



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION VIII

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August 31, 2023

Dr. Chris Fiedler
Superintendent
Brighton School District 27J
18551 E. 160th Ave.
Brighton, CO 80601

By email only to cfiedler@sd27j.net

Re: OCR Case No. 08-23-1352
Brighton School District 27J

Dear Superintendent Fiedler:

On April 4, 2023, the United States Department of Education (Department), Office for Civil Rights (OCR) received a complaint against the Brighton School District 27J (District). The Complainant alleged that the District, specifically the Second Creek Elementary School (School), discriminates against English learner (EL) students and their parents and guardians with limited English proficiency (LEP) on the basis of national origin by failing to:

1. Provide EL students with a language assistance program that is educationally sound and proven successful;
2. Sufficiently staff the language assistance programs for EL students with qualified EL teachers;
3. Monitor and evaluate EL students in language assistance programs to ensure their progress in acquiring English proficiency and grade level core content, exit EL students from language assistance programs when they are proficient in English, and monitor exited students to ensure they were not prematurely exited and that any academic deficits incurred in the language assistance program have been remedied;
4. Evaluate the effectiveness of a school district's language assistance program(s) to ensure that EL students in each program acquire English proficiency and that each program was reasonably calculated to allow EL students to attain parity of participation in the standard instructional program within a reasonable period of time; and,
5. Ensure that parents are provided school-related information in a language they understand.

OCR enforces 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 by recipients of federal financial assistance from the Department.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

Because the District receives Federal financial assistance from the Department, OCR has jurisdiction pursuant to Title VI.

I. Investigation Summary

On April 24, 2023, OCR opened the allegations for investigation in accordance with OCR's *Case Processing Manual* (CPM). OCR's investigation included reviewing documents pertinent to the complaint allegations, including information, records, and data from the District and interviewing the District's [redacted content] ([redacted content]) and the School's [redacted content] ([redacted content]). During the course of the investigation, OCR identified concerns related to the District's and School's compliance with Title VI. The District expressed an interest in voluntarily resolving the allegations and OCR's compliance concerns through a voluntary resolution agreement. Pursuant to Section 302 of the CPM, a complaint may be resolved when, before the conclusion of an investigation, a recipient expresses an interest in resolving the complaint and when OCR has determined that identified concerns can be addressed through a voluntary resolution agreement. OCR determined that the concerns identified during the course of the investigation can be addressed through a voluntary resolution agreement and that a voluntary resolution agreement is also an efficient way to resolve this complaint. The District voluntarily agreed to address the allegations by signing the enclosed resolution agreement (Agreement) pursuant to Section 302 of the CPM. The following is a discussion of the relevant legal standards and information obtained by OCR during the investigation that informed the development of the Agreement in this case.

II. Background Information

General Information

The District is located northeast of the Denver, CO metro area and, according to the Colorado Department of Education (CDE), served approximately 23,000 students during the 2022-23 school year (SY)¹, of which the School served approximately 630 students in grades kindergarten through five.² The District explained to OCR that over 65 languages are spoken by families in the District with 19 languages represented at the School. In the 2022-23 SY, the School served 189 students who were identified as English learners, ranging from students who were initially identified as non-English proficient (NEP) to students who were recently exited from the English language development (ELD) program, after becoming fluent English proficient (FEP) and in the second year of monitoring.

¹ Colorado Department of Education, *SchoolView Data Center*, https://edx.cde.state.co.us/SchoolView/DataCenter/reports.aspx;jsessionid=AkM9z-IPppfObjuYqa9k9vrKFyhnLe6uZ8HR-Q_MnYWt6VPH37db!1960436034?_adf_ctrl-state=pac20phbp_4.

² Colorado Department of Education, *Pupil membership*, <http://www.cde.state.co.us/cdereval/pupilcurrent>.

