



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION I
5 POST OFFICE SQUARE, 8th FLOOR
BOSTON, MASSACHUSETTS 02109-3921

July 24, 2018

Yaw Obeng
Superintendent
Burlington School District
By Email: superintendent@bsdvt.org

Re: Complaint No. 01-14-5001
Burlington School District

Dear Superintendent Obeng:

This letter is to inform you that the U.S. Department of Education (Department), Office for Civil Rights (OCR) has completed the above-referenced compliance review of Burlington School District (the District), which OCR initiated in December 2013. OCR's compliance review examined whether the District was providing equal educational opportunity to its national origin minority students who are English learners (ELs). As explained further below, before OCR completed its investigation, the District expressed a willingness to resolve the complaint by taking the steps set out in the enclosed Resolution Agreement (Agreement).

OCR initiated this compliance review pursuant to our authority under Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d *et seq.*, and its implementing regulation at 34 C.F.R. Part 100. The regulation at 34 C.F.R. § 100.7(a) requires and authorizes OCR to conduct periodic proactive compliance reviews to determine compliance with the laws OCR enforces. OCR also enforces Title VI of the Civil Rights Act of 1964 (Title VI) 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 federal financial assistance from the Department. Because the District receives federal financial assistance from the Department, OCR has jurisdiction over it pursuant to Title VI.

Background

The District has one high school, two middle schools, six elementary schools, a technical center, an early education program, and two alternative programs.¹ Of the 3,600 students enrolled in the District during the 2016-2017 school year, 6.1% were multi-racial, 0.2% were American Indian or Alaskan Native, 0.0% were Native Hawaiian or other Pacific Islander, 2.1% were Latinx, 11.8% were Asian, 14.6% were Black and/or African-American, and 65.2% were white.

¹ See Our Schools, Burlington School District, available at <http://www.bsdvt.org/our-schools/> (last visited March 19, 2018).

District personnel informed OCR that the District’s EL students were generally either refugees themselves or from ethnic groups that had previously settled in the area as refugees. According to the District’s Annual Report, during the 2016-2017 school year, approximately 14.7% of students received English language learning services. The XXXXXXXXXXXXXXX informed OCR that the largest language groups of students are Kirundi, Swahili, Kinyarwanda, French, Maay Maay, Burmese, Nepali, Somali, and Bosnian.

Legal Standard

Title VI and its implementing regulation prohibit discrimination on the basis of race, color, or national origin by recipients, including the School, 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 May 25, 1970, pursuant to its authority under Title VI, the Department issued a memorandum entitled, “Identification of Discrimination and Denial of Services on the Basis of National Origin,” 35 Fed. Reg. 11,595 (May 1970 memorandum). The memorandum clarifies OCR policy under Title VI on issues concerning the responsibility of school districts to provide equal educational opportunity to limited English proficient (LEP) national-origin minority students, and states that school districts must take affirmative steps to address the language needs of limited English proficient students (EL students). In 1974, the Supreme Court upheld the May 1970 Memorandum in its *Lau v. Nichols* decision, 414 U.S. 653 (1974).

In *Lau v. Nichols*, 414 U.S. 563 (1974), the Supreme Court determined that where the inability to speak and understand the English language excludes national origin minority students from effective participation in educational programs, districts must take affirmative steps to ensure that such EL students can meaningfully participate in the district’s educational programs and services in order to comply with Title VI. The Court did not directly address LEP parents. However the Court noted that the regulations specify recipients may not “provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program” nor may recipients “restrict an individual in any way in the enjoyment of any advantaged or privileged enjoyed by others receiving any service, financial aid, or other benefit under the program.” 414 U.S. at 567 citing 34 CFR Section 100.3(b)(i)(ii) and (IV). These regulations repeatedly reference a recipient’s obligations related to “individuals.” This broad authority, endorsed by *Lau*, can include parents as well as students. OCR has generally considered the Court’s affirmation of *Lau* of OCR’s 1970 policy memorandum to extend to OCR policy regarding LEP parents as well as EL students.

