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### **Via Electronic Mail**

Brenda Liss, Esq.  
General Counsel  
Newark Public Schools  
765 Broad Street  
Newark, NJ 07102

### **Re: Newark Public Schools EEOA Investigation**

Dear Ms. Liss:

We write to provide notice of the results of the United States Department of Justice's ("DOJ") investigation of Newark Public Schools' English Learner ("EL") programs and practices under Section 1703(f) of the Equal Educational Opportunities Act of 1974 ("EEOA"), 20 U.S.C. § 1703(f). The investigation was conducted jointly by two DOJ components: the Civil Rights Division and the U.S. Attorney's Office for the District of New Jersey. Section 1703(f) requires school districts to "take appropriate action to overcome language barriers that impede equal participation by [their] students in [their] instructional programs." On August 30, 2017, DOJ notified Newark Public Schools ("NPS" or "District") that it had opened an EEOA investigation into the District's policies and procedures for enrolling and registering ELs and its practices for communicating with Limited English Proficient ("LEP") parents.<sup>1</sup> In our opening letter and subsequent correspondence, we requested information related to the District's EL programs and practices to evaluate their compliance under Section 1703(f).

As part of our investigation, we visited NPS on June 5-7, 2018, October 2-5, 2018, and October 16-18, 2019. During these visits, we interviewed NPS staff at the Central Office,

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<sup>1</sup> "Parents" as used in this letter means both parents and guardians. LEP parents are parents or guardians whose primary language is one other than English and who have limited English proficiency in one or more of the four language domains—speaking, listening, reading, or writing.

Family Support Center, Contact Center, and the following schools: Barringer High School, Dr. William H. Horton Elementary School, East Side High School, George Washington Carver Elementary School, Hawkins Street Elementary School, Mt. Vernon Elementary School, Rafael Hernandez Elementary School, Spencer Miller Community School, Lafayette Street School, Central High School, Peshine Avenue School, Ivy Hill School, and Branch Brook School. Dr. Maria F. Pacheco, the United States’ consultant with expertise in K-12 EL programs, instruction, and practices, joined us for all site visits. We wish to extend our sincere thanks to Superintendent León, who was appointed after we commenced our investigation and cooperated throughout, and the District employees who helped compile the information we requested and met with us during our onsite visits.

In accordance with our statutory requirements under the EEOA, we are notifying the District of the “conditions which, in [our] judgment, constitute . . . violation[s]” of the EEOA. 20 U.S.C. § 1710. Below we discuss those conditions, describe the facts underlying our conclusions, and propose steps to remedy the conditions that do not comply with the EEOA. *See id.* We note that some of the conditions described in this letter began before the District initiated its transition to local control in 2018, ending many years of direct oversight over the District’s operations by the State of New Jersey.<sup>2</sup> Additionally, although the District has more work to do to fully remedy the non-compliance identified below, we appreciate and acknowledge the actions the District took during our investigation to begin to address the concerns that were evident from visits and responses to our questions. We share the District’s desire to work collaboratively to improve its EL programs and practices. We look forward to discussing this letter and the remedial steps set forth in the enclosed proposed settlement agreement with you and other District personnel.

### **Background**

NPS operates 64 traditional public schools with a total enrollment of approximately 36,000 students, of whom about 6,000 (17%) are ELs.<sup>3</sup> The District’s students and families speak approximately 32 different languages, most commonly Spanish, Portuguese, Haitian Creole, French, Bengali, Urdu, and Arabic.

The District provides four different EL programs, which it identifies as: (1) Full-time Transitional Bilingual (“Full-time Bilingual”); (2) Part-time Transitional Bilingual (“Part-time Bilingual”); (3) Dual Language; and (4) English as a Second Language (“ESL”). The first three programs are similar in that each is designed to include at least one period per day of ESL instruction by an ESL-certified teacher.<sup>4</sup> Both of the District’s bilingual programs provide

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<sup>2</sup> See “Transition Plan for Return of Local Control to Newark Public Schools,” Dec. 19, 2017, <https://www.nps.k12.nj.us/mdocs-posts/local-control-nj-doe-transition-plan-for-the-return-of-local-control-to-newark-public-schools-12-19-2017/>; *see also* Adam Clark, “N.J.’s takeover of Newark schools is officially over—25 years later,” NJ.com (July 2, 2020), <https://www.nj.com/education/2020/07/njs-takeover-of-newark-schools-is-officially-over-25-years-later.html>.

<sup>3</sup> District Data Summary 2019-2020, Newark Public Schools, <https://www.nps.k12.nj.us/departments/data-research/district-summary/>.

<sup>4</sup> The terms “bilingual-endorsed teacher” and “ESL-certified teacher” in this letter mean elementary and secondary teachers who hold (1) a New Jersey instructional certificate for the level and subject areas in which they teach, and

instruction in Spanish and Portuguese, and the Part-time Bilingual program also offers instruction in French and Haitian Creole. In contrast to the Full-time Bilingual program, Part-time Bilingual provides bilingual instruction only for reading and math. The Dual Language program, in which both ELs and native English-speaking students participate, provides instruction in Spanish and English for half of the day in each language in all core content areas (math, science, social studies, and English/language arts). The Dual Language program's goal is to develop and maintain students' proficiency in both languages. Bilingual-endorsed teachers are supposed to provide the instruction in the Dual Language program and the two other bilingual programs. The fourth program, called "High-Intensity" ESL, consists of at least two periods per day of ESL instruction—i.e., a standard ESL class and a tutorial or ESL reading class. The High-Intensity ESL program is the default program for ELs who speak a language other than the languages served by the Full-time Bilingual, Part-time Bilingual, and Dual Language programs.<sup>5</sup>

### **Conditions Identified**

Our investigation into the District's EL programs and services identified several conditions that violate Section 1703(f) of the EEOA. Specifically, the District: (1) failed to appropriately identify and assess potential ELs, resulting in under-identification of EL students; (2) places ELs in schools or classrooms that lack EL services, without obtaining knowing and voluntary waivers from their parents; (3) fails to assess the English language proficiency of ELs whose parents waived, or "opted out" of, services; (4) does not communicate effectively with LEP parents; (5) fails to provide sufficient EL services to hundreds of ELs; (6) lacks enough ESL-certified and bilingual-endorsed teachers to adequately staff its EL programs; (7) fails to provide adequate language services to ELs with disabilities; (8) did not ensure that ELs were proficient in English before they were exited from EL programs; (9) does not adequately monitor the academic progress of its former ELs; and (10) does not properly evaluate its EL programs for effectiveness.

School districts must "take appropriate action to overcome language barriers that impede equal participation by [their] students in [their] instructional programs" by, *inter alia*, providing an EL program to help EL students learn English and participate in the district's programs. 20 U.S.C. § 1703(f); *see also Issa v. Sch. Dist. of Lancaster*, 847 F.3d 121, 134 (3d Cir. 2017) (upholding a preliminary injunction that compelled a school district to transfer LEP refugees to a school designed to teach ELs in order to overcome language barriers). Where a District does provide an EL program, we evaluate the program by applying the seminal three-pronged analysis adopted in *Castañeda v. Pickard*, 648 F.2d 989 (5th Cir. 1981), to assess "the appropriateness of a particular school system's language remediation program . . . under § 1703(f)." *Id.* at 1009-10; *see Issa*, 847 F.3d at 134 (applying *Castañeda* to conclude that the school district had not taken appropriate action). These prongs are: (1) whether the chosen program is based upon sound educational theory or principles; (2) whether the program is reasonably calculated to implement

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(2) a New Jersey endorsement in bilingual education or a New Jersey ESL certificate, as required by New Jersey law. *See* N.J. Admin. Code § 6A:15-1.9 (2020).

<sup>5</sup> *See* "Entitlement Letter: Initial Entry to English Language Development Instruction" for SY 2019-20, Newark Public Schools; *see also* N.J. Admin. Code § 6A:15-1.2 (2020).



effectively the educational theory (i.e., whether the school district is using “adequate . . . practices, resources and personnel necessary to transform the theory into reality”); and (3) whether, after a period of time sufficient to give the program a legitimate trial, the results of the program show that language barriers are in fact being overcome within a reasonable period of time. *Id.* This analysis also considers whether, in terms of design, implementation, and results, the EL program is “reasonably calculated to enable [EL] students to attain parity of participation in the standard instructional program within a reasonable length of time after they enter the school system.” *Id.* at 1011.

As discussed in further detail below, the District has failed to meet these legal standards, and the conditions and supporting facts identified in this letter demonstrate violations of the EEOA. *See* 20 U.S.C. § 1710.

## **I. The District’s Practices Have Under-Identified EL Students**

A school district must have procedures in place to accurately and timely identify students who have a primary or home language other than English, and to determine if they are ELs through a valid and reliable English proficiency assessment that tests all four language “domains”—reading writing, speaking, and listening. *See Keyes v. Sch. Dist. No. 1, Denver*, 576 F. Supp. 1503, 1513-14, 1518 (D. Colo. 1983) (absence of a formal valid testing process to identify EL students violated the EEOA); *Rios v. Read*, 480 F. Supp. 14, 23-24 (E.D.N.Y. 1978) (“The school district has the [EEOA] obligation of identifying [EL] children . . . by objective validated tests conducted by competent personnel”); *Cintron v. Brentwood*, 455 F. Supp. 57, 64 (E.D.N.Y. 1978) (requiring “validated” tests of English proficiency). While it is important to ask parents some questions to determine if their child might be an EL, a valid testing process is essential to properly identify ELs because “[i]t is common for parents to overstate the language abilities of their children.” *See Keyes*, 576 F. Supp. at 1514.

NPS’s registration process does not reliably and timely identify all ELs as required by the EEOA. After students enroll at an NPS school through the online Newark Enrolls process or in-person, families must then report to that school to complete a packet of registration materials. The clerks in the front office at each NPS school manage the registration process, sometimes with assistance from the school’s Bilingual Needs Assessment Teacher. Each registration packet includes several forms, including the Home Language Survey. NPS uses the survey to determine whether a student has been exposed to a language other than English at home and whether testing the student’s proficiency in English is appropriate.

NPS has revised its Home Language Survey several times during the past few years. Most recently, for the 2019-20 school year, the District transitioned to a new six-question survey mandated by the New Jersey Department of Education (“NJDOE”). The Home Language Survey is the first step in a new three-step EL identification process that has been standardized statewide.<sup>6</sup> This three-step process includes (1) the Home Language Survey, (2) a review of the student’s records, and (3) administration of either the K-WAPT for kindergartners or WIDA

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<sup>6</sup> NJDOE recently issued statewide guidance on, among other things, the identification of ELs under the Every Student Succeeds Act. *See* NJDOE, English Language Learner Entry and Exit, July 2019 (revised July 2020), <https://www.state.nj.us/education/bilingual/policy/ESSAGuidance.pdf>.



Screeners for students in grades 1-12 (collectively, the “screener”), which are English language proficiency assessments developed by the WIDA Consortium.<sup>7</sup> NPS’s use of NJDOE’s new EL identification process reflects a marked improvement over NPS’s prior procedures, which were inadequate and led to the under-identification of ELs.

