



U.S. Department of Justice
Civil Rights Division



U.S. Department of Education
Office for Civil Rights

May 4, 2016

Via Overnight and Electronic Mail

Mr. Jordan Ellel
Assistant Attorney General
Arizona Office of the Attorney General, Education Unit
1275 West Washington Street
Phoenix, Arizona 85007-2926

RE: OCR Case No. 08-06-4006; DOJ Case No. 169-8-81

Dear Mr. Ellel:

We are pleased that the Arizona Department of Education (“ADE”) and Superintendent of Public Instruction (collectively, “the State”), have agreed to resolve the findings that the U.S. Department of Justice, Civil Rights Division (“DOJ”) and the U.S. Department of Education, Office for Civil Rights (“OCR”) (together, the “United States”) made as a result of its monitoring of the resolution agreement that the Arizona Department of Education (“ADE”) entered into with the United States on August 31, 2012 (“2012 Agreement”). The 2012 Agreement required ADE to adopt valid, reliable, and objective criteria for identifying and reclassifying English Language Learner (“ELL”) students and measures to redress past discrimination by ensuring that initial fluent English proficient (“IFEP”) and reclassified fluent English proficient (“RFEP”) students who still require English language support services are offered such services. Based on the data that the United States received during the course of its monitoring, including data that ADE was required to submit pursuant to the terms of the 2012 Agreement on September 15, 2015, the United States provided notice of its findings that ADE was underidentifying ELL students in Kindergarten and grades 3-12, prematurely exiting ELL students in grades 3-12, and thereby denying both sets of students ELL services in school years (“SY”) 2012-13 through SY 2015-16.

On January 28, 2016, the United States provided the State with final notice of noncompliance with the 2012 Agreement, Title VI of the Civil Rights Act of 1964 and its implementing regulations¹ (“Title VI”), and the Equal Educational Opportunities Act of 1974 (“EEOA”).²

On March 16, 2016, the State expressed its disagreement with the findings while proposing a series of actions it would take to address the findings. ADE and the United States engaged in negotiations to reach agreements that would resolve the findings.

¹ 42 U.S.C. § 2000d; 34 C.F.R. §§ 100.1-13 and 28 C.F.R. §§ 42.101-112.

² 20 U.S.C. § 1703(f).

The State has agreed to voluntarily resolve all of the findings by entering into two Resolution Agreements, signed copies of which are enclosed: 1) the April 22, 2016 Resolution Agreement regarding the Kindergarten Placement Test (“KPT”) and annually testing ELL students who opt out of ELL services; and 2) the May 2, 2016 Resolution Agreement to raise the proficient cut scores on Stages III, IV, and V of the AZELLA-3 (“AZ-3”) and to offer English language support services where appropriate to students previously identified as proficient under the lower scores.

Legal Authority

DOJ and OCR are both responsible for enforcing Title VI and its implementing regulations.³ Under the statute and regulations, recipients of federal financial assistance are prohibited from discriminating on the basis of race, color, or national origin. ADE is a recipient of financial assistance from DOJ and the U.S. Department of Education and, therefore, is subject to Title VI and its implementing regulations. DOJ is further authorized to enforce the EEOA, which requires that state and local educational agencies (“SEAs” and “LEAs”) take appropriate action to overcome language barriers that impede equal participation by students in instructional programs.⁴

OCR’s May 25, 1970 Memorandum interpreting Title VI states that “[w]here inability to speak and understand the English language excludes national origin minority-group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiencies of LEP [limited English proficient] students in order to open the school district’s instructional program to such students.”⁵ This interpretation was upheld by the U.S. Supreme Court in *Lau v. Nichols*, 414 U.S. 563 (1974). Title VI and the EEOA have long required that ELL students be identified in a timely, valid, and reliable manner and offered ELL services until they demonstrate English proficiency.⁶ ADE and the Superintendent are responsible for ensuring compliance with Title VI and the EEOA in this matter because ADE mandates the statewide assessments used to identify and exit all ELLs in Arizona and the Superintendent sets the proficient cut scores on those assessments.

