

- Applicable Regulatory Requirements

The regulation implementing Section 504, at 34 C.F.R. § 104.4, provides that no qualified person with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance. The regulation further provides, at 34 C.F.R. § 104.4 (b)(1)(vii), that no qualified person with a disability shall be limited in the enjoyment of any right or opportunity afforded to others on the basis of disability. The regulation provides, at 34 C.F.R. 104.33(a), that a recipient operating a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified person with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the disability. Section 104.33(b) (1) defines an appropriate education as the provision of regular or special education and related aids and services that are designed to meet individual educational needs of students with disabilities as adequately as the needs of non-disabled students are met, and that satisfy the requirements of sections 104.34, 104.35, and 104.36. Section 104.33(b)(2) provides that the implementation of an individualized education program developed in accordance with IDEA is one means of meeting this requirement. Appendix A of the implementing regulation further clarifies that the quality of the educational services provided to students with disabilities must equal that of the services provided to nondisabled students; thus, teachers for students with disabilities must be trained in the instruction of persons with the disability in question and appropriate equipment and materials must be available.

- Analysis and Conclusion

OCR concludes that the evidence is sufficient to show that the District denied your son a FAPE, as alleged above. Regarding the substitute teachers, although the regular ASD teacher was out for approximately fifty percent of the academic school year, the District made no effort to find substitute teachers for the ASD class who had training or certification in ASD or special education in general, nor to provide the substitute teachers for the class with training. The two substitute teachers who were hired for the greatest number of days during the 2008-2009 school year, including the substitute teacher who taught the class for 51 school days, nearly a third of the school year, had no training or education in ASD or special education, either before or after taking the position. The administrator responsible for selecting the substitute said the sole criteria she considered in hiring substitute teachers throughout the year for the class was their familiarity with that ASD program and the students, and yet of the eleven substitute teachers she called on throughout the 2008-2009 school year to substitute teach for that ASD class, she selected two substitute teachers for long-term assignment with the class who either had not substitute taught in that school during the previous school year at all or very rarely did. She did not consider training or certification and did not know whether there were substitute teachers available who had training or certification in special education or ASD. The District has no policy regarding qualifications of substitute teachers for long-

term assignments in special education classrooms, although the interim co-principals at BCS recognized the importance of placing substitute teachers for long-term assignments who had qualifications for their positions, such as the math substitute and the certified, retired teacher for the elementary class.

The evidence shows that because of the District's failure to find qualified substitutes, your son's services were disrupted. One of the two long-term substitute teachers said she never saw your son's IEP, she only saw the goals sheet that one of the paraprofessionals had put together. Neither of the substitute teachers was trained in the use of your son's AAC device, which was important to ensure that he access the curriculum, and was one of the services set forth in his March IEP. Moreover, although District staff asserted that your son did not miss any more science classes when there was a substitute teacher than when the regular ASD teacher was there, attendance records indicate that your son was absent or tardy from his science class more often when there was a substitute teacher in his class. Additionally, there is evidence that a curricular field trip the class would normally participate in was cancelled because of safety issues created by having a substitute teacher. Finally, two of the paraprofessionals said that 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. Your son's attendance in general education science and lunch in the cafeteria were both provisions of his IEP.

In addition to the failure to provide qualified substitute teachers, the District also denied your son a FAPE when it failed to ensure that your son regularly eat lunch in the cafeteria and attend his science class as required by his IEP. With regard to science class, data provided by the District shows that your son was absent from or tardy to his general education science class far more often than he was absent or tardy from school. Furthermore, because the science teacher and the paraprofessional who accompanied your son to science lacked training and familiarity with the AAC device, your son did not use the device to access the curriculum and communicate in science class.

Regarding your son's attendance in the cafeteria for lunch, District witnesses stated that your son's attendance was dependent on staffing and that, when the ASD teacher was absent, the students in the ASD classroom were only able to attend lunch with the general education students sporadically because the paraprofessionals could not leave the substitute alone with a student whose behavior was too disruptive for him to attend lunch with the rest of the students. Consequently, all of the students had to stay back in the room. Even when the ASD teacher was present, she said your son did not eat in the cafeteria every day, based on availability of staff.

The District also denied your son a FAPE when it failed to sufficiently train staff on the use of his AAC device and failed to use the device consistently, although use of the device was a service to be provided by the District at the very least from March 2009 to the end of the school year, and in May the IEP was revised to specifically require that the paraprofessionals and substitute teachers be trained on its use. None of the paraprofessionals or substitute teachers who covered the ASD classroom during the

teacher's extended absences received training in use of the device. Although the ASD teacher received some training, she was absent for more than half of the school year. The paraprofessional who worked with your son most frequently stated that she had a difficult time using the device and the general education science teacher said he hardly ever used it. The technician explained that extensive training was required to use the device effectively and that her classroom observations revealed that the device was hardly used. Moreover, although the AAC device was frequently inoperable, there was a back-up system for when the device was broken, a printout that came with the device, but no one working with your son was aware of it. Everyone responsible for working with your son employed a different method of communication as a backup system.

