

TAB 24

**Violation Letters of Findings for
Compliance Reviews
Corrective Action Plan
and
Referral to DOJ for Enforcement**

(See also TAB 26)

OCR Docket Number:
Issue date:
Signed by:

Dr.
Superintendent
Public Schools

Re:

Dear Dr.

The U.S. Department of Education, Office for Civil Rights (OCR) has completed its compliance review to determine whether Public Schools (District) is providing services to limited-English proficient, national-origin minority (LEP) students in a manner consistent with the requirements of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (Title VI), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504), Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12161 (Title II), and their implementing regulations. While on-site, OCR reviewed nine elementary schools

OCR is responsible for enforcing Title VI and its implementing regulation, Title 34, Code of Federal Regulations (C.F.R.), Part 100, which prohibit discrimination on the basis of race, color, or national origin in programs or services receiving Federal financial assistance from the U.S. Department of Education (Department). OCR is also responsible for enforcing Section 504 and its implementing regulation at 34 C.F.R., Part 104, and Title II and its implementing regulation at 28 C.F.R., Part 35, which prohibit discrimination on the basis of disability. The District is a recipient of Federal financial assistance from the Department and a public educational entity. Accordingly, OCR has jurisdiction to conduct the compliance review.

During the on-site review, OCR examined pertinent documents and interviewed administrators, staff, and faculty at the elementary, middle, and high schools. We held a public meeting for interested parents and other members of the community, and we privately interviewed an individual who expressed interest in the case. OCR reviewed whether the District discriminates against LEP students on the basis of their limited English proficiency by not providing them services necessary to participate meaningfully in the District's educational program. Based on our findings, we have determined that

Page 2 - Dr.

the District discriminates against LEP students on the basis of national origin and disability by not providing them equal educational opportunity. The bases for our conclusions are summarized below.

Legal Standard

The Title VI implementing regulation at 34 C.F.R. § 100.3(a) and (b), provides that recipients may not, directly or through contractual or other arrangements, on the ground of race, color, or national origin, restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service. A recipient may not deny or restrict services or benefits, provide different services or provide services in a different manner, treat an individual differently from others in determining whether he satisfies any requirement or condition that individuals must meet in order to be provided any service or other benefit provided under the program, deny an individual the opportunity to participate in the recipient's program, or afford an individual an opportunity to do so that is different from that afforded others.

OCR's May 25, 1970 policy memorandum, "Identification of Discrimination and Denial of Services on the Basis of National Origin" (May 1970 memorandum), advises school districts of their responsibility under Title VI to provide equal educational opportunity to national-origin minority students who are deficient in English-language skills. Where inability to speak and understand the English language excludes such students from effective participation in a district's educational program, a district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students. The policies delineated in the May 1970 memorandum were upheld in *Lau v. Nichols*, 414 U.S. 563 (1974) (*Lau*).

More recently, in *Castañeda v. Pickard*, 648 F.2d 989 (5th Cir. 1981) (*Castañeda*), the appeals court delineated a three-pronged standard for determining whether LEP students have equal and meaningful access to a district's program. Under this compliance standard, a program for LEP students is acceptable if:

1. The district is pursuing a program informed by an educational theory recognized as sound by some experts in the field, or, at least, deemed a legitimate experimental strategy;
2. The programs and practices actually used by the district are reasonably calculated to implement effectively the educational theory adopted by the district; and
3. The district has taken action if the program, after a legitimate trial, fails to produce results indicating that the language barriers confronting students are actually being overcome.

Page 3 - Dr.

OCR's December 3, 1985 policy memorandum, "The Office for Civil Rights' Title VI Language Minority Compliance Procedures" (December 1985 memorandum), and the September 27, 1991 policy memorandum, "Policy Update on Schools' Obligations Toward National Origin Minority Students With Limited-English Proficiency (LEP students)" (September 1991 memorandum), clarify OCR's standard for determining compliance with the May 1970 memorandum, in light of court cases and OCR's enforcement experience. The above policies and procedures guided OCR's review to determine whether the District is in compliance with Title VI in providing equal educational opportunities to LEP students.

The District is subject to the Bilingual/Multicultural Education Act (Act), enacted by the State in 1973. The stated purpose of the Act "is to ensure equal education opportunities for students in The Act states that districts will be eligible for State funding of bilingual instructional programs, provided that the programs:

- o "Provide for the educational needs of linguistically and cultural different students, including Native American children, and others who may wish to participate";
- o Use two language as media of instruction for any part or all of the curriculum;
- o Use specially-trained teachers; and
- o "Emphasize the history and culture associated with the students' mother tongue."

The Act empowers the State school board to "issue guidelines for the development and implementation of programs."

Guidelines developed by the State school board, pursuant to the Act, state that equal educational opportunities will be provided, in part, through an English language development (ELD) program such as English as a second language (ESL), with ongoing evaluation of English-language proficiency; core academic instruction will be delivered through the students' home language, in accordance with their assessed needs. To be eligible for funding, a district's program must include a process for identifying students. "Priorities for bilingual instruction shall be given to non-English speakers, partial English speakers, and bilingual students whose cognitive and affective development can best be served by such a program." In its experience in conducting compliance reviews in New Mexico, OCR has found that identification and assessment procedures, program models, and staffing patterns that are eligible for State funding under the Act and the guidelines of the State school board do not necessarily satisfy the requirements of OCR policy.

Identification and Assessment

The May 1970 memorandum states that districts must take affirmative steps to rectify national-origin minority students' language

Page 4 - Dr.

deficiencies where inability to speak and understand the English language prevents LEP students from effective participation in the district's program. The September 1991 memorandum states that a district should have procedures in place for identifying and assessing LEP students to ensure that all language minority students who are unable to participate effectively in the regular instructional program are receiving alternative language services. Thus, such procedures should be designed and implemented to ensure that a district identifies all language-minority students who are unable to speak, read, write, and understand the English language.

In order to account for the effect of language on test results, the staff at some school districts consider students' "dominant language" or "primary language," often using the terms interchangeably. However, determining that a student is dominant in English is not equivalent to determining that the student is proficient in the language skills required to participate meaningfully in an English-only academic environment without the benefit of alternative language services. Language dominance is simply a relative measure of two or more languages spoken by an individual, indicating the one language that the individual uses most commonly, productively, and comfortably. Language proficiency, on the other hand, is a measure of how well an individual can speak, read, write, and comprehend a language relative to the standard expected of native speakers of the language. A person whose dominant or primary language is English is not necessarily proficient in English.

In conducting the review, OCR assumed that any student with a primary (i.e., first-learned) or home language other than English (PHLOTE student) who cannot read, write, speak, and understand English at grade level is likely to be LEP. Performance below grade level may be indicated by a low percentile ranking (generally below the fortieth percentile) in total reading or language subtests on regionally- or nationally-normed standardized tests. Reading performance below grade level generally can also be inferred from placement in a Chapter 1 reading program.

The "Bilingual/Multicultural Education for Culturally and Linguistically Different Students Handbook" (bilingual-program handbook) provides suggested guidelines for identifying students who should be tested with the Language Assessment Scales (LAS). Language information is requested at the time of registration by an "Ethnic/Language Survey," located on the back of the enrollment card. The language survey asks parents to describe the student's use of English and other languages. Parents are asked to respond by selecting from the following scale of language dominance:

- A = Speaks or understands no English
- B = Speaks and understands very little English
- C = Speaks and understands English and another language equally well

Page 5 - Dr.

- D = Speaks mostly English, but speaks or understands another language
- E = Speaks only English

According to the bilingual-program handbook, a response indicating language category A or B requires subsequent testing with the LAS. The Supervisor of Cross Cultural Education (bilingual supervisor) confirmed that a response of A or B on the "language category" question will prompt language assessment with the LAS-O; a response of C may also result in assessment, but students in category D or E are not assessed. OCR found that the effect of these screening criteria is to exclude any PHLOTE student who is either "bilingual" or dominant in English from receiving the benefit of alternative language services, without regard to the student's proficiency in English.

The format of the language survey appears likely to cause difficulty for parents to provide accurate, meaningful responses. The language questions and all additional questions are confined in a space measuring eight inches wide and about two-and-one-half inches deep, in a font and size that may be challenging to read. Response blanks are scattered throughout the space, with no clear indication which survey items require a response and which are for supplemental information. The bilingual supervisor concurred that, in its present form, the language survey does not always produce accurate results, either because it is not understood or it is filled out incorrectly. While reviewing students' records, OCR identified several incomplete or inconsistent language surveys, suggesting that parents may have been confused by the format.

OCR found that the language survey and the guidelines for its interpretation are likely to fail to identify for English-language assessment all students who may be LEP. Not only is the format likely to produce invalid results, but the survey questions and guidelines for interpreting them are insufficient to identify all students who may be LEP (i.e., PHLOTE students), including:

- Students who first learned to speak a language other than English;
- Students who can speak or understand another language, regardless of how well they appear to speak or understand English; and
- Students in whose home a language other than English is commonly spoken.

The bilingual-program handbook provides limited guidelines for assessing the English language proficiency of identified students. The handbook states that students in language category A or B must be administered the LAS, but the handbook does not clearly state whether the assessment is limited to the oral version of the LAS (LAS-O). A sample "LAS Group Summary" form includes sub-test categories corresponding specifically only to the LAS-O. Students

Page 6 - Dr.

identified as "culturally and linguistically different" are assessed with standardized tests, such as the Gates MacGinitie, the Iowa Test of Basic Skills (ITBS), and the Stanford Achievement Test (SAT). A student scoring below the fortieth percentile on any subtest of a standardized test qualifies for English Language Development (ELD) services. These criteria fail to require that every PHLOTE student be assessed for proficiency in reading, writing, speaking, and understanding English at appropriate grade levels. That is, these procedures fail to ensure compliance with the requirement under OCR policy that the District provide appropriate services to all national-origin minority students whose limited ability to communicate in English impedes their ability to participate meaningfully in an English-only classroom.

In one school, some PHLOTE students in kindergarten are assessed with the Kindergarten Developmental Progress Record Assessment (KDPR), in lieu of the LAS-O. OCR learned that all kindergarten students are routinely assessed by classroom teachers with the KDPR. The KDPR is not a formal assessment instrument, but it provides teachers four categories to describe students' performance regarding developmental areas of strength, growth, need for more time or experience, and special concern (especially impediments to learning). The assessment booklet includes objective questions to ask the student as well as subjective elements for the teacher to assess. The District furnished no indication that the KDPR is designed to provide an objective assessment of English-language proficiency. OCR found that the District could not demonstrate that the KDPR is a valid instrument for assessing PHLOTE students' proficiency in English.

Evidence from other interviews conducted on site and documentation reviewed is summarized below:

- o Schools do not follow common procedures to identify PHLOTE and LEP students.
- o Indian Programs staff persons doubt that District procedures identify all Native American PHLOTE and LEP students.
- o Staff persons do not consistently ensure that language surveys are completed.
- o Staff persons do not consistently ensure that data included on language surveys are rational and consistent from one item to the next.
- o Identification of PHLOTE students is often based on teacher observation or interviews, rather than the language survey.
- o Although staff may consider the language survey on the registration cards to identify category A and B students, in some instances teacher opinion and preference are the

Page 7 - Dr.

overriding factors in identifying students to be assessed.

- Some schools have no procedures for assessing PHLOTE students' proficiency in English.
- English-language proficiency assessment generally does not include all four language skills.
- Standardized instruments (such as the Gates MacGinitie or ITBS) are administered only at scheduled times during the academic year, rather than as PHLOTE students are identified.
- Some PHLOTE students are not assessed for English-language proficiency if the classroom teacher does not want the student placed into the alternative language program.
- Identification of LEP students is often based on subjective criteria, such as teacher observation or interviews, rather than objective assessment instruments.
- A large number of PHLOTE students are excluded from assessment for English language proficiency, including many in category C and essentially all in category D.
- For some PHLOTE students, the Short Form of the LAS-O is used exclusively to assess language proficiency, contrary to the publisher's instructions.
- The records of at least 25 students reviewed by OCR indicated that they were probably LEP¹, but have not been identified as LEP by the District.

OCR found that the District has not established policies and procedures for initially identifying all PHLOTE students and assessing thoroughly their ability to speak, read, write, and understand the English language. Accordingly, OCR found that the District has failed to establish procedures to identify and assess LEP students to ensure that all language-minority students who are unable to participate effectively in the regular instructional program receive alternative language services.

Program Design and Delivery

The September 1991 memorandum, based on Castañeda, provides standards by which to determine whether a district's program for LEP students complies with Title VI. In its analysis, OCR considered whether the program design is educationally sound,

¹Based on (1) language survey results and (2) standardized test scores or placement in Chapter 1 reading programs.

Page 8 - Dr.

whether the program has been implemented as intended, whether participation is available to all identified students, whether staffing needs are satisfied, whether instructional materials are adequate, and whether objective criteria have been established for exiting LEP students from the program.

Specifics About the Program:

OCR's December 1985 policy memorandum states that OCR considers two general areas when considering whether a school district is in compliance with Title VI. First, OCR considers whether there is a need for the district to provide alternative language services to LEP students. Second, OCR considers whether the district's alternative language program is likely to meet the educational needs of language-minority students effectively. The September 1991 memorandum states that a district may demonstrate that its program is likely to be effective by showing that the educational approach used is considered sound by some experts in the field or that it is a legitimate experimental strategy. Under the December 1985 memorandum, districts with small populations of LEP students may be relieved of the requirement to develop a formal program description. Such lack of formality, however, does not exempt a district from demonstrating whether its program is likely to be effective in meeting the educational needs of language-minority students.

