



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

ONE PETTICOAT LANE
1010 WALNUT STREET, SUITE 320
KANSAS CITY, MO 64106

REGION VII
ARKANSAS
KANSAS
MISSOURI
NEBRASKA
OKLAHOMA
SOUTH DAKOTA

August 29, 2019

Sent via email only to XXXXX

XXXXXX XXXXX, Superintendent
XXXXXX XXXXX XXXXX
XXXX XXXXX XX XXXXX
XXXXXX, XXXXX XXXXX

Re: Kirby School District
OCR Case Number: 06-19-1430

Dear Superintendent XXXXX:

On March 13, 2019, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received a complaint against the Kirby Public Schools (District), Kirby, Arkansas, alleging discrimination on the basis of disability. This letter is to confirm that the District has voluntarily submitted a Resolution Agreement (Agreement) to resolve this complaint.

In a June 18, 2019 letter, OCR informed the District it would investigate whether the District's gymnasium lacks accessible parking, an accessible route to the gymnasium, accessible seating, and accessible emergency egress in violation of 34 C.F.R. §§ 104.21 – 104.23 and 28 C.F.R. §§ 35.149 – 35.151.

OCR is responsible for enforcing:

- Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance (FFA).
- Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131, and its implementing regulation, 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities.

As a recipient of FFA from the Department and a public entity, the District is subject to Section 504 and Title II. Additional information about the laws OCR enforces is available on our website at <http://www.ed.gov/ocr>.

To protect individuals' privacy, the names of employees and other parties were not used in the letter.

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

Legal Standards

The Section 504 implementing regulation at 34 C.F.R. § 104.4(a) provides that no qualified person with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of or otherwise be subjected to discrimination under any program or activity that benefits from or receives FFA. Title II's implementing regulation contains a similar provision for public entities at 28 C.F.R. § 35.130(a). Prohibited discrimination by a recipient or public entity includes: denying a qualified person with a disability the opportunity to participate in or benefit from the aids, benefits or services offered by that recipient or public entity; affording a qualified person with a disability an opportunity to participate in or benefit from aids, benefits or services that is not equal to that afforded others; and providing a qualified person with a disability with aids, benefits or services that are not as effective as those provided to others.¹

The Section 504 and Title II regulations also state that no qualified person with a disability shall, because a covered entity'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 of the entity's programs or activities.² The regulations reference standards for determining whether an entity's programs, activities, and services are accessible to individuals with disabilities depending upon whether the facilities are determined to be existing construction, new construction, or alterations. The applicable standard depends upon the date of construction or alteration of the facility. For purposes of determining accessibility, a "facility" is defined at 34 C.F.R. § 104.3(i) to include "all or any portion of buildings, structures, equipment, roads, walks, parking lots or other real or personal property or interest in such property." Under 28 C.F.R. § 35.104, a "facility" means "all or any portion of buildings, structures, sites, complexes, equipment, ... walks, ...or other real or personal property, including the site where the building, property, structure or equipment is located."

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 compliance standard is referred to as "program access." 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.³ Under the Section 504 regulation, existing facilities are those for which construction began before June 3, 1977. Under Title II, existing facilities are those for which construction began on or before January 26, 1992.

To provide program access in existing facilities, an institution may use such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternative accessible sites, alteration of existing facilities, construction of new facilities, or any other methods that result in making its program or activity accessible to persons with disabilities. A

¹ 34 C.F.R. § 104.4(b)(1)(i)-(iv); 28 C.F.R. § 35.130(b)(1)(i)-(iv).

² 34 C.F.R. § 104.21; 28 C.F.R. § 35.149.

³ 34 C.F.R. § 104.22(a); 28 C.F.R. § 35.150(a).

recipient is not required to make structural changes in existing facilities where other methods are effective in providing program access. However, in choosing among available methods for

providing program access, 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.⁴ 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.

For new construction, the facility or newly constructed part of the facility must itself be readily accessible to and usable by persons with disabilities.⁵ 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.⁶ Under Section 504, for construction or alterations commencing on or after March 15, 2012, recipients of Federal financial assistance may choose to comply with the Uniform Federal Accessibility Standards (UFAS) 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 ADA Standards for Accessible Design (2010 Standards) for construction or alterations commencing on or after March 15, 2012.

Preliminary Investigative Findings

The Complainant uses a wheelchair; she and her husband alleged they are unable to attend any more basketball games because of accessibility issues with the District's parking and gymnasium. According to the Complainant, there is an inadequate number of accessible parking spaces at the gymnasium. The Complainant said the surface of the parking lot is cracked and broken with holes in it. According to the Complainant, there is no designated wheelchair seating in the gymnasium. She said she sits on the floor right by the out-of-bounds line on the court. Her husband sat as close to her in the bottom rows of the bleachers as he could depending on available space in the bleachers because there is no designated companion seating. The Complainant said the gymnasium has no accessible emergency exit other than the front entrance to the gymnasium.

The District's gymnasium is not registered as a historical site nor has application been made to register it as a historical site. Construction on the gymnasium (which is a separate building) began in 1956 and was completed in 1958. Although the District made some alterations to the building in 1981 and 1999, those alterations did not impact the parking lot or the interior of the gymnasium where accessible wheelchair seating is located making those areas subject to accessibility standards for existing facilities. In 1981, the District added the lobby and front entrance to the gymnasium, making those areas subject to accessibility standards for new construction and alterations. In 1999, the District added the exit by the coaches' office, making that area subject to accessibility standards for new construction and alterations.

⁴ 34 C.F.R. § 104.22(b); 28 C.F.R. § 35.150(b).

⁵ 34 C.F.R. § 104.23(a); 28 C.F.R. § 35.151(a).

⁶ 34 C.F.R. § 104.23(b); 28 C.F.R. § 35.151(b).

OCR conducted a site visit on August 5, 2019, during which OCR inspected the parking for the District's gymnasium, the route from the parking to the gymnasium including the front entrance to the gymnasium, wheelchair accessible seating in the gymnasium, and the exterior exit by the coaches' office.

Resolution

On August 5, 2019, the District expressed interest in voluntarily resolving this complaint pursuant to Section 302 of OCR's *Case Processing Manual (CPM)*.⁷ Prior to the completion of OCR's investigation into this complaint, the District submitted a signed Agreement (copy enclosed) August 22, 2019, that, when fully implemented, will address the allegations of this complaint. The Resolution Agreement requires the District to develop and implement a plan for ensuring the gymnasium parking lot has an adequate number of designated accessible parking spaces, with access aisles, on an accessible route to the entrance of the gymnasium and for ensuring the provision of designated accessible wheelchair spaces and companion seating in the gymnasium. The Agreement also requires the District to ensure the surface at the end of an exterior ramp is stable, firm and slip resistant and to provide directional signage designating an exterior exit as accessible. Please consult the Agreement for further details.

OCR considers the allegation of this complaint resolved effective the date of this letter and will monitor the District's implementation of the Agreement. When OCR concludes the District has fully implemented the terms of the Agreement, OCR will close the complaint. If the District fails to carry out the Agreement, OCR may resume investigating the complaint.

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, please be advised 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.

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. Complainants may have the right to file a private suit in Federal court whether or not OCR finds a violation.

OCR is committed to prompt and effective service. If you have any questions, please contact XXXXX XXXXX, Attorney, at (816) 268-XXXX (voice) or (877) 521-2172

⁷ The *Case Processing Manual* is available on OCR's website at <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

(telecommunications device for the deaf), or by email at XXXXX.XXXXX@ed.gov Thank you for your cooperation.

Sincerely,

Kelli Douglas
Supervisory Attorney

Enclosure