



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION IV

61 FORSYTH ST., SOUTHWEST, SUITE 19T10
ATLANTA, GA 30303-8927

REGION IV

ALABAMA
FLORIDA
GEORGIA
TENNESSEE

September 26, 2019

Dr. Grant Rivera
Superintendent
Marietta City Schools
250 Howard Street
Marietta, GA 30060

Re: OCR Complaint No. 04-19-1279
Letter of Findings

Dear Dr. Rivera,

The U.S. Department of Education (the Department), Office for Civil Rights (OCR) has completed its investigation of the complaint we received on March 14, 2019 against Marietta City Schools (the District). In this complaint the Complainant alleged that people with disabilities are excluded from participation in, denied the benefits of, or otherwise subjected to discrimination in the District's programs or activities because the District's facilities are inaccessible to or unusable by individuals with disabilities. Specifically, the Complainant alleged that on or around February 26, 2019:

1. There was not an accessible route to the seating in the Marietta High School (the School) soccer field;
2. The wheelchair and companion seating did not provide viewing angles that are substantially equivalent to, or better than, the choices of seating and viewing angles that were available to other spectators when the view of the field was blocked by flags when seated in the wheelchair seating area.

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 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. Because the District receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over this complaint.

Summary of Investigation

During the investigation, OCR reviewed materials provided by the Complainant and the District, interviewed District staff, and conducted an onsite visit to the School on July 24, 2019. OCR evaluates evidence obtained during an investigation under a preponderance of the evidence standard to determine whether the greater weight of the evidence is sufficient to support a conclusion that a recipient failed to comply with a law or regulation enforced by OCR, or whether the evidence is insufficient to support such a conclusion.

After carefully considering all of the information obtained during the investigation, OCR found insufficient evidence to support the Complainant's allegation in Issue 1. With respect to Issue 2, OCR found a potential compliance concern regarding an obstructed view of the Field for designated accessible wheelchair and companion seating, in compliance with Section 504 and its implementing regulation at 34 C.F.R. §§ 104.21 and 104.22, and the Title II implementing regulation at 28 C.F.R. §§ 35.130, 35.149-35.150. The District expressed a willingness to resolve Issue 2 before OCR could complete its investigation.

The proposed resolution agreement will combine both issues under OCR's Case Processing Manual (CPM) Section 303(c) "mixed determination." OCR's findings and conclusions are discussed below.

Legal Standards

The regulations implementing Section 504, at 34 C.F.R. §104.21, and Title II, at 28 C.F.R. §35.149, state that no person with a disability shall, because a recipient's facilities are inaccessible to or unusable by persons with disabilities, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which Section 504 and Title II apply.

The Section 504 and Title II regulations contain two standards for determining whether a District's programs, activities, and services are accessible to individuals with disabilities. One standard applies to existing facilities; the other covers new construction and alterations. The applicable standard depends upon the date of construction or alteration of the facility.

For existing facilities, the regulations require an educational institution to operate each service, program, or activity so that, when viewed in its entirety, it is readily accessible to and usable by individuals with disabilities. This standard does not necessarily require that the institution make each of its existing facilities or every part of a facility accessible if alternative methods are effective in providing overall access to the service, program, or activity. 34 C.F.R. §104.22(a); 28 C.F.R. §35.150(a). Under the Section 504 regulation, existing facilities are those for which construction began before June 3, 1977. The applicable date under the Title II regulation is January 26, 1992. In choosing among available methods for meeting the program access requirement for existing facilities, the institution is required to give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate. 34 C.F.R. §104.22(b); 28 C.F.R. §35.150(b).

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

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, a recipient had a choice of adopting either UFAS or the 1991 Americans with Disabilities Act Accessibility Guidelines (ADA Accessibility Standards) 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 recipient had a choice of complying with either UFAS, the ADA Accessibility Standards, or the 2010 ADA Standards for Accessible Design (2010 ADA Standards). The Title II regulation provides that recipients are required to comply with the 2010 ADA 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 ADA Standards, a recipient may use the 2010 ADA Standards as an alternative accessibility standard for new construction and alterations pursuant to Section 504. The 2010 ADA Standards consist of 28 C.F.R. §35.151 and the 2004 ADA Standards, at 36 C.F.R. Part 1191, appendices B and D.

The District reported to OCR that the soccer field (Field) was constructed in August of 2000 and denied that the District made any major alterations until this current construction project at issue. Therefore, OCR used the 2010 ADA Standards in evaluating the District's compliance at issue in this case. In determining whether an institution is in compliance, OCR considered whether at least one accessible route complying with the 2010 ADA Standards is provided within the site from accessible parking spaces and accessible passenger loading zones; public streets and sidewalks; and public transportation stops to the accessible building or facility entrance they service.

The 2010 ADA standards for accessible routes is located in § 402.2. Accessible routes shall consist of one or more of the following components: walking surfaces with a running slope not steeper than 1:20, doorways, ramps, curb ramps excluding the flared sides, elevators, and platform lifts.

The 2010 ADA Standards at § 221.2.3 requires assembly areas such as a sports stadium or field to 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.

Issue 1: Whether the District failed to provide an accessible route to the seating at the Field in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. §§ 104.21 and 104.22, and the Title II implementing regulation at 28 C.F.R. §§ 35.130, 35.149-35.150; and

Background

The Complainant alleged that the route to the Field was not accessible for individuals who use wheelchairs during a period of construction when they visited the Field in February 2019.

