

MEMORANDUM

174
UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, DC 20202

SEP 27 1991

TO : OCR Senior Staff

FROM : Michael L. Williams
Assistant Secretary
for Civil Rights



SUBJECT: Policy Update on Schools' Obligations Toward National Origin Minority Students With Limited-English Proficiency (LEP students)

This policy update is primarily designed for use in conducting Lau¹ compliance reviews -- that is, compliance reviews designed to determine whether schools are complying with their obligation under the regulation implementing Title VI of the Civil Rights Act of 1964 to provide any alternative language programs necessary to ensure that national origin minority students with limited-English proficiency (LEP students) have meaningful access to the schools' programs. The policy update adheres to OCR's past determination that Title VI does not mandate any particular program of instruction for LEP students. In determining whether the recipient is operating a program for LEP students that meets Title VI requirements, OCR will consider whether: (1) the program the recipient chooses is recognized as sound by some experts in the field or is considered a legitimate experimental strategy; (2) the programs and practices used by the school system are reasonably calculated to implement effectively the educational theory adopted by the school; and (3) the program succeeds, after a legitimate trial, in producing results indicating that students' language barriers are actually being overcome. The policy update also discusses some difficult issues that frequently arise in Lau investigations. An appendix to the policy discusses the continuing validity of OCR's use of the Castaneda² standard to determine compliance with the Title VI regulation.

This document should be read in conjunction with the December 3, 1985, guidance document entitled, "The Office for Civil Rights' Title VI Language Minority Compliance Procedures," and the May 1970 memorandum to school districts entitled, "Identification of Discrimination and Denial of Services on the Basis of National Origin," 35 Fed. Reg. 11595 (May 1970 Memorandum). It does not

¹Lau v. Nichols, 414 U.S. 563, 94 S.Ct. 786 (1974).

²Castaneda v. Pickard, 648 F. 2d 989 (5th Cir. 1981).

[OCR-000011]

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¹Lau v. Nichols, 414 U.S. 563, 94 S.Ct. 786 (1974).

²Castaneda v. Pickard, 648 F. 2d 989 (5th Cir. 1981).

supersede either document.³ These two documents are attached for your convenience.

Part I of the policy update provides additional guidance for applying the May 1970 and December 1985 memoranda that describe OCR's Title VI Lau policy. In Part I, more specific standards are enunciated for staffing requirements, exit criteria and program evaluation. Policy issues related to special education programs, gifted/talented programs, and other special programs are also discussed. Part II of the policy update describes OCR's policy with regard to segregation of LEP students.

The appendix to this policy update discusses the use of the Castaneda standard and the way in which Federal courts have viewed the relationship between Title VI and the Equal Educational Opportunities Act of 1974.

With the possible exception of Castaneda, which provides a common sense analytical framework for analyzing a district's program for LEP students that has been adopted by OCR, and Keyes v. School Dist. No. 1, which applied the Castaneda principles to the Denver Public Schools, most court decisions in this area stop short of providing OCR and recipient institutions with specific guidance. The policy standards enunciated in this document attempt to combine the most definitive court guidance with OCR's practical legal and policy experience in the field. In that regard, the issues discussed herein, and the policy decisions reached, reflect a careful and thorough examination of Lau case investigations carried out by OCR's regional offices over the past few years, comments from the regional offices on a draft version of the policy, and lengthy discussions on the issues with some of OCR's most experienced investigators. Specific recommendations from participants at the Investigative Strategies Workshop have also been considered and incorporated where appropriate.

I. Additional guidance for applying the May 1970 and December 1985 memoranda.

The December 1985 memorandum listed two areas to be examined in determining whether a recipient was in compliance with Title VI: (1) the need for an alternative language program for LEP students; and (2) the adequacy of the program chosen by the recipient. Issues related to the adequacy of the program chosen by the

³These and other applicable policy documents can be located through OCR's automated Policy Codification System (PCS) by selecting "current" policy and the keywords "Limited-English-Proficient (LEP) Student" (F054). Documents not listed as "current" policy in the PCS should not be used.

recipient will be discussed first, as they arise more often in Lau investigations. Of course, the determination of whether a recipient is in violation of Title VI will require a finding that language minority students are in need of an alternative language program in order to participate effectively in the recipient's educational program.

A. Adequacy of Program

This section of the memorandum provides additional guidance for applying the three-pronged Castaneda approach as a standard for determining the adequacy of a recipient's efforts to provide equal educational opportunities for LEP students.

1. Soundness of educational approach

Castaneda requires districts to use educational theories that are recognized as sound by some experts in the field, or at least theories that are recognized as legitimate educational strategies. 648 F. 2d at 1009. Some approaches that fall under this category include transitional bilingual education, bilingual/bicultural education, structured immersion, developmental bilingual education, and English as a Second Language (ESL). A district that is using any of these approaches has complied with the first requirement of Castaneda. If a district is using a different approach, it is in compliance with Castaneda if it can show that the approach is considered sound by some experts in the field or that it is considered a legitimate experimental strategy.

