



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

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CLEVELAND, OH 44115

REGION XV  
MICHIGAN  
OHIO

August 7, 2020

**Via E-mail Only to [redacted]**

Michael D. Weaver, Esq.  
Plunkett Cooney  
38505 Woodward Ave., Suite 100  
Bloomfield Hills, Michigan 48304

Re: OCR Docket No. 15-20-1078

Dear Mr. Weaver:

This letter is to notify you of the disposition of the above-referenced complaint filed on November 14, 2019, with the U.S. Department of Education (Department), Office for Civil Rights (OCR), against Bay City School District (the District) alleging that the District discriminated against individuals based on disability. Specifically, the complaint alleged that the District's Western High School's football stadium is inaccessible to individuals with mobility impairments because it fails to provide accessible spectator seating and accessible route(s) from the ticketing booth to the away-side seating.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability by recipients of federal financial assistance. 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 regulation at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. As a recipient of federal financial assistance from the Department and as a public entity, the District is subject to these laws.

Based on the complaint allegation, OCR opened an investigation of the following legal issue: whether qualified persons with disabilities are being denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under any District programs or activities because its facilities are inaccessible to or unusable by persons with disabilities in violation of the Section 504 implementing regulation at 34 C.F.R. §§ 104.21-23 and the Title II implementing regulation at 28 C.F.R. §§ 35.149-151.

During its investigation to date, OCR interviewed the Complainant and reviewed information provided by the Complainant and the District. Prior to the conclusion of OCR's investigation, the District expressed an interest in resolving the allegation under Section 302 of OCR's *Case Processing Manual* (CPM) and OCR determined resolution was appropriate.

### **Summary of Investigation to Date**

The complaint alleged that the District's Western High School's football stadium located in Auburn, Michigan lacks accessible seating and route(s) to individuals using wheelchairs. The District reported that its Western High School educates 1,256 students in grades 9-12 and provides a small football stadium open on both ends. According to the aerial satellite image provided by the District, and also publicly available, the stadium is in a long oval shape, providing an 8-lane running track surrounding the grassy football field. The stadium provides two spectator seating areas (e.g., bleachers) on each side (east and west) and the seating on the west side (home side) appears to provide more seating than the one on the east side (away side). The entrance to the stadium is located in the south where the concession stand and ticketing booth are also located. The aerial satellite image appears to indicate that a wide concrete pathway from the entrance is provided to the home side seating, but it is not clear whether a similar concrete pathway is provided to the away side seating.

The Complainant stated that [redacted] and visited the stadium multiple times to watch games. According to the Complainant, the stadium does not provide any accessible seating designated for wheelchair users nor an accessible route from the ticket booth to the away side seating. The Complainant stated that in [redacted] [redacted] had to place [redacted] wheelchair on the ground in front of the home side seating as there was no assigned seating for wheelchair users. The Complainant stated that [redacted] could not view the game from this area and the stadium does not provide any marked area designated for wheelchair seating. The Complainant also stated that in [redacted] [redacted] decided to watch the game from the away side but it was hard for [redacted] wheelchair to traverse the pathway from the ticket booth to the away side seating as it was a grass path and there were pinecones getting stuck in [redacted] front wheels. [sentence redacted].

The District, through counsel, neither denied nor admitted the alleged inaccessibility of the stadium. The District stated that the construction of all aspects of the stadium was undertaken in the 1970s and the stadium was renovated in 2005 with respect to the spectator seating and routes that are currently available at the stadium. The District also stated that the renovation work on the stadium was planned for 2016 but the project did not proceed.

Regarding the 2005 renovation of the stadium, the District stated that limited documentation could be located and provided several documents that appeared undated and preliminary in nature, such as cost estimates, it is not clear which renovations were completed in 2005.

OCR asked the District to indicate the location of the public entrance(s), spectator seating, ticketing booth, and all routes serving the stadium. In response, the District submitted a diagram titled "Western High School Stadium Renovations" (revised October 12, 2005). OCR's review of this diagram indicated that this is only a preliminary document providing all locations as "proposed" so OCR could not ascertain whether each of these "proposed" structures or items was actually added and/or completed in compliance with Section 504 and Title II. The District also provided a copy of the aerial satellite image depicting the Stadium but the image itself, even with OCR's individual access to and examination of the publicly available satellite image, did not provide sufficient information for OCR to ascertain whether the proposed modifications in the

diagram were actually completed. Furthermore, OCR could not ascertain whether each modification was completed in compliance with the applicable accessibility standards, as the District's documentation did not provide any information as to what accessibility standards the District used in making any of the above-listed modifications. Additionally, the diagram did not provide any information as to total number of all spectator seating provided at the Stadium, location and total number of all spectator seating designated as accessible to individuals with mobility impairments, and location of any route(s) designated as accessible from the ticketing booth to designated accessible seating.