Finally, regarding the field trip to see *The Jungle Book*, the evidence is sufficient to find the District violated Section 504 when it denied the students in the ASD classroom an opportunity to participate in the field trip by requiring them to provide their own transportation when the other students in the class were not so required, and they were thereby not able to participate.

As a result of the foregoing, OCR concludes that the District denied your son a FAPE in violation of Section 504.

- Different Treatment Allegations

Based on allegation #6, OCR investigated the issue of whether the District failed to provide non-academic and extracurricular services and activities in such a manner as is necessary to afford students with disabilities an equal opportunity for participation in such services and activities, pursuant to 34 C.F.R. § 104.37. In addition, based on allegation #7, OCR investigated the issue of whether the District placed a surcharge on a student with a disability to cover the costs of providing that student with the nondiscriminatory treatment required by Title II and its implementing regulation, which is prohibited by 28 C.F.R. § 35.130(f).

Allegations #6-#7: Class-Wide Field Trip to Cedar Point

You also alleged that the District excluded your son and other students in his class from a field trip the students took to Cedar Point in June 2009, because of their disabilities. Specifically, you asserted that the District treated the students in the ASD class differently from students without disabilities with respect to the dissemination of information about the seventh and eighth grade field trip to Cedar Point at the end of the school year and required you to provide medical documentation and to pay for a chaperone for your son to attend the field trip.

You said that the school made it very difficult for your son to attend the trip. You said that first, your son was never given a permission slip to bring home so that he could attend the trip. According to the complaint, permission slips went home with the general education students the week before you requested one from the supervisor. You asserted

that even after you requested the permission slip by e-mails on May 13, 2009, and May 16, 2009, the District did not send one to you. You said that on May 18, 2009, you were directed to the paraprofessional for a permission slip.

You told OCR that after you received the permission slip, the District demanded a doctor's note stating that it was safe for your son to attend the field trip to Cedar Point. Then, the District said that you would have to chaperone your son and that if you could not attend, you would have to provide written permission from a doctor and would have to provide a paraprofessional to accompany your son. You provided OCR with copies of e-mails on the above dates in which you requested a permission slip for the field trip. The supervisor stated in an e-mail dated May 18, 2009, "I will need in writing a letter from you stating that the person accompanying your son on the field trip has the right to make decisions for him in your stead. Also, how does your son's seizure disorder interact with the Cedar Point rides? I would like reassurance from his medical doctor that your son is able to go on the Cedar Point rides."

You said you had to pay for the paraprofessional's admission to the park and expenses for the day. You noted that out of the six students in your son's class, only your son and one other student went on the Cedar Point trip.

The District's field trip policy and procedure state that parents are to be notified in writing of all particulars concerning field trips, including costs, date, times, supervision, and statements regarding the Student Code of Conduct. Teachers are to secure written parent permission from parents for the students to attend the field trip. The policy requires that the District check on medical, dietary, or other health conditions that may impact students on the trip and complete appropriate health forms and permission to treat.

In response to this allegation, one of the co-principals at BCS told OCR that general education parents were notified of the Cedar Point trip early in the school year by teacher's note, at parent night, and by web site posting. To his knowledge, all students, including special education students, were eligible to participate.

The supervisor said she was unaware of how information about the Cedar Point trip was distributed. She said that when you requested a permission slip, the supervisor asked you if you wanted to attend because it was a fourteen-hour day and she thought that your son might be more comfortable with his mother than with a paraprofessional. However, the supervisor said she made sure the paraprofessionals gave you a permission slip as soon as one was requested. The supervisor said there was no discussion with you about the District providing a paraprofessional; she thought you had pre-arranged it. The supervisor was uncertain whether you knew that the school would provide paraprofessional coverage.

According to the ASD teacher, however, although the field trip to Cedar Point was for all of the seventh and eighth graders at the school, only eighth graders from the ASD class were allowed to attend the field trip. Seventh graders from that classroom were not invited unless their parents attended with them. The ASD teacher said she discouraged

the parents of the seventh graders from sending them by telling them that it was a long day. The decision not to include seventh graders from the ASD room had been the ASD teacher's practice for the past six years. She did not disseminate information about the trip, but made a statement at the beginning of the year to explain the above. She informed OCR that she needed a "ton of support" for the trip in the ASD classroom and that the school provides chaperones for the eighth grade students only.

- Applicable Regulatory Requirements

The regulation implementing Section 504, at 34 C.F.R. § 104.4(a), provides that no qualified person with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance. The regulation further provides, at 34 C.F.R. § 104.4 (b)(1)(vii), that no qualified person with a disability shall be limited in the enjoyment of any right or opportunity afforded to others on the basis of disability. Pursuant to 34 C.F.R. 104.37, a recipient is required to provide non-academic and extracurricular services and activities in such a manner as is necessary to afford students with disabilities an equal opportunity for participation in such services and activities. According to 104.37(2), nonacademic and extracurricular services and activities may include recreational activities.