But, as discussed below, NPS’s implementation of the new EL identification procedures remains uneven and problematic in certain areas. Overall, we found the District: (1) did not test the English Language Proficiency of all students whose Home Language Survey responses indicated they have a Primary or Home Language Other than English (“PHLOTE”); (2) did not have available at each school’s enrollment office hard copies of the Home Language Survey translated into the most commonly spoken non-English languages, thereby increasing the chances of LEP parents not understanding how to complete the survey; (3) used unreliable oral language interviews that led to potential ELs not being tested to see if they were ELs; and (4) administered only the Listening and Speaking parts of the kindergarten test when PHLOTE students enrolled in the second semester of kindergarten, thereby missing ELs who would have been identified had the District administered the Reading and Writing parts of the test.

*1. The District’s Practices for Identifying ELs Prior to School Year (“SY”) 2019-20 Were Inadequate*

NPS’s previous EL identification procedures were not adequate to identify all of the District’s ELs in a timely and reliable way. EL identification procedures should prompt schools to evaluate the English proficiency of potential EL students whose parents’ responses on the Home Language Survey indicate their children are PHLOTE students. However, during our interviews at several NPS schools in October 2018, the Bilingual Needs Assessment Teachers provided inconsistent responses regarding which answers on the Home Language Survey required them to administer the screener to assess whether a student was an EL. Some Bilingual Needs Assessment Teachers said they administered the screener only if families indicated a primary or home language other than English in response to two or more Home Language Survey questions, while others screened all students whose survey indicated a primary or home language other than English. Based on DOJ’s experience with other states and school districts, when a state or district fails to administer an English proficiency test to all PHLOTE students, they under-identify ELs. Indeed, the [REDACTED], which oversees the District’s EL programs, confirmed our concerns when [REDACTED] candidly revealed in June 2018 that at NPS “a lot of kids aren’t screened for bilingual”—meaning not screened to see whether they are ELs who are eligible for ESL and bilingual programs under New Jersey’s requirements.

Further, during the 2018-19 school year, the Office of Bilingual Education introduced an oral language interview as part of the EL identification process, which led to further inconsistencies and unreliability in this process. NPS directed Bilingual Needs Assessment Teachers to use the oral language interview to help determine whether to test the English of a

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<sup>7</sup> The WIDA Consortium is a member-based organization made up of U.S. states, territories and federal agencies dedicated to the research, design and implementation of a standards-based system for K-12 ELs.

<sup>8</sup> [REDACTED]

potential EL flagged by the responses on the Home Language Survey. If a potential EL ostensibly performed well during the oral interview, Bilingual Needs Assessment Teachers had the discretion not to test the student. This is problematic because, unlike the screener, the oral interview is not designed to be a valid and reliable assessment of the student's listening and speaking skills.<sup>9</sup> Nor does the oral interview assess reading and writing skills the way the test does. Failures to evaluate potential ELs' proficiency in all four language domains can result in ELs being missed. A significant number of ELs in NPS were surely missed when Bilingual Needs Assessment Teachers decided not to test PHLOTE students in all four domains based on these oral interviews. *See, e.g., Cintron*, 455 F. Supp. at 64 (finding EL identification procedures "deficient" because they failed to include "more specific methods for identifying" ELs and requiring district to use "validated tests" to assess English proficiency).

Inconsistencies in NPS' administration of the interviews also increased the likelihood that ELs were not timely tested or identified. NPS created four versions of the oral language interview consisting of eight or nine questions for students in grades 1, 2-5, 6-8, and 9-12. The Bilingual Needs Assessment Teachers we interviewed in October 2018, however, did not have a clear understanding of when they should administer the oral language interview, had no formal rubric for assessing the results of the oral language interview, and did not appear to have received appropriate training on how to administer the oral language interview. The Office of Bilingual Education subsequently reported that it had discontinued the oral language interviews as of the 2019-20 school year.<sup>10</sup> Despite this change, certain schools appear to have continued the practice in some form, as discussed further below. To identify ELs whom NPS missed under its inadequate screening and testing procedures, NPS will need to take appropriate action to (1) identify the PHLOTE students who registered and did not have their English proficiency tested, (2) test these students to determine if they are ELs, and (3) if they are, offer them EL services in a language their parents understand. Our proposed agreement accompanying this letter identifies these remedial steps to identify the missed ELs and other steps to timely identify ELs in the future.

## *2. The District's Current Process for Identifying ELs Still Needs Further Improvement to Comply with the EEOA*

NPS's current EL identification procedures require further corrective action to ensure that the District identifies all ELs in a timely and reliable way. During our visit in October 2019, the District had begun implementing NJDOE's new, three-step EL identification procedures. The school clerks at the front desk at each school are generally responsible for assisting families in completing the necessary forms and addressing questions during the registration process.

The first step involves completing and reviewing NJDOE's new Home Language Survey. Although the survey is available electronically on NPS's website in eight languages—including

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<sup>9</sup> NPS could provide no evidence that its oral interview was a valid and reliable assessment of students' English.

<sup>10</sup> Although some of the Bilingual Needs Assessment Teachers we interviewed in October 2018 had not yet used the oral language interview, it remained in use as part of the EL identification process throughout the remainder of the 2018-19 school year (for example, [REDACTED] Bilingual Needs Assessment Teacher had administered the oral language interview as of October 2018).

Arabic, Bengali, English, French, Haitian Creole, Portuguese, Spanish, and Urdu—we noted that most schools only had printed materials available in English, Spanish, or Portuguese during our October 2019 site visit. This is a serious concern because failures to communicate effectively with LEP parents about the Home Language Survey lead to the under-identification of ELs. LEP parents must understand the questions on the survey to be able to provide accurate information that the District needs to decide if English proficiency testing is appropriate. Moreover, as discussed below in Section III.4, most enrollment clerks only speak English or a few non-English languages (Spanish or Portuguese), are unaware of NPS’s interpretation and translation vendors, and therefore do not use them. After parents complete the Home Language Survey, at some schools the Bilingual Needs Assessment Teacher reviews the survey to determine whether the responses indicate the student is a PHLOTE (i.e., has a primary or home language other than English), and at other schools, the enrollment clerk executes this task. Given the confusion among Bilingual Needs Assessment Teachers regarding how to evaluate responses to the previous version of the Home Language Survey, whoever evaluates the completed survey forms requires appropriate training, and we found that enrollment clerks lacked such training. Future training should ensure that ad hoc oral interviews with students and parents do not lead to unreliable decisions about whether PHLOTE students are ELs or fluent in English because our investigation discovered that at least two schools were still using such interviews.<sup>11</sup>

If the Home Language Survey indicates that the student is PHLOTE, the second step in NPS’ identification process consists of a records review to determine if the student’s educational history indicates that the student is not an EL.<sup>12</sup> Based on NJDOE’s guidance, if the records review reveals that the student was previously identified as an EL but later exited based on New Jersey’s exit criteria, and has been attending U.S. schools since being exited from EL status, then the student’s English proficiency is not tested.<sup>13</sup> Similarly, if the records review indicates the student has never been classified as an EL and has been receiving instruction in English in a U.S. school for more than three consecutive years, then, based on NJDOE’s guidance, the student’s English proficiency is not tested. This guidance may be appropriate if the records indicate that the student enrolling in NPS is succeeding academically and was not previously enrolled by the former school/Local Educational Agency as an untested PHLOTE student. However, if the records reveal that the student enrolling in NPS is an untested PHLOTE student and struggling academically in a way that suggests a potential language barrier, NPS should test the student’s English proficiency because the prior school may have failed to test and identify the student as an EL. Erring on the safe side of testing the student’s English proficiency would be especially

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<sup>11</sup> For instance, one Bilingual Needs Assessment stated that she still uses the oral language interview from the 2018-19 school year and, when she is unavailable, she asks other ESL teachers to administer it. The Bilingual Needs Assessment Teacher at another school went further, indicating that she developed her own informal, conversational interview process in which she asks students to read a magazine, write about their college plans, and listens to gauge their level of English fluency.

<sup>12</sup> The Bilingual Needs Assessment Teacher’s review of students’ prior educational histories may occur orally via a conversation with a parent. The records review does not determine whether a student is an EL. It determines whether a student (1) is not an EL, or (2) should proceed to the next step (i.e., testing). See NJDOE, English Language Learner Entry and Exit at 3, July 2019 (revised July 2020), <https://www.state.nj.us/education/bilingual/policy/ESSAGuidance.pdf>.

<sup>13</sup> This guidance seems appropriate if the exited student’s records do not indicate that the student is struggling due to a persistent language barrier within the monitoring period after exit.



appropriate for NPS schools because many students enrolled in NPS at various schools that failed to test all PHLOTE students over several years.

Although some Bilingual Needs Assessment Teachers pointed to this records review as a reason for not testing the PHLOTE student's English proficiency, others indicated that they proceed immediately with the third and final step—administering the K-WAPT or WIDA Screener—if the Home Language Survey indicates the student is a PHLOTE. This may be an appropriate next step depending on what the records review reveals, as noted above. Proper training on how to handle the records review is therefore critical. The proposed agreement includes the steps and training needed to ensure that all ELs are timely identified when families register in NPS going forward.

Bilingual Needs Assessment Teachers typically administer either the K-WAPT or WIDA Screener to potential ELs in kindergarten and grades 1 to 12. As of the 2018-19 school year, kindergarten students who register before January receive only the Listening and Speaking portions of the K-WAPT. NPS administers the entire K-WAPT covering all four domains to kindergarten students who register between January and June. Before the 2018-19 school year, however, NPS administered only the Listening and Speaking domains of the K-WAPT and did not use the Reading and Writing portions of the exam when students enrolled in the second semester of kindergarten. The District must therefore ensure that ELs were not missed when their families registered prior to the 2018-19 school year. Thus, our proposed agreement requires NPS to identify PHLOTE students who were not tested. The District must also identify the PHLOTE students whom it tested only in the Listening and Speaking domains after the second semester of kindergarten and identified as “Initially Fluent English Proficient.” Many of these students may be ELs and need to be tested in all four domains.

In sum, although NPS has improved its procedures for identifying EL students over the course of our review, the District must take further action to accurately identify all potentially eligible students. This action includes using a translated Home Language Survey and/or qualified interpreters, testing all PHLOTE students with a valid and reliable screener (with rare exceptions as appropriate under New Jersey's new guidance), and appropriately training Bilingual Needs Assessment Teachers—and any other personnel involved in registering students—to ensure that all schools identify ELs in timely, valid, and reliable ways.

