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Office of the General Counsel  
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Re: OCR Docket #15-14-1018

Dear Mr. Clemons:

This letter is to notify you of the disposition of a complaint filed on October 17, 2013, with the U.S. Department of Education (the Department), Office for Civil Rights (OCR), against Detroit Public Schools (the District), alleging discrimination on the basis of disability. Specifically, the complaint alleged that the playgrounds at Noble Elementary-Middle School (Noble) were not accessible to persons with disabilities, and the auditoriums at Noble and Henderson Elementary School (Henderson) did not include ramps to allow students with mobility impairments to access the stage.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104. Section 504 prohibits discrimination based on disability by recipients of Federal financial assistance from the Department. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities and their instrumentalities. As a recipient of Federal financial assistance from the Department and a public school system, the District is subject to these laws; therefore, OCR had jurisdiction to investigate this complaint.

Based on the complaint allegations, OCR investigated the legal issue of whether the District has denied qualified individuals with disabilities the benefits of, excluded them from participation in, or otherwise subjected them to discrimination on the basis of disability because its facilities are inaccessible to or unusable by individuals with disabilities, in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.21, and the Title II implementing regulation at 28 C.F.R. § 35.149.

OCR's investigation of the complaint included interviews with the Complainant, a review of data provided by the District, and an onsite visit to the District. After a careful review of the information obtained during the investigation, OCR has determined that the District is failing to provide access to the Noble playground and the stage area of the Noble Cafetorium to persons with mobility impairments in violation of Section 504 and Title II. The evidence OCR reviewed did not support a finding that the District is failing to provide access to the stage area of the Henderson Cafetorium.

The District signed the enclosed resolution agreement, which, once implemented, will fully address OCR's finding in accordance with Section 504 and Title II. A summary of the applicable legal standards, OCR's investigation, and the bases for OCR's determinations are discussed below.

### **Applicable Legal Standards**

The Section 504 implementing regulation at 34 C.F.R. § 104.4(a) provides that no qualified person 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 benefits from or receives federal financial assistance. Title II's implementing regulation contains a similar provision for public entities at 28 C.F.R. § 35.130(a). Prohibited discrimination by a recipient or public entity includes denying a qualified person with a disability the opportunity to participate in or benefit from the aids, benefits, or services offered by that recipient or public entity; affording a qualified person with a disability an opportunity to participate in or benefit from aids, benefits, or services that is not equal to that afforded others; and providing a qualified person with a disability with aids, benefits, or services that are not as effective as those provided to others. 34 C.F.R. § 104.4(b)(1)(i)-(iv); 28 C.F.R. § 35.130(b)(1)(i)-(iv). Pursuant to Section 504, recipient school districts must also provide nonacademic and extracurricular services and activities in such a manner as is necessary to afford students with disabilities an equal opportunity for participation in such services and activities. 34 C.F.R. § 104.4(b)(2).

The Section 504 implementing regulation at 34 C.F.R. § 104.21 states that no qualified person with a disability shall, because a recipient's facilities are inaccessible to or unusable by persons with disabilities, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which Section 504 applies. The Title II regulation at 28 C.F.R. § 35.149, contains a similar provision for public entities.

The regulations contain standards for determining whether a recipient's programs, activities, and services are readily accessible to and usable by individuals with disabilities, depending on whether the facilities are determined to be existing facilities, new construction, or altered construction. The applicable standard depends on the date of construction or alteration of the facility and the nature of any alternation.

- **Existing facilities**

Under the Section 504 regulation, existing facilities are those for which construction began before June 3, 1977. Under Title II, existing facilities are those for which construction began on or before January 26, 1992.

For existing facilities, the regulations require an educational institution to operate each service, program, or activity so that, when viewed in its entirety, it is readily accessible to and usable by individuals with disabilities. This compliance standard is referred to as "program access." This standard does not require that the institution make each of its existing facilities or every part of a facility accessible if alternative methods are effective in providing overall access to the service, program, or activity. 34 C.F.R. § 104.22(a); 28 C.F.R. § 35.150(a).

