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January 30, 2015

Dr. Marcia V. Lyles
Superintendent
Jersey City Public Schools
346 Claremont Avenue
Jersey City, New Jersey 07305

Re: Case No. 02-13-5002
Jersey City Public Schools

Dear Dr. Lyles:

This is to advise you of the resolution of the above-referenced compliance review that was initiated by the U.S. Department of Education (Department), Office for Civil Rights (OCR). The compliance review examined whether the Jersey City School District (the District) is providing equal educational opportunity to national origin minority students who are English Language Learners (ELL). The review also assessed whether the District's communications with limited English proficient (LEP) parents provide them with meaningful access to information the District provides to parents.

OCR initiated this compliance review under Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d *et seq.*, and its implementing regulation at 34 C.F.R. Part 100, which prohibit discrimination on the basis of race, color, or national origin in any program or activity receiving financial assistance from the Department. The District is a recipient of financial assistance from the Department. Therefore, OCR has jurisdictional authority to conduct this compliance review under Title VI. OCR appreciates the District's full cooperation from the outset, its proactive efforts to date, and its commitment to address the findings of the investigation.

During the course of the investigation, OCR found compliance concerns regarding the District's implementation of its alternative language program; exiting and monitoring of ELL students from its alternative language program; evaluation of its ELL program; communication with LEP parents/guardians; exclusion of ELL students from certain specialized programs; evaluation and placement of ELL students with disabilities; and provision of ELL services in the least

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segregative manner possible. The District expressed its interest in resolving these compliance concerns and any remaining issues without further investigation. Accordingly, on December 22, 2014, OCR entered into a resolution agreement with the District to resolve the compliance review.

Background

OCR's investigation examined the following issues: identification and assessment of ELL students; alternative language program implementation; ELL student placement and participation in the alternative language program; instructional materials; staffing and staff development; exit criteria and monitoring; program evaluation; parental communication; specialized programs; special education services; facilities; and segregation. OCR reviewed documentation the District provided, and toured the District's Multilingual Intake Center. OCR also interviewed District officials and staff, including ELL teachers at District schools.

The District has 38 schools, serving students from Kindergarten through the 12th grade.¹ When OCR initiated this review in school year 2012-2013, the District enrolled 27,990 students in its 38 schools; 3,005 (11%) white, 9,317 (33%) black, 10,608 (38%) Hispanic, 4,599 (16%) Asian, 105 (.4%) Native American, 185 (.7%) Pacific Islander, and 171 (.6%) of multiple races.

The District offered all or a combination of the following alternative language programs at 20 of its 38 schools: Bilingual Self-Contained; Bilingual Part-Time;² ESL; Port-of-Entry; and Dual Language. Students are generally assigned to their schools based strictly on residency. If a student is in the ELL program, the student's feeder school then determines which ELL school the student will go into (i.e., certain feeder schools are associated with certain ELL schools). The District provides transportation services to students who are placed in a program outside of their neighborhood school.

During school year 2011-2012, the District had 27,146 students enrolled at the 20 identified schools, of whom 2,495 (approximately 9%) were identified as ELL. Of the 2,495 students, 1,001 (approximately 40%) were placed in Bilingual Self-Contained or Dual Language programs, which are available only for students who identify Spanish as their primary home language; 334 students (approximately 14%) were placed in Bilingual Part-Time programs, which only are available for students who identify Arabic, Hindi, Gujarati, or Urdu as their primary home

¹ These schools include the following, broken down by grade level: K-2nd grade (Anthony J. Infante Elementary School #31); K-4th grade (Dr. Paul Rafalides School #33); K-5th grade (Frank R. Conwell School #3, Jotham W. Wakeman School #6, Charles E. Trefurt School #8, Cornelia F. Bradford School #16, Public School #20, Rev. Dr. Ercel F. Webb School #22, Nicholas Copernicus School #25, Gladys Nunery School #29, Alexander D. Sullivan School #30); K-6th grade (Ollie Cubreth, Jr. School #14, Whitney M. Young, Jr. School #15); K-8th grade (Dr. Michael Conti School #5, Martin Luther King Jr. School #11, Julia A. Barnes School #12, Joseph H. Bresinger School #17, Mahatma Gandhi School #23, Chaplain Charles Watters School #24, Alfred Zampella School #27, Christa McAuliffe School #28, Public School #34, Rafael de J. Cordero School #37, Dr. Charles P. DeFuccio School #39, and Fred W. Martin School #41); K-9th grade (James F. Murray School #38); 6th-8th grade (Frank R. Conwell Middle School MS4, Franklin L. Williams School MS 7, Ezra L. Nolan School MS40, and Academy I MS School); 6th-12th grade (Bright Street Academy); 7th-11th grade (Infinity Institute); 9th-12th grade (William L. Dickinson High School, James J. Ferris High School, Liberty High School, Lincoln High School, McNair Academic High School, and Henry Snyder High School).

² This is also referred to as Bilingual Pull-Out.

language; and 1,160 students (approximately 46%) were placed in an ESL program. In school year 2012-2013, the District had 27,990 students enrolled at the 20 identified schools, of whom 2,596 (approximately 9%) were identified as ELL students. Of the 2,596 students, 926 (approximately 36%) were placed in Bilingual Self-Contained or Dual Language programs; 443 students (approximately 17%) were placed in Bilingual Part-Time programs; and 1,227 students (approximately 47%) were placed in an ESL program.

For school years 2011-2012 and 2012-2013, the first language for approximately 50% of the ELL students was Spanish; for 18%, it was Arabic; for 7%, it was Urdu; for 5%, it was Gujarati; and for 3%, it was Hindi. The remaining ELL students (approximately 15%) spoke one of the following as a first language: Abkhaz, Afrikaans, Akan, Albanian, Amharic, Bengali, Berber, Bisaya, Cantonese, Cebuano Chamorro, Creole, Dutch, Estonian, Farsi, French, Georgian, Guaraní, Hmong, Ilocano, Indonesian, Italian, Japanese, Kannada, Kashmiri, Korean, Krio, Malayalam, Mandarin, Mandingo, Marathi, Nepali, Oriya, Panjabi, Papiamentu, Pashto, Polish, Portuguese, Russian, Sindhi, Slovak, Swahili, Swedish, Tagalog, Tamil, Telugu, Thai, Turkish, Ukrainian, Vietnamese, and Wolof.

Applicable Legal Standards

Title VI and its implementing regulation prohibit discrimination on the basis of race, color, or national origin by recipients, including the District, of federal financial assistance from the Department. The Title VI implementing regulation at 34 C.F.R. § 100.3(a) and (b)(i)-(ii) provides 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, 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 January 7, 2015, in conjunction with the Civil Rights Division at the U.S. Department of Justice, OCR issued a Dear Colleague Letter entitled, “English Learner Students and Limited English Proficient Parents” (January 2015 Memorandum).³ This guidance provides an overview of the legal obligations of school districts to ELL students and LEP parents under the civil rights laws.

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. A district should have procedures in place for identifying and assessing students who have a primary or home language other than English (PHLOTE) to ensure that all language-minority students who are unable to participate meaningfully in the regular instructional program are receiving alternative language services. Generally, these procedures must

³ <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf>. See generally OCR’s policies governing the treatment of ELL students, which are available at <http://www.ed.gov/ocr/ellresources.html>.

include an assessment of whether national-origin minority students proficiently speak, understand, read, and write English.

Districts are also required to select a sound educational theory for their programs for ELL students that are likely to meet the educational needs of language-minority students effectively. A school must use practices, resources and personnel reasonably calculated to implement its educational theory. Schools 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. Schools must demonstrate that their programs for ELL students are successful in meeting these responsibilities, or modify them if necessary.

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. 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 ELL program unless they can read, write, and comprehend English well enough to participate meaningfully in the recipient's program. Some factors to examine in determining whether formerly ELL students are able to participate meaningfully in the regular educational program include: (1) whether they are able to keep up with their non-ELL 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-ELL peers.

