



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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May 29, 2020

By email only to: strong@merchantville.k12.nj.us

Scott Strong
Chief School Administrator
Merchantville School District
130 South Centre Street
Merchantville, New Jersey 08109

Re: Case No. 02-20-1068
Merchantville School District

Dear Mr. Strong:

This letter is to notify you of the determination made by the U.S. Department of Education, Office for Civil Rights (OCR), with respect to the above-referenced complaint filed against Merchantville School District (the District). The Complainant alleged that the District building (the Building) is inaccessible to individuals with disabilities because (a) the main entrance includes steps, and (b) the Building does not have an elevator (Allegation 1). The Complainant also alleged that the District discriminated against her daughter (the Student), on the basis of her disability, by excluding the Student from her “specials” classes between on or about September 4, 2019, and November 1, 2019 (Allegation 2).

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities receiving financial assistance from the U.S. Department of Education (the Department). Additionally, OCR is responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (the ADA), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35. Under the ADA, OCR has jurisdiction over complaints alleging discrimination on the basis of disability that are filed against certain public entities. The District is a recipient of financial assistance from the Department and is a public elementary education system. Therefore, OCR has jurisdictional authority to investigate this complaint under Section 504 and the ADA.

In its investigation, OCR reviewed documentation that the Complainant and the District submitted. OCR also interviewed the Complainant and District staff. Additionally, OCR conducted an on-site inspection of the Building. OCR made the following determinations.

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With regard to Allegation 1, the Complainant alleged that the Building is inaccessible to individuals with disabilities because (a) the main entrance includes steps, and (b) the Building does not have an elevator. The Complainant stated that, as a result, the Student was unable to access the library with the rest of her class on September 27, 2019; and unable to access the cafeteria, and was required to eat lunch in the nurse's office, between on or about September 4, 2019, and November 1, 2019.

The regulation implementing Section 504, at 34 C.F.R. § 104.21, states that no qualified individual 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 regulation implementing the ADA includes a similar requirement for public entities at 28 C.F.R. § 35.149.

OCR determined that the District has one building, the Building, which houses grades K-8. The Building was constructed in the late 1800s. The regulation implementing Section 504, at 34 C.F.R. § 104.22, categorizes facilities constructed on or before June 3, 1977, as "existing facilities." Under the ADA, an existing facility includes facilities that were constructed, or for which construction was commenced, prior to January 26, 1992, the effective date of the regulation implementing the ADA. Therefore, the Building is an "existing facility" under the regulations implementing Section 504 and the ADA.

The regulation implementing Section 504 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.¹ The regulation implementing Section 504 does not require a recipient to make structural changes to existing facilities. A recipient may comply through means such as redesign of equipment, reassignment of classes or other services to accessible buildings or locations, or any other methods that result in making its program or activity accessible to individuals with disabilities. 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.

The Building has a basement and three floors, with a series of interior stairs between each floor, and half floors between the first floor and basement level and the second and third floors. During OCR's site visit, OCR confirmed that there are steps leading to the main entrance door of the Building from the exterior, and another series of steps from the main entrance door to the interior of the Building. There is no elevator in the Building.

The District informed OCR that the main entrance is not the designated accessible entrance to the Building, and that the designated accessible entrance is located on the side of the Building. OCR determined that the main entrance does not have signage indicating the location of the designated accessible entrance. Further, OCR determined that there was no signage at the designated accessible entrance indicating that the side entrance is designated as the accessible entrance.

OCR determined that the designated accessible entrance door is typically locked. The District stated that if someone other than a student or staff member with mobility limitations needed to use the accessible entrance, the individual would need to contact the District before his/her visit so that

¹ The ADA includes a similar requirement for public entities at 28 C.F.R. § 35.149-35.150.

a District staff member could arrange to meet the individual at the designated accessible side entrance, which would otherwise be locked. For special events at the school, a staff member would be available at the main entrance to direct individuals to the accessible entrance, and a staff member would unlock the door to the accessible entrance. The District informed OCR that these procedures are not publicized or posted anywhere.

