

April 7, 2014

Reference: 06131112

Mr. Juan Cabrera, Superintendent
El Paso Independent School District
6531 Boeing Drive
El Paso, TX 79925

Dear Mr. Cabrera:

This letter is to notify you of the determination made by the U.S. Department of Education (Department), Office for Civil Rights (OCR), Dallas Office, regarding the above-referenced complaint filed against the El Paso Independent School District (EPISD), El Paso, Texas, which was received in our office on November 27, 2012. The complainant alleged that the EPISD discriminates against individuals with mobility-impairments based on their disability, in violation of Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794 (amended 1992), and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability. Specifically, the complainant alleged that the EPISD, (specifically Lamar Elementary School or LES) discriminates against individuals with mobility impairments as follows:

1. There is no accessible route to the identified accessible entrance to LES facing Circle Street (*i.e.*, there is no handicap ramp);
2. Individuals with mobility impairments cannot enter the identified accessible entrance to LES facing Circle Street due to the fact that the door hardware at that entrance is difficult to operate;
3. There is no accessible route to the identified accessible entrance to the LES main building and gymnasium facing Wright Street;
4. The ground surfaces in the play areas are not stable, firm and slip-resistant (*i.e.*, they contain wood chips and gravel); and
5. The ground surfaces of the accessible route to the new play area are not stable, firm and slip-resistant.

OCR is responsible for determining whether entities that receive or benefit from Federal financial assistance from the Department of Education or an agency that has delegated

investigative authority to this Department are in compliance with 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. Section 504 prohibits discrimination on the basis of disability. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12132 and its implementing regulation at 28 C.F.R. Part 35. Under Title II, OCR has jurisdiction over complaints alleging discrimination on the basis of disability that are filed against public entities. EPISD is a recipient of Federal financial assistance from the Department and is a public elementary and secondary education system. Therefore, OCR has jurisdictional authority to process allegations of discrimination under Section 504 and Title II.

Issues Investigated

In letters dated February 12, 2013, OCR notified the complainant and the recipient that it was opening this complaint for investigation and would be investigating the following issues:

1. Whether the EPISD (specifically, Lamar Elementary School or LES) discriminates against individuals with mobility impairments because there is no accessible route to the identified accessible entrance to LES facing Circle Street (*i.e.*, there is no handicap ramp), in violation of 34 C.F.R. §104.21, 34 C.F.R. § 104.22, 34 C.F.R. § 104.23, 28 C.F.R. § 35.149, 28 C.F.R., § 150, or 28 C.F.R. § 35.151;
2. Whether the EPISD (specifically, Lamar Elementary School or LES) discriminates against individuals with mobility impairments because they cannot enter the identified accessible entrance to LES facing Circle Street due to the fact that the door hardware at that entrance is difficult to operate, in violation of 34 C.F.R. §104.21, 34 C.F.R. § 104.22, 34 C.F.R. § 104.23, 28 C.F.R. § 35.149, 28 C.F.R., § 150, or 28 C.F.R. § 35.151;
3. Whether the EPISD (specifically, Lamar Elementary School or LES) discriminates against individuals with mobility impairments because there is no accessible route to the identified accessible entrance to the LES main building and gymnasium facing Wright Street (*i.e.*, the ramp is blocked off due to construction), in violation of 34 C.F.R. §104.21, 34 C.F.R. § 104.22, 34 C.F.R. § 104.23, 28 C.F.R. § 35.149, 28 C.F.R., § 150, or 28 C.F.R. § 35.151;
4. Whether the EPISD (specifically, Lamar Elementary School or LES) discriminates against individuals with mobility impairments because the ground surfaces in the play areas are not stable, firm and slip-resistant (*e.*, they contain wood chips and gravel), in violation of 34 C.F.R. §104.21, 34 C.F.R. § 104.22, 34 C.F.R. § 104.23, 28 C.F.R. § 35.149, 28 C.F.R., § 150, or 28 C.F.R. § 35.151; and
5. Whether the EPISD (specifically, Lamar Elementary School or LES) discriminates against individuals with mobility impairments because the ground surfaces of the accessible route to the new play area are not stable, firm and slip-resistant (*e.*, consists of dirt), in violation of 34 C.F.R. §104.21, 34 C.F.R. § 104.22, 34 C.F.R. § 104.23, 28 C.F.R. § 35.149, 28 C.F.R., § 150, or 28 C.F.R. § 35.151.