Title VI and the May 1970 Memorandum, as endorsed by *Lau*, require recipients to select a sound educational theory for their English learner programming and to use practices, resources, and personnel reasonably calculated to effectively implement their educational theory. Districts

are expected to ensure their educational program produces results indicating that the students' language barriers are actually being overcome in a reasonable period of time, and to modify programs that are not successful. The May 1970 Memorandum outlines four "major areas of concern" with regards to Title VI compliance:

1. Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.
2. School districts must not assign national origin-minority group students to [special education] classes on the basis of criteria which essentially measure or evaluate English language skills; nor may school districts deny national origin-minority group children access to college preparatory courses on a basis directly related to the failure of the school system to inculcate English language skills.
3. Any ability grouping or tracking system employed by the school system to deal with the special language skill needs of national origin-minority group children must be designed to meet such language skill needs as soon as possible and must not operate as an educational dead-end or permanent track.
4. School districts have the responsibility to adequately notify national origin-minority group parents of school activities which are called to the attention of other parents. Such notice in order to be adequate may have to be provided in a language other than English.

To meet Title VI standards in serving EL students, a district must meet the three prong standard under *Castañeda v. Pickard*, 648 F.2d 989 (5th Cir. 1981): (1) select a sound educational theory for its programs for EL students that is likely to meet their educational needs effectively; (2) use practices, resources, and personnel reasonably calculated to implement its educational theory; and (3) demonstrate that its program is successful in teaching EL students English and providing them with access to the curriculum, or it must modify the program as necessary. *See Castañeda v. Pickard*, 648 F.2d 989 (5th Cir. 1981). The memorandum also provides that school districts must adequately notify national origin minority group parents of information that is called to the attention of other parents, and that such notice may have to be provided in a language other than English in order to be adequate.

Summary of Preliminary Investigation²

OCR's compliance review assessed the District's program for EL students, in addition to communications with LEP parents from 2013 to 2018. Specifically, OCR examined whether the District provided appropriate services to the District's EL students, including in the areas of: identification and assessment; language program selection and implementation; EL student placement and participation in the language program; staffing; staff development and training; exit criteria and monitoring; program evaluation; parental communication; specialized programs; special education; and facilities and segregation.

² OCR's investigation included three on-site visits, meetings with parent focus groups, and interviews with over 30 District personnel. The following is a summary of the investigation; topics may have been excluded where they had no bearing on the resolution agreement.

The following is a summary of OCR’s investigation to date, including its analysis identifying the areas of concern described below. However, because the District requested voluntary resolution, most recently on March 23, 2018, OCR has not completed its investigation. To do so, OCR would need to (i) conduct updated interviews of the parent groups, EL teachers, general education teachers, and multicultural liaisons; (ii) receive updated numerical data regarding student performance, exiting, opt outs, graduation and dropout rates, etc.; (iii) review the results of all of the District’s recent self-assessments (e.g., the interviews with teachers, etc.); and (iv) conduct a follow-up onsite to view the facilities at issue.

I. The District’s Program to Rectify Language Deficiencies

A. Identification and Assessment - Determining which Students are Eligible for EL Services

The May 1970 memorandum provides that districts must take affirmative steps to address national-origin minority students’ language barriers that prevent EL students from effective participation in the district’s program. *See Lau v. Nichols*, 414 U.S. 563 (1974) (affirming May 1970 memorandum). A district should have procedures in place for identifying and assessing students whose primary home language is 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 include an assessment of whether national-origin minority students proficiently speak, understand, read, and write English.

When OCR began its investigation, the District provided OCR with a decision-making flow chart representing the District’s procedures for identifying PHLOTE students, entitled “BSD Process for Identifying NELBs and ELLs,” which the District provided to principals, EL teachers, and multilingual liaisons.”³ The District reported in its data response that these personnel received reminder emails regarding the process, but did not state how often or whether they received any other training. During the course of OCR’s investigation, District personnel informed OCR that the District modified and improved its identification and assessment process, which is represented in a new flow chart.

