



**UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
CLEVELAND OFFICE
600 SUPERIOR AVENUE EAST, SUITE 750
CLEVELAND, OHIO 44114-2611**

JAN 29 2010

~~Ms. Rena Boogren
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Re: OCR Complaint #15-09-1233

Dear Ms. Boogren:

This letter is to inform you of the disposition of the above-referenced complaint filed against the Birmingham Public School District (the District), with the U.S. Department of Education (the Department), Office for Civil Rights (OCR) on June 11, 2009. The complaint alleged that the District discriminated against your son, a student at the District, on the basis of his disability (autism spectrum disorder or ASD). Specifically, the complaint alleged the following:

1. The District failed to provide a qualified substitute teacher for an ASD special education classroom at Birmingham Covington School (BCS) when the ASD classroom special education teacher was absent.
2. The District failed to consistently permit your son to attend his general education science class.
3. The District failed to train District personnel who work with your son to use your son's alternative augmentative communication device (AAC device), as provided for in his individualized education plan (IEP).
4. The District failed to permit your son to eat his lunch in the cafeteria with students in regular education classes.
5. The District excluded your son from a field trip because of his disability.

6. The District treated your son differently from non-disabled students regarding dissemination of information about and criteria for attending a school-wide field trip.
7. The District required you to pay for the cost of having a paraprofessional accompany your son on a school field trip.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance, including recipients of such assistance from the Department. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.*, and its implementing regulation, 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 from the Department and as a public entity, the District is subject to Section 504 and Title II. Accordingly, OCR had jurisdiction to investigate this complaint.

During the investigation, OCR staff interviewed you and District personnel, and reviewed documents provided by you and the District. Based on a careful analysis of this information, we have determined that there is sufficient evidence to conclude that the District violated Section 504 and Title II as alleged. However, on January 29, 2010, the District agreed to resolve the compliance issues. We set forth the bases for our determination below.

Background

Your son was enrolled at Birmingham Coventry School (BCS) in the seventh grade in the District's specialized autism program during the 2008-2009 school year. He was placed in a special education ASD classroom for the greater part of his school day. The class was comprised of six students with varying degrees of need. One eighth grader in the class was described as difficult to handle and physically aggressive; this eighth grader injured a substitute teacher and a paraprofessional during the 2008-2009 school year. There were a teacher and three paraprofessionals in the classroom every day. The special education secondary supervisor told OCR that she visited the room every Wednesday morning and a teaching consultant for the ASD program District-wide stopped by twice a week to ensure that staff were documenting progress toward achieving student goals.

Your son's evaluation report completed in December 2007 stated that his word recognition and word understanding were at the pre-primer level and that he independently carried his AAC device but had difficulty spontaneously using the device in all settings. The report stated that he only used the device to express basic or high interest needs.

Your son was on an individualized education plan (IEP) for the 2008-2009 school year. The IEP was effective on April 8, 2008, and provided that your son would be placed in the least restrictive environment, attend general education science and art classes, and “fully participate with students who are nondisabled in a general education setting except for time spent in separate special education programs/services provided outside of the general education classroom as specified in his IEP.” The IEP specified that your son would attend life, career, social science, language arts, and math in the ASD classroom. The IEP included a provision that your son would have the same opportunity as general education students to participate in nonacademic and extracurricular activities. The IEP also included as a short-term objective that your son would use his AAC device but stated that he required teacher demonstration and prompts. In addition, the IEP identified use of assistive technology as a factor to consider in providing your son with FAPE and noted that your son used an AAC device for communication. On March 16, 2009, the IEP team reconvened a meeting and revised the IEP to state, under the Supplementary Aids/Services/Personnel Supports section, that the District will support the use of the AAC device to facilitate appropriate social behavior. The IEP was modified again on May 5, 2009 to require formal staff training in use of the AAC device by SLP or the Oakland Schools for any untrained staff member or long-term substitute.

Based on complaint allegations #1-4, OCR investigated the issue of whether the District failed to provide a free and appropriate public education (FAPE) in violation of the Section 504 implementing regulation at 34 C.F.R. §§ 104.33, 104.34, and 104.35.

