

September 26, 2017

Barbara Deane-Williams  
Superintendent  
Rochester City School District  
131 West Broad Street  
Rochester, New York 14614

Re: Case No. 02-16-5001  
Rochester City School District

Dear Superintendent Deane-Williams:

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

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

During the course of the investigation, OCR obtained evidence indicating potential compliance concerns regarding the District's identification, assessment, and placement of students having a primary home language other than English (PHLOTE); implementation of its alternative language programs; provision of instructional materials and resources for its alternative language programs; staffing of its alternative language programs; exiting and monitoring of ELL students from its alternative language program; evaluation of its ELL program; communication with LEP parents/guardians; exclusion of ELL students from certain specialized programs; placement of ELL students with disabilities; and, the provision of ELL services in the least segregative manner possible. The District expressed its interest in resolving these potential compliance concerns

without further investigation. Accordingly, on August 31, 2017, the District signed a resolution agreement to resolve the compliance review without further investigation by OCR.

### **I. Applicable Legal Standards**

Title VI and its implementing regulation prohibit discrimination on the basis of race, color, or national origin by recipients of federal financial assistance from the Department, including the District. The regulation implementing Title VI, 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.<sup>1</sup> The memorandum clarifies OCR policy under Title VI on issues concerning the responsibility of school districts to provide equal educational opportunity to ELL students. It states that school districts must take affirmative steps to address the language needs of ELL students. To meet Title VI standards in serving ELL students, a district must: (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.

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

Districts are also required to select a sound educational theory for their programs for ELL students that is likely to meet the educational needs of language-minority students effectively. A school must use practices, resources and personnel reasonably calculated to implement its educational theory. Schools have a dual responsibility to teach students English and to provide them with access to the curriculum, taking steps to ensure that students are not left with academic deficits. Schools must demonstrate that their programs for ELL students are successful in meeting these responsibilities, or modify them if necessary.

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<sup>1</sup> The U.S. Supreme Court affirmed the Memorandum of May 25, 1970, in Lau v. Nichols, 414 U.S. 563 (1970).

Once students have been placed in an alternative language program, they must be provided with services until they are proficient enough in English to participate meaningfully in the regular educational program. A recipient will generally have wide latitude in determining criteria for exiting students from an alternative language program, but there are a few standards that should be met. First, exit criteria should be based on objective standards, such as standardized test scores, and the district should be able to explain why it has decided that students meeting those standards will be able to participate meaningfully in the regular classroom. Second, students should not be exited from the ELL program unless they can read, write, and comprehend English well enough to participate meaningfully in the recipient's program. Some factors to examine in determining whether formerly ELL students are able to participate meaningfully in the regular educational program include: (1) whether they are able to keep up with their non-ELL peers in the regular educational program; (2) whether they are able to participate successfully in essentially all aspects of the school's curriculum without the use of simplified English materials; and, (3) whether their retention-in-grade and dropout rates are similar to those of their non-ELL peers.

Districts are expected to carry out their programs effectively, with appropriate staff (teachers and aides) and with adequate resources (instructional and equipment). The appropriateness of staff is indicated by whether their training, qualifications, and experience are consonant with the requirements of the program.

School districts must ensure that language-minority parents who are not proficient in English receive meaningful access to the same admissions information and other school-related information provided to English-proficient parents in a manner and form they can understand, such as by providing free interpreter and/or translation services. School districts have the responsibility to adequately notify national origin minority group parents of information that is called to the attention of other parents. Such notice, in order to be adequate, may have to be provided in a language other than English.

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

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

Finally, in investigating whether ELL students are segregated, OCR examines whether the district has carried out its chosen program in the least segregative manner consistent with

achieving its stated goal and whether any degree of segregation in the program is necessary to achieve the program's educational goals.

## **II. Background**

OCR's investigation examined the following issues: identification, assessment, and placement of ELL students; alternative language program implementation; ELL student placement and participation in the alternative language program; instructional materials and resources; staffing and staff development; exit criteria and monitoring; program evaluation; parental communication; specialized programs; special education services; facilities; and, segregation. OCR reviewed documentation that the District provided, and conducted site visits to the District's Placement Office and several District schools serving ELL students.<sup>2</sup> OCR also interviewed District administrators and staff, including ELL teachers and principals at District schools.

During school years 2014-2015 and 2015-2016, the District offered a variety of alternative language programs at 50 schools. These included Learning English Through Academics Program (LEAP), English as a New Language (ENL), and bilingual education (BE) programs.

During school year 2014-2015, the District had 28,012 students enrolled in the 50 schools, of which 3,020 (approximately 11% of the total student population) were identified as ELL. Of the 3,020 students, 1,167 (approximately 39% of the ELL population) were placed in BE programs; 1,569 (approximately 52% of the ELL population) received ENL instruction; and, 284 (approximately 9% of the ELL population) were placed in a LEAP program.