OCR's understanding of experts' expectations of programs in bilingual education that are recognized as sound include instructional strategies to promote acquisition of English proficiency and the expectation that all or part of the content-area instruction is delivered in the primary or home language of the LEP student. As the student acquires greater proficiency in English, her understanding of the content area will, theoretically, transfer to English. Thus, without presuming to evaluate the educational benefit of language arts instruction in LEP students' primary or home language, OCR will find that a bilingual education program that is designed only to promote proficiency in a language other than English does not satisfy a school district's obligations toward LEP students under Title VI and its implementing regulation.

The bilingual supervisor informed OCR that LEP students in the District require alternative language programs. Many LEP students are unable to participate in the District's full curriculum "until a certain level of English proficiency is achieved."

The District offers three alternative language programs. The State-funded English as a Second Language (ESL) (only) program is established at ten schools, including two reviewed by OCR. The State-funded "Bilingual/ESL Program" is established at 55 schools, including five reviewed by OCR. "ESL tutorial" services are offered at 31 schools, including three reviewed by OCR. The remaining 19

Page 9 - Dr.

schools, including two reviewed by OCR, offer no alternative language services to LEP students.

The District's ESL program is designed to promote English-language acquisition for participating LEP students. On its face, the District's ESL program is recognized as sound for the education of LEP students.

The bilingual/ESL (i.e., bilingual education with ESL)² program may include some or all of the following options: ESL classes, sheltered English in content areas, native-language instruction in content areas, ELD language arts classes, native-language acquisition classes, and native-culture classes. Suggested academic use of the "home language," according to the bilingual-program handbook, includes the option to teach only the home language within the context of language arts (i.e., acquisition of the four skills in the home language), rather than content-area instruction.

OCR found that the District's description of the bilingual/ESL program may include instructional options that, taken together, are not recognized as sound or considered legitimate experimental strategy. The service options available within the bilingual/ESL program include no assurance that all LEP students will receive appropriate English language instruction.

OCR was informed that "the District provides only Spanish/English bilingual programs because teachers are only available for Spanish/English instruction." To the extent that Native American LEP students, Asian LEP students, and other LEP students for whom Spanish and English are second languages receive alternative language services primarily through a Spanish-based bilingual program, these students are not served under a program model that is recognized as sound or considered legitimate experimental strategy. Academic instruction in Spanish, using an approach that assumes that Spanish or English is the primary language, is functionally equivalent to submersion for students whose primary or home language is not Spanish or English. The primary objectives of bilingual education - transfer of academic and literacy skills from the primary language to a secondary language - is not a reasonable educational objective when the language of instruction is not the primary language. Accordingly, OCR accepts that the bilingual/ESL program is recognized as sound, only to the extent that it includes:

- o ESL instruction or ELD instruction (from staff persons qualified to teach ESL); and
- o Content-area instruction in a language native to every

²This program is also referred to as the Bilingual-Multicultural program.

Page 10 - Dr.

participating student.

Title VII Indian Programs staff persons stated that the District's Spanish-based bilingual education programs are not addressing the needs of Native American LEP students. Home-language instruction in the bilingual program is only delivered in Spanish. Native American students have enough difficulty with English, according to the Indian Programs staff persons, and their difficulty is compounded by having to learn a "home language" that is not their home language.

OCR received a report of High School cluster schools' participation in the Bilingual-Multicultural program, dated October 1993. Analysis of the data in the report indicates that 14% of the Native American students and 32% of the Asian students in the High School cluster participate in programs that include "home-language" instruction in Spanish.

Student 1 attends Elementary School; his native language is Navajo, and he is apparently LEP, based on a very low ITBS reading score. Elementary School participates in the State-funded bilingual/ESL program. Staff persons informed OCR that the students served in the program include Hispanics, Native Americans, and Asians. The purpose of the program is reportedly "to pursue learning activities in [Spanish] in understanding, speaking, reading, and writing" and "to provide students the opportunity to develop, maintain, and expand communication and literacy skills in Spanish and English." The ESL component serves only Hispanic students who are monolingual or nearly monolingual speakers of Spanish. Staff members identified no other ethnic group participating in ESL. Although Student 1 attends a school providing alternative language services that are otherwise recognized as sound, the services are not sound to meet his needs because the bilingual education program does not include his native language, and he is apparently excluded from the ESL program.

Within the ESL tutorial program, tutors "assist students with whatever the classroom teacher identifies as an instructional need." Several administrators and teachers stated that this program is not recognized as sound or considered legitimate experimental strategy. LEP students receive tutorial assistance for as little as one hour per week, usually in a pull-out setting, and without direct oversight by a licensed teacher.

OCR was informed that schools with small numbers of LEP students provide only ESL tutorial services - or no alternative language services at all - because "schools with small LEP populations do not generate adequate funding to support" formal alternative language programs. Formal ESL programs are "provided by schools with a significant number of ESL students," specifically, "15 or more identified category A and B students." On the other hand, "tutors are assigned to schools with small numbers of ESL

Page 11 - Dr.

students." When selecting ESL tutorial services for a school, "funding is the primary factor that is considered. It is quite expensive to place ESL teachers at schools that have few ESL students." A memorandum from the Cross Cultural Center to principals and other contact persons, dated August 1993, states: "Budgetary restrictions allow for limited services. Therefore the Cross Cultural Center will assign tutors based on a priority of student needs."

ELD, as generally described to OCR by District staff persons, is not an alternative language program designed to meet the specific needs of LEP students. OCR was informed that, as taught at District schools, ELD instruction is equivalent to whole language instruction with simplified English. ELD is an instructional strategy for all students (regardless of ethnicity or experience with another language) who score below the fortieth percentile in reading. It can be taught by a certified classroom teacher, regardless of endorsement. Accordingly, OCR found that the District's ELD program is intended for any student requiring remediation in language arts. Because it is not intended specifically for second-language learners nor taught necessarily by teachers who are trained in second-language acquisition, the District's ELD services are not equivalent to ESL.

Interviews identified other instructional programs primarily for minority students that are not recognized as alternative language programs, including sheltered English, Title V Indian Education, and Title VII Indian Education. Sheltered English is often used effectively by school districts to help LEP students keep up academically with their peers, but sheltered-English instruction is acceptable for serving LEP students only to the extent that each LEP student also participates in a recognized alternative language program. The Title V Indian Education program is not an alternative language program because it is intended to provide academic tutoring, rather than to foster second-language acquisition. The Title VII Indian Education program is not an alternative language program because classrooms are chosen for these services based on the number of Native American students in each classroom and the teacher's willingness to participate; instructional topics are related to science rather than English-language acquisition.

A. Elementary School offers no alternative language services for LEP students. Asked to provide a rationale for not providing an alternative language program, school staff persons replied that all of the students are English-speaking. The community has a large Hispanic population, but because a majority of the families have been established in the U.S. for four generations, there is no need for an alternative program for LEP students. Because the English language is becoming predominant in the Hispanic community, the staff persons explained, there is no need for a program for LEP students. The last LEP student to attend the school was, reportedly, a Mexican migrant who attended the

Page 12 - Dr.

school briefly eight years ago.

Student 2, enrolled at A. . . Elementary School, is one of the 25 students identified by OCR above as likely to be LEP, based on his language survey and a recent record of receiving Chapter 1 reading services. OCR cannot presume to substitute its educational judgments for those of District staff. Nevertheless, OCR can observe that the District's rationale for not providing alternative language services at A. . . Elementary School is related to the predominant language used in the Hispanic community and the length of time that the Hispanic community has been established in the U.S., rather than objective criteria related to the needs of individual students.

A region bilingual specialist informed OCR that participation in a formal alternative language program is a site-based decision. The District, she explained, does not require programs, even if indicated by student need. There are schools that should have programs but do not because they choose not to. To illustrate, she named an elementary school where nearly half of all students are probably LEP. The principal wanted to apply for participation in a State-funded program, but teachers objected. Consequently, the region bilingual specialist concluded, the school has no formal alternative language program to meet the needs of its LEP students.

Although a district may choose to exclude an LEP student from a formal alternative language program upon request of the parent, the district retains the general proscription under the Title VI regulation from discriminating against a language-minority student on the basis of a lack of English-language skills. OCR learned that students are withdrawn from District schools' alternative language program when the parent requests that the student not participate. School staff were unable to articulate for OCR what kinds of services that LEP students receive under these circumstances to meet their English language and academic needs. The District's failure to take informal steps designed to meet the individual needs of these LEP students indicates a failure to comply with the regulation.

Overall, OCR found that the District has not made available to all LEP students sufficient alternative language program services that are recognized as sound or considered legitimate experimental strategy. At some sites, bilingual education programs using languages that are not native to some LEP students are the only alternative language services available to the students. At some sites with LEP students who are not Hispanic, ESL services are limited to Hispanic students. ESL tutorial services, relied on exclusively in many schools to serve LEP students, are acknowledged by administrators and staff not to be a sound means of educating LEP students. Administrative decisions regarding what program services to provide are frequently based on available funding, the skills of available instructional staff, the numbers of LEP

Page 13 - Dr.

students, the predominant language of the language-minority community, the lack of recent immigrants within the language-minority community, and the preferences of building staff, rather than the educational needs of individual language-minority students. LEP students who do not participate in established alternative language programs or services at the request of their parents are not assured of receiving services tailored to meet their individual English-language and academic needs.

Program Participation:

According to the December 1985 memorandum, a district must provide alternative language services to all language-minority students who need such services. A district will be in violation of Title VI if it does not provide services designed to overcome effectively the language barriers of all its LEP students.

OCR found that schools with small populations of LEP students serve only "high priority" LEP students, that is, category A and B students. The rationale provided by the District is that schools with small LEP populations do not generate adequate funding to support alternative language programs. Additionally, there is a limited number of qualified teachers, and most of these are placed in schools with State-funded bilingual/ESL programs.

OCR also found that some LEP students in schools with State-funded alternative language programs are not served in those programs. PHLOTE students (i.e., "linguistically/ culturally different students") who are dominant in English but below the fortieth percentile in reading on achievement tests may receive a sheltered approach to academic instruction, but not ESL.

Additional data available to OCR include:

- A District memorandum states that a school should have at least three LEP students in language category A or B enrolled before requesting the assignment of an ESL tutor from the Cross Cultural Center.
- Two identified LEP students in kindergarten at an ESL school are not served. The ESL teacher is at the school only half the day. The two students are in kindergarten sessions during the other half of the day.
- As shown above, some Native American students who are LEP are excluded from the ESL services available to Hispanic LEP students at a school with a bilingual/ESL program.
- Classroom teachers were reported at times to:
 - > refuse to send LEP students to ESL;
 - prefer that LEP students be served in Chapter 1;

Page 14 - Dr. .

- forget to send their LEP students to the pull-out session; or
 - feel the time of the pull-out is too inconvenient to send LEP students to ESL.
- LEP students have been placed on a waiting list for the bilingual program because of a lack of space.
 - LEP students do not receive ESL because a lack of qualified teachers limits scheduling - options.
 - According to one region bilingual specialist, because many school staff persons do not understand who the LEP students are, they are not working with all LEP students only the identified category A and B students.

Student 3's home language is Vietnamese. He was in grade three at Elementary School during school year 1993-94. He received ESL services for two years prior to school year 1993-94, at the end of which his teacher wrote: "Although he's now reading at a second grade level, his lack of knowledge of English word meaning prevents his full participation in science, social studies, and in math." Although Student 3's school year 1993-94 teacher speaks no Vietnamese and has not been trained in alternative language service delivery, she reported that she is providing all of his language services, and not having him served in ESL.

Overall, OCR found that the District does not provide alternative language services to all language-minority students who need such services.

Staffing:

OCR's September 1991 policy memorandum requires a district to provide the staff necessary to carry out properly its chosen program. A district lacking adequate staff must either hire formally-qualified teachers trained to provide alternative language services or required that teachers already on staff work toward attaining those formal qualifications. A district must complete this transition within a reasonable period, and should be able to show that its teachers have mastered the skills necessary to teach effectively in a chosen alternative language program. According to Castañeda, if a District shows that it has unsuccessfully tried to hire qualified teachers, then it must provide adequate training to teachers already on staff to comply with Title VI. Such training must take place as soon as possible.

According to the bilingual-program handbook, resource teachers in bilingual education or ESL must be certified in their teaching area or acquire a waiver if they are paid with State funds. Licensed teachers who qualify may receive an endorsement in bilingual education or ESL from the State. Other licensed teachers who do not

Page 15 - Dr. .

hold an endorsement or waiver "may work in a bilingual program as part of a team with an endorsed bilingual teacher," provided that they are not paid out of State funds.

From interviews, OCR learned that the qualifications for ESL tutors are limited to holding a high school diploma or equivalent. No additional experience or training in any field is required, including experience or training in ESL.

According to the bilingual supervisor, the staffing pattern for the bilingual/ESL program requires bilingual-speaking teachers (who may be endorsed, on waivers, or not endorsed), regular classroom teachers, ESL teachers, bilingual teaching assistants, and ESL teaching assistants. He noted that bilingual teachers who are not endorsed and other regular classroom teachers deliver lessons prepared by a bilingual-endorsed teacher, but seldom with the endorsed teacher present. He noted that, because the District's goal should be for all LEP students to be served by trained staff, the use of teachers who lack appropriate endorsement to deliver bilingual education or ESL services should only be an interim measure.

