



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

1350 EUCLID AVENUE, SUITE 325
CLEVELAND, OH 44115-1812

REGION XV
MICHIGAN
OHIO

February 24, 2023

Via e-mail only to: XXXXX

XXXXX

Giarmarco, Mullins & Horton, P.C.
Tenth Floor Columbia Center
101 West Big Beaver Road
Troy, Michigan 48084-5280

Re: OCR Docket No. 15-22-1542

Dear XXXXX:

This letter is to notify you of the disposition of the above-referenced complaint filed on XXXXX XXXXX, XXXXX, with the U.S. Department of Education, Office for Civil Rights (OCR), against East China School District (the District) alleging that the District is discriminating against students with vision and mobility impairments on the basis of disability. Specifically, the Complainant alleged that the playgrounds at Pine River Elementary, Palms Elementary, and Gearing Elementary (the Schools) do not have an accessible route inside the playground and do not have accessible play components.

OCR enforces 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, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance. OCR also enforces 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 by public entities. Because the District receives Federal financial assistance from the Department and is a public entity, the District is subject to Section 504 and Title II.

Based on the complaint allegation, OCR opened an investigation of the following legal issue: whether a qualified individual with a disability was excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under any of the District's services, programs or activities because the District's facilities are inaccessible to or unusable by individuals with disabilities, in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.21 and the Title II implementing regulation at 28 C.F.R. § 35.149.

During its investigation to date, OCR reviewed information provided by the Complainant and the District and interviewed District staff.

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

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Legal Standard

The Section 504 and Title II regulations state that no qualified person with a disability shall, because a covered entity'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 of the entity's programs or activities. 34 C.F.R. § 104.21; 28 C.F.R. § 35.149. The regulations reference standards for determining whether an entity's programs, activities, and services are accessible to individuals with disabilities, depending upon whether the facilities are determined to be existing, new construction, or alterations. The applicable standard depends upon the date of construction or alteration of the facility.

The U.S. Department of Justice (DOJ) published revised regulations for Titles II and III of the ADA on September 15, 2010. These regulations adopted revised accessibility standards called the 2010 ADA Standards for Accessible Design (the 2010 ADA Standards). The 2010 ADA Standards went into effect on March 15, 2012, although entities had the option of using them for construction or alterations as early as September 15, 2010, until their effective date. For new construction and alterations as of March 15, 2012, public entities must comply with the 2010 ADA Standards.

A playground 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 playground facility is comprised of both the structures or equipment installed to provide play activities and the surface surrounding such structures or equipment. The Title II regulation, as amended, states that elements that have not been altered in existing facilities on or after March 15, 2012, and that comply with the corresponding technical and scoping specifications for those elements in either the 1991 ADA Standards or UFAS are not required to be modified in order to comply with the 2010 ADA Standards. However, this "safe harbor" provision does not apply to those elements in existing facilities for which there were neither technical nor scoping specifications in the 1991 ADA Standards. These include, among other elements, play areas. 28 C.F.R. §35.150(b)(2). Standards for play areas can be found at Sections 240 and 1008 of the 2010 ADA Standards.

The Title II regulation states that, where structural changes in facilities were to be undertaken to comply with the program accessibility obligations under 28 C.F.R. §35.150, the changes were to be made within three years of January 26, 1992, but as expeditiously as possible. 28 C.F.R. §35.150(c). Public entities employing 50 or more persons were required to develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes. Public entities were required to provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the development of the transition plan by submitting comments. A copy of the transition plan was required to be made available for public inspection. Transition plans are required to, at a minimum:

- (i) Identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities;
- (ii) Describe in detail the methods that will be used to make the facilities accessible;

- (iii) Specify the schedule for taking the steps necessary to achieve compliance with [28 C.F.R. §35.150] and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and
- (iv) Indicate the official responsible for implementation of the plan.

28 C.F.R. §35.150(d)(3). DOJ's Title II Technical Assistance Manual states that a public entity's self-evaluation must identify and correct those policies and practices that are inconsistent with Title II's requirements, and that, as part of the self-evaluation, a public entity should identify all of the public entity's programs, activities, and services, and review all of the policies and practices that govern their administration.

