



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGION IX
CALIFORNIA

50 UNITED NATIONS PLAZA
MAIL BOX 1200, ROOM 1545
SAN FRANCISCO, CA 94102

March 22, 2018

VIA ELECTRONIC MAIL

Ms. Cheryl Olson
Superintendent
Rescue Union School District
2390 Bass Lake Road
Rescue, California 95672

(In reply, please refer to case no. 09-17-1616.)

Dear Superintendent Olson:

In a letter dated September 5, 2017, the U.S. Department of Education (Department), Office for Civil Rights (OCR), notified the Rescue Union School District (District) of the above-referenced complaint filed by the Complainant on behalf of the Student.¹ The investigation of this complaint addressed whether students with disabilities were excluded from participation in District programs or activities because the playgrounds at Rescue Elementary School (School) were not accessible to individuals with disabilities.

OCR is responsible for enforcing 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 in programs and activities operated by recipients of federal financial assistance. OCR is also responsible for enforcing 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. Title II prohibits discrimination on the basis of disability by public entities. As a recipient of federal financial assistance and as a public education system, the District is subject to Section 504, Title II, and their implementing regulations.

To investigate this complaint, OCR interviewed the Complainant and School and District employees. OCR also reviewed documents and other information provided by both the Complainant and the District. Finally, OCR conducted a site visit to the School on November XX, 2017 to review the playgrounds. Based on the information gathered, OCR found that certain aspects of the playgrounds did not comply with Section 504 and Title II and their implementing regulations. The legal standards, factual findings, analysis, and the terms of the Agreement reached with the District are summarized below.

¹ OCR identified the Complainant and Student in its initial notification letter to the District and is withholding their names from this letter to protect their privacy.

Legal Standards

The regulations implementing Section 504 and Title II provide that no qualified person with a disability shall, because a recipient/public entity's facilities are inaccessible to or unusable by persons with disabilities, be denied the benefits of, excluded from participation in, or otherwise be subjected to discrimination under any program, service, or activity of the recipient. 34 C.F.R. § 104.21; 28 C.F.R. § 35.149. The regulations contain two standards for determining whether a recipient/public entity's programs, activities, and services are accessible to individuals with disabilities. One standard applies to "new construction" and "alterations" while the other applies to "existing facilities." The applicable standard of compliance depends upon the date of construction and/or the date of any alterations to the facility.

New construction and alterations

The Section 504 regulations, at 34 C.F.R. § 104.23, apply to "new construction or alterations," defined as any facility or part of a facility where construction was commenced after June 3, 1977. For the purposes of Title II, "new construction or alterations" is defined as any construction of or alterations to a facility or a part of a facility on or after January 26, 1992. The regulations for each law provide that each facility or part of a facility constructed by, on behalf of, or for the use of the recipient/public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by persons with disabilities. The regulations further provide that each facility or part of a facility altered by, on behalf of, or for the use of the recipient/public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, 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.

The Section 504 regulations, at 34 C.F.R. § 104.23(c), specify the American National Standards Specifications for Making Buildings and Facilities Accessible to and Usable by the Physical Handicapped (ANSI 117.1 – 1961 (1971)) as the minimum standard for determining accessibility for facilities constructed or altered on or after June 3, 1977 and before January 18, 1991. Facilities constructed or altered on or after January 18, 1991 are required to comply with the Uniform Federal Accessibility Guidelines (UFAS) (Appendix A to 41 C.F.R. subpart 101-19.6). Recipients may choose between applying the 2010 Standards for Accessible Design (2010 Standards) (28 C.F.R. § 35.151 and 28 C.F.R. part 36, subpart D) or UFAS for any new construction or alteration commenced on or after March 15, 2012. 77 F.R. 14972, 14975 (Mar. 14, 2012).

With respect to Title II, public facilities constructed or altered on or after January 26, 1992 through September 14, 2010 are required to choose application of UFAS or the 1991 ADA Standards for Accessible Design (1991 Standards) (28 C.F.R. Part 36, App. A). Public facilities constructed or altered on after September 15, 2010 through March 14, 2012 are able to comply through the application of UFAS, the 1991 Standards, or the 2010 Standards. Effective March 15, 2012, new construction and alterations pursuant to Title II are required to comply with the 2010 Standards. New construction and alterations completed before March 15, 2012 that did not

comply with the 1991 Standards or UFAS (i.e., noncompliant new construction and alterations) were also subject to the 2010 Standards. 28 C.F.R. § 35.151(c)(5).

