

Matthew A. Keegan
Superintendent of Schools
Norwell Public Schools
322 Main Street
Norwell, MA 02061

Re: Complaint No. 01-15-1092

Dear Superintendent Keegan:

The U.S. Department of Education's Office for Civil Rights (OCR) is closing its investigation of the above-referenced complaint filed against the Norwell Public Schools (District). The Complainant alleged that the playground at the District's Grace Farrar Elementary School (School 1) is not accessible to persons with mobility impairments. The Complainant also alleged that she raised these issues to the District, but the District failed to respond to her discrimination complaint. As explained below, the District offered to voluntarily resolve the playground accessibility allegation, pursuant to Section 302 of OCR's *Case Processing Manual (CPM)*, and OCR found insufficient evidence that the District failed to provide a prompt and equitable response to the Complainant's grievance.

OCR accepted this complaint for investigation under the jurisdiction of Section 504 of the Rehabilitation Act of 1973 and its implementing regulation found at 34 C.F.R. Part 104 (Section 504), and Title II of the Americans with Disabilities Act of 1990 and its implementing regulation found at 28 C.F.R. Part 35 (Title II), which prohibit discrimination based on disability. The District is subject to the requirements of Section 504 because it is a recipient of Federal financial assistance from the U.S. Department of Education. The District is also subject to the requirements of Title II because it is a public entity operating an elementary and secondary education system.

Based on the information provided, OCR opened for investigation the following legal issues:

1. Whether the District discriminates on the basis of disability, because its facilities are inaccessible to or unusable by persons with mobility impairments, in violation of 34 C.F.R. Sections 104.21, 104.22 and 104.23, and 28 C.F.R. Sections 35.149, 35.150 and 35.151.
2. Whether the District failed to provide a prompt and equitable response to a complaint of disability discrimination, in violation of 34 C.F.R. Section 104.7(b), and 28 C.F.R. Section 35.107(b).

Issue 1 – Playground Accessibility

Accessibility requirements for recipients of Federal financial assistance from the U.S. Department of Education and public entities are governed by the Section 504 implementing regulation at 34 C.F.R. Sections 104.21 through 23, and the Title II implementing regulation at 28 C.F.R. Sections 35.149 through 151, respectively.

The regulation implementing Section 504, at 34 C.F.R. Section 104.21, provides that “[n]o qualified person with a disability shall, because a recipient’s facilities are inaccessible to or unusable by individuals with disabilities, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.” Title II includes a similar requirement for public entities at 28 C.F.R. Section 35.149.

Existing Facilities

Section 504 at 34 C.F.R. Section 104.22 provides that any facility or part of a facility where construction commenced prior to June 3, 1977, is considered an “existing” facility; Title II at 28 C.F.R. Section 35.150 provides that any facility for which construction commenced before January 26, 1992, is considered an “existing” facility.

Section 504 and Title II require that each program provided in an existing facility, when viewed in its entirety, be accessible to and usable by persons with disabilities. In other words, the facility as a whole need not be accessible so long as a particular program offered by the District at an existing facility can be accessed by persons with disabilities. Section 504 and Title II provide that program accessibility may be provided through non-structural means, such as redesign of equipment, relocation of programs to accessible locations, or the assignment of aides, at 34 C.F.R. Section 104.22(b) and 28 C.F.R. Section 35.150(a)(b)(1), respectively. Structural changes are only required when there is no other feasible way to make a program accessible and usable.

New Construction

Section 504 at 34 C.F.R. Section 104.23, and Title II at 28 C.F.R. Section 35.151, require that facilities considered “new construction” be readily accessible to and usable by individuals with disabilities, as determined by whether the facilities meet specific architectural standards.

Under Section 504, facilities built or altered after June 3, 1977, are considered “new construction.” Facilities altered or constructed between June 3, 1977, and January 18, 1991, are accessible to and usable by individuals with disabilities if they comply with the American National Standards Institute (ANSI) Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped, while facilities altered or constructed on or after January 18, 1991, are accessible if they comply with the Uniform Federal Accessibility Standards (UFAS). Title II provides that facilities constructed or altered after January 26, 1992, are considered “new construction.” Under Title II at 28 C.F.R. Section 35.151, such facilities are accessible to and usable by individuals with disabilities if they comply

with UFAS or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG), so long as the covered entity applies one of those standards consistently. Section 504 and Title II allow departures from specified standards (ANSI, UFAS, or ADAAG), but only by methods that provide equivalent or greater access to a facility. For playground accessibility, OCR applies the 2010 ADA Standards for Applicable Design, required for all “new construction” as of March of 2012, to determine compliance with Section 504 and Title II.

During the course of OCR’s investigation, the District took proactive measures to assess playground accessibility by retaining the Institute for Human Centered Design (IHCD) to produce a consultation report regarding the accessibility of the playground at School 1, as well as the only other District playground, located at the William Gould Vinal Elementary School (School 2). School 1’s playground was constructed in 2004 and serves children in kindergarten through eighth grade. The site consists of a playground and sports facilities for older students concentrated at the northwest side of the school, and a small preschool play area located at the northeast side of the school. While visiting the school, OCR found that a chain-link fence encompasses three quarters of the playground site with a blacktop basketball court adjacent to the remaining quarter. The main playground site consists of a large elevated composite play structure, consisting of 10 elevated play components, a transfer system for accessing elevated components, and five ground-level play components. School 2’s main playground was recently removed and an entirely new playground constructed in summer 2015. In addition to the main playground site, there are separate preschool play and swing set areas.