During school year 2015-2016, the District had 27,201 students enrolled in the 50 schools, of which 3,276 (approximately 12% of the total student population) were identified as ELL.<sup>3</sup> Of the 3,276 students, 1,291 (approximately 39% of the ELL population) were placed in BE programs; 1,706 (approximately 52% of the ELL population) received ENL instruction; and, 277 (approximately 8.5% of the ELL population) were placed in a LEAP program.

For school years 2014-2015 and 2015-2016, ELL students identified their home languages as follows, approximately: 57% Spanish; 12% Nepali; 5% Arabic; 5% Karen; 5% Somali; and, 1% Burmese. The remaining approximately 15% of the ELL population reported that their home language was one of the following: Swahili, Amharic, Kachin, Creole and Pidgins, Umbundu,

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<sup>2</sup> OCR visited the following District schools: Rochester International Academy; James Monroe High School No. 66; Enrico Fermi School No. 17; John Williams School No. 5; and, Lincoln Elementary School No. 22. OCR elected to visit the Rochester International Academy because it is the refugee/immigrant school serving only ELL students. James Monroe High School No. 66 was selected because it houses the District's sole transitional bilingual program for ELLs in grades 7-12. Lincoln Elementary School No. 22 offers the bilingual one-way dual language program, and Enrico Fermi School No. 17 offers the bilingual two-way dual language program. Finally, John Williams School No. 5 was selected because it has a large population of students speaking low incident languages.

<sup>3</sup> When OCR initiated this review at the end of school year 2015-2016, the District enrolled 27,201 students in the 50 schools. The 27,201 students were identified as follows: 2,634 (9.68%) white; 15,817 (58.15%) black; 7,603 (27.95%) Hispanic; 1,034 (3.80%) Asian; 59 (0.22%) Native American; 11 (0.04%) Pacific Islander; and, 43 Multi-Racial (0.16%).

Turkish, Lao, Farsi, French, Grebo, Kinyarwanda, Kuanyama, Rundi, Tigrinya, Vietnamese, Twi, Thai, Portuguese, Polish, and Lingala.

### **III. Information Obtained During the Investigation**

#### **A. Identification, Assessment, and Placement**

The documentation the District provided, and the information OCR obtained during its site visit, indicated that the District has procedures in place to identify, assess, and place language-minority students who may be unable to participate meaningfully in the District's regular instructional program. Based on the information OCR collected during its investigation, OCR did not identify any compliance concerns regarding the District's efforts to identify students having a PHLOTE. OCR was unable to determine based on the evidence provided to date whether the District's procedures to assess students identified as PHLOTE were sufficient to identify which students may require alternative language services. The District asserted that all students identified as ELLs were receiving alternative language services that they required; however, the Civil Rights Data Collection (CRDC) data OCR collected prior to initiating this compliance review indicated that 11.7% of identified ELL students were not receiving alternative language services during school year 2013-2014.

With respect to the District's procedures for placing students in the District's alternative language programs, OCR determined that the District did not have a written policy to determine each student's placement, but that the District's practice suggests that students were largely assigned to alternative language programs based on the student's score on the New York State Identification Test for English Language Learners (NYSITELL), the primary language of the student (i.e., only Spanish-speaking students were assigned to BE programs; and, students whose primary home language is other than Spanish were assigned to ENL programs), and the available vacancies in the District's programs. During the course of OCR's investigation, OCR received feedback from numerous District staff that the Placement Office's established practice of relying solely on the student's NYSITELL score, home language, and program vacancies, without consultation with school-level staff, resulted in multiple students being placed in alternative language programs that were inappropriate to meet their language needs, and resulted in students being unable to effectively participate in the District's regular instructional program.

During the informational forums hosted by OCR, numerous parents also expressed concerns regarding the placement process. Specifically, parents asserted their belief that the Placement Office based its placement decisions solely on which ELL programs had available slots, without considering the language needs of a student. For example, parents/guardians stated that Spanish-speaking students were always placed in BE programs, which restricted the school a student could attend. Parents also expressed concerns that students who would be eligible for placement in the Rochester International Academy (RIA), the District's program for students with interrupted formal education (SIFE), were excluded from placement in the program if they were Spanish-speaking. According to the parents/guardians, these students were instead placed in a Spanish BE program even if they otherwise met the criteria for placement at RIA. Parents also asserted that when placing an ELL student in a language program, the Placement Office did not

simultaneously consider the special education needs of the student; and as a result, students did not receive the special education services to which they were entitled.

