

average requirement for all students because it is not necessary to meaningful participation in AP Calculus.

Some examples of when the Departments have identified compliance issues in this area include when schools: (1) schedule EL language acquisition services during times when GATE programs meet; (2) exclude EL students from all components of a GATE program, even though proficiency in English is not necessary for a meaningful participation in a math, science, or technology component of the GATE program; (3) use arbitrarily high admissions criteria in English for a GATE math program that causes the exclusion of EL students who could meet the math requirement but not the arbitrarily high English requirement; or (4) solicit teacher recommendations of students for gifted programs from all teachers except teachers of EL program classes.

In their investigations, the Departments consider, among other things, whether:

- ✓ *SEAs’ or school districts’ gifted evaluation and testing procedures screen out EL students because of their limited English proficiency when participation in particular gifted programs does not require proficiency in English; and*
- ✓ *SEAs and school districts monitor the extent to which EL and former EL students are referred for and participate in gifted and talented education programs, as well as honors and Advanced Placement courses, as compared to their never-EL peers.*

E. Avoiding Unnecessary Segregation of EL Students

EL programs may not unjustifiably segregate students on the basis of national origin or EL status. While EL programs may require that EL students receive separate instruction for a limited period of time, the Departments expect school districts and SEAs to carry out their chosen program in the least segregative manner consistent with achieving the program’s stated educational goals.⁵⁹ Although there may be program-related educational justifications for providing a degree of separate academic instruction to EL students, the Departments would rarely find a program-related justification for instructing EL and non-EL students separately in subjects like physical education, art, and music or for separating students during activity periods outside of classroom instruction (*i.e.*, during lunch, recess, assemblies, and extracurricular activities).

In determining whether an SEA or school district is unnecessarily segregating EL students, the Departments examine whether the nature and degree of segregation is necessary to achieve the goals of an educationally sound and effective EL program. As discussed more thoroughly in Part II. H below, school districts should not retain EL students in EL programs for periods longer or

⁵⁹ See 1991 OCR Guidance; *Castañeda*, 648 F.2d at 998 n.4 (“We assume that the segregation resulting from a language remediation program would be minimized to the greatest extent possible and that the programs would have as a goal the integration of the Spanish-speaking student into the English language classroom as soon as possible.”).

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.

- Example 12: The goals of a Spanish transitional bilingual education program are to teach EL students English and grade-level content in Spanish so that they do not fall behind academically as they transition to literacy in English and more content classes in English over time. This program may segregate beginner-level EL students for their ESL instruction and their content classes that are taught in Spanish. As the EL students acquire higher levels of English proficiency, the program should transition them from EL-only content classes in Spanish to integrated content classes in English with continuing primary language or other support needed to access the content.

In evaluating whether the degree of segregation is necessary in EL programs, the Departments consider whether entry and exit into a segregated EL program model are voluntary, whether the program is reasonably designed to provide EL students comparable access to the standard curriculum as never-EL students within a reasonable length of time, whether EL students in the program have the same range and level of extracurricular activities and additional services as do students in other environments, and whether the district at least annually assesses the English proficiency and appropriate level of language assistance services for its EL students and determines their eligibility to exit from the EL program based on valid and reliable exit criteria.

Some districts use newcomer programs as a bridge to general education classrooms. Districts operating newcomer programs or schools should take particular care to avoid unnecessary segregation. For example, it is unlikely the Departments would find a violation in the area of EL student segregation by a school district that offers a voluntary newcomer EL program with self-contained EL programs for a limited duration (generally for one year) so long as it schedules the newcomer EL students’ nonacademic subjects, lunchtime, and recess with non-EL students; encourages newcomer EL students to participate in integrated after-school activities; and evaluates their English proficiency regularly to allow appropriate transitions out of the newcomer EL program throughout the academic year.

Some examples of when the Departments have found compliance issues involving segregation include when school districts: (1) fail to give segregated EL students access to their grade-level curriculum, special education, or extracurricular activities; (2) segregate EL students for both academic and non-academic subjects, such as recess, physical education, art, and music; (3) maintain students in a language assistance program longer than necessary to achieve the district’s goals for the program; and (4) place EL students in more segregated newcomer programs due to perceived behavior problems or perceived special needs.

In their investigations, the Departments consider, among other things, whether:

- ✓ *SEAs and school districts educate EL students in the least segregative manner consistent with the goals of the educationally sound and effective program selected by the SEA or the district; and*
- ✓ *SEAs’ monitoring of school districts’ EL programs assesses whether the programs unnecessarily segregate EL students and, if so, rectifies this noncompliance.*

F. Evaluating EL Students for Special Education Services and Providing Special Education and English Language Services

The Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973 (Section 504) address the rights of students with disabilities in the education context.⁶⁰ The Department of Education’s Office of Special Education Programs, a component of ED’s Office of Special Education and Rehabilitative Services, administers the IDEA. OCR and DOJ share authority for enforcing Section 504 in the educational context, and DOJ coordinates enforcement of Section 504 across Federal agencies.⁶¹

SEAs and school districts must ensure that all EL students who may have a disability, like all other students who may have a disability and need services under IDEA or Section 504, are located, identified, and evaluated for special education and disability-related services in a timely manner. When conducting such evaluations, school districts must consider the English language proficiency of EL students in determining the appropriate assessments and other evaluation materials to be used. School districts must not identify or determine that EL students are students with disabilities because of their limited English language proficiency.

