



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

1350 EUCLID AVENUE, SUITE 325  
CLEVELAND, OH 44115

REGION XV  
MICHIGAN  
OHIO

XXXXXXXXXX  
XXXXXXXXXX  
XXXXXXXXXX XXXXXXX XXXXXXX  
XXXXXX XXXXXXX XXXXXXX XXXXXXX  
XXXXXXXX XXXXXXX XXXXXXX  
XXXXXX XXXXXXX XXXXXXX

Re: OCR Docket No. 15-12-1011

Dear Mr. xxxxxxxxxxx:

This letter is to notify you of the disposition of two complaints against the Cincinnati Public School District (the District), addressed together under the above-referenced docket number. One complaint was filed xxxxx xx xxxxx directly with the U.S. Department of Education (the Department), Office for Civil Rights (OCR), alleging disability discrimination. The other complaint, alleging national origin discrimination, was originally filed in xxxxx with the U.S. Department of Justice (DOJ), which referred the complaint to OCR on xxxxx xx xxxxxxxx. The complaints were made on behalf of a national origin minority English Learner (EL) student with a disability (the Student), and alleged the following:

1. the District failed to provide the Student with requisite EL services at the District's xxxxxxx xx xxxxx xxxxx xxxxxxxx xxxxxxx xxx;
2. the District denied the Student a free appropriate public education by failing to implement his Individualized Education Program (IEP) during the 2011-2012 school year; and

3. the District failed to carefully consider all relevant and appropriate information during the evaluation and placement process, resulting in an inappropriate determination that the Student was not eligible to receive xxx xx xxxx xxxxxxxx as a student with a disability.

OCR is responsible for enforcing 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. Title VI prohibits discrimination on the basis of race, color, and national origin by recipients of Federal financial assistance from the Department. OCR is also responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance from the Department. In addition, OCR is responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation, 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance from the Department and as a public entity, the District is subject to these laws. Accordingly, OCR had jurisdiction to investigate this complaint.

Based on the complaint allegations, OCR opened an investigation into the following legal issues:

- Whether the District discriminated against EL students on the basis of national origin by failing to provide EL students equal opportunity to participate in the benefits of the District's education program in violation of the Title VI implementing regulation at 34 C.F.R. § 100.3.
- Whether the District failed to provide a qualified student with a disability a free appropriate public education (FAPE) in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.33.
- Whether the District failed to make a placement decision based on the individual needs of a student with a disability and to carefully consider and interpret information obtained from all sources in making the placement decision for the student in noncompliance with the Section 504 implementing regulation at 34 C.F.R. §§ 104.33 and 104.35.

To date in its investigation, OCR has reviewed documents the District and the Complainant provided. OCR also interviewed District employees and the Complainant. Prior to the conclusion of OCR's investigation the District requested to resolve this complaint pursuant to Section 302 of OCR's Case Processing Manual. Accordingly, the District submitted the enclosed Resolution Agreement (Agreement) to resolve OCR's compliance concerns. The basis for OCR's decision to accept the Agreement is discussed below.

## **Background**

[xxx paragraph xxx]

[xxx paragraph xxx]

As indicated above, the EL portion of this complaint was transferred by DOJ to OCR on xxxxx xx xxxxxx. The Complainant had filed an individual complaint with DOJ about the EL services the District was providing to the Student, and, upon DOJ's referral of the individual complaint, OCR opened a class-wide investigation with respect to the District's EL program.

[xxx paragraph xxx]

With respect to the Student's District LEP plan, the Complainant expressed concern that the Student's teachers at the District were not familiar with his LEP plan, and therefore could not implement it. The Complainant did not offer further detail, and did not explain how the Student was deprived of access to any part of the District's educational program as a result of the LEP plan not being implemented.

On xxxxx xx xxxx, the District requested to resolve this complaint pursuant to Section 302 of the OCR's Case Processing Manual (CPM) after OCR conducted interviews of a xxxxxxxxxxx who worked with the Student, one of the Student's teachers, and the District's xxxxxx xxxxxx xxxxxxxx.