³ 42 U.S.C. § 2000d; 34 C.F.R. §§ 100.1-13 and 28 C.F.R. §§ 42.101-112.

⁴ 20 U.S.C. § 1703(f).

⁵ Department of Health Education and Welfare’s May 25, 1970 Mem., “Identification of Discrimination and Denial of Services on the Basis of National Origin,” 35 Fed. Reg. 11,595 (July 18, 1970).

⁶ See, e.g., *Lau v. Nichols*, 414 U.S. 563 (1974) (requiring affirmative steps to identify and serve ELLs); *Castañeda v. Pickard*, 648 F.2d 989 (5th Cir. 1981) (requiring educationally sound and effective ELL services); *Gomez v. Illinois State Bd. of Educ.*, 811 F.2d 1030, 1033-34, 1042-44 (7th Cir. 1987) (plaintiffs adequately stated EEOA claim for state failure to provide LEAs with adequate and objective guidelines for identifying and placing ELLs in services); *Rios v. Read*, 480 F. Supp. 14, 23 (E.D.N.Y. 1978) (requiring “objective, validated tests conducted by competent personnel”); *Cintrón v. Brentwood*, 455 F. Supp. 57, 64 (E.D.N.Y. 1978) (requiring “validated” tests of English proficiency); *Keyes v. Sch. Dist. No. 1*, 576 F. Supp. 1503, 1513-14, 1518; (D. Colo. 1983) (absence of a formal valid testing process to identify ELLs violated the EEOA); OCR’s Dec. 1985 Mem., “Policy Regarding the Treatment of National Origin Minority Students Who Are Limited English Proficient”; OCR’s Sept. 27, 1991 “Policy Update on Schools’ Obligations Toward National Origin Minority Students with Limited-English Proficiency”; EL Dear Colleague Letter at 10-12; OCR’s and DOJ’s Jan. 7, 2015 Dear Colleague Letter on EL Students and LEP Parents, at 7 n.8, 10-14, 20, 23, 31, 32 n.88, 33.

Summary of the Findings Regarding the 2012 Agreement, Title VI, and the EEOA

On January 28, 2016, the United States provided final notice of its findings that the State had not complied with the 2012 Agreement, Title VI, and the EEOA in five ways and advised ADE that it would need to voluntarily resolve each of these findings to avoid a federal enforcement action.

First, the United States notified the State that its English proficiency criteria on the AZ-3 continued to improperly exit and underidentify thousands of ELL students in grades 3-12 and thereby denied them ELL services. The 2012 Agreement required the State to stop using scoring methods that failed to require proficiency in reading and writing English and to provide sufficient evidence validating its new ELP tests and cut scores. The parties agreed that this evidence would include external validity evidence examining how the cut scores predicted performance on AIMS Reading, Writing, and Math. The United States found that the evidence from AIMS 2013, AIMS 2014, and AzMERIT 2015, (which replaced AIMS), did not validate ADE's proficient cut scores on Stages III, IV, and V. This evidence showed unacceptably low levels of performance on AIMS and AzMERIT by students whom ADE deemed "proficient" on the AZ-3, and unacceptably large gaps between these students' performance and that of their never-ELL peers. The United States also found that ADE did not comply with the terms of the 2012 Agreement regarding how the new cut scores were to be set in the standard setting process.

Second, the United States found that the State underidentified thousands of Kindergarten ELL students across SY 2012-13 and SY 2013-14 by using a "proficient" cut score of 32 on the KPT. The State agreed to retest all of the Kindergarteners identified as having a Primary or Home Language Other Than English with the Stage I test in the spring of 2013 and 2014, and to offer ELL services to all students who did not score proficient on the Stage I. Third, though ADE offered ELL services to the ELL students who were missed by the KPT and identified by the Stage I in 2013 and 2014, ADE did not annually assess the English proficiency of the students whose parents opted them out of ELL services. Fourth, though the State increased the KPT cut score to 35 beginning in SY 2014-15, the United States found this score continued to underidentify ELL students in Kindergarten. Lastly, ADE rejected the United States' requests to retest the Kindergarteners with the Stage I in 2015 and 2016 to find the missed ELLs and offer them services, and to increase the KPT cut score beyond 35 in SY 2015-16.