School districts must provide EL students with disabilities with both the language assistance and disability-related services⁶² to which they are entitled under Federal law. Districts must also

⁶⁰ 20 U.S.C. §§ 1400-1419; 34 C.F.R. pt. 300 (IDEA, Part B and its implementing regulations); 29 U.S.C. § 794 and 34 C.F.R. pt. 104 (Section 504 and its implementing regulations).

⁶¹ Any Federal agency, such as the Department of Education or Justice, that provides Federal funds to an SEA or school district may initiate a compliance review to ensure compliance with, or investigate a complaint alleging a violation of, Section 504 and its implementing regulations. DOJ may also initiate a Section 504 or IDEA suit if, after notice of a violation from the Federal funding agency, a recipient of Federal funds fails to resolve noncompliance with Section 504 or IDEA voluntarily and the agency refers the case to DOJ. Furthermore, DOJ can participate in private litigation involving Section 504 or IDEA.

⁶² The term “disability-related services” is intended to encompass either special education and related services provided to children with disabilities who are eligible for services under the IDEA or regular or special education and related aids and services provided to qualified students with disabilities under Section 504.

inform a parent of an EL student with an individualized education program (IEP) how the language instruction education program meets the objectives of the child’s IEP.⁶³

The Departments are aware that some school districts have a formal or informal policy of “no dual services,” *i.e.*, a policy of allowing students to receive either EL services or special education services, but not both. Other districts have a policy of delaying disability evaluations of EL students for special education and related services for a specified period of time based on their EL status.⁶⁴ These policies are impermissible under the IDEA and Federal civil rights laws, and the Departments expect SEAs to address these policies in monitoring districts’ compliance with Federal law. Further, even if a parent of an EL student with a disability declines disability-related services under the IDEA or Section 504, that student with a disability remains entitled to all EL rights and services as described in this guidance.⁶⁵

1. Individuals with Disabilities Education Act (IDEA)

The IDEA requires SEAs and school districts to, among other things, make available a free appropriate public education (FAPE) to all eligible children with disabilities.⁶⁶ Under the IDEA, FAPE means, among other things, special education and related services at no cost to parents provided in conformity with the student’s IEP.⁶⁷

Under the IDEA, school districts must also identify, locate, and evaluate all children who may have disabilities and who need special education and related services, regardless of the severity of their disabilities.⁶⁸ A parent or a school district may initiate a request for an initial evaluation

⁶³ 20 U.S.C. §§ 6312(g)(1)(A)(vii) (Title I), 7012(a)(7) (Title III). If the parent is LEP, this information must be in a language the parent understands. See discussion *infra* in Part II. J, “Ensuring Meaningful Communication with Limited English Proficient Parents.”

⁶⁴ The court in *Mumid v. Abraham Lincoln High School*, 618 F.3d 789 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 1478 (2011), rejected a private claim that such a policy was intentional national origin discrimination in violation of Title VI. The EEOA does not require proof of intentional national origin discrimination to establish a violation of section 1703(f), see *Castañeda*, 648 F.2d at 1004, and the court in *Mumid* assumed that such a policy would violate the EEOA, but did not reach the merits of that claim for other reasons. *Mumid*, 618 F.3d at 795-96. The court’s discussion of Title VI was limited to a private right of action and did not discuss the Federal government’s enforcement of Title VI or the other statutes discussed in this section.

⁶⁵ For more information regarding EL students with disabilities and Title III, see the Department of Education’s Questions and Answers Regarding Inclusion of English Learners with Disabilities in English Language Proficiency Assessments and Title III Annual Measurable Achievement Objectives, available at <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/q-and-a-on-elp-swd.pdf>. Among other matters, this guidance addresses requirements for including EL students with disabilities in the annual ELP assessment, including providing appropriate accommodations or alternate assessments when necessary.

⁶⁶ 20 U.S.C. §§ 1412(a)(1), 1413(a)(1); 34 C.F.R. §§ 300.101-300.102, 300.201.

⁶⁷ 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.

⁶⁸ 20 U.S.C. §§ 1412(a)(3), 1413(a)(1); 34 C.F.R. §§ 300.111, 300.201. Under the IDEA, a child with a disability means a child evaluated as having an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in IDEA as emotional disturbance), an orthopedic impairment, autism, traumatic brain injury, other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special

to determine if a child is a child with a disability under the IDEA.⁶⁹ A school district must ensure that assessments and other evaluation materials used to evaluate a child with a disability are “provided and administered in the child’s native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer.”⁷⁰ This is true even for those EL students whose parents have opted their children out of EL programs.⁷¹ A student cannot be determined to be a child with a disability if the “determinant factor” is limited English proficiency and if the student does not otherwise meet the definition of a “child with a disability” under the IDEA.⁷²

- Example 13: A teacher thinks that a Spanish-speaking EL student with beginner level English has a learning disability. She would like to have the student evaluated for a disability, but believes that the student must complete one year in the EL program or achieve intermediate proficiency in English before being evaluated for a disability or receiving special education and related services. She is incorrect. The principal explains to her that if she believes the student has a disability, the school district must seek parental consent for an initial evaluation and once consent is granted must evaluate the student in a timely manner. After the parents consent, the district arranges for a bilingual psychologist to conduct the evaluation in Spanish, given the EL student’s ELP level and language background.

