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- Example 16: A student is tested and determined to be an EL student. The parent initially refuses EL program services because the parent believes her child speaks fluent English. After the first quarter, the student’s teacher contacts the parent to discuss that the EL student is struggling with reading and writing assignments despite her strong English-speaking skills. The teacher offers a period of ELD and sheltered content classes, explaining how both can improve the student’s proficiency in reading and writing. The parent accepts the ELD services and agrees to reevaluate the placement at the end of the school year.

If the school district’s monitoring of the opt-out EL student shows the student is struggling but the parent continues to decline the EL program or services, the school district should take affirmative and appropriate steps to meet its civil rights obligations. School districts may accomplish this in a variety of ways. One such way would be providing adequate training to the opt-out EL student’s general education teachers on second-language acquisition and ELD to ensure the student’s access to some language acquisition supports.

- Example 17: At the beginning of the school year a kindergarten student is tested and determined to be EL. The parent declined Title III and English language services that were offered in segregated classes attended by EL students only. Although the student’s parents opted the child out of EL-specific services, the school recognizes that the student continues to struggle in English. The school responds by training the kindergarten teacher to use ELD strategies in the EL student’s regular, integrated classroom.

Further, opt-out EL students must have their English language proficiency assessed at least annually to gauge their progress in attaining English proficiency and to determine if they are still in need of and legally entitled to EL services. There is no assessment exemption for students

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<sup>86</sup> School districts also retain their EL obligations to a student even if parents opt their child out of IDEA or Section 504 services.

<sup>87</sup> See 1991 OCR Guidance; 20 U.S.C. § 1703(f) (requiring SEAs and LEAs to take appropriate action to overcome individual students’ language barriers that impede their equal participation in the agencies’ instructional programs).

who do not receive EL services.<sup>88</sup> Once opt-out EL students meet valid and reliable criteria for exiting from EL status, the district should monitor their progress for at least two years, as it does with other exited EL students (see Part II. H immediately below).

In their investigations, the Departments consider, among other things, whether:

- ✓ *School districts encourage parents or students to accept the EL services offered and respond appropriately when parents decline any or all EL services;*
- ✓ *School districts maintain appropriate documentation demonstrating that a parent made a voluntary, informed decision to decline EL services; and*
- ✓ *SEAs and school districts explore the causes of high opt-out rates for EL services, address any underlying cause(s) of opting out, and ensure that the academic and English language proficiency needs of the EL students who have opted out are being met.*

#### **H. Monitoring and Exiting EL Students from EL Programs and Services**

School districts must monitor the progress of all of their EL students in achieving English language proficiency and acquiring content knowledge. Monitoring ensures that EL students are making appropriate progress with respect to acquiring English and content knowledge while in the EL program or, in the case of opted-out EL students, in the regular educational setting.

With respect to monitoring EL students' acquisition of content knowledge, school districts must at a minimum validly, reliably, and annually measure EL students' performance in academic content areas, including through tests in a language other than English where appropriate as stated in Part II.D above.<sup>89</sup> School districts should also establish rigorous monitoring systems that include benchmarks for expected growth in acquiring academic content knowledge during the academic year and take appropriate steps to assist students who are not adequately progressing towards those goals. SEAs also have a role to play in ensuring EL students acquire content knowledge by monitoring whether school districts are providing EL students with meaningful access to grade-appropriate core content instruction and remedying any content deficits in a timely manner.<sup>90</sup>

With respect to monitoring EL students' acquisition of English proficiency, SEAs must develop ELP standards to inform EL programs, services, and assessments that are derived from the four domains of speaking, listening, reading, and writing, and that are aligned to the State's content

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<sup>88</sup> All students who meet the definition of LEP under the ESEA, *see* 20 U.S.C. § 7801(25), must be tested annually with a State-approved ELP assessment. *Id.* §§ 6311(b)(7) (Title I), 6823(b)(3)(D) (Title III), 6826(b)(3)(C) (Title III).

<sup>89</sup> *Castañeda*, 648 F.2d at 1014 (“Valid testing of student’s progress in these areas is, we believe, essential to measure the adequacy of a language remediation program” and requiring that a district’s assessments of the progress of LEP students in a subject taught in their primary language must include testing in the primary language).

