

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF EDUCATION

North Kingstown Band Room

DECISION

Held: This is a show cause hearing to determine if the North Kingstown School Committee has violated state and federal law by constructing a set of permanent band risers in the North Kingstown High School that are not accessible to people who use wheelchairs. The North Kingstown school committee is ordered to: 1) Keep the surface area in front of the risers wheelchair accessible; 2) Make the first level of the risers accessible to persons in wheelchairs; and 3) Make any surface area used by the conductor wheelchair accessible.

DATE: December 18, 2003

A. Travel of the Case, Jurisdiction, and Standing

This is a show cause hearing in which the Commissioner of Education is required to determine if the North Kingstown School Committee has violated state and federal law by constructing a set of permanent band risers that are not accessible to people who use wheelchairs.¹ These band risers are located in a band room at the North Kingstown High School. Jurisdiction is present under R.I.G.L.16-39-1, R.I.G.L.16-39-2 and R.I.G.L.42-87-5. The Governor's Commission on Disabilities (GCD)² has intervened to argue that the North Kingstown School Committee is in violation applicable state and federal law protecting the rights of individuals with disabilities. See: R.I.G.L. 42-87-1, et seq. and R.I.G.L. 42-51-9. We find that the GCD has standing to intervene in this matter. R.I.G.L.42-51-8 (6).

B. Issue Presented

This case deals with band risers. Band risers are, in essence, steps that are used to raise members of a band, one above the other, in ordered ranks.³ The issue in this case is whether or not all levels of a newly constructed set of band risers must be accessible to student musicians who use wheelchairs. The GCD argues that all levels of the risers must be accessible and that the Department of Education should deny construction reimbursement for the existing risers and that it should direct the demolition of the risers.

C. Position of the Parties

The Governor's Commission on Disabilities

The GCD takes the position that all levels of the band risers must be accessible to students in wheelchairs. It points out that the band risers and the school itself constitute new construction. The federal regulations governing new construction provide that:

§ 84.23 [104.23] New Construction

Design and construction. Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such a manner that the facility or part of the facility is readily accessible to and usable by handicapped persons.... [Emphasis added]

¹ The Governor's Commission on Disabilities [GCD] has requested the Commissioner of Education to withhold funding for this project. [Exhibit 12]

² Governor's Commission on Disabilities [GCD] See: 42-51-1, et seq.

³ Also called *choral risers*.

The GCD interprets this regulation to mean that the entire surface area of a newly constructed facility [with a few immaterial exceptions⁴] must be wheelchair accessible. That is to say, in the GCD's view, every part of every part of new construction must be wheelchair accessible.⁵ The GCD concedes that if we were dealing with old construction a different rule would apply:

§ 84.22 [104.22] Existing facilities

(a) Program accessibility. A recipient shall operate each program or activity to which this part applies so that the program or activity, when viewed in its entirety is readily accessible to handicapped persons. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons. [Emphasis added]

The GCD contends that the intent of the regulation governing new construction is to require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons. The GCD therefore submits that since the band risers are not accessible at all levels they must be torn down. The position of the GCD is therefore straightforward: *Fiat justitia, ruat caelum*—or at least the band risers in North Kingstown.

The North Kingstown School Committee

NK agrees that the accessibility standard applicable to new construction is applicable to this case. It also agrees that the band risers are not presently physically accessible to a student in a wheelchair. NK argues, however, that the word accessible must be given the meaning that accessible has in the Uniform Federal Accessibility Standards. In pertinent part the Regulations state:

§ 84.23 [104.23] New Construction

Accessible. Describes a site, building, facility, or portion thereof that complies with these standards and that *can be approached, entered, and used by physically disabled people (emphasis added)*.