District staff also expressed concerns regarding the District's placement of Spanish-speaking SIFE students. Specifically, staff reported that they were aware of multiple Spanish-speaking students who would have qualified for placement at RIA; however, according to these staff members, despite advocating for students who met the criteria to be placed at RIA, Spanish-speaking SIFE students were instead placed in the Spanish BE programs across the District, and that such programs were inappropriate to meet the unique needs of these students. District staff reported that Spanish-speaking SIFE students who were placed in BE programs struggled in the school, and many dropped out of school or "disappeared."

### **B. Alternative Language Program Implementation**

The District provides the following alternative language programs for ELL students, depending on students' spoken language and grade level: (a) Transitional Bilingual Education (TBE); (b) Dual Language (DL) (one-way or two-way); (c) an ENL instructional model; (d) Newcomer and SIFE Program; and, (e) LEAP Programs. ELLs in TBE or DL programs are mandated by the New York State Education Department's (NYSED's) Commissioner's Regulations (CR), Part 154, to receive the same amount of specific units of ENL instruction as students in the ENL model. At a minimum, all ELLs receive mandated ENL instruction. The District currently offers the TBE and DL programs only in Spanish. The District also provides a program for newcomers and SIFE students at RIA which consists of ENL instruction.

The District has selected alternative language programs (e.g., BE, ENL, and DL programs) that are recognized as sound by experts in the field; and, has developed both formal and informal practices and procedures to implement these alternative language programs. OCR could not conclude, however, based on the evidence provided by the District to date, that the District consistently provides alternative language services to all students who are placed in the District's alternative language programs. District staff stated that despite the District's recent recruiting efforts, the District lacks a sufficient number of ENL and bilingual staff to meet the needs of all ELL students, including special education teachers and school psychologists. OCR determined that the lack of BE and DL programs for ELL students in grades 7-12 (i.e., only TBE at School 66) may indicate that the District does not provide the same program to these ELLs as it provides for ELLs in grades K-6. OCR also determined that, currently, students in LEAP may not have any non-ELL students that can serve as language models; and, that LEAP classrooms may lack diversity in skill level.

### **C. Materials and Resources**

District staff shared that the most serious problem with instructional materials for the ELL programs is not budget, but rather the dearth of high quality bilingual and ENL education textbooks, workbooks, teacher books, and other supplemental texts, in the education publishing industry. As such, most District staff rely on their own materials that they have crafted, pulling from various internet sources, including sources based in Spanish-speaking countries.

The evidence OCR reviewed indicated that the District may provide adequate resources and materials, including adequate instructional materials, and technology, to ELL students in some classes; but that resources may not be distributed consistently to all ELL students. For example, an online reading program called Imagine Learning is provided at RIA, but is not available at School 17, School 5, or School 66. Similarly, the availability of computer hardware varies throughout the District. Some teachers were satisfied with their in-classroom computers and laptops but others reported that not all classrooms had desktop computers for student use. OCR conducted brief walk-through visits of a sampling of primary and secondary schools and observed that classrooms had two to three desktop computers for student use, either a laptop or desktop for teacher use only, and smartboards. OCR determined that although District staff may have differing opinions on the quality and efficacy of the instructional materials provided by the District, they uniformly stated that identifying materials appropriate for their students' abilities was challenging.

#### **D. Staffing and Staff Development**

OCR examined whether the District's staffing is adequate to carry out the District's chosen alternative language programs and whether the District hires and trains staff qualified to teach the programs. The District informed OCR that during school year 2014-2015, it employed a total of 241 full-time staff members and five part-time staff members providing instruction to ELL students; and during school year 2015-2016, it employed a total of 233 full-time staff members and five part-time staff members providing instruction to ELL students. The District did not provide data regarding the student-teacher ratios for each of the ELL and non-ELL District schools and programs for 2014-2015 and 2015-2016. The District also did not provide to OCR any evidence indicating that it evaluates District ELL teachers; however, the District provided evidence indicating that it offers opportunities for ELL teachers to share their classroom strategies and strengthen their knowledge of working with ELL students.

OCR could not conclude, however, based on the evidence provided by the District to date, whether the District is able to provide the staff necessary to implement the District's chosen alternative language programs, specifically bilingual programs. Staff stated that there is a lack of bilingual teaching staff, professional staff, and support staff (teachers, social workers, school psychologists, bilingual special education teachers, substitute teachers, and classroom teacher assistants) necessary to meet the demands and needs of ELL students. Moreover, although OCR found that the majority of the District's ELL teachers are certified in ESOL and/or bilingual education, some of its bilingual classrooms are being taught by teacher assistants or substitutes that do not have the required ESOL qualifications, per state regulations; however, staff expressed greater concerns regarding the lack of sufficient staff to serve ELL students, rather than the lack of proper qualifications for the staff in those positions. ELL staff also reported concerns that, due to district-wide staffing shortages, they are regularly pulled away from providing ELL services; and, that the District should improve teacher recruitment efforts.

