



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION I
5 POST OFFICE SQUARE, 8th FLOOR
BOSTON, MASSACHUSETTS 02109-3921

June 14, 2018

Christopher E. Hopey, Ph.D.
President
The Office of the President
315 Turnpike Street
North Andover, MA 01845
By email to: jebalil@merrimack.edu

Re: Case No. 01-16-2073
Merrimack College

Dear President Hopey:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has completed its investigation of the complaint we received against Merrimack College (the College). The Complainant alleged that the College discriminated on the basis of disability.¹ Specifically, the complaint alleged that the College's football stadium, including its routes, viewing areas, and bathrooms, were not accessible to individuals with mobility impairments.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive federal financial assistance from the Department. The College is a recipient of financial assistance from the U.S. Department of Education. Therefore, OCR has jurisdictional authority to investigate this complaint under Section 504.

In reaching a determination, OCR reviewed documents provided by the Complainant and the College; interviewed the Complainant and College faculty/staff; and conducted a site visit on June 1, 2017.

After carefully considering all of the information obtained during the investigation, OCR found sufficient evidence of a violation of Section 504, which the College agreed to resolve through the enclosed resolution agreement. In addition, the College expressed an interest in resolving portions of this complaint voluntarily, and the College also advised OCR that in October 2017, it completed the construction of a new stadium to address the concerns identified by OCR, and requested that OCR close this matter on the basis that they finalized all new construction in October 2017; however, OCR had previously completed its investigation and entered into negotiations, and the College entered into a Resolution Agreement dated March 26, 2018. OCR looks forward to working with the College in the monitoring phase.

¹ By letter dated March 25, 2016, the United States Department of Justice referred the complaint to OCR.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

The regulation implementing Section 504, at 34 C.F.R. § 104.21, provides that “[n]o qualified person with a disability shall, because a recipient’s facilities are inaccessible to or unusable by individuals 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 this part applies.”

The Field

The Complainant alleged that Martone-Mejail football field and seating area (the Field) were not accessible to persons with mobility impairments. Specifically, the Complainant alleged that the seating area had no ramp, railings on the stairs, or designated area for handicap viewing; the closest person could get to the football area is about 80 yards and then the person needs to walk; and there are no accessible restrooms at the venue, only two inaccessible portable toilets close to the entrance of the stadium.

OCR determined that the Field was constructed prior to 1977. The regulation implementing Section 504, at 34 C.F.R. §104.22, categorizes facilities constructed on or before June 3, 1977, as “existing facilities”. Accordingly, the Field and the seating area are an “existing facility” under the regulation implementing Section 504. Although the Field is an existing facility under the regulations implementing Section 504, the Field offers unique programs and activities to students and visitors to the College. Unique programs offered at the Field included football, men’s and women’s lacrosse and soccer, and field hockey practices and games.²

Seating Area

OCR determined that the Field’s seating area does not feature any wheelchair spaces or companion seats, lacks rails or ramps, and the viewing areas (on the ground on the side of the bleachers) are not horizontally or vertically dispersed to provide equal access and lines of sight. Viewed collectively, these features do not satisfy the “readily accessible” standard required for existing facilities under Section 504, because individuals with mobility impairments are

² The regulation implementing Section 504 requires that “[a] recipient shall operate its program or activity so that when each part is viewed in its entirety, it is readily accessible to [persons with disabilities.]” 34 C.F.R. § 122(a). Accordingly, each program or activity operated in the Field, when viewed in its entirety, must be readily accessible to individuals with disabilities. The regulation implementing Section 504 does not require a recipient to make structural changes to existing facilities where it can effectively achieve compliance through means such as (but not limited to) redesign of equipment, or reassignment of classes or other services to accessible buildings or locations. 34 C.F.R. § 122(b). However, if no effective alternatives can be provided to achieve program accessibility, a recipient is required to make necessary structural changes. These changes are to be made consistent with the requirements for new construction. To determine the accessibility and usability of programs in “existing facilities,” OCR considers the Uniform Federal Accessibility Standards (UFAS) and/or the 2010 ADA Standards for Accessible Design (2010 ADA Standards) when assessing the degree to which certain physical barriers may render the program inaccessible or unusable. OCR does not require strict compliance with UFAS or ADAAG for “existing facilities”; rather, OCR uses these standards as a guideline when determining whether particular features of the “existing facilities” would effectively render the program inaccessible to or unusable by persons with disabilities.

significantly impeded from accessing (by sitting/viewing) Field events.³ The College represented, after OCR’s determination, that it constructed a new stadium in October 2017 to address the deficiencies identified with respect to the Field, and requested that OCR close this matter on the basis that they finalized all new construction in October 2017; however, OCR had previously completed its investigation and entered into negotiations, and the College entered into a Resolution Agreement dated March 26, 2018. OCR looks forward to working with the College in the monitoring phase.

