



Ohio School Boards Association Capital Conference and Trade Show

November 7 – 10, 2010

Greater Columbus Convention Center
Columbus, Ohio

Service animals in schools

Student Issues

Monday, November 8, 2010

9:00 a.m.

C 114–115

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OHIO SCHOOL BOARDS ASSOCIATION 2010 CAPITAL CONFERENCE

Columbus, Ohio
November 8, 2010

“Service Animals in Schools”

Presented by

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Pepple & Waggoner, Ltd.

I. Introduction

II. Terminology

A. What is a Companion/Emotional Support Animal?

1. An animal that provides comfort, affection, or companionship. Such animals are not specifically trained to perform particular tasks to ameliorate a disability; rather, they require only as much training as an ordinary pet requires to live among humans so as not to be a nuisance, threat, or danger to others. <http://www.servicedogcentral.org>

2. Emotional support animals are not service animals by definition, but such an animal may be required if needed for a student to receive a FAPE.

B. What is a Service Animal?

1. Ohio Revised Code addresses the use of service dogs for mobility impaired, blind, deaf, and hearing impaired persons.

Definitions (O.R.C. §955.011(B)).

- a. “Assistance dog” means a guide dog, hearing dog, or service dog that has been trained by a nonprofit special agency.
 - b. “Guide dog” means a dog that has been trained or is in training to assist a blind person.
 - c. “Hearing dog” means a dog that has been trained or is in training to assist a deaf or hearing-impaired person.
 - d. “Service dog” means a dog that has been trained or is in training to assist a mobility impaired person.
 - e. “‘Mobility impaired person’ means any person, regardless of age, who is subject to a physiological defect or deficiency regardless of its cause, nature, or extent that renders the person unable to move about without the aid of crutches, a wheelchair, or any other form of support, or that limits the person’s functional ability to ambulate, climb, descend, sit, rise, or perform any related function. ‘Mobility impaired person’ includes a person with a neurological or psychological disability that limits the person’s functional ability to ambulate, climb, descend, sit, rise, or perform any related function. ‘Mobility impaired person’ also includes a person with a seizure disorder.” O.R.C. §955.011(B)(1).
2. The definition of “service animal” in the 2010 ADA regulations is found in Title II, Part 35, Nondiscrimination on the Basis of Disability in State and Local Government Services, 28 C.F.R. §35.104 (July 23, 2010, Effective March 15, 2011).
 - a. Service animal means 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. Other species of animals, whether wild or

domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the handler's disability.

- b. Miniature horses may be service animals for the purposes of the ADA if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability. 28 C.F.R. §35.136(i)(1).

III. Accessing Educational Facilities

- A. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (2008); 34 C.F.R. §104 (2008).

1. Section 504 prohibits recipients of federal U.S. Department of Education funds from discriminating on the basis of disability.

“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.” 34 C.F.R. §104.4(a).

2. Under Section 504, recipient schools are required to provide students with nondiscriminatory access to facilities, programs, and services so that they may be provided an equal educational opportunity.

3. Enforced by the Office for Civil Rights (“OCR”).

4. Sullivan v. Vallejo City Unified Sch. Dist., 731 F. Supp. 947 (E.D. Cal. 1990). Prohibiting the use of a service animal because it will expose persons who have allergies to unacceptable risk was carefully scrutinized and is not necessarily sufficient to deny a student’s service dog in school. In issuing a preliminary injunction under Section 504, the court explained that a student with cerebral palsy who used a wheelchair was entitled under federal and state law to be accompanied to school with a dog. Furthermore, assigning her to a classroom with a teacher who had severe allergies to animal dander would amount to a denial of the disabled student’s right to access an equal opportunity for a meaningful education.

B. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.* (2008), 28 C.F.R. Pt. 35 (2010).

1. Title II prohibits state and local governmental entities from discriminating on the basis of disability.

2. Enforced by the OCR.

3. Title II entities have the same legal obligations as Title III entities to make reasonable modifications in their policies, practices, or procedures to allow service animals when necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity. 28 C.F.R. §35.136(a); 75 Fed Reg. 56191; 28 C.F.R. §35.130(b)(7) (September 15, 2010).

a. Exceptions. A public entity may ask an individual with a disability to remove a service animal from the premises if:

(1) The animal is out of control and the animal's handler does not take effective action to control it. A service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use one, or if such use would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (e.g., voice control, signals, or other effective means). 28 C.F.R. §35.136(d).

