MEMORANDUM

TO : Gilbert D. Roman
Regional Civil Rights Director
Region VIII

DATE: SEPt11,t1984

FROM: Harry M. Singleton
Assistant Secretary
for Civil Rights

SUBJECT: Policy Regarding Title VI Language Minority Investigations

ISSUE

Four specific questions, discussed in detail below, are posed. These ask for the criteria and procedures to be used in determining the jurisdictional basis for a Title VI language minority discrimination investigation involving reservation based Native American school children.

BACKGROUND

This memorandum responds to your request, dated July 23, 1984, for guidance regarding a Title VI investigation of the Fort Yates Public School, Fort Yates, North Dakota, or the investigation of similar complaints.

The complaint, a copy of which is attached to your memorandum, involves an alleged Title VI violation on the part of the Fort Yates School. It alleges that Native American children enrolled in the Fort Yates School appear to be having academic difficulty, may be limitedE nglishp roficient, (LEP), and belong to a culture and a society in which the Dakota and Lakota languages are used. It does not allege specifically that the students in question are primary Lakota or Dakota speakers.

The region characterized this complaint as raising possible Title VI issues regarding equal educational opportunity, specifically: the possibility of the recipient's failure to identify and to take into account the linguistic and cultural characteristics of the students in question (Issue A); and the failure to provide a possibly required language program designed to meet the educational needs of the students (Issue B).

In order to process the complaint, or others like it, you asked for policy guidance in the form of responses to four specific questions.

DISCUSSION

1. Is the only legal basis for conducting a Title VI Language Minority investigation the May 25, 1970 Memorandum?

This interpretative guideline announces the basic requirements imposed by Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, et seq.,

regardingathe treatment of language minority students. The May 25,a1970 Memorandum,aa"Identification of Discrimination and Denial of Services onathe Basis of NationalaOrigin," 35aFed.aReg. 11395, announced requirements ofaTitle VIaand the Departmentaregulationsawhich implement the Title, 34 C.F.R. Part 100,aspecifically,a34aC.F.R. § 100.3 (b), (prohibited discrimination)aas these requirements pertain to the treatment ofaLEP languageaminorityastudents. The requirements announced in the Memorandum were deemed a proper interpretation of Title VIaand itsaregulationsaby the United StatesaSupreme Courtain Lau v. Nichols, 414aU.S. 563a(1974).aa

2. What childrenadoes theaMay 25, 1970, Memorandum include asaaaprotected class, i.e., howadoes DCR measure it? (If the definitionaprovidedain the July 2, 1982amemorandum is the operative definition, we doanot know howa"function effectively"aisameasured and how this is tied to language.)aa

Some relationshipabetween the student's "primary orahome" languageaand his oraher inability in English has to be established beforeathe requirements announced inathe Memorandum come intoaplay.aa

The May 25, 1970aMemorandum has generally been interpreted toaapply to students whoaarealearning English as a second or other language, or whose ability to learnaEnglishahasabeen clearly and substantially diminished through lack ofaexposure to the language.aItadoesanot generally cover nationalaoriginaminority students whoseaonly language is English, and who chance toabe inadifficulty academically,aor who havealanguage skills which, for reasonaoraanother, are less than adequate. However, other rightsaofaminority students generally, asaagainst those that specifically relate to theatreatment ofalinguisticallyadifferent children, are protectedaunder the more general requirements ofaTitle VI andathe Department rulesawhich implement it.aa

Thus, Lau v. Nichols, supra, theaSupreme Court decision whichainitially upheld the propriety of theaTitle VI requirements announced in the May 25, 1970 Memorandum,aapplied thesearequirements to thealackaof accommodation byathe San Francisco Public Schoolsato its Chinese-speaking students, ratherathan toaunderachievingaChinese-American, or other national origin minorityastudents, generally.aa

Subsequent litigation, notably Dteroav.aMesaaCountyaValley S.D. No.a51,a408 F.aSupp. 326 (D.aColo,a1975), rev'd on other grounds, 568 F.2d 1312 (10th Cir. 1978), held thatathe mere fact that numbers of student were Hispanic and in academicadifficulty was, without a showingathatatheastudents inaquestion had arrived at school speakingaSpanisharatherathan English, insufficient to establishaa TitleaVIaviolationabasedaon

the requirements announced in the May 25, 1970 Memorandum.[1] It is necessary to show, in order to affirmatively establish coverage under the provisions announced in the May 25, 1970 Memorandum, that students are handicapped in an English-speaking environment because of their use of, or exposure to, a different language.[2] Only students with a "primary or home" language other than English fall within the protected class.

