

### **AZ-3 Stage III-V Agreement**

#### **Arizona Department of Education**

**OCR Case Number 08-06-4006**

**DOJ Case Number 169-8-81**

#### **BACKGROUND**

1. The U.S. Department of Education, Office for Civil Rights (OCR) and the U.S. Department of Justice (DOJ) investigated a complaint filed against the Arizona Department of Education (ADE) regarding ADE's policies and procedures by which English Language Learner (ELL) students are reclassified as Fluent English Proficient (FEP) and, thereby, exited from the English language acquisition services program. The complainant alleged that thousands of ELL students are being reclassified as "proficient" in English when test results indicate that they are not in fact proficient in English. The complainant alleged that this is due to ADE's use of the Stanford English Language Proficiency (SELP) test and, later, the Arizona English Language Learner Assessment (AZELLA) test (along with their respective scoring procedures), as the sole reclassification criterion for ELL students statewide. After a comprehensive investigation, OCR and DOJ found that between 2006 and 2012 ADE prematurely exited and underidentified tens of thousands of ELL students with the AZELLA 1 and 2 (the AZ-1 and AZ-2) in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and its implementing regulations, and DOJ further found that ADE was not in compliance with the Equal Educational Opportunities Act (EEOA), 20 U.S.C. § 1703(f).
2. On August 31, 2012, ADE, OCR, and DOJ entered into a Resolution Agreement (2012 Agreement). The purpose of the 2012 Agreement was to stop and remedy ADE's premature exiting and underidentification of thousands of ELL students across Arizona with a short and long term plan. The short term plan secured reading and writing intervention services for approximately 28,000 ELLs who were prematurely exited and underidentified between 2006 and 2012 and still enrolled in Arizona local education agencies (LEAs); this short term plan has been completed. The long term plan requires ADE to implement a new, valid, and reliable English language proficiency (ELP) assessment beginning in school year (SY) 2012-13 for the purposes of identifying and exiting/reclassifying ELLs. Specifically, the 2012 Agreement required ADE to adopt new, valid, reliable, and objective criteria for LEAs to use to ensure that each ELL student has obtained English proficiency in reading, writing, listening, and speaking and in the composite of comprehension (reading and listening) and the composite of oral (listening and speaking) before: (a) being identified as Initially Fluent English Proficient (IFEP); (b) being reclassified as FEP or Reclassified Fluent English Proficient (RFEP)<sup>1</sup>; or (c) being required to exit English language acquisition services. ADE developed the AZELLA-3 (AZ-3) to serve as both its criterion for reclassification in grades K-12 and its test for identifying incoming ELLs in grades 1-12. ADE also developed the Kindergarten Placement Test (KPT) to identify incoming ELLs beginning in SY 2012-13. Under Paragraph 39 of the 2012 Agreement, the parties agreed that if OCR and DOJ believed that ADE was violating the Agreement, OCR/DOJ would notify ADE in writing, the parties would have 30 days from the date of the notice to reach a satisfactory resolution of the compliance issue, and if this was not possible, the United States could initiate an enforcement action.

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<sup>1</sup> "RFEPs" are students who have been reclassified and deemed proficient by the spring ELP assessment. During their first full school year of monitoring after exiting from the ELL program, these students are called "FEP1." During their second full school year, they are "FEP2."