2. Proper Implementation

Castaneda requires that "the programs and practices actually used by a school system [be] reasonably calculated to implement effectively the educational theory adopted by the school." 648 F. 2d at 1010. Some problematic implementation issues have included staffing requirements for programs, exit criteria, and access to programs such as gifted/talented programs. These issues are discussed below.

Staffing requirements

Districts have an obligation to provide the staff necessary to implement their chosen program properly within a reasonable period of time. Many states and school districts have established formal qualifications for teachers working in a program for limited-English-proficient students. When formal qualifications have been established, and when a district generally requires its teachers in other subjects to meet formal requirements, a recipient must either hire formally qualified teachers for LEP students or require that teachers already on staff work toward attaining those formal qualifications. See Castaneda, 648 F. 2d at 1013. A recipient may not in effect relegate LEP students to second-class status by indefinitely allowing teachers without formal qualifications to teach them while requiring teachers of non-LEP students to meet formal qualifications. See 34 C.F.R. § 100.3(b)(ii).⁴

Whether the district's teachers have met any applicable qualifications established by the state or district does not conclusively show that they are qualified to teach in an alternative language program. Some states have no requirements beyond requiring that a teacher generally be certified, and some states have established requirements that are not rigorous enough to ensure that their teachers have the skills necessary to carry out the district's chosen educational program.⁵ Discussed below are some minimum qualifications for teachers in alternative language programs.

⁴But cf. Teresa P. v. Berkeley Unified School District, 724 F. Supp. 698,714 (N.D. Cal. 1989) (finding that district had adequately implemented its language remediation program even though many of its bilingual and ESL teachers did not hold applicable credentials; court noted that district probably could not have obtained fully credentialed teachers in all language groups, district was requiring teachers to work toward completion of credential requirements as a condition of employment, record showed no differences between achievement of students taught by credentialed teachers and achievement of students taught by uncredentialed teachers, and district's financial resources were severely limited).

⁵Cf. Castaneda, 648 F. 2d at 1013 (court of appeals remanded for determination as to whether deficiencies in teaching skills were due to inadequate training program (100-hour program designed to provide 700-word Spanish vocabulary) or whether failure to master program caused teaching deficiencies).

If a recipient selects a bilingual program for its LEP students, at a minimum, teachers of bilingual classes should be able to speak, read, and write both languages, and should have received adequate instruction in the methods of bilingual education. In addition, the recipient should be able to show that it has determined that its bilingual teachers have these skills. See Keyes, 576 F. Supp. at 1516-17 (criticizing district for designating teachers as bilingual based on an oral interview and for not using standardized tests to determine whether bilingual teachers could speak and write both languages); cf. Castaneda, 648 F. 2d at 1013 ("A bilingual education program, however sound in theory, is clearly unlikely to have a significant impact on the language barriers confronting limited English speaking school children, if the teachers charged with the day-to-day responsibility for educating these children are termed 'qualified' despite the fact that they operate in the classroom under their own unremedied language disability"). In addition, bilingual teachers should be fully qualified to teach their subject.

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. This training can take the form of in-service training, formal college coursework, or a combination of the two. In addition, as with bilingual teachers, a recipient should be able to show that it has determined that its teachers have mastered the skills necessary to teach effectively in a program for LEP students. In making this determination, the recipient should use validated evaluative instruments -- that is, tests that have been shown to accurately measure the skills in question. The recipient should also have the teacher's classroom performance evaluated by someone familiar with the method being used.

ESL teachers need not be bilingual if the evidence shows that they can teach effectively without bilingual skills. Compare Teresa P., 724 F. Supp. at 709 (finding that LEP students can be taught English effectively by monolingual teachers), with Keyes, 576 F. Supp. at 1517 ("The record shows that in the secondary schools there are designated ESL teachers who have no second language capability. There is no basis for assuming that the policy objectives of the [transitional bilingual education] program are being met in such schools").

To the extent that the recipient's chosen educational theory requires native language support, and if the program relies on bilingual aides to provide such support, the recipient should be able to demonstrate that it has determined that its aides have the

appropriate level of skill in speaking, reading, and writing both languages.⁶ In addition, the bilingual aides should be working under the direct supervision of certificated classroom teachers. Students should not be getting instruction from aides rather than teachers. 34 C.F.R. § 100.3(b)(1)(ii); see Castaneda, 648 F.2d at 1013 ("The use of Spanish speaking aides may be an appropriate interim measure, but such aides cannot . . . take the place of qualified bilingual teachers").