OCR's investigation of this complaint included a careful review of information gathered through written documentation provided by the complainant and the EPISD, as well as interviews conducted with EPISD representatives and the complainant. OCR also conducted an onsite visit on May 6, 2013. After a careful review of all information obtained, OCR has determined there is sufficient evidence to support a finding of noncompliance with Section 504 with respect to Issue Number 4. However, OCR has determined there is insufficient evidence to support a finding of noncompliance with respect to Issues 1, 2, 3 or 5. An analysis of the information obtained by OCR in its investigation and its findings are detailed by issue below.

Legal Standards:

Section 504 and Title II set standards for accessibility. While buildings constructed after the Section 504 and/or Title II regulations were issued must be fully accessible, older buildings do not have to be made fully accessible. For older buildings, the law requires that the program or activity be made accessible. A common way this is done is to relocate the program to another building that is accessible. For newer buildings, the law requires that the building be made physically accessible. In determining whether a building is physically accessible, OCR utilizes one of a number of accessibility standards. Which standard is used in a particular case is determined by whether the entity who utilizes the building falls under the jurisdiction of Section 504, Title II or both, and the date the building was constructed or the date the building or relevant component of the building was altered.

Play Areas

A "play area" meets the definition of "facility" under the Section 504 and Title II regulations, 34 C.F.R. § 104.3(i) and 28 C.F.R. § 35.104. A "play area" is defined in the 2010 ADA Standards for Accessible Design as, "A portion of a site containing play components designed and constructed for children." The 2010 ADA Standards for Accessible Design clarify that a "play component" is "An element intended to generate specific opportunities for play, socialization, or learning. Play components are manufactured or natural; and are stand-alone or part of a composite play structure." The applicable requirements are listed in section 1008 of the 2010 ADA Standards for Accessible Design.

With respect to the ground surface of play areas, the American Society for Testing and Materials (ASTM) issued standards which apply to play areas. ASTM F 1292-99 and ASTM F 1292-04 establish a uniform means to measure and compare characteristics of surfacing materials to determine whether materials provide a safe surface under and around playground equipment. These standards are referenced in the play areas requirements of the 2010 ADA Standards for Accessible Design when an accessible surface is required inside a play area use zone where a fall attenuating surface is also required. ASTM F 1951-99 establishes a uniform means to measure the characteristics of surface systems in order to provide performance specifications to select materials for use as an accessible surface under and around playground equipment. Surface materials that comply with this standard and are located in the use zone must also comply with ASTM F 1292. The test methods in this standard address access for children and adults who may traverse the surfacing to aid children who are playing.

The EPISD informed OCR that it adheres to the Texas Accessibility Standards (TAS) in the construction and alteration of facilities. The United States Department of Justice has certified that the TAS is substantially equivalent to the Americans with Disabilities Act Accessibility Guidelines (ADAAG).

V. FINDINGS

Issue 1

Whether the EPISD (specifically, Lamar Elementary School or LES) discriminates against individuals with mobility impairments because there is no accessible route to the identified accessible entrance to LES facing Circle Street (i.e., there is no handicap ramp), in violation of 34 C.F.R. § 104.21, 34 C.F.R. § 104.22, 34 C.F.R. § 104.23, 28 C.F.R. § 35.149, 28 C.F.R. § 150, or 28 C.F.R. § 35.151.

During OCR's onsite visit, the investigator examined the identified accessible route to the accessible entrance to LES facing Circle Street. The accessible route starts at Circle Street, leads down a curb ramp, heads straight along a route with parking spaces located on either side of the route, up a ramp which is on the right entrance side to the LES as you face the school, and leads to the accessible entrance to LES. The accessible route was altered in December 2012 to include ramp improvements. The 2010 ADA Standards for Accessible Design (sections 302, 303.4, 401, 402, and 403) is the applicable standard. The accessible route crosses two demarcated traffic lanes, one at the bottom of the ramp at Circle Street and the second at the traffic lane in front of the LES entrance. Across the demarcated traffic lane near the entrance to the school is a second ramp constructed in December 2012. OCR determined that the accessible route and the two ramps contained therein comply with the 2010 ADA Standards for Accessible Design. No compliance concerns exist regarding this allegation.

Issue 2

Whether the EPISD (specifically, Lamar Elementary School or LES) discriminates against individuals with mobility impairments because they cannot enter the identified accessible entrance to LES facing Circle Street due to the fact that the door hardware at that entrance is difficult to operate, in violation of 34 C.F.R. § 104.21, 34 C.F.R. § 104.22, 34 C.F.R. § 104.23, 28 C.F.R. § 35.149, 28 C.F.R. § 150, or 28 C.F.R. § 35.151.

