



**UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS**

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September 21, 2016

Ms. Theresa Plascencia
Superintendent
Waukegan Community Unit School District 60
1201 North Sheridan Road
Waukegan, IL 60085

Re: OCR # 05-16-1228

Dear Ms. Plascencia:

This is to advise you of the disposition of the above-referenced complaint filed with the U.S. Department of Education, Office for Civil Rights (OCR) on March 25, 2016, against the Waukegan Community Unit School District 60 (District) alleging discrimination on the basis of disability. Specifically, the complaint alleges that the District discriminates against individuals with mobility and orthopedic impairments by maintaining inaccessible water fountains at Robert Abbott Middle School (School).

OCR established jurisdiction under Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, at 34 C.F.R. Part 104, and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131-12134, and its implementing regulation, at 28 C.F.R. Part 35. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance and Title II prohibits discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance and a public entity, the District is subject to Section 504 and Title II.

During its investigation, OCR reviewed information provided by the Complainant and the District, and conducted an on-site review of the School. OCR's conclusions regarding the allegation are set forth below.

Applicable Legal Standards

The regulation implementing Section 504 at 34 C.F.R. § 104.4(a) provides 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 recipient, or be subjected to discrimination by a recipient of Federal financial assistance. The Title II implementing regulation at 28 C.F.R. § 35.130(a) provides 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.

Accessibility - General

The implementing regulation of Section 504, at 34 CFR § 104.21, and of Title II, at 28 CFR § 35.149 provide that no qualified person with a disability shall, because a recipient's facilities are inaccessible to or unusable by students with a disability, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity.

Accessibility - Existing facilities

The implementing regulations of Section 504, at 34 C.F.R. § 104.22, and Title II, at 28 C.F.R. § 35.150, are applicable to any facility or part of a facility where construction commenced prior to June 3, 1977 (Section 504) or January 26, 1992 (Title II), respectively. The regulations provide that with regard to such facilities, termed "existing facilities," the recipient will operate the programs, activities and (as to Title II) services so that, when viewed in their entirety, the programs, activities, and services are readily accessible to and usable by persons with disabilities. The recipient may comply with this requirement through the reassignment of programs, activities, and services to accessible buildings, alterations of existing facilities or any other methods that result in making each of its programs, activities, and services accessible to persons with disabilities. The recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance.

In choosing among available methods for meeting the requirements of the statute, the recipient must give priority to methods that offer the programs, activities, and services to persons with disabilities in the most integrated setting appropriate. The implementing regulation of Section 504, at 34 CFR § 104.22(f), provides that the recipient shall adopt and implement procedures to ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and locations of services, activities, and facilities that are accessible to and usable by persons with disabilities. The implementing regulation of Title II, at 28 C.F.R. § 35.163(a), provides that public entities must also ensure that interested persons, including persons with impaired vision or hearing, can obtain information about the existence and location of accessible services, activities and facilities.

Accessibility - New Construction

The Section 504 regulation at 34 C.F.R. § 104.23 applies to any facility or part of a facility where construction was commenced on or after June 3, 1977. The regulation implementing Title II at 28 C.F.R. § 35.151 applies to any facility or part of a facility where construction was commenced after January 26, 1992. These facilities are termed "new construction" and the altered portions of existing facilities are termed "alterations." The regulations require that each such facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such a manner that the facility or part of the facility is readily accessible to and

usable by persons with disabilities. The regulations specify the accessibility standard to be used in determining the accessibility of the alterations based on the date of construction or renovation.

The Section 504 and Title II implementing regulations, at 34 C.F.R. § 104.23(b) and 28 C.F.R. §35.151(b) respectively, provide that when an existing facility or part thereof is altered in a manner that affects or could affect the usability of the facility or part of the facility, it shall, 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.

The Section 504 regulation at 34 C.F.R. § 104.23(c) designates the American National Standards Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped [ANSI 117.1-1961 (1971)(ANSI)] as a minimum standard for determining accessibility for facilities constructed or altered on or after June 3, 1977, but before January 18, 1991, and the Uniform Federal Accessibility Standards (UFAS) for facilities constructed or altered on or after January 18, 1991. The Title II regulation at 28 C.F.R. §35.151(c) designates UFAS or the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) as a minimum standard for determining accessibility for facilities constructed or altered on or after January 26, 1992.

The regulations implementing Title II and the ADAAG standards were amended in September 2010. Title II adopted new accessibility guidelines, the 2010 ADA Standards for Accessible Design (ADA Standards), which became effective March 15, 2011. Federal regulation 28 C.F.R. § 35.151(c)(3) now provides, "If physical construction or alterations commence on or after March 15, 2012, then new construction and alterations subject to this section shall comply with the 2010 Standards." OCR Notice of Interpretation, Federal Register, Vol. 77, No. 50, pages 14972-14976 (March 14, 2012) allows use of the ADA Standards under Section 504.

