



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE WANAMAKER BUILDING, SUITE 515
100 PENN SQUARE EAST
PHILADELPHIA, PA 19107-3323

REGION III
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December 22, 2015

IN RESPONSE, PLEASE REFER TO: 03151266

Superintendent William A. Smith
Cabell County Schools
2850 5th Avenue
Huntington, WV 25702

Dear Superintendent Smith:

This is to notify you of the resolution of the complaint filed with the U.S. Department of Education (Department), Office for Civil Rights (OCR), against the Cabell County Public Schools (the District), alleging discrimination on the basis of disability. The Complainant alleged that the playground at the District's XXXXXX is not accessible for students with disabilities.

OCR enforces:

- Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104 (Section 504). Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance.
- Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131, and its implementing regulation, 28 C.F.R. Part 35 (Title II). Title II prohibits discrimination on the basis of disability by public entities.

Because the District receives Federal financial assistance from the Department and is a public entity, the District is subject to these laws. Additional information about the laws OCR enforces is available on our website at <http://www.ed.gov/ocr>.

Legal Standards

The accessibility requirements of the Section 504 regulation are found at 34 C.F.R. Section 104.21-104.23. Comparable provisions of the Title II regulation are found at 28 C.F.R. 35.149-35.151. Both regulations provide 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 operated by the recipient.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

A playground meets the definition of a “facility” under the Section 504 and Title II regulations (see 34 C.F.R. 104.3(i) and 28 C.F.R. 35.104). A playground facility is comprised of the structure or equipment installed to provide play activities, the route into and around the playground area, as well as the surface surrounding the structure or equipment.

The general nondiscrimination provisions of Section 504 and Title II apply to playgrounds (see 34 C.F.R. 104.4 and 28 C.F.R. 35.130). These provisions provide for equal opportunity and program accessibility.

In September 2010, the U.S. Department of Justice (DOJ) released its final rule updating the Title II regulations. Among other significant changes, DOJ adopted the entirety of the 2004 ADA Accessibility Guidelines (ADAAG) as the revised standards for physical accessibility under Title II. The 2010 ADA Standards for Accessible Design (“2010 Standards”), which took effect on March 15, 2012, consist of the 2004 ADAAG and the requirements under 28 C.F.R. §35.151. These include sections 240 and 1008, the scoping and technical requirements for play areas, in the 2010 ADA Standards.

According to 28 C.F.R. § 35.150(b)(2)(i), 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 Standards or in the Uniform Federal Accessibility Standards (UFAS), are not required to be modified in order to comply with the requirements set forth in the 2010 Standards. However, 28 C.F.R. §35.150(b)(2)(ii) provides that this safe harbor provision does not apply to those elements in existing facilities that are subject to supplemental requirements, which includes play areas. Thus, play areas must comply with 2010 Standards sections 240 and 1008, as of March 15, 2012; accordingly, the 2010 ADA Standards became effective as the only physical accessibility standard for playgrounds on March 15, 2012. Under this standard, playgrounds must be designed and constructed so as to be readily accessible to and usable by persons with disabilities.

Not every component or element of a playground structure need be accessible. However, where components provide different types of play experiences, such as rocking, swinging, climbing, spinning, or sliding, at least one of each type of activity must be accessible to children with disabilities.

In reaching its determination regarding the accessibility of playground facilities, OCR analyzes whether there is an accessible route leading to and through the playground which is firm, stable, and slip resistant; whether there is a sufficient range of play structure activities within the playground that is accessible to and usable by disabled individuals; and whether there is accessible surfacing beneath accessible play equipment that is firm, stable, slip resistant, and resilient.

Factual Background and Analysis

- There are two playgrounds at the School: the main playground and the pre-kindergarten playground.
- The District reported to OCR that construction was completed at the School in 1951 and their main playground was developed at the time of the original construction. The District identified the play structures and equipment on the main playground, including the dates of installation and any modifications as follows: a swing set installed in 1959; a tire swing, arm-slider, lily pads, high climbing structure, see-saw, and low climbing structure installed in 1992; walking track installed in 2013; and play structure installed in 2015.
- The District reported that a second playground at the School was created for its pre-kindergarten program and this playground was installed in 2013. The District advised OCR that the School's main playground cannot be used by pre-kindergarten students due to applicable state safety regulations. The District reported that accessible equipment has been ordered for the pre-kindergarten playground.
- The District provided photos of both playgrounds.
- As noted above, regardless of the date of construction of the playgrounds, provisions 240 and 1008 of the 2010 ADA Standards apply and the District must comply with these provisions.

Request to Resolve Complaint through a Voluntary Resolution Agreement

OCR procedures provide that a complaint may be resolved before the conclusion of an investigation if a recipient asks to resolve the complaint by signing a resolution agreement. The provisions of the resolution agreement must be aligned with the complaint allegations and be consistent with applicable regulations. Such a request does not constitute an admission of a violation on the part of the District, nor does it constitute a determination by OCR of any violation of our regulations.

Consistent with OCR's procedures, on September 23, 2015, the District requested to resolve this complaint through a Voluntary Resolution Agreement (the Agreement). We determined that this case was appropriately resolved through OCR's voluntary resolution process because OCR would need to conduct an on-site inspection of the School's playground facilities and verify the District's representations regarding the accessibility of the School's playgrounds in order to make a compliance determination in this complaint.

On December 18, 2015, the District signed a Voluntary Resolution Agreement with OCR to resolve the allegation in this complaint. Accordingly, OCR is concluding its investigation of this complaint. A copy of the signed Agreement is enclosed. As is our standard practice, OCR will monitor the District's implementation of the Agreement.

This letter is not intended, nor should it be construed, to cover any other issues regarding the District's compliance with Section 504, Title II and their implementing regulations that may exist and are not discussed herein. The Complainant may have the right to file a private suit in federal court, whether or not OCR finds a violation.

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 personal privacy.

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.

If you have any questions, please contact Mr. Dale Leska at 215-656-8562 or Dale.Leska@ed.gov. Additionally, please also feel free to me at 215-656-8522 or Vicki.Piel@ed.gov as well.

Sincerely,

/s/

Vicki Piel
Team Leader/Supervisory Attorney
Philadelphia Office

Enclosure

cc: Todd A. Alexander Assistant Superintendent (w.encl.)