<sup>90</sup> *Id.* at 1011; *see also Gomez*, 811 F.2d at 1042; *Idaho Migrant Council*, 647 F.2d at 71; *supra* notes 9, 14 & 15.



standards.<sup>91</sup> SEAs must also ensure that school districts implement these ELP standards. In addition, SEAs and school districts must ensure the annual ELP assessment of all EL students in these domains and monitor their progress from year to year.<sup>92</sup> Because Title III requires that the annual ELP assessment be valid and reliable, the ELP assessment must be aligned to the SEA’s ELP standards.<sup>93</sup> Thus, in monitoring EL students’ acquisition of English, their performance on the annual ELP assessment and their progress with respect to the ELP standards during the school year should inform their instruction.

- Example 18: Some school districts choose to create forms for their ESL and content teachers to use to monitor EL students each quarter. These forms include the students’ grades in each subject, scores on district and State assessments and standardized tests, and the teachers’ comments on an EL student’s strengths and weaknesses in each of the four language domains and each academic subject. When the monitoring form of an intermediate EL student reflects difficulties in social studies and writing papers, an ESL teacher suggests sheltering strategies and writing rubrics to the social studies teacher to assist the EL student.

With respect to exiting EL students from EL programs, services, and status, a valid and reliable ELP assessment of all four language domains must be used to ensure that all K-12 EL students have achieved English proficiency.<sup>94</sup> To demonstrate proficiency on the ELP assessment, EL students must have either separate proficient scores in each language domain (*i.e.*, a conjunctive score) or a composite score of “proficient” derived from scores in all four language domains. Whether a conjunctive or composite “proficient” score is used, the score must meet two criteria. The ELP assessment must meaningfully measure student proficiency in each of the language domains, and, overall, be a valid and reliable measure of student progress and proficiency in English. A composite “proficient” score must be a valid and reliable measure that demonstrates sufficient student performance in all required domains to consider an EL student to have attained proficiency in English. The “proficient” score, whether conjunctive or composite, must be set at a level that enables students to effectively participate in grade-level content instruction in English without EL services. Evidence demonstrating each of the foregoing requirements should be available if the Departments request it.

While SEAs may include additional objective criteria related to English proficiency to decide if an EL student who scores proficient on the ELP assessment is ready for exit or requires additional language assistance services, these additional criteria may not serve as a substitute for a proficient conjunctive or composite score on a valid and reliable ELP assessment.

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<sup>91</sup> 20 U.S.C. § 6823(b)(2).

<sup>92</sup> 20 U.S.C. §§ 6311(b)(7) (Title I), 6823(b)(3)(C), (D) (Title III).

<sup>93</sup> 20 U.S.C. §§ 6841(a)(3), 6842(a)(3).

<sup>94</sup> See 2008 Title III NOI at 61832-61833 (explaining the requirements of an ELP assessment in all four domains and how “proficiency” may be demonstrated using a composite or a conjunctive score); see also *supra* note 33.

After students have exited an EL program, school districts must monitor the academic progress of former EL students for at least two years to ensure that: the students have not been prematurely exited; any academic deficits they incurred as a result of participation in the EL program have been remedied; and they are meaningfully participating in the standard instructional program comparable to their never-EL peers.<sup>95</sup> When a school district’s monitoring of an exited EL student indicates that a persistent language barrier may be the cause of academic difficulty because general education and remediation services have proven inadequate, school districts should re-test the student with a valid and reliable, grade-appropriate ELP test to determine if there is a persistent language barrier and must offer additional language assistance services where needed to meet its civil rights obligations. In no case should re-testing of an exited student’s ELP be prohibited. If the results of the re-testing qualify the student as EL, the school district must reenter the student into EL status and offer EL services. If the student is reentered into EL services, school districts should document the bases for the reentry and the parents’ consent to such reentry.

- Example 19: School districts throughout the State found that a longitudinal cohort analysis shows that EL students who completed and exited the EL program are not able to meaningfully participate in regular education classes comparable to their never-EL peers. The State revises its criteria for exiting EL students from EL programs to ensure that the criteria are valid and reliable and require proficiency in the four domains. The district then provides teachers and staff with training on revised exit criteria and procedures. The district takes additional steps to improve the EL program’s services.

Some examples of when the Departments have identified compliance issues regarding the exiting of EL students include when school districts: (1) exit intermediate and advanced EL students from EL programs and services based on insufficient numbers of teachers who are qualified to deliver the EL program; (2) prematurely exit students before they are proficient in English, especially in the specific language domains of reading and writing; (3) fail to monitor the progress of former EL students; or (4) fail to exit EL students from EL programs after EL students demonstrate (or could have demonstrated if assessed) proficiency in English.