OCR found that during the course of the investigation, the District also expanded its outreach and centralized the registration process. Currently, the registration process is done electronically either at a school, or with a multilingual liaison (either in the liaison’s office or the family’s home), or through a series of community-wide walk-in registration events that are widely publicized in advance. The parents/guardians complete a Home Language Survey (HLS) with the assistance of the multilingual liaisons and/or the administrative assistants at each school. Any answer other than English to any question on the HLS automatically sends an electronic alert to four District personnel who then review the answers and either conduct a brief follow up interview⁴ or refer the student to assessment. During the 2016-2017 school year, 116 students from over 20 different first language backgrounds were assessed through the new centralized

³ The version provided to OCR stated that it was last revised September 10, 2012 by XXXXXXXXXXXXXXXX.

⁴ XXXXXXXXXXXXXXXX said this interview assesses whether the student was a possible EL candidate or whether other languages were spoken at home for different reasons (e.g. one parent studied abroad in college and occasionally spoke that language at home).

system.

One District personnel member expressed concern that students at an elementary school were being placed in the EL program based on their responses to the HLS alone, before any formal assessment of their English proficiency. However, according to more recent interviews with District personnel, the District implemented a new centralized review of the HLS, in which the four District personnel who review the answers to the HLS (referenced above) would not approve placement prior to assessment. The new process is designed to be more efficient, so there would be no need to place a student before it was completed. Accordingly, while OCR's initial investigation identified some potential concerns with the District's process, the evidence provided by the District during the course of the investigation indicates that the District has addressed these concerns (e.g., centralization). However, when the HLS was recently converted into an online form, certain questions were omitted and need to be reinstated. During her most recent interview with OCR, XXXXXXXXX was aware of this omission and working to correct it.

B. The District's Language Program for EL Students

Once a district identifies the students in need of services, it must choose and utilize a sound educational theory and take affirmative steps to address the language barriers faced by EL students. Alternative language programs and practices adopted by a district must be effectively and reasonably developed to enable EL students to attain both English proficiency and parity of participation in the standard instructional program within a reasonable length of time, with consideration given to each EL student's English proficiency level, grade level, and educational background.

According to the District's *Lau* plan, the District instructs its EL students using an English as a Second Language (ESL)⁵ program; the District does not use a bilingual education program. In implementing this educational model for its EL students, the District employs direct language and literacy instruction, sheltered instruction, and intensive language instruction for newcomers and others needing additional instruction.

1. Program in the Elementary Schools

Based on the District's data and interviews with District personnel, the District informed OCR that in the language program at the elementary schools, EL teachers either "pull out" small groups of students for additional reading and language instruction or "push in" to support students in their mainstream classrooms, depending on the individual language needs of the students

⁵ As stated in OCR's Dear Colleague Letter "English Learner Students and Limited English Proficient Parents" (issued January 7, 2017), ESL is also known as English Language Development (ELD). ESL is a program of techniques, methodology, and special curriculum designed to teach EL students explicitly about the English language, including the academic vocabulary needed to access content instruction, and to develop their English language proficiency in all four language domains (*i.e.*, speaking, listening, reading, and writing). ESL instruction is usually in English with little use of the EL students' primary language(s).

EL students spend most of the day in their mainstream classes, and are grouped by their scores on the WIDA ACCESS test⁶ and by grade level. The District indicated that it strives to have no more than two grade levels per group, although District personnel stated that in at least one elementary school, some sessions contain more than two grade levels. The XXXXXXXXXXXX also said that XX was offering additional resources, training, and support to teachers to incentivize more co-teaching.

In addition, some elementary school students participate in a more intensive ESL program, the English Language Learners Studying Towards English Proficiency Program (EL STEP), which provides full-day ESL support outside of the mainstream classroom. While students in the EL STEP program are kept in the intensive program for more of the day, EL STEP students are able to interact with their non-EL peers during gym, music, and lunch, and collaborative arts projects.