The Section 504 regulation, at 34 C.F.R. §104.22(d)-(e), sets forth a requirement that recipients comply with the program access standard for existing facilities within 60 days of the effective date of the regulation, except for where structural changes in facilities were necessary, in which case the changes were to be made within three years of the effective date. In the event that structural changes were necessary to meet the program access standard, recipients were required to develop, within six months of the effective date of the regulation, a transition plan setting forth the steps necessary to complete such changes.

o Accessible Routes and Ground Surface

Regarding ground surfaces within playgrounds, the 2010 ADA Standards require that floor and ground surfaces be stable, firm and slip resistant (2010 ADA Standards at 1008.2, 403.2, 302.1); and that changes in levels should be ramped (2010 ADA Standard at 303.4) and should provide turning spaces that comply with Standard 304. In addition, the 2010 ADA Standards at 1008.2.6.1 state that ground surfaces shall comply with ASTM F-1951, which has been incorporated by reference into the 2010 ADA Standards. ASTM F-1951 states that sand, gravel, and wood chips are examples of a "loose fill system," which it defines as a "surface system consisting of small independent, movable components." ASTM F-1951 states that playground surfaces represented as complying with ASTM F-1951 must meet all applicable requirements specified therein, and that essential records necessary to document any claim that the requirements have been met must be kept. ASTM F-1951 sets forth additional requirements that must be met for the surface within the fall zone of the surrounded playground equipment. ASTM F-1951 states that, when tested according to the methods described therein, the surface in place must have average work per foot values for straight propulsion and for turning less than the average work per foot values for straight propulsion and for turning on a hard, smooth surface with a grade of 1:14. However, where play components are altered and the ground surface is not, the ground surface does not have to comply with the ASTM F 1951-99 standard for accessible surfaces unless the cost of providing an accessible surface is less than 20 percent of the cost of the alterations to the play components; in this situation, the surface is still required to be stable, firm, and slip-resistant.¹

¹ "Accessible Play Areas: A Summary of Accessibility Guidelines for Play Areas" (U.S. Access Board), at p. 39, available at [play-areas.pdf \(access-board.gov\)](#). See also Section 240.1 exception 2, which states that in "existing play areas, where play components are relocated for the purposes of creating safe use zones and the ground surface is not altered or extended for more than one use zone, the play area shall not be required to comply with 240." In

The standards also state that ground surfaces shall be inspected and maintained regularly and frequently to ensure continued compliance with ASTM F-1951. The Standards, and Access Board publications regarding playground surfaces, stress the importance, and the requirement, of ongoing care and maintenance of the playground surface.² The Title II regulation, at 28 C.F.R. §35.133, requires a public entity to maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities pursuant to the regulation. In addition, the Standards require the surface to be assessed as installed, and not merely as designed.³

- o Play Components

According to the 2010 ADA Standards, 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 describe two types of play components - ground-level and elevated.

A ground-level play component is approached and exited at the ground level. Examples of ground-level play components may include spring rockers, swings, diggers, and stand-alone slides. The 2010 ADA Standards require at least one of each type of ground-level play component to be on an accessible route, comply with 1008.4, and to be integrated into the play area. (240.2.1.1; 240.2.1)

An elevated play component is a play component that is approached above or below grade and 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. Play components that are attached to a composite play structure and can be approached or exited at the ground level as well as above grade from a platform or deck, such as a climber, are considered elevated play components, not ground-level play components. (Advisory 240.2.2)

Where a play area contains elevated play components, the play area must provide a certain ratio of ground-level play components of differing types on an accessible route. Table 240.2.1.2 sets forth the requisite number of ground-level play components that must be on an accessible route. Furthermore, 50% of the elevated play components must also be on an accessible route. (240.2.2) Two methods contemplated by the 2010 ADA Standards for the provision of an accessible route to elevated play components are ramps and transfer systems. (1008.2 and 1008.3)

addition, exception 4 states that: “Where play components are altered and the ground surface is not altered, the ground surface shall not be required to comply with 1008.2.6 unless required by 202.4.” Section 202.4 deals with alterations affecting primary function areas.

² See, e.g., Advisory 1008.2.6 Ground Surfaces. “Ground surfaces must be inspected and maintained regularly to ensure continued compliance with the ASTM F 1951 standard. The type of surface material selected and play area use levels will determine the frequency of inspection and maintenance activities.”

³ [Surfacing the Accessible Playground: 7 Things Every Playground Owner Should Know about the Accessibility of their Playground Surfaces \(U.S. Access Board and the National Center on Accessibility 2014\)](#); also available at [Chapter 10: Play Surfaces \(access-board.gov\) at p. 5](#). (“The standards require the actual site-installed surface systems to comply with ASTM F1292- 99/04 and ASTM F1951-99.”)

Ground level play components on accessible routes and elevated play components connected by ramps must comply with 1008.4. Such play components must provide clear floor space that is stable, firm and slip resistant, must be at least 30 inches by 48 inches minimum, and have at least one turning space provided on the same level as the play components. Clear floor or ground spaces, turning spaces and accessible routes are permitted to overlap within these play areas. (302, 304, 305 and 1008.4) Where swings are provided, the turning space shall be located immediately adjacent to the swing. (1008.4.1) Where such play components require transfer to entry points or seats, the entry points or seats must have a height of between 11 inches (minimum) and 24 inches (maximum) from the clear floor or ground space (except for slides) and at least one means of support for transferring shall be provided. Designs that provide for an unobstructed transfer are recommended. (1008.4.2, 1008.4.4 and 1008.4.5) The clear width of accessible routes at ground level must be 60 inches minimum and have a vertical clearance of at least 80 inches, with some limited exceptions. (1008.2)