## **II. The District Placed ELs in Schools or Classrooms that Lacked EL Services Without Obtaining Knowing and Voluntary Waivers From Their Parents**

In enacting Section 1703(f) of the EEOA, Congress affirmed the holding in *Lau v. Nichols* that “there is no equality of treatment merely by providing [EL] students with the same facilities, textbooks, teachers, and curriculum” as non-EL students because “students who do not understand English are effectively foreclosed from any meaningful education.” 414 U.S. 563, 566 (1974); see *Castañeda*, 648 F.2d at 1008 (“the essential holding of *Lau* ... has now been legislated by Congress [in Section 1703(f) of the EEOA]”). To afford equal educational opportunities to EL students, districts must provide them with specialized instructional services designed to overcome their language barriers through an educationally sound EL program. *Id.* at 1009. Parents may waive their child's EEOA right to receive such services, but this decision

must be informed and 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”). Additionally, ELs who opt out of EL services 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 under the EEOA.<sup>14</sup>

Our review uncovered a series of District failures involving the EL placement and waiver process, which require further remediation. The District: (1) failed to obtain voluntary, informed written waivers from parents of ELs enrolled in schools without EL programs; (2) did not follow up with parents in subsequent years to see if the parents wished to continue the waiver or enroll their EL children in an EL program; (3) did not inform parents that ELs could partially opt out of EL services (e.g., opt out of bilingual classes, but receive ESL); (4) failed to offer EL services to some students who were identified as ELs at Dr. William H. Horton Elementary School (“Horton”) and whose parents did not knowingly consent to waive EL services; and (5) failed to adequately train all Bilingual Needs Assessment Teachers, who are responsible for ensuring that LEP parents understand their EL program options before they waive EL services.

*1. The District’s Parental Waiver Procedures for Opt-out ELs Prior to SY 2019-20 Failed to Comply with the EEOA*

When our investigation began, the District’s EL placement and waiver processes did not comply with the EEOA. During our discussions in 2018, the [REDACTED] disclosed that the District has “a lot of kids who waived [EL services] without fully understanding.” As [REDACTED] explained, NPS has not offered EL programs at almost half of its schools, which the District calls “non-Hub” schools,<sup>15</sup> and has not required non-Hub schools to obtain signed parental waivers to opt out of EL services when ELs enroll. NPS did not produce any parental waivers from its non-Hub schools for the 2015-16, 2016-17, and 2017-18 school years and did not provide EL services at these schools. NPS staff indicated that for those parents who do waive EL services in writing upon enrollment, schools do not follow up with parents in subsequent years to determine whether the parents wish to continue the waiver or enroll their EL children in services, even if the ELs are struggling without services. The [REDACTED] also told us that, prior to 2018, NPS did not inform parents that ELs could partially opt out of EL services (e.g., opting out of bilingual classes, but opting in to ESL). In other words, some of NPS’s opt-out ELs might have chosen to receive partial EL services had NPS properly informed their parents of this option in a language they understand.

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<sup>14</sup> All students who meet the definition of English learner under the Every Student Succeeds Act, *see* 20 U.S.C. § 7801(20), must be tested annually with a State-approved English language proficiency assessment. *Id.* §§ 6311(b)(2)(G) (Title I), 6312(e)(3)(A)(viii) (Title I), 6823(b)(3)(B) (Title III), 6826(b)(4)(A) (Title III); *see also* 20 U.S.C. § 1703(f).

<sup>15</sup> Thus, the District refers to schools that offer EL programs as “Hub” schools.

As our investigation progressed, we also learned that, at Horton, NPS failed to offer language services to students who were identified as ELs in the registration process and placed in classrooms without EL services. Although the school has EL programs, NPS failed to obtain informed, voluntary written waivers from the ELs' parents when assigning these ELs to general education classes. According to NPS, at Horton, "certain students who scored close to the cut-off for being identified as an EL and who had errors towards the end of the identification test that were not deemed language-related were placed in general education classrooms, [and] not provided with EL services."<sup>16</sup> But NPS failed to explain how it determined that the students' incorrect answers on a screener designed to assess English proficiency were "not deemed language-related." Likewise, while NPS stated that Horton still "closely monitored" these ELs, NPS provided no evidence to support this assertion, and even if it did, monitoring would not be an adequate substitute for providing the ESL or bilingual services to which these ELs are entitled.

Most disconcerting, NPS identified many of these students as ELs in 2014 or 2016 but NPS never provided them any EL services. After the response to our investigative inquiries revealed that these ELs were never provided services, they were re-tested in 2018. Those test results demonstrated that almost all of those students were still eligible for EL services. For example, one student who was identified as an EL in kindergarten in 2014, but was not offered EL services, received a score of 2.5 on the WIDA Screener in June 2018 at the end of 3rd grade—a score significantly below the 4.5 threshold for English proficiency. Similarly, another student was identified as an EL in kindergarten in September 2016, was not offered EL services, and scored 1.5 on the WIDA Screener at the end of first grade in June 2018. NPS's decisions not to offer EL services to some students who were identified as ELs and whose parents did not knowingly consent to waive EL services constitute serious violations of Section 1703(f) of the EEOA and require the prompt and effective remedies proposed in the agreement. *See* 20 U.S.C. § 1703(f); *Serna v. Portales Mun. Schs.*, 499 F.2d 1147, 1150 (10th Cir. 1974) (discussing the negative effects of placing ELs in a class taught in English without EL services).

## *2. The District's Current Parental Waiver Practices for Opt-out ELs Remain Insufficient*

NPS attempted to address these deficiencies by re-training Bilingual Needs Assessment Teachers and assigning them at non-Hub schools to administer the WIDA Consortium's ACCESS 2.0 ("ACCESS") assessment to opt-out ELs.<sup>17</sup> Although these mitigation efforts are a positive step in the right direction, they proved insufficient.

First, in spring 2018, NPS began testing opt-out ELs for the first time with the ACCESS. The results showed that out of the 182 opt-out ELs NPS identified, 155 took the ACCESS and 27 did not. Of the 155 who completed the ACCESS, 11 achieved a proficient score. These results

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<sup>16</sup> *See* May 29, 2018 NPS Resp. to Info. Req. No. 1 at 1–5.

<sup>17</sup> NPS also revised its opt-out form for the 2018-19 school year to permit parents to partially opt out of EL services. However, one of the options on the revised form contained a confusing double negative by which parents were asked to opt out of all EL services by "declin[ing] . . . neither Bilingual nor ESL services." Therefore, parents who executed the form and selected this option were actually not opting out of any EL services. After we highlighted the error, NPS subsequently revised its opt-out form again to address the issue.



demonstrate that the vast majority of NPS's opt-outs were still ELs, continued to be entitled to EL services, and should have been re-offered services for the subsequent school year. Moreover, NPS failed to test 15% of its opt-out ELs with the ACCESS in June 2018 and did not explain why these students were not assessed.

Second, our review of NPS's more recent parental waivers from June and October 2019 show that ELs are still being placed at non-Hub schools without voluntary and knowing consent from parents in writing. For the 2018-19 school year, NPS reportedly enrolled 102 ELs at non-Hub schools, which, as noted above, do not provide EL services. Yet, the District failed to obtain waivers from the parents of 47 of the 102 ELs—nearly half of all ELs reportedly enrolled at non-Hub schools.<sup>18</sup> NPS's failure to obtain informed, voluntary parental waivers for all opt-out ELs at non-Hub schools persisted during the 2019-20 school year. As of October 2019, NPS disclosed that it had enrolled 112 ELs at non-Hub schools, but it had obtained waivers from only 54 of these ELs' parents. In other words, the parents of 52% of all non-Hub ELs did not waive EL services.<sup>19</sup>

For instance, Lincoln School, which offers no EL services, reported that the parents of some opt-out ELs still had not signed waivers at the end of the school year (e.g., notations stated “parents must complete” waivers) or that the waivers were “missing” because “parents have not returned [them].” Another non-Hub school, Fourteenth Avenue School, also reported that it had not received written parental waivers for all of its opt-out ELs as of June 2019. Additionally, we observed that Lincoln School had 17 opt-out ELs in October 2019, reflecting a relatively high number of ELs assigned to a school that does not offer EL services. We also noted that non-Hub school Bilingual Needs Assessment Teachers, who are responsible for ensuring that LEP parents fully understand the EL program options before they waive EL services, sometimes lack the pedagogical knowledge to explain the EL program. For example, the Bilingual Needs Assessment Teacher at [REDACTED], which lacks EL services, was unaware that NPS offers a Part-time Bilingual program; yet, the Bilingual Needs Assessment Teacher assisted families in waiving EL services to attend [REDACTED]. Given the limited, often inaccurate, and rarely translated or interpreted information about EL programs in the enrollment process, as discussed in Section III below, we remain concerned that LEP parents are not voluntarily and knowingly waiving their children's right to receive EL services, particularly at non-Hub schools, which do not offer EL services. The high number of NPS schools without any EL program leaves ELs with far fewer educational opportunities than non-ELs because the parents of ELs must effectively waive their child's right to EL services to enroll in non-Hub schools.

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<sup>18</sup> NPS documented 55 ELs whose parents reportedly waived their child's right to services and were listed on Form 5, 43 who did not waive EL services and were listed on Form 7, and 4 who were not accounted for on either Form 5 or Form 7 at non-Hub schools as of June 2019. See Dec. 17, 2019 NPS Resp. to Info. Req. Nos. 2, 5(c), 5(d) (“October and June 2019 Checklists,” “Form 5 Parental Waiver Lists,” “Form 7 Students Who Are Not Receiving All Entitled Services.”)

<sup>19</sup> As of October 2019, NPS documented 54 ELs whose parents reportedly waived their child's right to services on Form 5, 20 who did not waive EL services and were listed Form 7, and 38 who were not accounted for on either Form 5 or Form 7 at non-Hub schools. See Dec. 17, 2019 NPS Resp. to Info. Req. Nos. 2, 5(c), 5(d) (“October and June 2019 Checklists,” “Form 5 Parental Waiver Lists,” “Form 7 Students Who Are Not Receiving All Entitled Services.”)

The District's inappropriate EL placement and waiver practices violate Section 1703(f) of the EEOA. These practices unfairly deprive ELs of the right to the services they need to attain proficiency in English and have an equal opportunity to participate in the District's programs.

### **III. The District Does Not Communicate Effectively with LEP Parents**

A district must take appropriate action to overcome the language barriers of LEP parents when communicating about its programs and the procedures for accessing those programs so that their children are not denied an equal opportunity to participate. *See* 20 U.S.C. § 1703(f). Ensuring equal educational opportunities for ELs requires adequately notifying their parents of district and school activities, and effectively communicating in district and school meetings through interpreters and translated documents. As discussed below, we concluded that the District does not ensure effective communication with LEP parents and fails to provide them with adequate information regarding the District's language acquisition services, thereby impeding ELs' equal participation in the District's programs.

NPS's District-wide enrollment process relies on parent choice rather than traditional neighborhood attendance zones. The school selection process is more complicated for LEP parents of ELs, however, because only about half of the District's schools offer EL programs, known as "Hub" schools. And each of these Hub schools provides different types of EL programs. As a result, the school selection and enrollment process is critical because it determines which EL program options parents can choose and which language acquisition services ELs actually receive.

Ultimately, we determined that NPS fails to communicate effectively with LEP parents during the enrollment process by (1) not offering adequate interpretation and translation services to LEP parents so that they can meaningfully access the enrollment process, and (2) not providing LEP parents with adequate information in a language they can understand to allow them to make an informed choice about NPS's schools and EL programs. Moreover, our investigation revealed that NPS's failure to communicate effectively with LEP parents extends to its registration process more generally and to other areas of school operations.