Resolution Agreements

The State voluntarily agreed to resolve the five areas of noncompliance identified by the United States through the two attached Agreements executed on April 22, 2016, and May 2, 2016. The United States will monitor the implementation of all terms specified in the Agreements to ensure the State's compliance with applicable statutes and regulations.

Pursuant to the Agreements of April 22, 2016 and May 2, 2016, the State agrees to, *inter alia*:

- 1) increase the proficient cut scores for the Total Combined, Reading, and Writing scores of Stages III, IV, and V of the AZ-3, as set forth in the May 2 Agreement, to notify Arizona LEAs of these cut scores by July 1, 2016, and to use them beginning in SY 2016-17;

- 2) require LEAs to assess whether IFEP and reclassified students with Stage III-V scale scores below the new proficient cut scores performed comparably to their English-Only peers in SY 2015-16; and if they did not, to offer these students English language support services, including ELL services as part of the State Sheltered English Immersion program (e.g., an Individualized Language Learning Plan in mainstream classes) and special coursework during the school day or special services during or outside the school day.
- 3) for students whom the LEA believes would be best served by receiving ELL services as part of the SEI program, ADE will require LEAs to administer an AZ-3 placement test at the start of SY 2016-17 to those who lack 2016 AZ-3 scores, to treat students who score below the new, increased cut scores on the AZ-3 placement as ELLs, to offer ELL services to these students and those who scored below the new cuts on the 2016 AZ-3, and to provide accepted ELL services until the students demonstrate English proficiency;
- 4) raise the proficient cut score on the KPT from a scale score of 245 to a scale score of 257 beginning in SY 2016-17;
- 5) require Arizona LEAs to assess whether IFEP students with KPT scale scores of 245 through 256 performed below grade level in SY 2015-16, and if so, to administer the grade appropriate AZ-3 placement test to these students at the start of SY 2016-17, identify all students who do not score Overall Proficient⁷ as ELL, offer these students ELL services, and provide accepted ELL services under the students demonstrate English proficiency; and
- 6) require Arizona LEAs to annually assess the English proficiency of all opt-out ELL students to see if they continue to be ELL, and if they are, to offer them ELL services.

This letter addresses only the issues listed above and should not be interpreted as a determination of ADE's compliance or noncompliance with Title VI and its implementing regulation, and the EEOA, in any other respect. This resolution letter is issued to address an individual case and reflects DOJ's and OCR's legal determinations under Title VI and 20 U.S.C. § 1710 of the EEOA. Such letters are not formal statements of OCR or DOJ policy and they should not be relied upon, cited, or construed as such. OCR's and DOJ's formal policy statements are approved by a duly authorized OCR or DOJ official and made available to the public.

If OCR or DOJ determines that ADE has failed to comply with the terms of the Agreements or has failed to comply in a timely manner with any requirement of the Agreements, one or both agencies will so notify ADE in writing and will attempt to resolve the issue(s) in good faith with ADE. If OCR and DOJ are unable to reach a satisfactory resolution of the issue(s) within thirty (30) days of providing notice to ADE, OCR may initiate administrative enforcement pursuant to 34 C.F.R. §§ 100.9, 100.10, or DOJ may initiate civil enforcement proceedings in federal court.

⁷ "Overall Proficient" means the ELL student obtains Reading, Writing, and Total Combined scale scores that are at or above the proficient cuts, including the new grade 3-12 cuts set pursuant to the May 2, 2016 Agreement.

We look forward to working cooperatively with the State as we monitor both of the Agreements. If you have any questions about the information discussed in this letter or have questions during the course of monitoring, please contact J. Aaron Romine or Emily McCarthy.

Sincerely,



J. Aaron Romine
Director
U.S. Department of Education
OCR Denver Enforcement Office



Emily McCarthy
Deputy Chief
U.S. Department of Justice
Civil Rights Division
Educational Opportunities Section

Cc: Diane Douglas, Arizona Superintendent of Public Instruction
Complainant

Enclosures: April 22 and May 2, 2016 Resolution Agreements