2. Program in the Middle Schools

Based on the District's data (including its *Lau* plan) and interviews with District personnel, OCR found that the language program at the middle schools schedules EL students for one or more periods of focused ESL instruction, depending on their language proficiency. All middle school students take 12 courses, with six classes offered each day on alternating days. Beginning level EL students typically take two EL courses, instead of a foreign language or English course, while intermediate to advanced EL students typically take one EL course, instead of a foreign language course. The District's published "EL Program Guide" also reflects that beginning EL students were in class with their non-EL peers for nine or ten class periods out of the total of 12, while advanced EL students were with their non-EL peers for all but one class period. OCR found that the evidence indicated that beginning, intermediate and advanced students were previously received ESL instruction together at times, although the District stated that this is no longer occurring as of the 2017-2018 school year.

In addition, both middle schools also have a "newcomer" program, which provides intensive language instruction in the form of a longer block of instruction, or two periods per day. District personnel indicated that with respect to the newcomer program, they were working to ensure that students were not kept in newcomer status longer than necessary, and to have more of a bridge between the newcomer and mainstream programming. They also noted that while one program was accomplishing these goals, the other could learn from the best practices being implemented at the other school.

3. Program in the High School

The language program at the high school level features different levels of instruction based on language ability and grade. In general, beginner students have more periods of ESL instruction (including some core classes), and more advanced students have fewer periods of ESL instruction and more periods in mainstream courses. Students can earn up to 32 credits in four years and only need 24 credits to graduate, so student have flexibility in their schedules to take additional support classes while still being able to graduate in four years. The District places

⁶ The WIDA ACCESS test is offered by the World-Class Instructional Design and Assessment (WIDA) Consortium, a consortium of state departments of education focused on educating English language learners. While students are initially assessed using the WIDA MODEL assessment, annual retesting is done with the ACCESS test.

students in EL classes by their English Language Proficiency (ELP) Levels, which are based on their annual ACCESS scores and EL teacher recommendations. OCR reviewed student schedules produced by the District, and determined that all EL students at the high school had at least some classes with non-EL students.

i. Math at the High School

The evidence obtained in OCR’s investigation suggested a possible disparity in math performance between EL students and their non-EL peers. Specifically, OCR obtained schedules for the 86 EL students who were taking at least one EL English course in spring 2015, which indicated that most (58%) of these students were taking math courses below grade level. District personnel also reported that current and former (i.e., exited) EL students tended to take less advanced math courses than their non-EL peers. The District stated that enrollment in EL Math included a high number of EL students who lacked access to basic math before attending the high school, and that it is focusing on remedying issues with respect to the EL Math course.

XXXXXXXXXXXXXXXXX is focusing on remedying problems with the EL Math course. XX stated that because the students in that course have a large continuum of experience and enrollment is high, it is difficult to ensure all students are advancing properly. XX also emphasized that they have a high number of students who have not had any access to basic math before enrolling at the high school. While the evidence suggests a potential concern in that the District may need to take steps to improve the math performance of its EL students beyond this course, OCR has not completed its investigation of the extent and nature of the under-performance during the current school year.

ii. The ExcEL Program for Newcomers

The high school also offers the “ExcEL” program, which is an intensive program for high school students with little or no English language skill.⁷ ExcEL students take two blocks of English language development (90 minutes per day) to develop oral English skills. The District requires a minimum number of students to offer the ExCEL program, although there is no cap. The District did not offer it in fall 2017 because it did not meet the minimum. However, once the minimum was met in January 2018, the program was offered for spring 2018.

OCR’s investigation revealed that, at some points during its investigation, some students who exited the ExcEL program mid-year were unable to effectively do so because the core content classrooms were full. XXXXXXXXXXXXXXXX reported that when XX began her position in XXXXXXXX, XX was not aware of an issue involving capacity in core classes but rather in physical education, which had since been resolved. XX stated that this issue did not occur for any student exiting the ExcEL program over the 2016-2017 and 2017-2018 school years.⁸

⁷ Specifically, the program is for students with a score of less than 2.5 overall on the ACCESS or MODEL tests and scores of less than 2.0 in listening and speaking. Students may also qualify if they are Students with Limited and/or Interrupted Formal Education (SLIFE).

⁸ XXXXXXXXXXXXXXXX also reported that some of the problem with scheduling was eliminated when the District assigned a dedicated guidance counselor to EL students.

