



U.S. Department of Justice

Office of Justice Programs

Office for Civil Rights

Washington, D.C. 20531

February 9, 2021

VIA CERTIFIED MAIL

Raymond W. Dorian, Assistant Counsel
Pennsylvania Department of Corrections
Office of the Chief Counsel
1920 Technology Parkway
Mechanicsburg, PA 17050

Re: *Notice of Preliminary Finding*
[REDACTED] v. Pa. Dep't of Corr. (20-OCR-0056)

Dear Mr. Dorian:

Thank you for the information that you submitted to the Office for Civil Rights (OCR), Office of Justice Programs (OJP), U.S. Department of Justice (DOJ) in connection with the OCR's investigation into the above-referenced administrative Complaint against the Pennsylvania Department of Corrections (DOC). According to our records, the DOC receives federal financial assistance from the OJP's Bureau of Justice Assistance and is subject to the OCR's enforcement authority. The Complaint alleged that the DOC is discriminating against [REDACTED] (Complainant), based on disability.

The OCR has carefully reviewed the information provided by both the DOC and the Complainant during the course of our investigation. While the OCR concludes that there is insufficient evidence to demonstrate discrimination in regard to the majority of the Complainant's allegations, the OCR has made a preliminary finding that the DOC is failing to provide the Complainant with a fully accessible shower in violation of Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12132, Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and the DOJ implementing regulations at 28 C.F.R. pt. 35; pt. 42, subpt. G. Our findings are set forth below for your review.

I. Factual Background

The Complainant resides at the State Correctional Institution [REDACTED] administered by the DOC. The Complainant uses a wheelchair to ambulate and has a limited range of motion [REDACTED] injuries that he incurred from an assault. The Complainant also has high blood pressure.

The Complainant raised a number of allegations in the Complaint to the OCR. The OCR initially notified the DOC of the Complainant's allegations on April 30, 2020, and requested that it provide a position statement and some specific information. The OCR sent the DOC requests for supplemental information on August 20, October 5, and December 16, 2020. The DOC submitted its position statement on June 5, 2020, and responded to the OCR's supplemental inquiries on August 29, 2020, October 26, 2020, and January 12, 2021. The following is a summary of the Complainant's allegations and the DOC's response.

A. Failure to Provide a Fully Accessible Shower

The Complainant alleged that since arriving at [REDACTED], he has not had access to a fully accessible shower. At the time the Complainant initially submitted his Complaint to the OCR, he alleged that the seat in the DOC-designated accessible shower, which is affixed to the wall, was too high for him to safely transfer to. The Complainant had requested that the DOC provide him with a chair with rubber feet that will not slide around in the shower and that adjusts to the appropriate height for transfer. Instead, the DOC provided the Complainant with a regular chair that slides in the shower, and the Complainant fell off the chair all three times he attempted to use it. Additionally, there is a ridge at the entrance of the shower which makes it very difficult for the Complainant to roll his wheelchair in and out of the shower without the assistance of another inmate. The Complainant noted because of [REDACTED] injury he can only use one [REDACTED] to maneuver his wheelchair, making it especially difficult to get in and out of the shower. The Complainant said the DOC sometimes provides him with an inmate pusher to assist him in accessing the shower, but not always.

In its responses, the DOC said that in June 2020, it adjusted the height of the shower seat, and that it is now seventeen inches from the floor. The DOC said that prior to this, it ordered and received a new shower chair, but since the DOC adjusted the height of the seat the DOC physician determined that it was not necessary and would be more of a safety risk than benefit.

The DOC also said that the threshold to the shower is approximately 1.5 inches. The DOC indicated that staff have observed the Complainant wheel himself in and out of the shower without difficulty and that he has never requested assistance from staff, and that he has a "handicap assistant" available to him. The DOC also clarified that the shower that the Complainant uses is designed to be a transfer type shower.¹

B. Failure to Provide a Functioning Wheelchair

In his initial Complaint to the OCR, the Complainant alleged that his wheelchair was broken and very wobbly, as both front wheels and the brake needed repair. The Complainant said that he submitted several requests to the DOC to have his wheelchair repaired, to no avail.

In the DOC's responses, it provided documentation demonstrating that it ordered a new wheelchair and issued it to the Complainant on May 22, 2020.

¹ A transfer type shower is a shower designed so an individual in a wheelchair can transfer onto a mounted shower seat from standing or from the wheelchair.

C. Failure to Provide a Medical Transport

The Complainant alleged that on [REDACTED], correctional officers attempted to transport him to an external medical appointment, but that the officers told him [REDACTED] does not have a wheelchair-accessible van and that the Complainant would have to stand and walk into a regular vehicle. The Complainant explained to the officers that he is unable to do so, and as a result, he was not able to attend the scheduled medical appointment.

