



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

June 21, 2017

Superintendent Christine Mahoney
33 Turkey Hills Road
East Granby, CT 06026

Re: Complaint No. 01-16-1366
East Granby District of Education

Dear Superintendent Mahoney:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the East Granby District of Education (District). The complainant alleged that certain play components at the playground of the Carl Allgrove Elementary School (Playground) are not accessible to her children (Students), and that the ground surface of the Playground is not stable. OCR investigated whether the District discriminates on the basis of disability by failing to ensure the accessibility of the Playground.

OCR investigated this allegation under the authority of Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation found at 34 C.F.R. Part 104, and Title II of the Americans with Disabilities Act of 1990 (Title II) and its implementing regulation found at 28 C.F.R. Part 35, 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, and it is subject to the requirements of Title II because it is a public entity operating an elementary and secondary education system.

In its investigation, OCR gathered evidence through a review of documents and information provided by the complainant and the District, and through an on-site visit to the Playground. OCR also interviewed the complainant and District staff. While OCR did not find any compliance violations with respect to the play components of the Playground, OCR determined that there was sufficient evidence to support a conclusion of noncompliance with Section 504 and Title II with regard to the accessibility of the route into and ground surface of the Playground. As explained below, the District has agreed to enter into a Resolution Agreement to address the compliance violations that OCR identified during its investigation. OCR's investigation and findings are summarized below.

LEGAL STANDARD

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 facilities¹ 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

¹ A "facility" is "all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located." 28 C.F.R. § 35.104. Play areas, which are expressly governed by the 2010 ADA Standards, meet the definition of a facility as defined in 28 C.F.R. § 35.104. Advisory 240.1 of the 2010 ADA Standards states that play areas may be located on exterior sites or within a building.

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 understanding 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) (2012). 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 adopted revised enforceable accessibility standards called the 2010 ADA Standards for Accessible Design (the 2010 ADA Standards), which 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)(ii)(H). Therefore, there is no “safe harbor” for existing playgrounds constructed prior to the effective date of the 2010 ADA standards, and as a result playgrounds must comply with the technical and scoping requirements set for the 2010 ADA standards.²

The 2010 Standards contain detailed requirements for play areas, but the primary requirements, as applicable here, 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.³

OCR applied the 2010 ADA Standards 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.

² The Department of Justice has clarified that while it is “preferable for public entities to try to achieve compliance with the design standards established in the 2010 Standards [for existing play areas],” 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 (“*Existing Play Areas*”).

³ 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.

FACTUAL FINDINGS

The playground was constructed in 2004 and serves children between the ages of three and four years old who are in the District's preschool program. The playground consists of one large play area, split by a paved path that divides it in half and leads to the school entrance. Along the paved path, the playground is lined at the ground level with "railroad tie" pieces of wood. There is an opening in the "railroad tie" barriers to each side of the playground near the entrance of the school building; these two openings are the only potentially accessible entrances to the playground. The playground does not have a composite play structure or any elevated play components. The playground surface is composed of engineered wood fiber (EFW).

The Play Components

OCR did not find any compliance concerns with the play components of the Playground. The Playground contains 8 types of ground level play components, comprising a total of 7 ground level components (1 freestanding horseshoe climber, 1 climber fire truck, 1 bongo perch, 1 sand box, 1 spiral typhoon slide, 1 balance beam, and 1 straight crawl through tube). The playground does not contain any elevated components. The ground level play components are dispersed throughout the play area and integrated with other play components, in compliance with 2010 ADA Standard 240. All play components which require transfer to entry points – which are the climber fire truck, the bongo perch, balance beam and the straight crawl through tube – measure between 11 and 24 inches, in compliance with 2010 ADA Standard 1008.4.4.

The complainant in this case specifically alleged that the spiral typhoon slide and one other play component are not accessible to students who have mobility impairments. While the complainant's concerns with the spiral typhoon slide or any of the other play components are understandable to the extent that certain play components may be difficult for students with mobility impairments to use, the inclusion of these play components at the Playground ultimately does not constitute a violation of Section 504, Title II, or their implementing regulations, because the standards for these play components – as articulated above – have been met or otherwise not violated.