Restrooms

OCR determined that the College did not have any permanent restroom facilities or toilets constructed for the Field; instead the College provides temporary or portable restroom facilities to visitors during home games (port-a-potties). OCR found that these portable toilets were located close to the entrance of the Field, and did not comport with the 2010 ADA Standards 604.8.1, which state: “Ambulatory accessible toilet compartments shall comply with 604.8.2].” The regulation implementing Section 504 does not require a recipient to make structural changes to existing facilities, such as constructing restrooms or toilets where there are none. The regulation requires a recipient to operate each program or activity conducted in existing facilities so that the program or activity, when viewed in its entirety, is readily accessible to individuals with disabilities. Before OCR finalized its compliance determination on this issue, however, the College requested to voluntarily resolve this matter pursuant to Section 302 of OCR’s *Case Processing Manual*, and advised OCR that it constructed a new stadium addressing, inter alia, the restrooms. The College also requested that OCR close this matter on the basis that they finalized all new construction in October 2017; however, OCR had entered into negotiations, the College signed the enclosed Resolution Agreement, and OCR anticipates working with the College to complete monitoring of the Agreement.

Pathway to Field and Lot F

The College advised OCR that Lot F is the primary parking lot designated for the Field. OCR was unable to determine the walkway’s date of construction or alteration. However, even

³ This is confirmed by looking to the 2010 ADA Standards as a guide. According to the 2010 ADA Standards, wheelchair spaces shall be provided, and shall provide lines of sight comparable to those provided to nondisabled persons, and shall be dispersed and provide spectators with choices of seating locations and viewing angles that are substantially equivalent to, or better than, the choices of seating locations and viewing angles available to all other spectators. 2010 ADA Standards § 221.2.1 The Field’s seating areas do not approach this standard. Therefore, OCR determined that the Field’s seating area does not comply with Section 504 with respect to equal access and viewing areas. The College advised OCR that individuals with mobility impairments have historically been shuttled to the Field and provided “personalized” seating on the sideline of the field. However, OCR reviewed the College’s website and determined that the website does not address the Field, information as to how to contact the shuttle is unclear, and the scope of services offered is unclear. Moreover, accessibility standards are not limited to students who may visit the College’s disability services website, when members of the public and visitors may park in the lot to attend unique programs and activities (sporting events) at the Field, and there is no indication that there is signage or similar publication of the College’s practice advertising shuttle services to the Field.

assuming that it is an “existing facility,” OCR determined that it was not “readily accessible” to persons with disabilities.⁴

OCR determined that the exterior route from Lot F to the Field consisted of concrete sidewalks immediately departing Lot F and extending several hundred feet to a relatively steep asphalt (paved) pathway that proceeded for approximately one-quarter mile to the Field, at a change in level of up to 11.4 degrees of slope (approximately 1:3 to 1:4). OCR noted that the asphalt path featured a steeply sloped section, at the initiation of the asphalt pathway proceeding to the Field, extending to approximately 30 feet from the initiation of the asphalt pathway.⁵

Based on the compliance concerns identified above with respect to the Field’s seating area, restrooms, and exterior accessible route, OCR determined that qualified individuals with disabilities were excluded from participation in the unique programs and activities conducted at the Field. As stated above, the College informed OCR that in October 2017, the College completed the construction of a new stadium to serve all of the programs and activities, including football, men’s and women’s lacrosse and soccer, and field hockey, that were formerly conducted at the Field; thus, that it has made the structural changes that would be required. The College stated that the newly constructed stadium and seating area are fully compliant with the 2010 ADA standards and will feature dispersed accessible seating, ramps and lifts, and restrooms, and will be located adjacent to the beginning of the exterior accessible route formerly extending to the Field, thereby eliminating the change in level at the beginning of the current exterior accessible route. The College also requested that OCR close the complaint based on construction of the stadium, however, OCR had entered into negotiations, and on March 26, 2018, the College signed the enclosed Resolution Agreement, confirming the structural changes it represents that it has made. OCR anticipates working closely with the College to confirm the structural changes made by the College and conclude the monitoring of the Agreement.