In response, the DOC stated [REDACTED] has wheelchair accessible vans that the DOC uses to transport inmates who cannot walk. According to the DOC, DOC staff cannot confirm nor deny if a wheelchair accessible van was available on [REDACTED]. The DOC said that pursuant to its normal procedures, if security staff is unable to transport an inmate because of the lack of availability of the accessible van, staff contacts the medical unit prior to the appointment to request that the appointment be rescheduled. The DOC said that there is no documentation in the Complainant's medical record that staff notified the medical unit that a wheelchair accessible van was not available for [REDACTED]. The DOC provided the OCR with a release form that the Complainant signed on [REDACTED], which indicates that the Complainant refused an outside medical appointment with the stated reason "can't walk."

D. Failure to Provide Necessary Medication

In his initial Complaint, the Complainant indicated that when he previously resided at [REDACTED], a DOC physician prescribed him Motrin to alleviate the pain [REDACTED]. The Complainant alleged that since he arrived at [REDACTED] and as of [REDACTED], the DOC physician at [REDACTED] refused to renew his prescription for Motrin. As a result of not receiving Motrin, the Complainant has significant, chronic pain [REDACTED] and experiences great difficulty operating his wheelchair.

The Complainant subsequently informed the OCR that the physician at [REDACTED] eventually renewed his prescription for Motrin and began providing him with Motrin again on [REDACTED]. Based on all of the information provided by the Complainant and the DOC, it appears that the DOC stopped providing him with Motrin sometime over the past few months and started providing him with Tylenol instead. The DOC provided the OCR with medical documentation indicating that on [REDACTED], a DOC physician saw the Complainant to evaluate a complaint of neck pain, and that the Complainant expressed concern regarding the amount of Tylenol he was taking and the effect it could have on his liver. The DOC physician then discontinued the prescription for Tylenol and prescribed Excedrin as needed. The DOC told the OCR that as of [REDACTED], the Complainant has not requested to receive any Excedrin.

At the time of his initial Complaint, the Complainant indicated that he had a prescription for [REDACTED] to treat his [REDACTED]. The Complainant subsequently indicated that over the past few months the DOC began providing him with [REDACTED] instead of [REDACTED], and that he feels it is not as effective [REDACTED]. The Complainant said that the DOC provides him with [REDACTED] each time, which he takes twice a day, and the Complainant must submit a refill request by submitting a sick call request

form and attaching the relevant bar code. The Complainant alleged that he routinely needs to submit four or five refill requests before the DOC refills his prescription for [REDACTED], and that there is often a lapse of one month or so before the Complainant receives his medication. For example, the Complainant told the OCR that he ran out of [REDACTED], and did not receive a refill of [REDACTED] until [REDACTED]. When there is a lapse in receiving his medication, the Complainant's [REDACTED] and [REDACTED], causing his legs and feet to become so swollen that he is unable to put on his shower shoes. Additionally, during the Complainant's most recent lapse of medication in [REDACTED], several red spots appeared on one of his feet.

In response to these allegations, the DOC said that on [REDACTED], the DOC began prescribing the Complainant with [REDACTED] because the Complainant was complaining of swelling and it is a more powerful [REDACTED]. The DOC said that there is no medical reason why [REDACTED] would not work as well as [REDACTED] as it is more potent. In the OCR's December 16, 2020, request for information to the DOC, the OCR requested that the DOC respond to the Complainant's allegation that he routinely needs to submit several refill requests for [REDACTED] and to discuss what steps the DOC will take to ensure that his medication is refilled on a timely basis. In its January 12, 2021, response, the DOC did not address the Complainant's allegations regarding past lapses in medication. However, the DOC indicated that to ensure that the Complainant receives and is compliant with taking [REDACTED], the DOC physician has changed his medication from "keep on person" to "direct observation therapy," whereby nurses deliver his medication to him, record that it is administered, and monitor that he is taking his medication as prescribed.

E. Failure to Provide a Proper Mattress

Lastly, the Complainant alleged that despite his requests, the DOC has failed to provide him with a proper mattress at [REDACTED] and has only provided him with a bunch of rags to sleep on. The Complainant has submitted sick call requests to have his mattress replaced, to no avail. The Complainant states that the lack of a proper mattress exacerbates his back injuries, and he is in a significant amount of pain when he attempts to sleep.

