



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

1999 BRYAN ST., SUITE 1620
DALLAS, TX 75201-6810

REGION VI
ARKANSAS
LOUISIANA
MISSISSIPPI
TEXAS

March 10, 2015

Reference: 06-14-1515

Mr. Richard Bain, Superintendent
Silsbee Independent School District
415 Highway 327 West
Silsbee, Texas 77656

Dear Mr. Bain:

This letter is to notify you of the determination of the U.S. Department of Education (Department), Office for Civil Rights (OCR), Dallas Office, regarding the above-referenced complaint, which was received by OCR on July 7, 2014 against the Silsbee Independent School District (SISD), Silsbee, Texas. The complaint alleges that the SISD discriminated against the complainant's daughter (Student) based on her disability and also discriminates against individuals with disabilities, 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 34 C.F.R. Part 104, as well as Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability.

OCR investigated the following issues:

1. Whether the SISD discriminates against individuals with visual impairments because they are not provided an equal opportunity to participate in or benefit from the aid, benefit, or service that is afforded to others. Specifically, the SISD's website uses fixed fonts and text sizes, uses low-contrast text, and uses clickable images that do not have verbal descriptors, in violation of 34 C.F.R. § 104.4 and 28 C.F.R. § 35.130, and 28 C.F.R. § 35.160;
2. Whether the SISD discriminates against individuals with mobility impairments because several SISD buildings are not physically accessible as follows:
 - a. Kirby Elementary School
 - i. There is no accessible route connecting the school to either of the play areas (*i.e.*, both of the play areas require a person in a wheelchair to travel through grass to reach the play area);

- ii. There is no accessible route within either play area to reach play components (*i.e.*, both of the play areas have wood chips that are too soft to push through);
- b. Laura Reeves Elementary School
 - i. The accessible parking spaces are not located on the shortest accessible route to the accessible entrance (*i.e.*, the accessible parking spaces are on the other side of the parking lot from the main entrance doors to this building);
 - ii. The main entrance to the building is not accessible (*i.e.*, doors are heavy to open);
- c. Reed Turrentine Elementary School
 - i. The SISD does not provide an adequate number of accessible parking spaces for this facility (*i.e.*, the accessible parking spaces are filled up by the end of the day);
 - ii. There is no accessible route connecting the school to the play area (*i.e.*, the play area is surrounded by a raised piece of plastic so a person in a wheelchair cannot get inside);
 - iii. There is no accessible route within the play area to reach play components (*i.e.*, the play area has wood chips that are too soft to push through);
- d. Silsbee Middle School
 - i. The SISD does not provide accessible wheelchair spaces, companion spaces, or integrate the wheelchair spaces in the gymnasium seating (*i.e.*, wooden bleachers used for school functions in the gymnasium have no spaces for people in wheelchairs so they must sit on either side of the bleachers);
 - ii. There is no accessible route from the gymnasium to the hall where health and sex education classes are held (*i.e.*, a pole blocks the hallway leading from the gymnasium to the hall where health and sex education classes are held so a person in a wheelchair cannot access that hallway);
 - iii. There is no accessible route from Silsbee Middle School to the band hall/workshop area (*i.e.*, the sidewalk leading from Silsbee Middle School to the band hall/workshop area is too narrow);
 - iv. The main entrance to the building is not accessible (*i.e.*, doors are heavy to open).

3. Whether, during the 2013-2014 school year, the SISD failed to provide the Student with a free and appropriate public education (FAPE) by failing to provide her with the services a group of knowledgeable people determined was necessary to meet her individual needs. Specifically, the Student was supposed to receive 60 minutes of XXX per day, but only received 25 minutes per day, in violation of 34 C.F.R. § 104.33 and 28 C.F.R. § 35.130.
4. Whether the SISD failed to properly train its Autism Specialist to ensure that individual can properly administer the tests and other materials used by the SISD to evaluate students to determine if they need special education or related aids and services, in violation of 34 C.F.R. § 104.35(b)(1).
5. Whether the SISD failed to establish and implement, with respect to actions regarding the educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes...an impartial hearing (*i.e.*, the hearing officer failed to examine certain documents submitted by the SISD for an XXX due process hearing to determine whether they were “doctored” by the SISD), in violation of 34 C.F.R. § 104.36 and 28 C.F.R. § 35.130.

OCR is responsible for determining whether organizations that receive or benefit from Federal financial assistance from the Department, or an agency that has delegated investigative authority to the Department, are in compliance with Section 504 and Title II, which prohibit discrimination on the basis of disability. Under Section 504, OCR is responsible for determining whether entities that receive or benefit from Federal financial assistance from the U.S. Department of Education or an agency that has delegated investigative authority to the Department are in compliance with Section 504, which prohibits discrimination on the basis of disability. Under Title II, OCR has jurisdiction over complaints alleging disability discrimination against public entities, such as public pre-schools, elementary and secondary education systems and institutions, public institutions of higher education and vocational education (other than schools of medicine, dentistry, nursing, and other health-related institutions), and public libraries. OCR has determined that the SISD is a recipient of Federal financial assistance from the Department and is a public entity. Therefore, OCR has jurisdictional authority to process this complaint for resolution under Section 504 and Title II.