In instances where parents refuse to enroll their children in an ELL program, the school district should inform parents about the purpose and benefits of the ELL program in a language they understand; and if a student who has been opted out of ELL services is unable to perform at grade level without receiving ELL services, the school district should periodically remind the parent that the student remains eligible for such services. School districts must also provide language services to students whose parents have declined or opted out of the ELL program by monitoring students' academic progress and providing other language support services for such students.

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.

School districts must ensure that language-minority parents who are not proficient in English receive meaningful access to the same admissions information and other school-related information provided to English-proficient parents in a manner and form they can understand, such as by providing free interpreter and/or translation services. School districts have the responsibility to

adequately notify national origin minority group parents of information that is 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.

Unless the specialized program requires proficiency in English, the recipient must ensure that evaluation and testing procedures do not screen out ELL students on the basis of their limited English proficiency. Tests used to select students for specialized programs should not be of the type that the student's limited proficiency in English will prevent the student from qualifying for a program for which the student would otherwise be qualified.

A school district may not assign students to special education programs on the basis of criteria that essentially measure and evaluate English-language skills. Accordingly, a school district must employ standards and procedures for the evaluation and placement of language-minority students that reliably identify students' educational disabilities, rather than the students' English proficiency skills. Additionally, school districts may not maintain "no dual services" policies or practices for ELL students with disabilities. If an ELL student with disabilities needs both alternative language services and special education services, the student should be given both types of services.

Finally, in investigating whether ELL students are segregated, OCR examines whether the district has carried out its chosen program in the least segregative manner consistent with achieving its stated goal and whether the degree of segregation in the program is necessary to achieve the program's educational goals.

Facts and Analysis

A. Identification and Assessment

Districts must take affirmative steps to address national-origin minority students' language barriers that prevent ELL students from effective participation in the district's program. A district should have procedures in place for identifying and assessing PHLOTE students to ensure that all language-minority students who are unable to participate meaningfully in the regular instructional program are receiving alternative language services. Generally, these procedures must include an assessment of whether national-origin minority students proficiently speak, understand, read, and write English.

Identification:

The District's written policy and procedures for identifying PHLOTE students are set forth in its Policy 6142.2: *English as a Second Language/Bilingual Programs* and in the District's *Multilingual Intake Center Handbook* (MIC Handbook) (the Policies). Pursuant to the Policies, the District uses the Home Language Survey (HLS) to identify PHLOTE students.

The District stated that prior to enrollment, administrators at the District's school registration sites or staff at the MIC administer a six-question⁴ HLS⁵ to the parent/guardian of every new student entering the District. The documentation provided, however, did not indicate that school administrators, other than MIC intake staff, administered the HLS to parents/guardians; specifically, none of the documentation indicated that administrators or staff at the District's school registration sites administered the HLS to the parent/guardian of new students entering the District. Further, the Policies provide that a school principal/designee is required to ask each parent/guardian if a language other than English is spoken at home; parents/guardians need only fill out the HLS if they respond affirmatively to this question; however, this appears to be contrary to the District's stated practice of requiring the parents/guardians of all new students entering the District to complete the HLS. According to the District, if the parent/guardian circles "native language" on four or more of the questions on the HLS, the student is then referred to the MIC for assessment and evaluation. The Policies do not state such a requirement.

The District stated that it also identifies and refers to the MIC for assessment and evaluation: (a) students who come from another country; (b) students who speak languages other than English; (c) special education students who require translation and evaluation of school records; and (d) transfer students from other districts that did not have bilingual or ESL programs, and whose English proficiency needs have to be determined. District administrators informed OCR that a student also might be referred to the MIC for an assessment and evaluation if teachers or other staff members perceive that the student is having difficulties reading, writing, speaking, and comprehending English in his/her classroom.

Assessment:

Once the District identifies a PHLOTE student, he/she is sent to the MIC for assessment and evaluation. The MIC currently has several staff members, including individuals who are certified in bilingual and/or ESL education,⁶ review medical documentation, and review academic documentation such as prior transcripts. When entering the MIC, parents/guardians and students first meet with an MIC staff member to submit and review identifying documentation. Thereafter, MIC staff tests each student to evaluate his/her English proficiency and determine the student's placement. During school years 2011-2012 and 2012-2013, MIC teachers administered the IDEA Proficiency Test (IPT); a three-part comprehensive assessment test that measures oral, reading, and writing proficiency, as well as listening and comprehension skills. According to the

⁴ These questions are: "(1) Which language did your child learn to speak first?; (2) Which language do you (parent/guardians) use to speak to [sic] student?; (3) Which language does your child mostly use to speak to his/her parents/guardians?; (4) Which language does your child mostly use to speak to his/her siblings?; (5) Which language does your child mostly speak to his/her relatives?; [and] (6) Which language does your child mostly use to speak to his/her friends?"

⁵ The HLS is translated into Spanish, Tagalog, Arabic, Gujarati, Urdu, Vietnamese, Bengali, Mandarin, Hindi, Creole, French, and English. District staff stated that if the parent/student speaks another language, the District will orally translate the HLS for him/her at the MIC.

⁶ According to the MIC Handbook, in addition to English, MIC teachers are proficient in Arabic, Spanish, Tagalog, French, Haitian and French Creole, Greek, Gujarati, Hindi, Swahili, and Urdu. If a parent/guardian and student speak a different language, they are referred to an outside provider to translate their documentation into the appropriate language.

District, the IPT is a test approved by the New Jersey Department of Education (NJDOE) and developed by Educational IDEAS, Inc.⁷

The District stated that the MIC staff member immediately scores the IPT test. A student must pass all three sections (reading, writing and oral) in order to be considered proficient in English. Students who fail at least one of the three parts of the IPT are eligible for an alternative language program at the District. According to the District, MIC staff has been formally trained to administer the IPT tests, score the tests, and interpret the results for placement purposes.

The District also reported that MIC staff administers an additional quarterly assessment only to native Spanish speakers,⁸ in the student's native language. District staff informed OCR that only native Spanish speakers take this additional quarterly assessment "based on past practice and additionally the lack of appropriate manpower." The District's stated purpose for the quarterly assessment is to measure the student's fluency in Spanish and determine the appropriate placement for those students.

The documentation the District provided indicated, and OCR's site visit at the MIC confirmed, that the District has procedures to assess the language proficiency of PHLOTE students. Specifically, the documentation reviewed revealed that in determining whether a PHLOTE student is ELL, the District assessed his/her ability to speak, read, write, and comprehend the English language.

Prior to the conclusion of OCR's investigation of the District's identification and assessment of PHLOTE students, the District expressed interest in resolving the review pursuant to Section 302 of OCR's *Case Processing Manual (CPM)*. OCR did not make a compliance determination under Title VI as to whether the District's current policies and procedures are adequate to identify and appropriately assess all PHLOTE students who may be unable to participate meaningfully in the regular instructional program without language assistance services. However, OCR noted that the District's practices may under-identify PHLOTE students by not administering the HLS as broadly as intended by its policies and procedures and by requiring four or more affirmative responses on the HLS. As described in more detail below, the Agreement signed by the District addresses these concerns, including by requiring an assessment if a parent/guardian responds in the affirmative to one question.

B. Alternative Language Program Implementation

The alternative language programs and practices adopted by a district must be effectively and reasonably developed to achieve the educational goal of the district's adopted theory. OCR will consider two general areas when evaluating a school district's alternative language program to determine compliance with Title VI: (1) whether there is a need for the district to provide alternative language services to LEP students; and (2) whether the district's program is likely to meet the educational needs of language-minority students effectively. Districts retain an affirmative

⁷ The District informed OCR that effective school year 2014-2015, it replaced the IPT tests with the "World Class Instructional Design and Assessment" (WIDA) Model Measure of Developing English Language to assess the language proficiency skills of pre-kindergarten through 12th grade students. OCR determined that this assessment measures listening, speaking, reading, and writing skills.

obligation to remedy “academic deficits” sustained by language minority students in programs that temporarily emphasize English language acquisition over other subjects.