Existing facilities

The Section 504 regulations, at 34 C.F.R. § 104.22, and the Title II regulations, at 28 C.F.R. § 35.150, also apply to “existing facilities.” Section 504 defines existing facilities as any facility or part of a facility where construction was commenced prior to June 3, 1977. Existing facilities for the purposes of Title II are any facility or part of a facility where construction was commenced prior to January 26, 1992. The regulations provide that, with respect to existing facilities, the recipient shall operate its programs, services, and activities so that, when viewed in their entirety, they are readily accessible to and usable by persons with disabilities (hereinafter “the program accessibility standard”).

Accessibility of existing facilities is determined not by compliance with a particular architectural accessibility standard, but by considering whether a recipient program, service, or activity offered within an existing facility, when viewed in its entirety, is accessible to and usable by individuals with disabilities. The recipient may comply with the existing facility standard through the reassignment of programs, services, and activities to accessible buildings, alteration of existing facilities, or any other methods that result in making each of its programs, services, and activities, when viewed in their entirety, accessible to individuals with disabilities. In choosing among available methods for redressing program inaccessibility, the recipient must give priority to those methods that offer programs, services, and activities to individuals with disabilities in the most integrated setting appropriate as well as methods that entail achieving access independently and safely.

The concepts of program access and facilities access are related, because it may be necessary to remove an architectural barrier in order to create program access. For example, a program offered exclusively in a particular building on a campus may not be accessible and usable to individuals with disabilities absent the provision of physically accessible features. Under such circumstances, facility accessibility standards may be used to guide or inform an understanding of whether persons with disabilities face barriers to participating in the program, service, or activity provided in a particular facility. In reviewing program accessibility for an existing facility subject to Section 504, UFAS or the 2010 Standards may be used as a guide to understanding whether individuals with disabilities can participate in or benefit from the program, activity, or service. The 2010 Standards may be used as a guide to understanding whether individuals with disabilities can participate in or benefit from the program, activity, or service of a public entity subject to Title II. Specific details of the architectural standards are described below as needed.

Playgrounds

A playground meets the definition of a “facility” under the Section 504 and Title II regulations. 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 U.S. Architectural and Transportation Barriers Compliance Board (Access Board) issued its Final Accessibility Guidelines for Play Areas (Guidelines) in 2000. In 2004, the Access Board issued a revised version of the ADA Standards for Accessible Design that included the Guidelines (known as the 2004 ADAAG; see 75 F.R. 56177, September 15, 2010). In September 2010, the U.S. Department of Justice released the 2010 ADA Standards, which took effect March 15, 2012. The 2010 ADA Standards include specific requirements for play areas.

For playgrounds built before the 2010 Standards went into effect, OCR evaluates compliance by considering whether the range of activities in the playground facility that were accessible to students with disabilities was equivalent to the range offered to students without disabilities. Not every component or element of a playground structure needs to be accessible. However, where components provided 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. OCR uses the 2010 Standards as guidance in making these assessments.

Also of note, the 2010 ADA Standards incorporate sections of the standards from the American Society for Testing and Materials (ASTM). Specifically ASTM F-1292 covers impact attenuation of surfaces in playground use zones. Additionally, ASTM F-1951 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. The ASTM F standards provide specific testing standards to determine if the surface is firm, stable, and resilient to ensure the surface is safe and accessible to children who are playing. The Access Board has provided guidance on what surfaces meet the ASTM standards. They are: poured-in-place rubber, tiles, engineered wood fiber, hybrid surface systems.² For engineered wood fiber, the Access Board has advised that “[i]n most instances it is necessary for the loose material to be installed in layers, watered and compacted in order to achieve an accessible route and level clear ground space at equipment.”³

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

Findings of Fact

Background

The Student entered kindergarten at the School in the fall of 2017. The Complainant told OCR that the Student has XXXXXXXXXXXXX and XXX XXXXXX XXXX, and that, as a result, the Student’s knees do not bend, her gait is not sturdy, and she falls a lot. The Complainant also

² See <https://www.access-board.gov/guidelines-and-standards/recreation-facilities/guides/surfacing-the-accessible-playground/>.

³ See <https://www.access-board.gov/guidelines-and-standards/recreation-facilities/guides/surfacing-the-accessible-playground/6-recognize-that-proper-installation-is-key/>.

reported that the Student has very limited use of her arms because of XXXXXXXXXXXXXXXX, so if the Student falls down she is not able to brace herself and falls on her chest and face.

Pursuant to the Student's IEP, the Student has a 1:1 aide (the Aide) who assists her with tasks like writing, sitting down and standing up, and walking up and down steps. The Aide and Teacher reported that because the Student liked to be independent the Aide usually provided her with some space when she was walking, but stayed nearby if the Student needed assistance.