The bilingual supervisor informed OCR that more ESL teachers are needed District-wide to serve in schools with small numbers of students. He added that the use of tutors in lieu of qualified teachers is not satisfactory; however, to provide qualified staff persons at all schools that have small numbers of ESL students is quite expensive. Numerous interviews with building-level staff confirmed that tutors and teachers lacking appropriate endorsement are often selected to provide alternative language services to LEP students because of the fiscal burden associated with instruction by qualified staff.

Licensed teachers in the bilingual education and ESL programs who were interviewed by OCR were generally able to demonstrate their qualifications to deliver the services. Nevertheless, at schools with State-funded alternative language services, such as La Mesa Elementary School, OCR was informed that not enough qualified teachers were available to provide ESL services to all identified LEP students.

The District furnished documentation to OCR of 18 training sessions on serving LEP students that were offered to teachers during school year 1993-94. Based on the descriptions offered, about two-thirds of the sessions apparently focused on pedagogy for LEP students. Participation in offered training is optional for all staff. From interviews, OCR learned that few unendorsed teachers participate, and maybe 60% of endorsed teachers receive the training, according to a region bilingual specialist. OCR also learned that training intended specifically for ESL tutors is not provided. Only three of seven responding ESL tutors reported having received any training in alternative language service delivery in the previous two years;

Page 16 - Dr.

several reported receipt of no training at all.

Overall, OCR found that the District lacks enough teachers who are qualified to teach bilingual education or ESL to meet the needs of all LEP students. Instruction of LEP students by unqualified staff, including licensed teachers lacking endorsement or waivers and teachers' aides, is offered in lieu of instruction by qualified staff. The rationale for using teachers' aides in lieu of qualified teachers is based on funding, rather than the English-language and academic needs of LEP students. Although the District sponsors training in alternative language service delivery, many ESL and bilingual-education teachers and ESL tutors do not participate. Despite acknowledgement that the use of unqualified instructional staff should be no more than an interim measure, the District did not demonstrate that it is taking affirmative steps to provide all LEP students with alternative language program instruction by qualified staff within a limited period.

Instructional Materials and Resources:

According to the December 1985 memorandum, in order to ensure that alternative language program services are delivered effectively, districts are expected to provide adequate resources, such as instructional materials and equipment, in accordance with the requirements of the program. The adequacy of resources is determined by the timely availability of required equipment and instructional materials.

Materials appropriate to Spanish-English bilingual education programs and ESL programs are not consistently available to LEP students and alternative language program staff persons from school to school. In some cases, site-based decisions regarding priorities for purchasing instructional materials with limited budgets reportedly result in a disproportionate lack of instructional materials that are appropriate to meet the needs of LEP students. At two elementary schools, staff informed OCR that LEP students use the same instructional materials as other students, rather than materials adapted to the needs of students who are learning English. At a third elementary school, OCR was informed that Spanish-language texts are used mainly only in kindergarten and grade one for reading stories. Region bilingual specialists explained that instructional materials in Spanish and English are available, but administrators or staff persons choose not to purchase these materials; other schools do not have sufficient funds to purchase materials that are appropriate to LEP students.

Overall, OCR found that the District fails to provide adequate resources, such as instructional materials and equipment, in accordance with the requirements of the alternative language programs selected.

Exit Criteria:

Page 17 - Dr.

The September 1991 memorandum provides three means to determine the sufficiency of criteria established by a district for determining whether LEP students no longer require alternative language services. First, the exit criteria should be based on objective standards for which the district can explain how it ensures that students will be able to participate meaningfully in the regular educational environment. Second, the exit criteria should ensure that students can speak, read, write, and comprehend English sufficiently to participate meaningfully in the district's educational program. Third, the exit criteria must provide a meaningful opportunity for LEP students to be reassigned to the regular educational environment. In addition to these criteria, if a district's alternative language program has the effect of interrupting opportunities for normal academic progress, the district is obligated to remedy the resulting academic deficits.

The bilingual-program handbook includes no criteria for exiting or reclassifying LEP students from the alternative language programs.

In narrative data, the District described exit criteria (if applicable) for its programs and services for LEP students. Students do not exit from the bilingual education program because it is "also for maintenance of the home language, and students take the Spanish component for enrichment." LEP students exit from the ESL program by scoring at level 5 (out of 5) on the LAS-O, with the recommendation by the ESL teacher, in collaboration with classroom teachers, school counselors, or the principal. Students who exit ESL based on the LAS-O score may remain in ELD instruction until they achieve above the fortieth percentile in "academic proficiency" on a standardized achievement test. LEP students who receive ESL tutoring may continue until they score above the fortieth percentile on a standardized achievement test.

The bilingual supervisor confirmed that LEP students can exit out of the ESL program or the ESL component of the bilingual/ESL program with a score on the LAS-O at level 5 and teacher's recommendation. He added that the availability of testing in reading and writing proficiency would help teachers determine that exiting is appropriate. Students may continue to receive sheltered English instruction until they achieve at the fortieth percentile. The bilingual supervisor also noted that LEP students might be exited based on teacher recommendation alone, but this is not supposed to happen.

The statements of the region bilingual specialists generally corroborated the District's narrative and the statement of the bilingual supervisor. One region bilingual specialist added that there is no limit on the time a student can receive ESL tutorial services, "as long as funds are available to support [the] program."

As found above, the District's ELD and sheltered English programs

Page 18 - Dr.

are not recognized as educationally sound approaches for serving the needs of LEP students in the absence of other alternative language services, such as ESL. To the extent that LEP students who are orally proficient in English but not fully proficient in reading and writing skills are reclassified from ESL to ELD or sheltered English instruction, the District cannot ensure that it is meeting these students' English-language and academic needs, in accordance with OCR policy.

In addition to reiterating the criteria above, building-level staff persons interviewed by OCR provided the following information regarding reclassifying and exiting LEP students:

- At Elementary School, students are expected to read, write, speak, and understand English well enough to participate meaningfully in the English-only classroom before leaving the ESL tutorial program; but the school has not established criteria for exiting LEP students.
- At Elementary School, students are expected to read, write, speak, and understand English well enough to participate meaningfully in the English-only classroom before exiting ESL; but no formal testing is used for exiting. Students qualify to exit when they can perform at grade level or the regular classroom teacher and ESL teacher agree "that proficiency in English and academic proficiency can best be achieved in the classroom with total inclusion." Students exit ESL to sheltered English services, from which they do not exit.
- Elementary School has established no exit criteria for students receiving ESL tutoring services.
- At Elementary School, students exit from ESL services when they score at level 5 on the LAS-O, with no testing of reading or writing proficiency in English.
- At Avenue Elementary School, LEP students may exit the ESL program based on the LAS-O or mutual agreement between the ESL teacher, the classroom teacher, and the parent.
- At Middle School, LEP students may exit the ESL tutoring services based on the LAS-O or satisfactory performance in the regular classroom.
- High School has no established criteria for exiting ESL tutorial services. LEP students discontinue the services based on the recommendation of a teacher.

Student 4 is a Hispanic student who was in grade two at Elementary School during school year 1993-94. During school year 1992-93, he scored at level 1 (out of 5) on the LAS-O. No LAS-O

Page 19 - Dr.

score was available in his record for school year 1993-94. In March 1994, the classroom teacher had the student removed from ESL at her request. The teacher wrote in the student's record:

I am requesting that [Student 4] start attending the Chapter 1 Reading Program for the rest of this school year. He has made such significant gains in ESL that I feel he is ready to try a full reading program in English. (Emphasis added)

Based on subjective criteria, rather than an objective assessment of English-language proficiency, Student 4 was reclassified from an academic model that is recognized as sound for LEP students into a reading program that is not designed to meet the needs of second-language learners.

Student 5 is a Hispanic student who was in grade two at Elementary School during school year 1993-94. During school year 1992-93, he scored at level 5 on the LAS-O, but his records for school year 1992-93 reflect low grades in reading and writing skills. The teacher wrote in the student's record, May 1993: "He had received ESL services until budget cuts eliminated his program." Despite an apparent lack of proficiency in reading and writing English, alternative language services for Student 5 were discontinued for reasons related to funding, rather than his educational needs.

Despite the District's assurances that LEP students are expected to master the four skills in English, OCR found that LEP students are generally tested objectively only in oral English skill (if at all) to qualify for exiting. An assessment of English-language proficiency that does not evaluate proficiency in reading and writing is insufficient to ensure that each exited LEP student is prepared to participate meaningfully in the English-only classroom.

Overall, the evidence is sufficient to conclude that the District fails to ensure that LEP students are not exited from alternative language services until they are prepared to participate meaningfully in the regular classroom. The exit criteria do not ensure that LEP students can read, write, speak, and understand English and are academically prepared sufficiently to participate meaningfully without the assistance of alternative language services. File reviews indicated that alternative language services for some LEP students were discontinued before the students were reclassified as non-LEP, according to the District's standards.

Former LEP Students:

The September 1991 memorandum states that once exited from the alternative language program, former LEP students should be able to participate meaningfully in the regular educational environment. That is, they should be able to keep up with their non-LEP peers academically and participate successfully in essentially all

Page 20 -

aspects of the curriculum without the use of simplified English materials.

OCR evaluated the District's efforts to monitor the progress of students who have exited from alternative language services to ensure that these students have meaningful access to the full curriculum once they have exited. OCR also considered whether former LEP students are sufficiently prepared to participate meaningfully without the use of simplified English materials. OCR learned:

- According to the District's narrative, each school is responsible for monitoring the progress of former LEP students by reviewing periodic grade reports, scores from the Gates-MacGinitie Reading Test, ITBS, and the High School Competency Exam.
- A region bilingual specialist informed OCR that former LEP students' ability to participate in the District's regular curriculum without simplified English materials depends of the students' abilities to achieve academically. Each school is responsible for modifying the curriculum so that former LEP students can participate.
- The principal of an elementary school stated that former LEP students' academic progress is not monitored.
- After stating that she has no former LEP students in her class, a grade-four classroom teacher informed OCR that she would have no way of knowing which of her students might formerly be LEP.
- A grade-five classroom teacher stated that former LEP students are watched closely to see if they need to be referred back to ESL. She added that she would not know who her former LEP students are if they exited prior to the previous school year.
- An English teacher and a multicultural science teacher at a middle school informed OCR that they were unaware which of their students may have exited an alternative language program.
- A high school English teacher informed OCR that he will give former LEP students simplified English materials "if needed," but a student who has received ESL for one year can function well in the regular program.

OCR found that building-level staff persons are not fully informed of former LEP students who are enrolled in their classes; thus, teachers are not prepared to monitor whether these students are prepared to perform meaningfully outside of the alternative language program. The willingness of staff persons to furnish

Page 21 -

simplified materials for former LEP students suggests that these students are exited out of alternative language services before they are prepared to participate meaningfully.

Program Evaluation

OCR policy memoranda require districts that have designed and implemented programs for LEP students to have procedures for monitoring the program to ensure that it is effectively meeting the needs of LEP students. According to the December 1985 memorandum, OCR expects a district to maintain data regarding its implementation of an alternative language program and the progress of students who participate in the program. The September 1991 memorandum states, further, that a district that does not periodically evaluate its program or modify identified deficiencies is in violation of Title VI.

Asked to describe formal procedures for evaluating program effectiveness, the District identified the annual review of the Bilingual-Multicultural program, which is conducted by the State. OCR found that the State inquiry includes only the 55 schools implementing the program. The State inquiry emphasizes the identification procedures and program implementation, but it does not request evidence that the services provided are successfully meeting the English-language and academic needs of LEP students.

The District also informed OCR that region assistant superintendents are responsible for producing an annual program review for each school. However, OCR found that such reviews do not specifically address the effectiveness of alternative language services.

Finally, the District stated that the District Research, Development, and Accountability (RDA) Unit conducts periodic program evaluations. A "Research, Development and Accountability Response for U.S. Department of Education Office For Civil Rights" (RDA report) appears to identify disparities between the success rates of various ethnic and language groups in the District. Nevertheless, the RDA report includes no conclusions regarding the effectiveness of alternative language programs or services. The RDA director advised OCR that the RDA report cannot be used to draw conclusions about the effectiveness of alternative language services, nor was it intended to "present a comprehensive assessment of any particular program." According to the RDA director, evaluation of alternative language programs is the responsibility of each school.

By contrast, school staff persons consistently identified no formal building-level evaluation procedures, but some stated their belief that the RDA Unit is responsible for evaluation of alternative language programs. Although school administrators and staff members expressed their awareness that LEP students' academic performance

Page 22 - Dr.

and graduation rates are below the District average, OCR found no indication that such data has been used to identify needed modification to the District's services for LEP students. Likewise, neither District-level staff nor building-level staff identified for OCR any modifications to alternative language programs or services that were initiated in light of a program evaluation.

The District has failed to comply with its obligation under the regulation implementing Title VI to monitor its alternative language program and to modify any aspects found to be deficient. The District failed to show that reviews by the State department of education are designed to evaluate the effectiveness of the alternative language services selected and implemented by the District. Despite acknowledged indications of insufficient services for LEP students, the District has taken no steps to modify its alternative language programs in response to such indications.

Parental Notice

The May 1970 memorandum requires districts to provide the parents of language minority students with notices containing the same information that is provided to the parents of other students. To be adequate, such notices must be furnished in a language appropriate to the parents. The intent of the May 1970 memorandum is to clarify each district's responsibility to communicate as effectively with language-minority parents as it would with other parents, despite any language barrier. The burden of ensuring effective communication is the District's; the District may not transfer the burden to the language-minority families.

