



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION I
5 POST OFFICE SQUARE, 8th FLOOR
BOSTON, MASSACHUSETTS 02109-3921

February 11, 2022

Kyle Repucci
Superintendent
By email: repucci.k@sau54.org

Re: Complaint No. 01-15-1252
Rochester School District

Dear Superintendent Repucci:

This letter is to advise you of the outcome of the complaint that the U.S. Department of Education, Office for Civil Rights (OCR) received against the Rochester School District, which OCR will refer to as the District. The Complainant alleged that, during the spring of 2015, English Learner (EL) students at the XXXX were denied a meaningful opportunity to access and participate in the District's programs and activities when the District failed to provide them with English language support services (Allegation 1). The Complainant also alleged that the District failed to provide the parents of EL students with important information about their children's education program in their native language (Allegation 2). Finally, the Complainant alleged that the District failed to identify potential EL students who may be in need of English language support services in order to access the District's education programs (Allegation 3).

OCR enforces Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d *et seq.*, and its implementing regulation at 34 C.F.R. Part 100, which prohibit discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance from the U.S. Department of Education. Because the District receives federal financial assistance from the U.S. Department of Education, OCR has jurisdiction over it pursuant to Title VI.

As explained further below, before OCR completed its investigation, the District expressed a willingness to resolve Allegations 2 and 3, as well as an additional concern identified during OCR's investigation, by taking the steps set out in the enclosed Resolution Agreement. After carefully considering all of the information obtained during the investigation, OCR found insufficient evidence to support Allegation 1.

In reaching a determination, OCR reviewed documents provided by the Complainant and the District and interviewed the Complainant and District faculty and staff.

Summary of Preliminary Investigation

The Complainant is a former English for Speakers of Other Languages (ESOL) teacher in the District. She filed a complaint with OCR on XXXX. She alleged that XXXXX seven English Learner students (ELs) at the School were denied ESOL services for a period of six weeks in

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

XXXX. She alleged that her students' families were not informed about the interruption in services. She also alleged that the District was not providing home language surveys to all families, and instead had a procedure where the home language surveys were provided "as needed."

The District submitted its initial data response on November 23, 2015. According to the District, it had 51 students classified as ELs during the XXXX school year, and 43 students classified as ELs during the XXXX school year. In its data response, the District stated that
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XXXX. The District stated that it has "always provided translator and interpreters as well as document translation for students and parents." The District provided OCR with a copy of its "ESOL Compliance Plan," which was submitted to the New Hampshire Department of Education (NHDOE) during the XXXXX school year. The ESOL Compliance Plan states: "[T]o identify whether or not a student is eligible for ESOL services, the parents of all new students [*emphasis in original*] are given a home language survey to complete." The ESOL Compliance Plan does not directly discuss parental communication, except regarding initial notification and annual letters about test scores. The District also provided a copy of its Home Language Survey (HLS) and other standard forms regarding ESOL eligibility, services, and opt-outs. All of these forms were provided to OCR in English only.

The District also provided OCR with a copy of its "XXXX Title III Program Self-Assessment" that was submitted to NHDOE. Notably, the District indicated that it does not send translated school documents to parents, writing, "the District is currently working to secure several options for translation services." The District stated in the initial data response that it offers interpreters for parent meetings, and that translated forms are available on the NHDOE website. However, the District also describes its translation procedure as "in process." The District provided a list of resources for translation to OCR. However, the resource list includes many vendors and does not specify which services teachers can use.

OCR interviewed the middle/high school ESOL teacher on March 31, 2016. The ESOL teacher began working in the District in XXXX. The ESOL teacher said that during the XXXX school year, she exclusively taught students at the secondary level. XXXXX. The ESOL teacher explained that XXXXX, the students she worked with were not serviced by an ESOL teacher. The ESOL teacher was unable to personally cover elementary school students due to her schedule. She stated that she believed the paraprofessional's service hours were expanded so that the students could be covered, but said, "I know that there were some students who simply didn't receive services because no personnel [were] available to go see them." The ESOL teacher was unsure if the individual students' parents were notified. The ESOL teacher said that she raised this concern to the District, and the District tried changing the schedules, but they could not make a new schedule work. She said the District addressed the concern by immediately putting out an announcement to hire a new ESOL teacher, and ultimately, a new teacher was hired at the beginning of the XXXXX school year.

The ESOL teacher raised some concerns about how prior staff were tracking service hours for ELs, but described this issue as resolved by a system she put in place to track recommended

hours as compared to actual hours received for each student in the District. Regarding parental communication, the ESOL teacher stated that all ACCESS testing scores were sent home to parents in English. She expressed that the District was working towards getting more documents translated for parents. She reported that one of the highest need translation services is Arabic, and that the District has generally used an interpreter to discuss important documents with Arabic-speaking parents. She stated that Individualized Education Program (IEP) translation is not something the District provides.

