

Kristen Stewart, Ph.D.
Senior Head of School
Ohio Virtual Academy
1690 Woodlands Drive, Second Floor
Maumee, Ohio 43537

Re: OCR Docket #15-12-1116

Dear Dr. Stewart:

This letter is to notify you of the disposition of a complaint filed on February 21, 2012, with the U.S. Department of Education's Office for Civil Rights (OCR) against the Ohio Virtual Academy (the Academy). The complaint alleged that the Academy discriminated against students based on national origin. Specifically, the complaint alleged the Academy:

1. failed to provide limited-English proficient national origin minority parents with school information and notices in a language they could understand;
2. failed to have procedures in place for identifying and assessing limited-English proficient national origin minority students;
3. failed to provide limited-English proficient national origin minority students with meaningful access to the school's programs; and
4. failed to provide limited-English proficient minority students with a program designed to assist them in acquiring English language proficiency.

OCR is responsible for enforcing Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and its implementing regulation at 34 C.F.R. Part 100. Title VI prohibits discrimination based on race, color, and national origin by recipients of Federal financial assistance from the U.S. Department of Education (Department). As a recipient of such financial assistance, the Academy is subject to Title VI. Accordingly, OCR had jurisdiction to investigate this complaint.

Based on the complaint allegations, OCR opened an investigation into the following legal issues:

1. whether the Academy discriminated against limited-English proficient (LEP) national origin minority students on the basis of national origin by failing to provide them an equal opportunity to participate in the benefits of the Academy's education program in violation of the Title VI implementing regulation at 34 C.F.R. § 100.3; and
2. whether the Academy discriminated against LEP national origin minority parents by failing to meaningfully communicate school-related information to them in a language they could understand in violation of the Title VI implementing regulation at 34 C.F.R. §100.3.

Prior to the completion of OCR's investigation, the Academy asked to voluntarily resolve the complaint pursuant to Section 302 of OCR's Complaint Processing Manual (the Manual), stated its desire to work cooperatively with OCR in developing a new ESL program, and signed the enclosed resolution agreement, which, once implemented, will fully address the complaint allegations.

Applicable Regulatory and Legal Standards

On May 14, 2014, OCR issued a Dear Colleague Letter (May 2014 DCL) reminding those operating charter schools that the federal civil rights laws, regulations, and guidance that apply to charter schools are the same as those that apply to other public schools. The federal civil rights laws and the specific legal obligations discussed in this letter apply to all public charter schools in the United States, regardless of whether they receive federal funds under the Department's Charter Schools Program. In addition, charter schools that receive funds—either directly or through a state educational agency—under a Department grant program, such as the Charter Schools Program, are subject to the additional requirements of each grant program. The May 2014 DCL specifically references the provision of services to EL students as requirements that charter schools must follow so that these students can participate fully in their school's educational program.

The regulation implementing Title VI, at 34 C.F.R. § 100.3(a) and (b)(i)-(ii), provides that a recipient of financial assistance from the Department 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 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 issued a memorandum entitled "Identification of Discrimination and Denial of Services on the Basis of National Origin," 35 Fed. Reg. 11,595 (May 1970 Memorandum). The May 1970 Memorandum clarifies OCR policy under Title VI on issues concerning the responsibility of school districts to provide

equal educational opportunity to EL students. It states that school districts must take affirmative steps to address the language needs of EL students. In 1974, the Supreme Court upheld this requirement to take affirmative steps in its *Lau v. Nichols* decision, 414 U.S. 653 (1974). The May 1970 Memorandum also provides 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.

In determining whether a recipient's program for EL students complies with Title VI of the Civil Rights Act of 1964, OCR has used the standard set forth in *Castaneda v. Pickard*, 648 F. 2d 989 (5th Cir. 1981). Under this standard, a program for EL students is acceptable if: (1) "[the] school system is pursuing a program informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy;" (2) "the programs and practices actually used by [the] school system are reasonably calculated to implement effectively the educational theory adopted by the school;" and (3) the school's program succeeds, after a legitimate trial, in producing results indicating that the language barriers confronting students are actually being overcome." *Id.* at 1009-10. OCR adopted the *Castaneda* standard for determining whether recipients' programs for LEP students complied with the Title VI regulation in a policy memorandum issued on December 3, 1985, "The Office for Civil Rights' Title VI Language Minority Compliance Procedures" (December 1985 Memorandum).

In accordance with the December 1985 Memorandum, in providing educational services to language minority students, school districts may use any method or program that has proven successful or may implement any sound educational program that promises to be successful. Districts are expected to carry out their programs, evaluate the results to make sure the programs are working as anticipated, and modify programs that do not meet these expectations. Any educational approach that ensures the effective participation of language minority students in the district's educational program is accepted as a means of complying with the Title VI requirements. OCR will find a violation of Title VI if language minority students in need of an alternative program are not being provided such a program.