#### **E. Exit Criteria and Monitoring**

The District provided documentation indicating that during school year 2015-2016, 1,117 ELL students were exited from ELL status. OCR determined that of the students who were exited,

192 students were exited due to a passing NYSESLAT score; 49 students had graduated from the District; 79 students had dropped out of the District once; 11 students had enrolled in the District's General Education Diploma (GED) programs; 8 students had dropped out more than once; 112 students left New York state public schools; 42 students left the United States; and, 5 students exited from the program after reaching the maximum age to enroll in the District. OCR also determined that during the same time period, of the 27,201 students enrolled in the District, 766 students were retained. Of these students, 179 were classified as ELL students and 587 were classified as non-ELL students. Based on data analysis of the number of students retained in the District, OCR determined that approximately 4.97 % of the ELL population was retained, while only 2.48% of the non-ELL population was retained. Therefore, OCR determined that a statistically significant number of ELL students were retained in the District.

OCR determined that by following the requirements of CR Part 154 for exiting ELL students from ELL status, the District uses an objective standard to measure whether ELL students can speak, read, write, and comprehend English well enough to meaningfully participate in the District's programs; however, during OCR's investigation, OCR determined that the District does not have a formal policy or procedure to monitor the academic progress of students exited from the District's alternative language program. The District did not provide to OCR any documentation to indicate that it provides former ELL students with the services required by CR Part 154, or other such services approved by the Commissioner. The District informed OCR that it is the District's practice to monitor the academic progress of all students through state and local standardized assessments.<sup>4</sup> The building principals are responsible for monitoring the academic progress of all students in their buildings, including that of ELL students, to ensure that students receive the former ELL services to which they are entitled. ELL students' records include the student's ELL status, which allows principals to sort ELL achievement from the student population as a whole. The District did not further describe the type of services or the frequency with which these are offered to former ELL students, or how it oversees its principals' efforts to monitor the progress of former ELL students. During the investigation, OCR obtained information suggesting that at least some District personnel were unaware of their obligations to monitor former ELL students.

## **F. Program Evaluation**

In 2014, CR Part 154 was enhanced to better meet the needs of the growing ELL population in New York State. As a result, the District informed OCR that it responded by aligning service delivery models with those mandated by CR Part 154. On October 1, 2014, the District submitted a self-assessment and corrective action plan to NYSED's Office of Bilingual Education and Foreign Language Studies (OBEFLS) that it developed to determine the scope of the District's practices to meet the new regulations.<sup>5</sup> The self-assessment functioned as a needs

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<sup>4</sup> The District informed OCR that it uses monthly common formative assessments for end of units in all content areas; annual New York State third through eighth grade testing data; annual Regents' testing data; and conducts a transcript evaluation of high school students working towards graduation at least annually.

<sup>5</sup> The District informed OCR that the District's Bilingual Education Department submitted an action plan for 2014 and another in 2015, which reported on the state of the Bilingual Education programs in the District, in addition to the NYSED-Blueprint for ELL Success self-assessment for the state of ELL programs in the District.



assessment and focused on the eight essential elements of the Blueprint for ELL Success and CR Part 154, and evaluated the District in eight elements.<sup>6</sup>

The District also developed the NYSED CR 154 Title III Annual Measureable Achievement Objective (AMAO) Corrective Action Plan (the Plan)—with an implementation period that covered 2014 through 2018—because it was identified as not meeting the AMAOs for four or more years. The AMAOs specifically focus on ELL students showing growth in language proficiency as measured by the NYSESLAT (AMAO #1); ELL students testing proficient in English as measured by the NYSESLAT (AMAO #2); and, ELL students making measureable progress at the District level in meeting grade-level academic achievement standards in English Language Arts (ELA) and Mathematics (AMAO #3). As a result of the District’s self-assessment, several goals were established in the Plan to address the concerns that were found during the evaluation, which included, but were not limited to: inconsistent ELL instructional practices from classroom to classroom and building to building among teachers, including within the areas of special education, resources, professional development, and parental communication; low enrollment through the District’s school selection process for Career and Technical Education (CTE) programs; professional development to support greater student achievement; decrease long-term ELL students and increase graduation rates; a lack of a special education continuum for BE; and, no academic language support for the District’s Nepali, Somali, Arabic, Burmese, and Karen-speaking students. The Plan established goals for the District’s ELL program, such as increasing professional opportunities for teachers, targeting specific grades on the use of scaffolds and how to scaffold Common Core Modules and units; modeling classrooms of content-based or integrated, co-taught ENL for teachers to visit; providing instructional support in the form of job-embedded evidence gathering and ELL instructional coaching for ENL/content area teaching teams or individuals as needed; strengthening parent and community participation; and, more cohesion in ENL scheduling to ensure students receive appropriate services and that schedules reflect integrated, co-taught, content-based instruction.