3. Since August 31, 2012, OCR and DOJ have monitored ADE's implementation of the 2012 Agreement, and whether ADE has come into compliance with its obligations under Title VI and its implementing regulations and Section 1703(f) of the EEOA. As stated in several letters and the United States' final notice letter to ADE and accompanying Statement of Findings of Fact (SFF) on January 28, 2016, ADE failed to provide "sufficient evidence of validated cut scores exists for composite and domain subscores, particularly at the 'proficient' level, and of validated minimal achievement levels for AZ-3 reading and writing, using valid external criteria," as required by Paragraph 23(f)(i) of the 2012 Agreement. ADE defines an "Overall Proficient" student on the AZ-3 as having a "proficient" Total Combined score and "proficient" Reading and Writing scores (i.e., a composite score of the four domain scores with a conjunctive minimum for Reading and Writing). ADE's evidence, including its AIMS and AzMERIT external validity evidence, fails to show that its proficient cut scores "require sufficient proficiency in each of the language domains (reading, writing, speaking, and listening) and the composites of oral and comprehension, as appropriate to grade level to permit students to effectively participate in grade-level content instruction and assessments in English" or that ADE's definition of "proficient" on the AZ-3 Stages III-V "overall is a valid and reliable measure of the student's proficiency in English that enables his/her meaningful and equal participation in the educational program without ELL services, consistent with the purpose for which the assessment is used," as Paragraph 22 requires. ADE denies these AZ-3 Stage III-V violations, but has agreed to voluntarily resolve them through this Agreement.<sup>2</sup>
4. The purpose of this Agreement is to ensure that ADE comes into compliance with its obligations under the EEOA, Title VI, and the 2012 Agreement to: identify all ELLs in grades 3-12 in a timely, valid, and reliable manner; to offer them ELL services until they demonstrate proficiency in English (including in the oral, listening, reading, and writing skills), as defined by the 2012 Agreement; not to prematurely exit them from ELL services; and to continue to annually assess the English proficiency of ELLs who decline ELL services until they are proficient in English.

## **JURISDICTION**

5. Title VI and its implementing regulations at 34 C.F.R. pt. 100, and 28 C.F.R. pt. 42 taken together, provide, in relevant part, that no program or activity receiving Federal financial assistance from the United States may discriminate on the basis of national origin. ADE is subject to Title VI because it receives Federal financial assistance from the U.S. Department of Education and DOJ. OCR and DOJ enforce ADE's Title VI obligations.
6. Section 1703(f) of the EEOA requires that state and local educational agencies take appropriate action to overcome language barriers that impede equal participation by students in the instructional program. DOJ enforces the EEOA. ADE is subject to the EEOA because ADE is a state educational agency as defined by 20 U.S.C. § 1720.

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<sup>2</sup> In the January 28, 2016 letter and SFF, the United States further found that ADE underidentified thousands of Kindergarten ELLs under the KPT's proficient cut scores of 32 and 35 from SY 2012-13 to the present and thereby denied them access to ELL services. In this letter and SFF, the United States also notified ADE that it had violated the 2012 Agreement, Title VI, and the EEOA by failing to annually assess the English proficiency of approximately 4,248 Kindergarten ELLs whose parents had opted them out of ELL services for SY 2013-14 through SY 2014-15. ADE denied these opt-out and KPT violations, but agreed to voluntarily resolve them through the April 22, 2016 Agreement.

7. In exchange for ADE's full and good faith implementation of the terms of this Agreement, OCR and DOJ agree to refrain from initiating an enforcement action under Title VI against ADE, and DOJ agrees to refrain from initiating litigation under Title VI, the EEOA, and the 2012 Agreement against ADE, including its Superintendent, regarding their AZ-3 Stage III-V violations set forth in the United States' notice letter and SFF dated January 28, 2016, except as expressly discussed in this Agreement.

#### **REMEDIAL ACTION**

8. As set forth in the United States' January 28, 2016 Final Notice Letter and the SFF, OCR and DOJ have determined that ADE and its Superintendent's "proficient" cut scores for Reading, Writing, and Total Combined on Stages III-V of the AZ-3 were too low and thereby failed to identify and prematurely exited thousands of ELLs in grades 3-12 beginning in SY 2012-13 in violation of Title VI, its implementing regulations, the EEOA, and the 2012 Agreement. Pursuant to Paragraph 43 of the 2012 Agreement, the parties negotiated new "proficient" cut scores for Stages III-V that will, pursuant to Paragraph 10 below, go into effect beginning with the SY 2016-17 placement testing, remain in effect for SY 2016-17 reassessment testing and SY 2017-18 placement testing, and be applied retroactively to the IFEP and reclassified students from SY 2012-13 through SY 2015-16. The new "proficient" cut scores for Stages III-V will be informed by 2015 and 2016 AzMERIT ELA data. ADE does not concur with OCR's and DOJ's determinations; however, ADE is willing to implement the following measures to voluntarily resolve the Stage III-V compliance issues identified by the United States.