If a student meets such criteria, it is still necessary to determine if the student is LEP. In addition to being a "language minority" student, that is, a national origin minority student whose first language is not English, or whose exposure to English was limited, a student's English language skills must also be limited enough to warrant assistance in order for the student to be properly identified as LEP.

1/ See, also, Keyes v. Denver School District No. 1, 521 F.2d 465 (10th Cir. 1975). But see, Martin Luther King Junior High School Children v. Anne Arbor, Michigan School District, 473 F. Supp. 1371 (E.D. Mich. 1979), which treated Black English as a language different from Standard English, and imposed a duty to overcome the language barrier thus confronted by black speakers of this nonstandard dialect. The court imposed this duty pursuant to 20 U.S.C. § 1703 (f) of the Equal Education Opportunities Act (EEOA), which establishes requirements similar to the Title VI requirements discussed in the May 25, 1970 Memorandum.

The most recent decision in Keyes pertaining to language issues, Civil Action No. C-1499 (December 30, 1983), alluded to in the Title VI complaint under discussion, does not disturb the earlier holding of the Appellate Court referred to above to the effect that the difficulties caused by the "myriad economic, social, and philosophical problems connected with the education of minority students" did not fall within the purview of a plan implementing the Title VI requirements announced in the May 25, 1970 Memorandum. [Slip op., at 3, quoting 521 F.2d 465, 482-83.]

This recent decision dealt with the adequacy, in light of 20 U.S.C. §1703(f), of Denver's current attempts to assist children entitled to assistance under Colorado State law.

2/ The Region's view of the structure of a language minority case as stated at page 2 of your memorandum of July 23, 1984, is, therefore, incomplete. In addition to showing that a child is national-origin-minority and limited-English-proficient, it is also necessary to show that such lack of proficiency is related to child's use of or exposure to a language other than English.

The Memorandum does not provide an express definition of limited-English proficiency, but an analysis of its provisions and stated purpose results in a fairly clear working definition. On this point, the Memorandum speaks in terms of the obligation of a school district to take "affirmative steps" to overcome "English language deficiencies." It also contains additional provisions requiring that steps taken will permit a LEP student ultimately to participate effectively in the program of instruction offered a district's native speakers of English.

The Memorandum specifically notes that a school district may not assign children to classes for slow learners or the retarded on the basis of their language skills. Critically, the Memorandum provides that the school district, in taking steps to accommodate LEP students, may not employ a tracking system that leads to isolation of LEP students in "dead end" courses of study or classes. See, Cintron v. Brentwood Union Free School District, 455 F. Supp. 57 (E.D.N.Y. 1978).

Thus, schools must provide assistance that leads to their successful incorporation into the program of instruction offered native speakers of English. Whether or not a student is "deficient" in English must, by the same token, be answered by reference to whether the student's ability in English is on a par with that of a student who can successfully negotiate the course of instruction offered by the school district.

Thus, "deficiency" within the context of DCR policy materials pertaining to the May 25, 1970 Memorandum refers to a lack of proficiency minimally adequate to permit successful participation in school. The legal adequacy of a school's "entrance and "exit" criteria for programs offering assistance to LEP students must initially be judged in relationship to the skills possessed by competent speakers of the language, of the same age, who have been successful in school. See, Aspira v. Board of Education of the City of New York, 394 F. Supp. 1161 (E.D.N.Y. 1975).

It is to be ordinarily expected that some LEP students will have greater competency in speaking, understanding, reading, or writing English than will some native speakers. A student remains LEP until his or her skills approach those of a na"ordinary" native English-speaking student within the school, rather than one who, whether or not English was his or her primary language, has at least a fully adequate command of it.