Recipients frequently assert that their teachers are unqualified because qualified teachers are not available. If a recipient has shown that it has unsuccessfully tried to hire qualified teachers, it must provide adequate training to teachers already on staff to comply with the Title VI regulation. See Castaneda, 648 F. 2d at 1013. Such training must take place as soon as possible. For example, recipients sometimes require teachers to work toward obtaining a credential as a condition of employment in a program for limited-English-proficient students. This requirement is not, in itself, sufficient to meet the recipient's obligations under the Title VI regulation. To ensure that LEP students have access to the recipient's programs while teachers are completing their formal training, the recipient must ensure that those teachers receive sufficient interim training to enable them to function adequately in the classroom, as well as any assistance from bilingual aides that may be necessary to carry out the recipient's interim program.

Exit Criteria for Language Minority LEP Students

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 LEP students are able to participate meaningfully in the regular educational program include: (1) whether they are able to keep up with their non-LEP 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-LEP peers.

Generally, a recipient will have wide latitude in determining criteria for exiting students from an alternative language program,

⁶Aides at the kindergarten and first grade levels need not demonstrate reading and writing proficiency.

but there are a few basic 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 LEP program unless they can read, write, and comprehend English well enough to participate meaningfully in the recipient's program. Exit criteria that simply test a student's oral language skills are inadequate. Keyes, 576 F. Supp. at 1518 (noting importance of testing reading and writing skills as well as oral language skills). Finally, alternative programs cannot be "dead end" tracks to segregate national origin minority students.

Many districts design their LEP programs to temporarily emphasize English over other subjects. While schools with such programs may discontinue special instruction in English once LEP students become English-proficient, schools retain an obligation to provide assistance necessary to remedy academic deficits that may have occurred in other subjects while the student was focusing on learning English. Castaneda, 648 F. 2d at 1011.

Special Education Programs

OCR's overall policy on this issue, as initially announced in the May 1970 memorandum, is that school systems may not assign students to special education programs on the basis of criteria that essentially measure and evaluate English language skills. The additional legal requirements imposed by Section 504 also must be considered when conducting investigations on this issue. This policy update does not purport to address the numerous Title VI and Section 504 issues related to the placement of limited English-proficient students in special education programs. Although OCR staff are very familiar with Section 504 requirements, additional guidance on the relationship between Section 504 and Lau issues that arise under Title VI may be helpful. A separate policy update will be prepared on those issues.

Pending completion of that policy update, Lau compliance reviews should continue to include an inquiry into the placement of limited-English-proficient students into special education programs where there are indications that LEP students may be inappropriately placed in such programs, or where special education programs provided for LEP students do not address their inability to speak or understand English. In addition, compliance reviews should find out whether recipients have policies of "no double services": that is, refusing to provide both alternative language services and special education to students who need them. Such

inquiries would entail obtaining basic data and information during the course of a Lau compliance review regarding placement of LEP students into special education programs. If data obtained during the inquiry indicates a potential problem regarding placement of LEP students into special education, the regional office may want to consult headquarters about expanding the time frames for the review to ensure that it can devote the time and staff resources to conduct a thorough investigation of these issues. Alternatively, the region could schedule a compliance review of the special education program at a later date. In small to medium-sized school districts, regional offices may be able to gather sufficient data to make a finding regarding the special education program as part of the overall Lau review.

Gifted/Talented Programs and Other Specialized Programs

The exclusion of LEP students from specialized programs such as gifted/talented programs may have the effect of excluding students from a recipient's programs on the basis of national origin, in violation of 34 C.F.R. § 100.3(b)(2), unless the exclusion is educationally justified by the needs of the particular student or by the nature of the specialized program.

LEP students cannot be categorically excluded from gifted/talented or other specialized programs. If a recipient has a process for locating and identifying gifted/talented students, it must also locate and identify gifted/talented LEP students who could benefit from the program.

In determining whether a recipient has improperly excluded LEP students from its gifted/talented or other specialized programs, OCR will carefully examine the recipient's explanation for the lack of participation by LEP students. OCR will also consider whether the recipient has conveyed these reasons to students and parents.

Educational justifications for excluding a particular LEP student from a specialized program should be comparable to those used in excluding a non-LEP peer and include: (1) that time for the program would unduly hinder his/her participation in an alternative language program; and (2) that the specialized program itself requires proficiency in English language skills for meaningful participation.

Unless the particular gifted/talented program or program component requires proficiency in English language skills for meaningful participation, the recipient must ensure that evaluation and testing procedures do not screen out LEP students because of their limited-English proficiency. To the extent feasible, tests used to

place students in specialized programs should not be of a type that the student's limited proficiency in English will prevent him/her from qualifying for a program for which they would otherwise be qualified.

