



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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SAN FRANCISCO, CA 94105

REGION IX
CALIFORNIA

January 9, 2015

Mr. John R. Porter Jr.
Superintendent
Franklin-McKinley Elementary School District
645 Wool Creek Dr.
San Jose, CA 95112

(In reply, please refer to case no. 09-13-1056.)

Dear Superintendent Porter:

The U.S. Department of Education, Office for Civil Rights (OCR), has concluded its investigation of the above-referenced complaint against the Franklin McKinley Elementary School District (District). The complainant¹ alleged that the District discriminated against Limited English Proficient (LEP) parents and students at the school where she taught (the school), based on national origin. She also alleged that she was subjected to retaliation for advocating on behalf of these parents and students. The specific allegations OCR opened for investigation were:

1. Whether the District retaliated against the complainant for advocating for the rights of English learners and their parents.
2. Whether the District failed to provide Limited English Proficient (LEP) parents at the school with important information in their primary or home language, when such information is provided to English-speaking parents.
3. Whether the District denied language minority parents at the school an equal opportunity to participate on the school site council.
4. Whether the District failed to provide English learner students at the school with educational services that were designed to teach them English and afford them equal access to the District's educational program

OCR opened this complaint for investigation under the authority of Title VI of the Civil Rights Act of 1964 and its implementing regulations. Title VI prohibits discrimination on the basis of race, color, and national origin by recipients of Federal financial assistance.

Regarding issues 1 and 2 described above, under Section 302 of OCR's Complaint Processing Manual, complaint allegations may be resolved at any time when, before the conclusion of an investigation, a recipient expresses an interest in resolving the

¹ OCR previously informed the District of the name of the complainant. We are withholding the complainant's name from this letter to protect her privacy.

allegations. Prior to the completion of OCR's investigation regarding issues 1 and 2 described above, the District informed OCR it would take steps to address the issues raised in those allegations. OCR and the District entered into an agreement to resolve issues 1 and 2 on December 12, 2014. Accordingly, OCR did not complete its investigation of these issues or reach conclusions regarding the District's compliance with issues 1 and 2.

Regarding issues 3 and 4 described above, OCR found insufficient evidence of non-compliance with Title VI.

The applicable legal standards, the facts OCR gathered during its investigation, and the disposition of the allegations are summarized below.

Issue 1: Whether the District retaliated against the complainant for advocating for the rights of English learners

The Title VI regulations, at 34 C.F.R. §100.7(e), prohibit school districts from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Title VI. When OCR investigates an allegation of retaliation, it examines whether the alleged victim engaged in a protected activity and was subsequently subjected to adverse action by the school district, under circumstances that suggest a connection between the protected activity and the adverse action. If a preliminary connection is found, OCR asks whether the school district can provide a nondiscriminatory reason for the adverse action. OCR then determines whether the reason provided is merely a pretext and whether the preponderance of the evidence establishes that the adverse action was in fact retaliation.

OCR's preliminary investigation showed the following:

- The complainant is an elementary school teacher. She alleged that throughout her employment with the District she has advocated on behalf of English learners. She stated that this advocacy included frequent assertions, during Individualized Education Program (IEP) meetings for students whose parents were limited English proficient (LEP) that the parents were entitled adequate interpreter services and a translated copy of the IEP.
- The complainant alleged that, during the fall semester of 2012, the principal of her site took several actions against her in retaliation for her advocacy for English learners. These actions included refusing to select her to serve on the School Site Council (SSC) or in other school leadership positions; falsely accusing her, in front of office staff, of disciplining a kindergarten student for wetting himself; and overreacting to, or instigating, several parent complaints about her teaching and the use of Spanish in her classroom.
- OCR reviewed notes of a faculty meeting at which site staff were asked to sign up for committees for the 2012-13 school year, and did not find evidence that the

complainant requested assignment to the School Site Council. OCR did not find other evidence that specifically established that the complainant was denied school leadership positions to which she was otherwise entitled.

- The evidence suggested that the principal of the school during the 2012-13 school year was at times critical of the complainant, and that she responded to several alleged expressions of concern about the complainant by parents. OCR found evidence of two written communications to the complainant about these complaints:
 - On XXXXXXXX XX, 2012 a parent complained that the complainant had a monolingual Spanish-speaking volunteer who spoke Spanish to the Students in her class. The principal wrote her a letter in response to this complaint and advised her that all instruction must be in English.
 - On XXXXXXXX XX, 2012 a parent complained about several issues, including that the complainant provided work in Spanish to the students. The principal met with the parent and the complainant. The principal also wrote a letter to the complainant summarizing the meeting and telling the complainant that she could not teach in Spanish, and that all instruction must be in English.