The District has not provided specific data to OCR documenting their implementation of the Plan thus far. In July 2016, the District secured a consultant research analyst from Latina/o Affairs and Bilingual Education to evaluate its ELL program and specifically document the challenges confronting Latina/o families and the resources Latina/o families used at the secondary level.<sup>7</sup>

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<sup>6</sup> These eight elements were as follows: (1) All teachers are teachers of ELL students; (2) All leaders are responsible for ensuring that the academic, linguistic, social and emotional needs of ELL students are addressed; (3) ELL students are engaged in instruction that is grade appropriate, academically rigorous and aligned to NYSED Prekindergarten Foundations for Common Core and P-12 Common Core Learning Standards; (4) Bilingualism and biliteracy are recognized as assets and all students are provided opportunities to earn a Seal of Biliteracy upon obtaining a high school diploma; (5) All parents and families of ELL students are partners in education and effectively involved in the education of their children; (6) The expertise of bilingual, ENL, and Language Other Than English (LOTE) teachers and support personnel are leveraged while increasing their professional capacities; (7) ELL students’ home languages, cultural assets, and prior knowledge are valued and used; and, (8) Diagnostic tools and formative assessment practices are used to monitor ELL students’ content knowledge as well as new and home language development and to inform instruction.

<sup>7</sup> The report titled, “The Status of Latina/o and Bilingual Secondary Students in the Rochester City School District: An Examination of School Trends, District Policies, and School-based Responses,” examined the progress of Latina/o students in the District with a primary focus on high schools and extends prior studies in order to document changes in Latina/o students experiences in the District. The report referenced similar concerns to those described

The consultant highlighted several concerns for Latina/o students in the District, such as the continuing shortage of bilingual teachers, opportunity gaps encountered by Latina/o students in academic programs including advanced placement, and lack of funding necessary to expand the newcomer programs that meet the educational and vocational needs of students.

OCR was unable to determine based on the evidence provided to date whether the District evaluated its ELL program prior to October 2014; the efforts it has taken to implement the Plan, thus far; and, what, if any, steps it has taken to implement the suggested recommendations in the consultant's strategic report from 2016. Moreover, OCR did not find evidence indicating that the District has any formalized or written policies and procedures mandating that the District evaluate its ELL program on a periodic basis to address the concerns that were found during the District's self-evaluation.

### **G. Parental Communication**

School districts must adequately notify national origin minority group parents of information that is called to the attention of other parents, and such notice may have to be provided in a language other than English in order to be adequate. At the school and district levels, this essential information includes but is not limited to information regarding language assistance programs, special education and related services, Individual Education Program (IEP) meetings for students with disabilities, grievance procedures, notices of nondiscrimination, student discipline policies and procedures, registration and enrollment information, report cards, requests for parent permission for student participation in district or school activities, parent-teacher conferences, parent handbooks, information on gifted and talented programs, information on magnet and charter schools, and any other school and program choice options.

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

OCR evaluated whether the District developed and implemented a process for determining whether parents/guardians are LEP and what their language needs are; and whether the process identifies all LEP parents/guardians of children who are not proficient in English, as well as parents/guardians whose primary language is not common in the District.

The District reported that during the registration process, families complete a packet of information, including a home language questionnaire (HLQ). In these forms, parents/guardians identify their preferred language of communication. Data from the forms is captured in several screens in the District's student management system identifying a parent/guardian's preferred language. In addition, the District reported that these forms are included in a student's cumulative folder and forwarded to the school where the student is placed. Staff from the

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in the District's corrective action plan, and indicated that the needs of Latina/o and bilingual students are not being fully met.

District's Placement Office corroborated that translated versions of the HLQ can be found online at NYSED's website, and includes languages that are common in the District, including Spanish and low incidence languages.

OCR determined that the District's method of identifying LEP parents/guardians is reasonably calculated to properly identify LEP parents/guardians and their language needs; however, District staff was not consistent in describing the method by which they can access information identifying LEP parents/guardians and each parent/guardian's language preference. The evidence provided to OCR suggests that District staff may not be properly trained on how to access this information.

OCR further evaluated whether the District effectively provides language assistance to LEP parents with appropriate, competent staff, or appropriate and competent outside resources. A number of District staff reported frustration regarding the District's process to request interpretation services; specifically, staff communicated concerns that the process is cumbersome and confusing because it is unclear if services are available to all students or only students who are refugees. Further, multiple staff communicated a belief that the process is inappropriately controlled by one institution (RIA) rather than the District's central office. During interviews, multiple school staff confirmed the practice of untrained students, family members, and other LEP parents/guardians providing interpretation services for low incidence languages, including the communication of critical information.