Once a school district determines that an EL student is a child with a disability under the IDEA and needs special education and related services, the school district is responsible for determining, through the development of an IEP at a meeting of the IEP Team (which includes the child’s parents and school officials), the special education and related services necessary to make FAPE available to the child.⁷³ As part of this process, the IDEA requires that the IEP team consider, among other special factors, the language needs of a child with limited English

education and related services. 20 U.S.C. § 1401(3); 34 C.F.R. § 300.8. *See infra* note 77 for the definition of an individual with a disability under Section 504.

⁶⁹ 34 C.F.R. § 300.301(b). Once parental consent, as defined in 34 C.F.R. § 300.9, is obtained, the evaluation must be conducted within 60 days from the date that parental consent is received, or if the SEA has established a timeframe within which the evaluation must be conducted, within the State-established timeframe. 34 C.F.R. § 300.301(c)(1); *see also* 34 C.F.R. §§ 300.300-300.311.

⁷⁰ 34 C.F.R. § 300.304(c)(1)(ii); 20 U.S.C. § 1414(b)(3)(A)(ii). For the purposes of this document, native language and primary language are interchangeable terms. In determining whether an EL student is a child with a disability under the IDEA, the school district must draw upon information from a variety of sources (*e.g.*, aptitude and achievement tests and social and cultural background), and ensure that all of this information is documented and carefully considered. 34 C.F.R. § 300.306(c)(1).

⁷¹ *See discussion infra* in Part II. G, “Meeting the Needs of EL Students Who Opt Out of EL Programs or Particular EL Services.”

⁷² 20 U.S.C. § 1414(b)(5); 34 C.F.R. § 300.306(b)(1)(iii)-(b)(2).

⁷³ 20 U.S.C. § 1414(b)(4); 34 C.F.R. §§ 300.306(c)(2) and 300.323(c). For more information about IEPs, see 20 U.S.C. § 1414(d) and 34 C.F.R. §§ 300.320-300.324.

proficiency as those needs relate to the child’s IEP.⁷⁴ To implement this requirement, it is essential that the IEP team include participants who have the requisite knowledge of the child’s language needs. To ensure that EL children with disabilities receive services that meet their language and special education needs, it is important for members of the IEP team to include professionals with training, and preferably expertise, in second language acquisition and an understanding of how to differentiate between the student’s limited English proficiency and the student’s disability.⁷⁵ Additionally, the IDEA requires that the school district “take whatever action is necessary to ensure that the parent understands the proceedings of the IEP team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English.”⁷⁶

2. Section 504 of the Rehabilitation Act (Section 504)

Section 504 is a Federal law that prohibits disability discrimination by recipients of Federal financial assistance. Section 504 covers not only students with disabilities who have been found to be eligible for services under the IDEA but also students with disabilities who are not IDEA-eligible, but meet Section 504’s broader definition of disability.⁷⁷ As is true under the IDEA, Section 504 requires school districts to provide FAPE to qualified students with disabilities in a school district’s jurisdiction, regardless of the nature or severity of the student’s disability.⁷⁸ Under Section 504, depending on the individual needs of the student, FAPE can include special education and related aids and services or can consist of regular education with related aids and

⁷⁴ 20 U.S.C. § 1414(d)(3)(B)(ii); 34 C.F.R. § 300.324(a)(2)(ii). IEP Teams also must consider this special factor in the review and revision of IEPs. 34 C.F.R. § 300.324(b)(2).

⁷⁵ The Departments are aware that some States are using joint EL and IEP teams effectively to determine appropriate services for eligible students.

⁷⁶ 34 C.F.R. § 300.322(e); *see also id.* §§ 300.9, 300.503(c)(1)(ii), 300.612(a)(1). Under Title VI and the EEOA, for an LEP parent to have meaningful access to an IEP or Section 504 plan meeting, it also may be necessary to have the IEPs, Section 504 plans, or related documents translated into the parent’s primary language. For information on the separate Title VI obligations of school districts to communicate with LEP parents, *see infra* Part II. J, “Ensuring Meaningful Communication with Limited English Proficient Parents.”

⁷⁷ A person with a disability under Section 504 is an individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment. 29 U.S.C. § 705(9)(B), (20)(B) (as amended by the Americans with Disabilities Act Amendments Act of 2008); 34 C.F.R. § 104.3(j). For additional information on the broadened meaning of disability after the effective date of the 2008 Amendments Act, see OCR’s 2012 Dear Colleague Letter and Frequently Asked Questions document, *available at* www.ed.gov/ocr/letters/colleague-201109.html, and www.ed.gov/ocr/docs/dcl-504faq-201109.html. With respect to public elementary and secondary educational services, a student with a disability is “qualified” under Section 504 if he or she is of an age during which students without disabilities are provided such services; of any age during which it is mandatory under State law to provide such services to students without disabilities; or is a person to whom a State is required to provide FAPE under IDEA. 34 C.F.R. § 104.3(l)(2).