The School has two playgrounds, one that is used exclusively for the kindergarten classes (the kindergarten playground), and the second that is used by all grades (hereinafter the "main playground"). According to the District, the play structure on the kindergarten playground was installed in 2008. The main playground has two large play structures, hereinafter called the "large structure" and the "small structure." The larger structure was built in 2006 and the smaller structure was built in 1997.

Prior to the Student enrolling in kindergarten, the Complainant and the District had ongoing conversations about the accessibility of the playground. Originally, the Student was scheduled to be in a half-day kindergarten program (meaning she would only use the kindergarten playground), but the District then implemented a full-day kindergarten program starting in mid-September 2017, meaning that the Student began to use both playgrounds. As of the date that OCR visited the School, the kindergarten students had recess on the kindergarten playground in the morning and on the main playground in the afternoon.

The Complainant told OCR that as of the beginning of the school year, she felt that the playground was not accessible because 1) the wood fiber surface was not firm and even; and 2) the playground equipment was not accessible because there were no ramps up to the elevated equipment and because the Student could not climb the stairs. As noted in the Student's IEP meeting notes, the Student needs to lean her back against a solid surface in order to climb stairs independently (because she cannot use her arms to grab the hand railings). The Complainant told OCR that as of the beginning of the year there was more equipment on the kindergarten playground that she could access, but very little equipment on the main playground that she could access.

The issue of playground equipment was discussed at the Student's IEP meeting and in other meetings between the School and the Complainant in the fall of 2017. In order to make the main playground more accessible for the Student, the District purchased and installed an accessible swing in the fall of 2017. The District also purchased and installed a new three-panel piece of equipment that included a puppet panel, a chime panel, a panel with animal sounds, and a steering wheel. The District also ordered some replacement railings that were intended to allow the Student to navigate the steps of the large structure on the main playground by allowing her to use the railings as support for her back. The previous railings had been spaced too far apart, meaning that she could not safely climb the stairs using the railings as support without falling through the gaps in the railings.

Playground Surfaces

The surface on both playgrounds at the School is an Engineered Wood Fiber (EWF) surface. The District provided OCR with a certificate from the manufacturer of the product showing that the wood fiber product complied with ASTM F-1951 (regarding firmness and stability) when “properly installed to a depth of 12 inches.”

OCR obtained information showing the conditions under which the wood fiber product had been tested by the manufacturer in the laboratory to show compliance. That information showed that the wood fiber product provided by the manufacturer met the conditions for ASTM F-1951 when tested after the following installation process: “A 6-inch layer of [the product] was installed over a layer of 2-inch drain rock and geotextile fabric, wetted and compacted using a vibrating plate compactor to a depth of 4 inches. Another 6-inch layer of [the product] was installed, wetted, and compacted. A final 6-inch layer was laid [sic] down, wetted and compacted to a final depth of 12 inches. Prior to testing, the surface was leveled by placing a large piece of plywood down on the surface and having a person jump systematically across the entire area.”

The District’s Maintenance and Operations Coordinator (the Coordinator) told OCR that the District did not have any information about how the wood fiber surface was initially installed on the School’s playgrounds. He also told OCR that for the last couple of years, the District has brought in additional wood fiber product to “top off” the playground surface. He reported that the wood fiber product was added by blowing it onto the surface through a flexible tube, and that the wood fiber surface was not wetted or compacted during that process. The Coordinator was not aware of any instructions provided by the manufacturer of the wood fiber surface as to how the material should be installed or added.

The Coordinator also told OCR that the School’s custodian uses a blower to blow stray wood fiber pieces back onto the playground on a daily basis, and that District staff are supposed to rake the surface to knock down big lumps on a weekly basis.

As of the date of OCR’s visit, the playground surfaces at the School were not firm, level, stable, and accessible surfaces. Instead, the surfaces were loose, undulating, and uneven, particularly around high-use activities such as the swings and slides. Often, especially on the main playground, large amounts of the wood fiber material were piled up underneath the slides or other equipment, and the landing zones (for instance, where students would exit the slides or swings) were hollowed out into valleys. In one area, uneven application of the wood fiber had resulted in what was supposed to be a transfer step up to the small structure of the main playground essentially being underwater in wood fiber, in that the wood fiber had completely covered up the step.

On the day of OCR’s visit to the School, OCR observed the Student during recess on the main playground. OCR observed that the Student was generally able to walk on at least parts of the surface on the main playground. OCR also noted, however, that given the Student’s gait, the uneven nature of the surface had the potential to cause problems if the Student (or other students with mobility impairments) attempted to independently navigate the parts of the playground that were particularly uneven.