With respect to translation services, the District reported that it employs a full-time Spanish translator in the Communications department who primarily focuses on written translation services. Further, the District stated that the school calendar and parent handbook, school enrollment materials, and most Central Office communications to many or all schools are routinely produced in both Spanish and English; district-wide formative assessments and many grade-level class assessments in subjects other than English are translated into Spanish; letters, fliers, postcards and other short-form communications produced by the District's central office for individual schools are routinely produced in both Spanish and English; many school-generated communications to families are translated into Spanish upon request; and, that all district and school-level web pages can be translated by the user into 12 languages: Spanish, Nepali, Arabic, simplified or traditional Chinese, French, German, Italian, Japanese, Korean, Portuguese or Russian. The District, however, acknowledged that when it comes to parents receiving resources that enable them to make informed decisions about their child's education and receiving pertinent information about their rights and program choices in a language they can understand, the District's practice is inconsistent from classroom to classroom and building to building; and that while parents are provided with much information in Spanish, low incidence languages are not provided the same type of support. The District does not have translators on hand to help LEP parents/guardians of low incidence languages.

Individual school principals reported that Spanish translation services are generally readily available, typically provided at the school-level by ENL and bilingual staff; however, schools typically refer translation requests for low incidence languages to the District's central office, or request assistance from other students who are bilingual in the requested language and English. In addition, OCR learned from District staff interviews that the District does not readily provide

translations of district-wide forms (such as absentee forms and field trip permission slips) into low-incidence languages. Further, document translations may require two to three weeks advance notice; and, services for open houses and exams (Regents/state) may require three weeks of advance notice. District staff at School 5 and at School 66 confirmed that students' IEPs are not translated into a parent's/guardian's home language.

Accordingly, OCR's investigation appeared to indicate that the District does not have a plan in place to ensure meaningful communication with all LEP parents/guardians. The District did not acknowledge in its data response, and OCR was not able to confirm during its onsite interviews, whether the District ensures that interpreters and translators have knowledge of specialized terms and concepts in both languages and are trained on the ethics of interpreting and translating, as well as the need to maintain confidentiality. Similarly, it is unclear from the District's data response and OCR's interviews how parents are informed of the process to request interpretation and translation services, as the process varies from school to school and based on the parent/guardian's language preference. Also, OCR determined that District staff may not be properly trained on how to access information identifying LEP parents/guardians and each parent/guardian's language preference.

The evidence OCR reviewed suggests that the District does not provide adequate, qualified interpretation and translation services to parents/guardians who speak low incidence languages, and that the District does not adequately notify LEP parents/guardians of low incidence languages of information that is called to the attention of other parents/guardians. OCR determined that untrained students, family members, and other LEP parents/guardians, at times, provide interpretation services for low incidence languages, including the communication of critical information.

## **H. Specialized Programs**

The exclusion of ELL students from specialized programs such as gifted/talented programs may have the effect of excluding students from a recipient's programs on the basis of national origin, in violation of 34 C.F.R. § 100.3(b)(2), unless the exclusion is educationally justified by the needs of the particular student or by the nature of the specialized program. ELL students cannot be categorically excluded from gifted/talented or other specialized programs. If a recipient has a process of locating and identifying gifted/talented students, it must also locate and identify gifted/talented ELL students who could benefit from the program.

The District informed OCR that it has a variety of specialized programs within the District including a gifted and talented program, international baccalaureate (IB) program, and honors and advanced placement courses. The District also offers career and vocational education programs to its students, including the Pathways to Technology Program (P-TECH) and Shared Time CTE Programs.

The District provided documentation indicating that although ELLs comprised approximately 12% of the total student population during school year 2015-2016, only 245 of the 3276 ELL students enrolled in the District, or approximately 7.48%, participated in the District's specialized programs, including the gifted and talented program, IB program, and honors or

advanced placement classes.<sup>8</sup> During the same period of time, 2797 of the 22,116 non-ELL students enrolled in the District, or approximately 12.65 %, participated in the gifted and talented program, IB program, and honors or advanced placement classes. OCR conducted a chi square statistical analysis and determined that during school year 2015-2016, ELL students were underrepresented in the District's specialized programs to a statistically significant degree, including the gifted and talented program, IB program, and honors or advanced placement classes.<sup>9</sup>

## I. Special Education Services

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' disabilities rather than the students' English proficiency skills.<sup>10</sup> District staff informed OCR that language assessors do not consult with the District's Committee on Special Education (CSE) when initially assessing the language needs of students with disabilities. District staff further informed OCR that in accordance with CR Part 154, the District is required to have a Language Proficiency Team (LPT) to serve the needs of students with IEPs who might also qualify as ELL students; however, the District has not created such a team.<sup>11</sup>

As previously noted, District staff reported that the Placement Office placed students into BE programs based only on their language ability, without considering how a student's cognitive ability impacted whether the student could participate in the program. District staff also reported that ELL students were placed in both overly restrictive placements, and inadequately supportive special education placements as a result of their language needs. For example, staff reported that ELL students who did not require placement in a 12:1:1 classroom based on their special education needs, were placed in such a classroom because the school lacked a bilingual special

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<sup>8</sup> The District did not provide documentation from which OCR could determine the percentage of ELL students vs. non-ELL students participating in the P-TECH and Shared-Time CTE programs.