English Language Development Program

The School used the “Imagine Learning” computer-based program (IL) as its ELD program during the 2022-23 SY. The District described IL as a “personalized learning program that accelerates both literacy and [ELD] skills” by providing “direct, explicit and systematic instruction” for students in all four domains (*i.e.*, listening, speaking, reading, and writing). In its response to OCR, the District indicated that IL is included on CDE’s “Advisory List of Instructional Supplemental Programming” (Supplemental List). CDE lists the IL under the “Supplemental Programming” section of its webpage describing the requirements of Colorado school districts pursuant to the READ Act.³ The webpage explains the “Supplemental Instruction” as “instruction that goes beyond that provided by the comprehensive core program because the core program does not provide enough instruction or practice in a key area to meet the needs of the students in a particular classroom or school.”⁴ The Supplemental List indicates that IL is recommended for grades kindergarten through third grade as a supplemental “language and literacy” program.

Staff described IL as an adaptive program provided to EL students for approximately 20-45 minutes each day, depending on each student’s proficiency level, and at the same time that non-EL students are receiving literacy intervention instruction. The District provided documentation in its response to OCR which includes multiple tables and graphs representative of student gains and usage of the IL during the 2022-23 SY. The document explains that growth is determined through the “IL Embedded Benchmark” in literacy and vocabulary and notes the IL program level gains for each grade level using a score of red (2+ below), yellow (1 below), green (on level), and blue (above). One of the charts indicates that grades first through third decreased the amount of red (2+ below) by increasing in yellow (1 below) and green (on level) from the beginning to the end of the year. However, the third grade was the only grade level which recognized significant gains in green (on level) and blue (above), while the fourth and fifth grades effectively maintained their levels of red (2+ below). The documentation also includes a table titled “IL Average Usage (minutes)” which provides the average number of minutes students logged each week, for both the District overall and the School, for each month of the 2022-23 SY (August through April). The table indicates that the *weekly* usage in the School from August 2022 through January 2023 was between approximately 10 and 35 minutes. Between February and April 2023, the weekly usage increased to approximately 44 and 57 minutes per week. Another table breaks down the School’s weekly usage by grade level and month, and demonstrates that the majority of students in all grades engaged with IL for less than 45 minutes *weekly* between August 2022 and January 2023, with a brief and significant rise in usage during March 2023, when the weekly usage ranged from approximate 31 minutes (fifth grade) to 82

³ The READ Act is a Colorado state law which provides the “State the guiding philosophy, structure and resources to get children reading at grade level by the time they enter the fourth grade.” Colorado Department of Education, *READ Act Statute and State Board Rules*, <http://www.cde.state.co.us/coloradoliteracy/readactstatuteandstateboardrules>.

⁴ Colorado Department of Education, *Advisory List of Instructional Programming*, <http://www.cde.state.co.us/coloradoliteracy/advisorylistofinstructionalprogramming2020>.

minutes (second grade). The graphs indicate that the “goal for optimal usage is 60 minutes per week.”

The [redacted content] and [redacted content] explained to OCR that teachers were trained how to use IL and resolve any barriers students may face while using it (*e.g.*, logging on, how to motivate students, how to intervene if access issues arise), however, the teachers facilitating the instruction during the 2022-23 SY were not required to have credentials, qualifications, or endorsements specific to providing language assistance services and were not specifically trained in providing ELD instruction. OCR inquired whether the [redacted content] had received training, while in the District, on evaluating staff based on ELD services provided to EL students and she indicated she had not yet received this type of training. The [redacted content], who has served in the District-level position for approximately [redacted content] years, has a master’s degree in culturally and linguistically diverse education (CLDE) and a CLDE endorsement. Her job responsibilities include working with all schools in the District to ensure that CLD students (*i.e.*, EL students) have access to programming in the District, supporting building leaders and teachers, and providing professional development for staff. The amount of professional development delivered, however, is at the discretion and request of each school campus.

The [redacted content] also explained to OCR that when creating student schedules a “scheduling wizard” is used to randomize assignments and then administrators review the class rosters to ensure balance exists. When reviewing assignments, administrators also prefer not to schedule an EL student in a class alone (*i.e.*, without another EL student peer) and attempt to assign EL students together based on similar languages to provide students a peer in class with whom they identify. OCR inquired about whether the teacher’s endorsements are taken into consideration during the scheduling process and the [redacted content] stated yes and explained that “most” teachers have already renewed their license and received 45 hours of culturally and linguistically diverse (CLD) training. The District provided a spreadsheet to OCR with data indicating that of the 27 teachers on staff at the School during the 2022-23 SY, 8 teachers have obtained a CLDE endorsement and an additional 5 teachers (without a CLDE endorsement) have received 45 hours of CLD training. The spreadsheet does not indicate which grade level to which each teacher is assigned.