The District provides the following alternative language programs for ELL students, depending on students’ spoken language and grade level: (i) Bilingual Instruction (Self-Contained) model; (ii) Bilingual Instruction (Part-Time) model; (iii) ESL instructional model (including ESL-Only, High Intensity ESL, and Sheltered English Instruction); (iv) Dual Language Program model; and (v) Port-of-Entry model.

(i) *Bilingual Instruction (Self-Contained Spanish/English)*

The District’s Bilingual Instruction Self-Contained program is a full-time program that provides native Spanish-speaking students with instruction in their native language at eight (for 2011-2012) and seven (for 2012-2013) District-designated magnet schools. The District does not offer this program to ELL students whose native language is a language other than Spanish.

Elementary and Middle Schools

The District has adopted a three-tier system for classifying ELL students based upon their levels of English language proficiency, following the District’s initial determination that the student requires language services. The District assesses an ELL student’s level of English proficiency using the students’ individual scores on the *Assessing Comprehension and Communication in English State-to-State for English Language Learners* (ACCESS) test, which was developed by “World Class Instructional Design and Assessment” (WIDA), and is intended to assess English language proficiency for students between Kindergarten and 12th grade. The ACCESS test measures language proficiency in listening, speaking, reading, and writing; and the District administers the test to all ELL students in March or April of the school year. Depending on students’ scores, the District places students in one of three tiers for the following school year: Tier A – Entering/Beginning/Developing; Tier B – Beginning/Developing/Expanding; or Tier C – Developing/Expanding/Bridging. Students then are assigned to a homeroom that exclusively contains other students in the Bilingual Self-Contained program who are in a similar tier. The District has adopted a transitional program in native language instruction, which at the beginning of the year, consists of instruction in Spanish for 80% of the school day; mid-year consists of 50% instruction in Spanish; and by the end of the year, 20% instruction in Spanish.

Elementary and middle school students in the Bilingual Self-Contained program receive bilingual instruction in all subjects; including Language Arts, Math, Science, and Social Studies. All “specials,” the District’s term for classes such as Drama, Art, Music, and Physical Education, are taught in English only. Students also receive 45 minutes of ESL instruction each day. District staff informed OCR that the elementary and middle school students in the Bilingual Self-Contained program do not take any classes with the general education population, and they do not otherwise associate with the general education population except for after school programs, assemblies, or lunch.

The District stated that the Bilingual Self-Contained classes have the same curriculum and pacing as the general education classes, except that the materials and instruction may be taught in Spanish. District officials stated that the Bilingual Self-Contained curriculum is aligned to the

District curriculum, which is based on the New Jersey Core Curriculum Content Standards set forth by the NJDOE.

All ELL teachers interviewed used some form of differentiated instruction (e.g., grouping by proficiency); and if students demonstrated improvement in language proficiency, these students could switch levels/tiers during the course of the school year. Multiple ELL teachers in the District suggested that the three-tier system was not consistently applied for all classes. While some teachers acknowledged using this system, others informed OCR that they had developed their own system involving two tiers, or a system that followed the standards/levels used by WIDA.⁹

ELL teachers also informed OCR that they are unable to complete the curriculum by the end of the school year; and that Bilingual Self-Contained students receive at least 20-25 fewer minutes of instruction per day than non-ELL students. The teachers explained that this happens because bilingual students are bussed from different parts of the city and often do not arrive to class before 8:40 a.m. and must leave class at 2:30 p.m. to catch their buses; whereas, non-ELL students who typically are not bussed, begin class at 8:20 a.m. and do not finish class until 2:55 p.m.

High Schools

The District informed OCR that at the high school level, the Bilingual Self-Contained instruction is limited to Language Arts, Math, Social Studies, and Science. Students also receive 90 minutes of “High Intensity” ESL, discussed below. Additionally, 9th grade students may take a “Newcomers Academy” program, which is an elective class combined with ESL that teaches students about American culture. District staff informed OCR that other than the number of bilingual classes offered and the increased time for ESL, this program is similar to the Bilingual Self-Contained program for elementary and middle school students.

(ii) Bilingual Instruction (Part-Time) – Bilingual Pull-out or Push-In

The District offers Bilingual Part-Time instruction to students whose native language is Arabic, Gujarati, Hindi, or Urdu at eight (for 2011-12 and 2012-13) District-designated magnet schools.¹⁰

Elementary and Middle Schools

The District provides elementary and middle school Bilingual Part-Time students with bilingual instruction in Language Arts and Math only. They also receive 45 minutes of ESL instruction daily, with the exception of kindergarten students, who receive 30 minutes of ESL instruction daily. Depending on a student’s ACCESS scores, the student is placed in one of the three tiers discussed above, and assigned to an ESL homeroom with other students in the bilingual part-time

⁹ OCR determined that the WIDA “English Language Development Standards” for grades Kindergarten through 12 includes a total of five standards, including “Entering,” “Emerging,” “Developing,” “Expanding,” and “Bridging.”

¹⁰ District officials informed OCR that after native Spanish speakers, speakers of these languages represent the highest population of ELL students in the District.

program who are in a similar tier. These students participate with their assigned homeroom in “specials,” such as drama, art, music, and physical education, which are taught in English only.

District staff confirmed that Bilingual Part-Time instruction is not provided for social studies or science. For these subjects, ELL students attend the regular class and learn through the use of “sheltered instruction” strategies; or a Bilingual push-in or pull-out model.¹¹ The District stated that the curriculum and pacing for the Bilingual Part-Time classes are the same as for the general education classes; however, the materials and instruction may be taught in Arabic, Urdu, Hindi, or Gujarati, or a combination of these languages. The curriculum also is aligned with the District curriculum, which is based on the New Jersey Core Curriculum Content Standards set forth by NJDOE. Teachers, however, expressed concern that they typically are unable to complete the curriculum by the end of the school year; and that as of school year 2013-2014, the part-time bilingual math instruction was terminated at a school.

High Schools

The District informed OCR that it does not offer Bilingual Part-Time programs at its high schools. In its place, students receive sheltered instruction, as described above, and high-intensity ESL services, as described below.

(iii) High Intensity ESL Instruction

As previously noted, the District provides ESL instruction to all Bilingual Self-Contained and Bilingual Part-Time students. Other ELL students in the District receive “High Intensity ESL” in District-designated magnet schools. The District’s “Bilingual Restructuring Plan” for school year 2012-2013 defined this program as a “daily developmental second-language program of up to two periods of instruction based on student needs.” The District explained that this program provides ELL students with 90 minutes of High Intensity ESL instruction per day.¹²

Elementary and Middle School

The District’s Bilingual/ESL Three-Year Program Plan for School Years 2011-2012 through 2013-2014 (the Program Plan) stated that elementary and middle school students in the High Intensity ESL program receive 45 minutes of instruction in language proficiency and an additional 45 minutes of instruction in “language arts development with infusion of the content areas.” The District informed OCR that the 45 minutes of “language proficiency instruction” entails teaching ELL students how to understand and speak English. In contrast, the 45 minutes of “language arts development” involves teaching students reading and writing skills, such as English vocabulary through the use of flash cards or teaching reading through content-based stories. This curriculum is aligned to the New Jersey Core Curriculum Content Standards, set forth by the NJDOE, and WIDA standards.

¹¹ In sheltered instruction, students are taught concepts through the use of modeling. For example, a teacher may show a student a specific object like a book bag or an apple in order to better communicate a concept. In the Bilingual push-in model, ESL teachers go into the classroom to work with designated ELL students by providing them with supplemental support. In the Bilingual pull-out model, ESL teachers work with the designated ELL students to provide supplemental instruction outside of the classroom.

¹² Kindergarten students receive 60 minutes of High Intensity ESL instruction.