Overview of Playground Equipment

Kindergarten Playground

The kindergarten playground had one main play structure surrounded by a concrete curb, a second monkey bar structure (also called a “horizontal ladder”) surrounded by a separate concrete curb, an oval concrete “track” around the main play structure, and a nearby grassy area that students could play on.

The oval concrete curb around the main kindergarten play structure was approximately 6 inches high that kept the wood fiber material in. At one end of the oval there was an opening in the curb and a concrete ramp that sloped down into the play area that was intended to serve as an accessible entrance. OCR measured the running slope of that ramp at approximately 7%. OCR also reviewed an October 2016 assessment of the playground done by the District’s insurance provider, which also measured the running slope of the ramp at 7%. At the point at which the concrete ramp ended and the wood fiber surface began, there was a drop in level of between one-half of an inch and one inch. That change in level varied at different parts of the ramp because the wood fiber surface was uneven.

The area that contains the monkey bars was also surrounded by its own concrete curb that was approximately 12 inches high. There were no breaks in the concrete and thus no accessible entrance, as had also been noted in the October 2016 review by the District’s insurance provider.

Main Playground

The main playground had two main play structures, a set of swings, and a separate set of the recently installed play panels. All of these features were enclosed by a concrete curb approximately 12 inches high that kept the wood fiber material inside. There were two places that students could enter the play area without stepping over a curb. At one entrance there was a break in the curb that was approximately sixty inches wide, though there was a drop in level from the asphalt to the wood fiber surface of approximately 1.5 inches at that point. At another point, there was a larger entrance to the play area that was level and accessible. Both entrances were reasonably convenient for students entering the playground from the classroom areas.

Ground and Elevated Components

The 2010 Standards categorize play components as either “ground” components or “elevated” components. A ground level play component is defined as a play component that is approached and exited at the ground level. An elevated play component is a play component that is approached above or below grade that is part of a composite play structure consisting of two or more play components attached or functionally linked to create an integrated unit providing more than one play activity. The 2010 Standards⁴ require a minimum number of ground level play components to be provided on an accessible route based on the number of elevated play components:

⁴ As noted above, OCR did not require the District here to comply with the 2010 Standards, but does use the Standards as guidance in making its assessments.

Number of elevated play components	Minimum number of ground-level components required to be on accessible route	Minimum number of different types of ground-level components required to be on accessible route
1	Not applicable	Not applicable
2 to 4	1	1
5 to 7	2	2
8 to 10	3	3
11 to 13	4	3
14 to 16	5	3
17 to 19	6	3
20 to 22	7	4
23 to 25	8	4
More than 25	8, plus 1 for each additional 3, over 25, or fraction thereof	5

The District provided a list of ground and elevated components on each playground, which OCR inspected on its site visit as described below.

Kindergarten Playground

On the kindergarten playground, there were 12 ground play components and seven elevated play components. If the playground surface had been accessible, six of the seven elevated play components would have been on an accessible route served by a transfer platform and transfer steps. The Aide reported that the Student could climb up these steps (because the rails on the steps were close together) and get to the slide, and that she could go down the slide with some assistance from the Aide. The components on the ground-level accessible route included creative play activities (like activity panels and sound tubes). The elevated components on an accessible route also included slides, a bridge, and climbing activities.

Main Playground

On the main playground, combining the large and small structures, there were 24 elevated components and 10 ground components that would have been on an accessible route if the playground surface had been accessible. The different types of ground-level components that were on an accessible route included swings, a talk tube, a chin-up bar, and various interactive panels.

The small structure included a transfer platform and transfer steps for students with disabilities to get to a slide, but the Student could not access that slide independently because the railings were too far apart for her to scoot up the steps with her back on the railing, as described above. On the large structure, two slides were on an accessible route because they were served by transfer steps and a transfer platform. However, in order to get to them, students have to cross a “suspension bridge” that many students with mobility impairments (including the Student) would have difficulty traversing independently. The transfer platform and steps on the large structure also provided an accessible route to some climbing equipment, but that equipment also would not be

useful to the Student because her upper-body strength was limited. The transfer steps on the large structure also were not usable by the Student without assistance at the time of OCR's visit because the railings were too far apart. As described above, however, the District had ordered some replacement railings that were intended to allow her to use the transfer steps by putting her back on the railings.

None of the elevated play components on either structure were served by a ramp up to the elevated components.

