



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

March 12, 2018

Mr. James O'Brien
Superintendent-Director
Greater New Bedford Regional
Vocational Technical High School
1121 Ashley Blvd.
New Bedford, MA 02745
By email to: jobrien@gnbvt.edu

Re: Complaint No. 01-16-1236
Greater New Bedford Regional Vocational Technical High School

Dear Superintendent O'Brien:

This letter is to advise you of the outcome of the complaint that the U.S. Department of Education (Department), Office for Civil Rights (OCR) received against the (the Greater New Bedford Regional Vocational Technical High School (the School)). The Complainant alleged that the School discriminates against English language learner (ELL) students based on their national origin. Specifically, the Complainant alleged:

- the School failed to provide ELL services in its vocational education programs generally, and that its vocational education teachers are not certified to teach ELL students (Allegation 1);
- the School's vocational education teachers intentionally provided lower grades to ELL students than their English-speaking peers (Allegation 2); and
- the grading and makeup policies enforced in the School's vocational education classes negatively affected ELL students, as ELL students routinely turned in assignments late because they needed to review these assignments with tutors due to their limited English proficiency (Allegation 3).

As explained further below, before OCR completed its investigation, the School expressed a willingness to voluntarily resolve the complaint under Section 302 of OCR's *Case Processing Manual* by taking the steps set out in the enclosed Resolution Agreement. However, OCR found insufficient evidence to support Allegations 2 and 3. The following is a discussion of the relevant legal standards and information obtained by OCR during the investigation that informed the development of the Resolution Agreement regarding Allegation 1, and OCR's findings and conclusions regarding Allegations 2 and 3.

OCR is responsible for enforcing Title VI of the Civil Rights Act of 1964 (Title VI), as amended, 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 programs and activities receiving financial assistance from the U.S. Department of Education. The School is subject to the

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requirements of Title VI because it is a recipient of Federal financial assistance from the U.S. Department of Education.

Background

The School is a public, four-year vocational technical high school (grades nine through twelve) that combines academic and career/technical instruction. The School serves the communities of New Bedford, Dartmouth and Fairhaven, Massachusetts. During school year 2015-2016, 2,130 students attended the School, of whom 53 (2.5%) were identified as English Language Learners. For school year 2015-2016, 30 (56.6%) of the ELL students' first language was Spanish, and 16 (30.2%) of the ELL students' first language was Portuguese. Six students (1%) spoke Haitian Creole, and one (0.2%) spoke Cape Verdean.

Summary of Preliminary Investigation

During the investigation, OCR reviewed documents provided by the Complainant and the School pertaining to the 2015-2016 and 2016-2017 academic years, including: (1) the School's policies and procedures regarding the provision of educational services to ELL students, and information about eligibility and placement of ELL students; (2) information regarding the services/programs offered in vocational education classes, staffing and demographics; and (3) the School's policies, procedures and/or practices, concerning grading and late assignments, and communications regarding grade appeals or "make-ups" for vocational education classes. OCR also interviewed the Complainant and School faculty and staff; and conducted a site visit on March 29 and 30, 2017.

Allegation 1 (ELL Access to Curriculum)

The Complainant alleged that during school year 2015-2016, the School discriminated against ELL students at the School, based on their national origin, when it failed to provide appropriate supports and accommodations for ELL students in the School's vocational and technical education programs.¹ The Complainant stated that ELL students are "not getting accommodations based upon the past agreements and citations from the [Massachusetts Department of Elementary and Secondary Education's (DESE's) Coordinated Program Review (CPR)] process to give ELL students equal access to all programs including the vocational programs," which included the areas of "retention, level of instruction and access to services because of the ELL status."² In addition, the Complainant stated that ELLs are "being held to a standard rubric for task completion that is not translated or accommodated for students that are non-English speaker[s]." The Complainant further stated that the School's vocational instructors are not enrolled in mandated ELL training. For these reasons, the Complainant alleged that the

¹ The Complainant was formerly the School's Civil Rights Officer, and was no longer employed by the School.

² The Massachusetts State Department of Elementary and Secondary Education (DESE) Coordinated Program Review (CPR) process is a periodic comprehensive audit of local educational agencies (LEAs) by the State Educational Agency (SEA) for compliance with state and federal civil rights and educational program requirements, conducted in six year cycles for all LEAs in the Commonwealth of Massachusetts. The most recent CPR audit of the School took place during the 2014-2015 school year.