In their investigations, the Departments consider, among other things, whether:

- ✓ *School districts monitor the progress of all of their EL students, including opt outs, in achieving English language proficiency and acquiring content knowledge;*
- ✓ *SEAs monitor whether school districts’ programs enable EL students to acquire English, content knowledge, and parity of participation in the standard instructional program;*

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<sup>95</sup> Title III requires that school districts monitor for two years the progress made by exited ELs on content and achievement standards. 20 U.S.C. § 6841(a)(4). Exiting these students from EL status is not the same concept as the treatment of “former” EL students under Title I for accountability purposes. States are permitted to include the scores of former EL students on State content assessments in the LEP subgroup for up to two accountability determination cycles. 34 C.F.R. § 200.20(f)(2).

- ✓ *SEAs develop and ensure that school districts implement objective ELP standards that define EL status and inform EL programs, services, and assessments;*
- ✓ *School districts monitor EL student progress to establish benchmarks for expected growth and to assist students who are not adequately progressing towards those goals;*
- ✓ *SEAs and school districts do not exit students from EL programs, services, and status until EL students demonstrate English proficiency on a valid and reliable ELP assessment; and*
- ✓ *School districts monitor, for at least two years, the academic progress of students who have exited an EL program to ensure that the students have not been prematurely exited, any academic deficits they incurred resulting from the EL program have been remedied, and they are meaningfully participating in the district’s educational programs comparable to their never-EL peers.*

### **I. Evaluating the Effectiveness of a District’s EL Program**

As noted above, when evaluating a school district’s or SEA’s EL program(s) for compliance, the Departments consider whether the program succeeds, after a legitimate trial, in producing results that indicate that students’ language barriers are actually being overcome. In other words, the Departments look at whether performance data of current EL, former EL, and never EL students demonstrates that the EL programs were in fact reasonably calculated to enable EL students to attain parity of participation in the standard instructional program within a reasonable length of time. For a school district or SEA to make such a determination, as a practical matter, a district must periodically evaluate its EL programs, and modify the programs when they do not produce these results.<sup>96</sup> Continuing to use an EL program with a sound educational design is not sufficient if the program, as implemented, proves ineffective.

Generally, success is measured in terms of whether the particular goals of a district’s educationally sound language assistance program are being met without unnecessary segregation. As previously discussed, those goals must include enabling EL students to attain within a reasonable period of time, both (1) English proficiency and (2) meaningful participation in the standard educational program comparable to their never-EL peers.<sup>97</sup> The Departments will not view a program as successful unless it meets these two goals. If an EL program is not effective, the district must make appropriate programmatic changes reasonably calculated to enable EL students to reach these two goals. Some EL programs have additional goals such as exiting students within a set number of years. While the Departments review longitudinal data to determine if those goals are being met by the particular program, neither school districts nor

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<sup>96</sup> *Castañeda*, 648 F.2d at 1014-15; *1991 OCR Guidance*; 20 U.S.C. § 6841(b)(2) (requiring every school district receiving Title III, Part A funds to engage in a self-evaluation every two years and provide it to the SEA).

<sup>97</sup> An EL program may have other goals such as bicultural goals or maintaining primary language literacy.

SEAs may exit an EL student from EL status or services based on time in the program if the student has yet to achieve English proficiency.

To assess whether an EL program is succeeding in overcoming language barriers within a reasonable period of time, school districts must consider accurate data that permit a comprehensive and reliable comparison of how EL students in the EL program, EL students who exited the program, and never-EL students are performing on criteria relevant to participation in the district’s educational programs over time.<sup>98</sup>

Meaningful EL program evaluations include longitudinal data that compare performance in the core content areas (e.g., valid and reliable standardized tests in those areas), graduation, dropout, and retention data for EL students as they progress through the program, former EL students, and never-EL students.<sup>99</sup> When evaluating the effectiveness of an EL program, the performance of EL students in the program and former EL students who exited the program should be compared to that of never-EL students. While the data need not demonstrate that current EL students perform at a level equal to their never-EL peers,<sup>100</sup> a school district’s data should show that EL students are meeting exit criteria and are being exited from the program within a reasonable period of time, and that former EL students are participating meaningfully in classes without EL services and are performing comparably to their never-EL peers in the standard instructional program. To assess whether the EL program sufficiently prepared EL students for more demanding academic requirements in higher grades, the Departments expect districts to evaluate these data not only at the point that students exit EL services, but also over time.<sup>101</sup>

- Example 20: A district conducts a longitudinal cohort analysis that examines the percentage of beginner-level EL students who complete and successfully exit EL program services within four years, five years, and at other intervals. The district also compares the performance of the exited EL students and their never-EL peers on the standardized reading, math, science, and social studies tests in grades 3, 5, 8, and 10, as well as their retention-in-grade, drop out, and graduation rates. The district considers

