



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

June 13, 2019

Superintendent Ron Griffin
Scituate Public Schools

Via email: rongriffin@scit.org

Re: Complaint Nos. 01-18-1064, 01-18-1086 & 01-18-1307
Scituate Public Schools

Dear Superintendent Griffin:

This letter is to advise you of the outcome of the above-referenced complaints that the U.S. Department of Education (Department), Office for Civil Rights (OCR) received against Scituate Public Schools (District). As explained further below, before OCR completed its investigation of these complaints, the District expressed a willingness to resolve the complaints by taking the steps set out in the enclosed Resolution Agreement (Agreement). Hereinafter, you will be referred to as “the Superintendent.”

Jurisdiction

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. OCR also enforces Title II of the Americans with Disabilities Act (ADA) of 1990 (Title II) and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public education systems and institutions, regardless of whether they receive Federal financial assistance from the Department. The laws enforced by OCR prohibit retaliation against any individual who asserts rights or privileges under these laws or who files a complaint, testifies, assists, or participates in a proceeding under these laws. Because the District receives federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

Allegations

In Complaint No. 01-18-1086, OCR opened the following legal issue for investigation:

1. Whether the following parts of the XXXX School (XXXX School) are not readily accessible to and usable by individuals with disabilities, in violation of 34 C.F.R. § 104.23 and 28 C.F.R. § 35.151: (1) stalls in (a) a restroom off the cafeteria, (b) a restroom in the nurse’s office, and (c) an upper wing boys’ restroom; (2) a stair lift; (3) a curb cut to the right of the school’s front door; and (4) ramps leading from (a) a door near

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 XXXX grade classroom wing to a field, (b) a door in the modular wing to a XXXX, and (c) a side entrance near a shed to the back of the School (Allegation 1).

In Complaint No. 01-18-1064, OCR opened the following legal issues for investigation:

2. Whether the District discriminated against the Complainant's son (Student) on the basis of disability by failing to provide him an equal opportunity to participate in, and/or denying him the benefits of, transportation to and from school with his peers throughout the XXXX school year, in violation of 34 C.F.R. § 104.4 and 28 C.F.R. § 35.130(a) (Allegation 2).
3. Whether the District retaliated against the Student by denying him access to transportation to and from school with his peers throughout the XXXX school year because the Complainant filed complaints with the XXXX and the XXXX regarding allegedly inaccessible District facilities and unequal transportation services provided to the Student, in violation of 34 C.F.R. § 104.61 and 28 C.F.R. § 35.134 (Allegation 3).

During the course of its investigation, OCR identified additional concerns regarding the District's compliance with Section 504 and Title II with respect to whether the District denied the Complainant's request that the District transport the Student to and from school with his same-age peers as a reasonable modification of the District's policies, practices, and procedures to avoid discriminating against the Student on the basis of his disability (Allegation 4).

In Complaint No. 01-18-1307, OCR opened the following legal issues for investigation:

4. Whether there are no accessible curb ramps on each end of the crosswalk crossing the driveway leading to the XXXX School (XXXX School) from XXXX, and if so, whether the lack of such accessible curb ramps results in there being no accessible route from XXXX and its associated sidewalks to the School, in violation of 34 C.F.R. § 104.23 and 28 C.F.R. § 35.151 (Allegation 5).
5. Whether there is no accessible curb ramp at the end of the crosswalk connecting the parking lot closest to the School's main entrance to the main entrance, and if so, whether the lack of such accessible curb ramp results in there being no accessible route from that parking lot to the School's main entrance, in violation of 34 C.F.R. § 104.23 and 28 C.F.R. § 35.151 (Allegation 6).
6. Whether there is no stable, firm, and slip-resistant accessible route connecting a gravel parking lot and an adjacent athletic field located between the School and XXXX, in violation of 34 C.F.R. § 104.23 and 28 C.F.R. § 35.151 (Allegation 7).

Legal Standards

The Section 504 regulation, at 34 C.F.R. § 104.4, and the Title II regulation, at 28 C.F.R. § 35.130(a), provide that no qualified individual with a disability shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under the

District’s programs or activities on the basis of disability. When investigating an allegation of different treatment, OCR first determines whether there is sufficient evidence to establish an initial, or *prima facie*, case of discrimination. Specifically, OCR determines whether the District treated the Student less favorably than similarly situated individuals without disabilities. If so, OCR then determines whether the District had a legitimate, nondiscriminatory reason for the different treatment. Finally, OCR determines whether the reason given by the District is a pretext, or excuse, for unlawful discrimination.