School's ELL students were denied equal access to the School's vocational and technical programs during school year 2015-2016.³

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 (ELL 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 ELL 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

³ OCR determined that the DESE's most recent CPR report (to which the Complainant referred) was conducted in 2015 as part of the DESE's 6 year program review cycle and is available to the general public online at <http://www.doe.mass.edu/ell/cpr/2015/0825.pdf>. The 2015 CPR report identified 14 out of 18 of the School's English Language Learner program features as having been "fully implemented," but noted that three (out of 18) ELL program features were only "partially implemented," as follows: (1) the School uses assessment data to plan and implement educational programs for students at different instructional levels; (2) annual notification in the parent's home language is sent to parents regarding various features of the Student's ELL program; and (3) ELL students have full access to all academic programs and activities. OCR also noted that the CPR report indicated that one of the eighteen program areas, (4) periodic evaluations of the effectiveness of the School's ELL program (monitoring and evaluation), was "not implemented."

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 ELL 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 ELL 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 ELL 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 ELL 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.⁴

⁴ OCR also issued policy memoranda on December 3, 1985, entitled “The Office for Civil Rights’ Title VI Language Minority Compliance Procedures” and September 27, 1991, OCR entitled, “Policy Update on Schools’ Obligations Toward National Origin Minority Students with Limited-English Proficiency.” On January 5, 2015, OCR and DOJ jointly adopted and promulgated a “Dear Colleague Letter” entitled, “English Learner Students and Limited English Proficient Parents.”

Facts and Analysis

OCR reviewed the School’s ELL program, in both academic (non-vocational) and vocational (shop) classes, to determine if the School’s ELL programs met the elements of OCR’s guidance with respect to the development, implementation and provision of an appropriate ELL program. Specifically, OCR examined whether, during school years 2015-2016 and 2016-2017, the School provided appropriate services to the School’s ELL students participating in its vocational education classes, including: identification and assessment; alternative language program selection and implementation; ELL student placement and participation in the alternative language program; staffing the ELL program on the vocational education side; staff development and training; exit criteria and monitoring; program evaluation; parental communication; specialized programs; special education; and facilities and segregation. OCR’s analysis of the elements of the School’s ELL program is set forth below.

A. Identification and Assessment

The May 1970 memorandum provides that 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. *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.

OCR determined that the School’s written policy and procedures for identifying PHLOTE students are set forth in the “Greater New Bedford Regional Vocational Technical School Student Handbook 2016-2017, ‘English Language Learners’” and School Committee Policy Manual (the Policies)⁵. The Policies contain a broad description of the School’s practices and procedures to screen, identify, place and annually assess ELL students. Based on the Policies, and interviews with ELL Department personnel, OCR determined that the School requests parents of new entrants to complete the Home Language Survey (HLS) at the time of registration to identify PHLOTE students. The School provided OCR with versions of the HLS in English, Spanish and Portuguese. If the survey indicates that a language other than English is spoken at home, the School contacts the ELL Department Chair, who reviews the HLS. If a parent returns the HLS with questions marked indicating that the student may be an ELL, the School administers an assessment, the W-APT, to the student and determines whether they are designated ELL based on their language domain scores (reading, writing, speaking and listening).

OCR determined that the evidence to date indicates that the School maintains a formal procedure for identifying and assessing PHLOTE students. However, OCR has not yet reached a determination regarding the adequacy of the procedures, or their implementation.

⁵ The Policies require the School to provide education for students with limited English proficiency consistent with Massachusetts state law, and to provide equal access to all programs of study for English language learners.

B. Alternative Language Program

Alternative language programs and practices adopted by a district must be effectively and reasonably developed to enable ELL 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 ELL student’s English proficiency level, grade level, and educational background.

OCR determined that the School maintains an English as a Second Language (ESL) program for ELL students in grades 9-12 based on their scores on Massachusetts state assessments for WIDA English Language Development (ELD) levels.⁶ During school year 2015-2016, the School’s academic ELL program consisted of sheltered English instruction (SEI) ESL services delivered in core academic courses, in the form of self-contained SEI ESL English Language Arts (ELA) courses, entitled ESL I and ESL II. OCR determined that the School’s ESL program provided language arts and language acquisition instruction to ELL students in English, the target language, while supporting the ELL students with ESL methodologies; they provided a traditional ESL-model of instruction to ELLs, not bilingual instruction, by teaching English language arts in English while using strategies developed for language learners.⁷ Additionally, ELL students completing academic coursework were enrolled in SEI math, science, and social studies classes, taught by SEI endorsed, licensed content area teachers. OCR determined that three ELL Department teaching assistants “pushed in” to ELL students in core academic courses on a rotating basis.

