



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
32 OLD SLIP, 26TH FLOOR
NEW YORK, NEW YORK 10005

TIMOTHY C. J. BLANCHARD
DIRECTOR
NEW YORK OFFICE

August 20, 2020

Richard A. Carranza
Chancellor
New York City Department of Education
52 Chambers Street
New York, New York 10007

Re: Case No. 02-20-1109
New York City Department of Education

Dear Chancellor Carranza:

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 the New York City Department of Education (NYCDOE). The Complainant alleged that the NYCDOE discriminated against a student (Student A), and other individuals with disabilities, because the elevator is frequently inoperable in the building that houses the Compass Charter School (School 1); P.S. 372, the Children's School (School 2); and M.S. 113, Ronald Edmonds Learning Center (School 3).

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 or activities receiving financial assistance from the U.S. Department of Education. OCR also is responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (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 NYCDOE is a recipient of financial assistance from the Department and is a public elementary and secondary education system. Therefore, OCR has jurisdictional authority to investigate this complaint under both Section 504 and the ADA.

The regulation implementing Section 504, at 34 C.F.R. § 104.21, provides 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 ADA includes a similar requirement for public entities at 28 C.F.R. § 35.149.

In its investigation, OCR reviewed documentation that the NYCDOE and the Complainant submitted. OCR also interviewed the Complainant, and NYCDOE and School 1 administrators and staff.¹

The Complainant alleged that the NYCDOE discriminated against Student A and other individuals with disabilities, because the elevator is frequently inoperable in the building that houses Schools 1, 2, and 3 (the Building). The Complainant stated that the Building consists of four floors, as well as a basement, that are serviced by a “very old” elevator that requires a key to operate. The Complainant stated that the elevator was inoperable from on or about October 16, 2019, through November 21, 2019; and for at least two other periods lasting a week or less, during school year 2019-2020.² The Complainant stated that, as a result of the outages, the Building is inaccessible to individuals with mobility impairments, because they have to navigate the stairs to access programs and activities within the Building. The Complainant stated that programs and activities rendered inaccessible by the elevator outages were not moved to an accessible location.

OCR determined that the Building was constructed in 1962.³ The regulation implementing Section 504, at 34 C.F.R. § 104.22, categorizes facilities built prior to June 3, 1977, as “existing facilities.” Under the regulation implementing the ADA, at 28 C.F.R. § 35.150, 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. Accordingly, OCR determined that the Building is an existing facility under Section 504 and the ADA. The regulation implementing Section 504, at 34 C.F.R. § 104.22, 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. The regulation implementing the ADA includes a similar requirement for public entities at 28 C.F.R. § 35.150. Accordingly, each program or activity operated in the Building, when viewed in its entirety, must be readily accessible to individuals with disabilities. The regulations implementing Section 504 and the ADA do not require a recipient to make structural changes to existing facilities. A recipient may comply through means such as redesign of equipment, or reassignment of classes or other services to accessible buildings or locations. 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.

OCR determined that the NYCDOE operates the Building. The Building houses Schools 1, 2, and 3. School 1 is a public charter school that is not operated by the NYCDOE, and Schools 2 and 3 are NYCDOE schools.

According to the NYCDOE, the Building has five floors, inclusive of the basement level. The basement can be accessed by stairs, the elevator, and an exterior entrance that leads to the Carlton Avenue side of the Building, which serves as the main exterior entrance for School 2. The first floor can be accessed by stairs, the elevator, or an exterior entrance that leads to the Adelphi Street side of

¹ OCR was scheduled to conduct an on-site inspection of the Building on March 19, 2020; however, due to the COVID-19 outbreak, and the temporary closure of all schools, OCR was unable to conduct an on-site inspection.

² The Complainant also stated that the elevator was not operable at least three or four other times over the past three school years for time periods spanning several days to one week.

³ The elevator, which services the basement through the fourth floor, was installed in 1983.

the Building, which serves as the main exterior entrance for Schools 1 and 3. Floors two through four can be accessed by stairs or the elevator.

The basement contains the student and teacher cafeterias⁴ shared by all three schools, and classrooms used exclusively by School 2. The first floor contains an auditorium, a gymnasium, and a nurse's office shared by all three schools, and classrooms exclusively used by School 3 (including a dance studio). The second floor contains space exclusively used by School 3, including classrooms; a library; a dance studio; a science lab; and a science experiment room. The third floor contains three rooms used by School 1, including its library. It also contains classrooms; two science demonstration rooms; and a library used by School 3. The fourth floor consists of space exclusively used by School 1, including classrooms and two science demonstration rooms.

In school year 2019-2020, Student A was enrolled at School 1. One of the co-founders of School 1 (the Administrator) informed OCR that School 1 enrolls students in pre-K through fifth grade and provides a “progressive, inquiry-based, arts integrated learning environment.” The Administrator stated that School 1 recruits students with special needs. In school year 2019-2020, School 1 enrolled approximately 318 students, 65 of whom had individualized education programs (IEPs).

