



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

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REGION XV
MICHIGAN
OHIO

June 30, 2015

Jessica K. Philemond, Esq.
Scott, Scriven, & Wahoff
250 East Broad Street
Suite 900
Columbus, Ohio 43215

Re: OCR Docket #15-14-1186

Dear Ms. Philemond:

This letter is to notify you of the disposition of the above-referenced complaint that was received by the U.S. Department of Education's Office for Civil Rights (OCR) on April 21, 2014, against Brookfield Local Schools (the District). The complaint alleged discrimination on the basis of disability. Specifically, the complaint alleged that the District's high school football stadium is inaccessible to individuals with mobility impairments, including that it lacks seating, parking, an accessible route, and restrooms to serve individuals with mobility impairments.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104. Section 504 prohibits discrimination based on disability by recipients of federal financial assistance from the U.S. Department of Education. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities and their instrumentalities. The District is a public entity that receives Federal financial assistance from the U.S. Department of Education. It is, therefore, subject to the requirements of Section 504 and Title II, and OCR had jurisdiction to investigate this complaint.

Based on the complaint allegations, OCR investigated the legal issue of whether qualified persons with disabilities are being denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the District's programs and activities because the District's facilities are inaccessible to and unusable by persons with disabilities in violation of 34 C.F.R. § 104.21, and the Title II implementing regulation at 28 C.F.R. § 35.149.

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To investigate this complaint, OCR interviewed the Complainant, reviewed documents submitted by the District, and conducted an onsite inspection of the stadium property at issue with the District's superintendent on September 5, 2014. Based on careful consideration of the information obtained, OCR has determined that the District's high school football stadium does not meet the accessibility requirements of Section 504 and Title II. However, the District signed the enclosed agreement, which, once implemented, will fully address these allegations in accordance with Section 504 and Title II. A summary of the applicable legal standards, OCR's investigation, the bases for OCR's determinations, and the terms of the agreement are presented below.

Background

The Complainant alleged that the parking and routes into the District's high school stadium were not accessible and there were no facilities to accommodate a person with a mobility impairment. The District's high school football stadium is located in Masury, Ohio, on Addison Road. The District could not provide OCR with documents showing the specific dates when the field, stadium, and relevant structures were constructed. However, the District represented that it constructed the stadium in 1943, which is when the public restrooms were constructed as well. According to the District, it likely added the original seating structure on the home side of the field during the 1979-1980 school year and presumably added the home side press box at that time as well. The District is believed to have added the visitor side seating structure and press box sometime between 1982 and 1985. The District installed paved routes into the stadium circa the mid-1980s and constructed restrooms in the stadium in the 1970s.

The District stated that the football stadium is used exclusively for the District's middle school and high school football games, including three to five middle school football games annually, three to five high school junior varsity games annually, five varsity football games annually, and one "powder puff" football game annually.

Applicable 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 federal financial assistance. 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. 34 C.F.R. § 104.4(b)(1)(i)-(iv); 28 C.F.R. § 35.130(b)(1)(i)-(iv). Pursuant to Section 504, recipient school districts must also provide nonacademic and extracurricular services and activities in such a manner as is necessary

to afford students with disabilities an equal opportunity for participation in such services and activities. 34 C.F.R. § 104.4(b)(2).

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. 34 C.F.R. § 104.21; 28 C.F.R. § 35.149. 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 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. 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. 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 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. 34 C.F.R. § 104.22(b); 28 C.F.R. § 35.150(b). 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 support facilities for a program in an existing facility being viewed in its entirety, such as restrooms, telephones, water fountains, and parking spaces, it should be determined whether sufficient numbers exist that are reasonably convenient, usable in inclement weather, and appropriate to the use of the facility, with the focus being on whether access to the program is unreasonably limited by the lack of accessible support facilities.

The Section 504 regulation also requires a recipient to adopt and implement procedures to ensure that interested persons can obtain information as to the existence and location of services, activities, and facilities in existing construction that are accessible to and usable by persons with disabilities. 34 C.F.R. § 104.22(f).