#### *1. Enrollment Process Overview*

##### *a. Online Enrollment Summary*

Newark Enrolls, NPS's online enrollment platform, serves as the main point of enrollment usually between December and February for students who will enter Pre-K, K, or ninth grade during the following school year. During this period, through Newark Enrolls, parents and students may use the universal application to apply to as many as eight schools for the following school year. The application includes all NPS schools and most Newark charter schools.<sup>20</sup> NPS lists bilingual programs as a separate application option for each school that

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<sup>20</sup> Certain charter schools and some vocational schools have opted out of using the Newark Enrolls universal enrollment platform and use their own enrollment processes. Additionally, although families apply to NPS' magnet

offers one. ELs seeking to enroll in a school’s bilingual program must select that program as one of their eight choices when submitting an application. After the universal enrollment period closes in February, NPS uses a computerized algorithm to match students to schools based on their application information. Currently, the algorithm matches any student who (1) has already been formally identified as an EL, or (2) has been flagged as a potential EL to a Hub school that offers EL programs.

In April, NPS sends letters to applicants informing them of their assigned schools for the following school year. NPS informed us at the time of our June 2018 visit that the school match letters were available in only English and Spanish. Because NPS sends these letters in only English and Spanish, NPS fails to effectively communicate this critical information to families that speak another language. Families who apply online can also check the status of their application in a separate part of the Newark Enrolls website.<sup>21</sup> Unlike other parts of the Newark Enrolls website discussed in Section III.3 below, this part offers only limited translation options and, when accessed in a language other than English, fails to provide important information to parents.<sup>22</sup>

#### *b. In-Person Enrollment Summary*

Beginning with the 2019-2020 school year, families who (1) move into the District after the Newark Enrolls universal online application period closes and need to enroll a student, or (2) seek to change the school to which their child was matched after completing the universal enrollment process online, must do so in person during school hours at any NPS school. In these instances, school enrollment clerks directly enroll students and place them into an NPS school with available seats.<sup>23</sup> NPS defaults to enrolling ELs in separately tracked “bilingual” seats in Hub schools. Because LEP parents may go to any NPS school to complete the in-person enrollment process, it is essential that each school have complete and accurately translated information about which EL programs are offered at each NPS school and the differences between the EL programs, as well as access to qualified interpreters to communicate with parents in languages for which information is not translated.

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schools using Newark Enrolls, each magnet school has specific criteria for admission, including admissions tests and other assessments. This letter does not address magnet or charter schools.

<sup>21</sup> See Newark Enrolls, Log-In Portal Page, <https://newarkenrolls.schoolmint.net/> (last visited Dec. 15, 2020).

<sup>22</sup> For example, in August 2020, the English version of this section of Newark Enrolls provided information about the 2020-2021 school year and the availability of various forms, including a full-time remote instruction consent form. None of this information was available on the Spanish or Portuguese versions of the page. In other languages, like French, the information remained on the page in English. While we understand that NPS has now determined that all students will learn remotely through the first marking period, this incident still demonstrates a failure to timely provide essential information to LEP parents to assist them in making choices about educational opportunities for the 2020-2021 school year.

<sup>23</sup> Prior to the 2019-2020 school year, this in-person, direct enrollment process was centralized at the Family Support Center in downtown Newark. That system also lacked sufficient translation and interpreter services.



## 2. Newark Enrolls Guidebook

To help families choose up to eight schools in the application process, NPS provides a Newark Enrolls Guidebook that briefly describes each school for each upcoming school year.<sup>24</sup> The Guidebook is available in hard copy in English, Spanish, Portuguese, and French<sup>25</sup> and online in English, Spanish, Portuguese, and Haitian-Creole.<sup>26</sup> However, the 2020-2021 Guidebook provides no information in any language about the types of EL programs offered at each school (Full-time bilingual, Part-time bilingual, Dual Language, and High Intensity ESL).<sup>27</sup> Further, it fails to mention Dual Language programs at all. Instead, it indicates only which schools offer bilingual and/or ESL programs without further description. As a result, LEP parents lack sufficient information to make an informed choice about schools that offer EL services.<sup>28</sup>

Compounding this problem, NPS represents that the Guidebook contains accurate information at the time of publication and that parents should visit the Newark Enrolls website for the most up-to-date information; yet, the 2020-2021 Guidebook's list is not accurate or complete with respect to information that NPS knew or should have known at publication. For example, the 2020-2021 version of the Guidebook indicates that Peshine Avenue school will offer ESL for the 2020-2021 school year, but staff there informed us that the school would have no EL program in 2020-2021 because it lacks sufficient staff to provide its ELs with the required two periods of daily ESL.<sup>29</sup> (Staffing issues, like this one, are discussed below under Section V.) Providing an accurate list of Hub schools and a complete description of each Hub school's EL programs in the Guidebook is critical because the Guidebook is one of the only sources of information available to LEP parents about EL services during the enrollment process.

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<sup>24</sup> When we visited the Family Support Center in July 2018, we were told that the Guidebook for the 2017-2018 school year was also used for the 2018-2019 school year.

<sup>25</sup> We reviewed hard copies of the Guidebook in English, Spanish, and Portuguese. However, personnel at Central High School informed us that the Guidebook is also available in hard copy in French.

<sup>26</sup> The Newark Enrolls website is confusing on this point. The upper right hand corner of the website offers a drop down menu of translation choices, but clicking one of those does not translate the Guidebook itself. Instead, users must click on a separate translation button located near the guidebook. As of the date of this letter, clicking on the button for any language other than English leads only to a page that says "coming soon."

<sup>27</sup> The 2019-2020 Guidebook's individual school description pages indicated "bilingual" or "dual language" programs along with the languages offered, but did not identify or explain the differences between the bilingual programs or High Intensity ESL program. Parents of ELs need this information to choose among EL programs.

<sup>28</sup> This problem is compounded by the fact NPS maintains a Bilingual Schools Map on its Office of Bilingual Education website, which appears to be out of date and does not align with the information contained in the Guidebook. See Bilingual Schools Map, Office of Bilingual Education, Newark Public Schools, <https://www.nps.k12.nj.us/wp-content/uploads/2016/02/BilingualSchoolsMap.pdf> (last visited Dec. 15, 2020).

<sup>29</sup> We note that the current version of the Guidebook also indicates that Peshine Avenue will provide ESL during the upcoming school year (2021-2022). If, in fact, Peshine Avenue has continued to offer EL programs during the 2020-2021 school year with insufficient staff, and/or plans to do so during the 2021-2022 school year, we discussed this problem in Section V. In any event, school staff and parents still need accurate information about schools' EL programs to enable LEP parents to make an informed choice and participate equally in the District's instructional programs.

### 3. Newark Enrolls Website

Information about NPS' universal enrollment process is available on the Newark Enrolls<sup>30</sup> website; however, the website contains a host of obstacles for LEP parents seeking to access that information in order to enroll students. First, the website's mechanism for answering parent questions is inadequate for LEP parents given the limited number of languages available through the Contact Center's pre-recorded telephone menu and its language support services.<sup>31</sup> Second, the toolbar in the upper right-hand corner offering a drop down menu for translation does not function in all internet browsers (for example, it functions in Google Chrome, but not Internet Explorer or Microsoft Edge) and there is no translated information to clarify this for LEP parents. Third, even if LEP users can determine that they must access the toolbar through Google Chrome, the translation appears to be automated and inaccurate. NPS staff previously indicated that the District uses Google Translate for the Newark Enrolls main pages and only uses professional translation services in conjunction with the automated translation for the password-protected portion of the website. Without qualified translators reviewing and correcting the automated translated material, the information communicated is often unclear or inaccurate. For example, review of the FAQ section in Portuguese indicates that the Google-Translate-generated translation creates ambiguities that make the text difficult to understand.<sup>32</sup>

Finally, the website's new School Finder tool, which is designed to assist families in locating nearby schools and providing information necessary to help those families make an informed school choice, contains obstacles for LEP families.<sup>33</sup> Like the rest of the Newark Enrolls website, School Finder offers a translation button at the top right of the screen. Notably, however, School Finder offers automated translation into fewer non-English languages (5) than the rest of the Newark Enrolls site (7), and NPS does not have a qualified translator review and correct the automated translations to ensure their accuracy. Moreover, a review of the translated material revealed that the general description section for each school remains in English regardless of the language selected using the website's translation button, and the demographic

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<sup>30</sup> The website contains multiple tabs, including "About Enrollment," "School Finder," "Guidebook," "FAQs," "Enrollment Timelines," and "Contact." See Newark Enrolls website, <http://www.newarkenrolls.org> (last visited Dec. 15, 2020).

<sup>31</sup> The Newark Enrolls website offers users the opportunity to submit any questions online through the website (which may take up to five business days to generate a response) or to call the Contact Center during business hours. The Contact Center serves families via telephone who have general questions about NPS, including enrollment and can escalate issues regarding enrollment to the proper channels, but staff there do not have substantive information about the enrollment process. Moreover, the Contact Center's pre-recorded telephone menu provides only English, Spanish, and Portuguese options. Thus, LEP parents who speak other languages must rely on English-speakers to assist them. The Contact Center offers telephonic language support in only Portuguese and Spanish and can access internal support for Haitian Creole speakers through the Office of Bilingual Education. However, one Contact Center employee we interviewed indicated that in five years the employee had never contacted the Office of Bilingual Education for such assistance. Furthermore, it appears that Contact Center employees receive no training or certification as interpreters.

<sup>32</sup> For example, the Portuguese version translates the following words in English into words that have the following meanings in Portuguese: "English" into "Portuguese"; "Pre-Match" into "Pre-Game"; "Magnet School" into "Magnetic"; "Charter" into "Letter"; and "Grade" (meaning child's grade level) into the Portuguese word for academic performance.

<sup>33</sup> See School Finder, <https://newarkenrolls.schoolmint.net/school-finder/results> (last visited Dec. 15, 2020).

and other data are largely unusable because the categories enumerated in the English version are almost all listed as “null” in the translated versions.<sup>34</sup>

Because of current health and safety concerns, NPS also decided to host its annual school information fair virtually, with a “video showcase” including videos from schools within NPS and an overview from Superintendent León. While many of the Hub school videos contain at least some information in languages other than English, the overview video from Superintendent León, which informs students that all eighth graders must take an exam as part of the admissions process for high school, is available in English only.

#### *4. The Decentralized, School-Based Family Support Center System<sup>35</sup>*

NPS has indicated that it decentralized the in-person enrollment process across the entire District with the intention of making it more convenient for families who do not live near the main Family Support Center office.<sup>36</sup> While we appreciate the good intention behind decentralizing the enrollment process, decentralization unfortunately had the effect of exacerbating barriers for LEP parents and their children because NPS decentralized its enrollment process without first addressing the inadequate language services that LEP parents encountered under the centralized enrollment process. Specifically, NPS vastly increased the number of people involved in the process and the number of locations where those services are performed without ensuring that people at each location are qualified and adequately trained to communicate with LEP parents. Indeed, spreading the enrollment process across every school in the District has resulted in insufficient training of enrollment clerks and problematic experiences for LEP parents seeking to enroll ELs or potential ELs.