Districts are expected to carry out their programs effectively, with appropriate staff (teachers and aides) and with adequate resources (instructional and equipment). The appropriateness of staff is indicated by whether their training, qualifications, and experience are consonant with the requirements of the program. The adequacy of resources is determined by the timely availability of required equipment and instructional materials. Limited financial resources do not justify failure to remedy a Title VI violation.

A district will be in compliance with Title VI when it has adopted an alternative educational program that, when viewed in its entirety, effectively teaches language minority students English and moves them into the regular educational program within a reasonable period of time. OCR looks to local school officials to monitor the effectiveness of their programs, to determine what modifications may be needed when the programs are not successful after a reasonable trial period, and to implement such modifications. A school district's continued or consistent failure to improve an ineffective alternative program for language minority students may lead to a

finding of noncompliance with Title VI. It is expected that a sound educational program will include the maintenance of reasonably accurate and complete data regarding its implementation and the progress of students who move through it.

On September 27, 1991, OCR issued a policy memorandum entitled “Policy Update on Schools’ Obligations Toward National Origin Minority Students with Limited-English Proficiency” (September 1991 Memorandum). The September 1991 Memorandum provides additional guidance for applying the three-pronged approach outlined in *Castañeda*, including additional guidance for applying the May 1970 Memorandum in the context of staffing, transition and/or exit criteria, and program evaluation. In accordance with the September 1991 Memorandum, if a recipient uses a method other than bilingual education (such as ESL or structured immersion), the recipient should have ascertained that teachers who use those methods have been adequately trained in them. Additionally, once students have been placed in an alternative language program, they must be provided with services until they are proficient enough in English to participate meaningfully in the regular educational program. Some factors to examine in determining whether formerly EL students are able to participate meaningfully in the regular educational program include: (1) whether they are able to keep up with their non-EL peers in the regular educational program; (2) whether they are able to participate successfully in essentially all aspects of the school’s curriculum without the use of simplified English materials; and (3) whether their retention-in-grade and dropout rates are similar to those of their non-EL peers.

In accordance with the September 1991 Memorandum, a recipient will generally have wide latitude in determining criteria for exiting students from an alternative language program, but there are a few standards that should be met. First, exit criteria should be based on objective standards, such as standardized test scores, and the district should be able to explain why it has decided that students meeting those standards will be able to participate meaningfully in the regular classroom. Second, students should not be exited from the EL program unless they can read, write, and comprehend English well enough to participate meaningfully in the recipient’s program. If a recipient does not periodically evaluate or modify its programs, as appropriate, it is in violation of the regulation implementing Title VI unless its program is successful. Generally, “success” is measured in terms of whether the program is achieving the particular goals the recipient has established for the program. If the recipient has established no particular goals, the program is successful if its participants are overcoming their language barriers sufficiently well and sufficiently promptly to participate meaningfully in the recipient’s programs.

Recently, Executive Order 13166, “Improving Access for Persons with Limited English Proficiency,” reprinted at 65 Fed. Reg. 50121 (August 16, 2000), required that recipients of Federal financial assistance “take reasonable steps to ensure meaningful access to their programs and activities by LEP persons.” The U.S. Department of Justice (DOJ) subsequently issued its “Policy Guidance, Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons with Limited English Proficiency” (June 18, 2002), which provides guidance to recipients of Federal financial assistance from the DOJ about the method and manner (including translation and interpretation) for delivering information to LEP persons. OCR looks to the DOJ Guidance, including the four-factor analysis test it outlined, as a resource document. The four-factor analysis test to determine whether recipients are taking reasonable

steps to ensure meaningful access to LEP individuals involves a balance of the following factors: (1) the number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of the program, activity, or service provided by the program; and (4) the resources available to the grantee/recipient and costs.

On January 7, 2015, OCR and the U.S. Department of Justice jointly issued a Dear Colleague Letter (2015 DCL), “English Learner Students and Limited English Proficient Parents,” designed to assist beneficiaries in meeting their legal obligations to ensure that EL students can participate meaningfully and equally in educational programs and services and that parents with limited English proficiency have meaningful access to district- and school-related information. The 2015 DCL provides an outline of the legal obligations of recipient institutions towards EL students, discusses compliance issues that frequently arise in OCR investigations involving EL students, and offers approaches that recipients may use to meet their obligations to EL students and their parents. The guidance provides clarifying information, for example, on a school’s responsibilities regarding staffing of EL programs, stating that recipient schools have a federal obligation to ensure that there is an adequate number of teachers to instruct EL students and that these teachers have mastered the skills necessary to effectively teach in the district’s program for EL students. Further, the 2015 DCL discusses recipient school districts’ obligation to provide EL students with adequate resources, including adequate quantities of English language development materials available at the appropriate English proficiency and grade levels and appropriate bilingual materials for bilingual programs. The 2015 DCL also clarifies how a school district should monitor its program, comparing student performance in the aggregate to student never identified as EL students and that “meaningful EL program evaluations include longitudinal data that compare performance in the core content areas (*e.g.*, valid and reliable standardized tests in those areas), graduation, dropout, and retention data for EL students as they progress through the program, former EL students, and never-EL students.” Another important factor is the amount of time it takes for EL students to move up and out of the program.