To provide program access in existing facilities, an institution may use such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternative accessible sites, alteration of existing facilities, construction of new facilities, or any other methods that result in making its program or activity accessible to persons with disabilities. A recipient may comply with this standard through physical alteration of existing facilities, but a recipient is not required to make structural changes to the facility itself when other methods are effective in achieving compliance. 34 C.F.R. § 104.22(a); 28 C.F.R. § 35.150(a). In choosing among available methods for meeting the program access requirement for existing facilities, an institution is required to give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate. 34 C.F.R. § 104.22(b); 28 C.F.R. § 35.150(b). Where programs or activities cannot or will not be made accessible using alternative methods, structural changes may be required in order for recipients to comply.

In reviewing program access for an existing facility, the accessible design standards referenced in the Section 504 and Title II regulations (discussed below) may also be used as a guide to understanding whether individuals with disabilities can participate in the program, activity, or service. A covered public entity must make its programs and activities accessible unless it can demonstrate that required modifications would result in a fundamental alteration of the program or in undue financial and administrative burdens. The concept of program accessibility serves as a guideline in evaluating existing facilities and in formulating structural and nonstructural solutions to any physical access problems found in these facilities.

The Section 504 regulation at 34 C.F.R. § 104.22(f) also requires a recipient institution to adopt and implement procedures to ensure that interested persons can obtain information as to the existence and location of services, activities, and facilities in existing construction that are accessible to and usable by persons with disabilities.

- **New construction and alterations**

Under the Section 504 regulation, a facility will be considered new construction if construction began (ground was broken) on or after June 3, 1977. Under the Title II regulation, the applicable date for new construction is January 26, 1992. For new construction, the facility or newly constructed part of the facility must itself be readily accessible to and usable by persons with disabilities. 34 C.F.R. § 104.23(a); 28 C.F.R. § 35.151(a).

With regard to alterations, each facility or part of a facility that is altered by, on behalf of, or for the use of an institution after the effective dates of the Section 504 and/or Title II regulation in a manner that affects or could affect the usability of the facility or part of the facility must, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by persons with disabilities. 34 C.F.R. § 104.23(b); 28 C.F.R. § 35.151(b).

Determining which standards apply to a given new construction or alteration depends upon the date the new construction or alterations took place. For an entity covered by Section 504 and Title II, new construction and alterations begun after June 3, 1977, but prior to January 18, 1991, must conform to the American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped (ANSI). New construction and alterations begun between January 18, 1991, and January 26, 1992, must conform to the Uniform Federal Accessibility Standards (UFAS). Compare 45 C.F.R. § 84.23(c) (1977) and 34 C.F.R. § 104.23(c) (1981), with 34 C.F.R. § 104.23(c) (2012). New construction and alterations after January 26, 1992, but prior to March 15, 2012, must conform to either UFAS or the 1991 Americans with Disabilities Act Standards for Accessible Design (the 1991 ADA Standards).

The U.S. Department of Justice (DOJ) published revised regulations for Titles II and III of the ADA on September 15, 2010. These regulations adopted revised enforceable accessibility standards called the 2010 ADA Standards for Accessible Design (the 2010 ADA Standards). The 2010 ADA Standards went into effect on March 15, 2012, although entities had the option of using them for construction or alterations commencing September 15, 2010, until their effective date. For new construction and alterations as of March 15, 2012, public entities must comply with the 2010 ADA Standards.

A playground “meets the definition of “facility” under the Section 504 and Title II regulations, 34 C.F.R. §104.3(i) and 28 C.F.R. §35.104. A playground facility is comprised of both the structure or equipment installed to provide play activities and the surface surrounding such structure or equipment.

The Title II regulation states that, where structural changes in facilities were to be undertaken to comply with the program accessibility obligations under 28 C.F.R. § 35.150, the changes were to be made within three years of January 26, 1992, but as expeditiously as possible. 28 C.F.R. § 35.150(c). Public entities employing 50 or more persons were required to develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes. Public entities were required to provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the development of the transition plan by submitting comments. A copy of the transition plan was required to be made available for public inspection. Transition plans are required to, at a minimum:

- (i) identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities;
- (ii) describe in detail the methods that will be used to make the facilities accessible;
- (iii) specify the schedule for taking the steps necessary to achieve compliance with 28 C.F.R. § 35.150 and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and
- (iv) indicate the official responsible for implementation of the plan.