As a primary matter, NPS has not offered sufficient training to designated enrollment clerks and backup enrollment clerks. In summer 2019, NPS provided training, which included a list of schools offering bilingual programs and ESL programs, but failed to explain the differences between various types of EL programs (Full-Time/Part-Time Bilingual, Dual Language, and ESL) or to identify which schools offer Full-Time versus Part-Time Bilingual

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<sup>34</sup> Even where LEP families can access information on School Finder, the information sometimes conflicts with the 2020-2021 Guidebook and is often inaccurate. For example, School Finder states that Horton provides only an ESL program, yet the Guidebook indicates that it provides both ESL and bilingual Spanish programs, and Horton’s own website indicates that it offers a bilingual program. The School Finder entry is incorrect. This discrepancy is particularly concerning because the Guidebook asks users to defer to the Newark Enrolls website for the most up-to-date information when conflicts arise between the two.

<sup>35</sup> Prior to September 2019, NPS maintained a centralized Family Support Center in downtown Newark where all in-person enrollment occurred. While we noted problems with that center during our 2018 visit, we have not included them here because the Family Support Center no longer functions as a regular enrollment facility. However, to the extent that any enrollment continues to occur at that location, we would expect NPS to ensure that it complies with the EEOA.

<sup>36</sup> This portion of the letter discusses the enrollment process in a typical school year. We recognize that the in-person enrollment process may have changed temporarily because of current health and safety concerns.



programs.<sup>37</sup> Instead, NPS enrollment clerks must rely on the limited information contained in the Guidebook and the incomplete list of bilingual programs by school when communicating with LEP parents about NPS's EL programs. As a result, enrollment clerks cannot provide LEP families with sufficient information about various schools' EL programs to allow LEP parents to make an informed school choice.<sup>38</sup> Compounding this problem, NPS's training supports the use of Google Translate to communicate with LEP parents, which, as discussed above, creates inaccuracies in communications and further limits LEP families' access to NPS' programs.<sup>39</sup>

Second, most enrollment clerks, who speak English or a few non-English languages (Spanish or Portuguese), are not uniformly aware of NPS's interpretation and translation vendors and do not use those vendors. For example, NPS recently retained vendors—Language Line and the Big Word—to provide interpretation and translation services, but we discovered that a number of school enrollment clerks did not know about these resources, and that the services are only available by contacting the Office of Bilingual Education. Instead, enrollment clerks often rely on LEP parents to bring an interpreter with them or use Google Translate to communicate with families who speak languages other than the limited languages spoken by school staff, many of whom self-identify as bilingual, are not endorsed in bilingual education, and have not had their language skills objectively assessed. Worse yet, some schools, such as Central High School, indicated that they sometimes use students as interpreters.

Even where enrollment clerks are aware that the Office of Bilingual Education has language assistance vendors available, we learned that schools do not always contact that office and cannot directly call a vendor to obtain needed telephonic interpretation services when an LEP parent arrives. For example, we observed an enrollment clerk at [REDACTED] communicating with an LEP parent about enrollment in Spanish, although the parent only spoke Portuguese, resulting in confusion and misinformation. We also found that where the school conducting the enrollment process ultimately enrolls the student, that school usually provides the family with certain school specific forms that families must complete as part of the enrollment process but some schools did not have those forms available in multiple languages.

Finally, NPS fails to adequately train and supervise Central Office enrollment coordinators to ensure that school-based enrollment clerks are appropriately engaging with and supporting LEP parents. Under the decentralized system, NPS employs Central Office enrollment staff consisting of a senior enrollment manager, four enrollment coordinators who each are responsible for a roster of schools both on-site and remotely (via telephone and electronic mail), and two enrollment employees who remain at the Central Office to provide data entry and other “back end” enrollment support. The four Central Office enrollment coordinators

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<sup>37</sup> Although we did not attend the training and, therefore, cannot recite exactly what each speaker said, the training materials and our interviews revealed that enrollment clerks lack information about how the bilingual programs differ and which schools offer Full-time versus Part-time bilingual programs.

<sup>38</sup> Notably, the fact that about half of the District's schools do not even have EL programs effectively denies EL students an equal opportunity to participate in these schools and their programs.

<sup>39</sup> For enrollment clerks who could not attend the training, the designated enrollment coordinators provided direct instruction at each clerk's school. However, NPS failed to ensure that the direct instruction was standardized, and it did not necessarily replicate the summer training.

provide support to the school enrollment clerks, including occasional on-site visits to schools to answer questions, review paperwork, and audit student files. However, NPS did not train the enrollment coordinators regarding their new roles in the decentralized system, including how to (1) interface with enrollment clerks to ensure that all enrollment clerks have a thorough working knowledge of the enrollment process for ELs; (2) create a support structure for the enrollment clerks with access to translated materials and qualified interpreters; and (3) monitor the enrollment process at their assigned schools. Furthermore, NPS apparently has no protocol for the coordinators' on-site reviews. As a result, although enrollment coordinators may audit incoming student files as part of their supervisory duties, these audits merely confirm that files contain certain documents instead of substantively reviewing the files to ensure that the enrollment clerks completed the paperwork properly with the aid of translated materials and/or interpreters. In fact, the enrollment coordinators may not even have access to some of the files needed after a school enrollment clerk passes a student's files to a Bilingual Needs Assessment Teacher for registration and potential EL student screening. We also learned that Central Office enrollment staff will not know about any of these school-level problems unless the enrollment clerks choose to escalate them. Thus, NPS remains unaware of and unable to correct issues arising with LEP parents during the enrollment process.

#### *5. NPS Website*

NPS's main website<sup>40</sup> fails to provide LEP parents with access to important information necessary to ensure their children have equal opportunities to participate in other programs. The website is in English with only Google Translate options for additional languages. In addition to the inaccuracies of automated machine translations, it would be difficult for LEP parents even to find the Google Translate option because the instructions and language selection options are listed in English with no pictures. Even when a user figures out how to select another language, many of the icons on the homepage and the scrolling information bar contain information that remains in English. In addition, accessing the student portal link from the main NPS homepage in the Spanish language version links the user to an English language login page with no translation option. Further, accessing the student enrollment link from the Spanish language version of the NPS homepage connects the user to the English language version of the Newark Enrolls website. The user must then find and select the proper language option from the upper right corner drop-down menu to access Newark Enrolls in another automated machine translation in Spanish. Additionally, links from the NPS website to pdf documents connect the user to English-version documents only with no translation option. In all of these ways, the District fails to provide Spanish-speaking and other LEP parents access to essential information they need to participate in the District's programs.

#### *6. Other Areas of School Operations*

As discussed above, NPS often fails to communicate effectively with LEP parents during the enrollment process, but this failure extends throughout the registration process and other areas of school operations. For example, NPS does not formally ask LEP parents to identify the

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<sup>40</sup> NPS's website is separate from Newark Enrolls, and it provides information regarding NPS's non-enrollment-related operations as well as a link to Newark Enrolls. *See* Newark Public Schools Website, <https://www.nps.k12.nj.us/>.

language in which they need to receive communications—information which NPS could easily obtain by adding one question to the Home Language Survey or other registration documents, which parents complete after finishing the enrollment process. The LEP parent’s interpreter and/or translation needs could then be recorded in PowerSchool so that any school would be aware of these needs upon a student’s arrival and could secure the resources to communicate with the family in the designated language from the start.

Further, even where schools may know about parents’ LEP status, they communicate inadequately with LEP parents on matters essential to their children’s education. For example, the Bilingual Needs Assessment Teacher at one high school stated that report cards and progress reports are available only in English unless the teacher translates the comments herself into another language. Many of the schools we visited had bilingual office staff and community engagement specialists, but neither they, nor the District, had trained such staff on the practice of translating or interpreting. Staff often communicate with LEP parents using web-based, automated translation services, like Google Translate, or rely upon untrained students, friends, and family members to interpret when communicating essential information about the school programs and activities available to ELs in the District, as discussed above.

Collectively, the District’s failures to communicate effectively with LEP parents at the District and school levels deny ELs equal opportunities to participate in its instructional programs. The District must ensure that LEP parents have timely and meaningful access to accurate information about its EL and other educational programs so that LEP parents can make informed educational decisions for their children and are not denied the educational opportunities afforded to English-proficient parents and students.

#### **IV. The District Fails to Provide Sufficient EL Services to Hundreds of ELs**

NPS must provide EL students with a language assistance program that is educationally sound, adequately resourced, “reasonably calculated to enable students to attain parity of participation in the standard instructional program within a reasonable length of time after they enter the school system,” and proven successful. *Castañeda*, 648 F.2d at 1009-11. Without commenting on the quality or efficacy of the English language development services NPS delivers to ELs within classrooms,<sup>41</sup> our investigation revealed that NPS annually fails to provide hundreds of ELs with even the minimum amount of EL services required by the District’s EL program.

At the beginning and end of each school year, each school submits to the Office of Bilingual Education a document known as the “Form 7,” which lists ELs at that school who have not received all of the EL services that NPS had determined they were entitled to for that school year. In other words, the Form 7 requires each school to identify its underserved ELs.

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<sup>41</sup> Our investigation to date has not focused on the qualitative substance of English language development services provided by NPS to its ELs within the classroom. However, the United States reserves its authority under the EEOA to investigate the quality of such services provided by NPS, including during its monitoring of the proposed settlement agreement.

The data NPS produced demonstrated that many of the Hub schools reported large numbers of underserved ELs on their Form 7s. For example, in June 2018, the South Street and Wilson Avenue Schools reported 104 and 115 students on their Form 7s, respectively. In October 2018, the next reporting cycle, the Ann Street School listed 180 ELs on its Form 7. Moreover, the data reveals that, for certain schools, the number of underserved ELs on the Form 7 increased each year. For instance, Mt. Vernon Elementary School, touted as a “U.N. School” because of the diverse array of languages spoken by its students, identified 27 ELs as not being fully served as of June 2016, 40 ELs as of June 2017, and 55 ELs by June 2018.<sup>42</sup> Similarly, the Ann Street School identified 94 underserved ELs on its June 2016 Form 7, 129 in June 2017, 186 in June 2018, and 191 in June 2019. That number increased even further to 217 by October 2019. Wilson Avenue’s number of ELs without adequate EL services also rose from 94 in June 2019 to 151 by October 2019. In total, NPS reported that 819 ELs were not receiving all of their EL services at Hub schools as of June 2019, and that number increased to 1,281 ELs at Hub schools by October 2019.

We also learned through interviews that NPS does not use the Form 7 data to correct gaps in EL services or to identify chronically underserved ELs who appear on consecutive Form 7s for multiple years. In April 2019, at DOJ’s request, NPS identified 457 unique students that NPS failed to provide with full English language development services for more than one school year between fall 2015 and spring 2018. In some cases those students were underserved for all three of those school years. The data also revealed that the vast majority of Hub schools failed to provide full services to at least some ELs across multiple school years.