During the time period at issue in this complaint, the District implemented a construction plan for a building adjacent to the Field. The construction began during the summer in 2018 and the District expects the construction to be completed by January 1, 2020. During construction, the materials and machines necessary for the construction were placed in the parking lot closest to the Field and access to that parking lot was closed by School staff for the duration of the construction project. The Field is used only for spring season sports, including soccer and track. District staff advised OCR that the construction is not expected to have any impact on the 2020 season sports if completed on time. During the 2018-2019 school year, the School circulated a document which outlined the parking instructions during the period of construction. The instructional document stated,

“During the Spring of 2019, the traditional parking and access routes to the (...) Track Facility are not accessible due to the construction of a new facility that is being added to the Marietta HS building. All events hosted at (the School) for Track, Soccer, Lacrosse or Tennis will need to follow an alternative parking and access plan, as there is no access from the front parking lot through the construction zone (ORANGE ZONE). All team buses, referees, coaches and spectators will need to park in the parking lot adjacent to (...) (YELLOW ZONE) and walk to the Track Field or Tennis courts”

During OCR’s onsite visit to the School, OCR observed that portions of the route from the Yellow Zone parking area to the Field were unpaved at the time of OCR’s visit. The District reported to OCR that during the construction period a School staff member staffed the Yellow Zone parking area with a golf cart to assist visitors with disabilities to access the Field. However, OCR notes that patrons who used motorized wheelchairs or scooters would not be able to access the designated golf cart during the period of construction.

While OCR found that due to the ongoing construction, patrons were unable to park at the two van-accessible parking spaces adjacent to the Field because the road leading to it was unpassable. OCR could not assess the accessibility of the route from the Yellow Zone parking to the Field because of the temporary construction. OCR did not find evidence to suggest that following the completion of the construction, an accessible route would not be available for patrons visiting the Field.

Analysis and Conclusion

Due to the ongoing renovation, OCR was unable to determine whether the unfinished portions of the route were accessible. During its onsite review, OCR determined that many paved portions of the route were in compliance with the 2010 ADA standards; the path from the accessible parking spaces was stable, firm, and slip resistant. The parking spaces were located at the same level as the competition field/track. The entrance point is a double gate that measured greater than 36” and led directly onto the track. Once traversing across the track, patrons would be in the east end of the stadium in the accessible seating area. Additionally, the Field is only used for spring season sports and the District reported that the Field will not be used until after the construction is completed in approximately January 2020. OCR did not find evidence that the temporary interruptions to the designated accessible route would continue following the completion of the construction in January 2020.

The Title II regulation at 28 C.F.R. § 35.133 states, “(a) A public accommodation shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part. (b) This section does not prohibit **isolated or temporary interruptions in service or access due to maintenance or repairs.**” (Emphasis added.)

Given the temporary disruption due to the construction during the off season, OCR finds insufficient evidence that the District discriminated against the Complainant by not providing an accessible route to the Field.

Issue 2: Whether the District provided designated accessible wheelchair and companion seating with unobstructed views of the Field, in compliance with Section 504 and its implementing regulation at 34 C.F.R. §§ 104.21 and 104.22 and the Title II implementing regulation at 28 C.F.R. §§ 35.130, 35.149-35.150.

Background

The Complainant alleged that the wheelchair and companion seating did not provide viewing angles that are substantially equivalent to, or better than, the choices of seating and viewing angles that were available to other spectators when the view of the Field was blocked by flags when seated when wheelchair users and their companions were seated in the designated wheelchair accessible seating area at the Field.¹

During OCR’s onsite visit to the Field, OCR found that the School provided designated accessible wheelchair accessible seating at the top and bottom areas of the bleacher seating section. However, because of the ongoing construction, the designated accessible route to the upper seating was not available during its onsite review and OCR limited its review to the lower seating area of the Field. Regarding the lower level seating area, OCR observed that the District mounted a vinyl banner on the chain link fence in front of the lower designated accessible

¹ Based upon the information collected during the onsite visit and interviews with pertinent School staff, OCR inferred that the “flags” referenced by the Complainant were vinyl advertising banners hung on a chain link fence surrounding the field.

wheelchair accessible seating area which obstructed the view of the Field for the wheelchair users and their companions in the lower level.

Analysis and Conclusion

Prior to the completion of the investigation, the District voluntarily agreed to resolve this issue with a resolution agreement pursuant to Section 302 of the CPM. Pursuant to Section 302 of OCR's Case Processing Manual (CPM), a complaint may be resolved before the conclusion of an investigation when the recipient or public entity expresses an interest in resolving the complaint. The attached Resolution Agreement (Agreement) will require the District to remove flags, banners, and/or any other object that obstructs the lines of sight from the lower designated wheelchair accessible and companion seating areas in the Field at the School.

On September 19, 2019, OCR received the enclosed signed Agreement that, when fully implemented, will resolve the allegation in the complaint. OCR will monitor the District's implementation of this Agreement to ensure that it is fully implemented. If the District fails to fully implement the Agreement, OCR will reopen the case and take appropriate action to ensure compliance with Section 504 and Title II.

This concludes OCR's investigation of the complaint. 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.

The complainant has a right to appeal OCR's determination regarding Issue 1 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.

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 regarding this letter, please contact Eulen Jang, the OCR attorney assigned to this complaint, at 404-974-9467 or me at 404-974-9354.

Sincerely,

Scott R. Sausser
Supervisory General Attorney

Enclosure

cc: XXXXXX, District counsel