## **Alleged Discrimination Based on National Origin**

### **Applicable Legal Standards**

The regulation implementing Title VI, at 34 C.F.R. § 100.3(a) and (b)(1)(i)-(ii), provides that a recipient of financial assistance from the Department 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) of the regulation provides that, in determining the types of services or benefits that will be provided, recipients may not utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin.

On May 25, 1970, pursuant to its authority under Title VI, the Department issued a memorandum entitled "Identification of Discrimination and Denial of Services on the Basis of National Origin," 35 Fed. Reg. 11,595 (May 1970 Memorandum). The May 1970 Memorandum clarifies OCR policy under Title VI on issues concerning the responsibility of school districts to provide equal educational opportunity to EL students. It states that school districts must take affirmative steps to address the language needs of

EL students. In 1974, the Supreme Court upheld this requirement to take affirmative steps in its *Lau v. Nichols* decision, 414 U.S. 653 (1974).

In determining whether a recipient's program for EL students complies with Title VI of the Civil Rights Act of 1964, OCR has used the standard set forth in *Castaneda v. Pickard*, 648 F. 2d 989 (5<sup>th</sup> Cir. 1981). Under this standard, a program for EL students is acceptable if: (1) "[the] school system is pursuing a program informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy;" (2) "the programs and practices actually used by [the] school system are reasonably calculated to implement effectively the educational theory adopted by the school;" and (3) the school's program succeeds, after a legitimate trial, in producing results indicating that the language barriers confronting students are actually being overcome." *Id.* at 1009-10. OCR adopted the *Castaneda* standard for determining whether recipients' programs for EL students complied with the Title VI regulation in a policy memorandum issued on December 3, 1985, "The Office for Civil Rights' Title VI Language Minority Compliance Procedures" (1985 Policy Memorandum).

In accordance with the 1985 Policy Memorandum, in providing educational services to language minority students, school districts may use any method or program that has proven successful or may implement any sound educational program that promises to be successful. Districts are expected to carry out their programs, evaluate the results to make sure the programs are working as anticipated, and modify programs that do not meet these expectations. Any educational approach that ensures the effective participation of language minority students in the district's educational program is accepted as a means of complying with the Title VI requirements. OCR will find a violation of Title VI if language minority students in need of an alternative program are not being provided such a program.

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. The adequacy of resources is determined by the timely availability of required equipment and instructional materials. Limited financial resources do not justify failure to remedy a Title VI violation.

A district will be in compliance with Title VI when it has adopted an alternative educational program that, when viewed in its entirety, effectively teaches language minority students English and moves them into the regular educational program within a reasonable period of time. OCR looks to local school officials to monitor the effectiveness of their programs, to determine what modifications may be needed when the programs are not successful after a reasonable trial period, and to implement such modifications. A school district's continued or consistent failure to improve an ineffective alternative program for language minority students may lead to a finding of noncompliance with Title VI. It is expected that a sound educational program will

include the maintenance of reasonably accurate and complete data regarding its implementation and the progress of students who move through it.

On September 27, 1991, OCR issued a policy memorandum entitled “Policy Update on Schools’ Obligations Toward National Origin Minority Students with Limited-English Proficiency” (1991 Memorandum). The 1991 Memorandum provides additional guidance for applying the three-pronged approach outlined in *Castañeda*, including additional guidance for applying the May 1970 Memorandum in the context of staffing, transition and/or exit criteria, and program evaluation. In accordance with the September 1991 Memorandum, if a recipient uses a method other than bilingual education (such as ESL or structured immersion), the recipient should have ascertained that teachers who use those methods have been adequately trained in them. Additionally, 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. Some factors to examine in determining whether formerly EL students are able to participate meaningfully in the regular educational program include: (1) whether they are able to keep up with their non-EL 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-EL peers.