Adding to this issue, our site visits revealed that at least some of the Form 7s likely failed to include underserved ELs because the school employees responsible for completing the Form 7s, typically Bilingual Needs Assessment Teachers, did not understand how to accurately complete the forms. For example, one teacher did not include ELs who received only partial EL services, even though none of the school’s ELs received all the services to which they were entitled. Another failed to include ELs who had missed the minimum level of required services for one portion of the school year, but had received full EL services during other portions of that year.

NPS’ failure to adequately serve hundreds of ELs over several years violates Section 1703(f) of the EEOA by denying these students the ability to overcome their language barriers within a reasonable period of time and to participate equally in NPS’s instructional programs.

## **V. The District Lacks Enough Bilingual-Endorsed and ESL-Certified Teachers to Adequately Staff Its EL Program**

During our investigation, NPS staff repeatedly cited a shortage of qualified bilingual-endorsed or ESL-certified teachers as causing or contributing to its failure to provide ELs with all of their required EL services. Under the EEOA, districts must hire and train enough qualified

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<sup>42</sup> See Sept. 20, 2018 NPS Resp. to Info. Req. No. 7(c) (June 2017 & 2018 Form 7, Mt. Vernon Elementary School). Mt. Vernon may have addressed a staffing issue there as it listed no students on Form 7 for either June or October 2019, but that does not negate that multiple students there missed receiving full English language development services for multiple years, as discussed below.



staff to implement their chosen EL programs. *Castañeda*, 648 F.2d at 1010, 1012-13. As *Castañeda* recognizes, teachers should at a minimum meet the state requirements for teaching ELs, though they may need even more training to become qualified to deliver EL services. *See id.* at 1012-13. At a minimum, New Jersey’s regulations require ESL instruction to be taught by ESL-certified teachers and bilingual classes to be taught by teachers with an endorsement in bilingual education. *See* N.J. Admin. Code § 6A:15-1.9 (2020).

NPS has acknowledged that it lacks enough ESL-certified and bilingual-endorsed teachers to serve its large EL population, and this problem has only grown in recent years.<sup>43</sup> From the 2015-2016 to 2018-2019 school years, the number of certified ESL teachers at NPS dropped from 72 to 58, the number of bilingual-endorsed teachers dropped from 127 to 91, and the number of dually certified bilingual/ESL teachers dropped from 19 to 10. In October 2019, NPS reportedly still had about 25 vacant positions for ESL and/or bilingual certified teachers, and we remain concerned that NPS has failed to develop or implement an effective hiring and training plan to address its shortage of ESL-certified and bilingual-endorsed teachers. *See Castañeda*, 648 F.2d at 1010, 1012-13; *Keyes*, 576 F. Supp. at 1516-17 (finding district violated the EEOA by using unqualified teachers for ESL and not requiring adequate training for its teachers).

## **VI. ELs with Disabilities Do Not Receive Adequate Language Services**

Once properly identified, a school district must provide both special education and language assistance services to students who are eligible for both services, and the individualized education program (“IEP”) team must consider the language needs of the EL as those needs relate to the development of the IEP. *See* 20 U.S.C. § 1703(f); 20 U.S.C. § 1414(d)(3)(B)(ii); 34 C.F.R. § 300.324(a)(2)(ii). Many EL students with disabilities, however, are denied English language acquisition services at NPS.

Several NPS staff expressly told us that “SPED trumps bilingual”—i.e., special education services “trump” English language acquisition services in the District. The [REDACTED] disclosed that there is a significant “overlap” in NPS’s failure to both identify students with disabilities who may be ELs and then provide them with EL services. According to the [REDACTED], it was “not commonly understood” among District staff that it was possible for students to receive special education and EL services. She underscored that the District’s special education child study teams do not “interface with the Office of Bilingual Education.” She also noted that for the 2017-18 school year, the District had a total of two special education classes for bilingual students, which had just been added that school year. The [REDACTED] substantiated the [REDACTED] overall conclusion, noting that there is a “huge need for NPS to develop its SPED-EL instruction.” In response to our questions, NPS said it had no policy for identifying and providing ELs with disabilities with EL services and produced only a draft “checklist” in January 2019, which it had prepared for its child study teams regarding ELs with disabilities.

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<sup>43</sup> [REDACTED] told us that the District has “a shortage of ESL and bilingual-certified teachers. That’s a reality.” [REDACTED]. *See* Apr. 22, 2019 email from B. Liss to DOJ.



Our concerns were further corroborated by a review of a sample of IEPs from students whom NPS had identified as ELs. For example, the IEP of one EL indicated that the student was in first grade, spoke Portuguese primarily, was not proficient in English, and was receiving speech-language therapy and occupational therapy for multiple disabilities. NPS confirmed, however, that it had not offered EL services to the student prior to our inquiries, even though the student's IEP noted that a sibling had to assist the student with homework because the sibling had a greater level of English language proficiency. Another EL's IEP indicated that the student was in 11th grade, primarily spoke Spanish, and had a specific learning disability. This EL had never received EL services, even though the student had first been evaluated for special education services in 2013, according to NPS's records. Additionally, to receive the required special education and EL services, this student had to transfer to another high school in the spring of 2018. As a further example, we discovered an EL who was in 10th grade, primarily spoke Spanish, had mild intellectual disability, and was enrolled in a mild cognitive impairment program without any EL services.

Moreover, some of the students' IEPs indicated that they were proficient in English without any evidence of proficient ACCESS scores or further explanation, even though NPS previously had represented to us that the students were ELs. Therefore, we asked NPS to describe in detail how it determined these students' English language proficiency and to produce the supporting data, including assessment results, methods, and all information used to render its determination. In response, NPS just noted that several of the students at issue were "fully evaluated in English, responded to the English evaluation, and participate[] when taught in English."<sup>44</sup> This response fails to show that the ELs with disabilities achieved English proficiency and no longer need EL services. Given the District's failure to identify and serve ELs with disabilities, we have concerns about how NPS is determining that these students are proficient in English or would not benefit from EL services.

## **VII. The District Prematurely Exited Hundreds of EL Students**

A school district must monitor the progress of its ELs in acquiring English proficiency and participating in the district's instructional programs. To adequately monitor progress of ELs, a school district must use a valid and reliable test to determine ELs' English proficiency and performance in the core content subjects, math, science, social studies, and English/language arts. See *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."). When this testing shows that an EL has achieved proficiency in English, a school district should "exit" the student from its EL program and identify the student as a former EL, unless other criteria for exit indicate that the student needs additional EL services. During our investigation, NPS staff described—and the District's documents corroborated—a troubling multi-year practice of exiting ELs from the EL program or "mainstreaming" them before they achieved English proficiency on the ACCESS.<sup>45</sup> Ultimately, we concluded that NPS prematurely exited hundreds of ELs who

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<sup>44</sup> See Sept. 20, 2018 NPS Resp. to Info. Req. No. 3(a) at 2; see also Jan. 11, 2019 NPS Resp. to Info. Req. No. 7 at 3–4.

<sup>45</sup> Internally, NPS staff called this practice "special casing." Although our review focused on the 2015-2016, 2016-17, and 2017-18 school years, employees from the Office of Bilingual Education indicated that the District used

were not proficient in English and were still eligible to receive EL services in recent years.

The District's formal policy for exiting ELs consisted of two criteria: (1) ELs must separately achieve a minimum proficiency score of 4.5 on the Reading *and* 4.5 on the Writing components of the ACCESS exam, *and* (2) administrators must consider multiple measures. The multiple measures included scores on the Developmental Reading Assessment ; scores on the English/language arts and math assessments; cumulative final grades in math, science, and social studies; attendance; and approval from each student's ESL teacher, bilingual teacher, general education teacher and/or special needs teacher.

NPS, however, did not follow its formal EL exit policy. Instead, the District exited EL students who did not achieve the minimum scores on the ACCESS test by using other criteria determined subjectively by NPS administrators.<sup>46</sup> Furthermore, the [REDACTED] and [REDACTED] disclosed—and NPS confirmed—that it had previously maintained a practice of exiting ELs by default after ELs had received four years of language assistance. According to NPS, this was not a rare occurrence—“a *common practice* in the district has been to mainstream students that have completed more than 4 years of EL services.”<sup>47</sup> District staff referred to this specific type of “special casing” as “timing out,” which reduced the number of long-term ELs in the District under NCLB's Annual Measurable Achievement Objectives.<sup>48</sup> “Time in the [EL] program counts for a lot” when deciding whether to “special case” an EL, according to one school's Bilingual Needs Assessment Teacher. NPS staff also exited ELs from services based on a subjective determination that their lack of progress in achieving English proficiency was caused by a language disability. [REDACTED] further disclosed that NPS needed a “search and rescue plan” to find and serve these ELs, which she said was a “big hurdle” and that the “work was bigger than us [at the Office of Bilingual Education].” [REDACTED] candidly revealed that it “[k]eeps me up at night because I know we have a lot of kids who have not received EL services.”

Data produced<sup>49</sup> from the District's student information system provides some context for the potential scope of NPS's premature exit problem. Specifically, these data indicate that

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“special casing” for many years beginning with the implementation of the No Child Left Behind Act's (“NCLB”) Annual Measurable Achievement Objectives.

<sup>46</sup> The District maintains that “there is evidence that students who had not met the ACCESS criteria . . . were mainstreamed using the multiple measures/indicators.” May 29, 2018 NPS Resp. to Info. Req. No. 9 at 8–9. However, NPS's [REDACTED] disclosed that although the District's exit forms included fields so that administrators could identify the multiple measures the District relied upon to exit students, [REDACTED] review of the completed exit forms indicated that NPS did not use multiple measures consistently and that the District included the multiple measures on the exit form mainly because of NCLB.

<sup>47</sup> See May 29, 2018 NPS Resp. to Info. Req. No. 9 at 9 (emphasis added).

<sup>48</sup> Annual Measurable Achievement Objectives set yearly targets for ELs with respect to making progress toward English proficiency on the annual test of English proficiency and required schools to report on the ELs who did not achieve proficiency year after year. This requirement raised concerns about the number of District students in the EL program for 4-5 years or longer.

<sup>49</sup> NPS produced spreadsheets containing unduplicated EL and former EL data for SY 17-18 on Feb. 6, 2018, and for SY 16-17 and SY 15-16 on Mar. 9, 2018, which we used for this analysis. In response to our request for complete ACCESS score data for the past three school years for all former ELs—including scores for each domain, and Literacy, Oral Language, and Overall composite scores—NPS produced revised spreadsheets for SYs 16-17 and

the District enrolled 4,622 “former” ELs in SY 17-18, of whom 513 had Literacy composite proficiency level<sup>50</sup> scores (i.e., Reading and Writing domains only)<sup>51</sup> on the ACCESS, and 4,109 had no ACCESS scores available in NPS’s electronic student information system. Of the 513 former ELs who had ACCESS Literacy composite scores, 326 (63.5%) had scores of 4.4 or lower (i.e., indicating they did not achieve a minimum score of 4.5 or greater in the Reading and Writing domains) and their parents did not waive their child’s right to EL services.<sup>52</sup> In other words, NPS erroneously exited at least 326 ELs in SY 17-18 but potentially exited hundreds more prematurely because the District did not provide ACCESS score data for thousands of its former ELs for SYs 17-18, 16-17, and 15-16.