3. Program Evaluation

In return for allowing schools flexibility in choosing and implementing an alternative language program, Castaneda requires recipients to modify their programs if they prove to be unsuccessful after a legitimate trial. As a practical matter, recipients cannot comply with this requirement without periodically evaluating their programs. If a recipient does not periodically evaluate or modify its programs, as appropriate, it is in violation of the Title VI regulation unless its program is successful. Cf. Keyes, 576 F. Supp. at 1518 ("The defendant's program is also flawed by the failure to adopt adequate tests to measure the results of what the district is doing. . . . The lack of an adequate measurement of the effects of such service [to LEP students] is a failure to take reasonable action to implement the transitional bilingual policy").

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.

B. Need for a formal program

Recipients should have procedures in place for identifying and assessing LEP students. As the December 1985 memorandum stated, if language minority students in need of an alternative language program are not being served, the recipient is in violation of Title VI.

The type of program necessary to adequately identify students in need of services will vary widely depending on the demographics of the recipients' schools. In districts with few LEP students, at a minimum, school teachers and administrators should be informed of their obligations to provide necessary alternative language services to students in need of such services, and of their obligation to seek any assistance necessary to comply with this requirement. Schools with a relatively large number of LEP students would be expected to have in place a more formal program.

Title VI does not require an alternative program if, without such a program, LEP students have equal and meaningful access to the district's programs. It is extremely rare for an alternative program that is inadequate under Castaneda to provide LEP students with such access. If a recipient contends that its LEP students have meaningful access to the district's programs, despite the lack of an alternative program or the presence of a program that is inadequate under Castaneda, some factors to consider in evaluating this claim are: (1) whether LEP students are performing as well as their non-LEP peers in the district, unless some other comparison seems more appropriate;⁷ (2) whether LEP students are successfully participating in essentially all aspects of the school's curriculum without the use of simplified English materials; and (3) whether their dropout and retention-in-grade rates are comparable to those of their non-LEP peers. Cf. Keyes, 576 F. Supp. at 1519 (high dropout rates and use of "levelled English" materials indicate that district is not providing equal educational opportunity for LEP students).

If LEP students have equal access to the district's programs under the above standards, the recipient is not in violation of Title VI even if it has no program or its program does not meet the Castaneda standard. If application of the above standards shows that LEP students do not have equal access to the district's programs, and the district has no alternative language program, the district is in violation of Title VI. If the district is implementing an alternative program, it then will be necessary to apply the three-pronged Castaneda approach to determine whether the program complies with Title VI.

II. Segregation of LEP students

Providing special services to LEP students will usually have the effect of segregating students by national origin during at least part of the school day. Castaneda states that this segregation is permissible because "the benefits which would accrue to [LEP] students by remedying the language barriers which impede their ability to realize their academic potential in an English language educational institution may outweigh the adverse effects of such segregation." 648 F. 2d at 998.

OCR's inquiry in this area should focus on whether the district has carried out its chosen program in the least segregative manner

⁷For example, when an overwhelming majority of students in a district are LEP students, it may be more appropriate to compare their performance with their non-LEP peers county- or state-wide.

consistent with achieving its stated goals. In other words, OCR will not examine whether ESL, transitional bilingual education, developmental bilingual education, bilingual/bicultural education, structured immersion, or any other theory adopted by the district is the least segregative program for providing alternative language services to LEP students. Instead, OCR will examine whether the degree of segregation in the program is necessary to achieve the program's educational goals.

The following practices could violate the anti-segregation provisions of the Title VI regulation: (1) segregating LEP students for both academic and nonacademic subjects, such as recess, physical education, art and music;⁶ and (2) maintaining students in an alternative language program longer than necessary to achieve the district's goals for the program.

⁶For an example of a program exclusively for newly-arrived immigrants consistent with Title VI, see OCR's Letter of Findings in Sacramento City Unified School District, Compliance Review Number 09-89-5003, February 21, 1991.

APPENDIX: Use of the Castaneda standard to determine compliance with Title VI.

In determining whether a recipient's program for LEP 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 LEP 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.

The Castaneda court based its standard on the Equal Educational Opportunities Act of 1974 (EEOA), P.L. No. 93-380, codified at 20 U.S.C. §§ 1701-1720, rather than on Title VI or its implementing regulation (20 C.F.R. Part 100). The relevant portion of the EEOA (20 U.S.C. § 1703(f)) is very similar to OCR's May 1970 memorandum describing the obligations of districts toward limited-English-proficient students under Title VI of the Civil Rights Act of 1974.⁹ In Lau v. Nichols, 414 U.S. 563, 94 S.Ct. 786 (1974), the Supreme Court upheld OCR's authority to establish the policies set forth in the May 1970 memorandum.