(2) The animal is not housebroken. A public school district is not responsible for the care or supervision of a service animal. 28 C.F.R. §35.136(e).

b. An animal that poses a "direct threat" to others is an animal that poses a significant risk to the health and safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids and services as provided in C.F.R. §35.139. 42 U.S.C. §12111(3); 28 C.F.R. §36.208.

School Board of Nassau County v. Arline, 480 U.S. 273 (1987). In interpreting the definition of disability under Section 504, and whether a teacher with tuberculosis was an otherwise qualified

handicapped person under the Act, the Supreme Court opined that a “direct threat” is 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. Recognizing the need to balance the interests of persons with disabilities against legitimate concerns for public safety, the Court stated that the determination of a direct threat to the health or safety of others must be based on an individualized assessment, based on reasonable judgment that relies on current medical evidence or on the best available objective evidence, to determine 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 will mitigate the risk.

There is no express regulatory language that permits exclusion on the basis of “direct threat,” and such a determination should be based on objective evidence and not speculation, generalization, unsubstantiated fear, attitudes, or stereotypes.

- c. Bakersfield (CA) City Sch. Dist., 50 IDELR 169 (OCR 2008). The parents filed an OCR complaint insisting that the student with autism had the right under the ADA and Section 504 to have the dog assist him in school. Although the dog attended school for a few days with the consent of the school principal, the central office administration withdrew that consent. OCR found that school officials did not include the parents or student in its decision making, but unilaterally determined the dog was unnecessary and posed a direct threat to the safety of others. School administrators determined that the animal did not meet the ADA definition of service animal and therefore, was not a service animal under the Act, but was a behavior therapy animal. They asserted that the dog was unnecessary under the IDEA as well, due to the extensive related services provided to the student through his IEP, including a personal aide for six hours daily. Thus, school officials excluded the dog as a service animal and subsequently excluded the dog as a related aid and service. Reasonable accommodations under Title II, OCR said, are to be determined on a case-by-case basis, starting with a known disability or a request for an aid or service, and involving an open dialogue with the student and the student’s parents about the limitations experienced by the disability and the need for use of a service animal.

d. Accessing "direct threat."

- (1) Under 28 C.F.R. §35.139, the decision as to whether a service animal may pose an unacceptable risk or threat to others is to be based on a reasonable judgment that relies on the best available objective evidence, to ascertain:
 - (a) the nature, duration, and severity of the risk;
 - (b) the probability that the potential injury will actually occur; and
 - (c) whether reasonable modifications of policies, practices, procedures, or the provision of auxiliary aids and services will mitigate the risk to an acceptable level.
- (2) According to OCR, the decision may be based on considerations of:
 - (a) pedigree,
 - (b) breed,
 - (c) training, or
 - (d) propensity for harmful or frightening interaction with other students or others reasonably attributed to dogs of the type requested by those knowledgeable about such matters.
- (3) OCR noted that should a determination be made that the animal poses an unacceptable level of risk, there would be no requirement to consider accommodations which would reduce the level of risk to an acceptable level.

C. Management Issues

1. Individuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a public entity's facilities where members of the public, participants in services, programs or activities, or invitees, as relevant, are allowed to go. 28 C.F.R. §35.136(g).