The main exterior entrance for School 1 is located on Adelphi Street and enters onto the first floor of the Building. School 1 uses the student and teacher cafeterias and classrooms in the basement; the auditorium, gymnasium, and nurse's office on the first floor; three rooms on the third floor, including its library; and has exclusive use of the fourth floor, which consists of classroom space and two science demonstration rooms.

The NYCDOE's Accessibility Coordinator Managers (Managers 1 and 2) from the NYCDOE's Office of Accessibility Planning (OAP) acknowledged to OCR that the NYCDOE is responsible for ensuring that programs and activities operated in School 1 are accessible, since it is housed in a NYCDOE-operated building. The NYCDOE acknowledged that the Building elevator was inoperable from on or about October 16, 2019, through November 21, 2019.

The Administrator informed OCR that Student A could not access the third and fourth floor on his own due to the elevator outages. The Administrator stated that when the elevator outages first began in October 2019, School 1 staff XXXXX. The Administrator further stated that Student A was unable to eat lunch with his classmates in the basement cafeteria due to the elevator outages; instead, lunch was brought upstairs for Student A, and School 1 implemented a “buddy system” whereby a friend or several friends would always join Student A for lunch in a fourth floor classroom. The Administrator stated that there have been numerous elevator outages during school year 2019-2020, in addition to the outage that occurred over several weeks in October and November 2019; and in each instance, Student A would not have had access to School 1's programs and activities XXXXX. The Administrator stated that, sometime between November 13-18, 2019, he spoke with the NYCDOE's Director of Space Planning for Brooklyn (the Director) regarding the elevator outages and Student A's inability to access School 1. The Administrator stated that the Director informed him that he would assist in moving Student A's classrooms if it

⁴ The NYCDOE advised OCR that an interior accessible ramp must be used to enter the student cafeteria.

became necessary; however, a few days later the elevator was fixed, making moving programs unnecessary.

The XXXXX more complicated repairs are handled by the elevator company with which the NYCDOE has contracted. The XXXXX stated that when the elevator was inoperable during school year 2019-2020, he referred the repairs to the NYCDOE's contractor. The XXXXX stated that due to the age of the elevator, and because the original manufacturer and successor manufacturer are no longer in business, the elevator contractor had difficulty obtaining the requisite parts, which delayed the elevator's repair in October and November 2019. The XXXXX stated that there has been at least one elevator outage for a half-day since the filing of the instant OCR complaint.

OCR determined that the NYCDOE publishes a document entitled "Co-Locations and Accessibility" (the Document) established, in part, to provide temporary solutions to ensure programmatic accessibility. The Document suggests several alternatives to ensure program accessibility when there are temporary barriers; these alternatives include relocating programs, activities, and public events to accessible locations. The Document encourages building councils, which consist of representative administrators from all schools within a NYCDOE building (including charter schools, such as School 1) to create an Accessibility Contingency Plan (ACP) to "designate a classroom, on the ground floor (or any floor with an accessible entrance that does not require a lift, elevator, escalator or use of stairs to access), preferably a full size classroom, to be used if a student/staff with a disability temporarily requires the activation of the ACP." The NYCDOE stated that if there was a known need, programs and activities for any affected students/staff in the Building would be moved to the basement and first floor of the Building.⁵ Managers 1 and 2 stated that there is currently no NYCDOE protocol for informing school administrators about how to contact the OAP or move classrooms when there is an elevator outage.⁶ The Administrator and Principals of Schools 2 and 3 stated that they never received a copy of the Document during the October/November 2019 elevator outage, nor has their building council developed an ACP.

OCR determined that on March, 9 2019, in response to the instant complaint, the Administrator, the Principals of Schools 2 and 3, the XXXXX, Managers 1 and 2, and other NYCDOE representatives met to begin discussing the Building's protocol for providing alternative accessibility when there is an elevator outage. Managers 1 and 2 advised OCR that the meeting ended with the intention of meeting again to develop an ACP for the Building; however, the meeting has been postponed indefinitely due to COVID-19 temporary school closures.

On August 19, 2020, the NYCDOE signed the attached resolution agreement (Agreement) to voluntarily resolve the Complainant's allegation without further investigation, pursuant to Section 302 of OCR's *Case Processing Manual*. OCR will monitor the implementation of the Agreement.

⁵ As stated above, if an elevator was inoperable, the only designated accessible route between the basement and the first floor is an exterior route. The XXXXX stated that the concrete along this route is "really bad" with uneven surfaces that create tripping hazards and the exterior entrance to the basement level has a high threshold.

⁶ Managers 1 and 2 further stated that as a result of the instant complaint, the NYCDOE is currently working on a more seamless communication protocol for elevator outages.

This letter should not be interpreted to address the NYCDOE'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 a right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the NYCDOE 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.

If you have any questions regarding OCR's determination, please contact David Krieger, Senior Compliance Team Attorney, at (646) 428-3893 or david.krieger@ed.gov; Sandy Araj, Compliance Team Attorney, at (646) 428-3879 or sandy.araj@ed.gov; or Jonathon LeBeau, Compliance Team Investigator, at (646) 428-3790 or jonathon.lebeau@ed.gov.

Sincerely,

/s/

Timothy C. J. Blanchard

Encl.

cc: Michael Hilton, Esq.