OCR determined that the designated accessible entrance has a ramp that leads from the exterior of the Building to the entrance door. The District informed OCR that the ramp was installed in 1927. OCR determined that one of the handrails for the ramp has a 17-inch gap; therefore, the ramp railing was not continuous through the full length of the ramp run and could render the ramp inaccessible to an individual with a disability in need of grasping the handrail continuously. OCR also determined that one of the handrails did not extend beyond the bottom of the ramp run, and the other handrail only extended approximately three inches beyond the bottom of the ramp run; accordingly, the ramp could be inaccessible to an individual with a disability in need of grasping the handrail at the bottom of the ramp to maintain balance before or upon entering the ramp or an individual who needed to continuously grasp the handrail when on the ramp. Further, OCR determined that the length of the landing at the switchback portion of the ramp is only 46.5 inches; therefore, an individual in a wheelchair might have difficulty maneuvering the landing at the switchback portion of the ramp.

After exiting the top of the ramp and entering the designated accessible entrance, an individual would be in an area in front of the Building's auditorium's stage at the bottom of the auditorium. The District informed OCR that the auditorium was built in 1927. To reach the first floor of the Building from this area in the auditorium, an individual would travel up one of the three aisles of the auditorium to reach the top of the auditorium, where the auditorium is connected to the first floor of the Building. OCR determined that each of these three aisles have a slope of 13.4% towards the top of the aisle, which may be too steep for a mobility impaired individual to safely maneuver. There is no other accessible route connecting the designated accessible entrance to the rest of the Building.

If an individual is able to maneuver the steep aisles in the auditorium and enter the first floor through the auditorium, there is no accessible route to any floor other than the first floor of the Building. All other floors are only accessible by the stairs, rendering those areas inaccessible to individuals with disabilities. The District informed OCR that it has an alternate plan for making programs and activities conducted on other floors of the Building, when viewed in their entirety, accessible to the disabled; specifically, it would move any programs and activities on those floors to the first floor. To date, however, the District has not provided information to OCR regarding the programs and activities located on inaccessible floors; and whether each of these programs and activities, when viewed in its entirety, could be made readily accessible to individuals with disabilities.

The Complainant asserted that as a result of the physical accessibility issues discussed previously, the Student was unable to access the library with the rest of her class on September 27, 2019;² and

² In her complaint, the Complainant alleged that the Student was excluded from attending the library with the rest of her class on September 25, 2019; however, OCR determined that the Student was absent from school on September

unable to access the cafeteria and was required to eat lunch in the nurse's office between on or about September 4, 2019, and November 1, 2019. The Complainant advised OCR that the Student has xxxxxxxxxxx xxxxxxxxxxx and xxxxx xxxxxx, conditions which make her xxxxxxxxxxx xx xxxxxx xxxxx. The Complainant further advised OCR that, on September 5, 2019, the Student arrived for the first day of school with a xxxxx xxx xxxxx and used a xxxxxxxx to ambulate. As a result, the Student could not go to the library or the cafeteria, because those were located on floors other than the first floor of the Building.

OCR determined that during school year 2019-2020, the Student was in the second grade at the District. The Student's classroom was located on the first floor of the Building. The first day of school was Thursday, September 5, 2019. September 5, and 6, 2019, were half days, and the first full day of school was Monday, September 9, 2019. The Student remained in the xxxxx xxx xxxxx until xxxxxxxxxxx xx, xxxx, was in a xxxxx xxx xxxxxxxxxxx until on or about xxxxxxxx xx, xxxx,³ and then transitioned to a xxxxxxxx xxxxx.

The Complainant informed OCR that on September 27, 2019, the Student's class visited the library to check out books, but the Student was not permitted to join her class. The Student's teacher (the Teacher) checked out a book for the Student that day, but the Student did not like the book that was chosen for her.

OCR determined that the School is connected by a set of interior stairs to the Merchantville Public Library (the Library), part of the Camden County library system, which also serves as the School library. The main entrance to the Library has an exterior entrance, which is located at a different part of the Building. The Student could access the main entrance of the Library by exiting the School building through the auditorium and the entrance located outside of the auditorium, traveling outside around the Building, and then entering the Library from the outside using the Library's exterior ramp. District staff told OCR that they did not consider this route as an option for the Student to access the Library due to the distance she would need to travel.