The District’s data for SY 16-17 demonstrated a similarly concerning pattern of premature exit. For instance, the District enrolled 4,213 former ELs in SY 16-17, of whom 473 had Literacy composite proficiency level scores on the ACCESS, and 3,740 had no ACCESS scores available in the electronic student information system. Out of the 473 former ELs who had ACCESS Literacy composite scores, 179 (37.8%) had scores of 4.4 or lower and their parents did not waive their child’s right to EL services. Thus, at least 179 ELs—and probably hundreds more—were prematurely exited in SY 16-17, and it is unclear whether those who lacked 2017 ACCESS scores received services.

NPS enrolled 3,566 former ELs during the 2015-16 school year. For these former ELs, the District did not produce individual domain scores or Literacy composite proficiency level scores on the ACCESS for SY 15-16. Instead, it produced proficiency level bands (e.g., “Expanding 4.0 to 4.9,” “Developing 3.0 to 3.9”). Therefore, we were unable to determine precisely how many former ELs achieved a Literacy composite score of 4.4 or lower on the ACCESS test. Nevertheless, 73 of the former ELs had ACCESS scores that placed them in the proficiency level bands between 1.0 to 3.9 (i.e., Entering, Beginning, or Developing), and NPS indicated that these former ELs’ parents did not waive their child’s right to EL services in writing. Moreover, 2,691 of the former ELs had no ACCESS proficiency level bands available in the electronic student information system and no indication of a written parental waiver of

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17-18 on Sept. 20, 2018. However, instead of adding the requested missing assessment data, NPS provided revised spreadsheets that removed the ACCESS score data it had previously produced for hundreds of former ELs and was unable to explain the discrepancies. Therefore, we did not use NPS’s revised data in our analysis.

<sup>50</sup> For the ACCESS test, WIDA uses 50% of a student’s scale score in the Writing domain and 50% of the student’s scale score in the Reading domain, and interprets this result into a composite proficiency level called the “Literacy” composite proficiency level. A student’s overall proficiency level (“Overall” score) is a composite score based on the scale score of all four language domains—Reading (35%), Writing (35%), Listening (15%), and Speaking (15%). See WIDA Spring 2019 Interpretive Guide for Score Reports K-Grade 12, <https://wida.wisc.edu/sites/default/files/resource/Interpretive-Guide.pdf>.

<sup>51</sup> Despite our request for students’ ACCESS scores for each language domain and their Literacy, Oral Language, and Overall composite scores, the District only produced datasets containing ELs’ Literacy composite proficiency scores. Nevertheless, the Literacy composite scores are a reasonable indicator of premature exit. A student cannot achieve a Literacy composite score of 4.5 or greater on the ACCESS unless the student has also achieved at least a 4.5 on the Reading and Writing domains.

<sup>52</sup> Although NPS’s dataset identifies ELs whose parents waived services in SYs 15-16, 16-17, and 17-18 and we therefore have excluded them from this analysis, we do not believe that all of these students’ parents properly opted out of EL services. For the reasons discussed in Section II, we are concerned that many of these ELs’ parents did not opt out of EL services voluntarily and knowingly.



services. NPS further reported that 169 of the former ELs who did not have parental waivers received a score placing them within the Expanding (4.0 to 4.9) proficiency level band. Therefore, a subset of these 169 students likely scored less than the minimum 4.5 on the Reading and Writing ACCESS components, which was required to exit the EL program at that time.

Our review of the District’s hard copy documents, in addition to the electronic datasets, confirmed NPS’s premature exit problem during the relevant period. At the end of each school year in June, school administrators complete a form named “Form 1” and send the completed form to the Office of Bilingual Education. Form 1 identifies each EL who was exited/mainstreamed during each school year, including their Reading and Writing ACCESS scores, and their final English/language arts and math grades.

For example, East Side High School’s June 2017 “Form 1” showed that the school exited 102 ELs from the program in SY 16-17. Of the 102 ELs who were exited from the program, 56 students had a score of 4.4 or lower on Reading and/or Writing component of the ACCESS. In other words, more than half (55%) of the ELs exited from the program at East Side in SY 16-17 lacked the minimum English language proficiency level and were prematurely exited.<sup>53</sup> Alarmingly, some prematurely exited ELs included students had very low ACCESS scores—far below a score of 4.5. By way of example, the school exited from the EL program in September 2016 an 11th grade student who scored a very low 1.9 and 2.2 on the Reading and Writing components respectively and received a D in English/language arts. East Side exited a 9th grade EL in January 2017 who scored 2.4 and 2.8 on the Reading/Writing ACCESS components and had an F grade in English/language arts. Moreover, the data show that these students are representative—not aberrational—of the students that NPS prematurely exited. We note that few, if any, of the parents of these students who were “special cased” at East Side properly waived their child’s right to EL services in writing with informed consent because NPS reported that only three East Side High parents signed waiver forms for SY16-17.

ELs prematurely exited by NPS were not limited to the District’s high schools but also included ELs in the elementary and middle schools. First Avenue School, which serves students in grades K through 8, exited 24 students from the EL program in SY 16-17. Almost all of these students, 21 (88%) out of 24, were exited from the program without meeting the minimum ACCESS scores. This included, for example, a third grade student who received a score of 4.4 and 2.9 on the Reading/Writing ACCESS components, respectively, and an F in English/language arts. Furthermore, NPS reported that only six parents completed forms waiving their child’s right to EL services, meaning that most of the students who were “special cased” at First Avenue in SY 16-17 were prematurely exited from EL services without voluntary, informed, written consent from a parent.

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<sup>53</sup> Additionally, 41 of the exited ELs scored 4.5 or higher on the Reading and Writing components of the ACCESS exam, and five students had no ACCESS scores reported on East Side’s Form 1. See Jan. 11, 2019 NPS Resp. to Info. Req. No. 4 (June 15, 2017 Form 1, East Side High School, “List of Students Mainstreamed in SY 2016-2017 or on June 15, 2017”).

Although our interviews indicate that NPS appears to have discontinued “special casing” in most<sup>54</sup> schools as of June 2018, the District has not yet fully resolved this troubling issue. After raising the premature exit problem with NPS during our investigation, [REDACTED] and [REDACTED] stated that the office had attempted to locate all students who were ever ELs (former and current) and would re-administer the ACCESS assessment to these students during the spring of 2018. The results of the District’s attempts to resolve this matter remain uncertain. For instance, NPS has not described how and whether all prematurely exited ELs who remain in the District were selected for the re-administration of the ACCESS, summarized the results of the spring 2018 ACCESS exam, disclosed how many former ELs were re-identified as eligible for EL services, and whether the prematurely exited ELs were offered and/or are now receiving EL services, and, if not, whether their parents voluntarily waived the ELs’ right to services in writing in a language they could understand.<sup>55</sup> In response to our follow-up inquiries about its prematurely exited ELs, the District stated in December 2019 that its “review and determination of each student’s current eligibility and need, if any, for additional services is ongoing.”<sup>56</sup> The District’s response to this EEOA violation involving hundreds of prematurely exited ELs is insufficient.<sup>57</sup> The District, therefore, must take swift action to remedy this problem and provide complete, detailed, and accurate documentation on the results of its review, as described in the proposed agreement.<sup>58</sup>

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<sup>54</sup> Although almost all of the District’s staff responsible for exiting ELs indicated that special casing was no longer permitted as of SY 18-19, in October 2019 the District prematurely exited two ELs in grades 9 and 10 at American History High School with Overall composite scores of 4.1 and 3.6. Although the ELs’ parents reportedly waived EL services, these opt-out ELs are still ELs and should not have been exited. They must be re-tested annually, and they remain eligible for EL services until they achieve a minimum ACCESS score of 4.5, as discussed in Section II above. Additionally, during our interview in October 2018 the Bilingual Needs Assessment Teacher at [REDACTED] stated that ELs could still be “special cased” without meeting the minimum proficient score on the ACCESS exam.

<sup>55</sup> The District produced a spreadsheet entitled “final\_reidentification\_list\_04222019.csv” on April 22, 2019. The spreadsheet appears to contain some incomplete ACCESS score data, but the District offered no context, analysis, or description of what the data purports to demonstrate. The District was unable to explain the spreadsheet during our October 2019 site visit.

<sup>56</sup> See Dec. 17, 2019 NPS Resp. to Info. Req. No. 13 at 5.

<sup>57</sup> Additionally, we noted an unusually large increase in ELs from 3,797 ELs reported in SY 18-19 to 6,167 in SY 19-20. This reflects a surge of 2,730 (62%) more ELs enrolled at NPS in SY 19-20, although the District’s overall enrollment was nearly unchanged during this period (36,112 total students in SY 18-19 vs. 36,197 in SY 19-20). It is unclear whether this increase in EL enrollment reflects the re-identification of some of the prematurely exited ELs. The Office of Bilingual Education was unable to explain this increase during our October 2019 site visit. *Compare* District Data Summary 2019-2020, <https://www.nps.k12.nj.us/departments/data-research/district-summary/> with District Data Summary 2018-2019, <https://www.nps.k12.nj.us/mdocs-posts/district-data-summary-2018-2019/>.

<sup>58</sup> Under the Every Student Succeeds Act, NJDOE issued new statewide, standardized criteria to determine when ELs are eligible for exit. Therefore, as of July 2019, NPS must (1) ensure that all exited ELs achieve a minimum Overall composite English proficiency level of at least 4.5 on the ACCESS, *and* (2) consider multiple indicators (e.g., classroom performance, the student’s reading level in English, performance on achievement tests). See NJDOE, English Language Learner Entry and Exit, July 2019 (revised July 2020), <https://www.state.nj.us/education/bilingual/policy/ESSAGuidance.pdf>

### **VIII. The District Fails to Adequately Monitor Its Former EL Students**

To ensure that former ELs were not prematurely exited from English language programs and can participate in instructional programs comparable to their never-EL peers, a district must monitor the academic progress of its former ELs and re-offer them services if the students are struggling based on persistent language barriers. See 20 U.S.C. § 1703(f); *Castañeda*, 648 F.2d at 1014 (“The progress of limited English speaking students in these other areas of the curriculum must be measured by means of a standardized test . . . because no other device is adequate to determine their progress vis-à-vis that of their English speaking counterparts.”). As Section 1703(f) and *Castañeda* make clear, the ultimate question is whether ELs who participated in the district’s EL program have overcome their language barriers (i.e., became former ELs) and are able to participate equally in a district’s instructional programs.

When our investigation began, NPS did not monitor its former ELs. The District provided no explanation for its failure to monitor these students post-exit to ensure that their language barriers were overcome, but it indicated that it planned to address the issue. As a result, NPS created a former EL monitoring form, which it introduced at the end of the 2017-18 school year. NPS asks each school’s Bilingual Needs Assessment Teacher to complete the form and submit it to the Office of Bilingual Education annually in June as part of the EL program’s compliance process. The form records each former EL’s English/language arts and math grades and scaled scores on the New Jersey Student Learning Assessments. Bilingual Needs Assessment Teachers must indicate whether they “strongly agree,” “agree,” “disagree,” or “strongly disagree” that each former EL (1) “meets grade-level standards or benchmarks,” (2) exhibits “academic performance [that] demonstrates adequate progress,” and (3) displays “behavior in the classroom [that] is productive and developmentally appropriate.” The form also includes a comment box documenting the action steps the school will take for each area where the Bilingual Needs Assessment Teacher “strongly disagrees” or “disagrees.”