Analysis and Conclusion

Because the playgrounds were all constructed after 1992, the playgrounds are considered new construction under both Section 504 and Title II. Accordingly, at a minimum they should have: an accessible route leading to and through the playground that is firm, stable, and slip resistant; a sufficient range of play structure activities within the playground that is accessible to and usable by disabled individuals; and accessible surfacing beneath accessible play equipment that is firm, stable, slip resistant, and resilient. Based on the evidence, OCR determined that the School's playgrounds do not meet all of those standards.

As noted above, the entire surfacing for both playgrounds is loose-fill engineered wood fiber. Engineered wood fiber surfacing may form an accessible playground surface if it is properly installed and maintained to meet ASTM F-1951 and to consistently provide a firm, stable, slip resistant and level surface as required by the UFAS and ADAAG. As described above, the School's playground surfaces, as currently installed and maintained, are uneven and are not firm, stable, or sufficiently level. The surfaces are therefore not currently accessible to and usable for students with disabilities. Therefore, OCR found that the playground surfaces, as maintained, do not meet Section 504 and Title II accessibility requirements. While the manufacturer of the surface has asserted that the surface material meets the standards required in the 2010 Standards when "properly installed," OCR did not find evidence to conclude that the surface was installed here consistent with the conditions under which the surface material was certified as accessible.

OCR also found that the entrance to the kindergarten playground was not accessible because it had a running slope of 7%, steeper than the allowable 5% (1:20) slope pursuant to Section 4.3.7 of the 1991 Standards. It also had a drop in level from the ramp to the wood fiber surface of more than the one-half of an inch that is allowable under Section 4.3.8 of the 1991 Standards.

Regarding the playground equipment, OCR considered whether the range of accessible play activities is equivalent to the range of play activities available to non-disabled students.

For the kindergarten playground, the types of play experiences included those provided by slides, bridges, climbers, overhead climbing (upper-body strengthening) components, and creative play (activity panel and sound tubes). If the playground surface was accessible, at least one of each type of activities would be available on an accessible route except for the overhead climbing component. Because the horizontal ladder is contained within a concrete box that does not have an accessible route to get to the component, it is not accessible. There are also no other similar overhead climbing components that would provide students with disabilities a similar type of

play experience. As such, the horizontal ladder area needs to have an accessible route to the equipment in order for the kindergarten playground to be fully accessible. Alternatively, a different overhead climbing component needs to be provided on an accessible route somewhere else in the play area.

For the main playground, the types of play experiences included those provided by slides, swings, suspension bridges, climbing activities (climbers and ladders), upper-body strengthening activities (overhead ladders, chin-up bars), and creative play (activity panel and sound tubes). If the playground surface were accessible, OCR determined that, after the additional components added by the District in the fall of 2017, there is at least one type of each of these activities on a ground-level accessible route or on a route served by a transfer platform and transfer steps.

OCR notes that the main playground does not meet the requirement in the 2010 Standards requiring that, for play areas with more than 20 elevated components, at least 25% of the elevated components must be served by ramps. However, OCR determined that because the playground structures were constructed before the 2010 Standards were in effect, the District is not required to conform to this scoping requirement.

Based on the findings and conclusions described above, the District entered into a Resolution Agreement that included the following elements: (1) The District will develop and implement a Playground Surface Plan to ensure that the surfaces of the playgrounds at the School are accessible for mobility-impaired students; (2) The District will modify the entrance ramp into the play structure on the kindergarten playground so that the running slope is no more than 1:20, or no more than a 5% grade, and so that it does not have a change in level of more than one-half inch where the ramp ends; and (3) The District will modify the kindergarten playground so that either the area containing the horizontal ladder has an entrance that is accessible to mobility-impaired individuals or that there is other overhead climbing equipment in the kindergarten playground is located on an accessible route.

Conclusion

This concludes OCR's investigation of the complaint and 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. OCR is closing the investigation of this complaint as of the date of this letter, and notifying the Complainant concurrently.

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.

When fully implemented, the resolution agreement is intended to address the complaint allegations. OCR will monitor the implementation of the resolution agreement until the District is in compliance with the terms of the resolution agreement. Upon completion of the obligations under the resolution agreement, OCR will close the case.

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 may not harass, coerce, intimidate, retaliate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the individual 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, 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.

Thank you for your cooperation in resolving this case. If you have any questions about this letter, please contact Civil Rights Attorney Blake Thompson at Blake.Thompson@ed.gov or at (415) 486-5630.

Sincerely,

/s/

Zachary Pelchat
Team Leader

Enclosure

cc: Candice Harris, Assistant Superintendent (by email)