During the course of this investigation, OCR reviewed documentation and information provided by the complainant and the SISD. Based on OCR’s careful review and analysis of the information obtained from the above-listed sources, OCR found compliance concerns with respect to Issues #1 and #2. However, OCR has determined that there is insufficient evidence to establish that the SISD violated Section 504 or Title II with respect to Issues #3, #4, or #5. The basis for this determination is set forth below.

Issue #1: Whether the SISD discriminates against individuals with visual impairments because they are not provided an equal opportunity to participate in or benefit from the aid, benefit, or service that is afforded to others. Specifically, the SISD’s website uses fixed fonts and text sizes, uses low-contrast text, and uses clickable images that do not have

verbal descriptors, in violation of 34 C.F.R. § 104.4 and 28 C.F.R. § 35.130, and 28 C.F.R. § 35.160.

Both Section 504 and Title II state that qualified handicapped persons shall not be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance. Additionally, the Title II regulations have requirements for communications, which state in pertinent part that a public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.

On June 29, 2010, OCR and the U.S. Department of Justice Civil Rights Division jointly issued a Dear Colleague Letter that addressed the use of emerging technologies. The letter states that schools ought not to purchase, require or recommend use of any dedicated electronic book reader “unless or until the device is fully accessible to individuals who are blind or have low vision,” or they needed to “provide reasonable accommodation or modification so that a student can acquire the same information, engage in the same interactions, and enjoy the same services as sighted students with substantially equivalent ease of use.”

On May 26, 2011, OCR issued a Dear Colleague Letter which included Frequently Asked Questions (FAQ) and further clarified its June 29, 2010 Dear Colleague Letter. The FAQ makes clear that the June 29, 2010 Dear Colleague Letter also applies to elementary and secondary institutions and clarifies that students with disabilities, especially students with visual impairments, are to be afforded “the opportunity to acquire the same information, engage in the same interactions, and enjoy the same services as sighted students.” The FAQ explains that the educational institution must ensure that students with disabilities can access the educational opportunities and benefits with “substantially equivalent ease of use” as students without disabilities. Should the educational institution use a device that is not fully accessible, the institution must provide “accommodations or modifications that permit [students with disabilities] to receive all the educational benefits provided by the technology in an equally effective and equally integrated manner.” The FAQ also makes clear that an accommodation or modification that is available only at certain times or under certain conditions (such as when an aide is available to read to the student) will not be considered “equally effective and equally integrated” where other students have access to the same information at any time and any location, as is the case with a website or other online content. Additionally, the FAQ states that online programs are covered under the June 29, 2010 and May 26, 2011 Dear Colleague Letters and stresses the importance of planning to ensure accessibility from the initial design. The policies set forth in these documents apply to all forms of information technology. OCR relies on these general principles in assessing the accessibility and effectiveness of communication.

The SISD admits in its data response that its website does not have text equivalents or verbal descriptors, that colors and font sizes are not adjustable, etc. OCR utilized the 16 Web Standards and 12 Software Standards of Section 508 as well as the websites www.webaim.org and achecker.ca to help analyze the accessibility of the SISD’s website. OCR’s preliminary analysis identified 23 accessibility problems with the SISD’s website, such as: Linked images are missing alternative text (the text identifies what is in the picture for those with visual impairments) and

the language of the web page is not identified (this would allow the screen reader to read the content in the appropriate language). While the 23 items are not meant to be an exhaustive list of the features that make the SISD's website inaccessible, the items, along with the SISD's admission that its website does not contain some elements necessary to be considered accessible, do confirm that the SISD's website is not fully accessible to individuals with visual impairments.

Based on the information summarized above, OCR has determined that the SISD's website does not provide individuals who utilize assistive technology an equal opportunity to participate in or benefit from the website that is afforded to other individuals who do not need to use assistive technology. Prior to OCR reaching a formal compliance determination regarding this issue, the SISD submitted the attached Resolution Agreement (Agreement) on February 18, 2015 which addresses this issue. OCR has determined that the Agreement, when fully implemented in accordance with the appropriate accessibility standards, will resolve this issue.