A facility, or portion thereof, constructed on or after June 3, 1977, but before January 26, 1992, is deemed an existing facility under Title II, but is deemed new construction under Section 504. If a facility meets the Section 504 new construction standards, it is accessible throughout the facility and meets the Title II program accessibility standards. If the facility does not meet the Section 504 new construction standards, the facility may or may not comply with the Title II program access standards

For the new construction facilities, OCR determined if the facility met the specific accessibility standard for the facility based on the date of construction of the facility.

Water fountains

The ANSI guidelines, at Section 5.7, require water fountains to have upfront spouts and controls (5.1.7), and be hand-operated or foot-operated (5.7.2).

The UFAS guidelines, at Section 4.15, require a minimum number of water fountains to comply with UFAS Section 4.1 (4.15.1)¹, spout heights of 36 inches or less (4.15.2), front located water spouts (4.15.3), controls that comply with 4.27.4² (4.15.4), and have clear knee space of at least 27 inches and 19 inches deep (4.15.5).

Facts

The School is one of five middle schools in the District. It is housed in a two story brick facility with a basement, and serves approximately 790 students in sixth, seventh and eighth grades. The original building was constructed in 1924, and the District made additions to the building in 1928, 1970 and in 1991. The 1928 addition added a new wing for classrooms, the 1970 addition added a multipurpose room, and the 1991 addition added a new school gymnasium. There are 11 water fountains in the building: two are located in the basement; three are located on the first floor; four are located on the second floor; and two are located in the 1991 addition.

Based on the locations of the water fountains, OCR determined that the seven water fountains located in the original building (1924) and the two water fountains located in 1928 and 1970 additions are considered as existing facilities and must provide program access and be readily accessible to and usable by persons with disabilities. The two water fountains located in the 1991 addition are considered new construction facilities and are required to meet the 1991 UFAS guidelines.

OCR conducted an on-site inspection of the School on August 29, 2016 and examined all 11 water fountains. OCR found that there are five types of water fountains: stand-alone metal water fountains (3); wall-attached metal fountains (5); wall-attached porcelain fountain (1); wall-inserted metal fountain (1); and wall-inserted porcelain fountain (1).

OCR found at least one water fountain per floor (the building has two floors and one basement) located in the pre-1977 facility that meets the ANSI guidelines with respect to spout location and controls (up front) and which are hand or foot operated. Therefore, the water fountains located in the pre-1977 portions of the building are readily accessible to the disabled and provide program access.

OCR found that the two water fountains located in the 1991 gymnasium addition³ have spout heights that exceed the maximum 36 inches. Therefore, these two water fountains do not meet the 1991 UFAS guidelines for accessibility.

¹ UFAS Section 4.1.2 (9) states that "If drinking fountains or water coolers are provided, approximately 50 percent of those provided on each floor shall comply with 4.15."

² UFAS Section 4.27.4 states that "mechanisms shall be operable with one hand, and shall not require tight grasping, pinching, or twisting of the wrist."

³ One of the water fountains was a stand-alone metal fountain and one was a wall-inserted porcelain water fountain.

Analysis and Conclusion

With respect to the nine water fountains located in the pre-1977 portion of the building, OCR determined that there is at least one compliant water fountain per floor, which provides program access. Therefore, with respect to these water fountains, OCR determined that there is insufficient evidence to establish that the District discriminates against individuals with mobility and orthopedic impairments by maintaining inaccessible water fountains in the existing facilities portion of the School, as alleged.

With respect to the two water fountains located in the 1991 gymnasium addition, OCR found that these water fountains do not meet the 1991 UFAS guidelines for accessibility. Therefore, with respect to the water fountains in the 1991 addition, the District is not in compliance with Section 504, at 34 C.F.R. § 104.22, 104.23, and Title II, at 28 C.F.R. § 35.150, 35.151.

On September 19, 2016, the District entered into an agreement which, when implemented, will resolve compliance concerns described above. The agreement contains the steps to be taken and the dates for implementation. OCR looks forward to receiving the District's report confirming implementation of the agreement, which is due by January 20, 2017.

This concludes OCR's investigation of the complaint and 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 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 he or she has filed a complaint or participated in the complaint resolution process. If this happens, the Complainant may file another 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, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

OCR would like to thank you and your staff for their cooperation. In particular, we thank Thomas Morris, General Counsel for the District, for his assistance throughout OCR's investigation. If you have any questions regarding this letter, please contact Tom Okawara at (312) 730-1578 or by e-mail at Tom.Okawara@ed.gov.

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Sincerely,

Aleeza Strubel
Supervisory Attorney

cc: Thomas Morris, Esq.

Enclosure