The District furnished copies of numerous manuals, newsletters, and forms printed in language other than English, nearly all of which were in Spanish. From interviews and documentation, OCR learned that consistency in ensuring that language-minority parents receive adequate notice in an appropriate language varies from school to school. To illustrate:

- The bilingual supervisor informed OCR that the manner of communication with the home is a site-based decision. "Some schools provide notices to parents in the parents' home language; others do not," he said.
- A region bilingual specialist noted that the District needs to monitor schools' efforts to communicate with language-minority parents.
- Two region bilingual specialists stated that consistency in communicating orally or in writing with parents varies by school, depending on resource-related factors such as availability of bilingual staff members.
- The principal of an elementary school stated that bilingual

Page 23 - Dr..

staff help interpret at conferences when needed and requested. Nevertheless, he noted that insufficient bilingual staff members are available at the school to ensure consistently-effective communication.

- Two classroom teachers at an elementary school stated that notices in another language are not needed at the school. By contrast, the student language data base furnished to OCR by the District lists 131 students at the school whose home language is other than English.
- A grade-five classroom teacher who acknowledged that her ability to speak Spanish is limited, informed OCR that she can communicate unassisted in conferences with parents who speak Spanish.
- Asked how teachers know when there is a need to send notices home in a language other than English, a classroom teacher at a middle school replied that the staff person sending something home "knows" which language to use. Asked whether this knowledge of the home language comes from the language survey on the registration card, the teacher replied that teachers do not refer to the registration cards to learn the language used at home. "I think we forget those are there."
- A classroom teacher at a high school informed OCR that teachers are never given the home-language information from the registration cards. Teachers learn that an interpreter is needed when they speak to parents and discover that there is an obvious language difficulty.
- The principal of an elementary school with a State-funded bilingual/ESL program informed OCR that all written notices for the school are issued in English and Spanish. She added, "Bilingual staff members act as translators. In addition to Spanish speakers. . . , we have Navajo, Keres, and Towa speakers."
- The bilingual resource teacher at another school stated that there is no one in the school or District who can translate for the parents of her Chinese, Vietnamese, and Native American students.
- At least ten administrators and teachers at four schools informed OCR that they rely on students, siblings, or other members of the family to interpret at parent conferences or to translate notices that are sent home in English.

Overall, OCR found that the District provides some notices in an appropriate language other than English, but the District fails to ensure that language-minority parents consistently receive notices containing the same information that is

Page 24 -

provided to the parents of other students in the language best understood by the parents.

Facilities

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

The ESL tutor at Elementary School had no assigned room for providing pull-out assistance to LEP students. One room she often used is a half-sized room that is used as a kitchen and includes ovens for firing ceramics.

The ESL tutor at Middle School provided pull-out services to LEP students in the library, in lieu of an available classroom. He reported that working in the library is inappropriate because it becomes very noisy when other students are there. When the library must remain quiet, it is difficult to work with words orally.

ESL pull-out services at Elementary School were also provided in the school library. The principal explained that the school is short on space; consequently, club meetings and tutorials have to be assigned to the library.

Staff persons at Elementary School used the words "cramped" and "crowded" to describe the classrooms assigned for ESL and bilingual instruction. An ESL classroom was so crowded that some LEP students in kindergarten had to be placed on a waiting list for appropriate services. In addition, the tables and chairs in the ESL classroom were reported to be too large for primary-grade children.

OCR was also informed that ESL classes at Elementary School are displaced from their classrooms for about two weeks, six or more times per year, to accommodate other activities not directly related to the ESL program. National Laboratories has an agreement with the school to provide science demonstrations. In exchange, the school must provide space. Space for the demonstrations is created by moving ESL classes out of their assigned classrooms.

Facilities for the instruction of LEP students at other schools reviewed by OCR were found generally to be comparable. Nevertheless, OCR found that the District fails to ensure that LEP students consistently receive alternative language services in facilities that are comparable to the facilities enjoyed by other students.

Special Education

Page 25 -

The regulation implementing Title II, at 28 C.F.R. § 35.130(a) and (b)(1)(ii) and (iv), prohibits public entities from discriminating against qualified persons with disabilities by providing them different aids or services than are provided to others unless such action is necessary to provide them with aids or services that are as effective as those provided to others.

The regulation implementing Section 504, at 34 C.F.R. § 104.35, provides that a recipient that operates a public elementary or secondary education program shall conduct an evaluation of any person who, because of disability, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program. OCR's interpretation of the regulation includes the requirement that the District establish standards and procedures for the evaluation and placement of such persons ensuring, among other things, that tests are selected and administered so that test results accurately reflect a student's special education needs rather than English proficiency skills.

The regulation implementing Section 504, at 34 C.F.R. § 104.36, provides that a recipient must establish a system of procedural safeguards for students who need or are believed to need special education or related aids and services that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parent or guardian and representation by counsel, and a review procedure. Such procedural safeguards must be communicated in a language that is best understood by the parents or guardian.

The May 1970 memorandum states that districts may not assign students to special education programs on the basis of criteria that essentially measure and evaluate English language skills. The September 1991 memorandum adds that districts may not refuse to provide both alternative language services and special education to students who need both.

Referral, Evaluation, and Placement

In reviewing whether a district's special education referral and evaluation procedures are in compliance with OCR policy, OCR generally considers whether staff members use objective data and professional judgment to account for the effect of the language development and proficiency of language-minority students. If a student is not proficient in the language skills required to complete an assessment instrument, the results may not be valid. If district staff rely primarily on invalid test data, in lieu of other sources of information about the student, the district may be in violation of Section 504 and Title II.

As noted above, a person whose dominant or primary language is

Page 26 - Dr. .

English is not necessarily proficient in English. Accordingly, determining that a student is dominant in English or determining that a student's primary language is English is not equivalent to determining that the student is proficient in the language skills required to produce valid, reliable results on a special education evaluation instrument.

According to District policy, included in the "Operational Standards" for special education (special education manual), revised April 1993, referral for special education will include a review of a student's "language proficiency and dominance." Staff persons are directed to "attach Language Usage Data form when appropriate," but "when appropriate" is not defined .

Instructions on the Language Usage Data form state that it "must be submitted as part of a special education referral packet for any student with bilingual/cultural/linguistic

considerations." Among the items requested on the form are:

- > Languages used by the family and in the home;
- > The student's use of English and another language in various school settings;
- > A staff person's rating of the student's use of English and native language in instructional and non-instructional settings;
- > The extent to which English and another language are used by the teacher and educational assistant in the classroom;
- > History of alternative and remedial service receipt, including alternative language programs and Chapter 1; and
- > LAS-O level.

Other special education forms that refer to language proficiency or dominance include the Initial Referral Checklist, the Socio-Cultural Worksheet, the Initial Case History, and the Re-Evaluation Case History. Analysis indicates that these forms appear to use the terms "language proficiency," "language dominance," and "primary language" interchangeably.

According to the special education director, LEP students are referred for special education like other students, but language data must also be collected. Special education staff persons who do evaluations and make placement decisions expect the referring school to distinguish between disability issues and language issues. Documenting this distinction is the primary purpose of the Language Usage Data form.

A region bilingual specialist explained that she is responsible for assessment of language dominance, following completion of the Language Usage Data form by the referring teacher. If the student has not been properly identified from the start by means of the language survey card, then the referring teacher probably will not be aware of the need to complete the Language Usage Data form, and

Page 27 -

language-related factors will not be assessed. If the region bilingual specialist finds that the student is English-dominant, then the student will probably be assessed in English for special education. If she recommends an English-dominant student for assessment of English-language proficiency, she still may be overruled by the diagnostic coordinator. Consequently, the English-language proficiency of a PHLOTE student who is dominant in English will probably not be assessed or considered for the student's special education evaluation and placement.

Two special educators at separate elementary schools informed OCR that, unless a concern about language proficiency is raised prior to the referral, a student's language proficiency is not considered during the special education evaluation. Language testing information is almost never requested for a student who is not already in the bilingual/ESL program.

A third special educator at another elementary school stated that no student at her school has required a special education evaluation in a language other than English. Student 6 is a Hispanic student at the special educator's school who is placed in special education for a specific learning disability. Student 6 is PHLOTE, with a home language of Spanish and student languages of English and Spanish. OCR found no record that her proficiency in English had ever been assessed by the District. Thus, OCR found no basis for the special educator to state with certainty that no student has required evaluation for special education in another language.

According to the special education manual, the evaluation procedures and interpretations of standardized test results from a multidisciplinary evaluation "must be specialized for some bilingual and multicultural students. The procedures and interpretations will differ from those typically used with monolingual English speaking students." Diagnostic materials are:

- > "provided in the student's native language. . . , unless it is clearly not feasible to do so;"
- > "validated for the specific purpose for which they are used; and
- > "...administered by trained personnel, ...in conformance with the instructions provided by their publishers."

The special education manual also states: "All evaluation data. . . is reported in writing for presentation to IEP team members."

The District furnished a list of tests and assessment materials normed for Spanish speaking students that are used to evaluate Spanish-speaking students with limited or no English-speaking skills. There are reportedly no tests developed specifically for other language-minority groups in the District, such as Native American, Vietnamese, and Laotian students. The District also

Page 28 - Dr.

furnished a list of tests and assessment materials that "are either non-verbal in their administration and response format or . . . yield scores of non-verbal cognitive ability," including:

- > Wechsler Intelligence Scales (WISC-III, WISC-R, and WPPSI-R), performance intelligence score, and
- > Kaufman Assessment Battery for Children (K-ABC), nonverbal standard score.

Student 7 is a Hispanic student who was in grade two at Avenue Elementary School during school year 1993-94. He is placed in special education for a specific learning disability. Records indicate that he is PHLOTE (including language category B on the language survey), but OCR found no record of English-language assessment. For purposes of comparison with achievement test results, the special education diagnostician used the K-ABC composite IQ standard score, rather than the nonverbal standard score, as the estimate of Student 7's current ability.

Student 8 is a Hispanic student who was in grade six at Middle School during school year 1993-94. He is placed in special education for a specific learning disability. Records indicate that he is PHLOTE (including student's language indicated as Spanish on the language survey), but OCR found no record of English-language assessment. His teacher informed OCR that Student 8 "cannot read a speck." For purposes of comparison with achievement test results, the special education diagnostician used the WISC-R fullscale IQ, rather than the performance intelligence score, as the estimate of Student 8's current ability.

The District informed OCR that evaluation of LEP students can include one or more of the following procedures:

- > Administration of tests and assessment materials normed for Spanish-speaking students by a "bilingual evaluator";
- > Administration of tests and assessment materials that have not been translated formally or normed for LEP students by a "bilingual examiner" using the student's native language; or
- > Administration of tests and assessment materials that have not been translated formally or normed for LEP students with the assistance of an interpreter.

Tests and measures that are used for other than language-minority students are used with language-minority students but "with extreme caution...in interpreting results.... The impact of limited English proficiency on these test results is carefully considered when making eligibility decisions."

According to the bilingual director, the decision to use a bilingual assessor or interpreter is made on a case-by-case basis, depending on need and resources. The District does not have many staff persons nor community resources who can perform or assist in

Page 29 - Dr.

bilingual assessment. The District sorts out those students who "really need" a bilingual assessment. The District tries to balance between assessing in English and the extra wait (possibly several months) for a bilingual assessment. Interpreters are used to assist diagnosticians with languages other than Spanish or English. They interpret evaluation instruments only when special education staff persons feel this is appropriate.

The bilingual director informed OCR that test scores are only a part of the evaluation process. The District, he said, relies more heavily on "authentic assessments" and parental input for language-minority students than for other students.

The special education manual states that the IEP committee determines the amount of special education services to be provided to eligible students. The IEP committee is "a multidisciplinary group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the delivery of services options." OCR was informed that staff persons from the Indian Education Office are not allowed to sit in on IEP committee meetings for Native American students or to provide input on cultural differences. "We are totally out of the picture," said a resource teacher.

As directed by the special education manual, the IEP committee is to ensure that each student's placement is in the least restrictive environment appropriate to the student's needs. A special educator told OCR that, if more ESL classes were available, the school might be able to integrate special education students into more regular education classes. That is, the lack of ESL classes may result in inappropriately restrictive placements for language-minority students with IEPs.

The special education director asserted that only students who have disabilities are placed in special education by the IEP committee. A student cannot be labeled learning disabled until the IEP committee rules out lack of educational opportunities and lack of language experience.

Student 9 is a Native American student who was in grade three at Elementary School during school year 1993-94. He is placed in special education for a specific learning disability. Student 9's language survey had not been completed, and OCR could not locate his record on the student language data base. His records include no data from assessment of English-language proficiency, nor placement in an alternative language program. A portion of his initial multidisciplinary evaluation report, dated February 1994, reads:

While [Student 9] presented strong effort, his verbal responses often "wound around" and were very difficult to follow. [Student 9] repeated back EVERY question and direction that was given to him. His responses were

Page 30 - Dr.

delayed and he seemed to have much difficulty recalling the words he needed.

OCR asked the student's special education teacher if such verbal behavior is not uncommon for some Native American speakers with a background in their native language other than English. She replied that the diagnostician and staffing team should have investigated the case further to consider linguistic or cultural factors.

Student 10 is a Hispanic student who was in grade seven at Middle School during school year 1993-94. He is placed in special education for a specific learning disability. Records indicate that he is PHLOTE (including home language and student's language indicated as Spanish on the student language data base). The student language data base indicates that Student 10 scored at level 2 (out of 5) on the LAS-O, but his confidential diagnostic report for reevaluation, dated November 1993, indicates that his "primary" language is English, with no more specific mention of language proficiency. His IEP dated January 1994, reads in part: "[Student 10] has difficulty processing oral directions, reading, or completing a page without skipping lines." No discussion of the student's possible lack of language experience is reflected in the referral, evaluation, or placement records reviewed by OCR. A former ESL teacher who is familiar with Student 10 expressed her doubts to OCR that this student should be in special education. Likewise, a special educator indicated that she suspects Student 10 requires only ESL, not special education.