Prior to OCR's on-site inspection, the LES replaced the door hardware. Specifically, door hardware (grab handles and door knobs) were replaced at the main school entrance, at two doors used to enter the Main Office, at the entrance door to the Counselor's Office and at the entrance door to the School Nurse's Office. Because the door hardware was replaced after the 2010 Standards became effective, the 2010 ADA Standards for Accessible Design (sections 309.4, 404.2.7, 404.2.9) is the applicable standard. The door hardware at the two main entrance doors to the LES has U-shaped handles with an opening grab space between the door and the handle of about seven-inches at a top height of 37½ inches from the floor. The door hardware at the Main Office, at the Counselor's Office and at the School Nurse's Office was replaced with lever door handles located at 40 inches above the floor. OCR's onsite inspection found that all of the newly

installed door hardware can be opened with a loose grip/closed fist. Regarding the door opening force, because no door opening force is specified for exterior doors, the specific pound-force (lbf) was not measured during OCR's onsite inspection; however, the door opening force was determined by OCR (and agreed with by the complainant) to be at a force level making the entrance accessible to and useable by persons with disabilities. OCR has also determined that the door hardware complies with the applicable provisions of the 2010 ADA Standards for Accessible Design. Therefore, no compliance concerns exist with respect to this allegation.

Issue 3

Whether the EPISD (specifically, Lamar Elementary School or LES) discriminates against individuals with mobility impairments because there is no accessible route to the identified accessible entrance to the LES main building and gymnasium facing Wright Street (i.e., the ramp is blocked off due to construction), in violation of 34 C.F.R. §104.21, 34 C.F.R. § 104.22, 34 C.F.R. § 104.23, 28 C.F.R. § 35.149, 28 C.F.R. § 150, or 28 C.F.R. § 35.151.

OCR determined that LES does not have an accessible entrance that faces Wright Street and that entrance is not identified as an accessible entrance. As such, there is no requirement to have an accessible route leading to this entrance. Furthermore, under Allegation 1, OCR determined that LES has an accessible route from Circle Street and the parking lot serving the LES that leads to the building's accessible entrance. OCR determined these to be in compliance with the 2010 ADA Standards for Accessible Design. Therefore, no compliance concern exists regarding this allegation.

Issue 4

Whether the EPISD (specifically, Lamar Elementary School or LES) discriminates against individuals with mobility impairments because the ground surfaces in the play areas are not stable, firm and slip-resistant (i.e., they contain wood chips and gravel), in violation of 34 C.F.R. §104.21, 34 C.F.R. § 104.22, 34 C.F.R. § 104.23, 28 C.F.R. § 35.149, 28 C.F.R. § 150, or 28 C.F.R. § 35.151.

OCR inspected all three playgrounds located at LES. Playground #1 was constructed in 1994. The playground surface is pea gravel. Playground #1 is located in close proximity to the LES main building and on an accessible route that meets all requirements of the TAS.

The EPISD is required under the TAS to provide an accessible route within Playground #1 so that a person who is mobility-impaired can move from the edge of Playground #1 to the accessible play equipment. The ground surface within Playground #1 leading from the edge of the playground to the play equipment consists of pea gravel which does not meet the requirements under the TAS to be stable, firm and slip-resistant. As such, corrective measures are required and some or all of the pea gravel would need to be replaced with a surface that meets the requirement for an accessible path of travel. OCR determined that two options existed for compliance: 1) The entire playground surface could be removed and replaced with material that meets the ATSM F1951-99 standards for ground surface; or 2) Some of the pea gravel could be kept in place and other areas of pea gravel removed and replaced with a qualifying surface to

provide accessible paths of travel to play stations within the playground. As such, the 1994 Playground (Playground #1) could have areas of pea gravel with accessible paths within the playground which lead to the play stations made of other qualifying materials that provide a stable, firm, slip-resistant surface. This modification would allow students with disabilities to intermingle and interact with other students along the pathways or at the play stations.

Accordingly, to bring the 1994 Playground (Playground #1) into compliance, the EPISD must take corrective measures to replace the ground surface (pea gravel) with material that meets the ATSM F1951-99 standards, or provide accessible paths consisting of qualifying materials that connect to the playground components that exist at the playground.