#### **ACTION ITEM 1: ESTABLISH NEW CUT SCORES**

9. By **May 2, 2016**, ADE will send a letter to all Arizona LEAs explaining that the Stage III-V cut scores are being reset at the beginning of SY 2016-17. Although the exact cut scores will not be included within the May 2 letter, the parties have agreed that ADE will establish new cut scores for Stage III, grades 3, 4, and 5; Stage IV, grades 6, 7, and 8; and Stage V as set forth in Exhibit A, subject to revisions pursuant to Paragraph 10. The new "proficient" cut scores demonstrate an increase in the Total Combined score, the Writing score, and the Reading score. The cut scores set forth in Exhibit A have been informed by analyses of the 2015 AZELLA and AzMERIT results. ADE will share information regarding the new cut scores in newsletters produced by ADE's OELAS Section for ELL directors and ADE's Assessment Section for AZELLA test coordinators before the end of SY 2015-16, and at the May 2016 PELL meeting, which is attended by ELL directors and AZELLA test coordinators from most of Arizona's LEAs with significant populations.
10. Each party will have the opportunity to propose revisions to the cut scores set forth in Exhibit A informed by analyses of 2016 AZELLA and AzMERIT results. ADE will provide the 2016 AZELLA and AzMERIT data to OCR and DOJ by **June 6, 2016**. If a party proposes revisions to the cut scores, that party must provide the other party with all analyses relied upon to establish the new proposed cut scores no later than **June 10, 2016**. By **June 15, 2016**, the parties must confer regarding the proposed new cut scores, and reach agreement as to the new cut scores for them to be effective. In the event that the parties do not reach agreement, the cut scores set forth in Exhibit A will be final.

11. By **July 1, 2016**, ADE will notify LEAs of the new AZ-3 cut scores for Stages III-V. This same information will be included in the AZELLA District Test Coordinator's mandatory Placement Test training available beginning July 1, 2016, the first editions of the OELAS newsletter and the Assessment Section newsletter for SY 2016-17, and the September 2016 PELL meeting.
12. AZELLA placement test reports for SY 2016-17 and SY 2017-18 and AZELLA reassessment test reports for SY 2016-17 will be revised to reflect the new final cut scores as described in Paragraph 10.
13. AZELLA Stages III-V will move from a paper-based assessment to a computer-based assessment starting with the Spring 2018 Reassessment. Per the advice of Arizona's Technical Advisory Council (TAC), a new standard setting will be done in Spring 2018 for Stages III-V of the AZ-3 due to the change in testing mode. Because the actual test is not changing, and simply the method of delivery of the exam is changing at this time, the cut scores established pursuant to Paragraph 10 will be the baseline expectation for the proficient cut scores, with changes being made only to address differential performance of students due to the change in testing mode. If such a differential exists and ADE proposes to lower any of the cut scores set pursuant to Paragraph 10, ADE will notify the United States of ADE's proposed scores and include all documentation supporting such scores. If the United States objects to any proposed scores within 30 days of the notice, the parties will have 30 days to agree on new scores. If the United States does not object, the cut scores proposed by ADE will apply to the Spring 2018 Reassessment and all Stages III-V testing in SY2018-19 and beyond until there is a need for another standard setting.
14. Reporting Requirements: ADE will provide to OCR and DOJ:
  - a. By **June 1, 2016**, the letter to LEAs; the OELAS newsletter, the Assessment newsletter, and PELL meeting agenda referenced in Paragraph 9;
  - b. By **July 25, 2016**, the notification to LEAs of new cut scores; revised AZELLA score reports demonstrating the new scores; and AZELLA District Test Coordinator's mandatory Placement Test training materials related to Paragraphs 11 and 12.

**ACTION ITEM 2: OFFER SERVICES TO IFEP AND FEP STUDENTS AS NEEDED**

15. By **July 1, 2016**, ADE will direct LEAs to offer appropriate English language support services to currently enrolled IFEP and FEP students with Proficient AZELLA scores that do not meet the newly established cut scores and who did not perform in the classroom comparably to their English Only peers in SY 2015-16. ADE's July 1, 2016 directive to LEAs will explain the requirements in Paragraphs 15(a)-(d) and 16 below:
  - a. The following criteria will be used to determine whether the IFEP and FEP students' classroom performance is comparable to that of English-Only peers. Students with a 2015 or 2016 AzMERIT ELA score that is at or above the average score for English Only students on that same test at their grade level identified in Exhibit B will be considered to be performing comparably to their English Only peers. For students without such an AzMERIT ELA score, LEAs will be asked to determine whether the student performed comparably to or below his/her English-Only peers in one or more subjects in SY 2015-16 based on (1) teacher input, (2) student performance on

locally required reading or writing or ELA assessments, (3) student's report card grades in core content areas, and (4) any other language-related academic performance information from SY 2015-16 available to the school.