In response, the DOC said that it has issued the Complainant a standard issue mattress. The DOC noted the Complainant has never requested an accommodation from the DOC pursuant to DOC policy DC-ADM-006² regarding a mattress or any of the other matters discussed in the Complaint.

II. Legal Analysis

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of a disability, be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity." 42 U.S.C. § 12132. Section 504 contains a similar provision prohibiting discrimination by recipients of federal funding. *See* 29 U.S.C. § 794. An allegation

² DOC Policy DC-ADM 006, *Reasonable Accommodations for Inmates with Disabilities* (effective Jan. 23, 2009), indicates that if an inmate is seeking an accommodation for a disability, the inmate shall submit to the facility's Corrections Health Care Administrator a request using the Inmate Disability Accommodation Request Form.

that an agency failed to provide inadequate medical treatment generally does not constitute a claim under the ADA or Section 504, unless the failure resulted in an individual being unable to participate in an agency's services, programs, or activities. *Bryant v. Madigan*, 84 F.3d 246, 249 (7th Cir. 1996).

To comply with the ADA and Section 504, an agency shall make reasonable modifications in policies, practices, or procedures to ensure that it is not excluding a qualified individual with a disability from its services, programs, or activities. 28 C.F.R. § 35.130(b)(7)(i). While the ADA and Section 504 require that an agency provide reasonable accommodations to allow an individual with a disability to access its programs, they do not entitle an individual to the specific accommodations that the individual desires.

The OCR has carefully reviewed the information provided by the DOC and the Complainant, and has determined that for the majority of the Complainant's allegations, the Complainant's concerns have been addressed, or that there is insufficient evidence that the DOC is not reasonably accommodating the Complainant's disabilities. As for the Complainant's allegation that the DOC has failed to repair his wheelchair, the evidence demonstrates that on [REDACTED] [REDACTED] DOC provided the Complainant with a new wheelchair. Regarding his allegation that the DOC failed to have a wheelchair accessible van available for transport [REDACTED] while the DOC was unable to confirm whether a wheelchair accessible van was available [REDACTED], the DOC has indicated that it does have an accessible van at [REDACTED], and that staff are supposed to reschedule external appointments if the van is not available when needed. Based on this single incident, there is insufficient evidence that the DOC is failing to accommodate the Complainant. The DOC should ensure that in the future, should the Complainant need to be transported to an external appointment, a wheelchair accessible van is utilized or the appointment is rescheduled for when a van is available.

As for the Complainant's allegation that he only has a bunch of rags to sleep on, the DOC asserted that it has provided the Complainant with a standard issue mattress, and that the Complainant has not submitted an accommodation request for a special mattress. The evidence is insufficient to demonstrate that this is not the case. The OCR will inform the Complainant that should he desire a special mattress as an accommodation for a disability, he should submit an Inmate Disability Accommodation Request Form pursuant to DOC policy DC-ADM-006. The DOC should respond to any such request without undue delay.

In regard to the Complainant's allegations regarding his medication, the evidence demonstrates that the DOC has been prescribing the Complainant some type of pain medication at [REDACTED] since [REDACTED] and that it is currently prescribing the Complainant with Excedrin as needed. The DOC should continue to ensure that the Complainant is prescribed and receives pain medication as is deemed medically necessary and to allow him to participate in the DOC's programs, services, and activities. As for the Complainant's allegations regarding [REDACTED] there is insufficient evidence [REDACTED] is not as effective, if not more effective, than [REDACTED]. While the DOC did not address the Complainant's allegations that in the past he frequently has had to submit multiple requests for a refill of [REDACTED], the DOC indicated that it is taking steps to change the way his medication is administered to ensure he is receiving it and is compliant. The DOC should continue to take steps to ensure that the

Complainant receives [REDACTED] or any other prescribed diuretic in a timely manner and that he is not experiencing lapses in medication.

Lastly, the Complainant alleged that the designated accessible shower at [REDACTED] is not fully accessible to him, as the shower seat and threshold are too high. According to the DOJ's implementing regulations, all state or local government facilities newly constructed or altered on or after March 15, 2012, must comply with the DOJ's 2010 Standards for Accessible Design (2010 Standards).³ 28 C.F.R. § 35.151(c)(3). Facilities constructed prior to this date, and elements in such facilities that have not been altered on or after March 15, 2012, shall comply with the DOJ's 1991 ADA Standards for Accessible Design (1991 Standards) or the Uniform Federal Accessibility Standards (UFAS).⁴ 28 C.F.R. § 35.150(b)(2). Facilities that were constructed or altered before March 15, 2012 and that do not comply with the 1991 Standards or with the UFAS shall, on or after March 15, 2012, be made accessible in accordance with the 2010 Standards. 28 C.F.R. § 35.151(c)(5)(ii). A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with the ADA. 28 C.F.R. § 35.150(b)(1).

