



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

1999 BRYAN ST., SUITE 1620
DALLAS, TX 75201-6810

REGION VI
ARKANSAS
LOUISIANA
MISSISSIPPI
TEXAS

September 10, 2018

VIA MAIL
VIA EMAIL (XXXX)

Eldon Franco, Superintendent
Cherokee Independent School District
Box 100
305 S. Indian Ave.
Cherokee, TX 76832

Re: OCR Complaint No. 06-17-1347

Dear Superintendent Franco:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), Dallas Office, has completed its investigation of the above-referenced complaint, which OCR received on February 2, 2017, and which the complainant filed against the Cherokee Independent School District (District), in Cherokee, Texas. The complainant alleged that the District discriminates on the basis of disability.

OCR is responsible for determining whether entities that receive or benefit from Federal financial assistance from the Department, or an agency that has delegated investigative authority to the Department, are in compliance with Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulations at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131 *et seq.*, and its implementing regulations at 28 C.F.R. Part 35. Under Title II, 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 Federal financial assistance from the Department and is a covered public entity. Therefore, OCR has jurisdictional authority to process this complaint for resolution under Section 504 and Title II.

OCR investigated the following issue:

Whether individuals with disabilities are denied the benefits of, excluded from participation in, or otherwise subjected to discrimination by the District because the cafeteria at the Cherokee Elementary School is inaccessible to or unusable by individuals with disabilities (e.g., threshold in doorways, aisles and serving line are narrow) in violation of Section 504 and Title II implementing regulations, at 34 C.F.R. §§ 104.21-104.23, and 28 C.F.R. §§ 35.149-35.151, respectively.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

During this investigation, OCR reviewed information that the complainant and the District submitted. OCR also conducted interviews with relevant witnesses, including District personnel and the complainant. Additionally, OCR visited the District and inspected the relevant facilities on June 6, 2018.

Prior to the issuance of this letter, the District informed OCR that it was interested in resolving the complaint. Section 302 of OCR's *Case Processing Manual* provides that a complaint may be resolved at any time when, prior to the issuance of a final determination, the recipient expresses an interest in resolving it. The provisions of the resulting resolution agreement will be aligned with the complaint allegations or the information obtained during the investigation and will be consistent with applicable regulations. OCR approved the District's request to resolve the complaint as to the doorway threshold and aisles between cafeteria tables prior to the conclusion of the investigation.

The District submitted the enclosed Resolution Agreement (Agreement) to resolve this complaint; the District's representative signed the Agreement on September 6, 2018. OCR has determined the provisions of the Agreement are aligned with the complaint allegations and appropriately resolves them. Further, OCR accepts the Agreement as an assurance the District will fulfill its obligations under Section 504 and Title II with respect to this complaint. The dates for implementation and specific actions are detailed in the enclosed Agreement. OCR will actively monitor the District's implementation of the Agreement. Please be advised that if the District fails to adhere to the actions outlined in the Agreement, OCR will immediately resume its compliance efforts.

A finding that a recipient has violated one of the laws that OCR enforces must be supported by a preponderance of the evidence (i.e., sufficient evidence to prove that it is more likely than not that unlawful discrimination occurred). When there is a significant conflict in the evidence and OCR is unable to resolve that conflict, for example, due to the lack of corroborating witness statements or additional evidence, OCR generally must conclude that there is insufficient evidence to establish a violation of the law. Based on OCR's careful review and analysis of the information obtained, we have determined that there is insufficient evidence to support a finding of noncompliance as to the food service line. The basis for this determination is set forth below.

I. Legal Standard:

The accessibility requirements of the Section 504 implementing regulations are found at 34 C.F.R. §§104.21-104.23. Comparable sections of the Title II implementing regulations are found at 28 C.F.R. §§ 35.149-35.151. Both 34 C.F.R. § 104.21 and 28 C.F.R. § 35.149 provide generally that no qualified individual with a disability shall, because a recipient's facilities are inaccessible to or unusable by disabled individuals, be excluded from participation in, or denied the benefits of services, programs or activities; or otherwise be subject to discrimination by the recipient. The regulations implementing Section 504 and Title II each contain two standards for determining whether a recipient's/public entity's facilities are accessible to or usable by persons with disabilities. One standard applies to facilities existing at the time of the publication of the regulations and the other standard applies to facilities constructed or altered after the publication dates. The regulation implementing each statute requires entities subject to the statute to provide

“program accessibility” in programs and activities offered in existing facilities. In addition, each regulation establishes design and construction standards for new and altered facilities. The applicable standard depends on the date of construction and/or alteration of the facility.

Existing Facilities

An existing facility under Section 504 is any facility that was constructed, or for which construction was commenced, prior to June 3, 1977, the effective date of the Section 504 regulation. Under Title II, an existing facility includes facilities that were constructed, or for which construction was commenced prior to January 26, 1992, the effective date of the Title II regulation.

For existing facilities, both Section 504 and Title II require public entities and recipients to operate programs or activities so that the programs and activities, when viewed in their entirety, are readily accessible to and usable by individuals with disabilities. (The specific language of Title II also refers to services.) Neither regulation requires public entities or recipients to make all existing facilities or every part of the existing facility accessible to and usable by individuals with disabilities, if the service, activity, or program as a whole is accessible.