Where transfer is intended from wheelchairs or other mobility aids, including onto elevated play components required to be on an accessible route that do not have access via a ramp, transfer platforms complying with 1008.3.1 must be provided. Transfer platforms must have level surfaces and they must be at least 14 inches deep and 24 inches wide. (1008.3.1.1) The transfer platforms must have a height between 11 inches (minimum) and 18 inches (maximum) measured to the top of the surface from the ground or floor surface. (1008.3.1.2) There must be a transfer space at the ground or surface level adjacent to the transfer platform so that a wheelchair can maneuver to the transfer platform. The transfer space should be at least 48 inches wide and centered on the 24-inch width of the transfer platform. The transfer platform serving the transfer space shall be unobstructed. The clear width of accessible routes connecting elevated play components must be at least 36 inches with the exception of transfer systems connecting elevated play components which must be at least 24 inches. (1008.2.4.2) When movement is intended from transfer platforms to levels with elevated play components required to be on an accessible route, transfer steps must also be provided. Transfer steps must be at least 14 inches deep and 24 inches wide and may not be higher than 8 inches measuring from the space below. (1008.3.2) At least one means of transferring (transfer supports) shall be provided for transfer platforms and transfer steps. Transfer supports assist children when transferring and may include things like a rope loop, a loop type handle, a slot in the edge of a flat horizontal or vertical member, poles, bars or D rings on the corner posts. (1008.3.1.4 and 1008.3.2.3) Where ramps are provided, they must meet requirements provided at 1008.2.5.

Under Title II, public entities are encouraged, although not required, when they lease space to lease accessible space. However, once they have occupied the leased facility, they must provide access to all programs that are conducted there. (This is similarly required by the Section 504 regulation at 34 C.F.R. 104.4(b)(6).) If a public entity or recipient leases the building but it was built for them, and it is new construction, then the new construction standard applies. Likewise, if the entity leases the building, and then has an alteration made, that alteration must be made in conformance with the standards for alterations.

Analysis

Under Section 302 of OCR's *Case Processing Manual*, allegations under investigation may be resolved at any time when, prior to the conclusion of the investigation, the recipient expresses an interest in resolving the allegations and OCR determines that it is appropriate to resolve them because OCR's investigation has identified concerns that can be addressed through a resolution agreement. In this case, the District expressed an interest in resolving the allegation prior to the conclusion of OCR's investigation.

The playgrounds at the Schools were updated prior to the 2022-2023 school year. In its "invitation to bid" package, the District stated in section 1.02 Reference Standards, that the relevant standards were: 1) ASTM F1487 - Standard Consumer Safety Performance Specification for Playground Equipment for Public Use 2021; and 2) CPSC Pub. No. 325 - Public Playground Safety Handbook 2010. The invitation to bid package did not reference the 2010 ADA Standards. ASTM F1487 is only one of the standards referenced in the 2010 ADA Standards regarding playgrounds. District staff confirmed that the District did not require compliance with the 2010 ADA Standards in its request for bids for work on the playgrounds, as the District relied on a third-party engineering and architecture firm to create the bids. Photographs of the playgrounds show wooden borders around some play components rendering those play components inaccessible. While the District asserted that the Schools' playgrounds complied with the 2010 ADA Standards, the District did not provide specific information regarding whether the playgrounds contain the requisite number of accessible elevated play components, nor whether one of each type of ground level play components comply with the relevant accessibility standards. In addition, although the District asserted that its playground surfaces of engineered wood fiber were specifically designed for playgrounds, the District did not provide any documentation that, as installed, the surface complied with the relevant standards, nor does the District have a daily schedule for ensuring the playgrounds' surfaces remain stable, firm, and slip-resistant.

Based on the above, OCR determined that resolution pursuant to Section 302 was appropriate.

On February 24, 2023, the District signed the enclosed Resolution Agreement, which, when fully implemented, will address all of the allegations in the complaint. OCR will monitor the implementation of the Resolution Agreement.

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.

Please be advised that the District must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, it will seek to protect,

to the extent provided by law, personally identifiable information, that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

OCR looks forward to receiving the District's first monitoring report by **May 26, 2023**. For questions about implementation of the Agreement, please contact Ms. Kimberly Kilby or Ms. Allison Hite, who will be monitoring the District's implementation of the agreement. Ms. Kilby can be reached by telephone at (216) 522-2574 or by e-mail at Kimbery.Kilby@ed.gov, and Ms. Hite can be reached by telephone at (202) 987-1296 or by e-mail at Allison.Hite@ed.gov. If you have any questions about this letter, you may contact me phone at (216) 522-2672 or by e-mail at nathaniel.mcdonald@ed.gov.

Sincerely,

Nathaniel J. McDonald
Supervisory Attorney/Team Leader

Enclosure