C. Conclusion

As described above, the District's language program for EL students, i.e., ESL, and its techniques, are recognized educational theories and approaches. The District has developed practices and procedures to implement its program, although it appears that the *Lau* plan has not been consistently updated in its entirety. Further, the evidence obtained to date indicates there may be remaining areas that need to be addressed.

First, while the program strives to meet the individual language needs of the students at the elementary level, the pull-out instruction sometimes features more than two grade levels of students, which may make it difficult to meet the needs of each student. Second, at the middle school level, one of the two schools may be more effectively integrating students in the newcomer program into content-level classrooms. Finally, at the high school, the evidence indicates there are remaining concerns about the content-level instruction in math and the integration of students exiting the ExcEL program. Specifically, OCR's investigation to date suggests that EL students at the high school may be significantly behind their peers in math, which may have been compounded by students exiting the ExcEL program, who were unable to access other courses because they were full. While the District has represented that is no longer the case, OCR has not reached a determination regarding whether this occurred or is occurring.

Since the District expressed interest in a resolution under Section 302 of OCR's Case Processing Manual, OCR did not make a compliance determination as to the extent to which the District's language program and practices provide for EL students to attain both English proficiency and parity of participation. The Resolution Agreement will ensure the District has a language program that rectifies language deficiencies in compliance with Title VI.

II. The District's Use of Programs and Practices to Effectively Implement its Program

Under the second prong of *Castañeda*, a district must not only adopt a language program that is likely to meet the educational needs of EL students effectively, it must also follow through with the practices, resources and personnel that are reasonably calculated to transform the theory of the program design into the reality of the educational setting. In its analysis of the implementation of the program, OCR considers whether participation is available to all identified students, whether staffing needs are satisfied, and whether objective criteria have been established for exiting EL students from the program.

A. Staffing and Resources for the Language Program for EL Students

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 its language program to EL 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 program. Language program support staff must also be qualified for the educational support roles that they fulfill in a district's

English language 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.

1. *EL Personnel*

When OCR began its investigation, the District employed 26 EL teachers. Currently, the District employs 25 EL teachers. While XXXXXXXXXX reports that these teachers are ESL certified, OCR has not completed its investigation regarding the qualifications of these teachers or verified these certifications.⁹ As of March 2018, District personnel reported that there were also two paraeducators who work with the EL STEP program.

2. *General Education Teachers*

Because most EL students spend the majority of their days in general education classrooms, the qualifications of their general education teachers are also relevant. The evidence indicates that most students in the District are in English-only classrooms, taught by general education teachers, for the majority of the day. Accordingly, increased familiarity by general education teachers with ESL instruction will increase the District's effectiveness in meeting the language needs of the students. While the District has been working to improve training and exploring more co-teaching, OCR notes the evidence indicates these are continued areas for improvement.

3. *Guidance Counselors*

When OCR began its investigation, at the high school level, guidance counselors did not work with EL students in any different manner than non-EL students. However, beginning with the 2017-2018 school year, the District now has a dedicated guidance counselor for all EL students at the high school.

4. *Multilingual Liaisons*

The District employs multilingual liaisons, as well as a multilingual liaison coordinator, to facilitate communications between the District and parents, and between students and their teachers, including by providing language translation and helping bridge the cultural gap between parents and District personnel. The liaisons speak all of the languages spoken by more than 25 students in the District, and when the language needs of the student body shift, the District has worked to retain liaisons who speak those additional languages.

Multilingual liaisons reported that they acted as interpreters during special education meetings with parents, and that they generally had an adequate knowledge of special education vocabulary to do so effectively. When initially interviewed by OCR, the liaisons expressed a desire for more training on and about mental health conditions and autism. District personnel informed OCR that the liaisons had since received additional training on autism, with plans for further training on mental health and trauma topics.

⁹ In responding to OCR's data request, the District provided a chart of its EL teachers, which did not provide information regarding most of the teachers' qualifications.

5. *Conclusion*

As previously stated, OCR has not completed its investigation regarding the numbers or qualifications of staff for the District’s EL program. Accordingly, OCR did not reach a compliance determination with respect to staffing. The Resolution Agreement will ensure the District has adequate staffing to implement its language program for EL students in a manner consistent with Title VI.

