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Policy Regarding the Treatment of National Origin Minority Students Who Are Limited English Proficient

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE ASSISTANT SECRETARY FOR CIVIL RIGHTS

APR 6 1990

TO OCR Senior Staff

FROM William L. Smith, Acting Assistant Secretary for Civil Rights

SUBJECT Office for Civil Rights Policy Regarding the Treatment of National Origin Minority Students Who Are Limited English Proficient

I have recently received a number of inquiries regarding the Office for Civil Rights' (OCR) policy related to making determinations of compliance under Title VI of the Civil Rights Act of 1964 as regards the treatment of national origin minority students who are limited English proficient (language minority students). In responding to these inquiries, I am aware that our existing policy and procedures were issued several years ago and may be in need of updating. In fact, the Policy and Enforcement Service (PES) will issue such an update during the third quarter of FY 1990.

Until that document is available, you can, of course, continue to follow our current policy documents available to you. The May 25th Memorandum, as affirmed by the Supreme Court in the *Lau v. Nichols* decision, 44 U.S. 653 (1974), provides the legal standard for the Education Department's Title VI policy concerning discrimination on the basis of national origin. The procedures OCR follows in applying this legal standard on a case-by-case basis are set forth in a document issued to OCR staff on December 3, 1985, entitled, OCR's Title VI Language Minority Compliance Procedures (copy attached).

In developing its policy update, PES staff will review the cases we have investigated over the past few years, in addition to examining the case law, to determine where additional guidance may be needed. It will be helpful for PES attorneys to discuss various aspects of these cases with some regional staff who have had substantial recent experience in applying our case-by-case approach. I understand that there have been some excellent investigations carried out under this policy. You will be consulted prior to any discussions on these matters with members of your staff. In the meantime, I urge you to continue to investigate complaints of discrimination against national origin minority students and to conduct compliance reviews on this issue where appropriate.

If you have questions about the application of current policy, or if you have suggestions for policy modifications, you may call Cathy Lewis at 732-1635, or send your information to me in writing.

Attachment

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE ASSISTANT SECRETARY FOR CIVIL RIGHTS

THE OFFICE FOR CIVIL RIGHTS' TITLE VI

LANGUAGE MINORITY COMPLIANCE PROCEDURESISSUE

This discussion provides a description of the procedures followed by the Office for Civil Rights (OCR) in making determinations of compliance with Title VI of the Civil Rights Act of 1964, as regards the treatment of national origin minority students with limited-English proficiency (language minority students) enrolled in educational programs that receive Federal financial assistance from the Department of Education.

BACKGROUND

As part of the Civil Rights Act of 1964, Congress enacted Title VI, prohibiting discrimination on the grounds of race, color or national origin in programs or activities that receive Federal financial assistance. In May 1970, the former Department of Health, Education and Welfare (DHEW), published a memorandum to school districts on the Identification of Discrimination and Denial of Services on the Basis of National Origin (the May 25th Memorandum, 35 Fed. Reg. 11595 - Tab A). The purpose of the May 25th Memorandum was to clarify OCR's Title VI policy on issues concerning the responsibility of school districts to provide equal educational opportunity to language minority students. The May 25th Memorandum stated in part:

Where inability to speak and understand the English language excludes national origin minority-group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.

In 1974, the Supreme Court upheld this requirement to take affirmative steps in the Lau v. Nichols decision, 414 U.S. 653 (1974). The May 25th Memorandum, as affirmed by Lau, continues to provide the legal standard for the Education Department's (the Department) Title VI policy concerning discrimination on the basis of national origin. The Lau decision did not require school districts to use any particular program or teaching method. The opinion of the Court states:

No specific remedy is urged upon us. Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instruction to this group in Chinese is another. There may be others. Id. at 565

In 1975, the former DHEW promulgated a document designed to describe appropriate educational steps that would satisfy the Supreme Court's Lau mandate (Task Force Findings Specifying Remedies Available For Eliminating Unlawful Under Lau v. Nichols.) These "Lau Remedies" evolved into de facto compliance standards, which allowed undue Federal influence over educational judgments that could and should be made by local and state educational authorities

In August 1980, the newly-formed Department of Education published a Notice of Proposed Rulemaking (NPRM) that sought to replace the unofficial "Lau Remedies" with a document that would have set forth requirements for all schools enrolling language minority students. The 1980 NPRM proposed bilingual education as the required method of instruction in schools with sufficient numbers of language minority students of one language group.