Route from School to Playground

OCR found that the route from the school to the playground is out of compliance. A smooth paved route, ranging from 46 inches wide to 55 inches with a slope not steeper than 1:20, provides direct access from the back of the School's preschool classrooms to the entrance of Playground.

However, neither entryway from the paved route to the Playground surface complies with the 2010 ADA Standards, specifically Standard 403. OCR found that the entrance to the play area on the right side of the playground has a steep uneven slope of 11.2% and a cross-slope of 24.6%. Likewise, OCR found that the entrance to the play area on the left side of the playground has a steep uneven slope of 8% and a cross-slope of 11.4%. The change in level at both entrances is more than ¼ inch. These measurements indicate that these two entryways into the Playground are out of compliance with 2010 ADA Standard 403 because they are steeper

than 1:20; the cross slope is greater than 2%; and the change in level is more than ¼ inch. As a result, OCR determined that these features of the Playground violate Section 504 and/or Title II.

Ground Surface and Route between Play Components within Playground

OCR also found that the ground surface of the Playground is out of compliance. The ground surface in the playground is made of EWF. According to 2010 ADA Standard 1008.2.6.1, ground surfaces shall be maintained regularly and frequently to comply with the American Society for Testing Materials (ASTM) F 1951. According to 2010 ADA Standard 302.1, floor and ground surfaces shall be stable, firm, and slip resistant. The School has not provided OCR with documentation that verifies that the ground surface of the playgrounds has ever been inspected by an ASTM-approved inspector, or otherwise inspected or maintained in a comparable manner. Moreover, the District did not represent that it conducted any regular inspections or maintenance of the ground surface to ensure compliance. In addition, OCR's visual observation revealed areas of the ground surface within the Playground that were lumped together, uneven, with significant dips in the surface, and therefore not smooth for wheelchair access. Based on the foregoing, OCR determined that the ground surface of the Playground is not in compliance with 2010 ADA Standards 302.1 and 1008.2.6.1, and therefore violate Section 504 and/or Title II.

Aside from the composition of the ground surface of the Playground, OCR did not find any compliance concerns with the routes connecting the play components. OCR found that the ground level components within the play area are connected by a walking surface not steeper than 1:20 and a vertical clearance of more than 80 inches, in compliance with 2010 ADA Standards 402, 403, and 1008.2. There are routes connecting to each type of ground level play component with a clear width of over 60 inches, as required. Finally, OCR found that all ground level play components have turning spaces of at least 60 inches in diameter or T-shaped space, in compliance with 2010 ADA Standards 304 and 1008.4.1.

Conclusion

For the reasons explained above, OCR determined that there was sufficient evidence to support a conclusion of noncompliance with Section 504 and Title II with respect to the accessibility of the entrance to the Playground and the ground surface of the Playground.

As provided above, after OCR notified the District of its conclusion, the District promptly and voluntarily entered into a signed Resolution Agreement (Agreement) that, when fully implemented, will resolve these issues.

Pursuant to the Agreement, the District will: (1) modify the playground area to ensure that there is an accessible route into the play area, and that the accessible route(s) provided is/are in compliance with the 2010 ADA Standards; and (2) develop and implement a plan to maintain the ground surface of the playground on a regular basis so that the wood chip fiber surface has an appropriate depth and smoothness, and the ground surface is stable, firm, and slip resistant, in compliance with Standard 302.1 of the 2010 ADA Standards.

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 herein.

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 records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personal information that, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

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.

OCR would like to thank the District for its cooperation throughout the investigation. If you have any questions, please contact Benita Brahmhatt, Civil Rights Attorney, at (617) 289-0055 or Benita.Brahmbhatt@ed.gov.

Sincerely,

Ramzi Ajami
Compliance Team Leader

CC: Daniel Murphy, esq.
Enclosure