



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION IX
CALIFORNIA

May 8, 2023

Mark Marshall
Superintendent
Los Banos Unified
1717 South 11th St.
Los Banos, CA 93635-4800

By email only to: mmarshall@losbanosusd.k12.ca.us

Re: Los Banos Unified
OCR Case No. 09-22-1549

Dear Superintendent Marshall:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the Los Banos Unified (District). The complaint alleged that the District discriminated against students on the basis of national origin. Specifically, OCR investigated the following issue:

Whether the District provides students who are English learners at the elementary level with an English language development program that is designed to teach them English until they are fully English proficient.

OCR is responsible for enforcing Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. §§ 2000d-2000d-7, and its implementing regulation, 34 C.F.R. Part 100, which prohibit discrimination on the basis of race, color, or national origin under any program or activity receiving Federal financial assistance. The District receives funds from the Department and is therefore subject to Title VI and the regulation.

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.

Legal Standard

The Title VI implementing regulations, at 34 C.F.R. § 100.3(a) and (b), provide that a

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

school district 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, a school district 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.

School districts must take affirmative steps to address language barriers so that limited English proficient students (English learners or EL students) may participate meaningfully in the District's educational programs. Specifically, the District's language assistance program must be based on sound educational theory; the program and practices of the District must be reasonably calculated to effectively implement the District's educational theory. A District 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.

Facts

The following facts are relevant to OCR's analysis:

According to District data, there are approximately 5,520 students enrolled at the elementary level (K-6), of whom 1782 are EL (32.3%). There are nine elementary schools in the District. Each of the elementary schools has a sizeable "at-risk" EL population (identified as EL students in grades 3-5, who have been in the District since kindergarten and not meeting criteria for obtaining English proficiency) and long term English learner population (EL students who are 6+ years in the District and not meeting proficiency criteria), as follows.¹

School	Total Student Population	Total EL	LTEL At Risk	LTEL (6 th grade)
Charleston Elementary	353	72	9	7
Grasslands Elementary	832	231	27	27
Henry Miller Elementary	694	319	41	38
Lorena Falasco Elementary	766	246	41	35
Los Banos Elementary	431	163	22	17
Mercey Springs Elementary	614	168	17	23
R. M. Miano Elementary	727	341	54	30
Volta Elementary	511	112	6	21
Westside Union Elementary	583	130	18	21
District Totals:	5511	1782	235 (13%)	219 (13%)

¹ The student population for each school was pulled from the National Center for Education Statistics (NCES) website. The District provided data in March 2023 for the categories of Total EL, LTEL At Risk and LTEL (6th grade).

District Oversight of the EL Program at Elementary Schools

At the District level, the Director of English Learner Services and the Director of Elementary Schools have joint oversight of the implementation of the educational program for EL students in elementary schools. The District is in the first year of implementing a new ELD curricular program for the elementary level – “Journeys” for grades K-3 and “English 3D” for grades 4-6.

The District has directed sites/teachers to provide students at the elementary level with 30 minutes of designated ELD per day. At the beginning of the school year, on September XX, 2022, the EL Director informed teachers that they were to provide designated ELD to no more than two groups of EL students based on their level of proficiency. Therefore, in classrooms with more than two levels, the Director advised schools to deploy students to different classrooms, at the same grade level. On September XX, 2022, the teachers’ union sent the District a “cease and desist” letter, charging that such deployment was a “unilateral change and violation of the parties’ current contract.” As a result, the District instructed site principals to ensure through classroom visits and their own monitoring that teachers provide the 30 minutes of ELD instruction to EL students, and in groupings of no more than two proficiency levels. According to the District, several elementary teachers have chosen to continue with deployment, while other teachers have chosen other program models within their classrooms. As a result, there is inconsistency in terms of ELD implementation at the elementary level, particularly from grade to grade. The District paid for every elementary site and teacher to receive training and in-classroom support from ELD coaches associated with the ELD curricular materials.

Currently, there are few intervention programs or services specifically designed for EL students at the elementary level. The only intervention program is reading support for students, particularly at the lower grades. District staff and school administrators review EL program implementation by conducting “walk thrus.” Both Directors indicated that some site administrators are reluctant to conduct observations of classroom implementation, due to concerns expressed by the union. The District has not yet developed a checklist or form to be used to guide the observations for EL program implementation.