The Section 504 regulation, at 34 C.F.R. § 104.61, which incorporates the procedural provisions of the regulation implementing Title VI of the Civil Rights Act of 1964, prohibits retaliation against any individual who asserts rights or privileges under Section 504 or who files a complaint, testifies, assists, or participates in a proceeding under Section 504. The Title II regulation, at 28 C.F.R. § 35.134, contains a similar prohibition against retaliation. In analyzing an individual’s claim of retaliation against a recipient, OCR analyzes whether: (1) the recipient knew the individual engaged in a protected activity or believed the individual might engage in a protected activity in the future;¹ (2) the individual experienced an adverse action caused by the recipient;² and (3) there is some evidence of a causal connection between the adverse action and the protected activity. If all these elements are present, this establishes an initial, or *prima facie*, case of retaliation. OCR then determines whether the recipient has identified a legitimate, non-retaliatory reason for taking the adverse action. OCR next examines this reason to determine whether it is a pretext for retaliation, or whether the recipient had multiple motives (illegitimate, retaliatory reasons and legitimate, non-retaliatory reasons) for taking the adverse action. If OCR finds that the reason was pretextual, then OCR will make a finding of retaliation; conversely, if OCR finds that the recipient proffered a legitimate, non-retaliatory reason for the action at issue and that the reason was not pretextual, then OCR will find insufficient evidence of a violation.

The Section 504 regulation, at 34 C.F.R. § 104.21, and the Title II regulation, at 28 C.F.R. § 35.149, provide that no qualified individual with a disability shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination in a school district’s programs or activities because the school district’s facilities are inaccessible to or unusable by individuals with disabilities. The regulations implementing Section 504 and Title II each contain two standards for determining whether a school district’s programs, activities, and services are accessible to individuals with disabilities. One standard applies to facilities existing at the time of the publication of the regulations and the other applies to facilities constructed or altered after the publication dates. The applicable standard depends on the date of construction and/or alteration of the facility. Under the Section 504 regulation, existing facilities are those for which construction began prior to June 4, 1977; under the Title II regulation, existing facilities are those for which construction began prior to January 27, 1992. Facilities constructed or altered on or after these dates are considered newly constructed or altered facilities under Section 504 and Title II standards.

For existing facilities, the Section 504 regulation, at 34 C.F.R. § 104.22, and the Title II regulation, at 28 C.F.R. § 35.150, require a school district to operate each service, program, or activity so that, when viewed in its entirety, it is readily accessible to and usable by individuals

¹ A “protected activity” is the exercise of a right that is protected under OCR’s non-discrimination laws.

² An “adverse action” is something that could deter a reasonable person from engaging in further protected activity.

with disabilities. The school district may comply with this requirement through the reassignment of programs, activities, and services to accessible buildings, alteration of existing facilities, or any other methods that result in making each of its programs, activities and services accessible to persons with disabilities. In choosing among available methods of meeting the requirements, a school district must give priority to methods that offer programs, activities, and services to persons with disabilities in the most integrated setting appropriate.

With respect to newly constructed facilities, the Section 504 regulation, at 34 C.F.R. § 104.23(a), and the Title II regulation, at 28 C.F.R. § 35.151(a), require that the school district design and construct the facility, or part of the facility, in such a manner that it is readily accessible to and usable by individuals with disabilities. In addition, for new alterations that affect or could affect facility usability, the Section 504 regulation, at 34 C.F.R. § 104.23(b), and the Title II regulation, at 28 C.F.R. § 35.151(b), require that, to the maximum extent feasible, the school district alter the facility in such a manner that each altered portion is readily accessible to and usable by individuals with disabilities.

The new construction provisions of the Section 504 and Title II regulations also set forth specific architectural accessibility standards for facilities constructed or altered after particular dates. With respect to Section 504 requirements, facilities constructed or altered after June 3, 1977, but prior to January 18, 1991, must comply with the American National Standards Institute (ANSI) Standards (A117.1-1961, re-issued 1971). Facilities constructed or altered after January 17, 1991, must meet the requirements of the Uniform Federal Accessibility Standards (UFAS). Under the Title II regulation, school districts had a choice of adopting either UFAS or the 1991 Americans with Disabilities Act Accessibility Guidelines (ADAAG) for facilities constructed or altered after January 26, 1992 and prior to September 15, 2010. For facilities where construction or alterations commenced on or after September 15, 2010, and before March 15, 2012, the Title II regulation provides that school districts had a choice of complying with either UFAS, ADAAG, or the 2010 ADA Standards for Accessible Design (2010 Standards). The Title II regulation provides that school districts are required to comply with the 2010 Standards for construction or alterations commencing on or after March 15, 2012. While the Section 504 regulations have not been amended to formally adopt the 2010 Standards, a school district may use the 2010 Standards as an alternative accessibility standard for new construction and alterations pursuant to Section 504. The 2010 Standards consist of 28 C.F.R. § 35.151 and the 2004 ADAAG, at 36 C.F.R. Part 1191, appendices B and D.