2. School officials shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. 28 C.F.R. §35.136(f).
3. School officials shall not ask about the nature or extent of a person's disability. Inquire as to the need for a service animal through an interactive and individualized investigation as required for the determination of reasonable modification by making two inquiries to determine whether an animal qualifies as a service animal:
 - a. Is the animal required because of a disability? (No need to ask if the disability is obvious.)
 - b. What work or task has the animal been trained to perform? Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition. 28 C.F.R. §35.104.
4. A public entity shall not ask or require an individual with a disability to pay a surcharge, however, if a public entity normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by his or her service animal. 28 C.F.R. §35.136(h).
5. These inquiries and rules which apply to service animals also apply to miniature horses. 28 C.F.R. §35.136(i)(C). In determining whether reasonable modifications in policies, practices, or procedures can be made to allow a miniature horse into a specific facility, school officials must consider:
 - a. The type, size, and weight of the miniature horse and whether the facility can accommodate these features;

- b. Whether the handler has sufficient control of the miniature horse;
 - c. Whether the miniature horse is housebroken; and
 - d. Whether the miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation. 28 C.F.R. §35.136(i)(B).
- D. Ohio Revised Code (Effective 6/30/2006)
- 1. O.R.C. §955.43(A). When either a blind, deaf or hearing impaired, or mobility impaired person or a trainer of an assistance dog is accompanied by an assistance dog, the person or the trainer, as applicable, is entitled to the full and equal accommodations, advantages, facilities, and privileges of all *** institutions of education *** and may take the dog into such conveyances and places, subject only to the conditions and limitations applicable to all persons not so accompanied, except that:
 - a. The dog shall not occupy a seat in any public conveyance.
 - b. The dog shall be upon a leash while using the facilities of a common carrier.
 - c. Any dog in training to become an assistance dog shall be covered by a liability insurance policy provided by the nonprofit special agency engaged in such work protecting members of the public against personal injury or property damage caused by the dog.
 - 2. "Institutions of education" means:
 - a. Any state university or college;
 - b. Any private college or university that holds a certificate of authorization issued by the Ohio board of regents;
 - c. Any elementary or secondary school operated by a board of education;
 - d. Any chartered or nonchartered nonpublic elementary or secondary school; or

- e. Any school issued a certificate of registration by the state board of career colleges and schools. O.R.C. §955.43(C).
3. Ohio House Bill 399 was proposed December 17, 2009 to amend O.R.C. §955.011 to revise the definition of “mobility impaired person” to include a person who is diagnosed with autism for purposes of the statutes governing assistance dogs. “‘Mobility impaired person’ also includes a person with a seizure disorder and a person who is diagnosed with autism.” O.R.C. §955.011(B)(1). House Health Committee approved 5/13/10.

Kalbfleisch ex rel. Kalbfleisch v. Columbia Community Unit Sch. Dist. Unit No. 4, 2009 WL 4829008 (Ill. App. Ct. Dec. 16, 2009). A three-judge appellate panel in Illinois state court found “ample evidence” to uphold the lower court’s issue of an injunction finding that a five year old student with autism would be irreparably harmed under state law if he did not bring his dog with him to school. In considering the parents’ request that the child be accompanied to school by a service dog, the school district determined that the dog would have served no educational purpose as it was a companion animal that did not meet the definition of a service animal, and would have impacted at least one student with allergies to animal fur. District officials argued that the student could attend school without the animal if he chose to and that his behaviors were volitional. The parents, however, contended that the dog provided a calming influence on the child, reduced his tantrums, and provided the child with consistency throughout the various environments he encountered during his day. Because the plain language of state law permitted the use of service animals, the court held that it was not necessary for the parents to prove the dog was a service animal in order for it to issue a preliminary injunction. See also, K.D. v. Villa Grove Comm’ty Unit Sch. Dist. No. 302 Bd. of Educ., 110 LRP 50317 (Ill. App. Ct. 2010) (affirming that a six year old boy with autism could bring a dog to school even though the dog did not respond to commands given by the one-on-one aide rather than the child, or provide him with educational benefit.).

IV. Free Appropriate Public Education (FAPE) Issues

- A. Section 504 – In addition to nondiscriminatory access to educational programs, services, and facilities, Section 504 has an additional relevant component to consider in that recipient elementary and secondary schools also must provide a FAPE to qualified students with disabilities.

1. A FAPE is the provision of a regular or special education comparable to the education provided to students without disabilities and is based on a student's individualized educational needs. 34 C.F.R. §104.33(b) (2000).
 2. The provision of a FAPE may include related aids and services, including the possibility that a student may need a service animal for assistance in order to have access to, participation in, and gain the benefits of, the programs and services offered by the school. 34 C.F.R. §104.4(a) (2000).
- B. The Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §1400 *et seq.* (2004)

1. Under the IDEA FAPE provisions, the relevant question is whether the use of an animal is a related service to assist a child with a disability to benefit from special education or is the appropriate methodology to provide the student with educational benefit.