Before OCR had made an investigative compliance determination, the District requested to voluntarily resolve the playground accessibility issue of the complaint pursuant to Section 302 of OCR’s CPM.¹ Therefore, OCR did not proceed to conduct a comprehensive review of the playgrounds’ accessibility, and negotiated the attached Resolution Agreement with the District, in accordance with its case processing procedures. OCR has determined that the Resolution Agreement is aligned with the allegation concerning playground accessibility, and is consistent with applicable law and regulations. Accordingly, OCR is closing its investigation with respect to this issue and will monitor the District’s implementation of the Resolution Agreement.

Issue 2 – Prompt and Equitable Response

The regulation implementing Section 504, at 34 C.F.R Section 104.7(b), requires that a recipient adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by Section 504 and its implementing regulation.² In evaluating whether a district’s response has been prompt and equitable, OCR examines whether it included a prompt, adequate, and impartial investigation of the complaint; notice to the parties of the outcome; and, if discrimination occurred, ending the discrimination, preventing its recurrence, and remedying its effects.

¹ Section 302 of the CPM states: “Allegations and issues under investigation may be resolved at any time when, prior to the conclusion of the investigation, the recipient expresses an interest in resolving the allegations and issues *and* OCR determines that it is appropriate to resolve them with an agreement during the course of an investigation” (emphasis in original).

² The regulation implementing Title II, at 28 C.F.R § 35.107, has a similar requirement.

The Complainant contacted the Principal at School 1 by email on XXXXXXXX 2014, and expressed concern about the accessibility of the playground area and the composite play structure at School 1. The Complainant asserted that the District never responded to her complaint. However, OCR found that the Principal responded to the Complainant on XXXXXXXX 2014, and discussed procuring an accessible surface for the playground. Subsequently, XXXXXXXX 2014, the School contracted a playground construction company to perform a maintenance inspection for the playgrounds at Schools 1 and 2. On January 8, 2015, the Norwell School Committee (Committee) held a meeting to discuss the safety concerns of the playground structures at Schools 1 and 2. The Committee passed a motion to request funds from the Community Preservation Committee (CPC) to renovate the playground at School 2, as a top priority. The Committee requested funding for playground renovations at Schools 1 and 2 from the CPC on January 14, 2015; specifically, the replacement of the ground surfaces and pathways with permanent accessible surfacing at Schools 1 and 2. The District prioritized the replacement of School 2's playground play structure and surface, followed by the School 1's play surface.

The Complainant contacted the District on February 3, 2015, and requested an update regarding playground accessibility. The District responded to the Complainant in an email on February 5, 2015, informing her that the Town Budgeting Committee had only set aside funds for the renovation of the playground at School 2, but planned to request additional funds in fall 2015 to make the playground at School 1 fully accessible. In addition, as explained above, the District contracted with IHCD to receive additional feedback on any other changes required for the playgrounds' accessibility.

Based on the above, OCR determined that the District responded promptly and equitably to the Complainant's complaint. Specifically, in response to the Complainant's concerns, the District conducted prompt and comprehensive reviews of the playgrounds at Schools 1 and 2, and developed an appropriate plan to address any identified accessibility concerns. In addition, OCR determined that the District has taken numerous steps to remedy the concerns identified in the complaint XXX XXX XXX XXX XXXXXXXX XXX X XXXX XXXXXXXXXXXX XXXXXXXXXXXX XX XXX XXXXX XXXXXXXXXXXX XXXXXXXXXXX XXXXXXX XXXXX XXXXXXXXXXXX XXXXXXX XXXXXXXX, XXXXXXXXXXXX XXXX XXXXXXXX XXX XXX XXXXXXXXXXXX XXXXX, XXX XXXXXXXXXXXX XXXXX XXX XXXXXXXX. Therefore, OCR determined that the evidence was insufficient to substantiate that the District failed to respond to the discrimination complaint filed by the Complainant concerning playground accessibility. Accordingly, OCR will take no further action with respect to this issue.

OCR's findings only address the specific allegations and legal issues identified in this complaint and do not pertain to the District's compliance with other aspects of Section 504, Title II, or any other laws enforced by OCR. Additionally, this letter is a letter of findings issued by OCR to address an individual OCR case. Letters of findings contain fact-specific investigative findings and dispositions of individual cases, are not formal statements 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. We also wish to advise you that 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 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 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, it 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.

Thank you for your cooperation in this matter. If you have any questions, please contact Civil Rights Investigator Molly O'Halloran at (617) 289-0058 or Molly.OHalloran@ed.gov, Civil Rights Attorney Kensley Barrett at (617) 289-0072 or Kensley.Barrett@ed.gov, or me at (617) 289-0111.

Sincerely,

Allen L. Kropp
Acting Regional Director

Enclosure

Cc: James M. LaBillois, Executive Director for Instruction