North Kingstown argues that its band room can, in fact, be *approached, entered, and used by physical disabled people* because student

⁴ § 84.23 [104.23] New Construction (2) For purposes of this section, section 4.1.6 (1)(g) of UFAS shall be interpreted to exempt from the requirements of UFAS only mechanical rooms and other spaces that, because of their intended use, will not require accessibility to the public or beneficiaries or result in the employment therein of persons with physical handicaps.

⁵ Letter Memorandum of the GCD—April 22, 2003

musicians in wheelchairs can be accommodated on the flat surface in front of the risers and—with comparatively easy modifications—these musicians can be also accommodated on the first level of the risers.

North Kingstown also argues that since the appropriate federal regulatory agencies have not yet issued regulatory guidance on the question of band riser accessibility a judicial or quasi-judicial hearing is an inappropriate forum to address this technical engineering and architectural issue.

In the end the position of the North Kingstown school authorities is that there is no feasible way to make all levels of the band risers accessible to students in wheelchairs. North Kingstown submits that band students who are in wheelchairs can be accommodated by placement at floor level in front of the band. North Kingstown concedes that it would be possible to build a wheelchair ramp that would make the first level riser accessible and it is prepared to make this accommodation. Of course, North Kingstown also submits that band risers enhance its music program and that they improve the musical instruction given to North Kingstown students

D. Findings of Fact

1. The band risers in the North Kingstown High School are not presently accessible to students in wheelchairs. [Observation by Hearing Officer]
2. The flat surface in front of the band risers is accessible to students in wheelchairs. [Observation by Hearing Officer]
3. Furthermore, the North Kingstown School committee can, with relative ease, make the first level of the band risers wheelchair accessible. [Observation by Hearing Officer]
4. Band risers serve both a pedagogical and a musical purpose. While band risers are certainly not indispensable for a successful program of music instructions, band risers do enhance the pedagogical effectiveness of this instruction. [Exhibit 4]
5. For pedagogical purposes there are advantages to having student musicians placed on risers. [Exhibit 4]
6. The teacher can view the students as they play to be sure that they are using correct techniques or—for that matter—to be sure that they are playing at all. [Exhibit 4]
7. The hearing of students may even be protected because risers diminish the possibility that a loud instrument, such as trumpet, might be played at the ear

level of a student standing in front of the trumpet player. [Testimony of Music Teacher]

8. A student on a riser can be heard better by the teacher, thus facilitating correction and improvement of the student's playing. [Exhibit 4]
9. Risers also help in the maintenance of discipline by giving the teacher a better view of student behavior. [Testimony of Music Teacher]
10. At very high levels of musical performance expert conductors may have preferences for the placement of musical instruments at some particular level or place on band risers. These are refined and expert judgments that experts enjoy disagreeing about. At the instructional level of musical presentation the exact placement of a particular instrument on a set of risers is either unimportant or it is something that a qualified music teacher can work around. [Testimony of Music Teacher]
11. Having a student on the upper levels of a set of band risers might well present difficulties if a sudden evacuation of the school building had to be ordered.[Testimony of Superintendent]
12. Risers enhance the overall acoustic effect of the orchestra by the way they direct musical sounds within the hall. The band risers at the NK music room, along with the other acoustical aspects of the room, have made it a favorite venue for music competitions. [Exhibit 4]
13. Risers also serve a musical purpose by allowing the audience to hear instruments unmuffled by the bodies of the musicians. [Exhibit 4]
14. We find that both parties in the case are acting in good faith and that they have made strenuous efforts to resolve this matter. [Observation of Hearing Officer]
15. At the time when the NK facility was constructed the question of handicapped access was given close attention. School officials, through their architect sought the advice of appropriate regulatory authorities, including the commission. No objections were made to the band risers by the commission. [Exhibit 7 and 16]

E. A Note on Hypothetical Accommodation

The hearing officer has urged the parties to examine all available architectural changes or equipment purchases that might help resolve this matter. Both sides have technical expertise in methods of wheelchair accommodation that greatly exceed any expertise available to the present hearing officer. Both sides also have access to various national standards setting organizations, federal agencies, and commercial suppliers of accommodation equipment.