Analyzing Student 10's records, OCR notes documentary evidence indicating that evaluation staff either disregarded or were uninformed of objective data indicating that Student 10 is LEP. There is no indication that the special education evaluation was conducted in any language other than English. Documentation available to District staff indicated the likelihood of an influence of another language on the student, and staff persons knowledgeable about the student doubt that his placement is appropriate. Nevertheless, the student was identified as having a learning disability and placed in special education. Accordingly, the documentary evidence suggests and does not preclude the possibility that Student 10 was placed in special education on the basis of criteria that essentially measured English-language skills, rather than a true disability.

Student 11 is a Hispanic student who was in grade ten at High School during school year 1993-94. He is placed in special education for a specific learning disability. Records indicate that he is PHLOTE (including home language and student's language indicated as Spanish on the student language data base). The student language data base indicates that Student 11 scored at level 5 (out of 5) on the LAS-O, indicating oral proficiency in English (date unknown). A speech-language screening form, dated March 1987, indicates:

> The student's mother speaks no English, and his father speaks

Page 31 - Dr.

little.

- > "As English is not spoken in the home, he may be expected to have difficulty with English in school."

Student 11 's Bilingual Diagnostic Request, dated April 1987, includes:

- > Chronological age: nine years, seven months.
- > The student has been exposed to and instructed in English for less than five years.
- > The student has received no native-language instruction from the District.
- > Spanish is used most often in the home.
- > Hand-written comment: "Is it reasonable to assume that the child has had sufficient contact with English. . .so as to expect him to perform at par with his peers?" OCR found no direct response in the record.

Student 11 's Special Education Referral Packet, dated April 1987, includes:

- > "Student speaks and/or understands the following languages: Spanish, English."
- > . . .Language Proficiency level as determined by Cross Cultural Center: C - which is: speaks and understands another language which is English."

Student 11 's Referral for Support Evaluation, dated September 1987, includes:

- > "Child is proficient in both English/Spanish. Spanish spoken in the home."

Student 11 's family case history, dated September 1987 notes that Student 11 first learned to speak Spanish.

Notes on the cover of Student 11 's WISC-R, dated September 1987, read: [Student 11 l's first language is Spanish. Spanish is the only language his parents speak with any proficiency. [Student 111 indicates that he feels more proficient in English than in Spanish. (Emphasis added.)

Student 11 's initial confidential communication evaluation report, dated October 1987, includes:

- > Under the section "Languages Spoken": "According to information on the permission to test document, [Student 11] understands and speaks both English and Spanish. Spanish was his first language. His parents speak Spanish in the home, but his father can speak some English."
- > Under the "Summary and Clinical Impressions" section: "Although he did speak Spanish first, his English skills have been judged to be proficient. Therefore, we would not expect the communication problems to be due to second-language interference."
- > Test interpretation: ". . .moderate weaknesses in auditory and

Page 32 - Dr. .

verbal abilities."

Student 11 's initial confidential diagnostic report, dated November 1987, includes:

- > "The language spoken in the home is reported to be Spanish."
- > No direct reference to student's language proficiency.
- > Test observations include "frequent requests for repetition of oral directions and a low level of elaboration when responding verbally."
- > "Some of the factors which may have influenced [Student 11 l's test results include mixed language background."
- > "In the opinion of the diagnostician, the test scores obtained were valid estimates of [Student 11]'s skill levels."

The November 1987 initial confidential diagnostic report includes no additional narrative to explain how a "mixed language background" could affect the test results or to what extent the multidisciplinary team should view the test results cautiously.

Analyzing Student 11's records, OCR notes that the student is PHLOTE but never assessed for English-language proficiency in reading or writing skills. At least two educators questioned the student's cognitive skills in English, and another misinterpreted the significance of "Language Proficiency level" C to indicate mastery of English. Documentation indicates that the decision to administer the WISC-R in English was based on the students preference (i.e., dominance), rather than objective data on language proficiency. There is no indication that the special education evaluation was conducted in any language other than English. Overall, the documentation indicates that District staff persons were aware of the likelihood of influence of another language on the student, but the record includes no documentation of steps to respond to that information when evaluating him. Accordingly, the documentary evidence suggests and does not preclude the possibility that Student 11 was placed in special education on the basis of criteria that essentially measured English-language skills, rather than a true disability.

The following summarizes OCR's findings from this portion of the review:

- o Special education forms appear to use the terms "language proficiency," "language dominance," and "primary language" interchangeably.
- o The decision to perform an evaluation in a language other than English reportedly depends on resources, in addition to the needs of the student.
- o The language background of each student is reportedly rarely considered if the language survey is not completed accurately,

Page 33 - Dr.

it is not requested by the referring teacher, -or the student is not already participating in the bilingual education program.

- Language screening prior to referral for special education evaluation is often limited to a determination of language dominance, regardless of language proficiency.
- The referral, evaluation, and placement records of several language-minority students include no indication of testing for English-language proficiency, testing or screening for special education in a language other than English, or discussion of the effects of limited-English proficiency on the meaning and validity of test results.
- Resource teachers who are directed by the Indian Education Office are apparently instructed not to participate on special education placement staffing teams or to provide input to the placement decision.
- Although the District has established a variety of strategies for evaluating language-minority students for special education, these strategies are not reflected in the records of several students reviewed by OCR.

Overall, OCR found that the District fails to ensure that language-minority students are not assigned to special education programs on the basis of criteria that essentially measure and evaluate English-language skills.

Parental Notification of Procedural Safeguards

According to the special education manual, a parent who gives consent to action proposed by the District must be "fully informed of all information relevant to the activity. . .in his/her native language," understand and agree to the proposed action in writing, and understand that granting consent is voluntary. To ensure that these criteria are met for language-minority parents, notice must be "provided in the native language of the parent. . .unless it is clearly not feasible to do so." Along with a description of the proposed action and the basis for choosing it over available alternatives, the notice must include a full explanation of procedural safeguards. A disclaimer included in the special education manual states that the District's obligation to provide notice in appropriate languages does not mean that the District is obligated to translate all forms into all other languages; the information can be provided through an oral interpreter.

The special education manual includes procedures designed to promote the participation of language-minority parents in the IEP process. Notice of the IEP meeting "will be provided in a communication mode that is understandable to the parents." The IEP

Page 34 - Dr.

committee meeting will be conducted "in a communication mode that is understandable to the parents." District personnel will provide and document any interpretation or translation assistance needed by the parent. "Copies of bilingual forms or records of interpretation shall be included in the student's confidential file." "A record of verbal. . . translation having been provided shall be noted in the comment section of the IEP." OCR found the District's policies to provide for language-minority parents adequate notice of procedural safeguards and opportunities for participating on IEP committee to be sufficient, if fully-implemented, to satisfy OCR's policy.

The District informed OCR of its program "to train school and community interpreters to facilitate parental understanding of the special education process" and "to help make informed consent meaningful for the families in which English is not the primary language of the home." Trained interpreters are to be knowledgeable in the special education process, special education terminology (especially related to eligibility criteria), issues of confidentiality, ethics of interpretation and translation, and informed consent. Although the District noted that participants are required to demonstrate proficiency in English and a second language, the means of such demonstration were not specified.

By school year 1993-94, the District trained three interpreters, whose native languages are Spanish, Vietnamese, and Laotian. The notice of their availability states: "These interpreters can only be used for limited English proficient students/parents who are involved in the special education process."

The special education director informed OCR that written notice of procedural safeguards is available in Spanish and English. Notice in other languages is available through oral interpreters, such as those trained as described above. The District furnished copies in English and Spanish of at least 17 forms used for special education, including the notice of "Procedural Safeguards" and "Notice to Parents: Individualized Education Program Instructional Component Meeting." The District also furnished a "Consent for Initial Multidisciplinary Special Education Evaluation" in English only; the form includes a check-off item to indicate that procedural safeguards were provided in a specified language other than English.

An educational diagnostician who has worked for the District for several years informed OCR that she does not recall ever having seen Spanish-language forms explaining parents' rights and procedural safeguards. If the Spanish-speaking parent does not understand English sufficiently well, she explained, a bilingual interpreter or staff person assists the IEP team.

Another educational diagnostician stated that the Indian Education Office provides interpreters for Native American parents. A resource teacher from the Indian Education Office contradicted the

Page 35 - Dr.

educational diagnostician, noting that she and other staff persons from the Indian Education Office are not allowed to sit in on special education staffing meetings for Native American students.

The special education department chairperson at an elementary school informed OCR that several special education forms have been updated over the last several years in English, but outdated versions of Spanish-language forms have not been replaced. Specifically, she identified the notification of referral for initial evaluation, the notification of referral for reevaluation, the notice to parents of IEP meeting, the IEP, the permission to place, and the IEP goals and objectives forms as out of date in the Spanish versions.

At the same school, a bilingual special educator who can read, write, speak, and understand Spanish confirmed the department chairperson's statement. She explained that Spanish-language forms with notice of procedural safeguards used to be available, but not since the list was revised in English. Paraphrasing her explanation of how Spanish-speaking parents receive proper notice, she stated:

I orally translate the procedural safeguards. I follow the English form, which states at the end: "You have the right to receive all information written in Spanish." The parents and I just laugh when we come to that because the notice is not available.

She added that she has translated the revised IEP forms on her own, and has shared them only with one other elementary school.

At another elementary school, a special educator who cannot read, write, speak, or understand a language other than English asserted that the outdated Spanish-language forms are adequate. The terminology on the newer English-language forms is different, she said, but conceptually, the older forms, including the Spanish-language procedural safeguards, are still current.

The language data base entry for Student 11 indicates that his home language is Spanish. A referral packet, dated April 1987, indicates that the parents require an interpreter. The permission to test form, signed September 1987, is in Spanish. All other notices to the parents that were located by OCR in the student's file are in English, with no indication that translation or interpretation was provided. Thus, documentation included in Student 11's confidential record indicates that his parents have not consistently received notice of their rights and procedural safeguards in an appropriate language.

Student 12 is a Hispanic student who was receiving special education services for a specific learning disability at High School during school year 1993-94. The language data base entry for Student 12 indicates that his home language is Spanish. A permission to place form, dated April 1988, was presented to the

Page 36 - Dr.

mother in English, with no notation to indicate that the form was orally translated. A permission for individual evaluation form, dated November 1989, was also presented to the mother in English, with no notation to indicate that the form was orally translated. The case manager who witnessed the parent's signature, noted on the form: "Mom spoke limited English. Not sure we communicated very well." The record includes no indication of efforts to follow-up on or to resolve the communication difficulty. Thus, documentation included in Student 12's confidential record indicates that his parents have not consistently received notice of their rights and procedural safeguards in an appropriate language.

Overall, OCR found that the District's policy for informing language-minority parents of their rights and procedural safeguards is sufficient, and the District has taken steps to apply its policy. Nevertheless, the evidence demonstrates that such parents are not fully informed consistently, as required under District and OCR policy. Because student files lack documentation to indicate that parents were informed of the content of English language forms in a language that they understand best, OCR is unable to conclude that parents received proper notice. Furthermore, the District's use of outdated forms for Spanish-speaking parents is to treat such parents differently on the basis of national origin. Accordingly, OCR found that the District fails to notify language-minority parents of their specific special education rights and procedural safeguards in the language they can best understand.

Dual Services

The special education director informed OCR that all special education services are available to all LEP students who qualify for such services, and all alternative language program services are available to students with disabilities who are LEP. The bilingual supervisor, however, stated that bilingual teachers have told him that they do not feel qualified to go into special education classrooms. "To my knowledge," he said, "many LEP students in special education do not participate in alternative language programs."

A region bilingual specialist informed OCR that sometimes students are withdrawn from alternative language programs and placed in special education, once they are determined to have a disability. Once in special education, LEP students do not all receive alternative language services any longer. He noted that the "lucky ones" may get bilingual-speaking special educators or bilingual tutors, but this is unusual.

OCR learned that Avenue Elementary School operates a bilingual special education program for LEP students with specific learning disabilities who require special education services for at least half of the academic day in order to meet their individual needs. The program teacher, who has been trained for bilingual

Page 37 - Dr.

special education, provides English-language development instruction, as well as all required academic instruction in English and Spanish.

A special educator at a middle school stated that it is unfortunate that there are not more bilingual special education programs within the district. He added that some special education students at his school receive bilingual tutoring, but he did not identify qualified alternative language program instruction for LEP students in special education.

Two bilingual resource teachers at an elementary school with a bilingual/ESL program informed OCR that all aspects of the alternative language program except ESL are available to special education students. Until recently, school staff persons were of the understanding that students could not be "double served" in alternative language programs and special education, but now they know that this was not correct. Nevertheless, ESL is not serving special education students because most of the ESL classes are already overcrowded.

Overall, statements from staff persons in at least three regions indicate that LEP students with disabilities are excluded from receiving alternative language services for reasons other than their individual educational needs. At least one elementary school limits access to ESL for LEP students with disabilities because of an insufficient number of ESL teachers to serve all LEP students in the school. Consequently, OCR found that the District discriminates against LEP students with disabilities on the basis of disability by failing to provide all of these students with alternative language services.

Gifted and Talented Programs

According to the September 1991 memorandum, a district may not categorically exclude LEP students from gifted and talented programs. If a district has a process for locating and identifying gifted or talented students, it must also locate and identify gifted or talented LEP students who could benefit from the program. Educational justifications for excluding an LEP student from such a program should be comparable to justifications used in excluding a non-LEP student.