DOJ's *Title II Technical Assistance Manual* provides further guidance on the self-evaluation and transition plan requirements. The manual states that DOJ expected that many public entities would reexamine all their policies and practices even if they had already completed a self-evaluation under Section 504, as programs and functions may have changed significantly since the Section 504 self-evaluation was completed; actions that were taken to comply with Section 504 may not have been implemented fully or may no longer be effective; and Section 504's coverage has been changed by statutory amendment.

DOJ's manual further instructed that a public entity's self-evaluation identifies and corrects those policies and practices that are inconsistent with Title II's requirements, and that, as part of the self-evaluation, a public entity should:

- 1) identify all of the public entity's programs, activities, and services; and
- 2) review all the policies and practices that govern the administration of the public entity's programs, activities, and services.

This includes, among other things, examining each program to determine whether any physical barriers to access exist and identifying steps that need to be taken to enable these programs to be made accessible when viewed in their entirety.

The Title II regulation, as amended, states that elements that have not been altered in existing facilities on or after March 15, 2012, and that comply with the corresponding technical and scoping specifications for those elements in either the 1991 ADA Standards or UFAS are not required to be modified in order to comply with the requirements set forth in the 2010 ADA Standards. However, this safe harbor does not apply to those elements in existing facilities for which there were neither technical nor scoping specifications in the 1991 ADA Standards. These include, among other elements, play areas. 28 C.F.R. § 35.150(b)(2).

### **OCR's Investigation**

This complaint stems from the District's decision at the end of the 2012-2013 school year to close Oakman/Orthopedic Elementary School, which had served general education students in grades PreK-5, including students identified as physically or otherwise health impaired; and to transfer the school's students to Noble and Henderson elementary schools.

The complaint alleged that the playgrounds at Noble were inaccessible. The Complainant described a small gravel path leading to the one playground that students using walkers could not traverse. She also stated that the ground surface under the slides and swings at that playground were composed of grass and dirt and that the play area was bordered by a wooden encasement three to four inches high. The complaint also alleged that the auditoriums at Noble and Henderson did not include ramps to allow students with mobility impairments to access their stages.

According to the District, Noble was built in 1920 and underwent renovations in 1967. Noble includes two stages: one in the Noble Original Auditorium, and one in the Noble Cafetorium. The Noble Original Auditorium dates back to the building's original construction in 1920, while the Noble Cafetorium was added to the building during the 1967 renovations. The District told OCR staff members that the stage in the Noble Original Auditorium is not used except for storage. All special events at Noble Elementary during the 2013-2014 school year, including various assemblies, career fairs, dances, and other programs, were held in the Noble Cafetorium. The Cafetorium has, in practice, been designated as the accessible stage. Therefore, OCR did not consider the stage in the Noble Original Auditorium during its investigation of the complaint.

Henderson and the Henderson Cafetorium were built in 1963. During the 2013-2014 school year, the Henderson Cafetorium housed all Henderson special events, such as talent shows, open houses, pep rallies, and recognition assemblies.

Contrary to the Complainant's original allegation, only one playground is located on the Noble School grounds. This playground originated with the building's construction in 1967, but was renovated and updated sometime after 2000. Repairs to the playground were made in August 2013. The playground is used by students during recess.

- **The Noble playground**

When asked about the age of the Noble playground, the District responded only that it was updated sometime after 2000. The District stated repairs were made to the existing structure in August 2013, although no information was provided describing the work performed at that time. OCR therefore considered the playground to be new construction, although it was likely built prior to the effective date of the 2010 ADA Standards. In any event, however, UFAS and the 1991 ADA Standards did not include specific requirements for play areas, although they did include specific requirements for ground surface and accessible routes. OCR therefore applied the 2010 ADA Standards in analyzing the Noble playground.

OCR observed during the onsite visit that railroad ties enclose the Noble playground around its perimeter at varying heights. The enclosure does not comply with standards requiring ramps to allow access over changes in surface levels. Further, if students with disabilities were able to cross the railroad ties to access the Noble playground, its surface consists of an uneven mixture of woodchips, gravel, and mud. This surface does not comply with standards related to ground surfaces generally, or ground surfaces in play areas. OCR also did not observe any accessible routes within the play areas. OCR did not evaluate the accessibility of the play components because, in its entirety, the Noble playground is inaccessible based on the lack of accessible routes to and within the playground, as well as the playground's surface.