<sup>9</sup> A July 2016 evaluation report conducted by a consultant for the District as part of a self-evaluation of its bilingual programs also identified "minimal enrollment" of ELL students in AP courses.

<sup>10</sup> 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 and appropriate public education (FAPE) to qualified persons with disabilities. Section 104.34 prescribes standards for educating students with disabilities with nondisabled students to the maximum extent appropriate to the needs of the student with disabilities. Further, the regulation, at 34 C.F.R. § 104.35 (a)-(c) sets forth specific procedures designed to ensure appropriate classification and placement and the regulation at 34 C.F.R. § 104.36 prescribes relevant procedural safeguards. The applicable Title II regulatory provision is set forth at 28 C.F.R. § 35.130 and generally is interpreted consistently with the provisions of Section 504 mentioned above.

<sup>11</sup> According to New York State regulations, the LPT is a committee that makes a recommendation regarding the initial assessment of ELL status for students with disabilities. The LPT is comprised of a school district administrator, a teacher or related service provider with a bilingual extension, and/or an ENL teacher; the director of special education or individual in a comparable title; and, the student's parent/guardian.

education teacher that could provide push-in instruction in a general education classroom. District staff also reported that several students who should not have been placed in a bilingual self-contained 12:1:1 class due to their low academic functioning were in fact placed in such a program. Staff asserted that, rather, these students needed a bilingual special education program with a focus on teaching students functional life skills, but the District does not offer such a program. Other District staff also reported that other students should have been placed in an 8:1:1 monolingual special education class, but that type of setting is not at the school; and, as a result, these students were placed in a bilingual 12:1:1 special education class which was not appropriate to meet their needs. Staff further reported that with respect to these students, their parents were told that the school could only offer a bilingual 12:1:1 placement; however, this was not appropriate for the students who did not require bilingual services but were in need of a special education placement. District staff additionally reported that if an eleventh or twelfth grade student required a bilingual 12:1:1 placement, s/he might still be placed in the school's ninth and tenth grade program in order to receive the bilingual language services the student required. The school would then have to attempt to modify the student's schedule. One District staff member informed OCR that she was aware of an XX-year-old student who had previously attended school in XXXXXX XXXX and was placed in the bilingual 12:1:1 class available for ninth/tenth graders although the student should have been placed in XXXXXXXX grade based on his academic credits. The staff member reported that the student eventually XXXXXXXX XXX XX XXXXXX.

In terms of the delivery of ENL services to students with IEPs, District staff informed OCR that the delivery of special education services sometimes conflicts with ENL services, and that ELL students with IEPs do not receive as much ENL instruction as their peers who do not have IEPs. For example, a staff member informed OCR that she teaches several students with IEPs to whom she is supposed to provide pull-out ENL instruction; however, she is not able to provide the ENL instruction to which they are entitled based on their language needs because of the schedule for their special education related services. Another staff member who teaches ENL students also informed OCR that one of her student's speech therapy sessions conflicts with his ENL instruction, and that he only receives half of the required amount of ENL services as a result.

Based on the evidence provided to date, OCR was unable to determine whether the District employs 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. OCR could not confirm whether language assessors consult with the District's CSE when initially assessing the language needs of students with disabilities.

## **J. Facilities & Segregation**

OCR conducted onsite inspections of five District buildings, and interviewed school-level staff at each institution to evaluate if the District facilities used by ELL staff and students are comparable to those available to their non-ELL peers. While onsite, OCR observed that ELL students, regardless of their alternative language program placement (bilingual, ENL, etc.) are instructed in traditional classroom settings that are comparable to those provided to non-ELL students. Further, given that many of the District's alternative language program models are implemented in integrated classrooms, OCR found that ELL students often share classrooms

with non-ELL students. Teachers and administrators interviewed by OCR confirmed OCR's onsite observations and reported that ELL and non-ELL students have comparable, if not the same, facilities.

The District advised OCR in its data response that it carries out its alternative language programs in the least segregative manner consistent with achieving its stated goals. Specifically, the District reported that all ELL students, with the exception of one school whose entire population is ELL (RIA), participate in recess, lunch, physical education, assemblies, field trips, and extended learning activities with non-ELL students. In addition, several school principals corroborated that, in their respective schools, ELL students attend all core instructional and non-academic classes with non-ELL students; and, stated that the only separation of ELL and non-ELL students occurs during state-mandated ENL pull-out services.