The Title II regulation, at 28 C.F.R. § 35.130(b)(7), requires school districts to make reasonable modifications to policies, procedures, or practices when necessary to avoid discrimination on the basis of disability, unless the modification would fundamentally alter the nature of the service, program, or activity. OCR interprets the Section 504 regulation, at 34 C.F.R. § 104.4, to impose this same obligation. School districts may establish reasonable requirements and procedures for individuals with disabilities³ to provide documentation of their disability and request reasonable modifications. Individuals with disabilities are responsible for obtaining disability documentation and for knowing and following the procedures established by the school district. Once the individual with a disability has provided adequate notice and documentation of a disability and the need for modifications due to the disability, the school district must provide the individual

³ Or, if the individual with a disability is a minor, the individual's parents or guardians.

with a disability with reasonable modifications of the school district’s policies, practices, or procedures as necessary to avoid discrimination on the basis of disability. However, the school district is not required to make modifications that would result in a fundamental alteration of the school district’s program (e.g., by altering an essential aspect of the program) or impose an undue burden.

In determining what modifications are appropriate for an individual with a disability, the school district should familiarize itself with the individual’s disability and documentation, explore potential modifications, and exercise professional judgment. The question of whether a school district has to make modifications to its policies, practices, or procedures is determined on a case-by-case basis. OCR generally does not substitute its judgment for that of qualified educators and professionals regarding modifications. Instead, OCR reviews relevant factual evidence to determine whether a school district acted in a reasonable manner and whether it took appropriate steps consistent with Section 504 and Title II in making decisions regarding an individual’s eligibility for modifications. Both Section 504 and Title II envision a meaningful and informed process with respect to the provision of modifications, e.g., through an interactive and collaborative process between the school district and the individual with a disability. If a school district denies a request for a modification, it should clearly communicate the reasons for its decision to the individual with a disability so that he or she has a reasonable opportunity to respond and provide additional documentation that would address the school district’s objections.

Section 504 and Title II do not require a school district to modify requirements that would fundamentally alter the nature of its services, programs, or activities. In reviewing a school district’s determination that a requested modification would fundamentally alter the nature of a service, program, or activity, OCR considers whether the school district’s determination is educationally justifiable. The requirement that is the subject of the requested modification should be essential to the educational purpose or objective of the service, program, or activity. OCR policy requires, among other factors, that decisions regarding whether a requested modification would fundamentally alter the nature of a service, program, or activity be made by a group of people who are trained, knowledgeable and experienced in the area; through a careful, thoughtful and rational review of the service, program, or activity and its requirements; and that the decision-makers consider a series of alternatives for the requested modification that would afford the individual with a disability an equal opportunity to benefit from the service, program, or activity.

A school district is not required to provide a modification if it can show that the requested modification would pose an undue financial or administrative burden. Generalized conclusions are not sufficient to support a claim of undue burden. Instead, undue burden must be based on an individualized assessment of current circumstances that show a specific modification would cause significant difficulty or expense.

Summary of Preliminary Investigation

Physical Accessibility at the XXXX School

The Student has XXXX and has XXXX during all times relevant to these complaints. The Complainant informed OCR that, to the best of her knowledge, the Student was XXXX throughout the period that he was enrolled in the District.

The District informed OCR that the Student's home school while he was enrolled in the District was the XXXX School, which was initially constructed between XXXX and XXXX. The District informed OCR that, based on "the Town Building Inspector's review of building records," "there have been the following renovations" to the XXXX School since it was initially built: "installation of a chair lift in 1994, . . . two modular structures added to the building between 1998 to 2000; replacement of a water heater in 2005; Amaresco energy efficiency updates in 2013; and removal and replacement of seventeen exterior doors in 2013." The District noted that the two modular structures "were placed at opposite sides of the gymnasium, which is located in the upper wing." The District asserted that "[n]one of the renovations or alterations impacts the areas of the building that are the subject" of OCR Complaint No. 01-18-1086. It specifically noted that neither modular structure contains a restroom.

In anticipation of moving to Scituate with the Student during the XXXX, the Complainant met with the XXXX School's principal and nurse on XXXX to plan for the Student's transition to that school at the start of the XXXX school year. Immediately following those meetings, the Complainant sent the principal an email noting that she "had not realized that the bathroom on the level with the XXXX grade students is not accessible" to XXXX. She noted that while "there is an accessible bathroom on the lower level, this would require travel on the lift[,]resulting in lost . . . instructional time." She added that [g]iven that [the Student] needs to XXXX, this is a real concern," and "[i]t may make more sense to consider a newer building."

On March 4, 2013, the Complainant sent the XXXX School principal an email inquiring if she "had any information in terms of the likelihood of an upper level accessible bathroom" so that the Student's "XXXX can be met on the same level as his classroom." Later that day, the XXXX School principal sent the District's XXXX and XXXX an email noting that the XXXX had spoken with the XXXX "about the possibility of putting a bathroom facility in the upper wing at XXXX (or retrofitting one) for the needs of th[e S]tudent (XXXX is an issue along with the XXXX piece)." She noted that if it was "not possible at XXXX, [the Complainant] asked for a placement at another school that would provide access for [the Student's] needs." The XXXX responded that she and the XXXX had "spoke[n] about this with" the Superintendent, and the XXXX was "going to check out the bathroom refit at XXXX School (the XXXX School)] and also I believe at XXXX School] to see where this student would be able to attend school and have a bathroom to fit his XXXX and the XXXX with which he would need to XXXX for XXXX purposes." The following day, the Complainant sent an email to the XXXX that "[i]f we are going to consider an alternate XXXX school placement," "a stair lift . . . would be better to avoid given the lose [sic] of instructional time." On XXXX, the XXXX sent an email to the Superintendent and XXXX asking, "Why XXXX because it is the home school? Why not XXXX if he is being picked up by us? No renovation needed."