OCR's review in this area focused on two district programs, the Gifted Program and the High Potential Programs (HPP). Qualification standards for the Gifted Program are established by the Department of Education (. . .). The HPP was initiated to identify a population of students, including language-minority students, whose potential has historically been overlooked due to traditional measures of giftedness, such as those required by . . . That is, the HPP is for culturally different or disadvantaged students who are potentially gifted but do not meet . . . standards for

Page 38 - Dr.

eligibility.

According to data furnished by the District, 29% of all students enrolled District-wide are either in the bilingual/ESL program, the ESL program, or ESL tutorial. Only 4% of all students in the Gifted Program and HPP combined are in these programs. OCR's findings regarding the identification and assessment of LEP students give reason to doubt the accuracy of these figures for purposes of tabulating the total number of LEP students enrolled in the District. Nevertheless, assuming the District used the same data to identify LEP students in the Gifted Program and HPP, the data are useful to illustrate the apparent contrast between LEP students' rates of total enrollment and their rates of participation in these programs.

The Gifted Program in the District is administratively part of the special education program. The special education manual states that the same policies, procedures, and criteria that apply to other special education programs generally apply to the Gifted Program as well. Staff persons confirmed that students are referred, evaluated, and determined eligible for the Gifted Program in the same manner as students suspected of having disabilities, including referral by parents or teachers. Procedures for screening and formal testing for the HPP are similar as those for the Gifted Program. According to an administrative assistant in special education, LEP students are tested for the Gifted Program and HPP by a bilingual test administrator "when appropriate as determined individually for each student by the educational diagnostician." For Gifted Program testing, the diagnostician's determination is "based on information from the parents, school, and informal assessment in determining what kind of evaluation is needed."

Information gained by OCR from several interviews is summarized below:

- An elementary school principal informed OCR that no written information is provided to parents regarding the opportunity to refer their children for the Gifted Program. He added that parents know they can refer their children without such notice being provided.
- A bilingual resource teacher at a middle school informed OCR that he is not familiar with the screening procedures for the HPP. The teacher was unaware that the Gifted Program is also available at the school.
- A region bilingual specialist informed OCR that she assesses the oral language proficiency of LEP students referred for the Gifted Program, as is done when LEP students are referred to other special education programs.
- The principal of a middle school stated that the testing of

Page 39 - Dr.

LEP students for the Gifted Program and HPP is not conducted in the student's native language. "Many LEP students are dominant in English, and they are tested in English. There is an attempt to give the students the opportunity to be tested in the language they are most comfortable with in the testing situation."

- A former ESL teacher at a middle school informed OCR that the eligibility criteria for the Gifted Program tend to screen out LEP students "because the testing is done in English by people who are usually only monolingual English speakers." She believes that the attitude of staff persons at the school is that LEP students are not qualified for gifted services.
- An ESL teacher at an elementary school named an LEP student who has been "suggested" for referral, but she probably does not have sufficient grasp of English to pass the eligibility tests.
- Of seven principals responding, only one indicated that LEP students participate in the Gifted Program or HPP at their schools. The single affirmative response was contradicted by a bilingual resource teacher who informed OCR that two former LEP students are in the Gifted Program and one former LEP student is in the HPP.
- The administrative assistant in special education did not identify any of 92 staff members teaching in the Gifted Program as endorsed in alternative language service delivery or proficient in other languages.
- The administrative assistant in special education stated that HPP teachers do not instruct in a language other than English unless they happen to be bilingual.
- Of five principals responding, four indicated that the Gifted Program or HPP teachers at their schools are neither trained nor endorsed in alternative language services delivery. One principal added that "it is not currently a State requirement to be trained in ESL in order to teach gifted programs."

OCR found that the District does not ensure that LEP students have equal opportunity to participate in programs for gifted students. Although OCR did not conduct a valid statistical analysis, LEP students appear to be underrepresented in the Gifted Program and the HPP. Procedures for determining eligibility for the Gifted Program are the same as for other special education programs, under which, as found above, the District fails to ensure that evaluation results for language-minority students do not essentially measure and evaluate English-language skills. Although LEP students are not explicitly excluded from the Gifted Program, staff persons perceive the eligibility standards for the Gifted Program to present a

Page 40 - Dr.

barrier to LEP students' qualifying to participate. Although the qualification standards for HPP differ from those for the Gifted Program, the referral and evaluation procedures are the same as for the Gifted Program and other special education programs. Referral to the Gifted Program and HPP can be initiated by the parent, but none of the forms or notices furnished to OCR in another language related directly to the Gifted Program or HPP. Referral to the Gifted Program and HPP can be initiated by the teacher, but several alternative language program teachers were either unaware of the opportunities available for gifted or potentially-gifted LEP students, or unable to explain to OCR how students qualify for these programs. Teachers in these programs are generally not qualified to provide alternative language services, and native-language instruction is generally not available, unless the teacher happens to be bilingual. Accordingly, OCR found that the District failed to ensure that it locates and identifies gifted or talented LEP students who could benefit from special programs.

Conclusion

The evidence indicated that the District does not provide equal educational opportunity to LEP students. OCR identified compliance failures in the following areas:

- Procedures to identify and assess LEP students to ensure that all language-minority students who are unable to participate effectively in the regular instructional program receive alternative language services;
- Providing sufficient alternative language program services that are recognized as sound for the education of LEP students or considered legitimate experimental strategy;
- Providing alternative language services to all language-minority students who need such services;
- Providing enough teachers who are qualified to teach the program models selected by the District (bilingual education and ESL) to meet the needs of all LEP students;
- Providing adequate resources, such as instructional materials and equipment, in accordance with the requirements of the alternative language program models selected;
- Ensuring that LEP students were not exited from alternative language services until they are prepared to participate meaningfully in the regular classroom;
- Monitoring reclassified former LEP students to confirm that these students are prepared to perform meaningfully outside of the alternative language program;

Page 41 - Dr.

- Compliance with the obligation to monitor the alternative language programs and to modify any aspect found to be deficient;
- Ensuring that language-minority parents consistently receive notices containing the same information that is provided to the parents of other students in the language best understood by the parents;
- Ensuring that LEP students consistently receive alternative language services in facilities that are comparable to the facilities enjoyed by other students;
- Ensuring that language-minority students are not assigned to special education programs on the basis of criteria that essentially measure and evaluate English language skills;
- Notifying language-minority parents of their specific special education rights and procedural safeguards in the language they can best understand;
- Providing alternative language services to all LEP students with disabilities; and
- Ensuring that all gifted or talented LEP students who could benefit from special programs are located.

Accordingly, OCR has concluded that the District discriminates against national-origin minority students on the basis of their limited-English proficiency and disability by not providing them services necessary to participate meaningfully in the District's educational program, in violation of Title VI and its implementing regulation, 34 C.F.R. § 100.3(a) and (b), Section 504 and its implementing regulation at 34 C.F.R. §§ 104.35 and 104.36, and Title II and its implementing regulation at 28 C.F.R. § 35.130.

The District has submitted the enclosed Agreement for Corrective Action to correct the cited violations. Accordingly, OCR is closing this review effective the date of this letter. This letter addresses only the issues listed above and should not be interpreted as a determination of the District's compliance or noncompliance with Title VI, Section 504, or Title II in any other respect. Individuals participating in an investigation are protected under Federal law against harassment, retaliation, or intimidation by 34 C.F.R. § 100.7(e).

Continued compliance is contingent upon the District implementing the provisions of its Agreement. Failure to perform the actions in question may result in a finding of noncompliance. Compliance with commitments and assurances will be monitored to ensure full implementation.

Page 42 - Dr.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personal information which, if released, could constitute an unwarranted invasion of privacy.

We thank you and your staff, particularly Ms. _____, for the cooperation extended to OCR's staff throughout the course of the investigation. We are pleased that the District is voluntarily taking action which will ensure its continuing compliance with Title VI, Section 504, and Title II.

If you have any questions regarding this letter, please call Mr. _____, Investigator, at _____, or you may call me at _____.

Sincerely,

Branch Chief
Compliance Enforcement Division

Enclosure

cc: Honorable
Superintendent of Public Instruction

Ms.
Director of Federal and State Bilingual Programs
Department of Education

Ms.
Technical Assistant, EEO

AGREEMENT FOR CORRECTIVE ACTION**Public Schools**

Pursuant to compliance review number 08945027 of Public Schools (District) by the U.S. Department of Education, Office for Civil Rights (OCR), under the authority granted by Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act of 1990, the District agrees to take steps designed to ensure that all national-origin minority limited-English proficient (LEP) students in the District who are in need of language assistance services receive such services. Specifically:

A. By February 15, 1996, the District will identify all LEP students enrolled at all schools and grade levels.

1. By September 1, 1995, the District will submit for OCR's review and approval:

a. A home language survey (HLS) designed to identify all students whose primary or home language is other than English (PHLOTE students). The survey will ask parents the following questions in an appropriate language: i. What language is spoken in your home most of the time?

ii. What language does your child speak most of the time?

iii. What was your child's first language?

iv. What languages does your child speak and/or understand?

Any response on the HLS indicating a language other than English will identify the student as PHLOTE.

b. A strategy for the distribution and subsequent collection of the HLS forms to ensure that an HLS is completed for every student enrolled in the District.

c. Procedures to screen identified PHLOTE students to determine which of these students require assessment of English-language proficiency. Such screening procedures will not be included in the plan required under Part B below.

The District may exclude from such assessment any PHLOTE student whose record documents achievement at the fiftieth percentile or higher in reading on any one of the following normed-referenced tests, since October 1, 1994:

i. Iowa Test of Basic Skills,

ii. Gates MacGinitie, or

Agreement for Corrective Action

-44-

iii. Stanford Achievement Test.

No other measure of achievement may be substituted for these.

- d. An objective means of assessing the English-language proficiency of every identified PHLOTE student who requires such assessment, in the modalities of speaking, reading, writing, and understanding. Assessment of students in kindergarten and grade one may be limited to oral English skill.
 - e. Criteria, based on assessment results, for determining which PHLOTE students are LEP.
2. By January 30, 1996, the English-language testing of all identified PHLOTE students who require such assessment will be complete.
 3. By February 15, 1996, all test results will have been evaluated to identify every LEP student in the District.
 4. By March 1, 1996, the District will furnish to OCR the following documentation:
 - a. For each level and subtest of any published test of English-language proficiency used (if applicable), copies of pages from the manual(s) that may assist OCR in understanding the publisher's designated fluency scores for English-language proficiency.
 - b. For all students in kindergarten and grades one and two at Elementary, a copy of the home language survey.
 - c. In a separate list for each school identified below, identify by name each student identified with a primary or home language other than English, in accordance with this part of the Agreement. For each student, indicate:
 - i. grade level,
 - ii. the student's primary or home language,
 - iii. the criteria (including normed-referenced test scores) used to exclude the student from English-language assessment, if applicable,
 - iv. all English-language assessment scores, if applicable, and
 - v. whether the student was classified as LEP after the English language assessment.

Agreement for Corrective Action

-45-

Schools to include: Elementary, Elementary, Elementary, Elementary, Middle, High, and High.

- B. By April 1, 1996, the District will develop and submit for OCR's review and approval a written plan for providing educational services to all its LEP students. All parts of the Plan, at a minimum, will begin to be implemented by September 1, 1996, or no later than the beginning of the first semester following approval of the plan, whichever is earlier.

The District's plan will contain, at a minimum, the following written components that address educational services for LEP students at each school. The District will adopt or develop:

1. A statement describing the District's policies and goals for providing educational services to LEP-students at the elementary and secondary levels.
2. The specific steps that the District will take, including time-frames, to ensure that all newly-enrolled PHLOTE students are identified.
3. The specific steps that the District will take, including time-frames, to assess the English-language proficiency of all newly-enrolled PHLOTE students to determine which are LEP.

The extent of the language assessment will be guided by the type of educational services that the District decides to implement for its LEP students. At a minimum, assessment will be designed to determine whether PHLOTE students possess sufficient English-language skills to participate meaningfully in the regular educational environment. The District will determine whether PHLOTE students can speak, read, write, and comprehend English, if all four language skills are expected of their grade-level peers.

4. Procedures to establish and maintain a roster (or other appropriate instrument) of LEP students, by school, grade, and alternative language services).

These procedures will be designed to ensure that each identified LEP student continues to be recognized as requiring appropriate services, despite changes in classroom assignments, school assignments, and alternative language services, as long as the student is LEP.

Agreement for Corrective Action

-46-

5. Procedures for appropriate placement of LEP students into alternative language services or other educationally-appropriate services.

These procedures will delineate the extent to which educational services will be provided to each category of LEP students, based on educational need. For example, it is expected that students who speak no English will receive more intensive English-language assistance than students who speak some English. These procedures will also ensure that LEP students are not placed in special education classes because of their lack of English language skills.