Lot F: Van Accessible Parking Space

OCR determined that the van accessible parking space in Lot F does not comport with Section 504. OCR found that Lot F contains 114 spaces, of which 6 are designated accessible, and one is designated “van accessible.” The van accessible parking space was 96 inches in width with an access aisle that is 60 inches in width; however, the applicable accessibility standard pursuant to Section 504 requires a van accessible parking space to have an access aisle 96 inches in width.

⁴ The 504 regulation at 34 C.F.R. Section 104.31(i) expressly defines “facility” to include “roads, walks...”

⁵ Viewed collectively, these features do not satisfy the “readily accessible” standard required for existing facilities under Section 504, because individuals with mobility impairments are significantly impeded from traversing this walkway to access the Field. This is confirmed by looking to the 2010 ADA Standards as a guide. The 2010 ADA Standards provide that at least one accessible route shall be provided within the site from accessible parking spaces to the accessible building or facility entrance they serve, and that the running slope of walking surfaces shall not be steeper than 1:20. Similarly, UFAS requires that there must be at least one accessible route within the boundary of the site from accessible parking spaces, and that such route must not feature a running slope greater than 1:20. UFAS 4.1.1(1), 4.3.7. The pathway to the Field does not approach this standard. Accordingly, OCR determined that the exterior pathway to the Field did not comply with Section 504, and, relatedly, that there is no accessible route from the accessible parking spaces in Lot F to the Field.

Specifically, UFAS 4.6.3 states: “If accessible parking spaces for vans designed for handicapped persons are provided, each should have an adjacent access aisle at least 96 in.” Nor did these measurements satisfy an equivalent accessibility standard such as the 2010 ADA Standards. The College advised OCR that in addition to the construction of the stadium in October 2017, it has addressed the identified concern, and asked OCR to close the complaint, however, OCR had entered into negotiations, resulting in the enclosed Resolution Agreement to address the concern. OCR anticipates working with the College to close the monitoring of the Agreement.

Lot G: Signage, and Van Accessible Parking Space

OCR determined that the signage and van accessible parking space in Lot G do not comport with Section 504. The College advised OCR that along the exterior accessible route to the Field, a second parking lot (Lot G), although not designated as the primary parking facility for visitors to sporting events at the Field, may be used by visitors to sporting events. OCR determined that Parking Lot G adjoined an entrance to the area of the Field along the asphalt pathway, and featured 34 parking spaces, of which two were designated accessible by ground markings.

OCR determined that Lot G was repaved in 2015. Accordingly, OCR determined that the alterations undertaken at Lot G qualify as new construction under the regulation implementing Section 504.⁶ The College advised OCR that in addition to the construction of the stadium in October 2017, it has addressed the signage and van accessible parking space in Lot G, and asked OCR to close the complaint; however, OCR had entered into negotiations, resulting in the enclosed Resolution Agreement to address the concern. OCR anticipates working with the College to close the monitoring of the Agreement.

Conclusion

On March 26, 2018, the College agreed to implement the enclosed Resolution Agreement (Agreement), in which it represents that the College has already taken specific steps to address identified areas of noncompliance; specifically, it has constructed a new stadium and addressed the concerns identified in the Appendix to the Agreement, and voluntarily addressed additional accessibility concerns prior to the conclusion of OCR’s investigation. During its monitoring and onsite(s), OCR will monitor the College’s continued use of the Field, if any, to ensure that the accessibility issues identified during the course of OCR’s investigation have been addressed, and to ensure that the newly constructed stadium conforms to the 2010 ADA Standards, and if so,

⁶ The regulation implementing Section 504, at 34 C.F.R. § 104.23(c), requires that all facilities constructed or alterations to existing facilities made after January 18, 1991, be in compliance with the Uniform Federal Accessibility Standards (UFAS), or it must be clearly evident that equivalent access is provided to meet the requirements of Section 504, such as through compliance with the 2010 ADA Standards. The applicable accessibility standard pursuant to Section 504 requires accessible parking spaces to be designated as reserved for the disabled by a sign showing the symbol of accessibility, and such sign shall not be obscured by a vehicle parked in the space. UFAS 4.6.4. One of the two designated accessible spaces featured an access aisle, and was accordingly van accessible. However, it lacked vertical signage or ground markings indicating that it was van accessible, as required. In addition – like the van accessible space in Lot F – the access aisle was under the required 96 inches. UFAS 4.6.3. Nor did the College’s signage and measurements for its van accessible access aisle satisfy an equivalent accessibility standard such as the 2010 ADA Standards. Accordingly, OCR identified compliance concerns with respect to the vertical signage for the designated accessible and van accessible spaces in Lot G.