Issue #2: Whether the SISD discriminates against individuals with mobility impairments because several SISD buildings are not physically accessible as follows:

- a. Kirby Elementary School**
 - i. There is no accessible route connecting the school to either of the play areas (*i.e.*, both of the play areas require a person in a wheelchair to travel through grass to reach the play area);**
 - ii. There is no accessible route within either play area to reach play components (*i.e.*, both of the play areas have wood chips that are too soft to push through);**
- b. Laura Reeves Elementary School**
 - i. The accessible parking spaces are not located on the shortest accessible route to the accessible entrance (*i.e.*, the accessible parking spaces are on the other side of the parking lot from the main entrance doors to this building);**
 - ii. The main entrance to the building is not accessible (*i.e.*, doors are heavy to open);**
- c. Reed Turrentine Elementary School**
 - i. The SISD does not provide an adequate number of accessible parking spaces for this facility (*i.e.*, the accessible parking spaces are filled up by the end of the day);**
 - ii. There is no accessible route connecting the school to the play area (*i.e.*, the play area is surrounded by a raised piece of plastic so a person in a wheelchair cannot get inside);**

- iii. **There is no accessible route within the play area to reach play components (*i.e.*, the play area has wood chips that are too soft to push through);**

d. Silsbee Middle School

- i. **The SISD does not provide accessible wheelchair spaces, companion spaces, or integrate the wheelchair spaces in the gymnasium seating (*i.e.*, wooden bleachers used for school functions in the gymnasium have no spaces for people in wheelchairs so they must sit on either side of the bleachers);**
- ii. **There is no accessible route from the gymnasium to the hall where health and sex education classes are held (*i.e.*, a pole blocks the hallway leading from the gymnasium to the hall where health and sex education classes are held so a person in a wheelchair cannot access that hallway);**
- iii. **There is no accessible route from Silsbee Middle School to the band hall/workshop area (*i.e.*, the sidewalk leading from Silsbee Middle School to the band hall/workshop area is too narrow);**
- iv. **The main entrance to the building is not accessible (*i.e.*, doors are heavy to open).**

The accessibility requirements of the Section 504 implementing regulations are found at 34 C.F.R. §§104.21-104.23. Comparable sections of the Title II implementing regulations are found at 28 C.F.R. §§ 35.149-35.151. Both 34 C.F.R. § 104.21 and 28 C.F.R. § 35.149 provide generally that no qualified individual with a disability shall, because a recipient's facilities are inaccessible to or unusable by disabled individuals, be excluded from participation in, or denied the benefits of services, programs or activities; or otherwise be subject to discrimination by the recipient. The regulations implementing Section 504 and Title II each contain two standards for determining whether a recipient's/public entity's facilities are accessible to or usable by persons with disabilities. One standard applies to facilities existing at the time of the publication of the regulations and the other standard applies to facilities constructed or altered after the publication dates. The applicable standard depends on the date of construction and/or alteration of the facility.

For purposes of determining accessibility, a "facility" is defined at 34 C.F.R. § 104.3(i) to include "all or any portion of buildings, structures, equipment, roads, walks, parking lots or other real or personal property or interest in such property." Under 28 C.F.R. § 35.104, a "facility" means "all or any portion of buildings, structures, sites, complexes, equipment, ... walks, ...or other real or personal property, including the site where the building, property, structure or equipment is located." Interpretive guidance to the Title II regulation issued by the U.S. Department of Justice

states that the term "facility" includes both indoor and outdoor areas where human-constructed improvements, structures, equipment or property have been added to the natural environment.

For "existing facilities," the regulations require a recipient/public entity to operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This standard does not require a recipient/public entity to make each existing facility or every part of an existing facility physically accessible if alternative methods are effective in providing access to the service, program, or activity in question. The standard for program accessibility in existing buildings requires the recipient to make the program, not the building, accessible.

For "new construction," the regulations require that the newly constructed facilities or parts of facilities be designed and constructed in such a manner that they are readily accessible to and usable by individuals with disabilities. For new alterations that affect or could affect usability, the regulations require, to the maximum extent feasible, the alterations to be made in such manner that the altered portion(s) of the facility is/are readily accessible to and usable by individuals with disabilities.

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 2010 ADA Standards for Accessible Design were the first to affirmatively impose a duty on public entities to ensure that play areas are accessible to individuals with disabilities. The applicable requirements are listed in section 1008 of the 2010 ADA Standards for Accessible Design. Even though no accessibility standards existed before the 2010 ADA Standards for Accessible Design that were specifically targeted for play areas, the U.S. Department of Justice has clarified that there is no "safe harbor" provision (such as the date of construction of the play area) which allows entities to be absolved from compliance with the 2010 ADA Standards for Accessible Design as they relate 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 District reports that Silsbee Elementary School is set to open in August of 2015. When Silsbee Elementary School opens, both Kirby Elementary School and Reed-Turrentine Elementary School (subsections A and C in this issue) will be demolished.

OCR's review of the SISD's data response found compliance concerns including, but not limited to:

1. Kirby Elementary School

- a.* The ground surface between the sidewalks and the play areas is grass which is not an accessible surface;
- b.* Pea gravel is inside all of the play areas and pea gravel is not an accessible surface.