On XXXX, the XXXX School principal sent two emails to the XXXX School's physical therapist and the XXXX and XXXX to inform them that the Complainant had "just informed [her] that the handicapped bathroom off the cafeteria is not up to code as [the Student] can't

XXXX” and added that “there was a problem with the ramp.” She noted that “[i]t appears there are some things that will need to be addressed to bring XXXX up to code to meet [the Student’s] needs” and requested that the recipients of the email “[k]eep [her] in the loop with the name of the person responsible to accomplish these items over the summer.” That same day, the physical therapist conducted a “consult” with the Student and Complainant at the XXXX School “to problem-solve some issues that we can hopefully address over the summer.” Her “concerns and . . . proposed solutions” follow:

- Handicapped bathroom (off cafeteria)
 - Concern: Once in the stall, [the Student] cannot XXXX.
 - Solution: Remove XXXX, replace with XXXX.
- XXXX
 - Concern: XXXX.
 - Solution: XXXX.
- Upper wing boys bathroom
 - Concern: Need accessible stall.
 - Solution: Consider XXXX.^[4]
- Stair Lift
 - Concern: Since his XXXX.
 - Solution: Paint or tape off an XXXX.
- Yellow curb cut in the front of the building – just to the right of the front door
 - Concern: Too steep of an incline so it XXXX
 - Solution: Make smoother and longer to decrease the angle of incline
- Few blacktop ramps around school grounds
 - Concern: Width
 - Ramp from door near XXXX grade classroom wing (along that side of [a teacher’s] room) to the field. Narrow and steep drop off on sides.
 - Exit from door in modular wing (exit just past [another teacher’s] room) – a bit narrow, but concern is more the width of the turn as it goes towards the XXXX.
 - Wide ramp/curb cut from side entrance near shed to the back – choppy and uneven.
 - Solution: [The Complainant] suggested recycled asphalt which can be shoveled in and smoothed over fairly easily.

The physical therapist noted that her proposed solutions involved “just some minor changes,” as “it does not appear that [the District] need[s] any major or structural changes to make things work for” the Student.

On XXXX, the XXXX sent an email to the Superintendent, the XXXX, and the XXXX and XXXX School principals noting that she would “contact [the Complainant] next week about [the Student] going to XXXX instead of XXXX due to facilities.” On XXXX, the District sent an email to the Complainant welcoming the Student to the XXXX School. The Complainant

⁴ On XXXX, the Complainant informed the District that the Student’s XXXX.”

informed OCR that “the interior of [the] XXXX [School] was 100% accessible,” and certain accessibility concerns that the Complainant raised regarding the exterior of the XXXX School during the time the Student attended school there have since been resolved.

The District informed OCR that

in order to provide the Student with physical access to [the XXXX School], the District proposed to retrofit the building to accommodate his disability/provide XXXX accessibility. The [Student’s] Parents, however, wanted to tour other XXXX schools in the District before determining which XXXX school the Student would attend. . . . [including] the XXXX . . . School, which was already accessible to the Student. After considering both schools, Parents and the [Student’s Individualized Education Program (IEP)] Team determined that XXXX . . . School was the most appropriate school for the Student and he was placed there, with explicit consent of the Parents, pursuant to his IEPs.⁵

In contrast, the Complainant informed XXXX on XXXX that the District “decided that these modifications [to the XXXX School] were ‘too expensive’ and placed [the Student] in the ‘new accessible’ XXXX School” in XXXX. She noted that, “[g]iven the lateness of the placement, we were in no position to object.” On XXXX, she informed the XXXX School’s principal that she was “sad that XXXX did not work out” and expressed “regret” that “there were so many challenges especially with bathroom related issues.” She also provided OCR an email that she sent to a member of the Scituate School Committee on XXXX noting that “[i]f [the XXXX] had simply authorized the necessary modifications to the boy’s [sic] room at [the] XXXX [School] I would not be dealing with any of this and maybe [the Student] would have some friends in our neighborhood.”

Protected Activities Undertaken by the Complainant

On XXXX, the Complainant sent the Superintendent’s XXXX an email noting that she had contacted the XXXX regarding physical accessibility concerns with the District’s plan to build a “social staircase” in its proposed new middle school.⁶ The XXXX forwarded the Complainant’s email to the Superintendent the following day. On XXXX, the Complainant sent the Superintendent another email informing him that she would be contacting the XXXX again regarding her concerns related to this staircase. The Superintendent responded to the Complainant’s email the following day. The District informed OCR that the Complainant and her family have “filed numerous complaints with . . . the Town of Scituate, [the District], [OCR] and [XXXX] concerning complaints of accessibility to Town and school buildings,” including complaints regarding “access to the Social Stairs at [the] Middle School, a complaint regarding the pathway to the XXXX at the XXXX . . . School, a complaint regarding rear pedestrian entrance to XXXX . . . School. . . . [and] complaints regarding the curb cuts at” various roads in Scituate. The Complainant also provided OCR copies of physical accessibility complaints that she filed against the District and the Town of Scituate with the XXXX on XXXX, XXXX, and

⁵ As noted below, the District has provided OCR an IEP covering the period from XXXX through XXXX. OCR has not reviewed any other IEPs for the Student.

