



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGION IX
CALIFORNIA

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August 30, 2019

Dr. Deborah A. Flores
Superintendent
Gilroy Unified School District
7810 Arroyo Circle
Gilroy, California 95020

(In reply, please refer to case no. 09-16-1279.)

Dear Dr. Flores:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the Gilroy Unified School District (District). The Complainant alleged that the District discriminated against English learner students on the basis of national origin language minority status and students with disabilities. Specifically, OCR investigated the following issues:

1. Whether the District failed to provide English learners (EL) students at the secondary level with an effective program of English language development (ELD) and access to the content of the curriculum;
2. Whether the District failed to ensure that all teachers assigned to implement its program for EL students at the secondary level were appropriately qualified to do so; and
3. Whether the District denied a free appropriate public education (FAPE) to some special education students at Gilroy High School by not placing them in study skills classes consistent with their individualized education program (IEP) plans.

OCR investigated the complaint under the authority of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, Section 504 of the Rehabilitation Act of 1973 (Section 504), and Title II of the Americans with Disabilities Act of 1990 (Title II), and their implementing regulations. Title VI prohibits discrimination on the bases of race, color, or national origin in programs and activities operated by recipients of Federal financial assistance. Section 504 prohibits discrimination on the basis of disability in programs and activities operated by recipients of federal financial assistance. Title II prohibits discrimination on the basis of disability by public entities. As a

recipient of federal financial assistance and as a public education system, the District is subject to Title VI, Section 504, Title II, and their implementing regulations.

To investigate this complaint, OCR conducted interviews and reviewed documents and other information provided by the Complainant and the District. Prior to OCR completing its investigation and making a compliance determination, the District expressed an interest in voluntary resolution pursuant to section 302 of OCR's Case Processing Manual (CPM), and OCR determined it was appropriate to do so. The legal standards, facts gathered, and the reasons for OCR's determinations are summarized below.

Background

The District enrolls approximately 11,650 students in 15 schools, including three middle schools and two comprehensive high schools. According to records maintained by the California Department of Education, in 2018-19, the District enrolled 2,657 English learners and an additional 2,509 former EL students who have been reclassified as fluent English proficient (RFEP students). Between 8% and 12% of the students at the comprehensive high schools, and between 15% and 25% of the students in the middle schools are EL.

In January 2016, shortly before this complaint was filed, the District received a Uniform Complaint that included allegations about EL student instruction and placement and teacher qualifications, as well as other allegations concerning funding, state testing, and other issues not addressed in the OCR complaint. The District's attorney investigated the complaint and issued a report (UCP report) concluding that the EL program at the middle schools and high schools did not meet state or federal legal standards. The report determined that the District had adopted a Master Plan for English Learners that required that all EL students receive daily leveled ELD instruction, but that this Plan was not being implemented in the District's secondary schools. It found that not all EL students received ELD or content area instruction designed to provide EL students with equal access to the secondary program. The report included general "recommendations for corrective action."¹

OCR met with District administrators at the end of the 2015-16 school year to discuss the results of the District's investigation, and the concerns it raised for OCR regarding the District's compliance with Title VI. At that meeting, the District described its plans for addressing the areas of concern highlighted in the report. OCR has received reports and updates since that time regarding the District's progress in implementing those plans.

¹ Under OCR's complaint investigation procedures in effect when the complaint was filed, when OCR was required to close complaint allegations that had been resolved through a recipient's internal grievance procedures if all allegations had been investigated, there was a comparable resolution process under comparable legal standards, and any remedy obtained was the same as the remedy that OCR would have obtained, had it found a violation. OCR found that the UCP addressed allegations one and two of the OCR complaint, as described above, but that the recommendations included in the report were not specific enough to meet OCR's remedial standards.

In March 2019, OCR visited a middle school and a high school in the District to observe the District's implementation of its current program for EL students, and to identify components of a plan to address any remaining compliance concerns with respect to the allegations of the complaint.