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).

For an entity covered by Section 504, new construction and alterations after June 3, 1977, but prior to January 18, 1991, must conform to the American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped (ANSI). New construction and alterations between January 18, 1991, and January 26, 1992, must conform to the Uniform Federal Accessibility Standards (UFAS). Compare 45 C.F.R. § 84.23(c) (1977) and 34 C.F.R. § 104.23(c) (1981), with 34 C.F.R. § 104.23(c) (2012). New construction and alterations after January 26, 1992, but prior to March 15, 2012, must conform to UFAS or the 1991 Americans with Disabilities Act (ADA) Standards for Accessible Design (the 1991 ADA Standards) or equivalent standards. However, the Section 504 regulation provides, at 34 C.F.R. § 104.23(c), that departures from particular technical and scoping requirements of UFAS by the use of other methods are permitted where substantially equivalent or greater access to and usability of the building is provided.

The U.S. Department of Justice (DOJ) published revised regulations for Titles II and III of the ADA on September 15, 2010. These regulations adopted revised enforceable accessibility standards called the 2010 ADA Standards for Accessible Design (the 2010 ADA Standards). The 2010 ADA Standards went into effect on March 15, 2012, although entities had the option of using them for construction or alterations commencing September 15, 2010, until their effective date. For new construction and alterations as of March 15, 2012, public entities must comply with the 2010 ADA Standards.

In reviewing program access for an existing facility, the ADA Standards or UFAS may also be used as a guide to understanding whether individuals with disabilities can participate in the program, activity, or service.

With regard to parking, when a covered entity restripes a parking lot it must provide accessible parking spaces as required by the accessible design standards.

With respect to stadium seating, being an integral part of the seating plan means that people using wheelchairs will not be isolated from other spectators or their friends or family. Dispersed seating means that wheelchair seating locations must be dispersed throughout all seating areas and provide a choice of admission prices and views comparable to those for the general public. Integration has to do with both the appearance of normalcy of wheelchair locations in relation to other seating areas, as well as with the availability of opportunities for occupants of wheelchair locations to socially interact with other patrons that are the same or similar to those available to individuals sitting in nearby rows.

The Section 504 regulation, at 34 C.F.R. § 104.22(e), also required that, in the event that structural changes to existing facilities were necessary to meet the program accessibility requirement of 34 C.F.R. § 104.22(a), recipients develop, within six months of the effective date of this part of the regulation (June 3, 1977), a transition plan setting forth the steps necessary to complete such changes. Similarly, the Title II regulation states that, where structural changes in facilities were to be undertaken to comply with the program accessibility obligations under 28 C.F.R. § 35.150, the changes were to be made within three years of January 26, 1992, but as expeditiously as possible. 28 C.F.R. § 35.150(c). Public entities employing 50 or more persons were required to develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes. Public entities were required to provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the development of the transition plan by submitting comments. A copy of the transition plan was required to be made available for public inspection. Transition plans are required to, at a minimum:

- (i) identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities;
- (ii) describe in detail the methods that will be used to make the facilities accessible;
- (iii) specify the schedule for taking the steps necessary to achieve compliance with 28 C.F.R. § 35.150 and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and
- (iv) indicate the official responsible for implementation of the plan.

DOJ's *Title II Technical Assistance Manual* provides further guidance on the self-evaluation and transition plan requirements. The manual states that DOJ expected that many public entities would reexamine all their policies and practices even if they had already completed a self-evaluation under Section 504, as programs and functions may have changed significantly since the Section 504 self-evaluation was completed; actions that were taken to comply with Section 504 may not have been implemented fully or may no longer be effective; and Section 504's coverage has been changed by statutory amendment.

DOJ's manual further instructed that a public entity's self-evaluation identifies and corrects those policies and practices that are inconsistent with Title II's requirements, and that, as part of the self-evaluation, a public entity should:

- 1) identify all of the public entity's programs, activities, and services; and
- 2) review all the policies and practices that govern the administration of the public entity's programs, activities, and services.