⁶ For more information about this staircase, see OCR Complaint No. 01-15-1245.

XXXX, and with XXXX on XXXX. The District was notified that the Complainant had filed these complaints on various dates between XXXX and XXXX. The District’s counsel informed OCR that these complaints evince “an intent to harass and unnecessarily burden the District.”

The Student’s Transportation to and from the XXXX School

On XXXX, the XXXX confirmed that the Student would be transported between his home and the XXXX School each day on a XXXX accessible van. The Complainant informed OCR that “[f]or all XXXX years” that the Student was enrolled in the District between XXXX and XXXX grade, he “was isolated on a van with XXXX children in the morning and usually by himself in the afternoon.” On XXXX, the Complainant sent the Superintendent an email stating that she had “discovered today that Scituate has (or had) a large yellow accessible bus that [it] has not been using . . . because of union issues” and inquiring whether he had “included a large accessible bus in the buses that [he was] leasing.” She noted that if the District “had one functioning, then [the Student] would not require specialized transportation (a cost savings to the district).” She did not note any concern regarding the Student’s social isolation on the van. Two days later, the Superintendent responded that the District “does have a handicapped accessible bus,” but “it was taken off the road by the RMV two years ago” as it “could not pass inspection” and is therefore “used for spare parts for the other busses.” He noted that the District had “inquired with the bus lease company as to whether they have any accessible busses available,” noted that “[o]ne of the reasons [the District is] able to get such a good price on the busses is [it is] taking delivery from available stock,” and assured the Complainant that “[i]f they have an accessible bus [the District] will get one.”

The XXXX informed OCR that the Student “was transported in a XXXX van” throughout the XXXX and XXXX school years. For the XXXX school year, the Student “was transported with XXXX students” “[i]n the morning” “and in the afternoon he was transported alone in the van.” For the XXXX school year, the Student “was transported with XXXX students” “[i]n the morning” and “in the afternoon he was transported with a Grade XXXX student and a Grade XXXX student.” The District informed OCR that the other students who rode the van with the Student “were also non-neighborhood” or “‘out of district’ students,” and “the students who ride each van are determined by location of residence, location of destination and school start/finish time.” According to the District, “[t]hat the Student did not ride the van with any same age peers . . . was merely a matter of coincidence and not a decision by the District to prevent him from riding with same-aged peers.”

The District provided OCR a copy of the Student’s IEP covering the period from XXXX through XXXX, which indicates that he was placed at the XXXX School throughout that period and would be transported on a “bus and/or van with XXXX.”⁷ The IEP does not specify whether the Student required door-to-door or curb-to-curb transportation or provide any further detail regarding his transportation arrangements.

⁷ The District subsequently determined that the Student was ineligible for an IEP and drafted a Section 504 plan for the Student that took effect on XXXX. The District informed OCR that “[a]fter the [S]tudent transitioned to a [Section] 504 Plan, the District continued to transport the student” as it had previously done under the IEP. The Section 504 plan does not reference transportation.

The IEP states that the Student “continues to present with XXXX and XXXX” and notes that his “parents are concerned about his self-esteem” and “would like to see [the Student] expand his social circle and . . . be part of the community, as well as develop meaningful and close friendships with peers.” The IEP also notes that the Student “reports that he . . . has weak self-esteem,” “is working on expanding his social circle,” and “get[s] frustrated and discouraged when certain friends are playing with others instead of him.” The Student’s only IEP goal was to “be able to express social/emotional difficulties and challenges he may be having with friendships.” The District noted that the Student’s parents requested a “weekly email report on social participation” and his IEP team “determined that it would make more sense to have the special education liaison update [the Student’s] parents every three to four weeks with information regarding social interactions.”

Upon receipt of this IEP, the Complainant informed the District that the Student “feels he has no friends” and requested that the District’s Section 504 and Title II coordinator “attend [the Student’s] IEP meeting to learn about [the Student’s] social struggles due in part to physical access issues.” She also noted that the District’s “lack of compliance with” Section 504 and Title II had “significantly impacted [the Student’s] mental health.” The Complainant provided OCR a neuropsychology clinical note dated XXXX stating that the Student “continues to participate in psychotherapy to help with coping both at school and in the community” and noting that the Student’s “XXXX van has been frequently breaking down, which means that [the Student] is late to school” which had “caused an issue with tardies.”⁸ The Complainant informed OCR that the Student had participated in “over 100 psychotherapy visits” to address the “emotional harm” he experienced as a result of “all the ways that he felt he was treated differently from his peers,” including the social isolation he experienced on the van.