Subsequently, the Department determined that the proposed regulations were intrusive and burdensome. They were withdrawn on February 2, 1981, and OCR put into effect nonprescriptive interim procedures pertaining to the effective participation of language minority students in the educational program offered by a school district. Under these procedures, OCR reviews the compliance of school districts on a case-by-case basis. Any educational approach that ensures the effective participation of language minority students in the district's educational program is accepted as a means of complying with the Title VI requirements.

Since this compliance approach has been successful, OCR has determined that these procedures provide sufficient guidance for OCR staff and school districts. Accordingly, OCR will continue to follow procedures which allow for a case-by-case determination of a district's compliance status. Set forth below is an updated statement of OCR's current procedures, and a discussion of the analysis applied by OCR in assessing a district's efforts to

meet the requirements of Title VI and the May 25th Memorandum.

OCR'S CURRENT PROCEDURES

OCR conducts investigations of the educational services provided for language minority students either as a result of a complaint allegation or through a compliance review. Although the May 25th Memorandum and Lau v. Nichols decision require school districts to "take affirmative steps" to open their instructional programs to language minority students, OCR does not require the submission of a written compliance agreement (plan) unless a violation of Title VI has been established.

The affirmative steps required by the May 25th Memorandum have been interpreted to apply to national origin minority students who are learning English as a second language, or whose ability to learn English has been substantially diminished through lack of exposure to the language. The May 25th Memorandum does not generally cover national origin minority students whose only language is English, and who may be in difficulty academically, or who have language skills that are less than adequate.

In providing educational services to language minority students, school districts may use any method or program that has proven successful, or may implement any sound educational program that promises to be successful. Districts are expected to carry out their programs, evaluate the results to make sure the programs are working as anticipated, and modify programs that do not meet these expectations.

OCR considers two general areas in determining whether a school district that enrolls language minority students is in compliance with Title VI. These are:

- whether there is a need for the district to provide an alternative program designed to meet the educational needs of all language minority students; and
- whether the district's alternative program is likely to be effective in meeting the educational needs of its language minority students.

The question of need for an alternative program is resolved by determining whether language minority students are able to participate effectively in the regular instructional program. When they are not, the school district must provide an alternative program. In cases where the number of these students is small, the alternative program may be informal (i.e., no formal program description is required.)

The second major area of consideration is whether the district's alternative program is likely to be effective in meeting the educational needs of its language minority students. There is considerable debate among educators about the most effective way to meet the educational needs of language minority students in particular circumstances. A variety of factors influence the success of any approach or pedagogy. These factors include not only individual student characteristics, such as age and previous education, but also school characteristics, such as the number and the concentration of different language groups. OCR staff is not in the position to make programmatic determinations and does not presume to make those decisions.

OCR's deliberations are appropriately directed to determining whether the district has addressed these problems, and has developed and implemented an educational program designed to ensure the effective participation of language minority students. The following sets forth an analytical framework used by OCR in determining whether a school district's program is in compliance with Title VI in this area.

I. Whether there is a Need for an Alternative Program?

The determination of whether all language minority students in need have been served may be made in a number of ways. For example, a district may establish cut-off criteria for the placement of language minority students in either the regular or alternative programs based on the English language proficiency levels required for effective participation in their regular instructional programs. Alternately, past academic records of language minority students may be used to predict, for example, which new students are likely to require the assistance provided by the alternative program.

Many school districts screen students using information such as a language assessment test, information from parents, or structured interviews, to determine which language minority students may need further assessment and possible placement into an alternative program. The appropriateness of assessment methods and procedures depends upon several variables, such as the number of language minority students in each language group, the ages of these students, the size of the school district, and the availability of reliable assessment instruments in the different languages.

The district may show that the academic performance of language minority students in the regular instructional program indicates that these students do not require the assistance provided by the alternative program. The district may also show that language-minority students who need assistance can readily transfer from the regular to the alternative program for the portion of the school day during which assistance is needed.

OCR will find a violation of Title VI if language minority students in need of an alternative program are not being provided such a program. However, the mere absence of formal identification and assessment procedures and of a formal program does not, per se, constitute a violation of Title VI. Regional staff are cautioned to review carefully the school district's reasons for not having such procedures, and the effectiveness of any informal methods that may be used. For example, a school district that has received a recent influx of language minority students may not be reasonably expected to have in place the type of procedures and programs that other districts with more predictable language minority student populations should have. Similarly, a school district with only a small number of language minority students, may not need the formal procedures and programs necessary in districts with much larger numbers of such students. In the past, OCR has worked with such districts, in conjunction with State education agencies, to provide technical assistance in an effort to prevent future Title VI problems.