Since instruction proceeds through English, there is an invariably a level of proficiency which, at a minimum, is implicitly expected of students at a particular a grade. Thus, for example, a student would be expected to be able to read, understand, and manipulate the material contained in a fourth grade social studies text in order to obtain the material offered in a fourth grade social studies. Definitions of LEP used by a school district must be in accord with these expectations.

The task of developing a specific definition lies within the discretion of the individual district, however. In 1981, the Secretary announced that the Department would not prescribe specific steps or eligibility criteria and recipients could, therefore, "use any way which has proven to be successful" in meeting the legal requirements discussed in the May 25, 1970 Memorandum. (Statement of Secretary Bell, February 2, 1981.)

Thus, as discussed in the policy materials, such as the July 2, 1982 Interim Procedures Memorandum to which you have referred, the development of the criteria and procedures for determining whether or not a language minority student is eligible for assistance, as well as the nature and duration of the assistance itself, is a matter for school district discretion.

In evaluating the working definition used by a school district, debatable issues regarding the completeness and accuracy of the criteria employed must be resolved in favor of the school district. [See, Interim Procedures Memorandum, p. 6.]

Without a tangible showing, on the basis of expert opinion or common sense, that a student is incapable of effective participation in school because of a lack of skill in English, a variety of other causes can be almost invariably ascribed for academic failure. Such a showing is a relatively easy matter where a student simply cannot speak English, or where his or her skills fall incontrovertibly below that which anyone might believe are needed, but is a far more difficult matter in other cases. Thus, OCR must generally accept the discretionary judgment of school officials regarding whether or not a student is LEP, if this judgment falls within the realm of professional credibility.

3. How does OCR determine who the protected children are?

a. Does the District have an affirmative duty to identify

(1) children who do not speak and understand English

(2) children who have some ability to speak and understand English

even in the absence of a finding by OCR that any of these children exist or are "excluded"?

b. In light of the "flexibility" allowed recipients, what is OCR's position when a recipient asserts that no identification process and/or language program is necessary since all of its students speak English? Is this "visual identification" enough to meet the requirements of the May 1970 Memo?

3(a). As discussed above, OCR does not immediately determine which children within a school district are LEP. The school district must develop its own standards for deciding this, and has an affirmative duty to serve such students. It, therefore, has a duty to "identify" such children in the sense that it may not leave eligible children unserved. Where children who do not speak English, or speak very little English, are not served, a school district is in noncompliance with Title VI.

Where children speak "some" English, and it is debatable whether or not such students should be classified as LEP, deference to the discretion of the school district requires OCR to defer to the school district's determination of whether such students are eligible for assistance. Such deference is not, however, to be confused with a simple acceptance of the school district's rationale. An independent assessment of the school district's rationale and an investigation of the circumstances to which it is applied may be necessary.

A useful legal test for the legal adequacy of a recipient's policy is found in Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981) (construing substantially similar provisions of the Equal Educational Opportunities Act (EEOA), 20 U.S.C. § 1703 (f)). 3/

3/ In Castaneda, the Fifth Circuit held that a Title VI violation could not be established without a showing of discriminatory "intent." It found that announced Title VI requirements pertaining to language minority students could be violated without such "intent," and found them, for this reason, overbroad.

It looked to Section 204 (f) of the EEOA, 20 U.S.C. § 1703 (f), for an applicable legal standard. It found that this law did not require proof of "intent." The law otherwise imposed requirements substantially the same as those announced in the May 25, 1970 Memorandum.

Subsequent to Castaneda, the Supreme Court held, in Guardians Assoc. v. Civil Service Comm. of the City of New York, ___ U.S. ___, 103 S.Ct. 3221 (1983), that "intent" need not be shown before a Title VI violation was established. Thus, the Title VI requirements announced in the Memorandum may now be viewed as equally valid as those of Section 204.

As suggested above, the analysis employed by Castaneda in applying Section 204 (f) of the EEOA may also presently serve as a guide in determining whether a recipient is in violation of equally valid and virtually identical Title VI requirements.