6. Procedures to ensure that parents or guardians are informed of the purpose of the special assistance or alternative language services offered by the District in an appropriate language and medium of communication.
7. Procedures to ensure that the parents or guardians of PHLOTE students are notified adequately of school activities that are called to the attention of other parents in an appropriate language and medium of conversation.
8. Explanation of the alternative language service models and methods to be used to provide LEP students with equal educational opportunities. Include:
 - a. A general statement that all identified LEP students will receive appropriate alternative language services, based on educational need.
 - b. For each alternative language service model selected, a written summary of the model, when the services will be implemented at which schools, and the specific grade levels at which the specific services will be implemented;
 - c. A description of how these services will assist LEP students to become proficient in English;
 - d. How the services will relate to the District's curriculum in both the regular and the special educational settings; and
 - e. How the District will meet the English-language acquisition and other academic needs of LEP students whose parents or guardians refuse placement in formal alternative language programs.
9. To ensure that the District has appropriate staffing to implement its service models for LEP students, the

Agreement for Corrective Action

-47-

District will provide as part of its plan:

- a. The training and qualifications of staff needed to implement each service model;
 - b. A process for evaluating instructors in alternative language service settings to ensure that their classroom performance corresponds with the alternative language models and methods chosen by the District;
 - c. The extent to which the staff needed to implement the services are currently available;
 - d. Where qualified, trained staff are not available, the interim steps the District will take to provide staffing for the service models;
 - e. The efforts the District will make to recruit qualified, trained staff to implement the alternative language service models selected on a permanent basis;
 - f. The amount and type of training to be provided to existing staff to implement the alternative language service models selected on a permanent basis; and
 - g. The steps the District will take to ensure the availability of qualified, trained staff to implement the alternative language service models selected on a permanent basis, if voluntary measures are not successful.
10. The specific steps that the District will take, including time-frames, to provide the instructional materials necessary and appropriate to carry out properly its chosen alternative language service models for the instruction of LEP students.
 11. A description of the criteria that the District will use to determine when a LEP student has obtained sufficient proficiency in English to reduce the amount of time spent in an alternative language service setting or to exit such services altogether. At a minimum, these criteria will ensure:
 - a. That determination of English-language proficiency is based on objective standards, such as standardized test scores, for which the District can explain why students meeting those standards will be able to participate meaningfully in the regular classroom;
 - b. That students exiting alternative language services can read, write, speak, and comprehend English well enough to participate meaningfully in the District's program;

Agreement for Corrective Action

-48-

- c. That LEP students have a realistic opportunity to exit from alternative language services;
 - d. That the academic progress of students who exit from alternative language services is formally reviewed periodically (i.e., at least twice annually for two years) and that documentation is maintained; and
 - e. That appropriate steps are taken to remediate language or academic deficiencies identified in students who exit from alternative language services, including re-entry into alternative language services, if necessary.
12. The specific steps that the District will take periodically, including timeframes, to evaluate the effectiveness of its services for LEP students. These steps will include procedures for formal evaluation of the District's implementation of the components of this plan and procedures for formal reporting of identified deficiencies and required modifications.

Some factors to include in such procedures are whether current and former LEP students are:

- a. Satisfying established goals for student participation and achievement in the District's alternative language service models; and
- b. Being retained in grade or are dropping out at rates similar to those of their non-LEP peers.

Other factors to include in such procedures are whether former LEP students are:

- c. Keeping up with their non-LEP peers in the regular educational environment; and
 - d. Able to participate successfully in essentially all aspects of the school's curriculum without the use of simplified English materials.
13. The specific steps that the District will take to ensure that modifications required to remediate identified deficiencies in the services for LEP students are implemented timely. The plan will designate (by name, title, or function) the person(s) responsible for implementing these steps.
14. The specific steps that the District will take to ensure that LEP students generally receive the benefits of instructional facilities that are comparable in quality to the facilities enjoyed by other students.
15. The specific steps that the District will take, including

Agreement for Corrective Action

-49-

time-frames, to ensure that LEP students have equal and meaningful opportunities to participate in special opportunity services, such as those for gifted and talented students.

16. The specific steps that the District will take, including time-frames, to ensure that disabled PHLOTE students are appropriately placed and served with special education or related aids and services. Include:
- a. A description of the criteria and procedures that the District will use to ensure that PHLOTE students are not assigned to special education services on the basis of criteria that essentially measure and evaluate English language skills. At a minimum, these criteria will:
 - i. Require that objective assessments of proficiency in English and the home language (whenever possible) are administered and considered before any PHLOTE student is tested, evaluated, or placed in special education services;
 - ii. Require testing or evaluation using only those language skills in which the student is objectively known to be proficient (whenever possible);
 - iii. Provide for testing or evaluation by qualified staff; and
 - iv. Provide for documentation of:
 - (1) compliance with the procedures required above and
 - (2) any exceptions made to these procedures and the rationale for the exceptions.
 - b. A description of the criteria and procedures that the District will use to ensure that the parents and guardians of all PHLOTE students who need or are believed to need special education or related aids and services are informed of their specific rights and procedural safeguards in a language they can best understand.
 - c. A description of the criteria and procedures that the District will use to ensure that LEP students who are in need of special education or related aids and services are not restricted from receiving both special education services and alternative language services concurrently, as appropriate.

Agreement for Corrective Action

-50-

17. The specific steps that the District will take, including time-frames, to ensure that PHLOTE students already receiving special educational services (excluding gifted) have not received this placement on the basis of criteria that essentially measured and evaluated English-language skills. Include:
- a. Identification and assessment of all PHLOTE students presently receiving special education or related aids and services to determine which students are LEP, in accordance with the procedures specified in the District's written plan for providing educational services to all LEP students;
 - b. Review of the initial and subsequent placement records of each LEP student who is receiving special education services, to determine whether such placement was based on test data or other evaluative data that is unreliable or invalid because of the English-language skills required for reliable and valid results;
 - c. Diagnostic assessment and reevaluation of all LEP students special receiving education services, whose placement is based on unreliable or invalid data, in accordance with the procedures specified in the District's written plan for providing educational services to all LEP students; and
 - d. Steps to integrate any LEP students into the regular educational environment who are found not to qualify for special education services, in accordance with the procedures specified in the District's written plan for providing educational services to disabled PHLOTE students.
- C. By October 15, 1995, the District will notify the parents and guardians of all known PHLOTE special education students of their specific rights and procedural safeguards in a language they can best understand. Documentation of this notice and the means of delivery will be retained in each student's special education or other appropriate record. By November 1, 1995, the District will report to OCR its success in complying with this requirement.
- D. By October 1, 1995, the District will inform the parents or guardians of all students enrolled that OCR conducted a review of the District's programs and services for LEP students, and the District is developing a plan to ensure that LEP students have equal and meaningful access to the District's services. Written notice will be provided in a language(s) appropriate to the parents. Where written notice in a language other than

Agreement for Corrective Action

-51-

English is not appropriate, the District will document efforts to notify parents and guardians in an appropriate oral language. The District will provide documentation of this notice to OCR by November 1, 1995.

E. Within 30 days of OCR's approval of all terms of the plan required under Part B above, the District will:

1. Submit a final copy of the plan to OCR.
2. Provide a copy of the plan and training regarding the requirements of the plan (including staff members' responsibilities) to all building principals. The District will document completion of this step within 15 days of completion.
3. Inform the parents or guardians of all students enrolled that the District is implementing a plan to ensure that LEP students have equal and meaningful access to the District's program. This notice will explain in detail the purpose and benefits of the services and procedures specified in the plan. Written notice will be provided in a language(s) appropriate to the parents. Where written notice in a language other than English is not appropriate, the District will document efforts to notify parents and guardians in an appropriate oral language. The District will document completion of this step within 15 days of completion.

F. OCR will monitor the District's progress in serving LEP students for a minimum of two years following the implementation of all components of the plan for providing educational services for all LEP students. During that period, OCR may request additional reports and documentation until the District has demonstrated full compliance with the plan and this Agreement.

Dr.
Superintendent

Date



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

OFFICE OF THE
DIRECTOR

JAN 6 5 1995

Mr.
Superintendent

In reply refer to:

Dear Mr.

The United States Department of Education, Office for Civil Rights (OCR), is responsible for enforcing Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, and its implementing regulation at 34 C.F.R. Part 103. Title VI prohibits discrimination on the basis of race in education programs or activities that receive Federal financial assistance. As a recipient of Federal financial assistance, the (the District) must comply with Title VI and its implementing regulation.

On September 2, 1993, OCR received a complaint against the District and each of the other districts that then comprised the Conference (Conference or Mega). The complaint alleged that the District and the other Conference members discriminated on the basis of race by rejecting the Schools (and the Community Schools () for membership in the Conference because and have substantial black student enrollments. During its investigation, OCR also examined whether Conference members discriminated on the basis of race when they failed to allow members of the Suburban Athletic Conference (SAC) to join the Conference because of the substantial black student enrollments of the SAC schools.

OCR has completed its investigation of the above-referenced complaint and has determined that the District violated Title VI and its implementing regulation with respect to the matter alleged. The basis for OCR's determination is provided below.

The Conference was formed in February 1992 through the merger of schools from three interscholastic athletic conferences:

High School, High School, and High School. During the 1991-92 school year, the Conference members collectively enrolled approximately students of whom 3.8 percent were black; 20 of the 22 schools in Mega had less than 5 percent black student enrollment.

The constitution adopted by the Conference provides for its governance by a Board of Directors comprised of the principals of the member schools; each school to be represented by one vote. A president and other officers are selected on a rotating basis from the Board of Directors.

The purpose of the Conference is to promote and administer interscholastic athletics, which includes scheduling, division alignment, awards, and similar matters. A committee of the Conference, known as the Conference Student Activities Commission was set up at the same time to promote nonathletic inter-school social and academic communications and events. The Student Activities Commission has scheduled activities such as science and math fairs and debates. Under the constitution, applicants may be admitted to the Conference with the consent of three-fourths of the members.

In , was not a member of or affiliated with any interscholastic athletic league and had a black student enrollment of approximately 33 percent. In , which is a member of the SAC, had a black student enrollment of approximately 54 percent. Collectively, the SAC schools had a black student enrollment of approximately 66 percent; five of the SAC schools had black student enrollments in excess of 50 percent, and two of those five SAC schools had black student enrollments in excess of 97 percent. In addition to the SAC includes High School, High School, High School, High School, High School, and High School.

Prior to Conference formation, interscholastic leagues in the suburban Detroit/Wayne County area largely were identifiable by race. Generally, districts with more than 30 percent black student enrollment were either independent or belonged to the SAC. OCR determined that prior to Conference formation, generally, predominantly white districts failed to schedule interscholastic athletic events against districts located within their competitive areas with significant black student enrollments. Districts in , generally, failed or refused to schedule interscholastic athletic events against schools with significant black student enrollments.

All of the SAC districts had some black student enrollments prior to 1960. Between the mid 1960's and the mid 1970's, however, each of the SAC districts experienced substantial growth in minority population with several districts changing from majority white student enrollments to majority or near majority black student enrollments. The SAC began competition as an

Page 3 - Mr.

athletic conference during the 1974-75 school year. Its original members, and their black high school enrollment at the time of formation, were (97%), (98%), (47%), and (55%). (50%) joined in 1980. joined in 1984 and joined in 1987, at which time their black student enrollments were 23% and 43% respectively. Prior to the formation of SAC, and were members of the Conference; and were members of the Conference; had been a member of the Conference; and had been a member of the Conference. The other schools in these conferences were predominantly white. The and conferences disbanded in the early 1970's. Many individuals familiar with the break up of the and conferences and with the formation of the SAC, advised OCR that SAC was formed when the districts with substantial minority enrollments were orphaned by the disbanding of their conferences. These individuals also stated that the contemporaneous belief at the time the conferences disbanded was that the majority white conference members were not comfortable belonging to a conference which had majority black schools. Most of the white schools in the pre-1974 leagues ultimately became members of the Conference.

OCR determined that the continued operation of Mega severely affects the ability of area schools to schedule nonconference events in the suburban area. Because SAC schools have been unable to schedule interscholastic athletic events against appropriate competition in the suburban area, SAC schools have incurred additional expenses in providing for SAC students to travel to and from interscholastic events outside of the suburban area. SAC athletes are also denied the benefits of Conference awards and recognition.

The regulation implementing Title VI at 34 C.F.R. § 100.3 prohibits discrimination on the basis of race, color, or national origin in programs and activities which receive Federal funds. Specifically, 34 C.F.R. § 100.3(b)(1) provides that a recipient may not on the basis of race, directly or indirectly:

- (i) Deny an individual any service, financial aid, or other benefit provided under the program;
- * * *
- (iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program in the enjoyment of any advantage or privilege enjoyed by others. . .
- (iv) Restrict an individual in any way in the enjoyment of an advantage or privilege enjoyed by others receiving any service financial aid or other benefit . . .

Page 4 - Mr.

- (v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program;
- (vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others. . . .

Additionally, 34 C.F.R. § 100.3(b)(2) prohibits recipients, in determining the types of services, facilities, or other benefits, or the class of individuals to whom, or the situations in which, such services or benefits, will be afforded, from utilizing criteria or methods of administration which have the effect of subjecting individuals to discrimination on the basis of race. The prohibition against such discrimination applies to all actions taken by recipients, directly, or indirectly through contractual or other arrangements. Members of the Conference are thus responsible for the discriminatory effect of actions taken by the Conference, since the Conference is authorized by its members to act on their behalf. This is true whether or not a particular district agreed with the decision. In addition, founding members are responsible for the discriminatory effects of the procedures used to form the Conference. Conference members give up the right, for the most part, to establish their own team schedules and choose their opponents, thus effectively embracing the segregated pattern set up by the conference organizers. Because the District participated in the formation of the Conference and is bound by the effects of the decisions made, the Conference's formation, membership and expansion decisions are the responsibility of the District.

In order to determine whether the District complied with the requirements of Title VI and its implementing regulation, OCR gathered and analyzed evidence concerning the original formation of the Conference and its consideration of further expansion. Specifically, OCR reviewed the evidence to determine whether and members of the SAC were treated differently than predominantly white districts because of their significant black student enrollments. Additionally, OCR reviewed the evidence to determine whether the process of Conference formation had the result of excluding districts with significant black student enrollments or perpetuating prior racially separate league affiliations.