- b. IFEP and FEP students who have been identified as performing below their English-Only peers must be offered appropriate English language support services that best meet the student's need(s). These offered services will include (1) ELL services as part of Arizona's SEI program (e.g., an Individualized Language Learning Plan (ILLP) in mainstream classes), and at least one of these service options: (2) special course work during the school day, such as a reading and/or writing class, or (3) special services offered during the school day or outside the school day, such as tutoring on writing skills. Parents may opt out of any services offered to their student by the LEA.
  - c. If an LEA believes that a student would be best served by receiving ELL services as part of the SEI program, that student must have a recent, qualifying AZELLA score. Students without a spring 2016 AZ-3 score must take the grade-appropriate AZELLA Placement test within three weeks of enrolling in SY 2016-17 and must score below "Proficient" for Overall Proficiency to be eligible for and offered ELL services. Students with a Spring 2016 AZ-3 score that falls below those set by Paragraph 10, do not require an AZELLA Placement test to be administered to be eligible for and offered ELL services.
  - d. Only those IFEP and FEP students who are eligible for ELL services as described in Paragraph 15(c) will be classified as ELL students. Any of these students whose parents decline services will be classified as ELL-Parent Withdrawal students. All other students will keep their existing IFEP or FEP classification with FEP1 and FEP2 students being monitored as would otherwise be expected.
16. By **July 11, 2016**, ADE will have a Follow-up survey application in place for the purpose of identifying the IFEP and FEP students who are performing below their English-Only peers and to collect information about what English language support services students are receiving. This survey will list, for each LEA and school based on SY 2016-17 enrollment, all IFEP and FEP students with Proficient AZELLA scores who do not meet the newly established cut scores and who do not have an AzMERIT ELA score at or above the average score for English-Only students. As part of the **July 1, 2016** letter, ADE will direct LEAs to determine whether the listed students are performing comparably to or below their English Only peers using the criteria in Paragraph 15(a). ADE will direct LEAs to provide the appropriate English language support services, as described in Paragraph 15(b), to students identified as performing below their English Only peers and to indicate the services students are receiving in the survey application. The directive to LEAs will state that LEAs should complete this survey before school starts so that services may begin at the start of SY 2016-17 with parent consent, and that LEAs must complete the survey within 21 days of the start of the school year and provide any services within a week of receiving the consent of the student's parent. The directive will explain that for students who are enrolling for the first time in the LEA, LEAs will have until the end of the 9<sup>th</sup> week of school, or until the end of the student's 4<sup>th</sup> week of enrollment, whichever is later, to complete the survey. Services offered to such students and accepted by the student's parents must be in place as soon as possible, but no later than one week after receiving the consent of the student's parent. ADE will direct LEAs to continue offering English language support services each year until the student: (i) scores at or above the AzMERIT ELA scores in Exhibit B for the student's grade; (ii) scores "Overall Proficient" on the grade-appropriate AZ-3 using the cut scores required by Paragraph 10 if the

student has accepted ELL services; (iii) is performing comparably to his/her English-Only peers based on the criteria identified in Paragraph 15(a); or (iv) is no longer enrolled, whichever is sooner.

17. The same information required by Paragraphs 15 and 16 will be included in the AZELLA District Test Coordinator's mandatory Placement Test training available beginning July 1, 2016, the first editions of the OELAS newsletter and the Assessment Section newsletter for SY 2016-17, and the September 2016 PELL meeting.
18. Reporting Requirements: ADE will provide to OCR and DOJ:
  - a. By **July 25, 2016**, the letter to LEAs required by Paragraphs 15 and 16; the Follow-up survey required by Paragraph 16; and the AZELLA District Test Coordinator's mandatory Placement Test training materials related to Paragraph 17.
  - b. By **October 1, 2016**, the OELAS newsletter, the Assessment newsletter, and the September 2016 PELL meeting agenda referenced in Paragraph 17.
  - c. By **November 30, 2016**, for each Arizona LEA, the total number of students whom the LEA evaluated pursuant to the procedures in Paragraphs 15 and 16 and identified as performing below their English only peers, the number of such students participating in each of the services offered, and the number of students whose parents opted-out of offered services in SY 2016-17.