OCR determined an ELL teaching assistant for vocational classes (the Vocational ELL TA) is assigned to push into incoming freshmen ELL students’ exploratory shop classes for the first three months of the school year; after the students’ permanent shop classes are assigned in January, the Vocational ELL TA rotates throughout shop areas. The School informed OCR that due to the large number of incoming ELL students during the 2015-2016 school year, the Vocational ELL TA’s priority was to provide coverage in shop classes where language acquisition would present safety concerns. The School further stated that it hired an ELL teacher (the Vocational ELL teacher) at the beginning of the 2015-2016 school year to “push into” and “pull out” of ELL students’ vocational shop classes.

Based on the evidence, OCR determined that the School’s alternative language program (e.g., ESL) is one that is recognized as sound by experts in the field; and has developed practices and procedures (formal and informal) to implement its program. However, OCR has not yet reached a determination regarding whether the School’s alternative language programs and practices provide for ELL students to attain both English proficiency and parity of participation.

⁶ The School assesses an ELL student’s level of English proficiency using the students’ individual scores on the W-APT test, which is administered to all ELL students in spring of the students’ prior school year, or, for freshmen, when the parent returns the HLS in Fall of their freshman year.

⁷ SEI ESL methodologies are specific strategies to teach language learners in the “target” language, or English, while supporting them with their knowledge of the ELL students’ base language(s) (i.e., through the teacher’s fluency and language skills in both languages). This is in contrast to the “bilingual” model of instruction, which involves communicating and instructing language learner students in both languages simultaneously, to “bridge” their knowledge gaps in the target language.

C. Implementation of Alternative Language Program

Under the second prong of *Castañeda*, a district must not only adopt an alternative language program that is likely to meet the educational needs of ELL 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, whether instructional materials are adequate, and whether objective criteria have been established for exiting ELL students from the program.

1. Student Placement and Participation

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 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 and that it will provide such language services.

The School provided documentation to OCR regarding the parent of a 12th grade student who was eligible for ELL services during school year 2015-2016. OCR determined that this student opted out of the School's ELL programs with parent permission but agreed to have his progress monitored, and graduated from the School in spring 2016. The School provided sample notification letters to parents about their students' placement in the ELL program, as examples of notifications to parents of their ability to opt out of ELL services.⁸ Based on the evidence provided by the School to date, OCR determined that the evidence was insufficient to indicate that the School failed to consistently provide parents who either refused to enroll their children in the ELL program or opted them out of the program with information about the purpose and benefits of the program, or reminders of the students' eligibility.

2. Materials and Resources

In order to ensure ELL services are delivered effectively, ELL students must receive appropriate instructional materials in the ELL 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 School asserted that it utilizes curriculum developed by the District's ELA department,

⁸ This was one of the "partially implemented" areas cited in the DESE's CPR report.

which is combined with materials developed for preparation of ELL students for the Massachusetts State WIDA assessments for English Language development, and that it used a quarterly curriculum map from the ELA department, modified for ELL students. OCR has not yet received curriculum materials from the School; accordingly, OCR has not yet made a determination as to the adequacy of the resources and materials provided to ELL students.

3. 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.

OCR determined that the School's ELL Department consisted of the ELL Department Chair, two ESL and SEI certified ELL teachers providing instruction in SEI ELA courses (ESL I and ESL II), three certified ELL teaching assistants providing push-in support in SEI core content areas (science, math and social studies for ELLs), one certified ELL teacher providing push-in and pull-out support to ELL students in vocational (shop) classes, and one certified ELL teaching assistant providing push-in support to freshman ELLs in the exploratory cycle of their shop classes and for the balance of the year, on a rotating basis. OCR determined that the ELL Department's three ELL teachers and four ELL teaching assistant, as well as the ELL Department Chair, held appropriate Massachusetts State certifications.

The Complainant asserted that the vocational education teachers did not have appropriate SEI endorsements or ELL training for ELL students in their shop classes. However, OCR determined that the State of Massachusetts does not offer SEI for ELLs training or certification endorsement for vocational education teachers at this time. While the evidence indicated that the teaching staff held appropriate certifications, OCR has not yet reached a determination regarding the numbers or evaluation/training of ELL teachers.