B. Materials and Resources

In order to ensure EL services are delivered effectively, EL students must receive appropriate instructional materials in the EL program, which includes adequate quantities of materials at the appropriate proficiency and grade levels. 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 prior XXXXXXXX reported that both the District and each school provided teachers with funds for materials, which she allocated based on the number of EL students. When interviewed, some teachers expressed a desire for more materials, while others stated that they had attempted to find better materials and reviewed samples, but were unable to find any additional materials that would be helpful in instruction. OCR has not yet completed its investigation of the materials provided by the District for the instruction of EL students. Accordingly, OCR did not reach a compliance determination with respect to adequacy of materials and resources. The Resolution Agreement will ensure the District has adequate materials and resources to implement its language program for EL students in a manner consistent with Title VI.

C. Facilities for the Language Program for EL Students

The space in which the program is implemented can also be critical to its success and students in the EL program should have access to comparable facilities to their non-EL peers. The facilities provided to the EL student must be sufficient to effectively implement the District’s chosen language program.

OCR’s initial investigation indicated that EL students in the District may not always have had access to comparable facilities. District personnel reported that at one elementary school during the 2014-2015 school year, EL testing was done in a room described as “a closet,” which was later changed after personnel raised concerns. EL teachers reported having to share rooms with other classes, which limited EL students’ abilities to practice speaking. Additionally, high school EL teachers reported they did not have their own classrooms, which required them to carry supplies from room to room, and they could not use the walls to display learning tools (e.g., word walls). In addition, the teachers reported a science class being held in a non-science classroom (i.e., without lab space). However, more recent interviews with District personnel suggest these problems have been addressed. Specifically, while some teachers may share classrooms, all teachers at the high school have either their own office or classroom and have the ability to display materials in the classrooms. Additionally, where classes are located in the

same room, the District has constructed walls to divide the space and allow for conversation.

Based on the above, the concerns identified from evidence obtained at the beginning of OCR’s investigation appear to have largely been addressed. However, the evidence indicates that the EL intake and assessment space at the high school raises ongoing concerns, since it is currently part of a two-room area that used to be a shower room and now houses a coat closet, and is subject to interruptions when the closet is accessed.

Since OCR has not yet completed its investigation of the facilities provided by the District to EL students, it did not reach a compliance determination with respect to comparability and segregation with respect to facilities. The Resolution Agreement will ensure the District has adequate facilities to implement its language program for EL students in a manner consistent with Title VI.

D. Equal Access to Special Education, Specialized and Advanced Coursework

In addition to qualified staffing and an appropriate space, a district must ensure that its program extends to and provides access to special education, advanced courses, and specialized programs.

1. *Special Education*

OCR also enforces laws and regulations that prohibit discrimination based on disability.¹⁰ The May 1970 memorandum states that 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. Districts may not maintain “no dual services” policies or practices for EL students with disabilities. If an EL student with disabilities needs both alternative language services and special education services, the student should be given both types of services.

Based on its investigation to date, OCR has concerns that the District may not have been implementing its EL program consistent with the requirements of Section 504 and Title II. At the beginning of OCR’s investigation, the evidence collected indicated that the District may have had a practice, at least at some schools, of not evaluating EL students for special education services until they were in the country for three years. A student who has or is regarded as

¹⁰ 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. § 12132 *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 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.

having a physical or mental impairment that substantially limits one or more major life activities is entitled to a free appropriate public education, regardless of their status as an EL student. Accordingly, the evidence indicates that EL students with disabilities may not have been timely evaluated for special education services. However, more recent interviews suggest that this is no longer the practice in the District and XXXXXXXXXX had taken steps to ensure there are no remnants of the practice. While OCR acknowledges these efforts, it has not confirmed that all teachers are aware of this change in practice, and the District has not determined whether any compensatory services should be provided to students who may have been adversely affected.

2. Specialized and Advanced Courses and Programs

The exclusion of EL students from specialized 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. EL students cannot be categorically excluded from specialized programs.