#### **ADE MONITORING AND OTHER REPORTING**

19. ADE will monitor LEAs' implementation of the action required by Paragraphs 9-18 above through its OELAS monitoring process and where necessary, take action to ensure LEAs implement such action in a timely manner.

20. In each of the ADE notices and directives to LEAs required by this Agreement, ADE will notify LEAs that all of the communications with parents required by the above Action Items must be in a language the parents understand and must state that the purpose of the notification is to ensure that their children's educational needs are being met. In the May 2 letter to LEAs required by Paragraph 9, ADE will remind LEAs that if a classroom teacher believes a student is ELL, the student can be referred for an AZ-3 Placement test regardless of the procedures set forth in the May 2 letter.

21. By July 10, 2016 and then June 15, 2017, and June 15, 2018, ADE will submit electronic files of all AZ-3 Stage III-V and AzMERIT ELA and Math scores for students in grades 3-12 by SAISD, school district, school, grade, ELL Status (ELL, RFEP, FEP by year, IFEP), and as applicable: raw score, scale score, domain score, total combined score, overall score, performance level (e.g., "Proficient"), purpose of the test, and test date.

22. To ensure compliance with this Agreement, OCR and DOJ may require additional monitoring reports and/or the ability to inspect data or other information maintained by ADE as determined necessary by OCR and DOJ.

#### **ENFORCEMENT OF THIS AGREEMENT**

23. If, at any time, ADE desires to modify any portion of this Agreement because of changed conditions making performance impossible or impractical or for any other reason, ADE will promptly notify OCR and

DOJ in writing, setting forth the facts and circumstances thought to justify modification of this Agreement and the substance of the proposed modification. Until OCR and DOJ notify ADE in writing that they have agreed to the proposed modification, the proposed modification will not take effect. Any modifications must receive the prior written approval of OCR and DOJ. This approval shall not be unreasonably withheld or delayed.

24. It is a violation of this Agreement for ADE to fail to comply in a timely manner with any of its requirements without obtaining sufficient advance written agreement with OCR and DOJ for an extension of the relevant time frame imposed by this Agreement.

25. If OCR and DOJ believe that ADE has failed to comply in a timely manner with any requirement of this Agreement without obtaining sufficient advance written permission from OCR and DOJ regarding a modification of the relevant terms under the terms set forth above, OCR and DOJ will so notify ADE in writing and they will attempt to resolve the issue or issues in good faith. If OCR and DOJ are unable to reach a satisfactory resolution of the issue or issues raised within thirty (30) days of the date they provide notice to ADE, OCR and DOJ may take steps to initiate an enforcement action. This may include administrative proceedings through the Department of Education or as a referral for litigation to the U.S. Department of Justice, or DOJ taking action to enforce the terms of this Agreement, Title VI, its implementing regulations, and/or the EEOA in administrative proceedings or in court.

26. Failure by OCR or DOJ to enforce this entire Agreement or any provision of it regarding any deadline or any other provision shall not be construed as a waiver of OCR's or DOJ's rights to enforce other deadlines and provisions of this Agreement, or of ADE's obligation to comply with Title VI, its implementing regulations, or the EEOA.

27. This Agreement does not purport to remedy any existing or potential violations of Title VI, its implementing regulations, the EEOA, or any other federal law other than those addressed in this Agreement. This Agreement does not affect ADE's continuing responsibility to comply with these laws and regulations. ADE's participation in this Agreement in no way constitutes an admission of noncompliance with Title VI or the EEOA regarding this matter. In addition, ADE's participation in this Agreement in no way constitutes an admission of noncompliance regarding OCR/DOJ's investigation of the English Language Development Program, or any other matter involving ADE that is under investigation by OCR and/or DOJ or for which OCR and/or DOJ have received a complaint.