- **The auditoriums**

As explained above, according to the District, Noble was built in 1920 and underwent renovations in 1967. The building includes two stages, but only the Noble Cafetorium stage is used for school events and productions. The Noble Cafetorium was added to the building during the 1967 renovations. Henderson Elementary and the Henderson Cafetorium were built in 1963.

Because all of the stages were built before June 3, 1977, they are existing facilities that require "program access." In reviewing program access for these existing auditorium facilities, OCR applied current accessible design standards under Title II as a guide to determine whether individuals with disabilities can participate in the program, activity, or service located in these auditoriums.

The Noble Cafetorium contains a hallway which leads to a set of stairs for students to access the stage area. Off of this hallway, there is a doorway that enters into a room containing a lift to allow students with disabilities to access the stage area.

Because the hallway dead-ends into a set of stairs, there should be enough clearance for a wheelchair to make a 180-degree turn; however, the existing space does not allow for such maneuverability. A wheelchair could, however, turn around by entering the room containing the lift. Turning into the room from the hallway would require a 90-degree turn; however, the doorway's width does not meet the standards for a 90-degree-turn

allowance. Removing the door from the hinges would allow a 90-degree turn into the room containing the lift, and would also ensure that any wheelchair that enters the area would have adequate space to make a 180-degree turn by entering the room with the lift. This would ensure students with disabilities access to the stage area.

The Noble Cafetorium's lift allows students with disabilities program access for activities that occur on the Cafetorium stage. In order to ensure that there is access to the lift, however, the District must remove the door to the lift room from its hinges. Without removing the door, appropriate access to the lift does not exist.

Unlike the Noble Cafetorium stage, which can be accessed only by traveling down a hallway to a room containing a lift, the Henderson Cafetorium contains a doorway to the backstage area where the lift allows students with disabilities to access the stage area. The door, the lift, and the clearances around it met accessible design standards. Because the auditorium includes a lift to allow access to the stage, the Henderson Cafetorium allows students with disabilities to have access to programs that take place on the Henderson Cafetorium stage.

### **Conclusion and Resolution**

Based on the information above, OCR concluded that the District has failed to provide access to persons with mobility impairments to the Noble playground and the programs held at the Noble Cafetorium stage, in violation of the Section 504 and Title II regulations.

On June 5, 2015, the District provided OCR with the enclosed signed resolution agreement, which, once implemented, will fully address OCR's findings in accordance with Section 504 and Title II. In summary, the resolution agreement requires the District to make the following changes to Noble School: provide an accessible route to the chair lift in the back stage area of the Cafetorium; complete a self-evaluation of the playground; develop a transition plan to make the playground accessible and complete the necessary steps to ensure accessibility by August 2017; prepare an interim plan to make the playground accessible to and useable by persons with disabilities; and implement procedures by which persons can obtain information about the location of an accessible playground. Please note that there is an error in the language in the agreement, e.g., at Action Step I, that suggests the District can choose a design standard in making the modifications required under the agreement. As explained above, for new construction and alterations as of March 15, 2012, public entities must comply with the 2010 ADA Standards. Therefore, the modifications that the District makes under the agreement must comply with the 2010 ADA Standards. OCR apologizes for any confusion that may have resulted from this language in the agreement.

In light of the signed agreement, OCR finds that this complaint is resolved, and we are closing our investigation as of the date of this letter. OCR will, however, monitor the District's implementation of the Agreement. Should the District fail to fully implement the Agreement, OCR will reopen the complaint and take further appropriate action to ensure compliance with Section 504 and Title II.

This concludes OCR's investigation of the complaint and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

The Complainant may file a private suit in federal court, whether or not OCR finds a violation.

Please be advised that the District may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the harmed individual may file another complaint alleging such treatment.

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

If you have questions regarding this letter, please contact Supervisory Attorney/Team Leader Kelly M. Johnson at (216) 522-xxxxx or [Kelly.Johnson@ed.gov](mailto:Kelly.Johnson@ed.gov). If you have any questions or concerns about OCR's monitoring of the District's implementation of the resolution agreement, please contact Ms. Julianne Gran of our staff, who will be overseeing the monitoring. Ms. Gran may be reached at (216) 522-xxxxx or by e-mail at [Julianne.Gran@ed.gov](mailto:Julianne.Gran@ed.gov).

Sincerely,

/s/

Meena Morey Chandra  
Director

Enclosure