The evidence OCR reviewed to date indicated that ELL students, with the exception of RIA, are integrated with non-ELL students in subjects such as physical education, art, and music, as well as during activity periods outside of classroom instruction (i.e., during lunch, recess, assemblies, and extracurricular activities). Further, the evidence suggests that with respect to academic instruction, ELL students receive a mix of stand-alone (i.e., class of only ELL students) and integrated (i.e., general education class with a blend of ELL and non-ELL students) instruction, which varies based on their alternative language program placement and language proficiency. The evidence OCR reviewed indicated that the District's TBE and one-way DL program may segregate ELL students to a greater degree than the District's ENL and two-way DL program; however, this segregation may reflect each program's educational goals. For example, the majority of ELL instruction in TBE and one-way DL programs occurs in the student's primary language. Furthermore, although students at RIA do not interact with non-ELL students on a daily basis, the staff at RIA explained that the instructional model is focused on the specific needs of its unique student population (i.e., refugee students new to the United States who lack experience in the District's educational programs and often require additional supportive services that are offered at RIA and not at other schools in the District).

## **VI. Conclusion**

During the course of OCR's investigation, OCR noted several potential compliance concerns. On August 31, 2017, the District agreed to voluntarily implement the enclosed resolution agreement to resolve this compliance review without further investigation. The resolution agreement will require the District to:

- Ensure that every identified PHLOTE student is assessed by the District, including students from low incidence language groups, and placed in an appropriate alternative language program;
- Effectively implement a comprehensive alternative language program and track the participation and performance of students in the program;
- Provide English language services and instruction to all ELL students in all educational settings, including special education;

- Have a sufficient number of certified, trained ENL and/or bilingual teachers, social workers, school psychologists, substitute teachers, and classroom teacher assistants to implement its selected alternative language program;
- Develop and implement a procedure to ensure that ENL/bilingual teachers' classroom performance will be evaluated by a person knowledgeable in ENL/bilingual learning methodologies;
- Provide training on its alternative language program methodologies to all individuals identified to evaluate the ENL/bilingual teachers' classroom performance;
- Provide instructional materials and technology, appropriate to the curriculum, and comparable in quality, availability, and grade level to materials provided for the instruction of non-ELL students, to effectively implement its selected alternative language service model for the instruction of ELL students;
- Ensure that all ELL students receive alternative language services until the students meet the District's criteria to exit the alternative language program;
- Monitor the academic progress of students who have exited from the District's alternative language program to ensure that the students are participating meaningfully in the District's program;
- Evaluate the effectiveness of its alternative language programs using its existing procedure; or, develop and implement a new procedure to measure the effectiveness of its alternative language programs;
- Revise its disability pre-referral, identification, referral, evaluation, and placement procedures and practices, to ensure that ELL students with or suspected of having disabilities are appropriately evaluated, placed, and provided with appropriate special education or related aids and services, as well as alternative language services;
- Revise and implement its policies and procedures to ensure that LEP parents are notified, in a language understood by the parents, of school activities and other information and matters that are called to the attention of other parents;
- Complete a review of the participation of ELL students in its specialized programs to ensure that ELL students have an equal opportunity to participate in gifted and talented, International Baccalaureate, Honors and Advanced Placement, Pathways to Technology, Shared-Time CTE programs, or other specialized programs;
- Complete a review of its alternative language programs to ensure that it carries out its ELL program in the least segregative manner consistent with achieving its stated goal(s); and
- Convene one or more parent forums, in a language the parents can understand, to provide District parents with information regarding the alternative language program; including identification and assessment of students, alternative language services, exit criteria and monitoring, the availability of specialized programs, and the availability of interpreter and translation services.

OCR will monitor the implementation of the resolution agreement. If the District fails to comply with the terms of the resolution agreement, OCR will resume its investigation.

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 may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the case resolution process. If this happens, the individual may file a complaint alleging such treatment.

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

If you have any questions regarding OCR's determination, please contact Joy M. Purcell, Senior Compliance Team Attorney, at (646) 428-3766 or [joy.purcell@ed.gov](mailto:joy.purcell@ed.gov); Amy Randhawa, Compliance Team Attorney, at (646) 428-3781 or [sandeep.randhawa@ed.gov](mailto:sandeep.randhawa@ed.gov); Jessica Daye, Compliance Team Investigator, at (646) 428-3812 or [jessica.daye@ed.gov](mailto:jessica.daye@ed.gov); Grace Kim, Compliance Team Attorney, at (646) 428-3977 or [grace.d.kim@ed.gov](mailto:grace.d.kim@ed.gov); or Félice Bowen, Compliance Team Leader, at (646) 428-3806 or [felice.bowen@ed.gov](mailto:felice.bowen@ed.gov).

Sincerely,

/s/

Timothy C.J. Blanchard

Encl.

cc: XXXX XXXXXX, Esq.