We are, therefore, confident that if there were any easy, inexpensive, "quick-fix" to this problem the parties would have found it by now. We are also confident that if there were any way for North Kingstown to have easily constructed fully accessible band risers, the Commission would have pointed out this failing.

Band risers seem to present unique accessibility problems because they are designed to raise a comparatively few number of people in ordered ranks, one above the other, while at the same time keeping these ranks close to the instructor. Steep angles—angles not easily gentled to accommodate wheelchairs—seem to be inherent in the design of risers. While various mechanical contrivances may be imagined to address this problem, none seems yet to be on the market.

F. Conclusions of Law

Under Federal law discrimination against people with disabilities is prohibited:

§ 84.21 [104.21] Discrimination prohibited.

No qualified handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.

The school and the band risers at issue are new construction. The federal regulations governing new construction provide that:

§ 84.23 [104.23] New Construction

Design and construction. Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such a manner that the facility or *part of the facility* is readily accessible to and usable by handicapped persons.... [*Emphasis added*]

State and local government agencies have the option to follow the *Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG)* or the *Uniform Federal Accessibility Standard (UFAS)*⁶ Rhode Island follows the UFAS.⁷ This does not help us much since neither of

⁶ 28 C.F.R. §35.151

⁷ See: RI State Building Code—Accessibility for Individuals with Disabilities in State and Local Government Facilities. February 1, 1993. [Exhibit 19]

these Standards deal specifically with band risers. Sections of these Standards dealing with stadium style seating and public access to performing areas unfortunately provide us with little direct guidance about issues relating to band risers.

In the absence of specific regulatory guidance from the appropriate regulatory authorities concerning band risers we think that we must base our decision on the applicable laws and regulations as they now exist. We have been unable to find, and we have not been shown, any specific precedents to guide us in this inquiry. Our own research has, however, revealed one state regulatory enactment that specifically deals with band risers.

**Minnesota Rule 1341.0405 ADAAG 4.1.3 Accessible Buildings;
New Construction**

Accessible buildings and facilities shall meet the minimum requirements in items A to W.

A. ADAAG 4.1.3(1); At least one accessible route complying with part 1341.0422 shall connect accessible building or facility entrances with all nonexempt spaces and elements within the building or facility. All levels of a floor, located on an accessible route, shall be accessible except as modified by this chapter.

EXCEPTION: Band, orchestra, and choir risers must have access to the director/conductor level and at least one performance level. The director/conductor level and performance level may be the same level.

This regulation interprets § 84.23 [104.23] (New Construction) to mean that while in new construction every part of the new facility must be accessible to, and usable by, people in wheelchairs—this fact does not require that the entire surface area of every part of the facility must be made accessible. This interpretation seems to accord with what little guidance we can glean from cases dealing with stadium seating. In these cases the courts hold that while every sight angle and price level of the seating surface of a new stadium must be accessible, this does not mean that every seat in the stadium must be wheelchair accessible. Compliance with the disabilities law is demonstrated by having a sufficient number of seats in the stadium to accommodate the needs of individuals in wheelchairs.

We find this construction of the applicable law to be persuasive. It gives a plain meaning to the statute that fully protects the access rights of people in wheelchairs while avoiding the prohibition of a structure—a set of band risers—that is of eminent utility.

G. Conclusion

We therefore conclude that in the case at hand it will suffice for the North Kingstown school committee to:

- 1.
- 2.
- 3.
- 4.
- 5.
- 6.
7. Keep the surface area in front of the risers wheelchair accessible.
8. Make the first level of the risers accessible to persons in wheelchairs.
9. Make any surface area used by the conductor wheelchair accessible.

DECISION

It is so ordered: that the North Kingstown school committee follow the steps listed in the Conclusion above.

Forrest L. Avila
Hearing Officer

APPROVED:

Peter McWalters, Commissioner

December 18, 2003
Date