



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

August 17, 2016

Dr. Steven M. Constantino
Superintendent
Williamsburg-James City County Public Schools
P.O. Box 8783
Williamsburg, Virginia 23187

Re: OCR Complaint No. 11-15-1362
Letter of Findings

Dear Dr. Constantino:

The Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) has completed its investigation of the complaint we received on September 8, 2015 against Williamsburg-James City County Public Schools (the Division). The Complainant alleges that the Division discriminates against individuals on the basis of disability. Specifically, the complaint alleges that the XXXX (the School) is not accessible to persons with mobility impairments in that:

1. The School lacks an accessible path of travel between the parking lot and the building's entrance; and
2. The School's designated parking for individuals with disabilities is not the closest to the accessible entrance.

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 Division receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

In reaching a determination, OCR reviewed documents provided by the Complainant and the Division and conducted a site visit on February 17, 2016.

After carefully considering all of the information obtained during the investigation, OCR identified compliance concerns. The Division agreed to resolve the concerns through the enclosed resolution agreement. OCR's findings and conclusions are discussed below.

Background

The Complainant has a mobility impairment. He serves as an advocate and visits schools in the Division on occasion to participate in meetings on behalf of students with disabilities and their parents. On his recent visit to the School, he found the parking and the route to the School entrance to fall short of accessibility standards.

Accessible Parking

According to the Division, the original parking lot was built in 1988. There were originally 87 parking spaces, two of which were accessible parking spaces. In 2011, the School expanded the parking lot by adding 53 additional spaces, bringing the total number of parking spaces to 140. Three additional accessible parking spaces were added, bringing the total number of accessible parking spaces to five. At the same time, the School moved the accessible spaces from their original location in the corner of the lot that is closest to the School entrance to a location farther away from the entrance. Currently, the five accessible spaces are in the same row of the parking lot where they were previously located but now farther from the entrance to the building and located beyond three non-accessible spaces (two of which had previously been designated as the accessible spaces). The two parking spaces that previously served as the accessible parking spaces are closer to the entrance than the five accessible spaces. The closest accessible parking space is 36 feet, 2 inches past the parking space closest to the entrance. The last accessible parking space is over 90 feet from the closest parking space.

The School's explanation for moving the accessible spaces farther away from the entrance is that the grading variance of the original two accessible spaces (4 percent) is not in compliance with the 2010 ADA Standards (requiring a grading variance of no greater than 2 percent) and to fix the variance would have been too costly. The Division claimed that it is entitled to assert an exemption from bringing the closest spaces into compliance because the cost of fixing the grading variance would have exceeded 20% of the total cost of the renovation to the parking lot.

OCR measured, in various directions, the slope of the prior accessible spaces and the current accessible spaces during an onsite visit to the School. The slope measurements of the closest spaces, which previously were the accessible spaces, range from 0.4% to 6.5%. OCR took nine measurements, and seven of nine were greater than 2.08%. The slope measurements of the new accessible spaces range from 0.2% to 9.2%. OCR took 25 measurements and 15 out of the 25 were greater than 2.08%.

Accessible Route

The sidewalk leading from the parking lot to the building entrance also was originally constructed in 1988. When the lot was expanded in 2011, a new stretch of sidewalk was added adjacent to parking spaces. The new sidewalk runs along the front border of the parking lot

where the accessible spaces are located and connects with the original path that leads to the building entrance. Counsel for the Division told OCR that no other alterations were made to the sidewalk. However, there is one section of the original stretch of sidewalk that appears to be newer than the rest. It is smoother and gray, while the other sections are yellowed and have more texture or “grooving.”

OCR measured the running slope and cross slope of the sidewalk from adjacent to the accessible parking spaces to the point where three sidewalks converged near the School’s main door. OCR recorded measurements at intervals of two to four feet, and more frequently at the areas that measured greater slopes. OCR recorded twelve measurements along the new sidewalk adjacent to the accessible parking spaces, for which the running slope ranged from 0.7% to 4.0%. The running slope meets the requirements set forth by the 2010 Standards. OCR recorded cross-slope measurements at the same twelve intervals, and took additional cross slope measurements at nine of those points, for a total of 27 cross slope measurements. The cross slope ranged from 0.0% to 3.8%, with the 20 of the 27 measurements exceeding the 2.08%. OCR attained the most extreme measurements at the edges of the sidewalk closest to the grass and at the edges closest to the curb while the center of the sidewalk consistently measured 2.5%.

OCR also measured the 1988 section of sidewalk leading from the parking lot to the main entrance at 14 similarly spaced intervals, and recorded running slopes ranging from 0.4%, closest to the School entrance, to 11.5%, close to the parking lot where the 1988 sidewalk meets the 2011 sidewalk. OCR obtained six running slope measurements that exceeded the 2010 Standards across a stretch of 10-12 feet of sidewalk. Additionally, OCR took cross slope measurements at each interval and obtained 9 measurements that exceed current cross slope requirements in the 2010 Standards. The cross slope ranged from 0.0%, nearest the new stretch of sidewalk, to 4.3% and 5.0% closer to the entrance.