While neither of these letters were placed in the complainant's personnel file, they were in the District's records as of April 2013. OCR did not find evidence that other interactions between the complainant and the principal, including the incident concerning her alleged discipline of the kindergartener, resulted in written communications or other actions against the complainant.

In order to find that the complainant had been subjected to unlawful retaliation, OCR would first have needed to determine that s/he participated in activities that were protected under Title VI and that s/he was subsequently subjected to actions that were adverse to her. The complainant alleged that the District took several adverse actions in response to her ongoing advocacy on behalf of English learners and their parents. As to some of these alleged actions, OCR did not find evidence to establish that they were sufficiently severe to affect her employment or deter her from further protected activities. For example, the evidence did not establish that she requested membership on the SSC for the 2012-13 school year at the time when such requests were solicited, or that any negative employment actions were taken in response to some of the incidents she describes. OCR did find evidence, however, that the principal wrote letters to the complainant in response to two parent complaints, in which she admonished the complainant to provide instruction in English. To the extent that these letters might be used in support of a subsequent adverse employment action, they could be viewed as adverse, and could thus form the basis of a claim of retaliation.

Prior to the conclusion of OCR's investigation, the District removed the letters created during the fall of 2012 from the complainant's personnel file and from all school files

maintained by the principal, the former principal, or other school administrators. The District also provided training to all school site principals and District administrators concerning the prohibition against retaliation. OCR concluded that these actions resolved the complainant's allegations with respect to adverse actions allegedly taken during the fall of 2012. For this reason, OCR did not complete further investigation of this allegation, and reached no conclusion as to whether the complainant was, in fact, subjected to retaliation in violation of Title VI.

Issue 2: Whether the District failed to provide Limited English Proficient (LEP) parents with important information in their primary or home language, when such information is provided to English-speaking parents.

The Title VI implementing regulations, at 34 C.F.R. §100.3(a) and (b), provide that a recipient of Federal financial assistance may not, directly or through contractual or other arrangements, on the ground of race, color or national origin, exclude persons from participation in its programs, deny them any service or benefits of its programs, or provide any service or benefit which is different or provided in a different manner from that provided to others. Section 100.3(b)(2) provides that, in determining the types of services or benefits that will be provided, recipients may not utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color or national origin.

On May 25, 1970, pursuant to its authority under Title VI, the Department of Education issued a memorandum entitled "Identification of Discrimination and Denial of Services on the Basis of National Origin" (35 Fed. Reg. 11,595). The memorandum clarified OCR policy under Title VI on issues concerning the responsibility of school agencies to provide equal educational opportunity to limited English proficient national origin minority students.

The May 25th memorandum states that school districts must adequately notify national origin minority group parents of information that is called to the attention of other parents, and that such notice may have to be provided in a language other than English in order to be adequate. OCR analyzes this issue consistent with the U.S. Department of Justice (DOJ) "Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons" (67 Fed.Reg. 41,455, June 18, 2002). Under the DOJ Guidance, the extent of a recipient's obligation to provide language assistance to limited English proficient (LEP) individuals is determined by balancing four factors: 1) the number or proportion of LEP individuals likely to encounter the program; 2) the frequency with which LEP individuals come in contact with the program; 3) the nature and importance of the services provided by the program; and 4) the resources available to the recipient.

The complainant alleged that the District did not provide adequate translation and interpretation to enable parents who are not proficient in English to participate equally in their children's education. She stated that she had participated in IEP meetings for students whose parents were not proficient in English where oral interpretation was

inaccurate or incomplete. She also stated that parents had not received translated copies of their students' IEPs, despite their requests.

During the 2012-13 school year, approximately 78% of the students in the District spoke a language other than English at home. Over 70% of the students at the School spoke a language other than English. Most of these students spoke either Spanish or Vietnamese.

OCR obtained copies of the IEPs for students at the School that were translated during the 2012-13 school year. OCR's review of these documents, and of other documentation provided by the District, raised concerns as to whether parents who were not proficient in English received complete and timely translations of their students' IEPs.

Prior to the conclusion of OCR's investigation, the District informed OCR that it wished to take steps to ensure adequate interpretation and translation during all phases of the Section 504 and IEP process. As noted above, under OCR's procedures, a complaint may be resolved at any time when, before the conclusion of an investigation, a recipient expresses an interest in resolving the complaint. On December 10, 2014, the District entered into the attached agreement, which addresses the complainant's allegation regarding translation and interpretation during the special education process. Specifically, in the agreement between the District and OCR, the District agreed to develop written guidelines for staff outline procedures for the provision of oral interpretation and written translation for LEP parents during all phases of the IEP and Section 504 processes; maintain record keeping of interpretation and translation requests; and conduct training for all school principals regarding the interpretation and translation procedures. As a result of this agreement, OCR did not complete its investigation of this issue.