#### **IMPLEMENTATION OF THIS AGREEMENT**

28. This Agreement will remain in effect until OCR and DOJ determine that ADE has fully complied with all of its provisions. Upon determining that ADE has achieved full compliance with the terms of this Agreement, OCR and DOJ will conclude its monitoring and will notify ADE that it is closing this case and terminating this Agreement.

OCR and DOJ will consider this Agreement met and will close out the monitoring on this Agreement after review and approval of the submission of evidence required by this Agreement's action items. It is expected that monitoring of this Agreement will be closed in the summer of 2018.

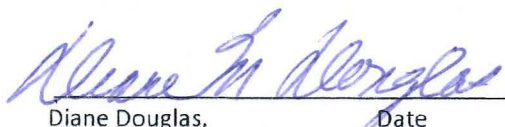
29. During monitoring of this Agreement, OCR and DOJ may visit ADE and LEAs, interview staff, and students, and request such additional reports or data as OCR and DOJ view as necessary to determine

whether ADE has complied with the terms of this Agreement and the provisions of Title VI and the EEOA that are applicable to this complaint. OCR and DOJ will provide sufficient notice to ADE prior to any visitations with or interviews of ADE staff. OCR and DOJ will provide ADE with sufficient time to comply with any additional requests for reports or data and any reports or data requested will be relevant to this Agreement.

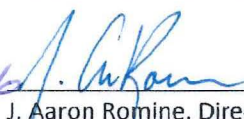
30. The person signing for ADE represents that she is authorized to bind ADE to this Agreement.

31. The effective date of this Agreement is the date of the last signature below.

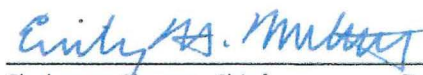
For ADE:

  
Diane Douglas, \_\_\_\_\_  
Superintendent of Public Instruction Date

For the U.S. Department of Education:

  
J. Aaron Romine, Director \_\_\_\_\_  
Erica Austin, Chief Attorney Date  
Angela Martinez-Gonzalez, Supervisory Team Leader  
Denver Enforcement Office  
U.S. Department of Education,  
Office for Civil Rights, Region VIII

For the U.S. Department of Justice:

  
Shaheena Simons, Chief \_\_\_\_\_  
Emily H. McCarthy, Deputy Chief Date  
Jonathan Newton, Trial Attorney  
Navin Pant, Trial Attorney  
U.S. Department of Justice  
Civil Rights Division  
Educational Opportunities Section  
Washington D.C.



**EXHIBIT A –Proficient Cut Scores for Stages III, IV, and V of the AZ-3**

| <b>Grade</b> | <b>Total Combined Cut Score</b> | <b>Reading Cut Score<sup>3</sup></b> | <b>Writing Cut Score<sup>4</sup></b> |
|--------------|---------------------------------|--------------------------------------|--------------------------------------|
| 3            | 2474                            | 260                                  | 250                                  |
| 4            | 2499                            | 270                                  | 267                                  |
| 5            | 2523                            | 280                                  | 290                                  |
| 6            | 2530                            | 270                                  | 280                                  |
| 7            | 2535                            | 280                                  | 290                                  |
| 8            | 2540                            | 290                                  | 290                                  |
| HS           | 2550                            | 270                                  | 270                                  |

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<sup>3</sup> The cut scores represented in the “Reading Cut Score” and “Writing Cut Score” columns represent the current value on the scale where 250 is the proficient cut score that ADE adopted in 2013. The scale for the Reading and Writing domains will be reset in SY 2016-17 so that the theta values represented by these cut scores become a score of “250” for each domain of Reading and Writing.

<sup>4</sup> See footnote 3 above.

**EXHIBIT B – AzMERIT ELA 2015 Average EO Scale Scores**

| <b>Grade</b> | <b>AzMERIT ELA Scale Score</b> |
|--------------|--------------------------------|
| 3            | 2501                           |
| 4            | 2517                           |
| 5            | 2531                           |
| 6            | 2542                           |
| 7            | 2549                           |
| 8            | 2559                           |
| 9            | 2558                           |
| 10           | 2568                           |
| 11           | 2568                           |