Further, many school districts design their alternative language programs to temporarily emphasize English over other subjects. While schools with such programs may discontinue special instruction in English once EL students become English-proficient, schools retain an obligation to provide assistance necessary to remedy academic deficits that may have occurred in other subjects while a student was focusing on learning English. In addition, as noted in the 2015 DCL, while EL programs may require that EL students receive separate instruction for a limited period of time, the Departments expect school districts to carry out their chosen program in the least segregative manner consistent with achieving the program’s stated educational goals. Thus, school districts should not retain EL students in EL programs for periods longer or shorter than necessary to achieve the program’s educational goals; nor should districts retain EL students in EL-only classes for periods longer or shorter than required by each student’s level of English proficiency, time and progress in the EL program, and the stated goals of the EL program.

Finally, some school districts have used web-based automated translation to translate documents. Utilization of such services is appropriate only if the translated document accurately conveys the meaning of the source document, including accurately translating technical vocabulary. OCR cautions against the use of web-based automated translations; translations that are inaccurate are

inconsistent with the school district's obligation to communicate effectively with LEP parents. Thus, to ensure that essential information has been accurately translated and conveys the meaning of the source document, the school district would need to have a machine translation reviewed, and edited as needed, by an individual qualified to do so. Additionally, the confidentiality of documents may be lost when documents are uploaded without sufficient controls to a web-based translation service and stored in their databases. School districts using any web-based automated translation services for documents containing personally identifiable information from a student's education record must ensure that disclosure to the web-based service complies with the requirements of the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g(b), and its implementing regulations at 34 C.F.R. Part 99. For more information on this issue, please visit the web page of the Department's Privacy Technical Assistance Center, which includes a guidance titled "Protecting Student Privacy While Using Online Educational Services": <http://ptac.ed.gov/document/protecting-student-privacy-while-using-online-educational-services>.

Summary of OCR's Investigation to Date and the Academy's Voluntary Resolution

During OCR's investigation to date, OCR reviewed documents provided by the Complainant and the Academy and interviewed the Complainant and Academy employees with knowledge of and involvement in the Academy's English as a Second Language (ESL) program as of the 2014-2015 school year. The Academy's prior ESL teacher, who would have been familiar with the situation at the time the complaint was filed, was not available for interview.

This complaint was filed on behalf of a student at the xxxxx (the Student). The Student's and the parent's native language is xxxxx, and both have limited proficiency in English.

The Academy is a kindergarten through twelfth grade public charter school that operates as a virtual academy, offering instruction through a mixture of instructional materials and online instruction. The Academy operates an online program under the auspices of the organization K¹². According to the Complainant, the Student's parent enrolled him at the Academy during the xxxxx school year via the school's website. The enrollment forms provided no option to fill them out in xxxxx, so the parent filled them out xxxxx. Post-enrollment, all Academy correspondence to the parent was in English. The parent called the Academy multiple times and left messages stating that she and the Student understood very little English, but she received no response. On xxxxx, the Complainant xxxxx. After that contact, the Academy informed the xxxxx she should use xxxxx for all materials that needed to be translated, and the Student was provided with access to the Academy's xxxxx teacher as a point person for all communications.

The Complainant stated that, after being notified of her concerns, the Academy xxxxx [a software program] to assist the Student in acquiring English language skills. The Complainant stated that she did not know if those changes applied to all English Language Learner (EL) students or just to the Student. Additionally, the Complainant stated that the parent continued to receive written communications from the Academy only in English and that, as far as she knew, this did not change. It is unclear whether the Academy implemented the other steps the Academy said it would take.

The Complainant informed OCR that the Student was xxxxx.

A parent or guardian (parent) can find information about the Academy online and through advertisements and then either initiates enrollment online or calls a toll-free number; after being asked to identify a zip code, the parent is given a list of pertinent K¹² schools and, if the parent chooses the Academy, an advisor or counselor then calls the parent to complete the enrollment process.

Once a student enrolls, the Academy provides all necessary computer hardware and software, shipping the equipment to the family for set-up (Academy contacts can assist a parent with this, but not in person) and provides a stipend to pay the cost of an internet service provider. Students also receive hard copy educational materials, which may include worksheets, reading material, materials for science experiments, art materials, etc.