Prior to OCR reaching a complete compliance determination regarding the physical accessibility issues under investigation, the SISD submitted the attached Agreement on February 18, 2015 which addresses this issue. OCR has determined that the Agreement, when fully implemented in accordance with appropriate accessibility standards, will resolve this issue.

Allegation #3: Whether, during the 2013-2014 school year, the SISD failed to provide the Student with a free and appropriate public education (FAPE) by failing to provide her with the services a group of knowledgeable people determined was necessary to meet her individual needs. Specifically, the Student was supposed to receive 60 minutes of XXX per day, but only received 25 minutes per day, in violation of 34 C.F.R. § 104.33 and 28 C.F.R. § 35.130.

Section 504, at 34 C.F.R. § 104.33(a) and (b), states that recipients shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, which includes the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of 104.34, 104.35, and 104.36. Title II prohibits recipients from excluding qualified individuals with a disability from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination.

Data from the SISD shows that the Student had an IEP during the 2013-2014 school year and the SISD agreed to provide the Student with XXX *to end of paragraph*.

OCR contacted the complainant, summarized the information from the SISD, and asked her to provide the information supporting her belief that that the Student XXX *to end of paragraph*. In consideration of the evidence, together with governing law and OCR policy, OCR has determined that there is insufficient evidence to support a finding of a violation of Section 504 or Title II for issue #3.

Issue #4: Whether the SISD failed to properly train its Autism Specialist to ensure that individual can properly administer the tests and other materials used by the SISD to evaluate students to determine if they need special education or related aids and services, in violation of 34 C.F.R. § 104.35(b)(1).

Section 504, at 34 C.F.R. § 104.35(b)(1), states in pertinent part that recipients shall ensure that tests and other evaluation materials are administered by trained personnel in conformance with the instructions provided by their producer.

The District provided OCR with copies of contracts the SISD has with four people to provide Autism assessments. The SISD also provided OCR with copies of certificates of Autism training for several of the identified individuals, listed various Autism seminars/conferences attended by the four individuals, and also provided summaries of their experience in the field.

OCR contacted the complainant and asked her to clarify XXX *to end of paragraph*. Therefore, there is insufficient evidence to demonstrate a violation of either Section 504 or Title II for issue #4.

Issue #5: Whether the SISD failed to establish and implement, with respect to actions regarding the educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes...an impartial hearing (i.e., the hearing officer failed to examine certain documents submitted by the SISD for an XXX due process hearing to determine whether they were “doctored” by the SISD), in violation of 34 C.F.R. § 104.36 and 28 C.F.R. § 35.130.

Section 504, at 34 C.F.R. § 104.36, states in pertinent part that a recipient shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes...an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel.

The SISD states that it never received any written claim by the complainant that any pages submitted by the District during the due process hearing were doctored.

OCR contacted the complainant and asked her to clarify XXX *to end of paragraph*. Therefore, there is insufficient evidence to demonstrate a violation of either Section 504 or Title II regarding this issue.

OCR found compliance concerns with respect to Issues #1 and #2. However, OCR has determined that there is insufficient evidence to establish that the SISD violated Section 504 and Title II with respect to Issues #3, #4, or #5. Prior to OCR reaching a formal compliance determination, the SISD submitted the attached Agreement on February 18, 2015 which addresses the compliance concerns OCR had regarding issues #1 and #2. OCR has determined that the Agreement, when fully implemented, will resolve issues #1 and #2.

OCR will monitor the implementation of the Agreement by the SISD to determine whether the commitments made by the SISD have been implemented consistent with the terms of the Agreement. Although verification of the remedial actions taken by the SISD can be accomplished by a review of reports and other documentation provided by the SISD, in some instances, a future monitoring site visit may be required to verify actions taken by the SISD. If the SISD fails to implement the Agreement, as specified, OCR will resume its investigation. If the SISD determines a need to modify any portion of the Agreement, the SISD may submit proposed revisions to OCR.

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

Under OCR procedures, we are obligated to advise you that intimidation or retaliation against a complainant is prohibited by regulations enforced by this agency. Specifically, the regulations enforced by OCR, directly or by reference, state that no recipient or other person shall intimidate, threaten, coerce or discriminate against any individual for the purpose of interfering with any right or privilege secured by regulations enforced by OCR or because an individual has made a complaint, testified, assisted or participated in any manner in an investigation, proceeding or hearing held in connection with a complaint.

Under the Freedom of Information Act, it may be necessary to release this document and other related correspondence and records upon request. In the event we receive 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 privacy.

If you have any questions, please feel free to contact the attorney-investigator, Richard Cho, by telephone at (214) 661-9631 or Team Leader Paul E. Coxé at (214) 661-9608.

Sincerely,

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