In accordance with the 1991 Memorandum, 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 EL program unless they can read, write, and comprehend English well enough to participate meaningfully in the recipient's program. If a recipient does not periodically evaluate or modify its programs, as appropriate, it is in violation of the regulation implementing Title VI unless its program is successful. Generally, "success" is measured in terms of whether the program is achieving the particular goals the recipient has established for the program. If the recipient has established no particular goals, the program is successful if its participants are overcoming their language barriers sufficiently well and sufficiently promptly to participate meaningfully in the recipient's programs.

On January 7, 2015, OCR and the U.S. Department of Justice jointly issued a Dear Colleague Letter (2015 DCL), “English Learner Students and Limited English Proficient Parents,” designed to assist beneficiaries in meeting their legal obligations to ensure that EL students can participate meaningfully and equally in educational programs and services and that parents with limited English proficiency have meaningful access to district- and school-related information. The 2015 DCL provides an outline of the legal obligations of recipient institutions towards EL students, discusses compliance issues that frequently arise in OCR investigations involving EL students, and offers approaches that recipients may use to meet their obligations to EL students and their parents. The

guidance provides clarifying information, for example, on a school district's responsibilities regarding staffing of EL programs, stating that recipient school districts have a Federal obligation to ensure 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. Further, the 2015 DCL discusses recipient school districts' obligation to provide EL students with adequate resources, including adequate quantities of English language development materials available at the appropriate English proficiency and grade levels and appropriate bilingual materials for bilingual programs. The 2015 DCL also clarifies how a school district should monitor its program, comparing student performance in the aggregate to student never identified as EL students and that "meaningful EL program evaluations include longitudinal data that compare performance in the core content areas (*e.g.*, valid and reliable standardized tests in those areas), graduation, dropout, and retention data for EL students as they progress through the program, former EL students, and never-EL students." Another important factor is the amount of time it takes for EL students to move up and out of the program.

Finally, many school districts design their alternative language programs to temporarily emphasize English over other subjects. While schools with such programs may discontinue special instruction in English once EL students become English-proficient, schools retain an obligation to provide assistance necessary to remedy academic deficits that may have occurred in other subjects while a student was focusing on learning English. In addition, as noted in the 2015 DCL, while EL programs may require that EL students receive separate instruction for a limited period of time, the Departments expect school districts to carry out their chosen program in the least segregative manner consistent with achieving the program's stated educational goals. Thus, school districts should not retain EL students in EL programs for periods longer or shorter than necessary to achieve the program's educational goals; nor should districts retain EL students in EL-only classes for periods longer or shorter than required by each student's level of English proficiency, time and progress in the EL program, and the stated goals of the EL program.

### **Information Obtained by OCR**

- **The District's EL Services Program Model and General Description of the Program**

The 1985 Policy Memorandum states that, when considering whether a school district is in compliance with Title VI, OCR considers whether the district's alternative language program is likely to meet the educational needs of language-minority students effectively. The 1991 Memorandum states that a school district may demonstrate that its program is likely to be effective by showing that the educational approach used is considered sound by some experts in the field or that it is a legitimate experimental strategy. Some approaches that OCR has recognized as falling under this category include transitional bilingual education, bilingual/bicultural education, structured immersion, developmental bilingual education, and English as a Second Language (ESL). If a school district is

using a different approach, it can demonstrate Title VI compliance if it can show that some experts in the field consider the approach sound or that it is considered a legitimate experimental strategy.

OCR interviewed the District's xxx xxxxxxx, who stated that the District has four magnet elementary and middle schools and one high school that emphasize foreign language<sup>1</sup>, and that EL services are available at every school in the District. The xxx xxxxxxx explained that the District uses a variety of methods, including an English-Spanish Dual Language program and Sheltered English Language Learning at the Academy of Multilingual Immersion Studies. The District provides these magnet schools as an option to the families of EL students, as these schools provide specialized programs that cater to EL students. However, the xxx xxxxxxx stated that EL students are free to attend any school in the District, and that outside of the magnet schools District building instructors use methods deemed appropriate for individual students based on where they are in the English language acquisition spectrum. Further, the District's Building Level Service Delivery Guide for English Language Learners School Year 2012-13 (updated Summer 2011), submitted by the District to OCR during the investigation, describes the District's general approach to providing services to EL students. It references academic documents considered in the creation of the District's EL program.