NPS’s current process for monitoring its former ELs, however, is inadequate. NPS has provided no guidance on the specific metrics Bilingual Needs Assessment Teachers should look for with respect to each observed benchmark. The completed monitoring forms from June 2019 that we reviewed often do not meaningfully reflect feedback from the former ELs’ classroom teachers (e.g., “Student is being monitored by the teacher. Showing improvement.”), even though they are more likely to know if a former EL is struggling due to a persistent language barrier. When Bilingual Needs Assessment Teachers do provide feedback on the forms, the comments are frequently generic (e.g., student with Ds in English/language arts and math will “receive help on ELA and math next year”) or unrelated to language development (e.g., student with a D in math will “switch classroom placement next year to remove from classroom distraction/peers”). One school referenced the same five action steps for every former EL who was struggling, demonstrating an apparent lack of consideration for individual students’ potential needs (e.g., “provide a print rich learning environment that the student can reference”). This same school also had a number of students whose monitoring forms indicated they were receiving Ds and Fs in English/language arts and were exited from the EL program in 2017 with ACCESS scores below the 4.5 minimum proficiency level. However, instead of offering to re-enter the students into the EL program, the school simply listed its standard, verbatim five action steps for these students as well.

Sometimes when explaining former ELs' poor grades (e.g., an F in English/language arts or math), the explanations are inadequate and seemingly unrelated to the benchmarks being monitored (i.e., indicating student received an F but is still making adequate academic progress). In other instances, former ELs' grades were poor (e.g., Ds in English/language arts and Math), but there were no action steps to address the issue. Moreover, even when Bilingual Needs Assessment Teachers do discuss specific actions for struggling former ELs, they over-rely on remedial and computer-based programs such as Systems 44, Learning Ally, and other online programs. Other considerations included summer school, after school services, Saturday school, sitting in front of class, small group instruction, and reviewing pedagogical practices. Few staff at the schools we visited could recall a recent instance of a former EL re-entering EL services because of a persistent language barrier, and some school staff were unaware of whether former ELs could re-enter the program (e.g., Barringer High School, Horton, Mt. Vernon Elementary School). Because of NPS's former practice of prematurely exiting ELs and its continuing failure to re-offer EL services to ELs who were prematurely exited, it is even more imperative that the District develop a mechanism to meaningfully monitor the performance of its former ELs to determine whether they may have a persistent language barrier and should be offered services.

#### **IX. The District Does Not Adequately Evaluate its EL Program for Effectiveness**

The District is failing to adequately evaluate its EL programs to determine whether they enable ELs to achieve English proficiency and "attain parity of participation in the standard instructional program" within a reasonable period of time. *Castañeda*, 648 F.2d at 1011. Even if an EL program is "premised on a legitimate educational theory and implemented through the use of adequate techniques," the program may "no longer constitute appropriate action" if it fails to produce positive results. *Id.* at 1010. To accurately assess the success of the EL program, a district must evaluate data that provides a comprehensive and reliable examination of how EL students, former EL students, and never-EL students are performing in the district's instructional programs longitudinally. *See id.* at 1011, 1014 ("Valid testing of students' progress . . . is, we believe, essential to measure the adequacy of a language remediation program."); *see also Horne v. Flores*, 557 U.S. 433, 464 (2009) ("[A]s the Court of Appeals recognized, the absence of longitudinal data in the record precludes useful comparisons" when evaluating the effectiveness of an EL program."); *United States v. Texas*, 601 F.3d 354, 371 (5th Cir. 2010) (same).

NPS staff informed us that the District evaluates its EL programs annually in August before the beginning of each school year during its Principal Leadership Institute. Our review of these materials revealed that NPS's EL program evaluation is flawed. For instance, NPS's August 2018 evaluation compared English/language arts and math results on the Partnership for Assessment of Readiness for College and Careers exam by subgroup and grade for ELs, former ELs, and "all students." In other words, by comparing ELs and former ELs' performance against "all students"—instead of "never-EL students"—NPS compares ELs and former ELs partly against themselves. As a result, NPS's comparative analysis obscures the actual academic performance of its ELs and former ELs. *See Castañeda*, 648 F.2d at 1014 ("The progress of limited English speaking students in these other areas of the curriculum must be measured by means of a standardized test . . . because no other device is adequate to determine their progress vis-à-vis that of their English speaking counterparts."). Moreover, because NPS failed to



monitor its former ELs prior to 2018,<sup>59</sup> it also failed to include former ELs in its EL program evaluation before 2018.

The District has also failed to disaggregate its analysis by EL program to assess whether each of its EL programs requires improvements under prong three of *Castañeda*. See *Issa v. Sch. Dist. of Lancaster*, 847 F.3d 121, 137-138 (3d Cir. 2017) (discussing district's failure to evaluate the effectiveness of each EL program). Despite this deficit, NPS's EL program evaluation nevertheless shows troubling patterns and demonstrates that the District must closely examine the implementation each of its EL programs at each school. For example, NPS's August 2018 EL program evaluation included an analysis of ELs' performance on the 2018 ACCESS. The 2018 ACCESS data show uniformly negative growth in all grade levels, except kindergarten, with very high percentages of negative growth for most grades. This means that many ELs' 2018 ACCESS scores were lower than their 2017 ACCESS scores, illustrating a significant regression of English language development.<sup>60</sup> Specifically, we noted tremendous negative growth rates almost uniformly across all grade levels, including grade 2 (-65.6%), grade 3 (-36.7%), grade 4 (-28.4%) grade 5 (-45.9%), grade 6 (-37.5%), grade 7 (-44.8%), grade 8 (-32.2%), grade 10 (-49.1%), grade 11 (-41.7%), and grade 12 (-42.4%). Moreover, of the 4,765 ELs who reportedly completed the ACCESS in 2018, only 409 (8.5%) students achieved a score of 4.5 or higher, indicating proficiency in English. In sum, these data illustrate that many ELs are not progressing in acquiring English.

Additionally, our review revealed that the District is not analyzing student performance data longitudinally (i.e., tracking cohorts of ELs who remain in the EL program over time to assess its effectiveness). See *id.* at 1011; *Horne v. Flores*, 557 U.S. at 464; *Texas*, 601 F.3d at 371. None of the materials NPS produced demonstrated that the District is conducting a longitudinal analysis that shows how ELs fare in NPS's EL programs over time.

As our investigation progressed, NPS hired a consultant, Creative Leadership Solutions, to perform an evaluation of the EL program. The consultant produced a report in December 2018 analyzing whether NPS's EL program is (1) based on sound educational theory; (2) implemented effectively with resources for personnel, instructional materials, and space; (3) helps increase academic language and academic achievement.<sup>61</sup> The report, however, replicated many of the same flaws reflected in NPS's EL program evaluation.

First, the Creative Leadership Solutions report acknowledges that ELs received a range of different types of EL programs but nevertheless fails to disaggregate its analysis by EL program. See *Issa*, 847 F.3d at 137-38. Thus, none of the report's analyses evaluate the effectiveness of the different EL programs or allow NPS to compare whether one type of EL program works

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<sup>59</sup> See Section VIII *supra*; see also Jan. 11, 2019 NPS Resp. to Info. Req. No. 2 (August 2017 Bilingual Education and ELL Achievement at Newark Public Schools (comparing ELs' English/language arts and math performance on the Partnership for Assessment of Readiness for College and Careers exam against "all students")).

<sup>60</sup> NPS maintains that ELs regressed on the ACCESS because the District transitioned from the paper-based version to the electronic version of the ACCESS in 2018.

<sup>61</sup> NPS almost entirely redacted the first and second parts of the report—obscuring the analysis on whether its EL program is based on sound educational theory and is implemented effectively—without explanation. See Sept. 16, 2019 NPS Resp. to Info. Req. No. 6 (December 2018, Creative Leadership Solutions, Evaluation of the Language Learner Programs in Newark Public Schools).

better than another, for example, at certain schools or grade levels. Second, like NPS's flawed evaluation, the report does not compare the academic performance of ELs, former ELs, and never-ELs. Instead, it merely differentiates between two groups of students—those who received EL services for (a) fewer than three years, and (b) three or more years. However, Creative Leadership Solutions' chosen metric—i.e., three or more years of EL services—does not appear to be informed by the actual experience of ELs in the District's schools. As discussed above, hundreds of ELs in NPS, including those at Hub schools and non-Hub schools and those with disabilities, received only partial or no EL services. In addition, the report should have examined how ELs perform over time until they achieve English proficiency, which in many instances could take more than three years. By dividing the EL group at the three-year mark, the study precludes this type of critical longitudinal analysis. Third, the report merely examines ELs for *any* academic growth over time. However, because we expect to see an increase in academic achievement over time for any student, the report's analyses establish only the barest of expectations for ELs. The report, therefore, does not resolve NPS's failure to properly evaluate its EL programs.

\* \* \*

We look forward to discussing the substance of this letter and the actions the District can undertake to comply with its EEOA obligations moving forward, as reflected in the enclosed proposed settlement agreement. Going forward, NPS must implement appropriate measures to: (1) timely and reliably identify and assess all potential ELs; (2) place all ELs in an EL program unless their parents knowingly and voluntarily waived EL services; (3) test the English language proficiency of all ELs whose parents waived services; (4) communicate effectively with LEP parents about available EL programs and other school programs and activities; (5) ensure that all ELs actually receive all of the EL services to which they are legally entitled; (6) deliver EL services from qualified teachers who know how to provide effective English language development instruction and meaningful access to core content instruction; (7) offer and deliver adequate EL services to EL students with disabilities; (8) ensure that ELs are not exited from those services until they meet valid and reliable exit criteria; (9) monitor the performance of current ELs and former ELs to ensure they are making adequate progress and are not prematurely exited; and (10) properly evaluate the effectiveness of each EL program over time. Please contact [REDACTED]

[REDACTED] as soon as possible to schedule a telephone settlement conference.

Sincerely,

Eric S. Dreiband  
Assistant Attorney General  
Civil Rights Division

Craig Carpenito  
United States Attorney  
District of New Jersey

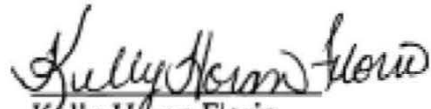
Shaheena A. Simons  
Chief, Educational Opportunities Section  
Civil Rights Division

By:

A handwritten signature in blue ink, appearing to read "J-N-f", written over a horizontal line.

Jonathan Newton  
Trial Attorney  
Educational Opportunities Section

By:

A handwritten signature in black ink, appearing to read "Kelly Horan Florio", written over a horizontal line.

Kelly Horan Florio  
Assistant U.S. Attorney  
Civil Rights Unit