OCR determined that the Student's class regularly went to the Library on Fridays during school year 2019-2020. During these visits, which lasted about 40 minutes, the Teacher typically read a story to the class and then allowed the students to choose a book to check out. The books are set aside in the Library for the County librarian to check out to the students over the weekend, and then the Teacher delivers the books to the class on Mondays. The first Friday that the Student was present was Friday, September 27, 2019.⁴ OCR determined that on that date, the Student was unable to go to the Library with the rest of her class because the Student could not navigate the interior stairs on the route between the Student's classroom and the Library. Instead, the Student remained in the classroom with a teacher's aide while the rest of the class went to the Library. While in the classroom with the aide, the Student was able to browse the selection of books in the

25, 2019, a Wednesday, and the Student's class did not go to the library that day. OCR determined that the actual date in question was Friday, September 27, 2019.

³ As described by the Complainant, unlike the xxx xxxxx, the xxx xxxxxxxxxxx allowed the Student to put some weight on her leg while using the xxxxxxx.

⁴ The first day that the class went to the Library was Friday, September 13, 2019. OCR determined that the Student was absent from school on that day, and on the following Friday, September 20, 2019. On xxxxxxxx x, xxxx, the Student was out of her xxxxx xxx xxxxx and able to navigate the stairs to the Library with the rest of her class.

classroom's library and read a story with the aide. The Teacher informed OCR that she picked out a book from the Library on September 27, 2019, with the input of other students, to check out on behalf of the Student. The book the Teacher chose was delivered to the Student on Monday, September 30, 2019, along with all of the other books checked out by other students.

Based on the foregoing, OCR determined that the Library program and activity, when viewed in its entirety, was not readily accessible to the Student. While the Teacher selected a book for the Student on September 27, 2019, in lieu of the Student attending the Library with the rest of her class that day, the Student was isolated from her classmates and did not enjoy the same program and activity that the library class offered other students. The Student did not have the opportunity to browse the library book collection and select a book for herself, or hear a story read by the Teacher.

Further, the Complainant asserted that, as a result of the physical accessibility issues discussed previously, the Student could not access the cafeteria and was required to eat lunch in the nurse's office with a friend of her choosing, between on or about September 4, 2019, and November 1, 2019. The Complainant informed OCR that the Student ate lunch in the nurse's office since she could not go down the stairs to the cafeteria.

OCR determined that the Building's cafeteria is located on the basement level, which was inaccessible to the Student. The lunch period lasts 40 minutes, with 20 minutes allotted for students to eat in the cafeteria, and 20 minutes of recess. OCR determined that on the first two half days of school year 2019-2020, September 5, and 6, 2019, there was no lunch period. Thus, the first day that the Student was scheduled for lunch was Monday, September 9, 2019. OCR determined that on that day, the Student ate her lunch alone in the nurse's office on the first level of the Building. After communication about this issue between the Complainant and District staff, starting the next day, September 10, 2019, the Student was allowed to have one friend eat lunch with her in the nurse's office each day. The Student brought a packed lunch to school each day. After finishing her lunch, the School nurse placed the Student in a xxxxxxxxxx and xxxxxxxx her out to the playground area, exiting the School building through the auditorium and the accessible entrance's exterior ramp. The Student then sat on a bench on the ground and participated in recess with her classmates. All students, including the Student, re-entered the School building together through the accessible entrance via the auditorium to return to class following recess.

Based on the foregoing, OCR determined that the cafeteria program and activity, when viewed in its entirety, was not readily accessible to the Student. While the Student was permitted to have a friend eat lunch with her in the nurse's office between September 4, 2019, and November 1, 2019, the Student was isolated from her classmates and did not enjoy the same program and activity that the cafeteria offered to other students.

On May 26, 2020, the District signed the enclosed resolution agreement (the Agreement) which addresses the compliance concerns identified in this letter. OCR will monitor implementation of the Agreement.

With respect to Allegation 2, the Complainant alleged that the District discriminated against the Student, on the basis of her disability, by excluding the Student from her "specials" classes

between on or about September 4, 2019, and November 1, 2019. The Complainant acknowledged that the Student's "specials" classes were moved to her classroom on the first floor; however, the Complainant remained concerned about the "emotional impact" that the lack of accessibility had on the Student.