OCR notes that, in 2009, the District signed an agreement which, in part, required the District to develop guidelines regarding translation and interpretation during the IEP and Section 504 process. Such guidelines were not in use at the time of OCR's investigation of the current complaint. The attached agreement incorporates the relevant requirements of the 2009 resolution. For this reason, OCR is closing its monitoring of that case (OCR number 09-08-1190).

Issue 3: Whether the District denied language minority parents an equal opportunity to participate on the School Site Council at the complainant's school

Under the Title VI regulations at 34 C.F.R. §100.3(a) and (b), a school district may not treat individuals differently on the basis of race, color, or national origin with regard to any aspect of services, benefits, or opportunities it provides. Section (b)(1) (vii) states that a school district may not, directly or through contractual or other arrangements, on the basis of race, color or national origin, deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

The complainant alleged that the process of selecting members of the school's SSC for the 2012-13 school year discriminated against LEP parents in two respects. She alleged that the Spanish translation of the SSC ballot included an inaccurate date for submission of ballots and that the principal subsequently selected two English-proficient parents who had not won the election for membership on the SSC.

OCR's investigation showed the following:

- In August 2012, the school principal sent a letter to parents, in English, Spanish, and Vietnamese, requesting volunteers to run for positions as parent members of the SSC. The letter did not include a due date for submitting nominations. According to District records, fourteen parents returned nomination forms before Monday, August 27; the names of these parents were placed on a ballot. Six of these self-nominations were submitted on Spanish forms; the District identified two other candidates as speaking Spanish as a primary language.
- The complainant provided OCR with copies of five additional nomination forms of parents whose names were not included on the ballot. All of these forms were dated on or after August 27.
- After the nomination forms had been returned, the principal sent out a second letter, which included a ballot with fourteen parent names. Parents were asked to vote for five candidates. Depending on their home languages, parents received ballot letters in English only, Vietnamese, or both English and Spanish.
- According to the Vietnamese ballot and the English statement on both the English and the Spanish/English ballots, the ballots were to be returned by September 4, 2012. The Spanish translation asked parents to return the ballot by September 14, 3011.
- The ballots were counted on September 4, 2012, and the new members were seated on September 5. The District reported that one Spanish-speaking parent returned his/her ballot after this meeting, but that this vote would not have changed the election results. OCR reviewed the ballots and confirmed that the five parents who were elected received more votes than any other parent. Two of the newly elected members had submitted self-nomination forms in Spanish.²
- Between the September and October meetings of the SSC, three of the elected parents resigned from the SSC. The SSC bylaws provided that vacancies were to be filled "by peer selection process." According to the minutes of the October SSC meeting, three new members were elected unanimously. OCR reviewed the sign-in sheets for the October meeting and did not find the names of any of the parents who volunteered to serve on the SSC but were not elected.

² OCR was unable to confirm whether these parents, or a third identified as Spanish-speaking by the District, were also proficient in English.

Under California law in effect during the, the School Site Council serves an important role in advising site leadership and approving portions of the school site budget. OCR does not enforce the state laws governing the membership of the SSC. However, Title VI prohibits school districts from denying parents an equal opportunity to participate on the SSC on the basis of their national origin or language minority status.

OCR reviewed the evidence concerning the nomination and election process and did not find a basis for finding discrimination against LEP parents. The evidence indicated that all parents received the same notification inviting parents to volunteer for the SSC. All nominations received before August 27, 2012 – including nominations made in English, Spanish, and Vietnamese -- were placed on a ballot. The five candidates who received the highest number of votes were selected for the SSC. The Spanish version of the ballot misstated the due date, but the date as written, including the year 3011, was clearly a typographical error. It appears that only one parent submitted a late ballot. While three of the parents who were ultimately selected for the SSC were not included on the ballot, they were selected at an SSC meeting to replace three elected members who had resigned. OCR did not find evidence that the principal took actions that had the purpose or effect of depriving LEP parents of an equal opportunity to participate on the SSC. OCR therefore concluded that there was insufficient evidence to establish a violation of Title VI in connection with this allegation.