According to 28 C.F.R. § 35.130(f), a District is prohibited from placing a surcharge on a student with a disability to cover the costs of providing that student with the nondiscriminatory treatment required by Title II and its implementing regulation. Specifically, the regulation provides that, "A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part."

OCR has found that a school district discriminates against a student with a disability when it sets special conditions for participation in field trips and extracurricular activities. Students with disabilities must be afforded the same chance to participate in field trips and other nonacademic activities as their nondisabled peers. Thus, a district may not condition a student's participation on his parents satisfying obligations that are not imposed on all parents. Where a district required parents of students with disabilities to personally attend an off-campus program, pay a registration fee, or authorize another parent to provide medical services, as a condition of the student's participation, OCR determined that the district discriminated against the student because the parents of nondisabled students were not required to meet these conditions.

- Analysis and Conclusion

In this instance, the evidence is sufficient to conclude that the District treated your son differently from non-disabled students because of his disability regarding dissemination of information about and criteria for attending a seventh and eighth grade field trip to

Cedar Point. The ASD teacher advised parents in her classroom that seventh graders from the ASD classroom were not invited to the Cedar Point trip, although general education seventh graders could attend, and that parents who insisted on sending their seventh grader were required to chaperone or provide their own paraprofessional. There was no discussion of a paraprofessional being provided by the school, in discussions between you and the supervisor, who said she did not know if you believed that was an option. Furthermore, the supervisor and the teacher clearly discouraged your son from attending by not providing a permission slip to you until you requested one (although the parents of general education students had their slips sent home via their students at least the week before, and more likely, at the beginning of the school year), discouraging you from sending him by emphasizing the length of the trip, and requiring him to provide a doctor's note as a condition of his attendance.

The District's practice of not including the special education students in general education field trips and requiring the parents to arrange their own transportation constitutes different treatment on the basis of disability in providing non-academic aids and services and is a denial of an equal opportunity to participate in the activity, in violation of 34 C.F.R. § 104.37. The District also failed to provide a qualified staff member to accompany your son and you had to pay for the services of a private paraprofessional, in violation of 28 C.F.R. § 35.130(f), which prohibits a district from placing a surcharge on a student with a disability to cover the costs of providing that student with the nondiscriminatory treatment required by Title II and its implementing regulation.

Overall Conclusion

Based on the foregoing, OCR concludes there is sufficient evidence to find that the District violated Section 504 and Title II with respect to the allegations of this complaint. However, the District, on January 29, 2010, agreed to implement the enclosed resolution agreement, which, when fully implemented, will resolve the compliance issues identified in this investigation and described above.

The Agreement requires the District to reimburse you for any out-of-pocket expenses incurred by your son's attendance at a field trip that were not incurred by the parents of non-disabled students; to convene an IEP meeting to determine the compensatory education necessary to supplement the educational instruction your son received during the 2008-2009 school year; to develop a policy and procedure for attempting to obtain substitute teachers for its special education classes who have certification or training related to the disabilities of the students in the class, or for providing substitute teachers with training; to revise its field trip policies to ensure advanced notice of field trips to parents or guardians of all students, including students with disabilities, and provide support and/or services for students with disabilities to enable them to participate in the same field trips that are offered to non-disabled students; to revise its Section 504 policy and procedures to ensure that teachers and paraprofessionals working with students using assistive technology receive the necessary training to ensure the technology can be utilized properly and also provide for alternative services for when the technology is in

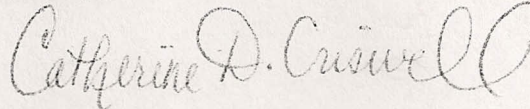
repair or is otherwise not functioning; and to provide training to the administrative and teaching staff on Section 504 requirements and its revised Section 504 policies and procedures.

As the agreement when fully implemented resolves the complaint allegations, OCR is closing this complaint effective the date of this letter. This concludes our investigation of this matter. OCR will monitor the implementation of this resolution agreement. If the District does not fully implement the terms of this agreement, OCR will reopen the complaint and take appropriate action to ensure the District's compliance with Section 504 and Title II.

This letter is a letter of findings issued by OCR to address an individual OCR case. Letters of findings contain fact-specific investigative findings and dispositions of individual cases. Letters of findings are not formal statements of OCR policy and they 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. Also, note that you may file a private lawsuit pursuant to Section 203 of the Americans with Disabilities Act, whether or not OCR finds a violation of Title II.

OCR is committed to ensuring that every complaint is resolved appropriately. If you have questions about this letter or the resolution of this complaint, please contact Mr. Donald Yarab, Team Leader, by telephone at (216) 522-7634 or by e-mail to Donald.Yarab@ed.gov.

Sincerely,



Catherine D. Criswell
Acting Director

Enclosure