The District submitted a supplemental data response to OCR on May 7, 2021, identifying the ELs that were placed at the School during the XXXX school year.

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX. The remaining students are no longer enrolled in the District. OCR reviewed transcripts and WIDA score reports for each student that is still in the District. OCR did not identify any compliance concerns based on its review of this information; the documentation showed that the students were appropriately assessed for language proficiency and the three students who qualify for ESOL services continue to receive services.

The District also submitted updated information about its HLS procedure. The District is in the process of switching to a New Hampshire model state form, which is available on the NHDOE's website in multiple languages. In the data response, the District stated: "In all cases, the completed HLS is reviewed by an ESOL professional who then initiates the assessment/placement process and implements the communication protocols..." The District stated that its website is available in 100 languages using Google Translate. The District stated that the primary person responsible for contacting limited English proficient (LEP) parents is the ESOL teachers, and that "translation services are used for sending emails or notes home regarding scheduling" and that interpreters are used for parent meetings.

The District also submitted a "5- step internal protocol for securing translators and translated materials." The protocol submitted by the District distinguishes between "casual classroom communications (not a document that needs to be signed, for example a newsletter)" and "legal documents (permission slip, Written Prior Notice form, etc.)". The form instructs that casual classroom communications should be translated using Google Translate, and legal documents should be sent to a specific staff member for translation services. The protocol also instructs that a teacher who "need[s] to call home" should consider sending a note home using Google Translate, and if that is not possible, contact the identified staff member to request approval to use the Language Line. When OCR requested to interview the staff member listed in the protocol as being responsible for approving translation requests, OCR was informed that this individual is no longer involved with the ESOL program.

OCR conducted virtual interviews of the District's two current ESOL teachers and the Director of Student Services on June 22, 2021. OCR asked each witness to estimate how many EL students were in the District; witnesses consistently estimated the number to be approximately 70 students. OCR noted that one ESOL teacher indicated she works with 15 students, and the other estimated she had 20 students on her caseload. Thus, it appears that approximately only half of the EL students in the District are directly instructed by a certified teacher. One of the teachers interviewed expressed concern that when she first started, in January 2021, paraprofessionals

were directly instructing EL students using no set curriculum or plans. When the other teacher was asked about this, she said that she knew things needed to change and that “paras should be more support staff.” Both teachers acknowledged that it is necessary to rely on paraprofessionals for instruction because there are eleven schools in the District, and there are EL students in every building. When one teacher was directly asked if she supervises paraprofessionals, she hesitantly responded yes, but described this process as meeting once a month to check in on students. OCR has not yet interviewed the paraprofessionals who work in the ESOL program.

All witnesses reported to OCR that the District relies heavily on Google Translate. Both teachers said that they had never seen a document formally translated (i.e., using a manual translation service) in the District. IEPs and other documents are translated solely using Google Translate. All witnesses stated that the District uses the Language Bank for interpreter services, and spoke positively about how easy it is to secure an interpreter using this service. The Director of Student Services explained to OCR that there are no limitations on how often or for what purpose a staff member can use the Language Bank. Staff confirmed this assertion. OCR asked each witness about the District’s “5- step internal protocol for securing translators and translated materials.” All witnesses described this document as being outdated and/or needing to be updated. The Director of Student Services said that a legal document, such as an IEP, would be translated using Google Translate and then reviewed for accuracy by someone from the Language Bank. However, both teachers said that in practice they had only seen IEPs translated using Google Translate. Both teachers expressed some concern about how important school information, such as pandemic or weather-related closures, is communicated to LEP families.

Legal Standard

The Title VI implementing regulation at 34 C.F.R. § 100.3(a) and (b)(i)-(ii) provides that a school district may not, on the basis of national origin, exclude persons from participation in its programs, or provide any service or benefit which is different or provided in a different manner from that provided to others.

The Departmental Policy Memorandum issued on May 25, 1970 clarified OCR policy under Title VI on issues concerning the responsibility of a school district to provide equal educational opportunity to EL students, and obligated a district to take “affirmative steps” to address the language needs of EL students. It provides that school districts must adequately notify LEP national origin minority group parents of information that is called to the attention of other parents, and that such notice may have to be provided in a language other than English in order to be adequate. This policy concerning the need for effective communication with parents who do not speak English fluently has consistently been upheld by the courts and reiterated in subsequent OCR policy guidance.