OCR asked the District to indicate whether any alterations or renovations were made to the Stadium to accommodate individuals with mobility impairments since the original construction. In response, the District indicated that individuals with mobility impairment may view the game from the track – on both sides of the field, if necessary; the entrance is open and flat; the path to the track is paved and flat; and there is a ramp to the visitor's stands. The District also provided photographs depicting various locations of the Stadium, such as the entrance, pathway, track, and ramp, but OCR could not determine the condition of these locations as most areas were covered with snow.

OCR asked the District to explain whether the stadium provides spectator seating designated as accessible to individuals with mobility impairments and if so, how such seating can be requested and how each of such seating is designated as accessible. In response, the District directed OCR to the diagram and the satellite aerial image without any further explanation.

### **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)-(iii); 28 C.F.R. § 35.130(b)(1)(i)-(iii).

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, 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 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 the Title II regulation, 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, 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 for recipients to comply.

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). The Title II regulation also requires, at 28 C.F.R. § 35.163, that a public entity ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

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.

The U.S. Department of Justice (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 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.

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 will be considered new construction if construction began (ground was broken) on or after June 3, 1977. Under the Title II regulation, the applicable date for new construction is January 26, 1992. 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.

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. Sections 221 and 802 of the 2010 ADA Standards set forth the requirements for assembly areas, such as stadiums, including the number and location of required wheelchair spaces and companion seats, integration of seating, lines of sight requirements, companion seating requirements, designated aisle seating requirements, and the spatial dimensions of the seating, companion seating, and line-of-sight requirements. Furthermore, Sections 206, 402 and 403 of the 2010 ADA Standards set forth the requirements for accessible routes.

### **Compliance Concerns and Resolution**

Prior to the completion of OCR's investigation, on May 4, 2020, the District asked to resolve this complaint pursuant to Section 302 of OCR's CPM. Under Section 302 of OCR's CPM, allegations under investigation may be resolved at any time when, prior to the issuance of a final investigative determination, the recipient expresses an interest in resolving the allegations and OCR determines that it is appropriate to resolve them because OCR's investigation has identified issues that can be addressed through a resolution agreement.

In this case, the information obtained to date indicates compliance concerns under the Section 504 and Title II regulations. For example, the District's information regarding its 2005 renovation of the Stadium does not indicate that the renovation was completed in compliance with the applicable accessibility standards (UFAS or the 1991 ADA Standards). Also, the information suggests that the current Stadium does not appear to provide integrated wheelchair accessible seating. The District stated that a ramp is provided to the visitor's stands, but the District's information does not indicate that wheelchair accessible seating is provided at the visitor's stands. Rather, the District reported to OCR that individuals with mobility impairment may view the games from the track on both sides of the field, if necessary. However, the Complainant reported to OCR that [redacted] could not view the game from the ground area in front of the home side seating. This suggests that the Stadium may not provide individuals with mobility impairments with meaningful access to the football games played in the Stadium. Additionally, the information obtained to date suggests that the Stadium may not provide an accessible route from the entrance to the away side, as reported by the Complainant. The

Complainant reported to OCR that [redacted] had difficulty in traversing from the ticket booth to the away side seating, as the route is a grass path and there were pinecones getting stuck in [redacted] front wheels. The satellite aerial image also suggests that the Stadium may not provide a concrete pathway that is wide and stable enough for a wheelchair user to safely traverse from the entrance area to the away side seating. Based on the foregoing compliance concerns, OCR determined resolution was appropriate. On August 4, 2020, the District signed the enclosed Resolution Agreement, which, when fully implemented, will resolve the allegation in the complaint. OCR will monitor the implementation of the Resolution Agreement.

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, the individual 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.

OCR looks forward to receiving the District's first monitoring report showing its implementation of Action Steps ##3-4 of the signed Resolution Agreement by September 13, 2020. For questions about implementation of the Agreement, please contact OCR attorneys, Suwan Park or Kiran Mikhael. Ms. Park and Ms. Mikhael will be overseeing the monitoring, Ms. Park can be reached by telephone at (216) 522-4972 or by e-mail at [Suwan.Park@ed.gov](mailto:Suwan.Park@ed.gov) and Ms. Mikhael can be reached by telephone at (216) 422-4971 or by e-mail at [Anne.Mikhael@ed.gov](mailto:Anne.Mikhael@ed.gov). If you have questions about this letter, please contact me by telephone at (216) 522-7634.

Sincerely,

/s/

Donald S. Yarab  
Supervisory Attorney/Team Leader

Enclosure