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<sup>98</sup> See, e.g., *Castañeda*, 648 F.2d at 1011, 1014 (discussing student achievement scores under the third prong); *Flores*, 557 U.S. at 464 n.16 (“[An] absence of longitudinal data in the record precludes useful comparisons.”); *Texas*, 601 F.3d at 371 (discussing achievement scores, drop-out rates, retention rates, and participation rates in advanced courses, and the need for longitudinal data, under prong three); *Keyes v. Denver Sch. Dist. No. 1*, 576 F. Supp. 1503, 1519 (D. Colo. 1983) (expressing concern over high drop-out rates of Hispanic students).

<sup>99</sup> See *Horne*, 557 U.S. at 464 n. 16 (“[An] absence of longitudinal data in the record precludes useful comparisons.”); *Texas*, 601 F.3d at 371 (discussing *Castañeda*’s third prong and noting that without an analysis of “longitudinal data . . . the comparisons made, and conclusions reached in making them, are unreliable”).

<sup>100</sup> See *Horne*, 557 U.S. at 467 (“Among other things, the Court of Appeals referred to ‘the persistent achievement gaps documented in [Nogales] AIMS test data’ between ELL students and native speakers, but any such comparison must take into account other variables that may explain the gap. In any event, the EEOA requires ‘appropriate action’ to remove language barriers, § 1703(f), not the equalization of results between native and nonnative speakers on tests administered in English – a worthy goal, to be sure, but one that may be exceedingly difficult to achieve, especially for older EL students.” (citation omitted)).

<sup>101</sup> See *id.* at 464 n.16 (“[An] absence of longitudinal data in the record precludes useful comparisons.”).

whether it is possible to attribute earlier exits and disparate performance data of exited EL students in the content areas to a specific program design, teacher training, or differences in programming across grade levels. The district disaggregates the average rate of EL program exit and the average standardized test performance by program, school, content areas, years in EL programs, and grade to determine which EL programs and services require modification.

- Example 21: Some school districts have updated or modified their existing data systems for the purpose of collecting and analyzing complete and accurate information about EL and former EL student data relative to never-EL student data. Such data include standardized tests, district assessments, participation in special education and gifted programs, enrollment in AP classes, and graduation, drop-out, and retention-in-grade rates. For example, when a district’s four-year longitudinal cohort analysis data revealed higher drop-out rates for EL students and exited EL students than never-EL students, the district revised its grade 6-12 ESL curriculum with the help of its ESL teachers and mandated more training for secondary sheltered content instructors.

In addition, as stated in sections II.D and H above, school districts must monitor EL students’ progress from grade to grade so that districts know whether the EL program is causing academic content area deficits that require remediation and whether EL students are on track to graduate and have comparable opportunities to their never-EL peers to become college- and career-ready. Other important indicators of program success include whether the achievement gap between EL students and never-EL students is declining over time and the degree to which current and former EL students are represented in advanced classes, special education services, gifted and talented programs, and extracurricular activities relative to their never-EL peers.

In their investigations, the Departments consider, among other things, whether:

- ✓ *SEAs and school districts monitor and compare the academic performance of EL students in the program and those who exited the program over time, relative to that of their never-EL peers; and*
- ✓ *SEAs and school districts evaluate EL programs over time using accurate data and timely modify their programs when they are not meeting the standards discussed herein.*

## **J. Ensuring Meaningful Communication with Limited English Proficient Parents**

Limited English Proficient (LEP) parents are parents or guardians whose primary language is other than English and who have limited English proficiency in one of the four domains of language proficiency (speaking, listening, reading, or writing). School districts and SEAs have an obligation to ensure meaningful communication with LEP parents in a language they can understand and to adequately notify LEP parents of information about any program, service, or activity of a school district or SEA that is called to the attention of non-LEP parents. At the

school and district levels, this essential information includes but is not limited to information regarding: language assistance programs, special education and related services, IEP meetings, grievance procedures, notices of nondiscrimination, student discipline policies and procedures, registration and enrollment, report cards, requests for parent permission for student participation in district or school activities, parent-teacher conferences, parent handbooks, gifted and talented programs, magnet and charter schools, and any other school and program choice options.<sup>102</sup>

School districts must develop and implement a process for determining whether parents are LEP and what their language needs are. The process should be designed to identify all LEP parents, including parents or guardians of children who are proficient in English and parents and guardians whose primary language is not common in the district. For example, a school district may use a student registration form, such as a home language survey, to inquire whether a parent or 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 in a language they are likely to understand. For LEP parents 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 may receive oral interpretation of the form and should offer interpreters to ensure parents accurately report their language communication needs on the form. Schools may also use other processes reasonably calculated to identify LEP parents, and should identify the language needs of LEP parents whenever those needs become apparent. It is important for schools to take parents at their word about their communication needs if they request language assistance and to keep in mind that parents can be LEP even if their child is proficient in English.