However, neither the xxx xxxxxxx nor the documentation provided identified the District's specific educational approach or approaches at specific schools other than the five identified above. The Delivery Guide dictates that buildings should choose one from the following delivery models: ESL push-in; ESL pull-out; ESL class period; ESL content-based instructional models; utilization of the ESL resource center; Sheltered Instruction Observation Protocol (SIOP); and early-exit bilingual programs; late-exit bilingual programs; dual language immersion programs; and structured English immersion programs.

The xxx xxxxxxx stated that, after the students' language skills are evaluated, the District identifies them as needing "Tier I, Tier II, or Tier III level interventions." She stated that Tier I students have the highest level of English acquisition, and Tier III students have the least. As such, the District provides more interventions for Tier III students than Tier I students. The xxx xxxxxxx pointed out that, while each tier employs standard interventions, each student has an LEP plan custom tailored to that student's need. Such plans are available to EL students at any school in the District.

Similar to how the xxx xxxxxxx described the three tiers of EL students, determined by need, the District's Delivery Guide also provides for three tiers of support offered to District schools based on their needs with respect to the size and proficiency of each

---

<sup>1</sup> Withrow University High School has an international language program; the Academy of Multilingual Immersion Studies offers immersion and partial immersion curriculums for Spanish and ESL programs for preschool through eighth-grade students; AWL offers second language acquisition programs in several languages for preschool through eighth-grade students; Bond Hill Academy offers a French fluency program for preschool through sixth-grade students; and Fairview-Clifton Language School offers a German language based curriculum.

buildings' EL student population. Tier III schools, i.e., those that need the most assistance (defined as: having more than 100 EL students with low proficiency; having an EL subgroup that fails to make adequate yearly progress; being identified as an EL site; or choosing to hire EL staff to support the EL population) get the greatest amount of support from the District. Tier I schools, which need the least assistance (defined as having fewer than 20 EL students who have low proficiency, fail to advance with proficiency, or score at certain levels showing on-track or proficient on certain assessments) receive the least support from the District. Tier II schools are in the middle with respect to the level of students' English proficiency and the services provided from the District level.

The Delivery Guide, on page five, provides, "All buildings within the [District] shall provide ESL services to ELL/LEP students." The Delivery Guide further provides that programs are to be designed at the building level.

The information obtained to date does not indicate which alternative language programs are implemented in which District schools.

- **Implementation of the Program**

- Identification and Assessment

A school district should have procedures in place for identifying and assessing EL students to ensure that all national origin language minority students who are unable to participate effectively in the mainstream instructional program, due to their limited English proficiency, are receiving alternative language services. Pursuant to this, school districts must identify upon enrollment in the district each national minority student, in kindergarten through grade twelve, who has a primary or home language other than English (PHLOTE). PHLOTE students should thereafter be assessed in a timely manner using objective assessment instruments to determine if the students require alternative language services because of limited proficiency in reading, writing, speaking, or understanding the English language. The criteria a school district uses to determine eligibility for EL placement must be objective and must ensure that all students receive alternative language services who, because of limited English proficiency, are not able to effectively participate in a school district's regular program. OCR does not prescribe particular assessments. However, OCR generally requires school districts to assess all four language domains (reading, writing, speaking, and comprehension). *See, e.g., 1985 Policy Memorandum; 1991 Policy Update.*

The District's Delivery Guide notes that EL students are identified upon enrollment by a Home Language Survey. If at that point a student is identified as potentially EL by indicating that a language other than English is spoken at home or by a primary caregiver, the student is referred to the District's Office of Second Language Acquisition within 24 hours, where the District begins its determination of whether the student is EL. The District uses five methods for determining English language proficiency. First, there is a District-approved language proficiency assessment. Second, students are given the

OTELA. The OTELA is a state-approved assessment. Third, the District uses the AIMSweb assessment system, which uses the information obtained through the assessments to determine the EL students' skills to determine what is needed from the District's Office of Second Language Acquisition. Fourth, the District considers District and classroom assessments. Finally, the District may use students' Ohio Achievement Assessment/Ohio Graduation Test scores in determining language proficiency.