Legal Standards

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. 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 of Education issued a memorandum entitled, "Identification of Discrimination and Denial of Services on the Basis of National Origin" (May 25, 1970), reprinted in 35 Fed. Reg. 11,595 (July 18, 1970) (hereinafter May 25th memorandum). The May 25th memorandum clarified OCR policy under Title VI on issues concerning the responsibility of school agencies to provide equal educational opportunity to limited English proficient national origin minority students. The May 25th memorandum states that school districts must take affirmative steps to address the language needs of limited English proficient students (English learners or EL students).

Title VI and the May 25th memorandum require school districts to select a sound educational theory for their programs for English learners, and to use practices, resources and personnel reasonably calculated to effectively implement their educational theory. OCR also reviews the educational program to see whether it succeeds in producing results indicating that the students' language barriers are being overcome in a reasonable period of time. Districts 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. This dual obligation requires school districts to 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. Districts must evaluate implementation and monitor outcomes of their services for EL students to determine whether the services are successful in meeting these responsibilities and the academic achievement standards set by the district.

Districts must validly, reliably and annually measure EL students' performance on the state English language proficiency assessment and in academic content areas. Monitoring systems should include benchmarks for expected growth and ensure that EL students are making appropriate progress with respect to acquiring English and content knowledge while in the EL

program. Districts should take appropriate steps to assist students who are not adequately progressing towards those goals and modify EL programs as necessary, if the dual obligation is not being met.

Issue 1: Whether the District failed to provide English learners (EL) students at the secondary level with an effective program of English language development (ELD) and access to the content of the curriculum

Facts

The following facts are relevant to OCR's analysis:

At the time of the District's internal investigation, the District had adopted a Master Plan for Services for English Learners that required all EL students to receive daily leveled ELD instruction that was targeted to their needs, with students being grouped for ELD instruction by proficiency level. The UCP report found that secondary schools offered very few ELD classes, and that most students did not receive leveled ELD instruction. The report expressed particular concern about the lack of services designed to meet the needs of students who had received EL services in the district for more than six years without meeting District criteria for reclassification as fluent English proficient (long term ELs, or LTELs). It also found that most secondary school teachers had not received formal training on the ELD standards and were not providing integrated ELD instruction in their content area classes.

Since the report was issued, the Master Plan has been revised to require that all EL students at the secondary level receive at least one period of designated ELD, but to state that students at the highest levels of English proficiency may receive this instruction in mainstream English language arts classes, where teacher is expected to provide ELD and ensure their progress toward reclassification. The Master Plan addresses the needs of LTEL students in general terms, noting that they need accelerated ELD instruction, access to core curriculum, counseling and monitoring, and interventions.

At the time of OCR's visit, Gilroy High School enrolled 151 English learners, of whom 106 were considered LTELs. South Valley Middle School enrolled 186 EL students, 161 of whom were LTELs.

At the two schools that OCR visited, EL students at the lowest levels of English proficiency received ELD instruction in designated ELD classes: one class (20 students) at the middle school and two classes (32 students) at the high school. In addition, sixteen LTEL students and one student who was considered at risk for becoming LTEL at the high school were enrolled in an Academic English Development (ALD) class designed for LTEL students. District and school administrators explained that, because the English proficiency assessment used in California recently changed (from the California English language development test, or CELDT, to the

English language proficiency assessment for California, or ELPAC), placement criteria for these classes were being reevaluated and adjusted.

Most of the EL students at both schools were enrolled in English language arts classes with English proficient students and received integrated ELD instruction in those classes rather than in a separate ELD class. According to administrators, recently adopted English language arts materials in both mainstream and special education classes provide guidance on differentiating instruction for EL students, and all English teachers have been trained in doing so. Most English teacher were able to identify their EL students and their levels and to describe strategies they used to develop EL students' oral and written language. Generally, these were techniques they used for all students in their classes. Middle school English teachers grouped students for extra support during an ELA enrichment classes; while these groupings focused on reading and writing levels rather than English proficiency, the instruction provided included strategies to address the needs of EL students.

EL students at both schools received content area instruction in mainstream classes with English-proficient peers. Some EL students at the high school were clustered for instruction, but almost all teachers at both schools had EL students in their classes. Content teachers' descriptions of their approach to teaching English learners varied significantly, with some teachers emphasizing academic vocabulary and language skill development and others mentioning that they required EL students to answer questions in English or paired them up with English-proficient peers.