District staff informed OCR that ESL teachers use differentiated instruction based on a student's tier to ensure that students are learning the appropriate level of English proficiency. According to a sample curriculum OCR reviewed, dated August 27, 2013, the goal of the High Intensity ESL program is to “apply the skills and strategies learned across the four domains of language development (listening, speaking, reading, and writing).” The District stated that due to a teacher shortage, it cannot guarantee that the ESL teachers will speak a student's native language; although for the more commonly spoken languages in the District, such as Spanish, Hindi, Gujarati, Arabic, and Tagalog, the ESL instructor will generally speak the native language of the ESL students that he/she is teaching. The District does not require that an ESL teacher proficiently speak, read, write, or understand the native language. Rather, an ESL teacher who does not speak the language is required to be trained in sheltered instruction. Aside from the two periods of ESL instruction, ELL students in the High Intensity ESL program take the remainder of their classes with non-ELL students. These classes are taught by monolingual teachers who are trained in and provide sheltered instruction for these courses.¹³ With respect to the District's provision of High Intensity ESL instruction, teachers expressed concerns with delays in the provision of High Intensity ESL instruction because of a lack of ESL staffing and an insufficient number of ESL teachers; and an inability to complete the curriculum by the end of the school year because of state testing, inclement weather, and school holidays.

High Schools

The District informed OCR that all ELL high school students receive 90 minutes of High Intensity ESL in the high school.¹⁴ Additionally, 9th grade students may take a “Newcomers Academy” program, which is an elective course combined with ESL that teaches students about American culture.

(iv) Dual Language Program

The District offers a Dual Language program for elementary school students who are either native Spanish or native English speakers in District-designated magnet schools. This program is offered only to Pre-kindergarten through 5th grade students. This program employs both English and Spanish instruction to ELL and English-proficient students in the same classroom. The expectation is that students in this class will ultimately become bilingual in English and Spanish. The District stated that native English-speaking students are chosen for the Dual Language program via a lottery system. Native Spanish-speaking students may choose to attend a Dual Language program instead of Bilingual Self-Contained Spanish at the MIC; the demand among native Spanish speakers is low enough that there is no need for a lottery.

The District stated that the curriculum for the Dual Language program is the same as for the general education classes. It also is aligned to the District curriculum, which is based on the New Jersey Core Curriculum Content Standards set forth by the NJDOE. The District stated that students in the Dual Language program take all of their classes together; including Language

¹³ OCR found that the District provided training on sheltered instruction to monolingual staff assigned to ESL homerooms on April 15-17, 2013; April 22-24, 2013; and June 3-5, 2013. The District trained a total of 91 monolingual teachers in sheltered instruction.

¹⁴ The Program Plan and ELL teachers indicated that high school ELL students receive 80 minutes of ESL per day, not 90.

Arts, Math, Science, Social Studies, and “specials,” such as Art, Music, and Physical Education. The District acknowledged that that the students in this program do not take any classes with the general education population, and do not otherwise associate with the general education population unless there is an after school program, an assembly, or lunch.

(v) ***Port-of-Entry Program***

The District offers a Port-of-Entry Program at two (for 2011-2012 and 2012-2013) District-designated magnet schools to native Spanish-speaking students who are determined at the MIC to be “overage but underschooled.” The Port-of-Entry program is typically offered to students entering the District from another country whose education level is below the student’s age level (for example, a 13-year old student who reads and writes at a 3rd grade level).

The District informed OCR that students in the Port-of-Entry program use the same curriculum as students in the Bilingual Self-Contained program. District staff stated that teachers teach and explain the materials to these students at their own levels of understanding. The program includes Language Arts, Math, Science, and Social Studies; and students are sometimes combined with the Bilingual Self-Contained program for “specials.” District staff noted that, ideally, these students remain in the Port-of-Entry program for only two years and then transition into a bilingual program.

Some District staff OCR interviewed stated that some bilingual self-contained students are severely below grade level and should be placed in the District’s Port-of-Entry program; however, they are not because the District only places students in the Port-of-Entry program if they have records indicating that the students did not attend school in their foreign countries. If no such records exist, the District does not place students in the Port-of-Entry program, even if it would be beneficial. Additionally, the Port-of-Entry program is not offered at the high school level. Prior to completing the investigation regarding whether the District adequately identified students for the Port-of-Entry program, the District agreed to resolve the compliance review without further investigation.

OCR determined that the District has selected alternative language programs (e.g., Bilingual, ESL, and Dual Language) that are recognized as sound by experts in the field, and has developed practices and procedures (formal and informal) to implement its alternative language program. Prior to making a determination about whether the District consistently provides ESL services to all students who are placed in the District’s alternative language programs, the District agreed to resolve the compliance review without further investigation. OCR further determined that District staff did not complete the New Jersey-mandated curriculum by the end of the school year for ELL students; and, that class time instruction for ELL students was not equivalent to class time instruction for non-ELL students in some cases. District staff also raised concerns about whether the District delays providing High Intensity ESL instruction due to an insufficient number of ESL staff and teachers; and about the termination of bilingual math instruction in the Part-Time Bilingual Program by the start of school year 2013-2014. Additionally, District staff raised concerns that Port-of-Entry students are not adequately identified, and therefore are not receiving appropriate ESL services. OCR also notes that in 2011, the District reported to the U.S. Department of Education, by means of OCR’s Civil Rights Data Collection (CRDC), that 2,654 students were identified as ELL, but only 2,060 (77.6%) ELL students were enrolled in ELL

programs; 594 (22.4%) ELL students were not receiving alternative language services. The reasons for this are unclear; however, OCR will monitor the implementation of the resolution agreement to ensure that ELL students are enrolled in alternative language programs, or those who have opted out are being provided appropriate language support services.

Prior to the conclusion of OCR's investigation of the District's implementation of its alternative language program, the District expressed its interest in resolving the review pursuant to Section 302 of OCR's *CPM*. Thus, OCR did not make a compliance determination as to whether all students who require ELL services are receiving such services.

C. Student Placement and Participation in the Alternative Language Program

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. If parents opt their children out of an ELL program or specific ELL services, the children retain their status as ELL students, and the school district remains obligated to take the "affirmative steps" required by Title VI to provide these ELL students access to its educational programs. In instances where parents refuse to enroll their children in an ELL program, the school district should inform parents about the purpose and benefits of the ELL program in a language they understand; and if a student who has been opted out of ELL services is unable to perform at grade level without receiving ELL services, the school district should periodically remind the parent that the student remains eligible for such services. School districts must also monitor the academic progress of students whose parents have declined or opted out of the ELL program and provide other language support services for such students.

Once the District completes the assessment described above, the District offers parents/guardians the option of placing their student in an alternative language program. The District informed OCR that parents/guardians must sign a consent form written in their native language before students may attend the District's ELL program. If the parent/guardian agrees, MIC staff will place a student at the school in closest proximity to the student's designated neighborhood school that offers the ELL program consistent with the student's ELL educational needs.

The District also explained that parents/guardians may waive or "opt out" of alternative language services by refusing to sign the consent form, and the student then is placed in his or her home school. District officials stated that if a parent refuses consent, an ESL contact teacher at the student's feeder school will follow-up informally with the parent if it appears, after the second marking period, that the student is not succeeding in the classroom.

For school year 2011-2012, the parents/guardians of 20 students deemed ELL students by the MIC (or approximately 2% of the students evaluated by the MIC) refused ESL/Bilingual services. OCR found that for school year 2012-2013, the parents/guardians of 31 students deemed ELL students by the MIC (or approximately 2.5% of the students evaluated by the MIC) refused ESL/Bilingual services. The District did not provide any documentation of a formal or informal process and/or procedure for monitoring the academic progress of students whose parents have

declined or opted out of the ELL program and providing other language support services for such students.

Prior to the conclusion of OCR’s investigation of the District’s placement of students in the alternative language program, the District expressed its interest in resolving the review pursuant to Section 302 of OCR’s *CPM*. Thus, OCR did not make a compliance determination as to whether the District has an appropriate process to track and provide services to students whose parents/guardians have “opted out” of ELL services.

D. Materials and 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 provide adequate resources. OCR considers the extent to which a particular remedy would require a district to divert resources from other necessary educational resources and services.