Under both regulations, program accessibility for existing facilities can be achieved by making nonstructural changes such as the redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, or delivery of services at alternate accessible sites. Priority consideration, however, must be given to offering the programs or activities in the most integrated setting appropriate. It should be noted that if no effective alternatives can be provided to achieve program accessibility, a recipient or public entity is required to make necessary structural changes. These changes are to be made consistent with the requirements for new construction.

Depending on the date of construction, some facilities may be existing facilities for purposes of Title II but may also constitute new construction under Section 504 (e.g., buildings constructed on or after June 3, 1977, but before January 26, 1992.) In these cases, public entities/recipients that are covered under both Title II and Section 504 must meet the standards for existing construction under Title II and also the applicable accessibility standards for new construction and alterations under Section 504.

New Construction and Alterations

Both Section 504 and Title II require that a new or altered facility (or the part that is new or altered) be accessible to and usable by individuals with disabilities. However, there are differences in the applicable accessibility standards for new construction and alterations. Alterations standards recognize that structural impracticability or technical infeasibility may be encountered; however, new construction standards must be used in alterations whenever possible.

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, public entities had a choice of adopting either UFAS or the 1991 Americans with Disabilities Act Accessibility Guidelines (1991 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 public entities had a choice of complying with one of the following: UFAS, 1991 Standards, or the 2010 ADA Standards for Accessible Design (2010 Standards). The Title II regulation provides that public entities 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, the 2010 Standards may be used 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.

II. Findings of Fact:

The complainant alleged that the District's cafeteria is inaccessible in the following ways: (1) the food service line is too narrow, including the turn in the food service line, (2) the aisles between tables/chairs in the cafeteria are too narrow, and (3) the threshold of the doorway between the cafeteria and the exterior is too high. As the Agreement addresses the allegations regarding the table aisles and threshold, OCR outlines its findings of fact only as to the food service line.

The District informed OCR that the building in question was constructed in 1974 and that there have been no alterations to the cafeteria. However, during OCR's inspection of the food service line, OCR saw that the equipment that made up the food service line was portable and had been moved from its usual location for the summer. The Superintendent was present during OCR's visit and explained how the equipment is typically arranged to create the food service line, which was also apparent due to rust spots visible on the floor. The Superintendent explained that students enter the food service line—which is in a room adjacent to the cafeteria—through the door from a long hallway. After entering the door from the hallway, students proceed straight ahead, with the food service equipment on their left and a wall on their right. The Superintendent explained that students exit the food service line through a door on the right wall, which leads to the cafeteria.

OCR took measurements based on the Superintendent's description of the typical configuration of the food service line and the rust spots discussed above. The width of the walkway between the equipment and the wall is 60 inches. Because the exit doorway is on the right wall, students must turn to the right to exit. The exit doorway has a door, and the serving line is on the pull side of the door. Someone using the serving line would approach the exit doorway from the latch side. The food service equipment ends 36 inches before reaching the doorway, creating 36 inches of maneuvering clearance parallel to the doorway, beyond the latch side. There is at least 60 inches of maneuvering clearance perpendicular to the doorway.

III. Analysis:

OCR analyzes the food service line using the 2010 Standards.¹ Section 403.5.1² of the 2010 Standards requires that walking surfaces have a clear width of 36 inches. The District's food service line has a clear width of 60 inches and therefore complies with this requirement. Section 404.2.4 requires the following minimum maneuvering clearance for a doorway approached from the latch and pull side: 24 inches parallel to the doorway (beyond the latch side) and 48 inches perpendicular to the doorway. The exit door for the food service line has a parallel maneuvering clearance of 36 inches and a perpendicular maneuvering clearance of at least 60 inches—meeting the standards of Section 404.2.4.

OCR concludes that the aisle width and exit door maneuvering clearance of the food service line meet the requirements of the 2010 Standards. OCR therefore finds insufficient evidence to establish that the District failed to comply with Section 504 and Title II as the complainant alleged with respect to the food service line.

IV. Conclusion:

In conclusion, based on the above findings of fact, and under a preponderance of evidence standard, OCR concludes that there is insufficient evidence to find that the District violated Section 504 or Title II as alleged with respect to the food service line. OCR therefore will take no further action as to the food service line. OCR has approved the District's request to resolve the complaint prior to the conclusion of the investigation as to the doorway threshold and aisles between cafeteria tables.

This determination 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 a right to file a private suit in Federal court whether or not OCR finds a violation.

Please be advised that a recipient 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, it will seek to protect, to the extent provided by law, personally identifiable information which, if

¹ The food service line is partially made up of non-fixed elements (i.e., the food service equipment). The 2010 Standards apply to "pedestrian routes," in addition to "fixed or built-in elements." 28 C.F.R. § 35.151(d).

² Section 904.5 of the 2010 Standards provides standards for food service lines. However, Section 904.5 does not provide any standards for the clear width of a food service line's aisle or doorway. Section 904.3, which governs check-out aisles, states that aisles must comply with Section 403. Accordingly, OCR looks to Section 403 for the appropriate standards.

released, could reasonably be expected to constitute an unwarranted invasion of personal privacy. If you have any questions or concerns regarding this matter, you may contact the attorney investigator assigned to this case, Katherine Fearn, by telephone at (214) 661-9653 or by email at katherine.fearn@ed.gov, or you may contact me at (214) 661-9600.

Sincerely,

/s/

Paul Coxe
Supervisory Attorney/Team Leader
Office for Civil Rights
Dallas Office

Enclosure

cc: XXXX XXXX, XXXX, XXXX XXXX
(XXXX)