The DOC told the OCR that [REDACTED] was constructed in 1993, and that the only alteration to the shower that it can verify is the alteration of the height of the shower chair in June 2020. Accordingly, based on this alteration it appears that the 2010 Standards apply. Nonetheless, as discussed below, the requirements for the height of the shower seat and the height of the threshold to the shower are the same under the 2010 Standards, the 1991 Standards, and the UFAS.

In regard to the height of a shower seat, Section 610.3 of the 2010 Standards, Section 4.21.3 of the 1991 Standards, and Section 4.21.3 of the UFAS all state that a seat in a transfer type shower, or a shower that is thirty-six inches by thirty-six inches, shall be seventeen to nineteen inches above the floor.⁵

As for any thresholds to a shower, Section 608.7 of the 2010 Standards states that any threshold to a transfer type shower shall be ½ inch high maximum, and it shall be beveled, rounded, or vertical. As an exception, Section 608.7 indicates that a 2-inch high threshold to a transfer type shower shall be permitted in an existing facility where the provision of a ½ inch high threshold would disturb the structural reinforcement of the floor slab. Section 4.21.7 of the 1991 Standards and Section 4.21.7 of the UFAS also state that curbs in thirty-six inches by thirty-six inches shower stalls shall be no higher than ½ inch.

³ The 2010 Standards are available at <https://www.ada.gov/regs2010/2010ADASTandards/2010ADASTandards.htm>.

⁴ The 1991 Standards are currently located at 28 C.F.R. pt. 36, app. D, and are also available at <https://www.ada.gov/1991standards/1991standards-archive.html>. The UFAS are contained at Appendix A to 41 C.F.R. pt. 101-19.6 (July 1, 2002 ed.), and at <https://www.access-board.gov/aba/ufas.html>.

⁵ The DOC told the OCR that the shower stall that the Complainant uses is thirty-six inches long by forty-six inches wide.

Following receipt of the Complaint, the DOC lowered the shower seat to seventeen inches above the floor, and it is now compliant with the 2010 Standards. Therefore, the DOC has come into compliance with the ADA and Section 504 in regard to the height of the shower seat.

However, the information provided by the DOC demonstrates that the threshold of the shower does not comply with the 2010 Standards. The DOC told the OCR that the threshold is approximately 1.5 inches high, which exceeds the maximum height of ½ inch high contained in the 2010 Standards. While the DOC asserted that staff have observed the Complainant wheel himself in and out of the shower without difficulty, the DOC has a legal obligation to comply with the DOJ's ADA regulations and the relevant accessibility standards.

Accordingly, this Notice of Preliminary Finding provides the DOC with notice that the OCR has concluded that the DOC is currently in noncompliance with the ADA and Section 504 in regard to the height of the threshold to the accessible shower. *See* 28 C.F.R. §§ 35.172(c), 42.107(d)(1). In accordance with 28 C.F.R. §§ 35.172(c) and 42.107(d)(1), the OCR is providing the DOC with recommendations for informally resolving this matter. The OCR recommends that the DOC take one of the following actions: (1) provide a written plan and estimated timeframe for making physical alternations to the threshold of the designated accessible shower currently used by the Complainant so that it does not exceed ½ inch in height; or (2) provide a plan for ensuring that the Complainant has access to another shower in [REDACTED] that is fully accessible to his wheelchair in accordance with the ADA implementing regulations and the 2010 Standards.

Prior to the issuance of a final finding of noncompliance, which may lead to suspension, termination, or repayment of funding, the OCR is providing the DOC with the opportunity to enter into voluntary compliance negotiations with the OCR to informally resolve this matter. *See* 42 C.F.R. §§ 35.172(c), 42.107(d)(1). **The DOC has fourteen days from the date of this letter to send its written request to enter into compliance negotiations.** Please direct any written request to enter into compliance negotiations to OCR Attorney [REDACTED] at [REDACTED].

If compliance negotiations are successful, the OCR and the DOC will enter into a binding agreement that will set forth the terms of the voluntary compliance agreement and the required time frame for the DOC to complete the required actions. If voluntary compliance can not be reached, the OCR will proceed with enforcement action in accordance with 28 C.F.R. §42.108.

Raymond W. Dorian, Assistant Counsel

February 9, 2021

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If you have any questions regarding this matter, please feel free to contact [REDACTED]

Sincerely,



Recoverable Signature

X *Michael L. Alston*

Michael L. Alston

Director

Signed by: Michael Alston