This includes, among other things, examining each program to determine whether any physical barriers to access exist and identifying steps that need to be taken to enable these programs to be made accessible when viewed in their entirety.

The Title II regulation, as amended, states that elements that have not been altered in existing facilities on or after March 15, 2012, and that comply with the corresponding technical and scoping specifications for those elements in either the 1991 ADA Standards or UFAS are not required to be modified in order to comply with the requirements set forth in the 2010 ADA Standards. However, this safe harbor does not apply to those elements in existing facilities for which there were neither technical nor scoping specifications in the 1991 ADA Standards.

Summary of OCR’s Investigation and Analysis

The District did not indicate which accessible design standards it had used in providing accessibility at its facilities.

- **Parking and Route into Stadium**

Parking for the football stadium is accessed from Addison Road, and is provided on a grass field and a connected adjacent gravel lot to the east of the stadium facility’s perimeter fence. An area of paved asphalt surface leads to a service gate into the stadium facility, but it is not designated for parking. The only designated accessible parking is by means of painted lines demarcating several parking spaces on the grass and gravel lot surfaces that are not easily traversed because they are not firm, stable, and slip resistant. Since there are no parking space lines otherwise on the property, the parking capacity of the grass and gravel lot is not clear. Based on the size of the property, it is conceivable that the parking area could contain at least 200 passenger vehicles. The uneven grass and gravel surfaces cannot be traversed by a person using a wheelchair, and therefore none of the parking is accessible.

An approximately eight-foot-wide asphalt pathway runs along the stadium perimeter fencing to the ticket booth and entrance gate on the east side entrance to the stadium. The District did not know when the route was originally installed or resurfaced. The pavement is missing in several areas along the path to the ticket booth and the front gate, which render this portion of the route into the stadium inaccessible.

- **Stadium and Route Within Stadium**

The football stadium is in a typical rectilinear shape with facilities and fencing boundaries erected to surround the playing field; the entire facility is surrounded by a perimeter fence. Ground surfaces outside the perimeter fence are a combination of grass, gravel, and asphalt. Outside of the perimeter fence, there is no accessible east-west path to get from one side of the stadium to the other. The District stated that the original field was constructed in 1943 and originally there were no seating structures or stands.

A gravel/grass walkway on the south side of the stadium is original and likely dates to 1943. The District reported that it adds gravel to areas where it gets thin, although it is mostly overgrown with grass during warm months. This walkway abuts the south end zone of the playing field. People are permitted to traverse this walkway before and after a game, but not while the game is in play. This walkway is not accessible to individuals with mobility

impairments because of the uneven surface. The other route to the visitor side of the stadium, along the north end zone of the playing field, is via a similar grass and gravel path that is also inaccessible by wheelchair or to individuals with mobility impairments because of the surface.

There are permanent restrooms and a concession stand on the east side of the playing field near the home side seating, and another concession stand on the west side of the playing field, near the visitor side seating. The route to the structures on both sides of the playing field is mixed, with some areas paved with asphalt, and others consisting of fine gravel. The walkway inside the perimeter fence connecting the ticket booth/entrance gate, concessions, and restrooms on the east side of the playing field is asphalt. The walkway in front of the seating on the east (home) side is gravel. As noted, the walkways on the north and south end of the stadium en route to the visitor side of the playing field from the home side are gravel and grass. The walkways on the visitor side of the playing field connecting the seating stands, portable toilet site, and concession stand are asphalt and gravel. The walkway in front of the seating stands on the visitor side is gravel. As a whole, the walkway within the stadium connecting the various components of the stadium is not accessible to individuals with mobility impairments due primarily to the uneven surfaces throughout and therefore the stadium does not have accessible routes.