4. Exit Criteria and Monitoring

A district should exit or reclassify ELL students from the alternative 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.

The School informed OCR that as part of its practices, the School staff administer Massachusetts

state assessments for WIDA ELD levels annually in accordance with DESE guidelines to measure identified ELL students' acquisition of English language and their proficiency level, and School staff monitor identified ELL students' academic progress and provide progress reports to parents. OCR reviewed the School's ELL and former ELL monitoring sheets, which are completed by all staff who work with ELL or former ELL students, to monitor students' continued progress. While the evidence indicates that the School uses objective measures to ensure students are fully proficient prior to exiting its program (i.e., state assessments), OCR has not reviewed any written policies/procedures or other evidence demonstrating the School's implementation of exit criteria or monitoring.

D. Program Evaluation

A district must modify its programs if they prove to be unsuccessful after a legitimate trial; 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.

The evidence obtained to date did not establish that the District was conducting a periodical evaluation of its alternative language program.⁹ Accordingly, OCR has not yet made a determination with respect to the School's implementation of program evaluations.

E. Parental Communication

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.

OCR determined that the Policies did not explicitly state that the School would provide LEP parents information in a language they understand, and to provide translated documents and oral interpretation services at meetings; School staff informed OCR that it does so in practice.¹⁰ OCR reviewed copies of the HLS that were translated into Spanish and Portuguese. The School provided OCR with copies of revised annual notices (in English). OCR has not received evidence regarding how and when such notices were provided. Based on the above, OCR has not yet made a determination regarding the adequacy of the School's communications with LEP parents.

⁹ The CPR report indicated that the School had not implemented DESE's program evaluation standard, which called for the School to conduct periodic evaluations of the effectiveness of the ELL program in developing students' English language skills and increasing their ability to participate meaningfully in the educational program.

¹⁰ The CPR report noted that the School did not implement a program element providing for the provision of annual notices to parents of ELL students, about the students' ELL program(s) and participation, in their native languages or otherwise.

F. 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 students in specialized programs, it must also locate and identify ELL students who could benefit from the program.

OCR has not received evidence regarding the inclusion of ELL students in specialized programs, such as gifted and talented student programs; however, OCR noted that the School's mission is to prepare students for vocational and technical education, and all students, both non-ELL students and ELL students, spend approximately half of their academic careers during the four-year school program in vocational (shop) classes. Based on the above, OCR has not yet made a determination regarding any exclusion of students from the School's specialized programs.

G. Special Education Services

OCR also enforces laws and regulations that prohibit discrimination based on disability.¹¹ 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 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.

The School informed OCR that ELL students are assessed for eligibility for special education related aids and services in the same manner as non-language minority students. School staff, informed OCR that in consulting with each other, if information or student achievement suggests the need for a student to be evaluated for special education related aids and services, the Director of Special Education would complete the appropriate documentation to order evaluations. OCR determined that the evidence provided by the School does not indicate that the School failed to appropriately assess students for special education based on their educational disabilities, rather than English proficiency, nor did the Complainant provide any specific information to indicate that this had occurred. Based on the foregoing, OCR determined that there was insufficient

¹¹ 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 are set forth in the Section 504 implementing regulation at 34 C.F.R. §§ 104.33-104.36, and Title II at 28 C.F.R. § 35.130.

evidence to establish that the School’s program failed to assess ELL students for eligibility for special education in the same manner as non-language minority students.

H. Facilities and Segregation

In investigating whether ELL students are segregated, OCR examines whether a 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.

OCR determined that the School utilized push-in services, particularly with respect to its vocational education (shop) classes. Accordingly, OCR determined that the facilities used to educate ELL students at the School were the same as those used to educate non-ELL students. OCR determined that all other academic and vocational classes in which ELL students participated were conducted in the same facilities, with the exception of the SEI ELA classes in which only ELL students participated. OCR further determined that the SEI ELA classrooms were not different in any respect from other academic classrooms at the School. The Complainant did not provide, and OCR did not find, any evidence to indicate that ELL students utilized different facilities than non-ELL students. Based on the foregoing, OCR determined that there was insufficient evidence to establish that the School’s program failed to educate ELL students in the least segregative manner, or otherwise subjected ELL students to segregation or provided different facilities.