The District stated that the instructional materials the District used for its ELL programs included but were not limited to textbooks, supplemental materials, technology (such as tablets, laptops, interactive white boards, and software), and dictionaries. OCR found that the ESL curriculum is updated once every five years through a committee of ESL teachers and administrators.¹⁵ According to the District, this group ensures that the new materials are aligned with the Common Core and New Jersey standards; are brand new or newly developed materials; and fit with WIDA standards. They stated that materials were last purchased in 2010. The District informed OCR that the ELL materials used were sufficient to implement the program; it has not received any complaints from parents about the materials; every student receives a book, which he/she can take home; and the classrooms used for ELL programs are of sufficient size and quality, and are not shared with anyone else. The District stated that students in the District’s Bilingual Self-Contained program generally receive the same materials provided to the equivalent non-ELL classes, but also receive a version of the materials translated into Spanish. Further, these students receive supplemental materials that are written at different proficiency levels, which allows for differentiated instruction of the students.¹⁶ The District also stated that students in the Bilingual Self-Contained program have access to tablets for translation, interactive whiteboards, and laptops.

Bilingual Part-Time program students receive the same instructional materials that other students receive; these are written in English. These students then use supplemental materials to support this instruction, which are also written in English. Bilingual Part-Time students do not have any instructional materials translated into their native languages. District staff stated that the District offers these students dictionaries so that they may look up vocabulary on their own. Additionally, bilingual teachers orally translate much of the material for them. The District stated that these students also have access to tablets for translation, interactive whiteboards, and laptops. ESL students in Kindergarten through 5th grade receive textbooks and workbooks through Rigby’s “On Our Way to English.” OCR reviewed a sample of these materials and confirmed

¹⁵ The District informed OCR that this process mimics the process used to determine curriculum for non-ELL classes.

¹⁶ OCR did not find any supplemental materials for subjects other than Language Arts.

that these incorporate lessons on reading, writing, speaking, and understanding the English language. ESL students in grades 6 through 12 receive textbooks and workbooks from Heinle Cengage Learning's "Milestones." OCR also reviewed a sample of these materials and confirmed that these incorporate lessons on reading, writing, speaking, and understanding the English language.

District staff informed OCR that they were satisfied with the materials provided, but had the following concerns: they were not furnished with a sufficient number of copies of texts or other books and materials; textbooks were not adequately challenging; the quality of certain materials was different from and older than materials provided in certain subject areas to non-ELL students; certain textbooks and resources that were furnished to non-ELL classes were not provided to bilingual classes; and the bilingual textbooks were not up to date. Additionally, anecdotal information from District staff indicated that notice of the procedure to obtain laptop computers and tablets was not sufficiently clear.

The evidence OCR reviewed indicated that the District provides adequate resources and materials, including adequate instructional materials, and technology, to ELL students in some classes and some staff identified concerns regarding the quality and quantity of the instructional materials and technology. Prior to the conclusion of OCR's investigation of the adequacy of the materials and resources the District provides to ELL students, the District expressed its interest in resolving the review pursuant to Section 302 of OCR's *CPM*. Thus, OCR did not make a compliance determination as to the adequacy of the District's materials and resources for ELL students.

E. Staffing and Staff Development

School districts have an obligation to provide the staff necessary to implement their chosen program properly within a reasonable period of time. When formal qualifications have been established and when a school district generally requires its teachers in other subjects to meet formal requirements, a district must either hire qualified teachers to provide alternative language services to ELL students or require that teachers already on staff work toward attaining those formal qualifications.

Additionally, teachers must be available in sufficient numbers to ensure effective implementation of the district's chosen English language development program. Alternative language program support staff must also be qualified for the educational support roles that they fulfill in a district's English language development program. Minimally, they must have the English language and native language skills appropriate to their assigned, non-instructional role in the alternative program. Certified or endorsed instructional staff must closely and appropriately supervise the support staff. School districts need to ensure that administrators who evaluate the ELL program staff are adequately trained to meaningfully evaluate whether ELL teachers are adequately prepared to provide the instruction that will ensure that the ELL program model successfully achieves its educational objectives.

The District reported that during school year 2011-2012, 60 ELL teachers taught Bilingual Self-Contained classes, 15 ELL teachers taught Bilingual Part-Time classes, 64 ELL teachers taught ESL classes, and 28 individuals served as teacher aides/assistants.¹⁷

OCR reviewed publically available data regarding the overall general education teacher-student ratio at each of the District schools for school year 2011-2012. OCR found that the teacher-student ratios of the Bilingual Self-Contained, Bilingual Part-Time, and/or ESL program(s) exceeded the overall general education teacher-student ratio, by more than 10 students per teacher at 12 District schools.

During school year 2012-2013, the District reported that 65 ELL teachers taught Bilingual Self-Contained classes, 17 ELL teachers taught Bilingual Part-Time classes, 69 ELL teachers taught ESL classes, and 29 individuals served as teacher aides/assistants. OCR was unable to obtain the overall general education teacher-student ratios for school year 2012-2013; however, OCR notes that 10 schools had teacher-student ratios above 1:22 in its alternative language programs.

The NJDOE requires individuals to meet several requirements in order to become bilingual and/or ESL-certified. This includes passing an oral test (such as an Oral Proficiency Interview (OPI)) and a written proficiency test, obtaining a bachelor's degree and a New Jersey instructional certificate, and completing a minimum of 24 hours of study on basic pedagogical skills offered through a state-approved provider or through approved coursework at a New Jersey-state approved college.

The District informed OCR that it does not hire ELL teachers unless they have already passed an OPI.¹⁸ If teachers have passed the OPI but are not yet certified, the District may hire them as ELL teachers, provided that the teachers commit to taking a minimum of six credits per year of coursework needed for certification, as required by the NJDOE. Teachers then have three years to complete their bilingual and/or ESL certification. During this time period, they may teach bilingual or ESL classes; the District noted that uncertified teachers are typically mentored by more experienced teachers during this time. The District stated that it established such a practice as a means of addressing teacher shortages.¹⁹ The District also informed OCR that in or around April 2013, it entered into a partnership with New Jersey City University to increase its pool of

¹⁷ In its Program Plan, the District reported having 78 bilingual-certified, 65 ESL-certified, and 36 bilingual/ESL-certified teachers at the start of school year 2011-2012. The information OCR reviewed indicated that some of the teachers counted as ELL teachers in the Program Plan are actually World Language high school teachers. These teachers are not ELL teachers, as the World Language program is not part of the District's ELL program.

¹⁸ This assessment was devised by the American Council on the Teaching of Foreign Languages and it measures functional speaking ability. According to New Jersey's "Bilingual/Bicultural Education Certificate of Eligibility (Endorsement Code 1480), published at <http://www.state.nj.us/education/educators/license/endorsements/1480CE.pdf>, and "English as a Second Language Certificate of Eligibility (Endorsement Code: 1475), published at <http://www.state.nj.us/education/educators/license/endorsements/1475CE.pdf>, the state requires "evidence of passing oral and written language proficiency tests (OPI & WPT)." Notably, neither document states that New Jersey requires evidence of reading and writing ability.

¹⁹ As stated previously, the District stated that due to a teacher shortage, it cannot guarantee that the ESL teachers will speak a student's native language, although for the more commonly spoken languages in the District, such as Spanish, Hindi, Gujarati, Arabic, and Tagalog, the ESL instructor will generally speak the native language of the ESL students that he/she is teaching. The District does not require that an ESL teacher proficiently speak, read, write, or understand the native language. Rather, an ESL teacher who does not speak the language is required to be trained in sheltered instruction.

teachers. These teachers will receive either bilingual certification or ESL certification. The District has agreed to fund 33 credits for 29 teachers to take this program. With respect to teaching assistants and aides, OCR learned that they do not need certification to work within the District. The District stated that aides/assistants typically are fluent in a second language; however, the District does not test for fluency in other languages. Both ELL teachers and assistants/aides must still meet the same criteria as teachers/aides/assistants for equivalent non-ELL classes.²⁰

OCR did not find any information indicating that the District conducted any ELL trainings during school year 2011-2012. OCR found that ELL staff in the District received the following training for school year 2012-2013: (a) training on changes to the ACCESS exam on December 17, 2012; (b) “Improving Quality of Instruction: Professional Development Program for Teachers of English Language Learners,” which took place over several Saturdays between April and June 2013; (c) attendance at the “New Jersey Teachers of English to Speakers of Other Languages/New Jersey Bilingual Educators Spring Conference” for 10 ELL teachers on May 29 and 30, 2013; (d) “Job Embedded Coaching for Bilingual Teaching” during May and June 2013; and (e) “Common Core Standards and ELLs: Teaching to Reading and Text Complexity in the ESL Classroom” on June 3, 2013.