⁷⁸ 34 C.F.R. §§ 104.33-104.36. OCR shares responsibility with DOJ in the enforcement of Title II of the Americans with Disabilities Act of 1990, which is a Federal law prohibiting disability discrimination in the services, programs, and activities of State and local governments (including public school districts), regardless of whether they receive Federal financial assistance. 42 U.S.C. § 12132. Violations of Section 504 that result from school districts’ failure to meet the obligations identified in this guidance also constitute violations of Title II. 42 U.S.C. § 12201(a). Covered entities also must comply with Title II requirements.

services that are designed to meet the individual educational needs of the student as adequately as the needs of nondisabled students are met. While Section 504 and the IDEA are separate statutes that contain different requirements, as reflected in ED’s regulations, one way to meet the requirements of Section 504 FAPE is to implement an IEP developed in accordance with the IDEA.⁷⁹

As with evaluations under the IDEA, Section 504 evaluations of EL students must measure whether an EL student has a disability and not reflect the student’s lack of proficiency in English. When administering written or oral evaluations to determine whether an EL student has a disability under Section 504, school districts must administer those evaluations in an appropriate language to avoid misclassification.⁸⁰ This is true even for those EL students whose parents have opted their children out of EL programs.⁸¹ Prior to evaluating an EL student, school districts should, to the extent practicable, gather appropriate information about a student’s previous educational background, including any previous language-based interventions.⁸²

- Example 14: An EL student whose parents declined her school’s EL services appears to be falling behind at school. The school decides to conduct an evaluation to determine if she has a disability under Section 504 and needs disability-related services, and obtains consent from the student’s parents. Although the parents have opted out of the school’s EL program, the principal nonetheless ensures that the student’s language needs are considered during the evaluation process, including whether the evaluations should be conducted in the student’s native language and whether they should be administered orally or in writing to help ensure that the evaluation determines whether the student has a disability rather than that the student has limited English proficiency.
- Example 15: An EL high school student recently transferred into his current school district and appears to be struggling in all of his classes. After consulting with his teachers and obtaining consent from his parents, the school district decides that it will evaluate the student to determine if he has a disability under Section 504 and needs special education or related aids and services. Prior to initiating the evaluation, the school district asks the student and his parents about the schools he attended before arriving in the school district and about his experience in those schools. The school district also obtains and reviews records from these previous schools and learns that the student’s ELP was previously assessed, that he was determined to be a native Spanish

⁷⁹ 34 C.F.R. § 104.33(b)(2).

⁸⁰ *Cf.* 20 U.S.C. § 1414(b)(3)(A)(ii); 34 C.F.R. § 300.304(c)(1)(ii); *see also* 34 C.F.R. pt. 104, App. A at number 25, discussion of § 104.35 (recognizing that Title VI requires evaluations in the primary language of the student).

⁸¹ *See* discussion *infra* in Part II. G, “Meeting the Needs of EL Students Who Opt Out of EL Programs or Particular EL Services.”

⁸² In conducting the evaluation and making placement decisions, school districts must draw upon information from a variety of sources (*e.g.*, aptitude and achievement tests and social and cultural background). 34 C.F.R. § 104.35(c) (school district “shall . . . draw upon information from a variety of sources”).

speaker, and that he was provided EL services, but was not evaluated to determine if he needed special education or related aids and services. The school district determines that its disability evaluation of this student should be provided in Spanish.

Some examples of when the Departments have identified compliance issues regarding EL students with disabilities eligible for services under Section 504 or the IDEA include when school districts: (1) deny English language services to EL students with disabilities; (2) evaluate EL students for special education services only in English when the native and dominant language of the EL student is other than English; (3) fail to include staff qualified in EL instruction and second language acquisition in placement decisions under the IDEA and Section 504; or (4) fail to provide interpreters to LEP parents at IEP meetings to ensure that LEP parents understand the proceedings.

When the Departments conduct investigations, compliance reviews, or monitoring activities to determine if an SEA or school district has met its obligations under the civil rights laws and to provide FAPE to an EL student with a disability, the Departments consider, among other things, whether:

- ✓ *The evaluations used to determine whether an EL student has a disability were conducted in the appropriate language based on the student’s needs and language skills, and whether the special education and EL services were determined in light of both the student’s disability and language-related needs;*
- ✓ *The disability determination of an EL student was based on criteria that measure and evaluate the student’s abilities and not the student’s English language skills;*
- ✓ *The EL student was promptly evaluated for disability-related services, or whether there was an impermissible delay on account of his or her EL status and/or level of English proficiency;*
- ✓ *Language assistance services and disability-related services are provided simultaneously to an EL student who has been evaluated and determined to be eligible for both types of services; and*
- ✓ *The individualized plans for providing special education or disability-related services address EL students’ language-related needs.*