Legal Standards

The Section 504 regulation, at 34 C.F.R. § 104.21, and the Title II regulation, at 28 C.F.R. § 35.149, provide that no qualified individual with a disability shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination in a Division’s programs or activities because the Division’s facilities are inaccessible to or unusable by individuals with disabilities.

The regulations implementing Section 504 and Title II each contain two standards for determining whether a Division’s programs, activities, and services are accessible to individuals 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 applicable standard depends on the date of construction and/or alteration of the facility. Under the Section 504 regulation, existing facilities are those for which construction began prior to June 4, 1977; under the Title II regulation, existing facilities are those for which construction began prior to January 27, 1992. Facilities constructed or altered on or after these dates are considered newly constructed or altered facilities under Section 504 and Title II standards.

For existing facilities, the Section 504 regulation, at 34 C.F.R. § 104.22, and the Title II regulation, at 28 C.F.R. § 35.150, require a Division 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. The Division may comply with this requirement through the reassignment of programs, activities, and services to accessible buildings, alteration of existing facilities, or any other methods that result in making each of its programs, activities and services accessible to persons with disabilities. In choosing among available methods of meeting the requirements, a Division must give priority to methods that offer programs, activities and services to persons with disabilities in the most integrated setting appropriate.

With respect to newly constructed facilities, the Section 504 regulation, at 34 C.F.R. § 104.23(a), and the Title II regulation, at 28 C.F.R. § 35.151(a), require that the Division design and construct the facility, or part of the facility, in such a manner that it is readily accessible to and usable by individuals with disabilities. In addition, for new alterations that affect or could affect facility usability, the Section 504 regulation, at 34 C.F.R. § 104.23(b), and the Title II regulation, at 28 C.F.R. § 35.151(b), require that, to the maximum extent feasible, the Division alter the facility in such a manner that each altered portion is readily accessible to and usable by individuals with disabilities.

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, Divisions had a choice of adopting either UFAS or the 1991 Americans with Disabilities Act Accessibility Guidelines (ADAAG) 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 Divisions had a choice of complying with either UFAS, ADAAG, or the 2010 ADA Standards for Accessible Design (2010 Standards). The Title II regulation provides that Divisions 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, a Division may use the 2010 Standards 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.

Analysis

Allegation 1:

The Complainant first alleged that the School lacks an accessible path of travel between the parking lot and the building's entrance because the slope of the current path is too steep and does not have handrails. For the new stretch of sidewalk (approximately 90'), added in 2011, the

2010 Standards apply¹ and require a running slope of not greater than 5% and a cross slope of not greater than 2.08%. OCR found that this part of the sidewalk is compliant with regard to running slope. However, it is out of compliance in a number of places with regard to cross slope. The cross slope of this new stretch of side walk ranges from 0% to 3.8%.

The original section of the sidewalk constructed in 1988 is out of compliance with regard to running slope under both ANSI and the 2010 Standards. ANSI requires that public walks “be at least 48 inches wide” and “have a gradient not greater than 5%.” *See* Section 4.2.1. OCR found that the running slope for this original stretch of sidewalk ranges from 0.5% to 11.5%, with the steepest section being the section closest to the parking lot that connects to the new sidewalk adjacent to the parking lot, at 11.5% running slope. The 2010 Standards contain the same requirement with regard to running slope as ANSI, in addition to requiring a cross slope of not greater 2.08%. For the original stretch of sidewalk, OCR measured a cross slope of greater than 2.08% at nine out of fourteen separate sections (*i.e.*, 2.2% – 4.3%).²

Accordingly, OCR finds that the slope and cross-slope of the accessible route do not meet accessibility requirements described in ANSI and the 2010 Standards in violation of Title II.

Allegation 2:

The Complainant also alleged that the School’s designated parking for individuals with disabilities is not located closest to the accessible entrance. Because the Division expanded the parking lot in 2011, the 1991 ADA Standards or UFAS or the 2010 Standards apply, all of which have comparable requirements for parking. Under the 2010 Standards, accessible parking spaces are required to be located on the shortest possible route between the parking and an accessible entrance (2010 208.3.1). The Division acknowledges that when it expanded the lot in 2011, it moved the accessible spaces (previously two spaces) from the corner of the lot closest to the entrance, to a location farther away and made the previous accessible parking into parking spaces not designated as accessible, so that the accessible spaces are no longer on the shortest possible

¹ As discussed above, the Division had the choice of complying with UFAS, ADAAG, or the 2010 Standards because the alteration was made in 2011. However, the Division’s data submission to OCR referenced the 2010 Standards, so that is what OCR is applying here.