Unless a particular course is demonstrated to require proficiency in English for meaningful participation, schools must ensure that evaluation and testing procedures for those specialized programs do not screen out EL students because of their limited English proficiency. The data provided by the District did not reveal any hurdles to enrollment, but did demonstrate that very few current or former EL students take the District's Advanced Placement (AP) or honors courses. While OCR has not reached a determination regarding the reasons for these low numbers, the evidence obtained to date suggests that EL students potentially are not accessing AP or honors courses due to factors related to their limited English proficiency.

3. Specialized Classes

During the course of OCR's investigation, the District has taken steps to improve access to specialized coursework, in particular those courses offered through its Technical Center to high school students. At the beginning of OCR's investigation, the evidence indicated that no or few EL students had access to the programs at the Technical Center. Presently, however, the District has an EL teacher assigned to the Technical Center for most of the week, and while there is still room for improvement, the District has shown a commitment to ensuring and improving access. The District has also articulated a plan to ensure appropriate access for EL students to its alternative programs.

4. Conclusion

OCR has not completed its investigation of EL students' access to special education, advanced courses, and specialized programs. Accordingly, OCR has not reached a compliance determination regarding EL students' access to these programs. The Resolution Agreement will ensure EL students have meaningful access to these programs.

E. Students Who Opt Out

According to OCR's 1970 Memorandum, where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the

educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students. In instances where parents refuse to enroll their children in an EL program, the school district should inform parents about the purpose and benefits of the EL program in a language they understand and, if a student who has been opted out of EL services is unable to perform at grade level without receiving EL services, the school district should periodically remind the parent that the student remains eligible for such services and that it will provide such language services.

According to the data provided, very few parents opted out of EL services for their children during the relevant period. According to interviews with District personnel, the District currently maintains no formal policy or procedure for monitoring students who opt out, although the District reassesses students who opt out on an annual basis, and is considering incorporating these students into its formal monitoring system.¹¹

OCR has not completed its investigation regarding students who opted out of EL services. Accordingly, OCR has not reached a compliance determination regarding whether the District is ensuring it is meeting the needs of students who opted out of the District's EL program. The Resolution Agreement will ensure that the District is in compliance with Title VI, with respect to its policies and procedures, and implementation thereof, for students who opt out of EL services.

III. Determining Whether the Program is Actually Overcoming the Language Barriers

A. Exiting Students

A district should exit or reclassify EL students from the language program once they are prepared to participate meaningfully in regular instruction (i.e., are proficient in reading, writing, speaking and comprehending English), and should use objective measures to make sure students are fully proficient in each of these four areas before discontinuing services.

According to the District's data response and OCR's interview with XXXXXXXXXXXXXXXX, students exited the EL program based on their performance on the annual WIDA ACCESS test. Students are exited once they receive a composite score of 5.0, and 4.0 or higher on the reading and writing subtests, which are the score cutoffs employed by the state of Vermont.

B. Monitoring Exited Students

When OCR began its investigation, the District had no formal monitoring program. However, during the course of OCR's investigation, the District has taken important steps by implementing a new monitoring protocol. Currently, twice a year, the District surveys the general education teachers of students who exited the EL program within the last two years to determine if any of these students need additional services. The first surveys were sent out in November 2017, and at least one student received additional services based on these monitoring results. The District also tracks these students in its data management system.

¹¹ See *infra* Section III(B) for greater discussion of the monitoring program.

OCR has not completed its investigation of students exiting from the District's EL program. Accordingly, OCR has not reached a compliance determination with respect to the District's policies, procedures and practices with respect to exiting students. The Resolution Agreement will ensure that the District monitors its EL students to ensure they are fully proficient before discontinuing services.

C. The District's Evaluation of its Program

A district must demonstrate that its program is actually overcoming the language barriers confronting students, that it is successful in teaching EL students English, and that its program is providing EL students with access to the curriculum. Additionally, if, in its own assessment the programs prove to be unsuccessful after a legitimate trial, a district must modify its program; as a practical matter, districts cannot comply with this requirement without periodically evaluating their programs. If a district does not periodically evaluate or modify its programs, as appropriate, it is in violation of the Title VI regulation unless its program is successful.