In view of the similarity between the EEOA and the policy established in the 1970 OCR memorandum, in 1985 OCR adopted the Castaneda standard for determining whether recipients' programs for LEP students complied with the Title VI regulation. Several courts

⁹Section 1703(f) of the EEOA states, in pertinent part, "No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." The pertinent section of the OCR 1970 memorandum states, "Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."

have also treated Title VI and the EEOA as imposing the same requirements regarding limited-English-proficient students. See Heavy Runner v. Brenner, 522 F. Supp. 162, 165 (D. Mont. 1981); Rios v. Read, 480 F. Supp. 14, 21-24 (E.D.N.Y. 1978) (considered Title VI, § 1703(f), and Bilingual Education Act of 1974 claims together; used 1975 Lau Remedies¹⁰ to determine compliance); Cintron v. Brentwood Union Free School Dist., 455 F. Supp. 57, 63-64 (E.D.N.Y. 1978) (same); see also Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030 (7th Cir. 1987) (used Castaneda standard for § 1703(f) claim; remanded claim under Title VI regulation without specifying standard to be used in resolving it, except to note that proof of discriminatory intent was not necessary to establish a claim under the Title VI regulation); Idaho Migrant Council v. Board of Education, 647 F.2d 69 (9th Cir. 1981) (Idaho state education agency had an obligation under § 1703(f) and Title VI to ensure that needs of LEP students were addressed; did not discuss any differences in obligations under Title VI and § 1703(f)).

Castaneda itself did not treat Title VI and the EEOA interchangeably, however. Instead, it distinguished between them on the ground that a showing of intentional discrimination was required for a Title VI violation, while such a showing was not required for a § 1703(f) violation. Castaneda, 648 F.2d at 1007. See also Keyes v. School Dist. No. 1, 576 F. Supp. 1503, 1519 (D. Colo. 1983) (court found that alternative language program violated § 1703(f) and elected not to determine whether it also violated Title VI; questioned continuing validity of Lau in light of Bakke and noted that remedying § 1703(f) violation would necessarily remedy any Title VI violation).

Castaneda and Keyes were decided before Guardians Association v. Civil Service Commission of New York, 463 U.S. 582, 607 n.27, 103 S. Ct. 3221, 3235 n.27 (1983). In Guardians, a majority of the Supreme Court upheld the validity of administrative regulations incorporating a discriminatory effect standard for determining a Title VI violation.¹¹ Thus, Castaneda and Keyes do not undermine the validity of OCR's decision to apply § 1703(f) standards to determine compliance with the Title VI regulation.

¹⁰OCR's 1975 Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful Under Lau v. Nichols.

¹¹The applicable Department of Education regulation is 34 C.F.R. § 100.3(b)(2).

A recent California case, however, distinguished § 1703(f) and the Title VI regulation on other grounds. Teresa P. v. Berkeley Unified School Dist., 724 F. Supp. 698 (N.D. Cal. 1989). In analyzing the § 1703(f) claim in Teresa P., the court used the three-part Castaneda standard and determined that the district's program was adequate under that standard. Id. at 712-16. In addressing the claim brought under the Title VI regulation, however, the court stated that plaintiffs had failed to make a prima facie case because they had not alleged discriminatory intent on the part of the defendants, nor had they "offered any evidence, statistical or otherwise," that the alternative language program had a discriminatory effect on the district's LEP students. Id. at 716-17.

In Teresa P., the district court found that the district's LEP students were participating successfully in the district's curriculum, were competing favorably with native English speakers, and were learning at rates equal to, and in some cases greater than, other LEP students countywide and statewide. 724 F. Supp. at 711. The court also found that, in general, the district's LEP students scored higher than the county and state-wide average on academic achievement tests. Id. at 712. Given these findings, the dismissal of the Title VI claim in Teresa P. can be regarded as consistent with OCR's May 1970 and December 1985 memoranda, both of which require proof of an adverse impact on national origin minority LEP students to establish a violation of the Title VI regulation.¹²

Neither Teresa P. nor any other post-Castaneda case undermines OCR's decision to use the Castaneda standard to evaluate the legality of a recipient's alternative language program. OCR will continue to use the Castaneda standard, and if a recipient's alternative language program complies with this standard the

¹²A Ninth Circuit case also treated § 1703(f) and Title VI claims differently, but in such a terse fashion that it cannot be determined whether these differences would ever have a practical effect. See Guadalupe Org. v. Tempe Elementary School Dist. No. 3., 587 F. 2d 1022, 1029-30 (9th Cir. 1978) (court found that maintenance bilingual/bicultural education was not necessary to provide students with the "meaningful education and the equality of educational opportunity that [Title VI] requires"; court also found that districts did not have to provide maintenance bilingual/bicultural education to be deemed to have taken "'appropriate action to overcome language barriers that impede equal participation by its students in its instructional program'" (quoting § 1703(f)).

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recipient will have met its obligation under the Title VI regulation to open its program to LEP students.