Master Plan

The District has a Board approved Master Plan, from May of 2021 that describes its program for EL students. Under Program Placement, the District states that schools will be provided “designated ELD during protected time” during the regular school day. Specifically it states that designated ELD “is when teachers provide lessons for English Learners to develop English language proficiency” (p. 24). The Master Plan does not describe specific instructional minutes, or models for implementing designated ELD by elementary classroom configuration.

The Master Plan states that EL students at the elementary grades are assessed each trimester, using multiple assessments including local benchmark assessments. It does not indicate how and when students are identified as “at risk” and should be considered in need for interventions. Under “interventions,” the Master Plan states that students who have not met year-to-year growth in ELD or core subjects, are scheduled for additional ELD or subject matter intervention at the school site. Interventions include: in and after

school tutoring, additional ELD sessions during the day or after school, intersession attendance focusing on ELD, and intersession attendance focusing on academic skills. The master plan lists specific interventions by school site.

OCR Site Investigations

OCR conducted interviews with administrators at two sites, XXXXX and XXXXXX elementary schools, and learned the following:

X---redacted content---X. OCR confirmed that staff have received coaching from an ELD coach provided by the publisher. However, the union directive has resulted in each classroom following a different model for ELD implementation. The assistant principal conducts observations and has developed a template for this purpose since the District has not provided an instrument or tool. Administrators have only been able to observe ELD at one grade level so far for the school year (X grade). They confirmed that teachers at the upper grades are not aware of how many LTELs are in their classrooms and are not on notice of any need for monitoring or intervention for this group.

X---redacted content---X. OCR confirmed that there is inconsistent ELD implementation based on teacher choice to either deploy, or segment ELD instruction to groupings of no more than two levels of proficiency. The principal confirmed conducting classroom observations in X grade only and observed small group instruction for ELD. Because most X grade classrooms have a mix of only level 2 or level 3 students, grouping the students without deployment works well enough. Because there is a variety of proficiency levels in other grades, administrators believed the small group model would be less effective. OCR confirmed provision of professional development from the ELD publisher.

On-Site Visit

OCR also conducted an on-site visit to XXXXXX in March of 2023. X---redacted content---X.

OCR confirmed that the School is experiencing challenges in implementing deployment for ELD instruction. Some teachers informed the principal that they would not deploy their students. In interviews with OCR, teachers cited many reasons for not deploying students, such as not having sufficient experience with the curriculum despite ongoing training from the curriculum coach, finding the curriculum hard or difficult to implement, or being a newer teacher. Through interviews with staff, OCR confirmed that the younger/newer teachers actually were implementing the EL deployment with greater ease than some of their more veteran teachers. Administrators informed OCR that prior to COVID-19, teachers conducted EL deployment without issue, and that teachers currently were generally struggling with managing student needs and learning a new curriculum.

Several teachers described available interventions for EL students in the X – X grades as an “XXXXX XX XXXXXX.” OCR only identified general after-school tutoring programs (available for all students), including computer-based tutoring and homework support.

OCR visited classrooms and interviewed approximately 16 teachers. All the teachers confirmed that the EL Director has provided professional in-services on the ELD program.

They also confirmed receiving coaching and support on the ELD curriculum from coaches provided by the publishers. Many said there has been an EL in-service almost monthly.

OCR observed the following with respect to ELD implementation:

- At XXXX grade, OCR confirmed deployment of students by level. At least two teachers indicated that they have been using English proficiency test preparation materials, instead of the ELD curriculum.
- At XXXX grade, OCR did not observe any deployment. One teacher reported having XX EL students who were all level 2s, with the exception of two students who are at the newcomer level. The teacher reported that several students were struggling, and that the curriculum was not well suited for newcomer students. Another teacher was providing an ELD lesson to a group of approximately XX EL students (levels 1, 2, and 3) who were seated alongside a larger group of non-EL students who sat at their desks, with headphones, working on a computer program. The teacher believed the materials were effective but confirmed that it was challenging to teach ELD with so many students of different needs. The teacher reported that 3 or 4 students was struggling in class and 2 of these students were performing a year behind their peers.
- At XXXX grade, OCR confirmed that teachers deployed for ELD. OCR interviewed one teacher who indicated a preference for using English proficiency test materials found on the state department website, to the ELD materials identified by the District. The teacher works with the levels 2/3 for ELD time. The teacher has had discussions with the principal about needing to do designated ELD but firmly believes that the Journeys curriculum does not prepare students to take the ELPAC test (English proficiency test). The teacher identified several students repeating the same level from the previous year.
- At the XXXX grade, OCR confirmed that teachers in this grade deployed for ELD. OCR interviewed one teacher who thought the ELPAC test is “too hard” and the students lost 1.5 years of instruction to the pandemic, so naturally they are low. The teacher was very upset that the ELD curriculum is not embedded in the regular language arts curriculum, and that teachers are being required to provide designated ELD through deployment. This teacher also believed that the ELD curriculum (English 3D) seemed really “hard” to teach and was too challenging for students.
- At the XXXX grade, OCR confirmed deployment for ELD. One teacher who takes levels 1-2 for ELD thought that the state’s English proficiency test was “too hard” and that there are academically strong students who just don’t show progress on that test. Two other teachers told OCR that they felt the curricular materials were too difficult for students.
- At XXXX grade, OCR observed inconsistent deployment. One teacher has XX students, XX of whom were EL, and deploys for ELD with one other teacher. This teacher has been working on English proficiency prep materials with the students