During OCR's investigation, the District issued a report concerning the 2012-2013 school year assessing its performance in relationship to specific program goals, i.e., the numbers of EL students, their proficiency level, length of time in the program, and grade level achievement after exiting. The District informed OCR that it currently strives to use differentiated support, and assesses its program by reviewing the length of time the student is in the program as compared to their progress. In addition, the District implemented a research project to survey graduating students, and commissioned other reports based on interviews of general education teachers, EL teachers, principals, and other data sources.

At present, however, the evidence obtained to date indicates that the District's goals are not clearly defined. Specifically, based on the above, the evidence did not indicate that the District currently maintains precise standards by which it assesses whether its program is successful or should be modified. For example, the District could consider, among other metrics, the data from its new monitoring program, in addition to dropout rates, retention rates, and graduation rates. The District reported this data was readily available, but was not routinely used to assess its program.

OCR has not completed its investigation of the District's assessment of its EL program, and has not reached a compliance determination with respect to the District's self-evaluation and any necessary modifications. The Resolution Agreement will ensure the District is monitoring its program as a whole to determine whether its program is overcoming language barriers in compliance with Title VI.

IV. Parental Communications

School districts must ensure meaningful communication with LEP parents/guardians in a language they can understand and must adequately notify national origin minority group parents of information that is called to the attention of other parents. The notice may have to be provided in a language other than English in order to be adequate. Districts must develop and implement a process for determining whether parents/guardians are LEP and what their language needs are. The process should be designed to identify all LEP parents/guardians, including parents or

guardians of children who are proficient in English and parents and guardians whose primary language is not common in the district.

The District informed OCR that it identifies LEP parents either before or during registration, and that many parents are identified prior to registration through community connections, such as partnerships with refugee organizations. The registration packet and signage in the schools also instructs parents how to request interpreters.

The evidence obtained to date indicates that District's multicultural liaison program provides effective services to families who speak the languages spoken by the liaisons (i.e., families who speak the most common languages). The liaisons are readily available to translate and to meet with families, including during home visits.¹² In addition, the District's network of on-call interpreters can assist with the language needs of families who speak other languages.

However, the District also uses computer programs that allow parents to monitor their students' grades and attendance, which are available in English only. With these programs, teachers regularly update the system so that parents can quickly determine if their children are doing poorly on assignments or missing class. When interviewed, LEP parents noted difficulty accessing the computer system. The District informed OCR that the liaisons and at times the EL Director herself will do home visits to convey the information, and the District has also done outreach events to teach LEP parents how to use the programs.¹³

Based on the above, the evidence indicates that District may not be meeting the language needs of LEP parents with regard to the computer systems utilized by the school to communicate with parents. Specifically, the evidence indicates that LEP parents may not be notified as effectively as non-LEP parents of their child's progress or whether they are struggling, since they may not be aware of this information until the liaison or EL Director visits them, or until they receive a report card.

OCR has not completed its investigation of the District's communications with LEP parents. Accordingly, OCR has not reached a compliance determination as to whether the District is ensuring meaningful communication with LEP parents/guardians. The Resolution Agreement will ensure the District is complying with Title VI meeting the needs of LEP families.

Conclusion

Prior to the conclusion of OCR's investigation and pursuant to Section 302 of OCR's *Case Processing Manual*, the District expressed an interest in resolving this compliance review. Subsequent discussions between OCR and the District resulted in the District signing the enclosed Agreement which, when fully implemented, will address the areas where OCR identified concerns but did not make a compliance determination. OCR will monitor the District's implementation of the Agreement.

¹² In addition to assisting parents with language barriers, the liaisons also provide valuable assistance in helping parents navigate cultural barriers.

¹³ The systems include some visual data (e.g. charts related to performance) that can be accessed regardless of the parent's language.

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

Please be advised that the District must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

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

If you have any questions, you may contact Civil Rights Attorney Catherine Deneke at (617) 289-0080 or by e-mail at Catherine.Deneke@ed.gov.

Sincerely,

Adrienne M. Mundy-Shephard
Acting Regional Director

Enclosure

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