Conclusion

As stated above, prior to the conclusion of OCR’s investigation, the School expressed an interest in voluntarily resolving this complaint. Subsequent discussions between OCR and the School resulted in the School signing the enclosed Agreement which, when fully implemented, will resolve the issues raised in Allegation 1.

Allegation 2 (Different Treatment):

The Complainant stated that in prior years, the Complainant worked with the principal and other administrators to ensure that ELLs would be promoted or given the opportunity to remain in their shops despite their low grades.¹² The Complainant also alleged that ELLs have lower vocational grades, lower promotion rates, and higher retention rates because they were treated differently than English-speaking peers. In reviewing a claim of different treatment, OCR considers whether the School subjected national origin minority students at the School who are ELLs to different treatment on the basis of national origin. Specifically, OCR examined whether vocational education teachers gave ELL students lower grades than their English-speaking peers

¹² The Complainant also filed a companion case, OCR Case No. 01-16-1237, in which the Complainant alleged that that the School’s implementation of a “math strategies” class constituted different treatment of students with disabilities; had a disparate impact on African American and/or ELL students; denied students with disabilities a free, appropriate public education (FAPE) by unilaterally placing them in the math strategies class; and /or failed to implement such students’ 504 plans or IEPs by placing them in the math strategies class.

because of their ELL status, in violation of the Title VI implementing regulation at 34 C.F.R. § 100.3.

OCR determined that during school year 2015-2016:

- 13 out of 53 (24.5%) of ELL students received grades in the 90th percentile range (the equivalent of an A grade);
- 31 out of 53 (58.5%) received grades in the 80th percentile range (the equivalent of a B grade);
- 21 out of 53 (39.6%) received grades in the 70th percentile range (the equivalent of a C grade);
- Two out of 53 (3.7%) received grades in the 60th percentile range (the equivalent of a D grade); and
- One student (1.8%) received a failing grade.

Similarly, OCR determined that during school year 2015-2016:

- 688 out of 2,133 (33%) of non-ELL students received grades in the 90th percentile range (the equivalent of an A grade);
- 907 out of 2,133 (43%) of non-ELL student received grades in the 80th percentile range (the equivalent of a B grade);
- 432 out of 2,133 (20%) non-ELL students received grades in the 70th percentile range (the equivalent of a C grade); and
- 75 out of 2,133 (4%) of non-ELL students received a grade in the 60th percentile (the equivalent of a D grade); and
- 16 out of 2,133 (0.7%) of non-ELL students received failing grades.

OCR noted that for some grade categories (e.g., B grade range and D grade range, ELL students outperformed non-ELL students (i.e., more ELL students received B grades than non-ELL students, and fewer received D grades), while in other grade ranges (e.g., A grade range and C grade range, non-ELL students outperformed ELL students in terms of the numbers of students receiving these grade range(s)). OCR also determined that whereas one ELL student received a failing grade, 16 non-ELL students received failing grades. OCR conducted Chi Square and Fisher's Exact tests of the disproportionality between non-ELL and ELL students for the A, C and F grade ranges, and determined that the disproportionality in those grade ranges was not statistically significant. Accordingly, based on the foregoing information, OCR determined that ELL students were not, as a group, assigned lower grades than the grades assigned to non-ELL students.

OCR further determined that for school year 2015-2016, 25 out of 2,133 (1.2%) of non-ELL students failed their assigned shop classes. OCR also determined that for school year 2015-2016, 2 out of 53 (3.8%) of ELL students failed their assigned shop classes. Accordingly, OCR determined that ELL students did fail their shop classes at a slightly higher rate than non-ELL students. However, OCR conducted a statistical analysis (a chi square test) of the higher rate of failure of shop classes for ELL students during the 2015-2016 school year, and determined that the disproportionality was not statistically significant.

OCR also determined that for school year 2015-2016, 24 out of 2,130 (1.1%) of non-ELL students were retained (not promoted). OCR also determined that for school year 2015-2016, 1 out of 53 (1.8%) of ELL students were retained (not promoted). OCR conducted a statistical analysis (a Fisher Exact test) of the higher rate of retention for ELL students during the 2015-2016 school year, and determined that the disproportionality was not statistically significant.

Based on the above, OCR determined that the evidence does not substantiate that ELL students were subjected to adverse treatment in the assignment of grades or retention (non-promotion) in the School's vocational education classes. As stated above, OCR did not find that ELL students failed their shop classes at a higher rate, that was statistically significant, or were retained at a higher rate, that was statistically significant. The Complainant did not provide, and OCR did not find, any other evidence to support that the School assigned ELL students lower grades, or retained ELL students at a higher rate, based on, or because of, their national origin.