SEAs and school districts must provide language assistance to LEP parents effectively with appropriate, competent staff – or appropriate and competent outside resources.<sup>103</sup> It is not sufficient for the staff merely to be bilingual. For example, some bilingual staff and community

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<sup>102</sup> In addition to the general requirement under the civil rights laws described in the text, LEP parents are also entitled to translation and interpretation of particular information under Titles I and III and the IDEA, as noted *supra* in Parts II. A, F.1, and G.

<sup>103</sup> Some school districts have used web-based automated translation to translate documents. Utilization of such services is appropriate only if the translated document accurately conveys the meaning of the source document, including accurately translating technical vocabulary. The Departments caution against the use of web-based automated translations; translations that are inaccurate are inconsistent with the school 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 school district would need to have a machine translation reviewed, and edited as needed, by an individual qualified to do so. 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. School districts using any web-based automated translation services for documents containing personally identifiable information from a student's education record must ensure that disclosure to the web-based service complies with the requirements of the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g(b), and its implementing regulations at 34 C.F.R. Part 99. For more information on this issue, please review the "Protecting Student Privacy While Using Online Educational Services" guidance found at <http://ptac.ed.gov/sites/default/files/Student%20Privacy%20and%20Online%20Educational%20Services%20%28February%202014%29.pdf>.

volunteers may be able to communicate directly with LEP parents 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. School 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, school 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.

- Example 22: A district captures parents’ language needs on a home language survey and stores these data electronically in its student information system. The district analyzes the parent language data to identify the major languages, translates essential district-level documents into the major languages, assists schools with translating essential school-level documents into the major languages and other languages, and stores these translated documents in a database that all schools can access electronically. For less common languages, the district ensures that LEP parents are timely notified of the availability of free, qualified interpreters who can explain district- and school-related information that is communicated in writing to parents. The district also canvasses the language capabilities of its staff, creates a list of staff who are trained and qualified to provide interpreter and/or translation assistance, contracts out for qualified interpreter and translation assistance in languages that are not represented on this list, and trains all schools on how to access these services.

Some examples of when the Departments have found compliance issues regarding communication with LEP parents include when school districts: (1) rely on students, siblings, friends, or untrained school staff to translate or interpret for parents; (2) fail to provide translation or an interpreter at IEP meetings, parent-teacher conferences, enrollment or career fairs, or disciplinary proceedings; (3) fail to provide information notifying LEP parents about a school’s programs, services, and activities in a language the parents can understand; or (4) fail to identify LEP parents.

In their investigations, the Departments consider, among other things, whether:

- ✓ *SEAs and school districts develop and implement a process for determining whether parents are LEP, and evaluate the language needs of these LEP parents;*
- ✓ *SEAs and school districts provide language assistance to parents or guardians who indicate they require such assistance;*
- ✓ *SEAs and school districts ensure that LEP parents have adequate notice of and meaningful access to information about all school district or SEA programs, services, and activities; and*

- ✓ *SEAs and school districts provide free qualified language assistance services to LEP parents.*

## **Conclusion**

We look forward to working with SEAs and school districts to ensure their services for EL students provide those students with a firm foundation for success in their schools and careers. We also encourage SEAs and school districts to reevaluate policies and practices related to their EL programs in light of this guidance to ensure compliance and improve access to educational benefits, services, and activities for all students. Together, through our collaborative efforts, the Departments, SEAs, and school districts can help ensure that all EL students receive equal educational opportunities and that the diversity they bring to our nation’s schools is valued.

Thank you for your efforts to meet the educational needs of EL students. If you need technical assistance, please contact the OCR office serving your State or territory by visiting [www.ed.gov/OCR](http://www.ed.gov/OCR) or by calling 1-800-421-3481. Please also visit the Departments’ websites to learn more about our EL-related work, available at [www.ed.gov/ocr/ellresources.html](http://www.ed.gov/ocr/ellresources.html) and [www.justice.gov/crt/about/edu/documents/classlist.php#origin](http://www.justice.gov/crt/about/edu/documents/classlist.php#origin).

*cited in Flores v. Huppenthal, No. 13-15805 archived on August 10, 2015*