The xxx xxxxxxxx confirmed that PHLOTE students are identified via home language surveys and assessed to determine EL status.

The information obtained to date does not raise any compliance concerns. OCR has not, however, reviewed specific students' records and determined how the District's identification and assessment methods are applied in practice.

- Alternative Program Staff

School districts have an obligation to provide the staff necessary to implement their chosen program properly within a reasonable period of time. When formal qualifications have been established and when a school district generally requires its teachers in other subjects to meet formal requirements, a recipient must either hire qualified teachers for EL students or require that teachers already on staff work toward attaining those formal qualifications. School districts must ensure that the EL student-teacher ratio is proportional to the student-teacher ratio of English-speaking students and allows teachers to implement the school district's educational program. *See* 1991 Policy Update.

If a recipient uses a method other than bilingual education (such as ESL or structured immersion), the recipient should ascertain that teachers who use those methods have been adequately trained in them. This training can take the form of in-service training, formal college coursework, or a combination of the two. A recipient should be able to show that it has determined that its teachers have mastered the skills necessary to teach effectively in a program for EL students. *See* 1991 Policy Update.

Additionally, the alternative program teachers must be available in sufficient numbers to ensure effective implementation of the recipient's chosen alternative program. Alternative program support staff must be qualified for the educational support roles that they fulfill in a recipient's alternative program. Minimally, they must have the English language and native language skills appropriate to their assigned, non-instructional role in the alternative program. Certified/ endorsed instructional staff must closely and appropriately supervise the support staff.

The District's xxx xxxxx stated that, in order to ensure that it is meeting the needs of EL students in non-magnet schools, the District has 11 full-time Teaching English to Speakers of Other Languages (TESOL) certified and SIOP-trained staff that go from

building to building tracking the District's 2,074<sup>2</sup> EL students and providing guidance for teachers and tutors that work with them. Additionally, the xxx xxxxxxx stated that the District employs more than 50 certified TESOL instructors. In addition to the TESOL instructors, the xxx xxxxxxx explained that many more staff throughout the District have been SIOP-trained.

The District's Delivery Guide states that the District supports the buildings with the following:

- the ESL manager, who monitors, evaluates, and manages District-wide EL programs and services, among other administrative tasks;
- itinerant ESL teachers, who provide instructional support at low-incidence, high need buildings; i.e. buildings in which there are low numbers of students with high language acquisition needs;
- a culturally responsive practices school psychologist to assist with EL students who are having academic and/or behavioral difficulties;
- a bilingual school social worker who works with students, families, and school staff to facilitate services related to school adjustment and student's academic/behavioral progress;
- an assistant school community coordinator who, in part, serves as a liaison between EL parents and schools to facilitate the exchange of ideas about EL students' needs, instruction, curriculum, and EL proficiency standards; and
- an Office of Second Language Acquisition/ELL Welcome Center to assist buildings with multiple aspects of their EL programming.

The information OCR obtained to date is insufficient to determine whether the District's staffing is adequate. The District has a significant number of trained staff and administrative support positions, but the information provided by the District does not detail how that staff is deployed. It is also unclear from the information obtained to date how the District determines whether staff are sufficiently trained, qualified, and assigned to implement the various alternative language services programs the District allows individual schools to choose from.

- Instructional Materials and Facilities

As noted above, in order to ensure that alternative language program services are delivered effectively, districts are expected to provide adequate resources, such as instructional materials and equipment, in accordance with the requirements of the

---

<sup>2</sup> Based on the District's 2014-2015 Ohio School Report Card.  
<http://reportcard.education.ohio.gov/Pages/District-Report.aspx?DistrictIRN=043752>

program. These resources must be made available in a timely manner to staff persons providing alternative language program services. *See* 1985 Policy Memorandum.