According to Conference members, members extended invitations to participate in Mega formation discussions to 29 individual schools all of which were members of either or and Conference members told OCR that because they wished to avoid being labelled "league-busters," they decided to invite entire leagues to join in Conference formation discussions, rather than to solicit individual applications from districts or to extend an open invitation to any interested district. With the exception of seven league schools, all of the invitees decided to join.

Conference founders did not present any consistent criteria to explain their rationale for the selection of leagues invited to discuss formation. Instead, according to Conference members invitations were based on informal expressions of interest by _____, and assumed or possible interest by a number of _____ and _____ districts. _____ and _____ Conference members advised OCR that they learned that leagues were interested in merger through informal channels, friendships and professional relationships of district personnel, coaches and athletic directors. Conference members did not develop any process to receive or explore potential interest of neighboring leagues. Conference members did not survey or advertise to determine the interest of area districts or area leagues to participate in Conference formation discussions or membership.¹ Mega members also explained that the Conference was primarily interested in forming a conference of Class A² schools and that each of the existing leagues had easily identified needs or characteristics which made them good candidates for merger. According to Mega members, because _____ consisted of only five (5) Class A schools, and had difficulty scheduling non-league games, _____ was not viable and, therefore, made a suitable candidate for Mega formation.

Mega members told OCR that the _____ league made a suitable candidate because it was on the verge of disintegrating. Prior to Mega formation, three schools within _____ were Class A schools, while the remaining five schools were Class B schools. According to _____ and Mega representatives, the district which contained the three Class A schools was considering closing one of the Class A schools and redistributing its student population among the two remaining Class A schools. Mega members told OCR that the five Class B schools, therefore, could not compete successfully with the two remaining "super" Class A schools. _____ and Mega members told OCR that the two remaining Class A schools, therefore, made a logical addition to Mega. OCR determined that _____ officials

¹ In January 1991, prior to discussions concerning Mega formation, _____ members decided to expand _____ from eight (8) members to twelve (12) members. Although the expansion committee had initially wished to send applications only to selected districts, the superintendents of the _____ league required the league to publicly advertise the available openings. Accordingly, _____ placed an advertisement to solicit applications in local suburban newspapers. _____ members told OCR that because they only received letters of interest in response to the advertisement from three (3) school districts, one of which was _____, _____ determined not to expand in this manner.

² According to the _____ High School Athletic Association, schools are classified according to student enrollment. Schools with student enrollments of more than 950 are Class A; 502 to 949 are Class B; 262 to 501 are Class C; and less than 261 are Class D.

Page 6 - Mr.

extended an invitation to the entire league, including the Class B schools, to join in the formation of Mega. The three Class A schools never consolidated.

Similarly, Mega members told OCR that the sole Class A school in the league also was at a competitive advantage over the six (6) Class B schools and one Class C school and, therefore, made a suitable candidate. OCR determined that even though Mega members were particularly interested in the Class A school, officials invited the entire league to join in Mega formation. Based on a discussion with a representative of the Huron league, OCR determined, however, that the Class A school in fact had difficulty successfully competing against other members.

representatives also told OCR that the league had not expressed any interest in participating in league merger discussions prior to being approached by members of members did not know why they were approached to join in Mega formation.

OCR also determined that prior to Mega formation, expressed an interest in participating in expansion and in Mega formation discussions. officials admitted that contacted them in writing in order to be considered for expansion early in 1991; however, determined not to expand at that time. Conference officials also told OCR that they received formal letters of interest from concerning Mega formation in the fall of 1991. According to the minutes of the league reorganization committee formed by the various schools interested in merger, it was decided that application would not be considered until after the conference was officially formed. The only other district to formally express an interest in participating in Conference formation discussions, also a district with a substantial black enrollment, learned of the discussions through informal channels and may have been considered beyond the intended geographic limits of the Conference.

OCR determined that, prior to the announcement of Mega's formation on February 27, 1992, neither Westwood, the SAC nor any SAC district expressed any interest in participating in Conference formation. OCR determined that although SAC representatives interacted with a number of Mega members in professional meetings, at High School Athletic Association related events and at interscholastic athletic events, no member of or ever discussed with SAC schools the formation of Mega. Conference members did not produce evidence of any correspondence or other communication with SAC members concerning Conference formation. Moreover, Conference members did not advertise Conference formation discussions or survey area conferences to determine interest in Conference affiliation.

To the extent that size, location, and quality of program were factors considered by Mega members, Conference members and designated representatives stated that and the SAC districts were comparable to

Page 7 - Mr.

the other districts offered membership in the Conference. The SAC was the only comparable league in the immediate area not invited to participate in Mega formation discussions. Except for the Class A member of the SAC, Romulus was the only Class A school in the immediate area not invited to participate in Conference formation.

Except for black student enrollment, for purposes of Conference formation the SAC and were indistinguishable. At the time of Mega formation, the SAC virtually mirrored district-size distribution; consisted of eight (8) members, six (6) of which competed as Class B districts, one (1) competed as a Class A district, and one (1) competed as a Class C district; SAC consisted of seven (7) members, five (5) of which competed as Class B districts, one (1) competed as a Class A district, and one (1) competed as a Class C district.

In addition to not inviting and SAC schools to participate in Mega formation, the Conference also refused to consider and the SAC districts' subsequent applications for membership. Once Conference formation had been announced, four (4) SAC schools and filed formal applications for membership in the Conference. Mega members told OCR that they determined not to expand without considering any of the applications received. OCR determined, however, that completed applications were circulated among Conference members. Only after it appointed an Expansion Committee, developed an application form and process, and received and circulated the completed applications, did Mega decide that it should not expand beyond its original 22 schools until the league had established its viability. Personal notes between members of the Expansion Committee established that Conference members were predisposed to excluding the individual SAC districts based on their league affiliation and a concern that every district in the SAC would apply for membership.

OCR determined that the Conference members could not offer a credible or consistent justification for limiting conference membership to virtually all-white schools in the and Huron leagues and failing to consider schools with large black student enrollments. and SAC members were apparently qualified for participation in the Conference and Conference founders disregarded an explicit articulation of interest by and, instead, sought Conference members from leagues which had not expressed any interest in Conference formation. Mega members did not explore the interest of the SAC in league realignment or share information of Mega's formation with members of the SAC. Mega invited all comparable leagues in the immediate area except the SAC to participate in Mega formation discussions.

An invitation to , an independent district without any league affiliation, or to the entire SAC, would not have imperiled Mega's stated desire to avoid the appearance of "league-busting." Yet, inexplicably, the Conference departed from this stated desire to avoid the appearance of "league-busting" when it admitted a single district from after

Page 8 - Mr.

refused to join Mega as a league. This inconsistent application of a claimed criterion belies the Conference's stated goal to avoid "league-busting."

Subsequent to the formation of Mega, the Conference rejected membership applications from Westwood, other SAC members, and [redacted] without a compelling justification. The admission of [redacted] and SAC schools would have expanded Mega membership to 30 schools, one more than the 29 originally invited to participate in Mega formation discussions. No intervening events occurred to suggest that the Conference was any more or any less viable than it was when initially formed. The Conference's development of membership criteria and a formal application process, and initial invitation to 29 school districts discredit the Conference's articulated concern over Conference viability.

Based on the above, OCR determined that the District violated Title VI and its implementing regulation as a result of its participation in founding a Conference which limited membership to predominantly white schools and [redacted] failed to consider schools with significant black student enrollments. The prior participation of Mega districts in racially identifiable leagues, the failure to develop consistent criteria for extension of invitations, and the inconsistent application of purported considered factors raise a persuasive inference that [redacted], and the SAC schools were either rejected or not considered for membership because of their black student enrollments.

Even in the absence of deliberate consideration of race in Mega formation and expansion, the Conference founders violated 34 C.F.R. 100.3(b)(2) when they employed a method of formation which had the result of excluding racial minorities and perpetuating the prior racially separate league affiliations. Participation in conference formation was by invitation only, and was not open generally to qualified area leagues. Assuming that the conference founders had nonracial reasons for utilizing an invitation procedure or for being especially interested in the leagues actually invited, the invitation-only process created a barrier which prevented districts with substantial black enrollments from being considered on their merits. The invitation only procedure can be contrasted with the procedure used by [redacted] in the winter of 1990-91 which resulted in applications from school districts with substantial black enrollments. Additional interest by other schools with substantial black enrollment is also shown by the four more applications received by the Conference after it was publicly announced. The subjective procedure used to select districts for consideration therefore had the result of limiting participation by black students in Conference athletic and other events. In addition, Mega members gave no reasons why the invitation-only method of selection was justified or necessary to meet their objectives. Even were such a rationale presented, clearly, other methods of selection would have had less segregative results without substantial disadvantages.

OCR understands that, in response to the complaint filed with OCR and a threatened lawsuit by _____, but prior to the conclusion of OCR's investigation, the District and the Conference admitted _____ as a member to begin competition in the 1995-96 school year. To remedy the violations cited above, the District must end its participation in the Conference unless the Conference: (i) invites all districts which were members of the Suburban Athletic Conference (SAC) during the 1991-92 academic year to become full and active Conference members to begin interscholastic athletic competition in the 1995-96 school year and to participate in all other student activities and invitationals to begin in the 1994-95 school year; (ii) admits each SAC school which accepts the invitation pursuant to (i) above; (iii) develops criteria for all future expansion, invitation and admission decisions consistent with Title VI and its implementing regulation at 34 C.F.R. Part 100; and (iv) makes all future expansion, invitation, and admission decisions on a nondiscriminatory basis. If the Conference fails to implement (i) through (iv) within thirty days of the agreement, the District must withdraw its membership in the Conference and cancel any future events between the District and Conference schools.

Pursuant to the Title VI regulation at 34 C.F.R. § 100.7(d)(1), OCR must seek voluntary compliance with respect to the violation set forth in this letter. As a matter of policy, OCR prefers to resolve any findings of violations through negotiations prior to the issuance of the letter of findings. To date, our attempts to resolve this matter through informal negotiations have not been successful. OCR, therefore, must issue this letter of findings. Nevertheless, the District should be aware that the issuance of this letter of findings does not terminate meaningful negotiations. OCR remains willing to continue discussions and explore proposals that may lead to a satisfactory resolution. My staff is available for technical assistance regarding any plan or proposals for a plan. In the event that the District does not develop an acceptable remedial plan, OCR will be obligated to initiate enforcement action. This proceeding may result in an administrative decision to suspend and/or terminate Federal financial assistance to the District, or OCR may refer the matter to the Department of Justice for enforcement.

I must inform you that if, within 30 days from your receipt of this letter, the District has not demonstrated to the satisfaction of OCR that it is in compliance with Title VI and its implementing regulation with respect to the violation cited in this letter, OCR will exercise its authority to impose a deferral on funding to the District. Such a deferral will include new programs for which applications are pending and applications for substantial increases in continuing programs. See 42 U.S.C. § 2000d-5; 20 U.S.C. § 1232i; 28 U.S.C. § 50.3.

This letter is not intended, and should not be construed, to cover any other issues regarding compliance with Title VI and its implementing regulations which may exist and which are not discussed specifically herein. Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR

receives such a request, we will seek to protect, to the extent provided by law, personal information which, if released would constitute an unwarranted invasion of privacy.

Members of my staff will be in touch with you to determine your interest in resolving this matter informally. Meanwhile, if you have any questions, feel free to contact me or Director, Elementary and Secondary Education Division (.....) at

Sincerely,

Regional Director



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE GENERAL COUNSEL

THE GENERAL COUNSEL

1995

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The Honorable Deval L. Patrick
Assistant Attorney General
Civil Rights Division
U.S. Department of Justice
Washington, D.C. 20530

Re: Title VI/Athletics

Dear Mr. Patrick:

The purpose of this letter is to refer to the Department of Justice (DOJ) the noncompliance findings made by the Office for Civil Rights (OCR), United States Department of Education, pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, and its implementing regulation at 34 C.F.R. Part 100 against the following eighteen school districts:

Public Schools. The Department of Education requests that DOJ commence judicial proceedings against each of these school districts that have been found to be in violation of Title VI and its implementing regulation at 34 C.F.R. §100.3(a) and (b).

The referral of this case to DOJ is authorized by 42 U.S.C. §2000d-1. Section 2000d-1 provides for action to effect compliance with Title VI and any requirement adopted pursuant thereto "by any other means authorized by law." The Title VI regulation, adopted by the Department of Education, at 34 C.F.R. §100.8(a) provides, in part:

Such other means may include . . . a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States . . . or any assurance or contractual undertaking, . . .

Page 2
Honorable Deval L. Patrick

Pursuant to §100.8(d), each district was notified of this pending referral by letter dated June 21, 1995. During the intervening ten days, each district has failed to submit an agreement to remedy the violation of Title VI referred to below.

On January 5, 1995, OCR found each district to be in violation of Title VI and its implementing regulation at 34 C.F.R. §100.3(a) and (b) for founding and maintaining an athletic conference, the Michigan Mega Conference on a racially exclusive basis. Since then, OCR has engaged in negotiations with each district through its legal counsel. Nevertheless, each district has failed to take action which will correct the noncompliance.

Enclosed is a copy of the letter of findings issued in this case, as well as a copy of the letter sent on June 21, 1995, notifying each of the districts of the pending referral. Our files are available for your review if you need any further information or supporting documentation for this case. Our office will cooperate with you in any way possible.

Sincerely,



Judith A. Winston

Enclosure

cc: All Districts