The regulation implementing Section 504, at 34 C.F.R. § 104.4(a), provides that no qualified person with a disability shall, on the basis of a disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives or benefits from federal financial assistance. The regulation implementing the ADA, at 28 C.F.R. § 35.130(a), states that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

The regulation implementing Section 504, at 34 C.F.R. § 104.33(a), provides that a recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education (FAPE) to each qualified disabled person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. The regulation implementing Section 504, at 34 C.F.R. § 104.33(b)(1), defines an appropriate education as the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of persons with disabilities as adequately as the needs of non-disabled persons are met. Implementation of a Section 504 plan is one way of meeting this requirement.

OCR determined that the Student was scheduled to have three "specials" classes in addition to her core classroom subjects on a rotating schedule: music, technology, and art. OCR determined that no "specials" classes were held on the first two half days of school year 2019-2020, September 5, and 6, 2019, and that the Student's first school day to include "specials" classes was the first full day of school, September 9, 2019.

The music classroom is located on the first floor of the School building and was fully accessible to the Student. The Student attended music class in the music classroom with her class and did not miss any instructional periods of music.

The technology classroom is located on the second floor and the art classroom is located on the basement level, accessible only through a set of interior stairwells. OCR determined that in order to accommodate the Student, both the technology class and the art class were "pushed in" to the Student's regular classroom for the entire class, rather than having the class going to the technology or art classrooms, beginning on the first full day of school, September 9, 2019, through November 1, 2019.⁵ The Student did not miss any instructional periods of technology or art.⁶ The Teacher

⁵ Following the removal of the xxx xxxxxxxxxxxx on or around xxxxxxxx xx, xxxx, the Student remained in a xxxxxxxx xxxx. Per the Student's Section 504 plan dated October 17, 2019, the Student was allowed to self-limit during activities to avoid injury and increased fatigue. The District left the accommodation procedures for the Student's technology and art classes in place through November 1, 2019, to avoid over-fatiguing her.

⁶ The Student's classroom has a set of laptops that they used for the technology lessons. For the art class, the art teacher brought in art supplies, and the class created the same art projects as they would have created in the art room.

reported to OCR that, because it was the very beginning of the school year, the students were not aware of the room change, as a routine had not been established yet.

Based on the foregoing, OCR determined that the Student's music "specials" class was located on the first floor and accessible to the Student. Further, OCR determined that the Student's art and technology "specials" classes were initially inaccessible to the Student because they were located on a floor other than the first floor and the Building has no elevator; however, the District was able to ensure that the art and technology "specials" classes were accessible to the Student between on or about September 4, 2019, and November 1, 2019, by moving these classes to the first floor during this time period for the Student's entire class. Therefore, OCR determined that there is insufficient evidence to substantiate the Complainant's allegation that the District discriminated against the Student, on the basis of her disability, by excluding the Student from her "specials" classes between September 4, 2019, and November 1, 2019. Accordingly, OCR will take no further action with regard to Allegation 2.

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 may not harass, coerce, intimidate, or discriminate against any individual because the individual has filed a complaint or participated in the complaint resolution process. If this happens, the individual may file a 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, it will seek to protect, to the extent provided by law, personally identifiable information that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

The Complainant has a right to appeal OCR's determination regarding Allegation 2 within 60 calendar days of the date indicated on this letter. In the appeal, the Complainant must explain why the factual information was incomplete or incorrect, the legal analysis was incorrect, or the appropriate legal standard was not applied; and, how correction of any error(s) would change the outcome of the case. Failure to do so may result in dismissal of the appeal. If the Complainant appeals OCR's determination, OCR will forward a copy of the appeal form or written statement to the recipient. The recipient has the option to submit, to OCR, a response to the appeal. The recipient must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the recipient.

If you have any questions, please contact Natasha Fitzsimmons, Compliance Team Attorney, at (646) 428-3899 or natasha.fitzsimmons@ed.gov; or Coleen Chin, Senior Attorney, at (646) 428-3809 or coleen.chin@ed.gov.

Sincerely,

/s/

Timothy C.J. Blanchard

Encl.

cc: Daniel H. Long, Esq.; via email only (dlong@wlwklaw.net)