Castaneda attempted to devise a mode of analysis:

> . . . [to] permit . . . courts to fulfill the responsibility Congress has assigned . . . without unduly substituting . . . [the court's] educational values and theories for the educational and political decisions reserved to state [sic] and local school authorities or the expert knowledge of educators.

Thus, the concerns of the court were substantially the same as those which entered into the formulation of OCR enforcement procedures after the Secretary's announcement of current policy. The court's analysis, therefore, not surprisingly appears an orderly capitulation of the steps OCR might take in implementing the steps discussed in the Interim Procedures Memorandum.

Castaneda posed a three-stage inquiry, the first two of which are pertinent to the specific question which you have posed. 4/ The first was:

> . . . to ascertain that a school system is pursuing a program recognized as sound by some experts in the field, or, at least, deemed a legitimate experimental strategy.

The second was:

> . . . whether the programs and practices actually used by the school district are reasonably calculated to implement effectively the educational theory adopted by the school.

3(b). As discussed above, there is a general duty, imposed by Title VI, and announced in the May 25, 1970 Memorandum, for a school district to serve all LEP language minority children. There is no express substantive requirement that students be generally identified and assessed in order to determine whether or not they are language minority or LEP.

However, when a school district offers no services, it has implicitly decided that no student served by it is entitled to assistance. If it

4/ The third stage of the inquiry deals with whether the program has met its stated objectives after a "legitimate trial."

A program which was not revised after experience determined that it had generally failed to meet its objectives, would not be legally acceptable. Castaneda v. Pickard, supra; See, also, Serna v. Portales, New Mexico Municipal School District, supra.

enrolls any possibly eligible students, it has, therefore, adopted implicit criteria for determining service eligibility. In effect, its criteria lie at some point below the level of English language skills possessed by its least proficient language minority student.

The adequacy of these implicit criteria, and the "visual identification" or any other process used by a school system to ascertain if its students meet or surpass them, may be judged on the same basis as are express criteria used by a district to determine whether a student is LEP. Simply, has the district failed, either because of defective procedures or the lack of any procedure, to identify, assess, and serve children who are clearly eligible for assistance?

If the school district has failed to serve students who, when legitimate educational issues pertaining to identification and assessment are resolved in favor of the school district's implicit judgment, still appear in need of assistance, a school district may be found in noncompliance on the ground that it has failed to serve eligible LEP students.

4. Where a complaint has been filed on behalf of children who may speak and understand some English, and the District has no identification/assessment procedure for identifying these children based on language, how does OCR identify these children? On what basis, if any, can OCR require a district to identify these children?

Where a complainant has alleged that unserved language minority LEP students are enrolled in a school district which does not have any procedure for identifying such children, OCR has to determine whether or not such children exist. The task is obviously complicated by the fact that, precisely because the school district has refused to identify students who may be eligible, it will have no hard information regarding the language backgrounds of individual students, or the level of language skills which they have.

Inquiry may be made pursuant to the Title VI investigatory authority outlined at 34 C.F.R. §§ 80.6 and 80.7. A district may be asked to explain why it does not believe that it enrolls LEP students, as was asserted in a complaint. As discussed in the previous subsection of this memorandum, such a decision is necessarily underpinned by an implicit understanding of LEP which the district believes none of its students meet.

The district can be asked to supply information supporting the proposition that no eligible students are enrolled. That is, it can be required

to explain why its does not believe it enrolls LEP students, and to supply a factual basis for its decision that none of its students are entitled to the types of assistance contemplated by the Anay 25, 1970 Memorandum.

An independent investigation by OCR may be necessary to review data pertaining to individual students or to obtain other evidence that would confirm or deny the complaint allegations.

CONCLUSION

In the present case, the region should, therefore, by recontacting the complainants, or by the techniques described above, ascertain whether the students in question are bilingual, and otherwise possess language characteristics markedly different from those of monolingual English speakers. Once an understanding of the actual characteristics of the students in question are generally ascertained, the District's apparent view that it does not enroll eligible LEP children can be evaluated in light of OCR standards for assessing the legal adequacy of criteria for eligibility, as also discussed above.