According to the District, ELL teachers are evaluated for performance using the same criteria used to evaluate non-ELL teachers; namely, the Principal and/or the Assistant Principal observes the teacher in the classroom and evaluates their professional growth, planning and preparation, communication with students, and instruction. The District stated that it sometimes also evaluates ELL teachers in the classroom. The District stated that Principals and Assistant Principals are required to take the same trainings as ELL staff; accordingly, they are trained to look for specific ESL and bilingual strategies. However, a review of the trainings offered during school years 2012-2013 did not indicate that Principals or Assistant Principals attended the trainings.

OCR found that not all of the District’s ELL teachers are certified in ESL and/or bilingual education; and, the evidence OCR reviewed indicated that the District does not evaluate uncertified teachers’ proficiency in reading or writing language. The evidence OCR reviewed also did not indicate that the District routinely evaluates teachers’ classroom performance by an individual familiar with ESL and/or bilingual methodology; or that ELL teachers were trained prior to school year 2012-2013.

Prior to the conclusion of OCR’s investigation of staffing and development with respect to District’s ELL programs, the District expressed its interest in resolving the review pursuant to Section 302 of OCR’s *CPM*. Thus, OCR did not make compliance determinations as to whether the District has provided sufficient qualified staff to implement its ELL programs, including by appropriately evaluating a teacher’s qualifications, proficiency in reading/writing language and classroom performance; training ELL staff; and assigning a sufficient number of staff to the District’s ELL programs.

²⁰ Several teachers OCR interviewed stated that they did not have any aides or assistants assigned to work with them in their classes.

F. Exit Criteria and Monitoring

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. Criteria for exiting students from an alternative language program 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. In addition, students should not be exited from the ELL program unless they can read, write, and comprehend English well enough to participate meaningfully in the recipient's program. Some factors to examine in determining whether formerly ELL students are able to participate meaningfully in the regular educational program include: (1) whether they are able to keep up with their non-ELL 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-ELL peers.

In an attachment to two letters written to all elementary, middle, and high school principals dated April 29, 2013, the Associate Superintendent outlined the process by which students exit from the District's ELL program. According to this document, a student's ESL, bilingual, and/or monolingual teachers must first come to a consensus on the appropriateness of exiting that student from the ELL program. This recommendation is then reviewed by the school's principal and forwarded to the Supervisors of the Bilingual/ESL/World Language Program, who review the information and make the final determination on granting or denying the exiting recommendation. If granted, the District informs the student's parents of the decision in the parents' own language. Parents may challenge this determination via an appeal to the District's administration.

The District provided OCR with "Group Profile[s] of Students Recommended for Exiting Bilingual and ESL Services." According to this document, the District reviews the following criteria before exiting elementary and middle school students from its alternative language programs: (a) the student's age/entry date; (b) teacher recommendations; (c) the student's ACCESS score;²¹ (d) the student's Reading DORA Lexile levels;²² (e) the student's "Reading Street" evaluation²³ (i.e., strategic intervention, on level, or advanced); (f) the student's report card grade in English reading for the third marking period; and, (g) whether the student will be promoted to the next grade. For high school students, the District reviews the following before exiting the students: (a) the student's age/entry date; (b) the student's English Z ESL level;²⁴ (c)

²¹ The District informed OCR that students must receive a score of 4.5 or higher on this test to exit from the program.

²² The District stated that this exam measures a student's knowledge of English and his or her language proficiency. Bilingual Self-Contained students take this exam in both English and Spanish, while all other ELL students take this in English only. Students must demonstrate that their understanding is on or above grade level to exit from the program.

²³ The District stated that this test is only offered to students in Kindergarten to 5th grade, and is offered after every unit to measure language improvement; the students' evaluations are reviewed after the third marking period.

²⁴ The District informed OCR that this rating indicates the ESL level of a student. Level 1 is the lowest level and Level 4 is most advanced. The student's middle school ESL teacher recommends a level prior to high school, and then the student typically advances one level each year.

teacher recommendations; and (d) the student's report card grade as of April. District staff informed OCR that the District expanded the high school criteria for school year 2014-2015 to include the student's ACCESS score and Reading DORA Lexile level.²⁵ Multiple teachers confirmed that they recommend students for exiting in accordance with the criteria described above.

The District informed OCR that for elementary and middle school students, it has determined that the most important criteria, in order of importance, are the student's ACCESS score; their Reading DORA Lexile levels; their grades; whether they have been promoted to the next grade level; and the number of years they have been in the program. District staff noted that although the ACCESS score is most important, the District must review the scores for the tests taken in the prior school year, because the District must make an exiting determination by the end of the school year and the scores for the ACCESS test in April or May do not come back until July. District staff added that once the District receives the scores in July, the District reviews the recommendation of every student to see if the exiting decision should change. The District stated that students then may be exited from the program in September of the following school year. The District's review process is not formalized or in writing; rather it reviews the recommendations informally.

Regarding the number of years that a student is in the program, the Program Plan states that students may not remain in the ELL program for more than five years, even if they are not deemed ready for monolingual classes. The District informed OCR that the state of New Jersey requires that it take no more than five years for a student to exit an ELL program. Despite the Program Plan, the District asserted that it would not automatically exit a student from the program after five years; the District still assesses whether exiting is appropriate. If it is found to be inappropriate, the District will keep the student in the program but may revisit how the program is being implemented for the student. The District may also decide to exit the student from the bilingual program but maintain ESL instruction.²⁶ The District acknowledged that it currently does not have a program in place to monitor students once they exit from the ELL program.²⁷ Accordingly, OCR determined that the District provided no information to indicate if prior ELL program participants are overcoming their language barriers sufficiently well and sufficiently promptly to participate meaningfully in the recipient's programs.

Based on the above, OCR determined that the objective testing criteria used for exiting elementary and middle school ELL students from the program is based, in part, on ACCESS scores the student achieved one year prior to the exiting evaluation. Additionally, OCR did not

²⁵ Teachers at the high school level stated that the ESL teacher has responsibility for recommending students for exiting. The recommendation is then forwarded to the principal for approval, and it is subsequently forwarded to the District for its determination. They stated that the criteria used are generally consistent with the criteria above; however, they noted that they may also include a review of the student's score on the High School Proficiency Assessment (HSPA) administered in March of the student's junior year, and the ACCESS test.

²⁶ District staff informed OCR that parents sometimes request that their child remain in the ELL program even if the District feels that exiting is appropriate, because the magnet schools where the ELL programs are located are often perceived as providing a better education than the other schools in the District. District staff informed OCR that there are instances where the District has allowed students to remain in the program because of a parental request, even after they were found eligible to exit the program.

²⁷ Some of the ELL teachers OCR interviewed stated that they will informally monitor students; however, they confirmed that there is no formalized monitoring program in place at the District.

find evidence corroborating that the District reviews or considers the most recent ACCESS scores for the student, which are reported nearly two months after each student's exiting recommendation is made. The District's written exiting criteria for high school ELL students do not appear to provide for any objective measurements of a student's ability to read, write, and understand English; all measures stem from the ESL teacher's recommendation, overall grades, and years in the program. Additionally, the evidence did not indicate that the District has developed an exiting process sufficient to ensure that teachers apply the subjective criteria consistently to each student in making their exiting recommendations. Accordingly, OCR determined that there was sufficient evidence to conclude that the District is in violation of the regulation implementing Title VI, because the District has not developed exit criteria that is based on objective standards, such as standardized test scores; and, the District has not demonstrated that students are only exited from the ELL program when they can read, write, and comprehend English well enough to participate meaningfully in the recipient's program.