Based on the general prohibitions of different treatment under Title VI, EL students should receive the benefits of facilities, equipment, and services that are comparable to those available to other students with respect to such factors as space, quantity, quality, condition, availability, appearance, and usefulness.

The xxx xxxxxxxx stated that the District uses grade-level-specific materials for EL students, catering to the students' language acquisition needs. She stated that the details are handled at the building level. The information OCR obtained to date does not include building-level specific information with regard to materials and facilities.

- Peer Integration

EL students may not be segregated from their non-EL peers except to the extent educationally justified to meet the recipient's stated goals for the alternative program. The *Castañeda* court found that limited segregation of EL students is permissible where the benefits accrued in remedying language barriers, which impede their academic potential, outweigh the adverse effects of the segregation. OCR's inquiry in this area focuses on whether the school district has carried out its chosen program in the least segregative manner consistent with achieving its stated goals. *See* 1991 Policy Update.

Given the nature of the District's program, in which EL students are in regular classrooms most or all of the school day and receive structured English immersion, sheltered English instruction, pull-out English instruction, and in limited circumstances, self-contained ESL classrooms, the District does not segregate the EL students more than is educationally justified. OCR found no evidence that EL students are being segregated from other students on the basis of their limited-English proficiency.

While the District has schools that cater to EL students, EL students at the District are free to attend any District school and receive EL services there. The information to date does not indicate that the District assigns students to schools based on EL or national origin status. However, OCR noted that the Ohio 2014-2015 School Report Card Information for the District indicated that 6.2% of the District's students are identified as EL.

- Access to Special Education

The May 1970 Memorandum states that school districts may not assign EL students to special education programs on the basis of criteria that essentially measure and evaluate English-language skills. Accordingly, a 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. In investigating whether a school district discriminates against EL students in its special education evaluation and placement processes, OCR focuses on the requirements of the

Section 504 regulation at 34 C.F.R. § 104.35, in particular Section 104.35(b)(1)'s requirement that tests be validated for the specific purpose for which they are used; Section 104.35(c)(1)'s requirement that school districts draw upon a variety of sources in interpreting evaluation data and making placement decisions, including information about the student's social or cultural background (including limited English proficiency), and Section 104.35(c)(3)'s requirement that placement decisions be made by a group of persons knowledgeable about the student, the evaluation, data, and the placement options (including the student's limited English proficiency and how that may affect the evaluation data and the placement options).

In reviewing whether a school district's special education referral and evaluation procedures are in compliance with OCR policy, OCR generally considers whether staff use objective data and professional judgment to account for the effect of the language development and proficiency of language-minority students. If a student is not proficient in the language skills required to complete and assessment instrument, the results may not be valid. If school district staff rely primarily on invalid test data, in lieu of other sources of information about the student, the school district may be in violation of Section 504, Title II, and Title VI. If no one involved in interpreting evaluation data and making placement decisions is knowledgeable about limited English proficiency, the school district may be in violation of Section 504, Title II, and Title VI.

In addition, school districts may not maintain "no dual services" policies or practices; if an EL student with disabilities needs both alternative language services and special education services, the student should be given both types of services. *See* 1991 Policy Update.

The xxx xxxxxxxx stated that the District dual-identifies students as EL and special education. She stated that the District has a specific school xxxxxxxx tasked with ensuring that students are not erroneously identified in either category. The information OCR obtained to date with respect to the Student appears to confirm that this is the case.

