



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

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CLEVELAND, OH 44115

REGION XV
MICHIGAN
OHIO

December 19, 2018

Daniel L. Lautar, Esq.
Pepple & Waggoner, Ltd.
250 E. 5th St., Suite 1565
Cincinnati, OH 45202

Re: OCR Docket #15-18-1314

Dear Mr. Lautar:

This is to notify you of the disposition of the above-referenced complaint that was filed on April 25, 2018, with the U.S. Department of Education, Office for Civil Rights (OCR), against Sandusky City Schools (the District). The complaint alleged discrimination based on disability. Specifically, the complaint alleged that the District's high school baseball field is inaccessible to individuals who have a disability that impairs mobility.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 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 from the Department. 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, 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance from the Department and as a public school district, the District is subject to these laws; thus, OCR had jurisdiction to investigate this complaint.

Based on the complaint allegations, OCR opened an investigation into the legal issues of whether qualified individuals with a disability were excluded from participation in, were denied the benefits of, or were otherwise subjected to discrimination in the District's programs and activities because the District's high school baseball field is inaccessible to or unusable by individuals with disabilities in violation of 34 C.F.R. §§ 104.21-104.23, and 28 C.F.R. §§ 35.149-35.151.

Background

To date, OCR has investigated this complaint by reviewing information provided by the District and the Complainant, and through an on-site visit on September 25, 2018.

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

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XXXXXXXXXXXX XXXXXXXX unable to access a baseball game at the District's field due to a two-foot wide opening in the fencing around the field that turns inward which prevents wheelchair access. XXXXXXXXXXXX that there was no other way XXXXXXXXXXXX to enter the field as all other gates were locked. XXXXXXXXXXXX XXXXXXXXXXXX XXXXXXXXXXXX XXXX XXXXXXXX.

Applicable Legal Standards

The Section 504 implementing regulation at 34 C.F.R. § 104.21 and Title II implementing regulation at 28 C.F.R. § 35.149 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. The Section 504 and Title II regulations contain different standards, based on when a facility was constructed and/or renovated, for determining whether a school's programs, activities, and services are accessible to individuals with disabilities.

The standard of program access applies to any existing facility. 35 C.F.R. § 104.22; 28 C.F.R. § 35.150. Under the Section 504 regulation, existing facilities are those for which construction began before June 3, 1977; under the Title II regulation, existing facilities are those for which construction began before January 26, 1992. *See* 28 C.F.R. § 35.151(a)-(b). Pursuant to the program access standard, educational institutions must 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 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. *See* 34 C.F.R. § 104.22(a); 28 C.F.R. § 35.150(a). In choosing among available methods for meeting the program access requirement for existing facilities, 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. *See* 34 C.F.R. § 104.22(b); 28 C.F.R. § 35.150(b).

However, when all or part of an existing facility is altered in a manner that affects or could affect the usability of the facility or part of the facility, it must, to the maximum extent feasible, be altered in such a manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities. 34 C.F.R. § 104.23(b); 28 C.F.R. § 35.151(b).

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). Under the Section 504 regulation, a facility is considered new construction if construction began (ground was broken) on or after June 3, 1977. Under the Title II regulation, a facility is considered new construction if the construction was commenced after January 26, 1992.

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) (1997) 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 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 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 2010 ADA Standards may also be used as a guide to understanding whether individuals with disabilities can participate in the program, activity, or service.

The Section 504 regulation, at 34 C.F.R. § 104.22(d)-(e), set forth a requirement that recipients comply with the program access standard for existing facilities within 60 days of the effective date of the regulation, except for where structural changes in facilities were necessary, in which case the changes were to be made within three years of the effective date. In the event that structural changes were necessary to meet the program access standard, recipients were required to develop, within six months of the effective date of the regulation, a transition plan setting forth the steps necessary to complete such changes.

Summary of OCR's Investigation to Date

Prior to the completion of OCR's investigation, the District asked to resolve this complaint pursuant to Section 302 of OCR's *Case Processing Manual* (CPM) on September 25, 2018.

The District responded to OCR's data request, through legal counsel, on June 12, 2018. The District informed OCR that the baseball field was constructed between 2013 and 2014. The field was completely surrounded by a pre-existing chain-link fence. However, as of June 1, 2018, the District removed the portion of the chain-link fence in the northwest corner of the field, closest to the backstop and home plate.