OCR did not make compliance determinations as to whether the criteria used to exit students are implemented consistently and appropriately or whether the District's failure to monitor students who have exited the ELL program violates the regulation implementing Title VI, because prior to the conclusion of OCR's investigation, the District expressed its interest in resolving these remaining issues pursuant to Section 302 of OCR's *CPM*. However, OCR has determined that there is sufficient evidence to conclude that the District has not developed or implemented a process or procedure for monitoring students who have exited from the ELL program; the District's failure to monitor students who have exited the ELL program constitutes a compliance concern.

G. Program Evaluation

Recipients are required to modify their programs if they prove to be unsuccessful after a legitimate trial; and further notes that 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. Generally, "success" is measured in terms of whether the program is achieving the particular goals the recipient has established for the program without unnecessary segregation. 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.

In March 2013, the District hired an outside consultant to evaluate the District's ELL program. The consultant's evaluation functioned as a "needs assessment" intended to determine the needs of ELL staff involved in a professional development program. It also considered how the District could continue to meet the professional development needs of ESL/bilingual teachers and administrators, with the goal of improving ELL academic performance. OCR found that the consultant reviewed ELL student's results on the New Jersey Assessment of Skills and Knowledge Exam (NJASK) for language and literacy, math, and science, and compared it to state averages and to the District Factor Group (DFG).²⁸ The consultant made recommendations based

²⁸ The State of New Jersey has created DFGs for the purpose of comparing students' performance on statewide assessments across demographically similar school districts. The consultant refers to this as "Demographic Factor Group."

on two objectives the District outlined: (a) “create the opportunity for all students to meet high quality academic standards;” and (b) “improve the quality of instruction through professional development which will help students meet vigorous academic standards.” The consultant made several recommendations for the District, including increasing teacher training; providing instructional support in the form of job-embedded evidence gathering and instructional coaching; and providing “targeted technical assistance in developing a comprehensive” ELL program District-wide.

The District stated that after receiving the report, it followed all of the consultant’s recommendations, but the District has not provided specific data to OCR documenting its implementation of the recommendations. The District informed OCR that the District had not evaluated its ELL program prior to March 2013. Further, OCR did not find evidence indicating that the District has any formalized or written policies and procedures mandating that the District will evaluate its ELL program on a periodic basis.

Based on its investigation, OCR determined that there was sufficient evidence to conclude that the District has not periodically evaluated its ELL program. Additionally, the District provided insufficient documentation to otherwise demonstrate that its program is successful; i.e., that its participants are overcoming their language barriers sufficiently well and sufficiently promptly to participate meaningfully in the recipient’s programs. Accordingly, OCR determined that the District is in violation of the regulation implementing Title VI.

H. Parental Communication

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. At the school and district levels, this essential information includes but is not limited to information regarding language assistance programs, special education and related services, Individual Education Program meetings for disabled students, grievance procedures, notices of nondiscrimination, student discipline policies and procedures, registration and enrollment, report cards, requests for parent permission for student participation in district or school activities, parent-teacher conferences, parent handbooks, gifted and talented programs, magnet and charter schools, and any other school and program choice options.

School districts must develop and implement a process for determining whether parents are LEP and what their language needs are. The process should be designed to identify all LEP parents, including parents or guardians of children who are proficient in English and parents and guardians whose primary language is not common in the district. School districts must provide language assistance to LEP parents effectively with appropriate, competent staff – or appropriate and competent outside resources.

The District informed OCR that the District currently does not have a system in place to identify LEP parents. OCR found that the HLS includes one question asking parents: “Which language

do you (parents/guardians) use to speak to student?”²⁹ However, the District did not indicate that this question/survey is formally and consistently used to identify LEP parents. Additionally, the question itself does not necessarily identify LEP parents, since it leaves open the possibility that the parent/guardian may also speak fluent English. The District also stated that there is no formalized process in place regarding interpreter services outside of the MIC. District staff stated that ELL teachers may help to translate for a parent if they are available. If not, school staff will attempt to find another student who may speak the language. The District did not provide information to OCR indicating that it ensures that interpreters and translators are certified or competent to provide interpretation and translation services, and have been appropriately trained on the role of an interpreter and translator; the ethics of interpreting and translating; and the need to maintain confidentiality.

The District stated that it provides school-related documents in English and Spanish, including codes of conduct; homework policies; student handbooks; and promotion policies. It stated that these documents are not translated into any other languages. OCR confirmed that some documents were translated into Spanish, among other languages; such as letters from administrators to parents, brochures, advertisements for a “Bilingual Parents Advisory Council,” and a 2013-2014 Pre-Kindergarten Program. The evidence, however, did not indicate that the Code of Conduct, homework policies, student handbooks, and/or promotion policies were translated into Spanish. Individual teachers reported that if they were proficient in the parent/guardian’s native language, they sometimes translated progress reports or report cards for parent/guardians; but this was entirely up to the individual teacher.

OCR found that the District does not have a formalized program in place to identify LEP parents/guardians; provide interpreters for LEP parents/guardians; provide translated documents for LEP parents whose native language is not Spanish; and consistently provide Spanish translations of documents. Based on its investigation, OCR has determined that there was sufficient evidence to conclude that the District’s failure to provide and implement a program to provide appropriate services and documents to LEP parents/guardians constitutes a violation of the regulation implementing Title VI.

I. Specialized Programs

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

The District offers a gifted and talented program for elementary and middle school students through its “Honors, Opportunity, Potential, Enrichment” (HOPE) Initiative; an Acceleration and

²⁹ The HLS is translated into Spanish, Tagalog, Arabic, Gujarati, Urdu, Vietnamese, Bengali, Mandarin, Hindi, Creole, French, and English. District staff stated that if the parent/student speaks another language, the District orally will translate the HLS for him/her at the MIC.

Enrichment Program (AEP) for middle school students; and Advanced Placement courses for high school students. The District informed OCR that for school year 2013-2014, the District opened a Bilingual Self-Contained HOPE Initiative for native Spanish-speaking students at one District middle school. The District stated that all Bilingual Self-Contained students who qualified for gifted and talented are placed in this program. The District further stated that ELL students may also push-in to HOPE classes; however, students who are part of the Bilingual Part-Time Program cannot take HOPE classes, and have no other access to gifted and talented programs. Additionally, OCR did not find any evidence indicating that bilingual students could attend the AEP program.

The District stated that high school ELL students may “push-in” to Advanced Placement courses, and are subject to the same criteria for acceptance into these classes as every other student. High school teachers informed OCR, however, that ELL students do not participate in any Advanced Placement Courses, with the exception of AP Spanish; this is primarily because their English proficiency is not at a sufficiently high level for such participation. District staff stated that they believed that students must be exited from the ELL program to take Advanced Placement classes; and that ELL students would not be denied the opportunity to take an AP class, but it would be hard for them to succeed.

Based on its investigation, OCR determined that there was sufficient evidence to conclude that the District excludes certain ELL students from specialized programs; and the District’s exclusion of ELL students from specialized programs constitutes a violation of the regulation implementing Title VI.

J. Special Education Services

During the course of OCR’s investigation, OCR also noted concerns regarding the provision of special education services to ELL students.³⁰ A school district may not assign students to special education programs on the basis of criteria that essentially measure and evaluate English-language skills. Accordingly, a school district must employ standards and procedures for the evaluation and placement of language-minority students that reliably identify students’ educational disabilities, rather than the students’ English proficiency skills. Additionally, school districts may not maintain “no dual services” policies or practices for ELL students with disabilities. If an ELL student with disabilities needs both alternative language services and special education services, the student should be given both types of services.

³⁰ Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104 prohibit discrimination on the basis of disability in programs or activities operated by recipients of Federal financial assistance, and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35 prohibit discrimination on the basis of disability by public entities. The applicable standards for determining compliance with Section 504 are set forth in the implementing regulation at 34 C.F.R. §§ 104.33-104.36. Section 104.33 provides, in pertinent part, that a recipient is responsible for providing a free and appropriate public education (FAPE) to qualified persons with disabilities. Section 104.34 prescribes standards for educating students with disabilities with nondisabled students to the maximum extent appropriate to the needs of the student with disabilities. Further, the regulation, at 34 C.F.R. § 104.35 (a)-(c) sets forth specific procedures designed to ensure appropriate classification and placement and the regulation at 34 C.F.R. §104.36 prescribes relevant procedural safeguards. The applicable Title II regulatory provision is set forth at 28 C.F.R. § 35.130, and generally is interpreted consistently with the provisions of Section 504 mentioned above.