G. Meeting the Needs of EL Students Who Opt Out of EL Programs or Particular EL Services

Although school districts have an obligation to serve all EL students, parents have a right to decline or opt their children out of a school district’s EL program or out of particular EL services

within an EL program.⁸³ For example, parents may choose to enroll their child in ESL classes, but decline to enroll their child in EL-only bilingual content classes. School districts may not recommend that parents decline all or some services within an EL program for any reason, including facilitating scheduling of special education services or other scheduling reasons. A parent’s decision to opt out of an EL program or particular EL services must be knowing and voluntary.⁸⁴ Thus, school districts must provide guidance in a language parents can understand to ensure that parents understand their child’s rights, the range of EL services that their child could receive, and the benefits of such services before voluntarily waiving them.⁸⁵

During an investigation, the Departments consider whether a parent’s decision to opt out of an EL program or particular EL services was knowing and voluntary. If a school district asserts that a parent has decided to opt out their child, the Departments will examine the school district’s records, including any documentation of the parent’s opt-out decision and whether the parent signed such documentation. Appropriate documentation is important to support school districts’ assertions and for the Departments to evaluate school districts’ legal compliance.

The Departments’ past investigations have found high numbers of EL students whose parents have opted them out of EL programs or particular services within an EL program due to problematic district practices such as school personnel steering families away from EL programs, or providing incorrect or inadequate information to parents about the EL program, particular services within the program, or their child’s EL status. The Departments have also found noncompliance where school personnel have recommended that families decline EL programs due to insufficient space in such programs or because school districts served only EL students with a basic or emerging level of English. Parents have also been found to have opted their children out of EL programs because the school district did not adequately address parental concerns expressed about the quality of the EL program, their lack of confidence in the EL program offered because the school district was not able to demonstrate the effectiveness of its program, or their belief that their child did not need EL services.

If parents opt their children out of an EL program or specific EL services, the children retain their status as EL students, and the school district remains obligated to take the “affirmative

⁸³ Cf. 34 C.F.R. § 100.3(b)(1), (2); see also 20 U.S.C. §§ 6312(g)(1)(A)(viii) (Title I), 7012(a)(8) (Title III).

⁸⁴ Although not directly related to EL services, courts have found in other areas that a waiver must be informed and/or knowing as well as voluntary. See, e.g., *Town of Newton v. Rumery*, 480 U.S. 386, 393 (1987) (any waiver of statutory right of action must “be the product of an informed and voluntary decision”); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974) (waiver must be “voluntary and knowing”).

⁸⁵ Parental notification of these rights must “be in an understandable and uniform format and, to the extent practicable, provided in a language that the parent can understand.” 20 U.S.C. §§ 6312(g)(2) (Title I), 7012(c) (Title III). This means that whenever practicable, written translations of printed information must be provided to parents in a language that they understand; but if written translations are not practicable, SEAs and school districts must ensure parents are provided oral interpretations of the written information. See 67 Fed. Reg. 71,710, 71,750 (2002). This obligation is consistent with Title VI and EEOA obligations of school districts to ensure meaningful communication with LEP parents, discussed in Part II. J “Ensuring Meaningful Communication with Limited English Proficient Parents.”

steps” required by Title VI and the “appropriate action” required by the EEOA to provide these EL students access to its educational programs. Thus, the Departments expect school districts to meet the English-language and other academic needs of their opt-out EL students under the civil rights laws.⁸⁶ To ensure these needs of opt-out EL students are being met, school districts must periodically monitor the progress of students who have opted out of EL programs or certain EL services.⁸⁷ If an EL student who opted out of the school district’s EL programs or services does not demonstrate appropriate growth in English proficiency, or struggles in one or more subjects due to language barriers, the school district’s affirmative steps include informing the EL student’s parents of his or her lack of progress and offering the parents further opportunities to enroll the student in the EL program or at least certain EL services at any time.

- Example 16: A student is tested and determined to be an EL student. The parent initially refuses EL program services because the parent believes her child speaks fluent English. After the first quarter, the student’s teacher contacts the parent to discuss that the EL student is struggling with reading and writing assignments despite her strong English-speaking skills. The teacher offers a period of ELD and sheltered content classes, explaining how both can improve the student’s proficiency in reading and writing. The parent accepts the ELD services and agrees to reevaluate the placement at the end of the school year.

If the school district’s monitoring of the opt-out EL student shows the student is struggling but the parent continues to decline the EL program or services, the school district should take affirmative and appropriate steps to meet its civil rights obligations. School districts may accomplish this in a variety of ways. One such way would be providing adequate training to the opt-out EL student’s general education teachers on second-language acquisition and ELD to ensure the student’s access to some language acquisition supports.

- Example 17: At the beginning of the school year a kindergarten student is tested and determined to be EL. The parent declined Title III and English language services that were offered in segregated classes attended by EL students only. Although the student’s parents opted the child out of EL-specific services, the school recognizes that the student continues to struggle in English. The school responds by training the kindergarten teacher to use ELD strategies in the EL student’s regular, integrated classroom.

Further, opt-out EL students must have their English language proficiency assessed at least annually to gauge their progress in attaining English proficiency and to determine if they are still in need of and legally entitled to EL services. There is no assessment exemption for students

⁸⁶ School districts also retain their EL obligations to a student even if parents opt their child out of IDEA or Section 504 services.