Attachments
As Stated



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE ASSISTANT SECRETARY FOR CIVIL RIGHTS

APR 6 1990

TO : OCR Senior Staff

FROM : William L. Smith *W. L. Smith*
Acting Assistant Secretary
for Civil Rights

SUBJECT: Office for Civil Rights Policy Regarding the Treatment
of National Origin Minority Students Who Are Limited-
English Proficient

I have recently received a number of inquiries regarding the Office for Civil Rights' (OCR) policy related to making determinations of compliance under Title VI of the Civil Rights Act of 1964 as regards the treatment of national origin minority students who are limited-English proficient (language minority students). In responding to these inquiries, I am aware that our existing policy and procedures were issued several years ago and may be in need of updating. In fact, the Policy and Enforcement Service (PES) will issue such an update during the third quarter of FY 1990.

Until that document is available, you can, of course, continue to follow our current policy documents available to you. The May 25th Memorandum, as affirmed by the Supreme Court in the Lau v. Nichols decision, 44 U.S. 653 (1974), provides the legal standard for the Education Department's Title VI policy concerning discrimination on the basis of national origin. The procedures OCR follows in applying this legal standard on a case-by-case basis are set forth in a document issued to OCR staff on December 3, 1985, entitled, OCR's Title VI Language Minority Compliance Procedures (copy attached).

In developing its policy update, PES staff will review the cases we have investigated over the past few years, in addition to examining the case law, to determine where additional guidance may be needed. It will be helpful for PES attorneys to discuss various aspects of these cases with some regional staff who have had substantial recent experience in applying our case-by-case approach. I understand that there have been some excellent investigations carried out under this policy. You will be consulted prior to any discussions on these matters with members of your staff. In the meantime, I urge you to continue to investigate complaints of discrimination against national origin minority students and to conduct compliance reviews on this issue where appropriate.

If you have questions about the application of current policy, or if you have suggestions for policy modifications, you may call Cathy Lewis at 732-1635, or send your information to me in writing.

Attachment



THE OFFICE FOR CIVIL RIGHTS' TITLE VI
LANGUAGE MINORITY COMPLIANCE PROCEDURES

ISSUE

This discussion provides a description of the procedures followed by the Office for Civil Rights (OCR) in making determinations of compliance with Title VI of the Civil Rights Act of 1964, as regards the treatment of national origin minority students with limited-English proficiency (language minority students) enrolled in educational programs that receive Federal financial assistance from the Department of Education.

BACKGROUND

As part of the Civil Rights Act of 1964, Congress enacted Title VI, prohibiting discrimination on the grounds of race, color or national origin in programs or activities that receive Federal financial assistance. In May 1970, the former Department of Health, Education and Welfare (DHEW), published a memorandum to school districts on the Identification of Discrimination and Denial of Services on the Basis of National Origin (the May 25th Memorandum, 35 Fed. Reg. 11595 - Tab A). The purpose of the May 25th Memorandum was to clarify OCR's Title VI policy on issues concerning the responsibility of school districts to provide equal educational opportunity to language minority students. The May 25th Memorandum stated in part:

Where inability to speak and understand the English language excludes national origin minority-group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.

In 1974, the Supreme Court upheld this requirement to take affirmative steps in the Lau v. Nichols decision, 414 U.S. 653 (1974). The May 25th Memorandum, as affirmed by Lau, continues to provide the legal standard for the Education Department's (the Department) Title VI policy concerning discrimination on the basis of national origin. The Lau decision did not require school districts to use any particular program or teaching method. The opinion of the Court states:

No specific remedy is urged upon us. Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instruction to this group in Chinese is another. There may be others. Id. at 565.

In 1975, the former DHEW promulgated a document designed to describe appropriate educational steps that would satisfy the Supreme Court's Lau mandate (Task Force Findings Specifying Remedies Available For Eliminating Past Educational Practices Ruled Unlawful Under Lau v. Nichols.) These "Lau Remedies" evolved into de facto compliance standards, which allowed undue Federal influence over educational judgments that could and should be made by local and state educational authorities.

In August 1980, the newly-formed Department of Education published a Notice of Proposed Rulemaking (NPRM) that sought to replace the unofficial "Lau Remedies" with a document that would have set forth requirements for all schools enrolling language minority students. The 1980 NPRM proposed bilingual education as the required method of instruction in schools with sufficient numbers of language minority students of one language group.

Subsequently, the Department determined that the proposed regulations were intrusive and burdensome. They were withdrawn on February 2, 1981, and OCR put into effect nonprescriptive interim procedures pertaining to the effective participation of language minority students in the educational program offered by a school district. Under these procedures, OCR reviews the compliance of school districts on a case-by-case basis. 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.

Since this compliance approach has been successful, OCR has determined that these procedures provide sufficient guidance for OCR staff and school districts. Accordingly, OCR will continue to follow procedures which allow for a case-by-case determination of a district's compliance status. Set forth below is an updated statement of OCR's current procedures, and a discussion of the analysis applied by OCR in assessing a district's efforts to meet the requirements of Title VI and the May 25th Memorandum.