The District informed OCR that it first determines ELL eligibility; then if appropriate, refers that student to a Committee on Special Education for evaluation. District staff informed OCR that the MIC tests students for ELL eligibility prior to evaluating the student for a disability. District staff also stated that there are students who need special education services in the ELL program but who are not receiving them. District staff stated that if a student is found eligible for special education, he/she cannot take bilingual classes; therefore, parents are sometimes hesitant to get students evaluated for special education, because they prefer that students receive ELL services.

Based on its investigation, OCR determined that there was sufficient evidence to conclude that the District is in violation of the regulation implementing Title VI, because the District has not ensured that if an ELL student with disabilities needs both alternative language services and special education services, the student is given both types of services.

K. Facilities and Segregation

In investigating whether ELL students are segregated, OCR examines whether the district has carried out its chosen program in the least segregative manner consistent with achieving its stated goal and whether the degree of segregation in the program is necessary to achieve the program's educational goals.

With respect to the facilities, witness interviews indicated that the ELL classrooms were the same as the general education classrooms; however, OCR has not completed its investigation of the District's facilities, and has not made a determination as to whether the District provides comparable facilities to ELL and non-ELL students.

With respect to segregation, as previously discussed, elementary and middle school students in the Bilingual Self-Contained and Port-of-Entry programs take all of their classes with students in their respective program, even for "specials," such as Drama, Art, Music, and Physical Education, as these are tied to a student's homeroom (i.e., a bilingual self-contained classroom). The District informed OCR that the students in this program do not take any classes with the general education population, and do not otherwise associate with the general education population unless there is an after school program, an assembly, or lunch. The District further informed OCR that this applies to students of every tier in the program, including Tier C students who are preparing to exit the program. OCR found that other ELL programs in the District, including the Bilingual Part-Time program, the ESL program, the Dual Language Program, and all high school ELL programs, do not segregate ELL students to the same degree as the District's Bilingual Self-Contained and Port-of-Entry programs; students in these programs take classes with monolingual students.

Based on its investigation, OCR determined that there was sufficient evidence to conclude that the District is not carrying out its Bilingual Self-Contained program in its lower and middle school Bilingual Self-Contained programs in the least segregative manner possible; accordingly, the District is in violation of the regulation implementing Title VI.

Conclusion

As stated above, during the course of the investigation, OCR found that the District was not in compliance with the regulation implementing Title VI at 34 C.F.R. § 100.3(a) and (b)(i)-(ii) regarding the District's implementation of its alternative language program; exiting and monitoring of ELL students; evaluation of its ELL program; communication with LEP parents/guardians; exclusion of ELL students from certain specialized programs; evaluation and placement of ELL students with disabilities; and provision of ELL services in the least segregative manner possible. Specifically, class time instruction for ELL students was not equivalent to class time instruction for non-ELL students in some cases; the District has not developed exit criteria for high school students that are based on objective standards, such as standardized test scores; and, the District has not demonstrated that students are only exited from the ELL program when they can read, write, and comprehend English well enough to participate meaningfully in the District's program. OCR also determined that the District has not periodically evaluated its ELL program and has not monitored exited ELL students. Additionally, the District provided insufficient documentation to otherwise demonstrate that its program is successful; i.e., that its participants are overcoming their language barriers sufficiently well and sufficiently promptly to participate meaningfully in the district's programs. OCR also determined that the District excludes certain ELL students from some specialized higher-learning programs; and, has not ensured that if an ELL student with disabilities needs both alternative language services and special education services, the student is given both types of services. With respect to communication with LEP parents/guardians, the District does not have a formalized program in place to identify LEP parents/guardians; provide interpreters for LEP parents/guardians; provide translated documents for LEP parents whose native language is not Spanish; and did not consistently provide Spanish translations of documents.

In areas where OCR did not make Title VI compliance determinations, OCR still noted concerns; including the possible under-identification of ELL students as a result of the District's current identification and assessment policies and procedures, and the effective implementation of its alternative language programs. OCR noted staff shortages, the termination of math instruction in the Part-Time Bilingual Program, difficulties cited by staff in completing the state-mandated curriculum by the end of the school year, and the lack of a process to track and provide services to students who have "opted out" of ELL services. OCR also found evidence that the resources allotted for ELL students may not be distributed consistently to all ELL students, and that some District staff indicated that they were not satisfied with the amount and quality of these resources. OCR also identified concerns regarding the qualifications and performance evaluations of ELL teachers.

Prior to completing the investigation of the remaining areas of this review, the District expressed its interest in resolving all identified compliance concerns and any remaining issues without further investigation. Accordingly, on December 22, 2014, OCR entered into a resolution agreement with the District to resolve the compliance review. The resolution agreement will require the District to:

- Ensure that every PHLOTE student will be identified and assessed by the District, including students from low incidence language groups;
- Effectively implement a comprehensive alternative language program and track the participation and performance of students in the program;

- Provide English language services and instruction to all ELL students in all educational settings, including special education;
- Ensure that all ELL students receive alternative language services until the students meet the District's criteria to exit the alternative language program;
- Provide notification of the placement for each ELL student and the benefits derived from participation in the alternative language program to each ELL student's parent/guardian in a language LEP parents can understand;
- Monitor the academic progress of students whose parents have declined or opted out of the alternative language program, and provide other language support services for such students;
- Have a sufficient number of certified, trained ESL and/or bilingual teachers to implement its selected alternative language program;
- Develop and implement a procedure to ensure that ESL/bilingual teachers' classroom performance will be evaluated by a person knowledgeable in ESL/bilingual learning methodologies;
- Provide training on its alternative language program methodologies to all individuals identified to evaluate the ESL/bilingual teachers' classroom performance;
- Provide instructional materials, appropriate to the curriculum, and comparable in quality, availability, and grade level to materials provided for the instruction of non-ELL students, to effectively implement its selected alternative language service model for the instruction of ELL students;
- Identify and describe the criteria that it will use to determine when an ELL student has obtained sufficient proficiency in English to exit the alternative language program; and to monitor exited ELL students to ensure that the students are participating meaningfully in the District's program;
- Develop and implement a procedure to measure the effectiveness of its alternative language program;
- Ensure that ELL students with or suspected of having disabilities are appropriately evaluated, placed, and provided with appropriate special education or related aids and services, as well as alternative language services;
- Revise and implement its policies and procedures to ensure that LEP parents are notified, in a language understood by the parents, of school activities and other information and matters that are called to the attention of other parents;
- Ensure that ELL students have an equal opportunity to participate in gifted and talented, Advanced Placement, or other specialized programs;
- Ensure that it carries out its ELL program in the least segregative manner consistent with achieving its stated goal(s); and
- Convene one or more parent forums, in a language the parents can understand, to provide District parents with information regarding the alternative language program; including identification and assessment of students, alternative language services, exit criteria, and monitoring.

The new or revised policies and procedures developed by the District require OCR review and approval under the Agreement. OCR will monitor implementation of the Agreement. If the District fails to implement the Agreement, OCR may initiate administrative enforcement or

judicial proceedings to enforce the specific terms and obligations of the Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10), or judicial proceedings to enforce the Agreement, OCR shall give the District written notice of the alleged breach and a minimum of sixty (60) calendar days to cure the alleged breach.

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.

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

Thank you for the cooperation extended by you and your staff to resolve the compliance review. Should you have any questions, please contact Jane Tobey Momo, Senior Compliance Team Attorney, at (646) 428-3763 or jane.momo@ed.gov; or Nadja Allen Gill, Compliance Team Leader, at (646) 428-3801 or nadja.r.allen.gill@ed.gov.

Sincerely,

/s/

Timothy C.J. Blanchard

Encl.

cc: Hope Blackburn, Esq.