The Complainant informed OCR that the Student’s principal informed her in the XXXX that the District would be “leasing a full size accessible school bus.” On XXXX, the Superintendent informed the Complainant at a XXXX meeting that the District would “be leasing 13 [school buses] (an increase of 3)” for the XXXX school year and “[a]t least one of these buses will be permanently set up as a handicapped accessible bus meeting ADA requirements.”⁹ On XXXX, the Complainant sent an email to the XXXX and the XXXX School principal inquiring whether the Student will “have an option to ride a big yellow bus to school next year.” On XXXX, the XXXX responded that the District had “not taken delivery of the XXXX bus” and did not “have a delivery date yet.” He noted that the District had the Student “scheduled for a van for the start of school” and “[w]hen we get the bus we can discuss the safest way to transport” the Student. The Complainant informed OCR that, pursuant to a public records request, she received a delivery slip on XXXX indicating that the District took possession of a full-size XXXX-accessible school bus on XXXX, but the District had never notified her of that fact and the Student was never provided an opportunity to ride that bus, as the District allegedly used it to transport students to the South Shore Vocational Technical High School throughout the XXXX school year.

⁸ That same day, the Complainant raised these concerns regarding the van with the Scituate Commission on Disabilities. See XXXX.

⁹ See XXXX.

On XXXX, the Complainant emailed the XXXX and the XXXX School principal to inquire whether the Student was “allowed to bring home peers (who have paid a bus fee) on the van with him” because “the van only has [the Student] in the afternoons.” The XXXX responded two days later that, per the District’s transportation policy, “[s]tudents may only ride their assigned buses”¹⁰ and “[t]his also applies to special education vans.” The Complainant responded to the Superintendent, XXXX and XXXX, XXXX, and the XXXX School principal that she “would like to request a ‘reasonable accommodation’ that [the Student] be allowed to bring a peer home with him on the van” because the Student “deserves to experience riding home on the bus with a friend,” as “[t]his is a normal part of childhood that he has not been able to experience given his placement outside of his neighborhood school as well as the lack of a full-size accessible district bus.” The XXXX responded on XXXX that “[t]hese are the procedures for all riders of transportation to and from” the District and the Complainant’s request did not fit within any exception in the District’s transportation policy. The Complainant responded that she was

asking for a “reasonable accommodation” to your policy under the [ADA] so that [the Student] can have some semblance of a normal childhood. It is normal for a XXXX grade student to have a buddy ride home with him on the bus. Policies can have exceptions. Or you can make a new policy to allow wheelchair users to have same age peers on transportation. [The Student] only has one XXXX in XXXX grade and your inflexibility is causing harm. You still have not told me when the large accessible bus will be delivered. Last XXXXI was told that he would be riding with his peers in the XXXX. So he continues to ride to school with XXXX students and ride home in isolation. This is not the least restrictive environment.

On XXXX, the District’s XXXX informed the Complainant that, “[w]hile [she] do[es] not believe [the District] ha[s] a legal obligation to grant this request,” she was “recommending that . . . the special education team . . . work on a plan . . . [to] allow for a peer to be allowed to ride with [the Student] once a week.” She noted that “[t]his would require a week’s notification to the school, and the peer’s parent would need to sign a permission slip.” The Complainant subsequently informed the aforementioned District employees that she had coordinated with a peer “to ride home with [the Student] on the van on Fridays” during the month of XXXX and thanked them for their efforts.¹¹ She also asked if “there [is] a delivery date on the large accessible bus so that [the Student] can travel with his peers on a daily basis” or if “the bus [is] only going to be used for field trips,” to which the XXXX responded that she “spoke with [the XXXX] and the Superintendent” and “[t]hey are working on it.” That same day, the Superintendent sent an email to the XXXX and the XXXX and XXXX noting that they “should discuss her bus question at Monday admin before responding” because “[t]here are many logistical issues in play.”

The District informed OCR that it denied the Complainant’s request for the Student to be transported on a school bus with his peers, rather than in a van, because (1) a “school bus was

¹⁰ See http://www.scituate.k12.ma.us/images/FAQS_1617.pdf#page=3.

¹¹ The District informed OCR that it “reached out to the Student’s peers and their parents on numerous occasions to share transportation with the Student” “for all field trips, as well as times when the Student requested a peer’s accompaniment to the Student’s home for after school activity.” The District noted that it was sometimes, but not always, able “to find students to agree to ride with the Student.”