Gallia County Local Sch. Dist., 36 IDELR 205 (SEA OH 2002). The state hearing review officer ("SRO") affirmed the impartial hearing officer's order ("IHO") and concluded that, under the IDEA, the student, diagnosed with separation anxiety disorder and social phobia, needed a dog for companionship in order to attend school. In arriving at the decision, the SRO applied a preponderance of evidence standard to determine whether the full-time use of a companion dog in school was necessary for the provision of a FAPE under the IDEA. The dog was determined to provide the student with some meaningful educational benefit in the least restrictive environment to meet her "current" needs. The school district was ordered to permit the student the use of the dog at all times in school, while on school property, and on the school bus; and elementary school staff and students were to be trained on the use of a service dog. Thus, use of the dog was a necessary component of a FAPE under the IDEA, not as a service animal trained to perform tasks or do work, but as an emotional companion providing comfort to the student.

2. The process in which a school must engage under the IDEA to make decisions regarding the use of animals for a student with a disability is a highly fact specific, case-by-case inquiry into the details of the student's needs, the nature and severity of the disability and its impact on the student, and the appropriate methodology to be used to meet those needs.

New Mexico Dept. of Educ., 103 LRP 57802 (SEA NM 2002). The IHO concluded that the determination of whether or not to use a dog as part of the special education program of a student with a hearing impairment was

a choice of methodology, and therefore up to the school district. Testimony at the due process hearing established that student's dog was not used to perform tasks or other disability-related services through work, but was instead used as a means of therapy. The IHO concluded that the purpose of the dog was to confer educational benefit, not to compensate for any lack of mobility or other disability as would a service dog. However, the IHO found that other means of accomplishing the same educational benefit sought by the proposed use of the dog were evident in the IEP, considered by the team, and made part of the child's educational program. Because the decision of whether to permit use of the child's dog was a choice of educational methodology, and because the district's chosen methods conferred educational benefit, the decision not to use the student's therapy dog and the subsequent non-use of the dog did not constitute a denial of a FAPE.

3. Use of a Service Animal May Be a Related Service, OAC 3301-51-01(B)(52).
 - a. "Related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.
 - b. "Orientation and mobility services."
 - (1) Means services provided to blind or visually impaired children by qualified personnel to enable those students to attain systematic orientation to and safe movement within their environments in school, home, and community; and
 - (2) Includes teaching children to use the long cane or a service animal to supplement visual travel skills or as a tool for safely negotiating the environment for children with no available travel vision.

- c. Because the list of related services is nonexhaustive, a service animal may be necessary as another supportive service as are required to assist a child with a disability to benefit from special education. Notably, the team may consider e.g., paraprofessional services (OAC 3301-51-01(B)(41)).
 - d. Cave ex rel. Cave v. East Meadow Union Free Sch. Dist., 480 F. Supp.2d 610 (E.D. N.Y. 2007). In denying the request under Section 504 for a preliminary injunction to require the school district to permit the presence of the service dog as a reasonable accommodation for the student with a hearing impairment, the court found extensive testimony on the effects of animal dander on people with such allergies to be persuasive and found that the presence of a dog in school would severely impact persons with allergies. Importantly, the court found it persuasive that the parents did not exhaust their administrative remedies under the IDEA first. On appeal, the Second Circuit Court affirmed, reiterating that the parents should file a request for a due process hearing under the IDEA to seek to incorporate the use of the dog into the IEP as a related service. "A request for a service dog to be permitted to escort a disabled student at school as an 'independent life tool' is hence not entirely beyond the bounds of the IDEA's educational scheme." Cave ex rel. Cave v. East Meadow Union Free Sch. Dist., 514 F.3d 240 (2d Cir. 2008).
4. The parents bear the burden of proof at a due process hearing and must show that empirical evidence supports the need for a service animal in lieu of human supports, and that their student needs the animal in order to receive a FAPE.