² OCR notes that two separate sections of the “old” sidewalk appear much different from the rest, containing concrete of a different, light gray coloration and smoother texture than other portions of sidewalk. One of the two sections is along the drop-off loop that merges with the stretch of sidewalk leading from the parking lot to the entrance; the other section is on the route from the parking lot to the entrance. The Division acknowledged replacing the concrete of the section along the drop-off loop in 2012 when it made repairs to the curb cut at the drop-off loop; however, the Division did not acknowledge repairing or otherwise replacing the other section of concrete along the accessible route from the parking lot. Even if we accept the Division’s representation, the addition in 2011 of approximately 90’ of new sidewalk connecting to the original sidewalk was sufficient in and of itself to result in a renovation that would bring the entire sidewalk under the 2010 Standards, as the new stretch of sidewalk is the only means to access the original stretch of sidewalk to get from the accessible spaces to the School’s entrance. Further, whether OCR applies ANSI or the 2010 Standards to the sidewalk, to remedy the running slope concerns identified under either standard, the Division will need to replace sufficient sidewalk to amount to a renovation that will require the full length of the route to meet the 2010 Standards, including the cross-slope requirement.

route between the parking and the accessible entrance. The Division claims that it moved the accessible spaces further from the entrance because, when it began the renovation, the grading variance of the two accessible spaces was not in compliance with the 2010 Standards. The Division asserts that it was permissible to move the accessible spaces farther from the entrance rather than regrade the closer spaces because of the “disproportionality exception” in the Title II regulations. That is, that the Division was not required to regrade the closer spots because the cost of regrading would have exceeded 20 percent of the total cost of the renovation.

The Division is inappropriately applying the disproportionality exception. The exception states that “alterations made to provide an accessible path of travel to the altered area will be deemed disproportionate to the overall alteration when the cost exceeds 20% of the cost of the alteration to the primary function area.” See 28 C.F.R. Section 35.151 (b)(4)(iii). However, a parking lot is not a primary function under the regulations (a “primary function” is defined as a major activity for which the facility is intended. 28 C.F.R. Section 35.151 (b)(4)(i)). Because there is no applicable exception to the requirement that the accessible parking spaces be located on the shortest possible route between the parking and an accessible entrance, the Division is in violation of this provision.

Additionally, OCR found that the five accessible spaces created in 2011 are not in compliance with the 2010 Standards with regard to slope (Section 503.4 (providing that slopes not steeper than 2.08% shall be permitted)). The closest accessible space to the School (accessible space no. 1) has slopes ranging from 2.2% to 5.6%, with the steepest slope running from the center of the space to the curb. Accessible space no. 2 contains slopes ranging from 2.0% to 6.3%, with the steepest part being closest to the curb. Accessible space no. 3 contains slopes ranging from 0.3% to 4.7% with the steepest being from the center of the space toward the curb. Accessible space no. 4 contains slopes ranging from 0.2% to 9.2% with the steepest area near the curb. Accessible space no. 5 is the only space that is in full compliance, with slopes ranging from 0.5% to 0.9%.

OCR concludes that the accessible parking is out of compliance with Title II with respect to both the location of the accessible parking spaces and the slope of the spaces.

Conclusion

On August 15, 2016, the Division agreed to implement the enclosed Resolution Agreement (Agreement), which commits the Division to take specific steps to address the identified areas of non-compliance. The Agreement entered into by the Division is designed to resolve the issues of noncompliance. Under Section 303(b) of OCR’s *Case Processing Manual*, a complaint will be considered resolved and the Division deemed compliant if the Division enters into an agreement that, fully performed, will remedy the identified areas of noncompliance pursuant to Section 303(b). OCR will monitor closely the Division’s implementation of the Agreement to ensure that the commitments made are implemented timely and effectively. OCR may conduct additional visits and may request additional information as necessary to determine whether the Division has fulfilled the terms of the Agreement and is in compliance with Section 504 and Title II with regard to the issues raised. As stated in the Agreement entered into by the Division on August 15, 2016, if the Division fails to implement the Agreement, OCR may initiate administrative enforcement or judicial proceedings, including to enforce the specific

terms and obligations of the Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10) or judicial proceedings, including to enforce the Agreement, OCR shall give the Division written notice of the alleged breach and sixty (60) calendar days to cure the alleged breach.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the Division'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 Division 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, or participates in an OCR proceeding. If this happens, the individual may file a retaliation complaint with OCR.

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.

We appreciate the Division's cooperation in the resolution of this complaint. If you have any questions regarding this letter, please contact Amy S Williams or Sara Clash-Drexler, the OCR attorneys assigned to this complaint, at 202-453-5933 or amy.williams2@ed.gov, or 202-453-5902 or sara.clash-drexler@ed.gov.

Sincerely,

/S/

Alessandro Terenzoni
Supervisory Attorney, Team II
Office for Civil Rights
District of Columbia Office

Enclosure

cc: Pakapon Phinyowattanachip, Esq.