- Access to Special Programs and Extracurricular Activities

If a school district has a process for locating and identifying gifted and talented students, it must also locate and identify gifted and talented EL students, and provide equal opportunity for EL students to participate in gifted and talented programs, and nonacademic and extracurricular activities. To the extent feasible, placement tests should not be of a type that the student's limited proficiency in English prevents him/her from qualifying for a program for which he/she would be otherwise qualified. Admission to these programs should not rely on just one criterion. EL students cannot be categorically excluded from gifted/talented or other specialized programs. If a recipient has a process for locating and identifying gifted/talented/students, it must also locate and identify gifted/talented EL students who could benefit from the program. *See* 1991 Policy Update.

Unless the particular gifted/talented program or program component requires proficiency in English language skills for meaningful participation, the recipient must ensure that evaluation and testing procedures do not screen out EL students because of their limited English proficiency. To the extent feasible, tests used to place students in specialized programs should not be of a type that the student's limited proficiency in English will prevent him/her from qualifying for a program for which they would otherwise be qualified. *See* 1991 Policy Update.

Information about the District's schools on the District's website shows a wide variety of programs and activities offered at each school, including the five schools mentioned above. For example, the web page for the Academy of Multilingual Immersion only indicated one or two school clubs or organizations and listed a few student performances that take place during the school year. AWL's web page during the 2015-2016 school year indicated that this school offered many events, field trips, and special programs, and is designated as a "community learning center" offering a variety of afterschool programs. The Withrow University High School web page indicated that the school offers several athletics teams, student organizations, and clubs.

- Exiting Criteria and Monitoring of Exited Students

A recipient must exit an EL student from an alternative language services program only after determining through objective measures that the student is sufficiently proficient in speaking, reading, writing, and understanding the English language to participate effectively in the school district's regular education program. Exited students must be monitored for a reasonable time period to ensure that they are not in need of additional alternative language services. Generally, a recipient will have wide latitude in determining criteria for exiting students from an alternative language program, but there are a few basic standards that should be met. First, exit criteria should be based on objective standards, such as standardized test scores, and the school 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 ALS program unless they can read, write, and comprehend English well enough to participate meaningfully in the recipient's program. Exit criteria that simply test a student's oral language skills are inadequate. Finally, alternative programs cannot be "dead end" tracks to segregate national origin minority students. *See* 1991 Policy Update, citing *Keyes v. School Dist. No. 1*, 576 F. Supp. 1503, 1518 (D. Colo. 1983).

The District maintains a formal process for exiting students from the EL program. The District's Delivery Guide provides that students must be classified as EL for as long as they meet the definition of limited English proficient. The District assesses EL students' progress annually to make that determination. The District exits students from its EL program when the student obtains a composite score of 5 on the OTELA; or obtains a composite score of 4 on the OTELA, subsequently completes a trial period of mainstream instruction, and obtains a composite score of 4 or above on the OTELA during the trial period of mainstream instruction. Further, students will not be exited from the EL program before third grade, and students who obtain a composite score of 4 or 5 on the

OTELA in second grade and obtain a composite score of 4 or above in the OTELA during the completion of a trial period of mainstream instruction in third grade shall be exited from the program.

The xxx xxxxxxx told OCR that her staff will consult with teachers even if a student scores a 5 on the OTELA to ensure that exiting is appropriate. The xxx xxxxxxx also stated that the District monitors exited students, although this does not seem to be provided for in the Delivery Guide. The xxxx xxxxxxx said that pre-high school students who are exited are monitored with assessments twice a year for two years, and for high school students the District will look at the student's grades.

The information obtained to date raises a potential concern with respect to whether the District is monitoring students for a reasonable time after exiting to determine whether they need additional services. However, OCR has not obtained specific student data to determine the actual exiting and monitoring practices at the District's individual schools.

- Alternative Program Evaluation and Modification

OCR has interpreted Title VI as requiring that school districts do more than adopt and implement an alternative language services program; districts are expected to offer programs that are successful in providing EL students with equal education opportunities. The only way for a school district to gauge success or failure is to have an ongoing alternative language services program evaluation and to promptly address any deficiencies noted during the self-evaluation process. Generally, "success" of a program is measured in terms of whether the program is achieving the particular goals the recipient has established for the program. If the recipient has established no particular goals, the program is successful if its participants are overcoming their language barriers sufficiently well and sufficiently promptly to participate meaningfully in the recipient's programs. If EL students are not acquiring sufficient English language skills to allow effective participation in regular academic programs in a reasonable amount of time and in a manner equivalent to the participation of non-EL proficient students, the school district must make appropriate modifications to its alternative program. *See* 1991 Policy Update.