The District reported providing teachers with extensive training in instructing EL students since the 2016 CCR report, and OCR confirmed that teachers at both schools have received such training numerous times each year. Teachers on special assignment (TOSAs) at each school received release periods to observe classes and provide coaching and guidance to other teachers. TOSAs also provide updates in staff meetings. While most teachers reported receiving this training, several special education teachers informed OCR that they had not been able to attend EL training because of conflicts with training on the special education program.

The District has developed a tool used by site administrators and TOSAs to observe instruction during informal class "walkthroughs". Results of these walkthroughs, which occur several times each week, are used to verify implementation of the strategies discussed during EL training, to guide the design of future professional development, and to develop school plans. Use of the tool is well established at the high school and in development at the middle school.

The Master Plan states that EL students' academic performance is to be monitored using benchmark and curriculum embedded assessments as well as annual state tests of academic achievement and English proficiency. Students who are not making adequate progress are expected to receive an EL Intervention Catch-Up Plan that identifies the specific supports or academic interventions that are required to help them meet English language acquisition and academic achievement goals. OCR found that the academic progress of all students was

monitored through informal classroom assessments, grade checks and California Assessment of Student Performance and Progress (CAASPP) “midterms” which are administered three times annually and which are discussed in teachers’ professional learning communities. EL TOSAs at both schools reported checking the grades of EL students and meeting with those who receive ‘D’ and ‘F’ grades. No teachers or administrators referred to an EL Intervention Catch Up Plan.

Analysis

Pursuant to Title VI and the May 25th memorandum, districts are required to select a sound educational theory for their programs for English learners, and to use practices, resources and personnel reasonably calculated to effectively implement their educational theory. Districts have a dual obligation to implement programs that enable EL students to learn English within a reasonable amount of time and access the district’s core curriculum. In order to ensure that their program is successful, districts must monitor the progress of students in learning English and accessing the curriculum and take necessary steps to address the needs of students who are not making adequate progress. They must also modify the program as necessary to ensure its success in teaching students English and enabling their academic success.

The investigation of the complainant’s 2016 UCP complaint concluded that not all EL students in District secondary schools received ELD instruction, that there were no programs for LTEL students and that many content area teachers were not providing EL students access to the core curriculum. The attorney who conducted the investigation noted that the District Master Plan required each EL student to receive daily leveled ELD instruction and concluded that this requirement was not being implemented. Based on the results of the review, OCR was concerned that the secondary school EL program at that time did not meet the requirements of Title VI to implement a program that taught EL students English and provided them equal access to the academic curriculum.

Soon after the UCP investigation was concluded, the District verbally described to OCR a series of actions it intended to take to improve the EL program and its implementation. The District has provided updates on its initiatives since that time. OCR visited two secondary schools in 2019 to determine whether these actions had resolved OCR’s compliance concerns.

OCR’s 2019 visit confirmed that the District had taken important steps to design and implement a program that met the requirements of Title VI. Teachers in the District had received training that enabled them to identify and address the needs of the ELs in their classes. Most teachers of content areas had received information about their EL students and could describe how they used that information to make their instruction accessible to EL students. Teachers on special assignment provided support to these teachers on an ongoing basis. Site administrators and TOSAs visited classrooms regularly and used a districtwide observation instrument to ensure that EL students’ needs were met and that the methodologies the District had adopted were in use in the classrooms.

Although the District had taken significant steps to strengthen the implementation of its EL program, OCR concluded that these steps had not fully resolved OCR's compliance concerns. The District's program design, as outlined in its Master Plan, requires that all EL students receive at least one period of ELD instruction, but states that students at the highest levels of English proficiency (based on measures of proficiency that are no longer current) may receive this instruction in mainstream English language arts classes. It does not provide clear guidance as to how this instruction should be delivered or what students should receive ELD in this setting.

The District continues to offer a limited number of designated ELD classes for EL students who are new to US schools, and those with the least English proficiency. At the schools OCR visited, almost all long term EL students, except those at the lowest levels of English proficiency, received the instruction designed to teach them English in mainstream English language arts classes (at the high school) and/or mainstream "ELA enrichment" classes (at the middle school). The teachers of these classes were able to describe methods and strategies they used to develop their students' English proficiency, but in most cases, these approaches were the same for EL and English proficient students. OCR was concerned that all EL students may not have been receiving instruction designed to address their level of English proficiency and enable them to reach fluent English proficiency within a reasonable amount of time.

