

November 4, 2014

Rev. Dr. Patrick T. Ferry
12800 N Lake Shore Drive
Mequon, Wisconsin 53097-2418

OCR Case No. 05-14-2405

Dear Dr. Ferry:

The U.S. Department of Education's Office for Civil Rights (OCR) has completed its investigation of this complaint against Concordia University (University), which alleged discrimination on the basis of disability. The Complainant alleges that the University is inaccessible to people with mobility impairments in several ways. Specifically, the Complainant contends that the University:

1. does not maintain sufficient accessible parking at its baseball stadium;
2. maintains an inaccessible elevator in the administration hall because its call button is not at regulation height;
3. maintains an inaccessible classroom at room 25 in Barth Hall because there is no accessible seating; and
4. fails to maintain accessible routes at Barth Hall and Luther Hall because tiles in the floor are cracked and snow is not promptly cleared from walkways.

OCR is responsible for enforcing 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 and retaliation by recipients of Federal financial assistance. As a recipient of Federal financial assistance from the Department of Education, the University is subject to the provisions of Section 504.

During its investigation, OCR interviewed the Complainant, conducted an onsite at the University, and reviewed documents from both parties. OCR's determinations are set forth below.

Policies and Procedures

The University prohibits discrimination on the basis of disability.¹ Students with disabilities who require academic adjustments or auxiliary aids must apply for services with Disability Support Services at the Learning Resource Center (LRC). Students are directed to submit documentation from licensed practitioners to the LRC when applying for services. When Disability Support Services approves specific services, LRC issues a Faculty Notification of Accommodations to the relevant faculty members.

¹ <https://www.cuw.edu/Departments/lrc/dss.html>.

Applicable Legal Standards

Accessibility, general: The implementing regulation of Section 504, at 34 C.F.R. § 104.21, states that no qualified person with a disability shall, because a recipient's facilities are inaccessible to or unusable by persons with a disability, be denied the benefits of, excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which the regulation applies.

Accessibility, existing facilities: The Section 504 regulation, at 34 C.F.R. § 104.22(b), requires institutions to operate programs and activities offered in "existing facilities" so that, when viewed in their entirety, they are readily accessible to persons with disabilities. Under Section 504, an "existing facility" is a building, or part thereof, where construction was commenced on or before June 2, 1977. In general, an institution may comply with this requirement, called "program access," through the redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, alteration of existing facilities and construction of new facilities, or any other method that results in making each of its programs and activities accessible to persons with disabilities. The institution is not required to make structural changes to existing facilities where other methods are effective in achieving compliance with this section. In choosing among available methods for providing program access, the institution shall give priority to those methods that offer programs and activities to disabled persons in the most integrated setting appropriate.

Notice: The implementing regulation of Section 504, at 34 C.F.R. § 104.22(f) (under "existing facilities"), also provides that "the recipient shall adopt and implement procedures to ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usable by persons with disabilities."

If a recipient utilizes the relocation option of program accessibility, it must provide reasonable notice to students, parents and others who may have a disability and require relocation of programs, activities or services.

Maintenance of Accessible Facilities: A public entity must maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities. This requirement does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs. This standard is codified in the regulation implementing Title II of the Americans with Disabilities Act (Title II), at 28 C.F.R. § 35.133, and is also generally applicable to recipients of Federal financial assistance under Section 504.²

Accessibility, new construction: The Section 504 regulation, at 34 C.F.R. § 104.23, applies to any facility or part of a facility where construction was commenced on or after June 3, 1977.

² The regulation implementing Title II, at 28 C.F.R. §§ 35.149–52, requires public entities to offer accessible facilities. The regulation implementing Section 504, at 34 C.F.R. §§ 104.21–23, requires recipients of Federal financial assistance, such as the University, to offer accessible facilities. OCR therefore applies the Section 504 standards to the University.

These facilities are termed, "new construction" and the altered portion of existing facilities are termed, "alterations." The regulations require that each such facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by persons with disabilities. In addition, under Section 504, each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after June 3, 1977, in a manner that affects or could affect the usability of the facility or part of the facility shall, 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.

The Section 504 at 34 C.F.R. § 104.23(b) provides that when an existing facility or part thereof is altered in a manner that affects or could affect the usability of the facility or part of the facility, it shall, 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. The Section 504 regulation, at 34 C.F.R. § 104.23(c), designates the *American National Standards Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped* [ANSI 117.1-1961 (1971)(ANSI)] as a minimum standard for determining accessibility for facilities constructed or altered on or after June 3, 1977, and before January 18, 1991, and the Uniform Federal Accessibility Standards (UFAS) for facilities constructed or altered on or after January 18, 1991.