The District's Delivery Guide calls for the entire EL program to be evaluated for effectiveness annually by all those involved in the EL program. Specifically, the Guide provides that EL subgroup data is monitored in order to determine effectiveness of EL services and supports. Program effectiveness is evaluated annually, and modified as necessary. However, OCR has not reviewed the District's program evaluation process in practice.

## **Alleged Disability Discrimination**

### **Applicable Legal Standards**



[xxx paragraph xxx]

### **Voluntary Resolution**

As noted above, prior to the conclusion of OCR’s investigation the District requested to resolve this complaint pursuant to Section 302 of OCR’s Case Processing Manual (CPM). The CPM provides that a complaint may be resolved before the conclusion of an OCR investigation if a recipient asks to resolve the complaint and signs a resolution agreement that addresses the complaint allegations. Such a request does not constitute an admission of liability on the part of the District, nor does it constitute a determination by OCR that the District has violated any of the laws that OCR enforces. The provisions of the resolution agreement are to be aligned with the complaint allegations or the information obtained during the investigation and consistent with applicable regulations.

The District signed the enclosed resolution agreement (the Agreement) on June 22, 2016. The Agreement resolves the allegations and is aligned with regulatory standards and the information obtained to date, as explained above. Specifically, the Agreement calls for the Student to receive xxxxx xxxxxxxx xxxxxxxxxx , to address any denial of FAPE that may have occurred in violation of 34 C.F.R. § 104.33, and any failure to provide needed xxxxx xxxxx xxxxxx in violation of 34 C.F.R. § 100.3. The Agreement also calls for the Student’s IEP team to xxxx xxxxxxxx xxxxxxx xxxxxxx, to address any potential IEP changes that xxxxx xxxxx xxxx xxxxx xxxxx xxxxx in violation of 34 C.F.R. § 104.35. The Agreement also addresses the potential issues raised by the information obtained to date regarding the District’s overall EL program and its compliance with 34 C.F.R. § 100.3 and OCR’s applicable policy standards, by requiring the District to specify and keep record of the specific alternative language services program models being employed at each school; revise its Delivery Guide to specify procedures for monitoring of exited students and the resources and materials needed at each building for the program model(s) employed; develop a staffing plan to ensure that appropriate numbers of qualified and trained staff are available at each school to implement the specific program model being used at the buildings; and implement a comprehensive program evaluation plan to analyze the effectiveness of its EL program at each building, including analysis of the students’ opportunity to benefit from special programs and extracurricular activities and of EL student integration

**Conclusion**

In light of the signed Agreement, OCR finds that this complaint is resolved, and OCR is closing its investigation as of the date of this letter. OCR will, however, monitor the District's implementation of the Agreement. Should the District fail to fully implement the Agreement, OCR will take appropriate action to ensure the District's compliance with Section 504 and Title VI.

This concludes OCR's investigation of the complaint and 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 complaint resolution process. If this happens, the harmed individual may file a 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, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

The Complainant may file a private suit in federal court, whether or not OCR finds a violation.

If you have any questions regarding this letter, please contact xxxxxx xxxxx xxxxxx xxxxxx xxxxxxxx xxxxxxxx.

We look forward to receiving the District's monitoring report by September 1, 2016. Please forward the District's monitoring reports to xx xxxxxxxx xxxxx, who will be overseeing the District's implementation of the Agreement. Should you have any questions regarding the monitoring of the Agreement, please contact xx xxxxxx at xxxxxx xxxxxxxx xxxxxxxx xxxxxxxx.

Sincerely,

/s

Meena Morey Chandra  
Regional Director

Enclosure