Playground #2 was constructed in 2009 and the applicable accessibility standard is TAS. Playground #2 is located on the same accessible route from the LES main building as Playground #1, about 90 feet beyond the entrance to Playground #1. The portion of the route from Playground #1 to the entrance to Playground #2 meets all applicable accessibility requirements. Playground #2 is approximately 34 feet by 52 feet. The ground surface of Playground 2 consists of wood chips. Prior to installation at Playground 2, the wood chips were tested by Western Organics, Inc. The tested material was certified as meeting the ASTM F1951-99 standards, (i.e., the average work force per Newton meter measured lower when rolling over the playground chips material than when rolling over a flat surface with a grade of 7.1%). Based on the information above, OCR determined that the ground surface of Playground #2 meets the applicable accessibility requirements.

Playground #3 and the route leading to it were constructed in December 2012 so the 2010 ADA Standards apply to the route and Playground #3. This playground is about 18 feet by 20 feet. The ground surface consists of wood chips that conform to the ASTM F1951-99 standards. The accessible route to this playground is made of asphalt and is 5-feet wide, however, the slope rise is 6-degrees and the surface is rough and does not meet the ADA requirements that the ground surface is stable, firm and slip-resistant or that the running slope of an accessible route is no steeper than 1:20 (2.86 degrees). As such, the accessible route to Playground #3 is not in compliance with the 2010 ADA Standards for Accessible Design (sections 302, 402, 403, and 405).

To bring Playground #3 into compliance, the EPISD must alter the slope of the identified accessible route so that the running slope is equal or less than 1:20 (sections 402.2 and 403.3) or alter the portion of the route at issue to meet the ramp requirements (located at section 405). Additionally, the EPISD must also alter the ground surface of the route leading to Playground #3 so that it is stable, firm and slip-resistant (sections 302,402 and 404).

Issue 5

Whether the EPISD (specifically, Lamar Elementary School or LES) discriminates against individuals with mobility impairments because the ground surfaces of the accessible route to the “new play area” are not stable, firm and slip-resistant (i.e., consists of dirt), in violation of 34 C.F.R. §104.21, 34 C.F.R. § 104.22, 34 C.F.R. § 104.23, 28 C.F.R. § 35.149, 28 C.F.R., § 150, or 28 C.F.R. § 35.151.

OCR's on-site inspection revealed that the LES provides an accessible route to the "new play area" (constructed in 2009, which is referred to by the complainant as the "new play area" in the complaint) that meets the 2010 ADA Standards for Accessible Design. This multi-use path is used by students for various activities during school or recess, but is not used as the accessible route to the newest play area. As such, there would be no requirement that the path comply with accessibility standards as an alternate accessible route is provided to the playground at issue. Thus, no compliance concerns exist with respect to this allegation.

Conclusion

Based on the above, OCR determined that there is sufficient evidence to support a finding that the EPISD must take corrective measures to bring the 1994 Playground (Playground #1) into compliance by replacing the entire ground surface (pea gravel) with material that meets the ASTM F1951-99 standards, or provide accessible paths consisting of qualifying materials that connect to the playground components that exist at the playground. In addition, OCR determined that the EPISD must also bring Playground #3 into compliance by altering the slope of the identified accessible route to Playground #3 so that the running slope is equal or less than 1:20 or alter the portion of the route at issue to meet ramp requirements. Further, the EPISD must also alter the accessible route ground surface to Playground #3 so that it is stable, firm and slip-resistant.

To address the compliance concerns regarding Playgrounds #1 and #3, EPISD submitted the attached Resolution Agreement (Agreement) on March 25, 2014 which addresses these issues. OCR has determined that the Agreement submitted by EPISD, when fully implemented, will resolve the issues.

OCR will monitor the implementation of the Agreement by EPISD to determine whether the commitments made by EPISD have been implemented consistent with the terms of the Agreement. A future monitoring site visit may be required to verify actions taken by EPISD.

This concludes OCR's investigation of the complaint and should not be interpreted to address the EPISD'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 of 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 file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the EPISD 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, it 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.

OCR would like to thank you and your staff for your cooperation throughout its investigation of this matter. If you have any questions or concerns, please contact Paul Edward Coxe, Supervisory Attorney/Team Leader, at (214) 661-9608, or Mr. Marvin Macicek, the assigned Investigator, at (214) 661-9636.

Sincerely,

Taylor D. August, Director
Office for Civil Rights
Dallas Office

Enclosure