or activity. Reasonable modifications, depending on the individual circumstances, include, but are not limited to, providing assistance to a student with a disability in tethering or untethering the service animal and escorting a student with a disability throughout the school or campus as he or she is accompanied by a service animal, and assisting a student with a communication disability in issuing commands to the service animal.
- Ensure that schools within the District do not impose a surcharge for the use of a service animal on District property.
- Publish an announcement and description of the District's revised ADA service animal policy at <http://www.gateschili.org>.
- Hire a trainer to develop and deliver training to the following District staff members on the District's obligations under title II of the ADA, including obligations with respect to service animals: all Principals, Assistant Principals, Teachers, and Teachers' Aides and appropriate transportation personnel.

III. Conclusion

We hope to work with you to resolve our outstanding concerns with respect to the District's service animal policies, practices, and procedures. We are obligated to advise you that, in the event that we are unable to reach a resolution regarding our concerns, the Attorney General may initiate a lawsuit pursuant to the ADA. *See* 42 U.S.C. § 12133-34; 42 U.S.C. § 2000d-1. Please contact Paula Rubin at 202-305-2191 within two weeks of the date of this letter if you are willing to resolve this matter voluntarily in a manner that will bring the District into full compliance with title II, or if you have any questions regarding this letter.⁹

Sincerely,

Rebecca B. Bond
Chief
Disability Rights Section

cc: Kristin Small, Esq.
Empire Justice Center
Attorneys for the Complaining Party

⁹ Please note that this Letter of Findings is a public document and will be posted on the Civil Rights Division's website.