unable to access the Student’s home to provide the door-to-door transportation he required,” (2) “the trip for all other students riding their neighborhood school bus would be considerably lengthened” if the bus was required “to go off-route to pick up the Student, who resided in another area of Town” and “wait for the Student to board the bus and/or be picked up at a later time” due to “XXXX reasons,” and (3) “there was one regular school bus (registered for use XXXX) that was wheelchair accessible,” but “it was not accessible for [the] Student’s then-current XXXX (not compatible with XXXX).”¹² In contrast, the Complainant informed OCR that (1) the Student did “not require door-to-door transportation” and was “perfectly competent to wait for a school bus at the side of a road,” (2) the Student’s “XXXX issues were resolved by a treatment” “in XXXX” and the Student “did not have any ‘XXXX’ problems on the van during the XXXX or the XXXX school years,” (3) “new bus routes can be developed,” and (4) the Student “always transferred from his XXXX to a regular seat” and “has never ridden in his XXXX on any school bus or van,” so “[t]he XXXX on his XXXX are . . . not relevant.” The District also informed OCR that “no students in the District are guaranteed transportation to and from school with same age peers,” “no students are refused transportation with same age peers,” and “[t]he routes of both the District’s regular school buses and vans are entirely determined by geographic location of the students’ homes and schools, and not by the age of the students taking said transportation.”

The District informed OCR that the Student has not resided within the District since XXXX. The Complainant informed OCR that she and the Student moved to XXXX at the end of the XXXX school year because of the emotional harm the Student had suffered as a result of the perceived ongoing disability discrimination in the District. The Complainant noted that, since that time, the Student has continued to participate in weekly psychotherapy sessions in XXXX related to these events.

Physical Accessibility at the XXXX School

The Complainant provided OCR photographs of the exterior of the XXXX School, taken on December 26, 2015, which indicate that (1) there are no accessible curb ramps on each end of the crosswalk crossing the driveway leading to the XXXX School from XXXX; (2) there is no accessible curb ramp at the end of the crosswalk connecting the parking lot closest to the XXXX School’s main entrance to the main entrance; and (3) there is no stable, firm, and slip-resistant accessible route connecting a gravel parking lot and an adjacent athletic field located between the XXXX School and XXXX. OCR reviewed a Massachusetts School Building Authority website that indicates that the XXXX School opened in XXXX and was last renovated in XXXX.¹³

Analysis

¹² A local newspaper article published on October 8, 2016 quoted the Superintendent as stating that “[t]he cost for the bus is \$96,955 for a five-year lease,” and the District “can purchase the bus at the end of the lease for approximately \$40,000” with “[t]he annual cost of \$19,391 . . . carried in [the District’s] operational budget.” The District’s operational budget for the 2017 fiscal year was \$38,567,832. *See*

<http://scituate.wickedlocal.com/news/20161008/handicapped-accessible-school-bus-added-to-scituates-fleet>;
https://www.scituate.ma.gov/sites/scituatema/files/minutes/minutes-file/20160920_bos_minutes.pdf#page=3;
http://www.scituate.k12.ma.us/images/FY_19_Budget_Proposal_March_19_complete.pdf#page=23.

¹³ *See* <http://www.massschoolbuildings.org/node/40264>.

Allegation 1

OCR has determined that the XXXX School was constructed prior to the publication of the Section 504 and Title II regulations and is thus an “existing facility” pursuant to 34 C.F.R. § 104.22 and 28 C.F.R. § 35.150. However, the school was subsequently altered by “installation of a chair lift in 1994, permits related to the two modular structures added to the building between 1998 to 2000; replacement of a water heater in 2005; Amaresco energy efficiency updates in 2013; and removal and replacement of seventeen exterior doors in 2013,” all of which occurred after the Section 504 and Title II regulations were published. Based on the evidence collected thus far, OCR has preliminary concerns regarding whether the XXXX School’s stair/chair lift and any other identified portion of the school that may be located in the modular wings (including, but not limited to, a ramp leading from a door in one modular wing to a XXXX) comply with 34 C.F.R. § 104.23(b) and 28 C.F.R. § 35.151(b), and complied with these regulations while the Student was enrolled in the District. In particular, the XXXX School’s physical therapist reported that the Student’s “XXXX,” which is “XXXX.” Because the lift was installed in 1994, it must comply with either the UFAS or ADAAG standards. Sections 4.11.2 and 4.2.4.1 of both of these standards require that lifts XXXX are a minimum of 30 inches wide.¹⁴

Allegations 2–4

OCR’s preliminary investigation suggests that the District treated the Student less favorably than similarly situated individuals without disabilities by transporting him to and from a non-neighborhood school (the XXXX School) without the accompaniment of any same-age peers throughout the XXXX and XXXX school years.¹⁵ The District has asserted a number of rationales for this decision that it contends are legitimate nondiscriminatory reasons for this different treatment, including that the Complainant accepted an IEP for the Student that specifies that he would be placed at the XXXX School and transported via a “bus and/or van with XXXX,” and the District complied with this IEP. A school district is permitted to treat students with disabilities differently than their peers without disabilities if such treatment is necessary to provide those students a free appropriate public education as described in an approved IEP or Section 504 plan, and OCR generally will not “review the result of individual placement and other educational decisions, so long as the school district complies with the ‘process’ requirements of” Section 504.¹⁶ In this case, however, there is evidence suggesting that the Student’s IEP team’s placement determination may have been based in part on discriminatory factors (e.g., the XXXX School’s possible noncompliance with 34 C.F.R. § 104.23(b) and 28 C.F.R. § 35.151(b), as described above) rather than legitimate nondiscriminatory factors related to the Student’s individual education needs. Nevertheless, there is also evidence indicating that the Complainant’s primary interest was the District altering the restrooms located on the same floor of the XXXX School as the Student’s proposed classroom to make them physically accessible, and if that was not possible, she preferred placement in a physically accessible

¹⁴ Section 410.6 of the currently effective 2010 ADA Standards states that “[p]latform lifts shall have low-energy power-operated doors or gates” which “shall provide a clear width [of] 32 inches (815 mm) minimum.”