- Denial of FAPE Allegations

Allegation #1: Qualified Substitute Teachers

You alleged that the District failed to provide a qualified substitute teacher when the ASD teacher was absent for an extended period of time during the 2008-2009 school year. OCR’s investigation of this issue focused on whether the substitute teachers hired by the District to provide services to your son resulted in the denial of FAPE. OCR considered the substitute teachers’ experience and training in light of the services required by your son’s IEP.

The District’s data and staff confirm that the District had substitute teachers for the ASD teacher for at least 88.5 school days out of a total of 176 school days during the 2008-2009 school year, including from January 13, 2009 through March 3, 2009, and then again from April 17, 2009 through the end of the school year on June 11, 2009. The class had eleven different substitute teachers throughout the school year. District’s records confirm that the primary substitutes for the ASD teacher held only substitute teaching permits and that in no instance did any of the substitute teachers for that class during the 2008-2009 school year hold a special education teaching certificate.

The District’s assistant superintendent for human resources (assistant superintendent) told OCR that the District hires most of its substitute teachers through an independent contractor. He said that the District’s contract requires that the substitute teachers meet

the State qualifications for substitute teaching. Neither he nor any other District staff interviewed was aware of any District policy requiring the District to secure a substitute with relevant content area certification, other than the general requirement that it comply with Michigan State law.¹

The interim co-principals at BCS explained that they are not responsible for hiring long term substitute teachers for the special education program; the special education secondary supervisor (the supervisor) has that responsibility. However, they both stated that they try to find substitute teachers with content or grade-specific certification when teachers from the general education program are absent for extended periods. For example, one of the co-principals said that he found a retired elementary level teacher to substitute long-term for a grade three teacher and the other co-principal found a substitute teacher with math certification to substitute for a math teacher who was out on maternity leave earlier in the school year.

The regular ASD teacher for your son's class is certified in cognitive impairment with an ASD endorsement. She acknowledged that she had two long term absences in 2008-2009. The first absence commenced on January 15, at which time her doctor faxed a note to the District's Human Resources (HR) department, explaining that she would be out for six weeks. She said she requested a particular substitute from the substitute teachers list who had worked in the ASD class before and knew the students. She said that beginning in April, she again took leave through the end of the school year. The ASD teacher confirmed the same substitute teacher's availability, and again requested that the District hire her as the substitute teacher for the class.

The supervisor confirmed that it was her responsibility to find long term substitute teachers for special education teachers and also confirmed that during the 2008-2009 school year, she selected the substitute teacher for your son's ASD class. The supervisor explained that in selecting a substitute teacher for the extended absences of the ASD teacher, she did not consider whether the substitutes were certified in special education or autism. She said that her only concern was that they had experience substitute teaching in an ASD class and were familiar with the students and the program. She did not know whether other substitute teachers in the District's available pool of substitute teachers at the time had certification or training in autism or special education.

¹ Michigan State law provides that a substitute teaching permit allows a person who does not hold a valid Michigan teaching certificate to be employed as a substitute teacher on a day-to-day basis when the regular teacher is temporarily absent. The substitute permit is not valid for a regular or extended teaching assignment, which is defined as an assignment to the same classroom for more than 90 calendar days. Michigan Department of Education, State Board of Education, State Certification Code, Regulation 390.1143.

The supervisor said that she selected one long-term substitute teacher for your son's ASD class during the 2008-2009 school year because that substitute teacher knew the program from her past experience substitute teaching in various ASD classrooms throughout the District and because she had substitute taught for the ASD classroom in the District's other middle school.

This substitute teacher served as the long-term substitute from January 13 through March 3, 2009, and from April 17 through May 1, 2009. District records show that she substitute taught the ASD class a total of 52 school days during the 2008-2009 school year but had only been at the school for four days during the previous school year, and not with the ASD class. This substitute teacher told OCR that she had no teaching or special education certifications and no specific training in special education or ASD. She explained that, although she had no formal special education or ASD training, she had ten years of experience substitute teaching in "those kinds of classrooms," including six long term assignments in an emotionally impaired classroom. She said she had worked as a long-term substitute teacher at BCS for four years, including in the learning resource center, and knew the students and parents in the ASD class before taking the long-term assignment in January 2009. She said that, while she was substitute teaching for your son's ASD class, she was assisted by the school support team, described as the two principals, the psychologist, and the social worker, all of whom were on call if needed. This substitute teacher did not finish the long-term assignment at the end of the year because she was injured by one of the students in the ASD class.