On September 25, 2018, OCR did an on-site visit to the field. The field is a standard baseball field with a set of small portable bleachers on each side. The home side is designated as the first base or west side and the visitor side is on the third base or the north side. Each set of bleachers has four rows of seats. The bleachers are placed on either side of the backstop to afford fans an unobstructed view of the field.

OCR interviewed the District's XXXXXXXX XXXXXXXX while on-site. The XXXXXXXX XXX told OCR that the District uses the baseball field only for Varsity and Junior Varsity baseball games and that those games are scheduled in the spring. The City's Recreation Department also leases the field from the District to use in the summer. While the XXXXXXXX XXXXXXXX conceded that the previous configuration of the fences surrounding the field may have made it difficult for a patron in a wheelchair to enter the field, XXXXXXXX stated that the District could have unlocked a gate to allow wheelchair access to the field. XXXXXXXX, however, that the fencing issue is moot because the District does not intent to replace the fence that it has removed on the northwest corner of the field.

OCR observed during its onsite, that the nearest District parking lot to the field, was conveniently located a very short distance from the field across the street (Novelty Street); however, none of the parking spots nearest the field in the northeast corner of that lot are currently handicap accessible.

The evidence gathered to date appears to support the Complainant's allegation that the District's high school baseball field was inaccessible to individuals with a disability that impairs mobility. The photographs xxxxx xxxxxx xxxxxxxxxxxxxxxx showed a fence that would not allow a person in a wheelchair to enter. Further, the District admitted in its Data Response that those fences were in place until they were removed in June 2018.

To complete its investigation, OCR would need to conduct a more thorough site visit to the field to examine the field and the route to the field for accessibility, and conduct interviews with relevant staff (superintendent, school principal, maintenance director), as well as possibly request further documentation to determine the dates of construction and any alteration to the field and route.

Voluntary Resolution Prior to Conclusion of Investigation

Before OCR completed its investigation, the District expressed interest in resolving the complaint pursuant to Section 302 of the *Manual*. The *Manual* provides that a complaint may be resolved before the conclusion of an OCR investigation if a recipient expresses an interest in resolving the complaint. This does not constitute an admission of liability on the part of a recipient such as the District, nor does it constitute a determination by OCR that the District has violated any of the laws that OCR enforces. The provisions of the resolution agreement are to be aligned with the complaint allegations or the information obtained during the investigation and consistent with applicable regulations.

The District has signed the enclosed resolution agreement, which, once implemented, will fully address the information obtained during the investigation in accordance with Section 504 and Title II. The agreement requires the District to make modifications to Bill Deming Field and its supporting facilities by no later than beginning of the 2018-2019 baseball season. The District will make the modifications required by the Agreement in accordance with the 2010 Americans with Disabilities Act (ADA) Standards for Accessible Design; and include information regarding the location of accessible parking for games and accessible seating locations at the field in any publications it produces to promote the athletic teams that use the field, and it will add information regarding the location of accessible parking and seating locations to the athletic department website, and in any article it posts in the local newspaper. In addition, the District must post conspicuous signage about available accessible seating for the field.

In light of this agreement, OCR considers the allegations in the complaint to be resolved, and we are closing our investigation as of the date of this letter. OCR will, however, monitor the District's implementation of the agreement. Should the District fail to fully implement the agreement, OCR will reopen the case and take appropriate action to ensure the District's full compliance with Section 504 and Title II.

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. 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, a 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, OCR 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.

The complainant may file a private suit in federal court whether or not OCR finds a violation.

We appreciate the cooperation of District staff during the resolution of this complaint. We look forward to receiving the District's first monitoring report, which is due by March 31, 2019. Please send the first monitoring report to XXXXXXXX XXXXXXXX

who will be monitoring the District's implementation of this agreement.
XXXXXXXXXX XXXXXXXX may be reached by telephone at (216) XXX-XXXX and
by email at XXXXXXXXXXXX@ed.gov. If you have any questions about this letter, you
may contact me at (216) XXX-XXXX.

Sincerely,

/s/

Donald S. Yarab
Supervisory Attorney/Team Leader

Enclosure