¹⁵ And possibly throughout the XXXX and XXXX school years as well, although OCR has not requested data from the District regarding other students who rode the van with the Student during these school years.

¹⁶ 34 C.F.R. Part 104, App. A.

building that did not require use of a stair lift. There is also evidence indicating that the XXXX School’s restrooms have not been altered since the school opened in XXXX. Based on the evidence gathered to date, it therefore seems likely that the District was under no obligation to alter the restrooms at the XXXX School as the Complainant requested, and the team decision to reassign the Student to a “100% accessible” building such as the XXXX School was permissible.

At the start of the XXXX school year, however, the Complainant requested that the District provide the Student a “reasonable accommodation” to allow the Student “to experience riding home on the bus with a friend” as “[t]his is a normal part of childhood that he has not been able to experience given his placement outside of his neighborhood school as well as the lack of a full-size accessible district bus.” Although the District may establish and publicize reasonable requirements and procedures for individuals with disabilities to request reasonable modifications and provide documentation of their disability, it is not clear whether the District has done so. In the absence of a published procedure dictating additional requirements to request a reasonable modification, the Complainant’s request was likely sufficient to trigger the District’s obligation to engage in an interactive and collaborative process with the Complainant to determine what modifications of the District’s policies, practices, or procedures, if any, were necessary to avoid discriminating against the Student on the basis of disability.

The evidence suggests that the District may have failed to engage the Complainant in such an interactive process. Although the XXXX had previously assured the Complainant that “[w]hen we get the bus we can discuss the safest way to transport” the Student, the District never notified the Complainant that it had access to a XXXX-accessible bus at the start of the school year notwithstanding her frequent inquiries about the bus, nor did the District notify the Complainant of the reasons that it articulated to OCR for its decision to deny her request for the Student to ride that bus to school or provide her an opportunity to respond to the District’s objections, as required by Section 504 and Title II. If it had, the Complainant has alleged that she would have provided additional information to the District that would have addressed the District’s objections.

With respect to the Complainant’s retaliation allegation, OCR has determined that the Complainant repeatedly engaged in protected activity when she filed complaints with the District, XXXX, XXXX, and OCR regarding allegedly inaccessible District facilities and unequal transportation services provided to the Student throughout his enrollment in the District. OCR has also determined that the District subjected the Student to an adverse action by denying him access to transportation to and from school with his peers throughout the XXXX school year while permitting similarly-situated students without disabilities to ride a school bus with their peers to and from school. However, OCR has not determined whether there is a causal connection between the adverse action and the protected activity, whether the District has identified a legitimate, non-retaliatory reason for taking the adverse action, and whether any such reason was, in fact, a pretext for retaliation.

Allegations 5–7

OCR has reviewed information indicating that the XXXX School was constructed prior to the publication of the Section 504 and Title II regulations and is thus an “existing facility” pursuant

to 34 C.F.R. § 104.21 and 28 C.F.R. § 35.149. However, the same information indicates that the XXXX School was subsequently altered in an unspecified manner in XXXX, after the Section 504 and Title II regulations were published. OCR has not determined whether the XXXX School's gravel parking lot; driveway; sidewalks along XXXX; or the route leading from the parking lot closest to the XXXX School's main entrance to the main entrance have been altered in a manner that affected the usability of those parts of the XXXX School by individuals with disabilities, and if so, whether the alterations were conducted in such a manner that the relevant parts of the school are readily accessible to and usable by individuals with disabilities.

Conclusion

Prior to the conclusion of OCR's investigation and pursuant to Section 302 of OCR's *Case Processing Manual*, the District expressed an interest in resolving the above-referenced complaints and OCR determined that a voluntary resolution is appropriate.¹⁷ Subsequent discussions between OCR and the District resulted in the District signing the enclosed Agreement which, when fully implemented, will address all of the allegations raised in the above-referenced complaints. OCR will monitor the District's implementation of the Agreement.

This concludes OCR's investigation of the above-referenced complaints. This letter 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 have the right to file a private suit in federal court whether or not OCR finds a violation.

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

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

If you have any questions, you may contact Civil Rights Attorney Paul Easton at (617) 289-0008 or by e-mail at Paul.Easton@ed.gov.

Sincerely,

/s/ Michelle Kalka
Michelle Kalka

¹⁷ The *Case Processing Manual* is available at <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

Compliance Team Leader

Enclosure

cc: Joshua R. Coleman, Esq. (via email: jcoleman@mlmlawfirm.com)