The District indicated in its response to OCR that it monitors EL students who have been redesignated as FEP in alignment with CDE guidance (*i.e.*, for two years). During the interview with the [redacted content], she shared that the District and School jointly share the responsibility of monitoring EL students who have exited from the ELD program. Specifically, the District identifies the students and reviews their data while the School’s general education teachers are responsible for monitoring the students in class. The [redacted content], however, stated to OCR that the [redacted content]’s office at the District level was responsible for the monitoring of exited EL students.

During interviews and in the District’s response, the District explained that it recently received additional funding after the successful passage of a Mill Levy Override and, as a result, the School was allotted an additional 0.5 FTE, with which it intended to hire a CLD interventionist

(Interventionist). The [redacted content] clarified in the interview with OCR that the School intended to increase its budget to create a 1.0 FTE for the Interventionist who would be implementing a more formalized pull out ELD program during the 2023-24 SY. She also explained that IL would still be implemented by the teachers in the classroom and that all NEP and FEP EL students would receive pull out services, though she was unsure how many minutes would be provided each day or from which class the students would be pulled.

Communication with National Origin Minority Parents/Guardians who have Limited English Proficiency

The District primarily relies on the information it collects from parents/guardians during registration when the District's home language survey (HLS) is completed. The HLS provides an option for parents/guardians to select a preferred language and inquires about the need for interpretation and/or translation services. The [redacted content] and [redacted content] explained to OCR that the HLS is provided through the District's "Infinite Campus" platform, though the [redacted content] stated that there is an assumption that when a student has low English proficiency, parents may also experience similar proficiency levels. For example, if a student is identified as NEP, the staff would assume there may also be a language barrier in the home. When OCR inquired about how the School would identify national origin minority parents/guardians with LEP, the [redacted content] was unable to think of a process in place that would currently provide that information.

The District employs three staff members (full-time) and additional staff (part-time) to provide interpretation and translation services and contracts with two third-party entities to provide additional interpretation and translation services. The [redacted content] explained that the School utilizes a dialer to provide Spanish interpretation, that the newsletters she issues have a translation feature, and that School-based staff members may also provide interpretation and translation services. She clarified that the School-based staff members participate in a District-level training annually on providing these services. The [redacted content] also shared that staff were made aware of the option to utilize the language assistance services in a variety of ways (*e.g.*, [redacted content]'s newsletter, Welcome Center resources, etc.), but that staff may also rely on family members or friends of parents/guardians to provide interpretation or translation services for more informal discussions. For example, the [redacted content] described a scenario after school when a teacher is communicating with a parent about a particular assignment the student should focus on. She also described a scenario when the School had discipline concerns with an EL student and another administrator called the student's home and spoke with his uncle, rather than his mother, due to communication barriers.

In addition to the resources discussed above, the [redacted content] and [redacted content] described the School's use of other non-contracted resources, including Google Translate, "Talking Points," and a "pop and talk." The [redacted content] explained that "Talking Points" is a free application, approved by but not contracted by the District, which allows a staff member to type a message in English and the message will be translated into the language of choice. She was uncertain how the accuracy of the message is addressed or ensured. The [redacted content]

also explained that teachers use their personal phones to utilize Google Translate to facilitate conversations with parents/guardians and/or students.

III. Allegations 1-4 (Language Assistance Program, Staffing, Monitoring and Evaluating EL Student Proficiency, and Evaluating Effectiveness of Program)

Legal Standard

Under Title VI, school districts must provide equal educational opportunity to EL students, including taking affirmative steps to address the language needs of EL students. When determining whether a school district's programs for EL students comply with the civil rights laws, OCR considers whether: (a) the educational theory underlying the language assistance program (LAP) is recognized as sound by some experts in the field or is considered a legitimate experimental strategy; (b) the program and practices used by the school district are reasonably calculated to implement effectively the educational theory adopted by the district; and (c) the program succeeds, after a legitimate trial, in producing results indicating that students' language barriers are actually being overcome within a reasonable period of time. *See Castañeda v. Pickard*, 648 F. 2d 989, 1009-10 (5th Cir. 1981). More specifically, school districts must:

- a) identify and assess EL students in need of language assistance in a timely, valid, and reliable manner;
- b) provide EL students with a LAP that is educationally sound and proven successful;
- c) sufficiently staff and support the LAPs for EL students;
- d) ensure EL students have equal opportunities to meaningfully participate in all curricular and extracurricular activities, including the core curriculum, graduation requirements, specialized and advanced courses and programs, sports, and clubs;
- e) avoid unnecessary segregation of EL students;
- f) ensure that EL students with disabilities under the Individuals with Disabilities Education Act (IDEA) or Section 504 are evaluated in a timely and appropriate manner for special education and disability-related services and that their language needs are considered in evaluations and delivery of services;
- g) meet the needs of EL students who opt out of LAPs;
- h) monitor and evaluate EL students in LAPs to ensure their progress with respect to acquiring English proficiency and grade level core content, exit EL students from LAPs when they are proficient in English, and monitor exited students to ensure they were not prematurely exited and that any academic deficits incurred in the LAP have been remedied; and
- i) evaluate the effectiveness of a school district's LAP to ensure that EL students in each program acquire English proficiency and that each program was reasonably calculated to allow EL students to attain parity of participation in the standard instructional program within a reasonable period of time.

School districts must sufficiently staff and support the LAPs for EL students. School districts have an obligation to provide the personnel and resources necessary to effectively implement their chosen EL programs. This obligation includes having highly qualified teachers to provide language assistance services, trained administrators who can evaluate these teachers, and adequate and appropriate materials for the EL programs. At a minimum, every school district is responsible for ensuring that there is an adequate number of teachers to instruct EL students and that these teachers have mastered the skills necessary to effectively teach in the district's program for EL students.

Analysis

During OCR's investigation, OCR identified concerns related to the District's compliance with Title VI concerning its ELD program at the School. Specifically, OCR noted concerns whether the IL, *on its own* and delivered by staff who are unqualified to provide ELD instruction, is sufficient to meet the first requirement of the *Castañeda* standard that the educational theory underlying the LAP is recognized as sound by some experts in the field or is considered a legitimate experimental strategy. Though the District points toward the inclusion on CDE's Supplemental List, the underlying development of the Supplemental List was based on the literacy goals and requirements of the State and does not appear to be intended as a menu of ELD programming options. Even more, while teachers are trained in the mechanics of IL, they lack training in the delivery of instruction that furthers the LAP; rather, the focus is on the technical side of accessing a personalized program, not the instruction of ELD programming. Further, the data provided by the District underscores that many EL students neither received the asserted 20-45 minutes of instruction via IL per day nor, minimally, the 100 minutes per week suggested on the documentation. Instead, the data indicates that many grade levels only received the District's suggestion of 20-45 minutes of instruction per *week* and staff explained that it is delivered at the same time that literacy interventions are being provided. OCR reminds the District that it must design and implement EL programs that are reasonably calculated to enable EL students to attain both English proficiency and parity of participation in the standard instructional program within a reasonable period of time.

Additionally, though the School demonstrated that it has qualified teachers on staff with a CLDE endorsement, EL students are currently scheduled based on the availability of peer EL students, rather than being strategically scheduled with staff who are qualified to provide ELD instruction. And, while the [redacted content]'s responsibilities include providing CLDE training, the District leaves the staff training opportunities to the discretion of the School, based upon request only, and it is unclear whether administrative staff are sufficiently trained to evaluate the staff delivering the LAP.

OCR also noted compliance concerns related to the District's and School's understanding of who is responsible for monitoring EL students who have attained proficiency and exited the School's LAP. While the [redacted content] perceived monitoring as a joint effort between the District and the School, the [redacted content] understood this to be a responsibility that lies at the District level.

OCR appreciated learning during the course of the investigation, though, that the School has since hired the CLD Interventionist and intends to provide a more explicit ELD instruction model during the 2023-24 SY. However, OCR remains concerned about the implementation of IL and the CLD Interventionist's role, as this was not fully developed when OCR conducted its interviews shortly after the end of the 2022-23 SY and based on the number of EL students at the School.

IV. Allegation 5 (Meaningful Communication with Limited English Proficient Parents/Guardians)

Legal Standard

The Title VI implementing regulations, at 34 C.F.R. §§ 100.3(a) and (b), provide 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, deny them any service or benefits of its programs, or provide any service or benefit which is different or provided in a different manner from that provided to others.