The regulations implementing Title II and the ADAAG standards were amended in September 2010. Title II adopted new accessibility guidelines, 2010 ADA Standards for Accessible Design (ADA Standards), which became effective March 15, 2011. 28 C.F.R. § 35.151(c)(3) now provides, "If physical construction or alterations commence on or after March 15, 2012, then new construction and alterations subject to this section shall comply with the 2010 Standards." OCR Notice of Interpretation, Federal Register, Vol. 77, No. 50, pages 14972-14976 (March 14, 2012) allows use of the ADA Standards under Section 504.

Background

The University is a private religious institution affiliated with the Lutheran Church – Missouri Synod, and is one of 10 colleges and universities located in the United States in the Concordia University system. The University informed OCR that it uses the 2010 ADA Standards.

Factual Summary

OCR requested data from the University on July 18 and the University provided the data on August 4. A subsequent data response was provided on August 26. OCR visited the campus on September 16.

Allegation One: the University does not maintain sufficient accessible parking at its baseball stadium.

Parking lots M, L and K were constructed in 1998, 2002 and 2008, respectively, with no subsequent major alterations. The University informed OCR that it restripes its parking lots

every summer. These parking lots are deemed new construction and are subject to UFAS, but the University has elected the ADA 2010 Standards.

Parking lot M is closest to the baseball stadium and has 28 parking spaces, 14 of which are designated for persons with disabilities during the baseball season. There are two designated parking spaces during the remainder of the year. Additional parking for the baseball stadium is available in lots K and L. The University provides transportation in golf carts between the baseball stadium and lots K and L for individuals with disabilities.

During baseball season, the University posts signs on the fence between the parking lot and the stadium warning of foul balls. Because parking lot M is in an area where foul balls frequently land, the University provides additional parking in lots K and L, around the corner from lot M.

OCR's onsite visit revealed that all of the parking spaces in lot M, including those designated for disabled persons, are perpendicular and adjacent to the accessible route to the two gates of the baseball stadium. Appropriate signage indicates the designated parking spaces. Each designated space is 117" wide. However, the parking lot does not have any access aisles. The number of spaces designated for the disabled is appropriate for the baseball season and off-season.

Lots K and L are not separated by any barrier and combined have 103 parking spaces with two spaces designated for persons with disabilities year-round, including during baseball season. The 2010 Standards, at 208.2, provide that a parking lot with 101 to 150 total spaces must have at least 5 spaces designated for persons with disabilities. At 114" wide, the parking spaces are a sufficient width. The designated spaces are located nearest the route to the University's Student Center, served by both lots. As with lot M, there are no designated access aisles.

In totality, during baseball season, the three lots have a sufficient number of parking spaces designated for persons with disabilities. However, during the off-season, lots K and L have an insufficient number of spaces designated for persons with disabilities. Additionally, lots K, L, and M lack access aisles as required by ADA 2010 Standard 502.3. The University is not in compliance with Section 504 regulation, at 34 C.F.R. § 104.23(b), as the identified parking lots do not meet the applicable accessibility standard and therefore are not readily accessible to and usable by persons with disabilities.

Allegation Two: the University maintains an inaccessible elevator in the administration hall because its call button is not at regulation height;

The University's buildings are connected by above-ground and underground walkways. The elevator located in the Rincker building is directly connected to Luther (the administration building) and Barth. The University library and the Disability Support Services (DSS) office are located on the second floor of the Rincker Building. The elevator serves Barth and Rincker.

Barth and Rincker were constructed in 1961-62 and have had no major renovations since that time. Therefore, they are existing facilities under Section 504.

In its response to OCR's data request, the University reported that the call buttons for the elevator are 60 inches above the floor; OCR confirmed this during its September 2014 onsite

visit. The 2010 ADA Standards give a maximum call button height of 48 inches. An exception for existing facilities such as Barth and Rincker allows for a maximum height of 54 inches. Under Section 504 a recipient is not required to make structural changes in existing facilities where other methods are effective in achieving methods that result in making its program or activity accessible to disabled persons. Recipients should give priority to those methods that serve disabled persons in the most integrated setting appropriate. However, the University did not indicate that if had any methods that would make the elevator its program or activity accessible to disabled persons.

Notice: The University expressed a willingness to move programs, services and activities from inaccessible locations to accessible locations. However, the University does not provide notice that it will move programs, services or activities upon request.

The elevator call buttons are too high and the University does not presently provide effective access to the library or the Disability Support Services (DSS) office, which are located on upper floors of the Rincker Building. As such, the University is not in compliance with the Section 504 regulation, at 34 C.F.R. § 104.22(b), because the programs in the upper floors of the Rincker Building, when viewed in their entirety, are not readily accessible to persons with disabilities. In addition, the University fails to provide appropriate notice as required by the Section 504 regulation, at 34 C.F.R. § 104.22(f) as to the existence and location of services, activities, and facilities that are accessible to and usable by persons with disabilities or its willingness to move programs and activities to provide access.

Allegation Three: the University maintains an inaccessible classroom at room 25 in Barth Hall because there is no accessible seating.