EL Students

Under Title VI, school districts must provide equal educational opportunity to EL students, including taking affirmative steps to address their language needs. In determining if a school district’s programs for EL students comply with civil rights laws, OCR uses the analytic framework articulated in *Castañeda v. Pickard*, 648 F.2d 989 (5th Cir. 1981), considering whether: (a) the educational theory underlying the language assistance program is recognized as

sound by some experts in the field or is considered a legitimate experimental strategy; (b) the program and practices used by the school district are reasonably calculated to implement effectively the educational theory adopted by the district; and (c) the program succeeds, after a legitimate trial, in producing results indicating that students' language barriers are actually being overcome within a reasonable period of time. More specifically, school districts must:

- a) identify and assess EL students in need of language assistance in a timely, valid, and reliable manner;
- b) provide EL students with a language assistance program that is educationally sound and proven successful;
- c) sufficiently staff and support the language assistance programs for EL students;
- d) ensure EL students have equal opportunities to meaningfully participate in all curricular and extracurricular activities, including the core curriculum, graduation requirements, specialized and advanced courses and programs, sports, and clubs;
- e) avoid unnecessary segregation of EL students;
- f) ensure that EL students with disabilities under the Individuals with Disabilities Education Act (IDEA) or Section 504 are evaluated in a timely and appropriate manner for special education and disability-related services and that their language needs are considered in evaluations and delivery of services;
- g) meet the needs of EL students who opt out of language assistance programs;
- h) monitor and evaluate EL students in language assistance programs to ensure their progress with respect to acquiring English proficiency and grade level core content, exit EL students from language assistance programs when they are proficient in English, and monitor exited students to ensure they were not prematurely exited and that any academic deficits incurred in the language assistance program have been remedied;
- i) evaluate the effectiveness of a school district's language assistance program to ensure that EL students in each program acquire English proficiency and that each program was reasonably calculated to allow EL students to attain parity of participation in the standard instructional program within a reasonable period of time; and
- j) ensure meaningful communication with LEP parents about school-related information.

LEP Parents and Guardians

Districts have the obligation to ensure that LEP parents/guardians have meaningful access to district- and school-related information in a language they can understand and to adequately notify LEP parents/guardians of information about any program, service, or activity of a district that is called to the attention of non-LEP parents/guardians. A district's obligation to ensure meaningful communication with LEP parents requires it to provide LEP parents/guardians with oral interpretation and/or written translation of essential information into their primary language where necessary to ensure that they can meaningfully participate in their child's education. Essential information includes, but is not limited to, special education related documents, notices to parent/guardians, student-parent handbooks, documents concerning enrollment or registration, report cards and other academic progress reports, parent-teacher conferences, and qualified interpreters at special education related meetings.

Districts also must develop and implement a process for determining whether parents/guardians are LEP and what their language needs are. The process should be designed to identify all LEP parents/guardians, including parents/guardians of students who are proficient in English and parents/guardians whose primary language is not common in the district. For example, a district may use a student registration form, such as a home language survey, to inquire whether a parent/guardian requires oral and/or written communication in a language other than English. The school's initial inquiry should, of course, be translated into languages that are common in the school and surrounding community so that the inquiry is designed to reach parents/guardians in a language they are likely to understand. For LEP parents/guardians who speak languages that are less common at a particular school, the school may use a cover page explaining in those languages how a parent/guardian may receive oral interpretation of the form and should offer interpreters to ensure parents/guardians accurately report their language communication needs on the form. Schools may also use other processes reasonably calculated to identify LEP parents/guardians, and should identify the language needs of LEP parents/guardians whenever those needs become apparent. It is important for schools to take parents/guardians at their word about their communication needs if they request language assistance and to keep in mind that parents/guardians can be LEP even if their child is proficient in English.

Finally, districts must provide free language assistance to LEP parents/guardians effectively with appropriate, competent staff, or appropriate and competent outside resources. It is not sufficient for the staff merely to be bilingual. For example, some bilingual staff and community volunteers may be able to communicate directly with LEP parents/guardians in a different language, but not be competent to interpret in and out of English (e.g., consecutive or simultaneous interpreting), or to translate documents. Districts should ensure that interpreters and translators have knowledge in both languages of any specialized terms or concepts to be used in the communication at issue. In addition, districts should ensure that interpreters and translators are trained on the role of an interpreter and translator, the ethics of interpreting and translating, and the need to maintain confidentiality.

Districts may violate these Title VI obligations if the districts rely on students, siblings, friends, or untrained school staff to translate or interpret for parents/guardians; fail to provide translation or an interpreter at IEP meetings, parent-teacher conferences, enrollment or career fairs, or disciplinary proceedings; fail to provide information notifying LEP parents/guardians about a school's programs, services, and activities in a language the parents/guardians can understand; or fail to identify LEP parents/guardians.

Allegation 1:

The Complainant alleged that, during the XXXXXX, EL students at the XXXXX were denied a meaningful opportunity to access and participate in the District's programs and activities when the District failed to provide them with English language support services.