A different substitute teacher taught the class during the first week in May 2009, and then the District hired the second long-term substitute teacher. The supervisor said that she selected the second long-term substitute teacher from a pool of substitutes who did well with long term substitute teaching assignments in an ASD classroom, and that she had substitute taught an impaired class at the high school. She did not know whether this substitute teacher had special education training or whether she knew the students individually.

The second long-term substitute teacher acknowledged that she had received no special education or ASD training and did not have special education certification, but said she had seven-years experience as both a substitute paraprofessional and substitute teacher, usually in the District's ASD program. She stated that she had not substitute taught for your son's ASD teacher very often, probably twice a year, until the 2008-2009, when she substitute taught in the room for the last six weeks of the school year. District records reflect, however, that she had not taught at BCS at all during the 2007-2008 or 2008-2009 school years until she took over your son's ASD class on May 11, 2009, through the end of the school year.

As is discussed below, your son's attendance records reflect that he was absent or tardy for science classes more frequently during the school year when there was a substitute teacher in the class than when there was not a substitute, and did not eat in the cafeteria as frequently when there was a substitute teacher. The second long term substitute said she had not seen your son's IEP, although she reviewed your son's goal sheets and

worked toward the goals. In addition, during the 2007-2008, the students had attended a field trip to Life Town, which was a model city where students learned life skills. According to the District's documentation, the Life Town trip could not be scheduled for the 2008-2009 school year due to staffing and safety concerns caused by the "inconsistent substitute teacher situation."

Allegations #2 and #4: Science Class and Cafeteria Participation

You alleged that the District failed to consistently allow your son to attend his general education science class. You informed OCR that, in order to attend the class, he needed to be accompanied by a paraprofessional. You stated that when the ASD teacher was absent, the paraprofessional was frequently unable to take your son to his science class because there was a child in the ASD class with behavioral problems, and the paraprofessional needed to stay in the special education classroom to assist the substitute, who could not handle the student alone.

Your son's IEP provided that your son would attend general education science class. The ASD teacher told OCR staff that, when she was there, your son attended his science class regularly, although he was sometimes late. She said that the science teacher sometimes requested that your son take his tests in the ASD classroom because he took a different test, completed it quickly, and engaged in noises and behaviors that distracted other students. The ASD teacher also explained that if a lesson was too hard to adapt or modify for your son, then the science teacher would give him a different lesson to do in the ASD or LRC rooms, but she said this happened only occasionally.

According to the supervisor, substitute teachers, the paraprofessionals, and the science teacher, your son attended his science class most of the time and his attendance was not impacted by the ASD teacher's absences. The science teacher acknowledged, however, that there was a period when your son's attendance was "spotty," but he did not know when or why. The paraprofessional who usually accompanied your son to his science and art classes explained that another student in the ASD class had some severe behavioral issues that sometimes upset your son and caused him to be late to his science class. The paraprofessional said that she sometimes had to calm your son down before taking him to class because, when your son got upset, he vocalized loudly and would get disturbed. She was not sure how often these situations kept your son from attending class because they occurred at different times of the day and, thus, did not always impact science class. She also said that these occurrences did not necessarily increase when the substitute was there.

Your son's attendance records show that for the 2008-2009 school year, he was absent from school a total of two full days and six partial days during the 2008-2009 school year. He was marked as absent from his general education science class a total of 26 times (15 times during ASD teacher's extended absences) and tardy 24 times (13 times during ASD teacher's extended absences). Your son received grades of "A" for science both semesters.

Regarding the cafeteria, you alleged that your son was not able to eat lunch in the cafeteria with general education students due to the behavior of another student in the ASD class and the concern that the substitute could not handle that student alone. Your son was to be accompanied to the cafeteria, and the District did not always have to staff to provide the accompaniment. You explained that although the school has a “link” program, in which typical students interact with special education students in various contexts, such as by accompanying them to the cafeteria and eating with them in the cafeteria at lunch, the link program did not work for your son. You alleged that the District had relied upon this program as the primary opportunity for your son to eat lunch in the cafeteria.