Bakersfield City Sch. Dist., 51 IDELR 142 (SEA CA 2008). An administrative law judge (ALJ) who heard the due process complaint found no violation of the IDEA. Although the dog did not qualify as a service animal, school officials did not follow procedures in their decision making. They were required to consider whether the student needed the animal as a related service in order to receive a FAPE. The ALJ found that the parents' proffered evidence that the dog was essential to the provision of a FAPE was not based on peer-reviewed experimentally and empirically based research, but was based on anecdotal reporting. The ALJ also determined that the district's recommendation of a one-on-one aide was the least restrictive means to provide supports to the student as the aide could make human judgments as to when to wean away from the student when appropriate in order to facilitate communication with his

peers, where the dog would be nothing but a constant companion. The presence of the dog was not required for the student to receive a FAPE.

V. Considerations

- A. Avoid blanket policies that prohibit the use or presence of service animals on school grounds, as they are likely discriminatory.
- B. A service animal may be necessary under Section 504 for a student with a disability to access the facilities, services, and benefits of the educational program, and whether reasonable modifications would facilitate that access.
- C. A service animal may be a necessary related service or methodology to enable a student with a disability to receive a FAPE under the IDEA.
- D. Know the definition of service animal, the needs of the student, and identify the nature of the tasks the animal is trained to perform through a case-by-case, interactive process with the parent/guardian and the child, if appropriate. Document the specific ways in which an animal or other related service will assist the student and ameliorate the effects of the disability.
- E. School officials may need to exercise discretion to seek consent to evaluate or reevaluate the student to determine whether the student qualifies for the need under the IDEA or to determine if the disability substantially limits a major life activity under Section 504.
- F. Consider information from a variety of sources, including the child's health care or other service provider.
- G. Ensure that the student's IEP is reasonably calculated to provide a FAPE and addresses the student's identified needs and in all settings, including field trips and transportation.
- H. Consider policy and procedure regarding service animals on school transportation, including loading/unloading, emergency evacuation, and training for other riders as well as potential suspension of bus service for the animal if the animal poses a direct threat to the safety of others, defecates or urinates on the bus, leaves the vicinity of the student, or is not properly leashed. Note that if the animal is suspended or excluded from transportation, the obligation to transport the student may still exist.

- I. Ensure the IEP team considers and documents all the student's educational needs and discusses all the methods proposed to meet those needs before proposing a FAPE. The IEP team should consider the diagnosis of the specific disability; the needs that stem from it; consider the parent's request for the service or comfort/therapy animal; identify and verify the need for such a service or comfort animal; and directly address the function(s) that the service or comfort/therapy animal is expected to perform in relation to the student's disability as this may impact the school district's methodology choices.
- J. With regard to a trainer of a service animal, know the school board's visitor policy. The focus of the inquiry should include the permissibility of the trainer's entry into the building during the school day, with or without a service animal.
- K. If an animal will be necessary in order for a student to have access to the educational programs or benefits, or the provision of a FAPE, consider the procedures for removing animals from the premises at any time given that they may be ill, may pose a direct threat to others, or may interfere with educational and operational functions.
- L. Consider policy and procedure regarding the animal's access to water; the location, walking, caring, feeding, clean up of the animal's waste; and any restrictions such as requiring that the animal be restrained at all times by being leashed or that the animal be restricted to certain spaces on school property.
- M. Consider policy regarding the animal's vaccinations and other veterinary records but do not condition a service animal request on the parents' submission of such information.
- N. Consider how to balance the needs of a student who requests use of a service animal with the needs of others who may have allergies.
- O. Under the ADA/Section 504 and the IDEA, school officials may offer alternative means to accomplish the requested service or need, but the alternative must actually be appropriate to achieve all of the work or purposes the service animal provides with respect to the student's disability.
- P. Always remember to provide parents with a copy of the procedural safeguards and prior written notice under the IDEA and, if applicable, a copy of their procedural rights under Section 504.

- Q. Consult with your School Board attorney concerning waivers of liability to protect the school district given the fact that, no matter how well trained an animal may be, there is still the potential for an attack or bite causing harm to others.

VI. Conclusion