- **Restrooms**

The restrooms at the stadium facility are not accessible to individuals with mobility impairments because of concrete block privacy walls that narrow the entrances to both the women's and men's restrooms such that they do not meet the minimum width requirement for accessibility. In addition, the toilet stalls do not have sufficient maneuverability space or necessary grab bars for users with disabilities. The District rents portable toilets for the stadium, however, and indicated to OCR that it intends to ensure that the portable toilets are accessible. At the time of OCR's site visit, the District had placed one portable toilet on the home side of the stadium and one on the visitor side. The portable toilets that OCR observed during its site visit were slightly larger versions of the standard portable toilet, but they were not accessible portable toilets. The District stated that it ordered accessible units, but during OCR's inspection it was noted that the units did not contain the universal symbol of accessibility nor did they meet dimension standards for ADA-compliant units. The District acknowledged that the portable units were not accessible to individuals with disabilities. OCR did not evaluate the accessibility of each component of the permanent and portable restroom units, as OCR finds that the restrooms, in their entirety, are inaccessible based on the lack of accessible routes to and within the units. Thus, access to programs held at the stadium is unreasonably limited due to the lack of accessible restroom facilities.

- **Stadium Seating and Press Boxes**

As reported by the District, the current home side seating structure seats 1,766 persons and the visitor side seating structure seats 800 persons. OCR observed that the home seating structure has ten rows of seats with sections separated by stairs. OCR observed that the visitor side seating structure has ten rows of seats with sections separated by stairs. The press boxes on both the home and visitor sides are at the top of the seating structures and are only accessible by stairs. Accordingly, seating on the home and visitor sides as well as the route to the press boxes

is inaccessible to individuals with mobility impairments. The District reported that the visitor side press box is no longer in use, but it is still intact. The home side press box is 575 square feet and is used by the game clock operator, spotters, coaches from one or both teams, and the announcer.

As noted above, the District constructed the original seating structure on the home side of the field and the home side press box in the 1979-1980 school year, although it renovated the stairs on the route into the home side press box during the 2004-2005 school year. It added the visitor side seating structure and press box sometime between 1982 and 1985. As with the restrooms, OCR did not evaluate the accessibility of each component of the seating structures and press boxes because, in their entirety, they are inaccessible based on the lack of accessible routes to and within the units.

Resolution

Based on the information above, OCR concluded that the District is not meeting the requirements of the Section 504 and Title II regulations in that its high school football stadium is inaccessible to individuals with mobility impairments, including that it lacks accessible seating, accessible parking, an accessible route into and within the stadium to its various components, and accessible restrooms to serve individuals with mobility impairments.

In order to resolve the complaint, the District signed the enclosed resolution agreement on June 26, 2015, which, once implemented, will fully address the complaint allegations in accordance with the requirements of Section 504 and Title II. The agreement requires the District to: 1) either find alternative locations to host its football programs or make modifications to the stadium and its facilities, including its parking facilities, routes, restrooms, seating, and press boxes, in accordance with the ADA Standards, by no later than the beginning of the 2016-2017 football season; 2) include information regarding the location of accessible seating and parking for games in a District newsletter, add the information to the District's website, and include it any articles or posts the District publishes in the local newspaper; and 3) provide training to its stadium and maintenance staff to ensure that accessible routes and facilities are not blocked and kept free of debris, spectators are informed of the revised accessible seating arrangements, and spectators are not permitted to stand in front of and obstruct the view of patrons using wheelchair seating areas.

Conclusion

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. OCR will monitor the District's implementation of the agreement. Should the District fail to fully implement the agreement, OCR will take appropriate action to ensure the District's full compliance with Section 504 and Title II.

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.

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 harmed individual may file a 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.

We appreciate your efforts and those of District staff as we investigated and resolved this complaint. We look forward to receiving the District's first monitoring report by either July 20, 2015, or August 21, 2015, depending on whether the District modifies the stadium or moves its football program. The report should be directed to Ms. Chenelle Love, who will be overseeing the District's implementation of the agreement and can be reached at (216) 522-7626 or Chenelle.Love@ed.gov. If you have any questions about this letter or OCR's resolution of this case, you may contact Donald S. Yarab, Supervisory Attorney/Team Leader, at (216) 522-7634.

Sincerely,

/s/

Meena Morey Chandra
Director

Enclosure