Issue 4: Whether English learner students at the school were denied educational services that were designed to teach them English and provide them equal access to the District's educational program

As explained with respect to Issue 2, Title VI and OCR's May 25th Memorandum requires school districts to provide equal educational opportunity to limited English proficient national origin minority students. OCR policy interpreting Title VI and the May 25th memorandum requires school districts to select a sound educational theory for their programs for English learners, and to use practices, resources and personnel reasonably calculated to implement their educational theory. Districts have a dual responsibility to teach students English and to provide them with access to the curriculum, taking steps to ensure that students are not left with academic deficits. In addition, districts must evaluate the implementation and outcomes of their services for English learners to determine whether the services are successful in meeting these responsibilities and the program goals set by the district. If not, districts must modify the programs as necessary.³

The complainant alleged that EL students at the school did not receive a program of English language development and an equal opportunity to access instruction in all areas of the core curriculum. OCR visited the school in March 2013 and interviewed

³ A more detailed description of the school districts' obligation ensure that English learners can participate meaningfully and equally in educational programs and services is included in a Dear Colleague Letter issued on January 7, 2015. The letter and related guidance may be found at www2.ed.gov/about/offices/list/ocr/ellresources.html.

teachers and other school staff and administrators. OCR also interviewed school and District level administrators in June 2014, in order to obtain an update on initiatives at the school and in the District concerning the EL instructional program.

OCR's investigation showed the following:

- During the 2012-13 school year, when this complaint was filed, the school enrolled students in grades K – 6. 271 of the 490 students at the school (55%) were English learners.
- At the time of OCR's site visit, all teachers were able to identify their EL students and their levels of English proficiency, and to describe the steps they took to make the curriculum accessible to them, and to monitor their progress.
- OCR found that students at most grade levels were regrouped for 30 to 35 minutes per day to receive English language development (ELD) instruction that was targeted to their proficiency level. Where such regrouping was not occurring, teachers provided targeted ELD instruction within their own classrooms. Students at grade 4 - 6 who had been determined to need more intensive ELD instruction received it through an intervention pull-out program.
- The District had adopted materials, *Language Central*, for ELD instruction at all grade levels. A number of teachers expressed concerns about the effectiveness of these materials in meeting the needs of their students. A separate ELD intervention curriculum, *Inside*, was used in the pull-out program.
- In September 2013, after OCR's visit, the school was reorganized as a Literacy and Technology Academy for students in transitional kindergarten through third grade, with a new principal and an increased focus on student literacy. During the 2013-14 school year, 380 of the 519 students at the school (73%) were EL.
- During the 2013-14 school year, the school assessed the needs and progress of all of the students at the school, and developed new initiatives for its EL students. The school adopted and provided teacher training on an instructional model specifically developed to enhance early literacy instruction for EL students in grades K – 3, and to ensure that they make continued progress in developing skills in academic English. Additional steps were also taken to ensure that EL students who were not making adequate progress received interventions targeted to their needs.

The complainant alleged that the school, as it was constituted during the 2012-13 school year, did not provide ELD instruction to meet the needs of EL students, and did not provide them access to the core curriculum. OCR's visited the school during that school year, and determined that an ELD program was in place, and that teachers took steps to ensure that EL students were able to access the elementary school curriculum. Interviews with teachers raised concerns about whether the ELD curriculum, as

implemented, was effective in teaching English to EL students at all grade and English proficiency levels. However, the preponderance of the evidence that OCR collected during its visit was not, by itself, sufficient to establish a violation of Title VI.

OCR noted that the grade levels, instructional focus, and student population of the school changed significantly shortly after its visit. In light of this change, OCR determined that further investigation of the program in place during the 2012-13 school year was not appropriate. OCR further determined, that although 2013-14 was a transitional year, both the school and the District were taking steps to address the concerns raised during OCR's visit. Under these circumstances, OCR concluded that additional investigation of this allegation was not necessary.

Conclusion

Because the District voluntarily resolved issues 1 and 2, OCR did not complete its investigation or reach conclusions as to whether the District retaliated against the complainant or failed to provide LEP parents with important information in their primary home language. OCR will monitor the District's implementation of the agreement. As described above, OCR did not find a violation of Title VI with regard to issues 3 and 4.

OCR has incorporated the provisions of the Resolution Agreement in OCR complaint number 09-08-1190 into the Resolution Agreement in this case. For this reason, we are closing case number 09-08-1190.

OCR is closing this complaint as of the date of this letter, and notifying the complainant simultaneously. 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. The complainant may have the right to file a private suit whether or not OCR finds a violation.

OCR routinely notifies recipients that they are prohibited from harassing, coercing, intimidating, or discriminating against any individual for filing a complaint with OCR or participating in the complaint resolution process.

Under the Freedom of Information Act, it may be necessary to release this document and related records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personal information that, if released could reasonably be expected to constitute an unwarranted invasion of privacy.

Thank you for your cooperation in resolving this case. If you have any questions about this letter, please contact Nefertiti Sadat, OCR investigator, at 415-486-5550 or Katherine Riggs, OCR attorney, at 415-486-5544.

Sincerely,

/s/

Anamaria Loya
Team Leader

Enclosure

Cc: Randy Parent, Liebert Cassidy Whitmore