⁸⁷ See *1991 OCR Guidance*; 20 U.S.C. § 1703(f) (requiring SEAs and LEAs to take appropriate action to overcome individual students’ language barriers that impede their equal participation in the agencies’ instructional programs).

who do not receive EL services.⁸⁸ Once opt-out EL students meet valid and reliable criteria for exiting from EL status, the district should monitor their progress for at least two years, as it does with other exited EL students (see Part II. H immediately below).

In their investigations, the Departments consider, among other things, whether:

- ✓ *School districts encourage parents or students to accept the EL services offered and respond appropriately when parents decline any or all EL services;*
- ✓ *School districts maintain appropriate documentation demonstrating that a parent made a voluntary, informed decision to decline EL services; and*
- ✓ *SEAs and school districts explore the causes of high opt-out rates for EL services, address any underlying cause(s) of opting out, and ensure that the academic and English language proficiency needs of the EL students who have opted out are being met.*

H. Monitoring and Exiting EL Students from EL Programs and Services

School districts must monitor the progress of all of their EL students in achieving English language proficiency and acquiring content knowledge. Monitoring ensures that EL students are making appropriate progress with respect to acquiring English and content knowledge while in the EL program or, in the case of opted-out EL students, in the regular educational setting.

With respect to monitoring EL students' acquisition of content knowledge, school districts must at a minimum validly, reliably, and annually measure EL students' performance in academic content areas, including through tests in a language other than English where appropriate as stated in Part II.D above.⁸⁹ School districts should also establish rigorous monitoring systems that include benchmarks for expected growth in acquiring academic content knowledge during the academic year and take appropriate steps to assist students who are not adequately progressing towards those goals. SEAs also have a role to play in ensuring EL students acquire content knowledge by monitoring whether school districts are providing EL students with meaningful access to grade-appropriate core content instruction and remedying any content deficits in a timely manner.⁹⁰

With respect to monitoring EL students' acquisition of English proficiency, SEAs must develop ELP standards to inform EL programs, services, and assessments that are derived from the four domains of speaking, listening, reading, and writing, and that are aligned to the State's content

⁸⁸ All students who meet the definition of LEP under the ESEA, *see* 20 U.S.C. § 7801(25), must be tested annually with a State-approved ELP assessment. *Id.* §§ 6311(b)(7) (Title I), 6823(b)(3)(D) (Title III), 6826(b)(3)(C) (Title III).

⁸⁹ *Castañeda*, 648 F.2d at 1014 (“Valid testing of student’s progress in these areas is, we believe, essential to measure the adequacy of a language remediation program” and requiring that a district’s assessments of the progress of LEP students in a subject taught in their primary language must include testing in the primary language).

⁹⁰ *Id.* at 1011; *see also Gomez*, 811 F.2d at 1042; *Idaho Migrant Council*, 647 F.2d at 71; *supra* notes 9, 14 & 15.

standards.⁹¹ SEAs must also ensure that school districts implement these ELP standards. In addition, SEAs and school districts must ensure the annual ELP assessment of all EL students in these domains and monitor their progress from year to year.⁹² Because Title III requires that the annual ELP assessment be valid and reliable, the ELP assessment must be aligned to the SEA’s ELP standards.⁹³ Thus, in monitoring EL students’ acquisition of English, their performance on the annual ELP assessment and their progress with respect to the ELP standards during the school year should inform their instruction.

- Example 18: Some school districts choose to create forms for their ESL and content teachers to use to monitor EL students each quarter. These forms include the students’ grades in each subject, scores on district and State assessments and standardized tests, and the teachers’ comments on an EL student’s strengths and weaknesses in each of the four language domains and each academic subject. When the monitoring form of an intermediate EL student reflects difficulties in social studies and writing papers, an ESL teacher suggests sheltering strategies and writing rubrics to the social studies teacher to assist the EL student.

With respect to exiting EL students from EL programs, services, and status, a valid and reliable ELP assessment of all four language domains must be used to ensure that all K-12 EL students have achieved English proficiency.⁹⁴ To demonstrate proficiency on the ELP assessment, EL students must have either separate proficient scores in each language domain (*i.e.*, a conjunctive score) or a composite score of “proficient” derived from scores in all four language domains. Whether a conjunctive or composite “proficient” score is used, the score must meet two criteria. The ELP assessment must meaningfully measure student proficiency in each of the language domains, and, overall, be a valid and reliable measure of student progress and proficiency in English. A composite “proficient” score must be a valid and reliable measure that demonstrates sufficient student performance in all required domains to consider an EL student to have attained proficiency in English. The “proficient” score, whether conjunctive or composite, must be set at a level that enables students to effectively participate in grade-level content instruction in English without EL services. Evidence demonstrating each of the foregoing requirements should be available if the Departments request it.

While SEAs may include additional objective criteria related to English proficiency to decide if an EL student who scores proficient on the ELP assessment is ready for exit or requires additional language assistance services, these additional criteria may not serve as a substitute for a proficient conjunctive or composite score on a valid and reliable ELP assessment.

⁹¹ 20 U.S.C. § 6823(b)(2).

⁹² 20 U.S.C. §§ 6311(b)(7) (Title I), 6823(b)(3)(C), (D) (Title III).

⁹³ 20 U.S.C. §§ 6841(a)(3), 6842(a)(3).