Students and parents communicate with Academy staff via “k-mail” (an internal e-mail system), by telephone, through instant messaging, through online “live” sessions called “Class Connect,” and via online threaded academic discussions and class postings. The only exceptions are for Ohio Graduation testing, various required face-to-face meetings or activities (perhaps four a year are required), and the like. During a typical school day, students work independently through a virtual classroom format known as Blackboard® with the assistance of a “learning coach” not provided by the Academy (usually the student’s parent). Time online varies by age, with younger students spending less time online than older students. Students also generally attend two or more online Class Connect sessions a week per subject, held “live” at set times, when teachers deliver instruction that students can hear and where they can, virtually, see a presentation (PowerPoint, video, etc.), a whiteboard, or the teacher on camera and can “virtually” raise their hands and ask questions by pushing a button. Students can also work in virtual breakout sessions with other students if the teacher grants permission. In addition, students can earn flexible (“flex”) credit for activities such as going to a museum or a nature preserve; if so, they do not have to attend Class Connect sessions at that time but can access sessions later via recorded links.

According to the Academy’s 2011-2012 High School Handbook, students must: ask questions of teachers online, through instant messaging; read teacher feedback; talk with the learning coach; and interact with others through discussion boards and in-class postings. Students also communicate with an academic advisor, a homeroom teacher, intervention specialists, and a school counselor. There is no indication of how EL students communicate effectively with these individuals, particularly in a “virtual” environment.

At the time the complaint was filed, the Academy indicated it had identified few EL students;

however, as of the 2014-2015 school year, about 50 students were identified as EL at the Academy. The languages represented by the Academy’s EL students include Spanish, Karen, Urdu, Swahili, Hindi, Chinese, German, and Arabic.

OCR’s investigation to date indicated potential concerns with the structure and implementation of the Academy’s EL program and its communication with LEP parents. The Academy indicated during the investigation that it had started revising its EL program and also its method for communicating with LEP parents.

As noted above, before OCR completed its investigation into whether the Academy had violated Title VI, as alleged, the Academy expressed interest in resolving the complaint pursuant to Section 302 of the Manual. The Manual provides that a complaint may be resolved before the conclusion of an OCR investigation if a recipient expresses an interest in resolving the complaint. This does not constitute an admission of liability on the part of a recipient institution such as the Academy, nor does it constitute a determination by OCR the Academy has violated any of the laws that OCR enforces. The provisions of the resolution agreement are to be aligned with the complaint allegations or the information obtained during the investigation and are to be consistent with the applicable regulations.

The Academy has signed the enclosed resolution agreement, which, once implemented, will fully address the allegations in the complaint in accordance with Title VI. As the Academy is building a new EL program, the agreement requires the Academy to: develop effective means of identifying and assessing, in an online environment, current and new students whose primary or home language is other than English; identify and implement with more specificity its EL program model, including how it will ensure students progress both in English and in the Academy's general education program; assess its resource and staffing needs and develop and implement a plan for ensuring the Academy will have resources and staffing adequate in numbers and training to effectively implement its program model; determine what factors it will use to exit students from its EL program and the methods it will use to monitor exited students to ensure that students are exited only when it has been determined through objective measures that the student is sufficiently proficient in speaking, reading, writing, and understanding the English language to participate effectively in the Academy's regular education program and effectively implement those factors; and develop and implement a method of evaluating its program model and its implementation to ensure that it effectively meets the needs of EL students. In addition, pursuant to the agreement, the Academy will develop and implement a plan to ensure that it communicates effectively with LEP parents and guardians. Finally, the Academy will provide training to its upper-level administrators, principals, ESL personnel, and Academy teachers on the Academy's legal requirements pursuant to Title VI, EL students, and LEP parents.

Conclusion

Based on the foregoing, OCR considers the allegations in this complaint to be resolved, and we are closing our investigation as of the date of this letter. OCR will, however, monitor the Academy's implementation of the agreement. Should the Academy fail to fully implement the agreement, OCR will take appropriate action to ensure the Academy's full compliance with Title VI.

This concludes OCR's investigation of the complaint and should not be interpreted to address the Academy's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

Please be advised that the Academy may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the harmed individual may file another complaint alleging such

treatment.

A complainant may file a private suit in federal court whether or not OCR finds a violation.

We appreciate the cooperation of you and Academy staff during the resolution of this complaint. We look forward to receiving the Academy's first monitoring report, due xxxxx. Please address any questions regarding OCR's resolution of this complaint to Kelly M. Johnson, Supervisory Attorney/Team Leader. Any questions about OCR's monitoring of the agreement should be directed to Allison Beach, who will be monitoring the Academy's implementation of the agreement. Ms. Beach can be reached at (216)xxx-xxxx, or at Allison.Beach@ed.gov. Should the Academy choose to submit required monitoring reports electronically, please send them to OCRCleMonitoringReports@ed.gov.

Sincerely,

/s/

Meena Morey Chandra
Director

Enclosure