Accordingly, OCR determined that there was insufficient evidence to establish that ELL students were subjected to adverse treatment based on national origin, or that students outside the protected class were treated more favorably than students in the protected class. OCR concluded that the evidence was not sufficient to substantiate the Complainant's allegation that the School's vocational education teachers provided lower grades to ELL students than their English-speaking peers. Therefore, OCR will take no further action with respect to Allegation 2.

Allegation 3 (Disparate Impact):

The Complainant also alleged that vocational education teachers have their own "makeup policies" that negatively affect ELLs. The Complainant alleged that ELLs need more time to complete assignments because they need to seek out assistance from the ELL tutors after the shop class, but they received lower grades when they turned in their assignments late.

The School advised OCR that at the beginning of the 2015-2016 school year, the School's policy regarding making up work consisted of two parts: (1) a Make-Up Policy (the make-up policy) and (2) a Re-Take/Improvement of Grade Policy (the re-take policy). The School advised OCR that pursuant to the make-up policy, students who receive an excused absence are given a zero on missed work until it is passed into the instructor. For an excused absence, full credit is given for any completed make-up work within the allowed timeframe (before day 9 of the 9 day shop cycle following the shop cycle in which the work was missed). For an unexcused absence, students received an average of the zero and the grade on the work that was made up (as long as it was made up by day 9 of the shop cycle following the shop cycle in which it was missed). The School advised OCR that pursuant to the re-take policy, students are allowed to re-submit one additional submission of work to improve his or her grade, and the initial assignment grade and re-take grade are averaged to improve the student's grade. The timeframe is the same as for the make-up policy.

The School advised OCR that during the 2015-2016 school year, several changes were made to the make-up and re-take policies, including allowing students with unexcused absences to receive full credit for their made-up work, rather than an average of the two scores, and allowing a student who earned higher than 65 on the made-up or re-taken work to pass the assignment, regardless of the

averaged score. The School stated that shop teachers allowed students to make-up or re-take the same assignments, but acknowledged one teacher who did not, as described below.

OCR determined that one vocational/shop teacher, the medical assistant shop teacher (the Teacher), interpreted the policies differently than other teachers, and did not allow any students (either ELL or non-ELL) to make-up or re-take the same assignment as had previously been given, and instead gave students new assignments. OCR determined that two ELL students in the Teacher's class brought this practice to the attention of the Complainant, who served as the School's Civil Rights Officer at that time, and the former ELL Department Chair. The Complainant and the former ELL Department Chair met with the Teacher and the academic and vocational principals, who directed the Teacher to conform her practices to the School's modified policies described above, as well as provide the two ELL students with unlimited time to make-up or re-take the disputed assignments, using the same assignment rather than a new one.

Based on the above, OCR determined the Teacher's interpretation of the policies applied to both ELL and non-ELL students, and the evidence did not indicate that the Teacher's practice for making up or re-taking assignments, although different from the stated policies, constituted different treatment of students based on ELL status. OCR further determined that the School addressed the discrepancy when notified, by amending the policies and instructing the Teacher to also allow the two ELL students to make-up or re-take the same test or assignment. The Complainant did not provide, and OCR did not find, any other evidence to establish that the Teacher's practice had a disparate impact on ELL students, or that any other teachers did not follow the School's policies for re-taking or making up assignments.

Accordingly, OCR determined that there was insufficient evidence to substantiate the Complainant's allegation that the School's make-up and re-take policies during school year 2015-2016, or teachers' practices with respect to those policies, had a disparate impact on ELL students. Therefore, OCR will take no further action with respect to Allegation 3.

Conclusion

Based on the foregoing, OCR has closed Allegations 2 and 3 as of the date of this letter, and will take no further action with respect to them. As stated above, prior to the conclusion of OCR's investigation, the School voluntarily entered into the enclosed Agreement which, when fully implemented, will resolve the issues raised in Allegation 1. The terms of the Agreement are aligned with Allegation 1 and are consistent with the applicable laws and regulations. OCR will monitor the School's implementation of the Agreement and continue to do so until it has determined that the School has complied with the terms of the Agreement. Failure to implement the Agreement could result in OCR reopening the complaint

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the School'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