⁹⁴ See 2008 Title III NOI at 61832-61833 (explaining the requirements of an ELP assessment in all four domains and how “proficiency” may be demonstrated using a composite or a conjunctive score); see also *supra* note 33.

After students have exited an EL program, school districts must monitor the academic progress of former EL students for at least two years to ensure that: the students have not been prematurely exited; any academic deficits they incurred as a result of participation in the EL program have been remedied; and they are meaningfully participating in the standard instructional program comparable to their never-EL peers.⁹⁵ When a school district’s monitoring of an exited EL student indicates that a persistent language barrier may be the cause of academic difficulty because general education and remediation services have proven inadequate, school districts should re-test the student with a valid and reliable, grade-appropriate ELP test to determine if there is a persistent language barrier and must offer additional language assistance services where needed to meet its civil rights obligations. In no case should re-testing of an exited student’s ELP be prohibited. If the results of the re-testing qualify the student as EL, the school district must reenter the student into EL status and offer EL services. If the student is reentered into EL services, school districts should document the bases for the reentry and the parents’ consent to such reentry.

- Example 19: School districts throughout the State found that a longitudinal cohort analysis shows that EL students who completed and exited the EL program are not able to meaningfully participate in regular education classes comparable to their never-EL peers. The State revises its criteria for exiting EL students from EL programs to ensure that the criteria are valid and reliable and require proficiency in the four domains. The district then provides teachers and staff with training on revised exit criteria and procedures. The district takes additional steps to improve the EL program’s services.

Some examples of when the Departments have identified compliance issues regarding the exiting of EL students include when school districts: (1) exit intermediate and advanced EL students from EL programs and services based on insufficient numbers of teachers who are qualified to deliver the EL program; (2) prematurely exit students before they are proficient in English, especially in the specific language domains of reading and writing; (3) fail to monitor the progress of former EL students; or (4) fail to exit EL students from EL programs after EL students demonstrate (or could have demonstrated if assessed) proficiency in English.

In their investigations, the Departments consider, among other things, whether:

- ✓ *School districts monitor the progress of all of their EL students, including opt outs, in achieving English language proficiency and acquiring content knowledge;*
- ✓ *SEAs monitor whether school districts’ programs enable EL students to acquire English, content knowledge, and parity of participation in the standard instructional program;*

⁹⁵ Title III requires that school districts monitor for two years the progress made by exited ELs on content and achievement standards. 20 U.S.C. § 6841(a)(4). Exiting these students from EL status is not the same concept as the treatment of “former” EL students under Title I for accountability purposes. States are permitted to include the scores of former EL students on State content assessments in the LEP subgroup for up to two accountability determination cycles. 34 C.F.R. § 200.20(f)(2).

- ✓ *SEAs develop and ensure that school districts implement objective ELP standards that define EL status and inform EL programs, services, and assessments;*
- ✓ *School districts monitor EL student progress to establish benchmarks for expected growth and to assist students who are not adequately progressing towards those goals;*
- ✓ *SEAs and school districts do not exit students from EL programs, services, and status until EL students demonstrate English proficiency on a valid and reliable ELP assessment; and*
- ✓ *School districts monitor, for at least two years, the academic progress of students who have exited an EL program to ensure that the students have not been prematurely exited, any academic deficits they incurred resulting from the EL program have been remedied, and they are meaningfully participating in the district’s educational programs comparable to their never-EL peers.*

I. Evaluating the Effectiveness of a District’s EL Program

As noted above, when evaluating a school district’s or SEA’s EL program(s) for compliance, the Departments consider whether the program succeeds, after a legitimate trial, in producing results that indicate that students’ language barriers are actually being overcome. In other words, the Departments look at whether performance data of current EL, former EL, and never EL students demonstrates that the EL programs were in fact reasonably calculated to enable EL students to attain parity of participation in the standard instructional program within a reasonable length of time. For a school district or SEA to make such a determination, as a practical matter, a district must periodically evaluate its EL programs, and modify the programs when they do not produce these results.⁹⁶ Continuing to use an EL program with a sound educational design is not sufficient if the program, as implemented, proves ineffective.

Generally, success is measured in terms of whether the particular goals of a district’s educationally sound language assistance program are being met without unnecessary segregation. As previously discussed, those goals must include enabling EL students to attain within a reasonable period of time, both (1) English proficiency and (2) meaningful participation in the standard educational program comparable to their never-EL peers.⁹⁷ The Departments will not view a program as successful unless it meets these two goals. If an EL program is not effective, the district must make appropriate programmatic changes reasonably calculated to enable EL students to reach these two goals. Some EL programs have additional goals such as exiting students within a set number of years. While the Departments review longitudinal data to determine if those goals are being met by the particular program, neither school districts nor

⁹⁶ *Castañeda*, 648 F.2d at 1014-15; *1991 OCR Guidance*; 20 U.S.C. § 6841(b)(2) (requiring every school district receiving Title III, Part A funds to engage in a self-evaluation every two years and provide it to the SEA).

⁹⁷ An EL program may have other goals such as bicultural goals or maintaining primary language literacy.

SEAs may exit an EL student from EL status or services based on time in the program if the student has yet to achieve English proficiency.