OCR'S CURRENT PROCEDURES

OCR conducts investigations of the educational services provided for language minority students either as a result of a complaint allegation or through a compliance review. Although the May 25th Memorandum and Lau v. Nichols decision require school districts to "take affirmative steps" to open their instructional programs to language minority students, OCR does not require the submission of a written compliance agreement (plan) unless a violation of Title VI has been established.

The affirmative steps required by the May 25th Memorandum have been interpreted to apply to national origin minority students who are

learning English as a second language, or whose ability to learn English has been substantially diminished through lack of exposure to the language. The May 25th Memorandum does not generally cover national origin minority students whose only language is English, and who may be in difficulty academically, or who have language skills that are less than adequate.

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.

OCR considers two general areas in determining whether a school district that enrolls language minority students is in compliance with Title VI. These are:

- whether there is a need for the district to provide an alternative program designed to meet the educational needs of all language minority students; and
- whether the district's alternative program is likely to be effective in meeting the educational needs of its language minority students.

The question of need for an alternative program is resolved by determining whether language minority students are able to participate effectively in the regular instructional program. When they are not, the school district must provide an alternative program. In cases where the number of these students is small, the alternative program may be informal (i.e., no formal program description is required.)

The second major area of consideration is whether the district's alternative program is likely to be effective in meeting the educational needs of its language minority students. There is considerable debate among educators about the most effective way to meet the educational needs of language minority students in particular circumstances. A variety of factors influence the success of any approach or pedagogy. These factors include not only individual student characteristics, such as age and previous education, but also school characteristics, such as the number and the concentration of different language groups. OCR staff is not in the position to make programmatic determinations and does not presume to make those decisions.

OCR's deliberations are appropriately directed to determining whether the district has addressed these problems, and has

developed and implemented an educational program designed to ensure the effective participation of language minority students. The following sets forth an analytical framework used by OCR in determining whether a school district's program is in compliance with Title VI in this area.

I. Whether there is a Need for an Alternative Program?

The determination of whether all language minority students in need have been served may be made in a number of ways. For example, a district may establish cut-off criteria for the placement of language minority students in either the regular or alternative programs based on the English language proficiency levels required for effective participation in their regular instructional programs. Alternately, past academic records of language minority students may be used to predict, for example, which new students are likely to require the assistance provided by the alternative program.

Many school districts screen students using information such as a language assessment test, information from parents, or structured interviews, to determine which language minority students may need further assessment and possible placement into an alternative program. The appropriateness of assessment methods and procedures depends upon several variables, such as the number of language minority students in each language group, the ages of these students, the size of the school district, and the availability of reliable assessment instruments in the different languages.

The district may show that the academic performance of language minority students in the regular instructional program indicates that these students do not require the assistance provided by the alternative program. The district may also show that language minority students who need assistance can readily transfer from the regular to the alternative program for the portion of the school day during which assistance is needed.

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. However, the mere absence of formal identification and assessment procedures and of a formal program does not, per se, constitute a violation of Title VI. Regional staff are cautioned to review carefully the school district's reasons for not having such procedures, and the effectiveness of any informal methods that may be used. For example, a school district that has received a recent influx of language minority students may not be reasonably expected to have in place the type of procedures and programs that other districts with more predictable language minority student populations should have. Similarly, a school district with only a small number of language minority students, may not need the

formal procedures and programs necessary in districts with such larger numbers of such students. In the past, OCR has worked with such districts, in conjunction with State education agencies, to provide technical assistance in an effort to prevent future Title VI problems.

II. Whether the Alternative Program is likely to be Effective?

A. Is the alternative program based on a sound design?

School districts must demonstrate that the alternative program designed to ensure the effective participation of language minority students in the educational program is based on a sound educational approach.

OCR avoids making educational judgments or second-guessing decisions made by local education officials. Instead, OCR looks at all the available evidence describing the steps taken to ensure that sound and appropriate programs are in place. Example of factors that would be considered are:

- Whether the program has been determined to be a sound educational program by at least some experts in the field.

An expert in the field can be defined as someone whose experience and training expressly qualifies him or her to render such judgments and whose objectivity is not at issue.

- Whether there is an explanation of how the program meets the needs of language minority students.

Such an explanation would normally include a description of the program components and activities, along with a rationale that explains how the program activities can be reasonably expected to meet the educational needs of language minority students.

- Whether the district is operating under an approved state plan or other accepted plans.

Plans that have previously been accepted by OCR as being in compliance with Title VI continue to be acceptable. These plans may be modified by school districts at any time. When comprehensive programs are mandated by state law, OCR will approve such plans, upon request, where it

can be demonstrated that the plans provide a sound educational program that will meet the educational needs of language minority students. When a plan applies only to certain grade levels, the acceptance memorandum is limited to those grades covered under the state plan.

- B. Is the alternative program being carried out in such a way as to ensure the effective participation of the language minority students as soon as reasonably possible?