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*.⁵ The memorandum clarified OCR policy under Title VI on issues concerning the responsibility of recipients to provide equal educational opportunity to limited English proficient (LEP) national origin minority students and their parents/guardians (parents).

The May 25, 1970 memorandum states that recipients 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. A recipient's obligation to ensure meaningful communication with parents in a language they can understand and to adequately notify parents with language assistance needs of information about any programs, service, or activity of a school district that is called to the attention of non-LEP parents requires a recipient to provide LEP parents with oral interpretation and/or written translation of important school-related information and documents in the parents' primary language where necessary to ensure that the parents can meaningfully participate in their child's education.⁶ Further, recipients must develop and implement a process for determining whether parents are LEP and identify their language needs. 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.

⁵ 35 Fed. Reg. 11,595.

⁶ On January 7, 2015, OCR and the United States Department of Justice issued a joint *Dear Colleague Letter* entitled "English Learner Students and Limited English Proficient Parents," which discusses school districts' obligation to ensure meaningful communication with LEP parents in a language they can understand of information about any program, service or activity that is called to the attention of non-LEP parents. The *Dear Colleague Letter* may be found at: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf>.

Recipients must provide language assistance to LEP parents effectively with appropriate, competent staff – or appropriate and competent outside resources. It is not sufficient for staff merely to be bilingual. Recipients should ensure that interpreters and translators have knowledge in both languages of any specialized terms or concepts to be used in the communication at issue and they are trained in their role of an interpreter or translator, the ethics of interpreting and translating, and the need to maintain confidentiality. In addition, interpreters should be able to demonstrate proficiency in and ability to communicate information accurately in both English and in the other language and be knowledgeable of any particularized vocabulary and phraseology used by the person with LEP. It is not sufficient for recipients to rely on students, siblings, or friends to translate or interpret for parents.

Analysis

OCR also identified concerns during its investigation related to the District's compliance with Title VI concerning its communication with national origin minority parents/guardians who have LEP and may need communication services, including translation and interpretation services. The District initially relies on the responses it receives in its HLS; however, the School lacks a process for documenting the needs of LEP parents/guardians and interviewed staff indicated that an underlying assumption exists regarding a *student's* English proficiency as indicative of whether the *parents/guardians* may also be LEP. Moreover, while the District employs translators and contracts for translation and interpretation services, it is unclear that all staff are aware of the service as interviewed staff indicated the potential use of friends or family when interpretation or translation services are needed. Finally, OCR notes concern about the use of third-party applications and online services (*e.g.*, Google translate, pop and talk, Talking Points, etc.) when the District is neither contracting the services or ensuring the accuracy of the translated and/or interpreted information provided.

V. Conclusion

The District voluntarily agreed to address OCR's concerns by signing the enclosed Agreement. When fully implemented, the Agreement will resolve the allegations raised in this complaint. The provisions of the Agreement are aligned with the allegations and issues raised by the complainant(s) and the information that was obtained during OCR's investigation, and the provisions of the Agreement are consistent with the applicable statute and regulations. OCR will monitor the District's and School's implementation of the Agreement until the District and School are in compliance with the statute and regulations at issue in the case. Failure to implement the Agreement could result in OCR reopening the complaint. OCR will promptly provide written notice of any deficiencies with respect to the implementation of the terms of the Agreement and will promptly require actions to address such deficiencies. If the District and School fail to implement the Agreement, we will take appropriate action, which may include enforcement actions.

OCR is closing the investigative phase of the case effective the date of this letter. The case is now in the monitoring phase. The monitoring phase of the case will be completed when OCR determines that the District has fulfilled all of the terms of the Agreement. When the monitoring phase of the case is complete, OCR will close case number 08-23-1352 and will send a letter to the Complainant, the School, and the District stating that the case is closed.

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. Complainants may have the right to file a private suit in federal court whether or not OCR finds a violation.

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

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

If you have any questions, please contact Colleen Brooks, the OCR attorney assigned to this case, at 303-844-0196 or Colleen.Brooks@ed.gov.

Sincerely,

/s/

Angela Martinez-Gonzalez
Program Manager

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