To assess whether an EL program is succeeding in overcoming language barriers within a reasonable period of time, school districts must consider accurate data that permit a comprehensive and reliable comparison of how EL students in the EL program, EL students who exited the program, and never-EL students are performing on criteria relevant to participation in the district’s educational programs over time.⁹⁸

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.⁹⁹ When evaluating the effectiveness of an EL program, the performance of EL students in the program and former EL students who exited the program should be compared to that of never-EL students. While the data need not demonstrate that current EL students perform at a level equal to their never-EL peers,¹⁰⁰ a school district’s data should show that EL students are meeting exit criteria and are being exited from the program within a reasonable period of time, and that former EL students are participating meaningfully in classes without EL services and are performing comparably to their never-EL peers in the standard instructional program. To assess whether the EL program sufficiently prepared EL students for more demanding academic requirements in higher grades, the Departments expect districts to evaluate these data not only at the point that students exit EL services, but also over time.¹⁰¹

- Example 20: A district conducts a longitudinal cohort analysis that examines the percentage of beginner-level EL students who complete and successfully exit EL program services within four years, five years, and at other intervals. The district also compares the performance of the exited EL students and their never-EL peers on the standardized reading, math, science, and social studies tests in grades 3, 5, 8, and 10, as well as their retention-in-grade, drop out, and graduation rates. The district considers

⁹⁸ See, e.g., *Castañeda*, 648 F.2d at 1011, 1014 (discussing student achievement scores under the third prong); *Flores*, 557 U.S. at 464 n.16 (“[An] absence of longitudinal data in the record precludes useful comparisons.”); *Texas*, 601 F.3d at 371 (discussing achievement scores, drop-out rates, retention rates, and participation rates in advanced courses, and the need for longitudinal data, under prong three); *Keyes v. Denver Sch. Dist. No. 1*, 576 F. Supp. 1503, 1519 (D. Colo. 1983) (expressing concern over high drop-out rates of Hispanic students).

⁹⁹ See *Horne*, 557 U.S. at 464 n. 16 (“[An] absence of longitudinal data in the record precludes useful comparisons.”); *Texas*, 601 F.3d at 371 (discussing *Castañeda*’s third prong and noting that without an analysis of “longitudinal data . . . the comparisons made, and conclusions reached in making them, are unreliable”).

¹⁰⁰ See *Horne*, 557 U.S. at 467 (“Among other things, the Court of Appeals referred to ‘the persistent achievement gaps documented in [Nogales] AIMS test data’ between ELL students and native speakers, but any such comparison must take into account other variables that may explain the gap. In any event, the EEOA requires ‘appropriate action’ to remove language barriers, § 1703(f), not the equalization of results between native and nonnative speakers on tests administered in English – a worthy goal, to be sure, but one that may be exceedingly difficult to achieve, especially for older EL students.” (citation omitted)).

¹⁰¹ See *id.* at 464 n.16 (“[An] absence of longitudinal data in the record precludes useful comparisons.”).

Moreover, we recognize that districts have Federal obligations, and in some instances State obligations, to report certain data such as the race and ethnicity of their student population. While the Department of Education requires districts to collect and report such information, districts cannot use the acquired data to discriminate against students; nor should a parent's or guardian's refusal to respond to a request for this data lead to a denial of his or her child's enrollment.

Similarly, we are aware that many districts request a student's social security number at enrollment for use as a student identification number. A district may not deny enrollment to a student if he or she (or his or her parent or guardian) chooses not to provide a social security number. See 5 U.S.C. §552a (note).² If a district chooses to request a social security number, it shall inform the individual that the disclosure is voluntary, provide the statutory or other basis upon which it is seeking the number, and explain what uses will be made of it. *Id.* In all instances of information collection and review, it is essential that any request be uniformly applied to all students and not applied in a selective manner to specific groups of students.

As the Supreme Court noted in the landmark case of *Brown v. Board of Education*, 347 U.S. 483 (1954), "it is doubtful that any child may reasonably be expected to succeed in life if he [or she] is denied the opportunity of an education." *Id.* at 493. Both Departments are committed to vigorously enforcing the Federal civil rights laws outlined above and to providing any technical assistance that may be helpful to you so that all students are afforded equal educational opportunities. As immediate steps, you first may wish to review the documents your district requires for school enrollment to ensure that the requested documents do not have a chilling effect on a student's enrollment in school. Second, in the process of assessing your compliance with the law, you might review State and district level enrollment data. Precipitous drops in the enrollment of any group of students in a district or school may signal that there are barriers to their attendance that you should further investigate.

We are also attaching frequently asked questions and answers and a fact sheet that should be helpful to you. Please contact us if you have additional questions or if we can provide you with assistance in ensuring that your programs comply with Federal law. You may contact the Department of Justice, Civil Rights Division, Educational Opportunities Section, at (877) 292-3804 or education@usdoj.gov, the Department of Education Office for Civil Rights (OCR) at (800) 421-3481 or ocr@ed.gov or the Department of Education Office of the General Counsel at (202) 401-6000. You may also visit <http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm> for the OCR enforcement office that serves

² Federal law provides for certain limited exceptions to this requirement. See Pub. L. No. 93-579, § 7(a)(2).

