**UNITED STATES DEPARTMENT OF EDUCATION**
**OFFICE FOR CIVIL RIGHTS, REGION I**
**5 POST OFFICE SQUARE, 8th FLOOR**
**BOSTON, MASSACHUSETTS 02109-3921**

January 28, 2020

Beth Regulbuto
Superintendent of Schools
Southern Berkshire Regional School District
491 Berkshire School Road
Sheffield, MA 01257
Via Email: bregulbuto@sbrsd.org

Re: Complaint No. 01-16-1335
Southern Berkshire Regional School District

Dear Superintendent Regulbuto:

This letter is to advise you of the outcome of the complaint that the U.S. Department of Education (Department), Office for Civil Rights (OCR) received against the Southern Berkshire Regional School District (the District). The complaint alleged that the playgrounds at the District's Undermountain Elementary School (Undermountain), New Marlborough Central School (New Marlborough), and South Egremont School (South Egremont) are not accessible to persons with mobility impairments. As explained further below, before OCR completed its investigation, the District expressed a willingness to resolve the complaint by taking the steps set out in the enclosed Resolution Agreement.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. Section 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in any program or activity receiving federal financial assistance from the Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. Section 12131 *et seq*., and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public education systems and institutions, regardless of whether they receive federal financial assistance from the Department. 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, and it is also subject to the requirements of Title II because it is a public entity operating an elementary and secondary education system.

Because OCR determined that it has jurisdiction and that the complaint was timely filed, OCR opened the following legal issues for investigation:

- Whether the District discriminates on the basis of disability, because its playground 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.

Background

The District is located in western Massachusetts and serves the towns of Alford, Egremont, New Marlborough, Monterey, and Sheffield. The playgrounds at Undermountain and New Marlborough were installed in 2013 and 1998, respectively. The District did not have any information about the installation of the playground at South Egremont.

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)-(iv); 28 C.F.R. § 35.130(b)(1)(i)-(iv). Pursuant to Section 504, recipient school districts must also provide nonacademic and extracurricular services and activities in such a manner as is necessary to afford students with disabilities an equal opportunity for participation in such services and activities. 34 C.F.R. § 104.37(a)(1).

The Section 504 implementing regulation 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 disabilities, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which Section 504 applies. The Title II regulation at 28 C.F.R. § 35.149, contains a similar provision for public entities.

The regulations contain standards for determining whether a recipient's programs, activities, and services are readily accessible to and usable by individuals with disabilities, depending on whether the facilities are determined to be existing facilities, new construction, or altered construction. The applicable standard depends on the date of construction or alteration of the facility and the nature of any alternation.

***Existing Facilities***

Under the Section 504 regulation, existing facilities are those for which construction began before June 3, 1977. Under Title II, existing facilities are those for which construction began on or before January 26, 1992. While these dates remain the primary benchmarks for accessibility standards, Appendix A to the Title II regulations clarifies that the classification of a facility under the ADA is "neither static nor mutually exclusive." 28 C.F.R. part 35, Appendix A. In general, a newly constructed facility is subject to the accessibility standards in effect at the time

of construction, and as a facility undergoes subsequent alteration, those alterations will be subject to the accessibility standards in effect at that time. *Id*.

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 compliance standard is referred to as "program access." This standard does not 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).

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, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternative accessible sites, 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 may comply with this standard through physical alteration of existing facilities, but a recipient is not required to make structural changes to the facility itself when other methods are effective in achieving compliance. 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, an 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 in order for recipients to comply.

In reviewing program access for an existing facility, the accessible design standards referenced in the Section 504 and Title II regulations may also be used as a guide to understand whether individuals with disabilities can participate in the program, activity, or service. A covered public entity must make its programs and activities accessible unless it can demonstrate that required modifications would result in a fundamental alteration of the program or in undue financial and administrative burdens. 28 C.F.R. § 35.150(a)(3). The concept of program accessibility serves as a guideline in evaluating existing facilities and in formulating structural and nonstructural solutions to any physical access problems found in these facilities.

***New construction and alterations***

Under the Section 504 regulation, a facility will be considered new construction if construction began on or after June 3, 1977. Under the Title II regulation, the applicable date for new construction is January 26, 1992. 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).

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).

Determining which standards apply to a given new construction or alteration depends upon the date the new construction or alterations took place. For an entity covered by Section 504 and Title II, new construction and alterations begun 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 begun 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) (2010). New construction and alterations after January 26, 1992, but prior to March 15, 2012, must conform to either UFAS or the 1991 Americans with Disabilities Act Standards for Accessible Design (the 1991 ADA Standards).

The U.S. Department of Justice (DOJ) published revised regulations for Titles II and III of the ADA on September 15, 2010. These regulations called the 2010 ADA Standards for Accessible Design (the 2010 ADA Standards), adopted revised enforceable accessibility standards, as relevant here, they also included specific technical and scoping regulations for various recreational facilities, including play areas. 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.

The Title II regulation, as amended, states that elements that have not been altered in existing facilities on or after March 15, 2012, and that comply with the corresponding technical and scoping specifications for those elements in either the 1991 ADA Standards or UFAS are not required to be modified in order to comply with the requirements set forth in the 2010 ADA Standards. However, this safe harbor does not apply to those elements in existing facilities for which there were neither technical nor scoping specifications in the 1991 ADA Standards. These include, among other elements, play areas. 28 C.F.R. § 35.150(b)(2).