As stated above, Barth Hall was constructed in 1961-62 and is therefore an existing facility under Section 504. Classroom 025 is located on the lower level of Barth Hall.

In response to OCR's data request, the University provided pictures of classroom 025, showing a desk in the level area in front of the classroom, which is a tiered room with desks behind the level area. The University informed OCR that the desk at the front of the classroom is movable and that a student with a disability could sit at the desk in the front of the classroom or request other accessible seating. OCR's onsite confirmed that there was sufficient room at the front of classroom 025 for a person in a wheelchair to maneuver and sit at a desk. University officials also confirmed that another desk would be provided upon request. Based on the information provided and confirmed by the onsite, OCR finds that the University is in compliance with Section 504 with respect to classroom 025.

Allegation Four: The University fails to maintain accessible routes a Barth Hall and Luther Hall because tiles in the floor are cracked and snow is not promptly cleared from walkways.

Floor tiles

Although the Complainant contends that floor tiles were cracked, she was unable to inform OCR how often she had seen cracked tiles, when she had seen them, or how long the University took to repair them. In addition, the Complainant did not assert that the entire walkways were impassable due to broken or missing tiles.

The University informed OCR that the tiles in the floor of Barth and Luther Hall were “generally free from cracks or major defects.” The University also provided documentation for the period June 1, 2013 – July 23, 2014, showing that on six dates the University repaired and replaced damaged floor tiles during the period. The University informed OCR that its maintenance crew tours the campus every day to determine whether maintenance is required; crew members are responsible for filing requests for repair or replacement as needed. Also, students are able to report maintenance issues through the University’s student portal. During its onsite visit, OCR observed that the tiled floor in question was in good repair, and did not observe any cracked or broken tiles.

OCR finds the floor tile breakage to be isolated and temporary, causing minimal interruptions to the walkways in the campus buildings. The evidence indicates that the University maintains the walkways in Barth and Luther Halls in good working order, and that while some ongoing maintenance is necessary, as in any building, the University performs it promptly upon learning of damage to a tile. There is no evidence to indicate that cracked or damaged tiles deny or limit any student’s ability to access the University’s educational programs.

Snow Removal

The Complainant asserted that the University fails to remove snow promptly from walkways, specifically the route to the campus bust stop near the University’s Sports and Fitness Center, which is near parking lot L and the Student Center. The Complainant was unable to provide a specific date on which the University failed to quickly remove the snow.

In its data response to OCR, the University provided 57 pages of snow removal records for the 2013-2014 academic year. The records show that the University removed snow (plowing, shoveling, and blowing) from doorways, sidewalks and parking lots, and salted these areas consistently throughout the year, including parking lots K and L. During the onsite, the University informed OCR that the bus stop is in parking lot K near the ramp from the Student Center adjacent to parking lot K. The ramp is heated, and contains a heat sensor, which melts snow and ice upon contact with the ramp. However, subsequently, the University informed OCR that, although the bus turns around near the ramp from the Student Center, the bus stop is around the corner next to the entrance of the student fitness center. The entrance is covered by roof and is level, enabling students to wait for the bus in an area unobstructed by snow.

The evidence shows that the University made sufficient and reasonable efforts to clear snow from routes around the campus, including with a heated ramp in the area about which the Complainant expresses concern. While it is not possible to keep a campus free of snow in Wisconsin during the winter, the University’s 57 pages of snow-removal records establish that it diligently removes snow across the campus and salts the grounds to prevent slipping and falling.

Based on the information above, there is therefore insufficient evidence to conclude that the University discriminated as alleged in allegation four.

Conclusion

Regarding allegations Three and Four, OCR has determined that there is insufficient evidence that the University discriminated against persons with disabilities as alleged.

Regarding allegations One and Two, OCR finds that parking lots K.L and M, are not readily accessible to and usable by persons with disabilities. OCR also finds that the elevator with respect to its call button is also not readily accessible to and usable by persons with disabilities, and that the University was unable to identify to OCR any general notice of the right to request movement of programs, services, or activities to accessible locations.

The University has provided the enclosed Agreement to OCR. In developing the proposed agreement, OCR has ensured that it is aligned with the complaint allegations, and is consistent with the applicable regulations and legal standards. OCR will monitor the University's implementation of the agreement.

This concludes OCR's investigation of the complaint and should not be interpreted to address the University's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. The Complainant may file a private suit in federal court whether or not OCR finds a violation.

The 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 University 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, 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 privacy.

We wish to thank you and your staff for the cooperation and courtesy extended to OCR during our investigation. In particular, we wish to thank Mr. Scott LeBlanc, Attorney at Law. If you

Page 8 of 8 – Rev. Dr. Patrick T. Perry

have any questions regarding this letter, please contact me at (312) 730-1610 or by email at amy.truelove@ed.gov.

Sincerely,

Dawn R. Matthias
Team Leader

Cc: Scott LeBlanc

Enclosure