The Master Plan also requires systematic review of student scores on a variety of formative assessments and the creation of specific plans for students who are not making adequate progress. At the schools visited, TOSAs reviewed EL student grades frequently and followed up with those who received poor or failing grades. It was not clear, however, that students who were not failing classes, but whose English proficiency was not improving, were identified and provided necessary interventions. Neither school was currently using the Catch-up plans described in the Master Plan.

Finally, although the District recently acquired ELD materials for special education classes, special education teachers at the schools OCR visited stated that scheduling conflicts had prevented them from receiving most of the EL training provided at their school sites.

Prior to the conclusion of the OCR investigation, the District expressed an interest in resolving OCR's compliance concerns through a voluntary resolution. On August 28, 2019, the District submitted the attached Resolution Agreement which, when implemented, will resolve these concerns. Pursuant to the Agreement, the District will revise its Master Plan to describe the standards for placing secondary level EL students in mainstream English language arts and ALD classes, provide guidance on the ELD instruction that English teachers are expected to provide, and describe expectations for monitoring EL student progress and identifying and implementing interventions. The District will also develop and implement an EL professional development plan for the 2019-20 school year and conduct an evaluation of the success of the ELD program in grades 6 – 12.

Issue 2: Whether the District failed to ensure that all teachers assigned to implement its program for EL students at the secondary level were appropriately qualified to do so

At the time the complaint was filed, the complainant alleged that not all of the District's secondary science, social science, math, science or elective teachers were authorized by the state of California to teach English learners. The District's UCP report concluded that all teachers in the District, with the exception of two special education teachers, possessed Crosscultural, Language and Academic Development (CLAD) certification, and were therefore authorized to teach EL students in California.

The District Assistant Superintendent for Human Resources informed OCR that the District requires every teacher who is hired to hold a state authorization to teach EL students and verifies the credentials of each applicant. In addition, the Santa Clara County Office of Education regularly audits the District to ensure that all teachers are appropriately credentialed for their assignment. OCR confirmed that, in a 2018 audit, the County Office had found all teachers appropriately qualified. Based on this information, OCR concluded that the District is currently compliant with Title VI with respect to this allegation.

Issue 3: Whether the District denied a free appropriate public education (FAPE) to some special education students at Gilroy High School by not placing them in study skills classes consistent with their individualized education program (IEP) plans.

Legal Standard

The Section 504 regulations, at 34 C.F.R. §104.33, require public school districts to provide a free appropriate public education (FAPE) to all students with disabilities in their jurisdictions. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of non-disabled students are met, and that are developed in accordance with the procedural requirements of §§ 104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. Implementation of an individualized education program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. 34 C.F.R. §104.33(b)(2). OCR interprets the Title II regulations, at 28 C.F.R. §§35.103(a) and 35.130(b)(1)(ii) and (iii), to require districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

Facts and Analysis

The complaint alleged that, at Gilroy High School, at least 24 students whose IEPs required them to be enrolled in study skills classes had not been assigned to these classes. The District informed OCR that, at the time the complaint was filed, the Gilroy High School special

education department had encountered problems that stemmed from a shortage of qualified special education teachers and an inefficient system for assigning students to special education classes. Since that time, the school has resolved the teacher shortage and has assigned each student's study skills teacher to be his or her case manager. OCR concluded that these actions resolved this allegation.

Overall Conclusion

Based on the commitments made in the enclosed Agreement, OCR is closing the investigation of this complaint as of the date of this letter and notifying the Complainant concurrently. When fully implemented, the Agreement is intended to address the complaint allegations. OCR will monitor the implementation of the Agreement until the District is in compliance with the terms of the Agreement. Upon completion of the obligations under the Agreement, OCR will close the case.

OCR's determination in this matter 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. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

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, retaliate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the individual may file another complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document 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 the law, personal information that, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

Thank you for your cooperation in resolving this case.

Sincerely,

/s/

Kana Yang
Team Leader

Cc: Mary Hernandez, Garcia, Hernandez, Sawhney