Analysis

OCR determined that there is insufficient evidence to support Allegation 1. OCR determined that that XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX, the District took steps to find a replacement teacher by posting a vacancy announcement for the position. In addition, the District attempted to provide coverage for affected students by rearranging staff schedules. The evidence indicates that the District provided some services for affected students during the six week time period that the Complainant was unavailable to teach. Additionally, OCR reviewed current ESOL documentation for these students which did not raise any compliance concerns. Accordingly, OCR determined that there is insufficient evidence of a violation.

Although OCR did not find a violation regarding the six weeks of services missed by the students at the School, through its investigation OCR identified a preliminary concern about the District's current staffing and resources for its ESOL program. Based on OCR's interviews with current District personnel, OCR is concerned that some EL students may not be receiving instruction from qualified teachers. The evidence obtained to date by OCR indicates that approximately half of the District's EL students are not directly instructed by certified teachers, and may be instructed by paraprofessionals, who do not appear to be adequately supervised by certified teachers. School districts have an obligation to provide personnel and resources necessary to effectively implement their EL programs. This obligation includes having highly qualified teachers provide language assistance services. Paraprofessionals may not take the place of qualified teachers, and may only be used as an interim measure while the school district hires, trains, or otherwise secures enough qualified teachers to serve its EL students. If a school district uses paraprofessionals to provide language assistance services to EL students that supplement those provided by qualified teachers, it may do so only if the paraprofessional is trained to provide services to EL students. OCR is concerned, based on the evidence obtained to date, that the District may be inappropriately relying on paraprofessionals rather than fully qualified ESOL teachers for ESOL instruction.

Allegation 2:

The Complainant alleged that the District failed to provide the parents of EL students, who are also ELs, with important information about their children's education program in their native language.

Analysis

Based on the evidence obtained to date, OCR has a preliminary concern about the District's communication with LEP parents regarding essential information about their children's education program in their native language. The evidence provided by the District indicates that the District solely uses Google Translate for documents that are provided to LEP parents. Utilization of such services is only appropriate if the translated document accurately conveys the meaning of the source document, including accurately translating technical vocabulary. Recipients are cautioned against the use of web-based automatic translations; translations that are inaccurate are inconsistent with the District's obligation to communicate effectively with LEP parents. Thus, to ensure that essential information has been accurately translated and conveys

the meaning of the source document, the District would need to have a machine translation reviewed, and edited as needed, by an individual qualified to do so.¹ OCR also identified preliminary concerns, based on teacher interviews, about how other essential information (such as school closures) is communicated to LEP parents.

Allegation 3:

The Complainant alleged that the District failed to identify potential EL students who may be in need of English language support services in order to access the District's education programs.

Analysis

Based on the evidence obtained to date, OCR has a preliminary concern about the District's administration of its HLS. Specifically, none of the documents the District provided, over the course of OCR's lengthy investigation, included any copy of a translated HLS. District staff stated that the new state-wide HLS would be available in multiple languages, and OCR confirmed that the state website now contains translations of the HLS into eight languages. Although translated HLS forms were not available to staff at the time of OCR's investigation, District staff interviewed by OCR confirmed that the HLS is regularly administered to all incoming students and interpreters are used when necessary. Given the concerns identified in this case, OCR will require the District to assess the major languages in the District and consider whether it is necessary to translate its HLS into any other languages.

Prior to the conclusion of OCR's investigation and pursuant to Section 302 of OCR's *Case Processing Manual*, the District expressed an interest in resolving this complaint and OCR determined that a voluntary resolution is appropriate. Subsequent discussions between OCR and the District resulted in the District signing the enclosed Agreement which, when fully implemented, will address Allegations 2 and 3, as well as additional concerns identified during OCR's investigation. OCR will monitor the District's implementation of the Agreement.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. OCR would like to make you aware that individuals who file complaints with OCR may have the right to file a private suit in federal court whether or not OCR finds a violation.

The complainant has a right to appeal OCR's determination regarding Allegation 1 within 60 calendar days of the date indicated on this letter. In the appeal, the complainant must explain why the factual information was incomplete or incorrect, the legal analysis was incorrect or the appropriate legal standard was not applied, and how correction of any error(s) would change the outcome of the case; failure to do so may result in dismissal of the appeal. If the complainant appeals OCR's determination, OCR will forward a copy of the appeal form or written statement

¹ Additionally, the confidentiality of documents may be lost when documents are uploaded without sufficient controls to a web-based translation service and stored in their databases.

to the recipient. The recipient has the option to submit to OCR a response to the appeal. The recipient must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the recipient.

Please be advised that the District must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

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

Sincerely,

XXXXXX
Compliance Team Leader

Enclosure

cc: XXXXX, Esq.