Districts are expected to carry out their programs effectively, with appropriate staff (teachers and aides), and with adequate resources (instructional materials and equipment).

- Appropriateness of staff

The appropriateness of Staff is indicated by whether their training, qualifications, and experience are consonant with the requirements of the program. For example, their appropriateness would be questioned if a district has established an English-as-a-Second-Language (ESL) program, but the staff had no ESL training and there was no provision for ESL teacher training.

- Adequacy of resources

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. However, OCR considers the extent to which a particular remedy would require a district to divert resources from other necessary educational resources and services.

Similarly, districts faced with a shortage of trained teachers, or with a multiplicity of languages, may not be able to meet certain staffing requirements, such as those needed for an intensive ESL program or a bilingual program. OCR does not require a program that places unrealistic expectations on a district.

- C. Is the alternative program being evaluated by the district and are modifications being made in the program when the district's evaluation indicates they are needed?

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. A more difficult compliance determination arises when a district implements an educational approach which, by all available objective measures, does not provide language minority students with the opportunity for effective participation.

For the reasons discussed earlier in this document, OCR approaches this compliance issue with great caution. Since OCR does not presume to know which educational strategy is most appropriate in a given situation, the failure of any particular strategy or program employed by a school district is more properly addressed by school officials. 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.

There are no specific regulatory requirements regarding the data a district must keep on its alternative programs for language minority students. OCR's current approach to determining compliance with Title VI on this issue does not require that new, additional, or specifically designed records be kept. 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.

CONCLUSION

In viewing a school district's compliance with Title VI regarding effective participation of language minority students in the educational program, OCR does not require schools to follow any particular educational approach. The test for legal adequacy is whether the strategy adopted works -- or promises to work -- on the basis of past practice or in the judgment of experts in the field. OCR examines all the available evidence within the analytical framework described, and determines whether the preponderance of evidence supports the conclusion that the district is implementing a sound educational program that ensures the effective participation of its language minority students.

ISSUED INITIALLY ON DECEMBER 3, 1985

REISSUED WITHOUT CHANGE ON APRIL 6, 1990



William L. Smith
Acting Assistant Secretary
for Civil Rights

Attachment



DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20460

May 25, 1970

MEMORANDUM

TO : School Districts With More Than Five Percent
National Origin-Minority Group Children

FROM : J. Stanley Pottinger
Director, Office for Civil Rights *JSP*

SUBJECT : Identification of Discrimination and Denial
of Services on the Basis of National Origin

Title VI of the Civil Rights Act of 1964, and the Departmental Regulation (45 CFR Part 80) promulgated thereunder, require that there be no discrimination on the basis of race, color or national origin in the operation of any federally assisted programs.

Title VI compliance reviews conducted in school districts with large Spanish-surnamed student populations by the Office for Civil Rights have revealed a number of common practices which have the effect of denying equality of educational opportunity to Spanish-surnamed pupils. Similar practices which have the effect of discrimination on the basis of national origin exist in other locations with respect to disadvantaged pupils from other national origin-minority groups, for example, Chinese or Portuguese.

The purpose of this memorandum is to clarify D/HEW policy on issues concerning the responsibility of school districts to provide equal educational opportunity to national origin-minority group children deficient in English language skills. The following are some of the major areas of concern that relate to compliance with Title VI:

- (1) Where inability to speak and understand the English

language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.

(2) School districts must not assign national origin-minority group students to classes for the mentally retarded on the basis of criteria which essentially measure or evaluate English language skills; nor may school districts deny national origin-minority group children access to college preparatory courses on a basis directly related to the failure of the school system to inculcate English language skills.

(3) Any ability grouping or tracking system employed by the school system to deal with the special language skill needs of national origin-minority group children must be designed to meet such language skill needs as soon as possible and must not operate as an educational dead-end or permanent track.

(4) School districts have the responsibility to adequately notify national origin-minority group parents of school activities which are called to the attention of other parents. Such notice in order to be adequate may have to be provided in a language other than English.

School districts should examine current practices which exist in their districts in order to assess compliance with the matters set forth in this memorandum. A school district which determines that compliance problems currently exist in that district should immediately communicate in writing with the Office for Civil Rights and indicate what steps are being taken to remedy the situation. Where compliance questions arise as to the sufficiency of programs designed to meet the language skill needs of national origin-minority group children already operating in a particular area, full information regarding such programs should be provided. In the area of special language assistance, the scope of the program and the process for identifying need and the extent to which the need is fulfilled should be set forth.

School districts which receive this memorandum will be contacted shortly regarding the availability of technical assistance and will be provided with any additional information that may be needed to assist districts in achieving compliance with the law and equal educational opportunity for all children. Effective as of this date the aforementioned areas of concern will be regarded by regional Office for Civil Rights personnel as a part of their compliance responsibilities.