Therefore, there is no safe harbor for existing playgrounds constructed prior to the effective date of the 2010 ADA standards, and playgrounds must comply with the technical and scoping requirements set for the 2010 ADA standards. However, the Department of Justice has clarified that, for existing play areas, while it is "preferable for public entities to try to achieve compliance with the design standards established in the 2010 Standards," if such compliance is "not possible to achieve in an existing setting, the requirements for program accessibility provide enough flexibility to permit the covered entity to pursue alternative approaches to provide accessibility." 28 C.F.R. part 35, Appendix A. Accordingly, in the context of program accessibility, the regulations recognize that achieving full compliance may not be possible or required where it "would result in a fundamental alteration in the nature of the service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. 35.150(a)(3). A public entity that asserts that complying with the 2010 Standards for play areas is not possible bears the burden to establish that it faces undue financial or administrative burden, and it must nevertheless achieve program accessibility. 28 C.F.R. § 35.150(a)(3).

The 2010 Standards contain numerous detailed requirements for play areas, but the primary requirements relate to the play components, the routes to and from the play area, and the routes within the play area. Specifically, the 2010 Standards require there to be a particular proportion of elevated and ground components; require the ground play components to be dispersed throughout the play area and integrated into the play experience; require accessible routes to, from and within the play area that comply with the relevant width and slope requirements, and require the ground surface to be stable, firm, and slip-resistant.[1]

OCR applied the 2010 ADA Standards, as required by the regulations, to determine whether the playground is compliant with the applicable law, which requires an examination of the play components, the routes to and from the play area, and the routes within a play area to determine whether it is accessible. Although the School's playgrounds are existing play areas with respect to the 2010 ADA Standards, the technical requirements of the 2010 ADA Standards apply in full, and the District may demonstrate programmatic access only if it asserts that it would face an undue financial or administrative burden in complying with the 2010 ADA.[2]

Summary of Preliminary Investigation

During the investigation, OCR reviewed the District's data response and conducted an on-site visit on November 28, 2016, which included an examination of the playgrounds at each school and interviewing the District Superintendent and the Director of Buildings and Grounds.

While visiting the District, OCR found that the playgrounds at each school have a ground surface consisting of Engineered Wood Fiber (EWF) chips. There are three playgrounds at Undermountain: the Upper Playground, the Lower Playground, and a separate fenced in playground for the daycare/pre-K program.

The Upper Playground, which consisted of a set of swings and a composite play structure, was located up a hill to the left of the back entrance of Undermountain. The Upper Playground lacked an accessible route to the playground; it had approximately six steps built into the pathway, and the pathway had a slope that ranged from about 7% to 28.3% at varying points. In the swing area, there was a railroad tie perimeter separating this area from the rest of the playground, with EWF chips as the ground surface. It did not appear that the ground surface was maintained to be even and stable, and there was an approximately 5-inch dip beneath the swings.

[1] The latter two requirements listed here (accessible routes and providing a stable, firm, and slip-resistant ground surface) are identical to the analogous requirements that already existed in the 1991 ADA Standards and UFAS. These were generally applicable accessibility requirements that applied to elements of play areas as relevant, although they did not contain the additional technical and scoping requirements for play areas that were first set forth in the 2010 ADA Standards.

[2] The Appendix to the 2010 ADA Standards states, in a section discussing the applicability of the 2010 ADA Standards to existing play areas: "The Department has considered all of the comments it received in response to its questions and has concluded that there is insufficient basis to establish a safe harbor for compliance with the supplemental guidelines...The Department believes that the factors used to determine program accessibility, including the limits established by undue financial and administrative burdens defense, provide sufficient flexibility to public entities in determining how to make their existing play areas accessible. Appendix A, 2010 ADA Standards.

The Lower Playground at Undermountain was located directly outside the building, and there was an accessible concrete pathway to the playground with a width of 83 inches, a slope of 0.2%, and a cross slope of 0.7%. Overall, the EWF chips appeared uneven at various places in the playground, and there appeared to be significant dips underneath the swings.

There are two playgrounds at New Marlborough, one closer to the school and one set back approximately 100 feet. The closer playground was fenced in and designed for use by younger children. There was no accessible route to this playground because there was a short grassy patch that one would have to walk across to get to the playground. The farther playground also lacked an accessible route to the playground, as accessing the playground required walking approximately 100 feet across a grass field.

South Egremont is a historic schoolhouse built in the nineteenth century. It lacked an accessible route to the playground from the school. The playground consisted of a visibly old composite play structure, and four swings with EWF chips underneath. The EWF chips were uneven and unstable.

In its October 26, 2016 written data response to OCR, the District asserted that the playground at Undermountain was fully accessible, and that it sends all students with mobility impairments, as appropriate based on individualized placement decisions, to Undermountain. In an interview with the Superintendent on November 28, 2016, the Superintendent echoed that position, asserting that he believed the playground at Undermountain was accessible, but conceding that he did not think the playgrounds at New Marlborough or South Egremont were accessible.

Following the onsite visit, the Superintendent emailed OCR staff on May 18, 2017, with photographs showing that the District had repaved the pathway and removed the steps to the Upper Playground at Undermountain.

On November 20, 2019, OCR staff spoke to the new Superintendent (the previous superintendent retired in 2017) about the status of the investigation. The Superintendent indicated that additional work had been done on the playgrounds since she became Superintendent, including work to make the pathways to the playgrounds at New Marlborough more accessible. The Superintendent also indicated that the District had regraded the pathways to the Upper Playground at Undermountain to address slope issues.

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 Case Processing Manual. 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.

This concludes OCR's investigation of the complaint. This letter 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. 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 must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will seek to protect personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

If you have any questions, you may contact Civil Rights Attorney Benita Brahmbhatt at (617) 289-0055 or by e-mail at Benita.Brahmbhatt@ed.gov.

Sincerely,

Adrienne M. Mundy-Shephard
Chief Attorney

Enclosure