Your son’s IEP provided that he would “fully participate with students who are nondisabled in a general education setting except for time spent in separate special education programs/services provided outside of the general education classroom as specified in his IEP,” and the specific exceptions did not include lunchtime. It also explicitly provided that your son would have transitions developed throughout his environment and throughout his day in the cafeteria, community, special education and general education environments. According to the ASD teacher the students in her class ate in the cafeteria unless one of them was having behavior issues or staff was required to stay in the classroom for safety reasons. She estimated that your son ate in the cafeteria three to five times per week, but she said she was not sure of that. The paraprofessionals and both substitute teachers agreed that your son attended lunch with general education students only sporadically due to the behavior of other students as well as staffing and safety concerns. According to two of the paraprofessionals, when there was a substitute teacher, students frequently had to eat lunch in the classroom because the substitute teacher needed assistance with a student who had a behavior problem.

E-mails provided by both you and the District also demonstrate that although the goal was for the students in the ASD class to eat in the cafeteria on a daily basis, that did not occur. For example, on February 25, 2009, you sent an e-mail to the District social worker and copied the special education secondary supervisor questioning why your son was not eating in the cafeteria every day as was required in his IEP. The e-mail response from the social worker to you, dated March 4, 2009, states that “[the ASD teacher’s] goal is to get all the students into the lunch room and the daily plan is to eat in the cafeteria. However, sometimes behaviors interfere with this plan.”

The District social worker informed OCR that an attempt was made to have a “links” student accompany your son to lunch. However, this plan did not work very well because it was voluntary on the part of the general education students, who did not volunteer regularly or frequently.

Allegation #3: AAC Device Training

You alleged that the District failed to train its staff in the use of your son’s AAC device. You claimed that the device is part of his IEP and is necessary for your son to be able to participate and make progress in his general and special education classes. The purpose

of the device is to enable your son to access the curriculum and communicate. You said that you are able to see how often the device is used and had seen that it was generally only used when your son was at home, not when he was at school. You stated that there was no one at the school who was trained to help your son use the device. Although the device had been broken and out for repair a few times, you believed that the device was not being used even when it was in good repair. As a result, you alleged that your son did not receive this service on a regular basis as required by his IEP.

Your son's IEP dated April 8, 2008, referenced use of the device as a "factor to consider in order to provide a FAPE" and also referenced increased use of the device as a stated goal in the IEP; it was not listed as a service, aid, or support. The revised IEPs dated March 16, 2009, also referenced the need for assistive technology devices or services in order for your son to receive a FAPE but also specified that "support[ing] the use of the AAC device to facilitate appropriate social behavior" was a supplementary aid/service/personal support the District would provide. The May IEP added "formal staff training in use of the AAC device by SLP or Oakland Schools for any untrained staff member or long term substitute." The IEP did not address what to do when the device was not operational. According to the special education supervisor, when the device was broken, you requested a picture exchange program, which was developed by the speech pathologist and a paraprofessional, who works for the ASD program District-wide.

The assistive technology (AT) technician for Oakland Schools (the technician), who was responsible for training staff on the use of the device, said that a lot of training was needed to use the device effectively and required attention to what method of use worked best for the user. For example, some users need pictures, others need line drawings, orthography, or alphabets. She said that she trained staff at BCS more than once, but does not recall who was trained other than the ASD teacher, who was trained in both programming and using the equipment. She said she anticipated that the ASD teacher would train the paraprofessionals and others working with your son on the use of the device. The technician said that it was important that the teacher follow through in using the device and training the paraprofessionals. According to the technician, the ASD teacher knew how to use the device, but she said that during her observations of the classroom on April 14, 2009, when the ASD teacher was on an extended leave, the staff was not using the device very often. The paraprofessionals and substitute teachers in the ASD classroom all stated that they had not been trained on the use of the AAC device, and the ASD teacher acknowledged that she had not trained them on the use of the device. The ASD teacher originally stated that she also had received no training, but later recalled that she might have met with someone from the Oakland Schools about the device for about an hour.

The ASD teacher explained that your son needed a mode of communication for expressing his wants and needs and believed that use of the AAC was part of your son's IEP goals and objectives in this respect. She noted that the IEP goals were initially vague on how the device was to be used but that when your son's IEP was revised in March, use of the AAC device was integrated into your son's interactions in the general education

population, in the services section, and the IEP team understood that the AAC device would be used more frequently. She said that the AAC was part of a larger communication system that included picture cards, gestures, and sign language. She said the staff was not able to program the device and relied on you to program it. The ASD teacher stated that your son would use the device 75-80% of the time with verbal and model prompting. Without prompting, he would not use it at all. She said she consistently prompted him to use the device, and he used it for morning group, science, art, table work, and for basic addition and subtraction, which comprised approximately 60% of his day. The ASD teacher also asserted that the AAC device was complicated, that your son broke the device by tapping it against the walls and desk, and that it could be down for two-three weeks at a time.