since the beginning of the school year and was still using those materials even though testing is now complete. This teacher did not like the curriculum at all, because it is too difficult for the students. Another teacher has XX EL students (at levels 2 and 3) – most of whom are LTEL. This teacher does not deploy, instead keeping her students for ELD because there are only two levels of students. This teacher expressed a belief that ELD integrated with the regular language arts curriculum is more effective.

Legal Analysis

Based on the facts gathered thus far and OCR's interviews with site staff, and a visit to a third site, OCR has concerns that the District has not taken adequate steps to design and implement an ELD program at the elementary level that meets the requirements of Title VI. OCR confirmed that the District has an approved Master Plan for English Learners, which describes a curricular program and includes general definitions of ELD, and the number of instructional minutes that should be provided to EL students at the elementary level, by their level of proficiency. However, the Master Plan does not provide elementary sites with specific models of ELD delivery, which is significant because some of the elementary sites have high concentrations of EL students, and some have far fewer. The Master Plan also does not include a description of how sites should monitor EL student progress, identify students who are risk for becoming long-term English learners, or provide intervention programs. OCR identified a number of elementary schools in which upwards of 25% of the EL population were either at risk or LTEL.

OCR also identified concerns regarding uneven implementation of the ELD program for EL students, with some grades at sites opting to deploy, and other grades not doing so. Some teachers interviewed by OCR openly questioned the effectiveness of the current ELD curriculum, and the need to group students for targeted instruction. OCR notes that the District is in the first year of implementing a new ELD curricular program, and has provided staff with professional development and support from the publishers. OCR also was concerned that some teachers appeared unwilling to utilize the chosen curriculum, instead delivering test preparation exercises during designated ELD time, over several months and not just before the testing period. OCR also notes that teachers report that they are struggling with how to deliver the new curriculum, and appear frustrated that some EL students appear not to be making progress, and that there were no evident intervention programs available for EL students, particularly at the upper elementary grades.

Overall Conclusion

To address the complaint allegations and OCR's concerns identified in the investigation, the District, without admitting to any violation of law, entered into the enclosed resolution agreement. Prior to the completion of OCR's investigation of this matter, the District agreed to take several actions to improve the implementation of the ELD program at the elementary level, including revising its Master Plan to clarify program models, monitoring procedures, and interventions for EL students not making progress and at risk for becoming long term EL. The District also committed to creating clearer expectations for program implementation and site accountability, and to implement a professional development plan to support teachers in the delivery of ELD instruction and how to monitor EL student progress.

Based on the commitments made in the enclosed resolution 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 resolution agreement is intended to address the evidence obtained and all of the allegations investigated. OCR will monitor the implementation of the resolution agreement until the District is in compliance with the terms of the resolution agreement and the statutes and regulations at issue in the case.

This concludes the investigation of this complaint.

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 must not harass, coerce, intimidate, discriminate, or otherwise retaliate against any 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 separate 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, it will seek to protect, to the extent provided by the law, personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of privacy if released.

Thank you for your cooperation in resolving this case. If you have any questions about this letter, please contact civil rights investigator Apryle Stanley at 415-486-5559 or Apryle.Stanley@ed.gov.

Sincerely,

/s/

Ava De Almeida Law
Team Leader

cc: Carolina Moreno, Director of English Learner Services