II. Whether the Alternative Program is likely to be Effective?

A. Is the alternative program based on a sound design?

School districts must demonstrate that the alternative program designed to ensure the effective participation of language minority students in the educational program is based on a sound educational approach.

OCR avoids making educational judgments or second-guessing decisions made by local education officials. Instead, OCR looks at all the available evidence describing the steps taken to ensure that sound and appropriate programs are in place. Example of factors that would be considered are:

- Whether the program has been determined to be a sound educational program by at least some experts in the field.

An expert in the field can be defined as someone whose experience and training expressly qualifies him or her to render such judgments and whose objectivity is not at issue.

- Whether there is an explanation of how the program meets the needs of language minority students.

Such an explanation would normally include a description of the program components and activities, along with a rationale that explains how the program activities can be reasonably expected to meet the educational needs of language minority students.

- Whether the district is operating under an approved state plan or other accepted plans.

Plans that have previously been accepted by OCR as being in compliance with Title VI continue to be acceptable. These plans may be modified by school districts at any time. When comprehensive programs are mandated by state law, OCR will approve such plans, upon request, where it can be demonstrated that the plans provide a sound educational program that will meet the educational needs of language minority students. When a plan applies only to certain grade levels, the acceptance memorandum is limited to those grades covered under the state plan.

B. Is the alternative program being carried out in such a way as to ensure the effective participation of the language minority students as soon as reasonably possible?

Districts are expected to carry out their programs effectively, with appropriate staff (teachers and aides), and with adequate resources (instructional materials and equipment).

- Appropriateness of staff

The appropriateness of Staff is indicated by whether their training, qualifications, and experience are consonant with the requirements of the program. For example, their appropriateness would be questioned if a district has established an English-as-a-Second-Language (ESL) program, but the staff had no ESL training and there was no provision for ESL teacher training.

- Adequacy of resources

The adequacy of resources is determined by the timely availability of required equipment and instructional materials. Limited financial resources do not justify failure to remedy a Title VI violation. However, OCR considers the extent to which a particular remedy would require a district to divert resources from other necessary educational resources and services.

Similarly, districts faced with a shortage of trained teachers, or with a multiplicity of languages, may not be able to meet certain staffing requirements, such as those needed for an intensive ESL program or a bilingual program. OCR does not require a program that places unrealistic expectations on a district.

C. Is the alternative program being evaluated by the district and are modifications made in the program when the district's evaluation indicates they are needed?

A district will be in compliance with Title VI when it has adopted an alternative educational program that, when viewed in its entirety, effectively teaches language minority students English, and moves them into the regular educational program within a reasonable period of time. A more difficult compliance determination arises when a district implements an educational approach which, by all available objective measures, does not provide language minority students with the opportunity for effective participation.

For the reasons discussed earlier in this document, OCR approaches this compliance issue with great caution. Since OCR does not presume to know which educational strategy is most appropriate in a given situation, the failure of any particular strategy or program employed by a school district is more properly addressed by school officials. OCR looks to local school officials to monitor the effectiveness of their programs, to determine what modifications may be needed when the programs are not successful after a reasonable trial period, and to implement such modifications. A school district's continued or consistent failure to improve an ineffective alternative program for language minority students may lead to a finding of noncompliance with Title VI.

There are no specific regulatory requirements regarding the data a district must keep on its alternative programs for language minority students. OCR's current approach to determining compliance with Title VI on this issue does not require that new, additional, or specifically designed records be kept. It is expected that a sound educational program will include the maintenance of reasonably accurate and complete data regarding its implementation and the progress of students who move through it.

CONCLUSION

In viewing a school district's compliance with Title VI regarding effective participation of language minority students in the educational program, OCR does not require schools to follow any particular educational approach. The test for legal adequacy is whether the strategy adopted works -- or promises to work -- on the basis of past practice or in the judgment of experts in the field. OCR examines all the available evidence within the analytical framework described, and determines whether the preponderance of evidence supports the conclusion that the district is implementing a sound educational program that ensures the effective participation of its language minority students.

ISSUED INITIALLY ON DECEMBER 3, 1985

REISSUED WITHOUT CHANGE ON APRIL 6, 1990

William L. Smith
Acting Assistant Secretary
for Civil Rights

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