The paraprofessional who worked most closely with your son and accompanied him to science class said she found the AAC device difficult to use, particularly in science because it had not been programmed to correspond with the curriculum. She said she used the device in group math activities to key in math problems; she would also help your son use the device for communications. She said your son would use the device for speaking, but could only use what was programmed into it. The paraprofessional could not recall whether any of the goals in your son's IEP related to the use of his AAC device. She advised that the device was gone more than not for repair because your son was not gentle with it and threw it down. When the device was broken, she substituted communication picture cards or drew her own pictures to illustrate concepts. She said she also had her own system for putting pictures on a Velcro board which she felt was as effective as the device. She said she thought that training on the device would have helped her use it better, but a couple of hours of training would not be enough. Also, she said the device is only as good as what is programmed into it, and you did a lot of the programming for material for the paraprofessionals to use in class.

Another paraprofessional who worked closely with your son from March through the end of the school year said she found the AAC device to be fairly straight forward, but agreed that it was difficult to use in the science class. She said that your son did not use the device independently and always needed staff to open it and point to pages and prompt him.

The first substitute teacher said that she believed the paraprofessionals were "excellent" at using the AAC device. This substitute said she was familiar with the AAC device and found it easy to use when it was working, but that it was broken more often than not. She said her understanding was that the IEP required its use as often as possible for spelling and math and for communicating, but she noted that your son did not use the device unless he was directed to do so. She said that when the device was broken, she used counters for math, and scrabble tiles for spelling. For communicating, she said she used a picture board.

The second substitute also thought that the device was fairly straight-forward and easy to use. She stated that someone in the room always knew how to use it. Although she did not know how to program the device, she said the programming seemed sufficient for the

lessons given. She also noted that the device was broken a few times while she was there, and said that when that happened, she would write your son a social story or give him a printed calendar. She explained that in those instances, instead of using the device, your son pointed to pictures. She added that she did not know if your son needed the AAC device to meet his goals, but that her understanding was that he needed to use the device as often as possible.

The science teacher said that your son brought the AAC device to his science class but barely used it. His understanding was that it was programmed at home and supposed to be used in science, and the science teacher could not explain why he did not use it with your son. The science teacher did note, however, that your son did use the AAC device in his class with the paraprofessional who accompanied him. The science teacher received no training on the device, but was shown how it worked. He received your son's IEP at the beginning of the year, but did not know if the IEP addressed using the device. The science teacher said he never looked at the device to see if the science material was programmed into it.

In a progress note, dated May 18, 2009, a supports coordinator from the Association for Macomb-Oakland Regional Center (AMORC), which assisted with the technology in the classroom, noted that the paraprofessionals in the classroom did not have a consistent word for your son's AAC device and were not exactly sure how to use it.

If the device was broken, the AT technician explained that there was a back-up system. Your son had a light-tech communication book with the same information in hard copy as was in the device. The light tech version consists of different kinds of communication boards, which could be line drawings, words, pictures, etc., in order to duplicate the machine pages in book form. None of the staff members OCR interviewed who were working with your son were familiar with the communication book.

Allegation #5: The Jungle Book Field Trip

You said that during the 2008-2009 school year, regular education students attended a performance of *The Jungle Book* at the high school, but that special education students were not included because the school did not have the staff needed to take them. She was not sure of the specific date when the field trip occurred.

Most of the District employees OCR interviewed did not know about the field trip or whether the ASD students were permitted to attend. The ASD teacher, however, advised OCR staff that the school set up a school-wide field trip to see a dress rehearsal of the play presented by the high school students at the high school. When she requested to bring her students from the ASD class, she was told that there was no space available in the buses, but that the students could attend if they provided their own transportation. She said that transportation was provided for the other students. She said that the students in her class therefore did not attend the field trip. She stated that she considered the field trip to be academic in nature and tied to the language arts curriculum.