UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Lor Ler Kaw, Lor Ler Hok Koh, Mary Jane Sommerville, and George Thawmoo, on behalf of themselves and all others similarly situated,

Case No. ____________

Plaintiffs,

v.

JURY TRIAL REQUESTED

Independent School District #625,

Defendant.

CLASS ACTION COMPLAINT

Plaintiffs Lor Ler Kaw ("LLK"), Lor Ler Hok Koh ("LLHK"), Mary Jane Sommerville ("Sommerville"), and George Thawmoo ("Thawmoo"), on behalf of themselves and all others similarly situated, state and allege as follows for their Class Action Complaint against Independent School District #625 (the "School District").

INTRODUCTION

1. Plaintiffs bring this class action lawsuit seeking relief from the Court to remedy the School District's illegal discrimination against foreign-born students who are just beginning to learn English. The School District's unlawful policies and practices are depriving these English Language Learners ("ELL" or "EL") of their right to equal educational opportunities and meaningful public education, in violation of federal civil rights statutes, the United States Constitution, Minnesota state law, and the City of Saint Paul's ordinances.

2. LLK and LLHK are refugees of Karen ethnicity and Burmese nationality. Both came to Minnesota from Thailand in 2012. LLK was 15 years old and LLHK was 12 years old. For more than one year prior to their arrival in the United States, they had no schooling at all. They had learned limited English from teachers with extremely limited English, and were barely literate in their own language given the difficult circumstances that they endured. Upon their arrival in the United States, they, for the first time, received school books and had the opportunity to attend school every day.

3. LLK and LLHK are ELL students who are entitled to an equal and meaningful opportunity to participate in public education under federal, state, and local law. This requires public school districts to take affirmative steps to address language barriers for ELL students.

4. Unfortunately, however, the School District has implemented policies and practices that have forced LLK, LLHK, and other immigrant students with limited English proficiency to attend "mainstream" classes, where they do not receive sufficient and effective language instruction. For example, at the time of the 2014-2015 school year, LLK was reading at a second-grade level. But the School District scheduled him in mainstream eleventh-grade English and Social Studies classes, sitting side-by-side with mainstream students who speak English fluently and who had nine or ten years of consistent, formal education. The School District scheduled him for classes to read American literature and perform advanced analyses when he was reading at a second-grade level and just beginning to acclimate to formal schooling. After being thrown into mainstream classes like Biology, English, and Economics, his ability to learn the content

of the courses was impaired because they exceeded his English level. LLHK, similarly, has been placed in mainstream core content courses where his ability to learn the course content was impaired because they exceeded his English level.

5. The School District's mainstreaming policies have denied LLK and LLHK, and others similarly situated, the ability to learn in a language they understand and, ultimately, the ability to become productive members of society.

6. Plaintiffs also bring this action to address the School District's discriminatory practices with respect to special education and disability services for ELL students. Like all other students, ELL students are entitled by federal and state law to screening for special educational services and reasonable accommodations for disabilities. Contrary to this obligation, the School District has implemented practices that improperly consider students' national origin in determining eligibility for special educational services or accommodations, and fail to accommodate students with disabilities by refusing to evaluate them, refusing to reimburse parents for the cost of evaluations they were required to obtain on their own, and causing significant and unreasonable delay in providing the necessary accommodations.

7. LLHK, for example, was not screened for a learning disability until his parents, Thawmoo and Sommerville, obtained – at their own expense – a medical evaluation and threatened the School District with legal action. Despite a medical diagnosis, the School District repeatedly refused to conduct an evaluation. While it eventually performed evaluations because of Sommerville's and Thawmoo's substantial efforts on LLHK's behalf, it still refused to recognize that LLHK qualified for special

education services. The School District improperly and unreasonably delayed providing LLHK with disability services to which he is entitled for over *14 months*.

8. Following an extensive and impartial investigation – including sworn testimony and witness interviews – the City of Saint Paul Human Rights Division determined that "probable cause exists to believe that [the School District] unlawfully discriminated against [LLHK]." The findings were based on the School District's discriminatory practices with respect to ELL students, and ELL students with disabilities.

9. The City of Saint Paul's Memorandum of Findings ("MOF") is attached as Exhibit A, and incorporated by reference. Specifically, the City of Saint Paul concluded:

> The evidence shows probable cause that the [School District] discriminated against the [LLHK] because of his national origin for failing to offer effective instruction that he and other Karen students needed. As a result, the [School District] deny[ed] him the equal opportunity to benefit from his education that was offered to mainstream students.
>
> The evidence also shows probable cause that the [School District] improperly considered [LLHK's] national origin in determining his eligibility for special education services or accommodations. The [School District's] discriminatory treatment of [LLHK] resulted in significant delays in evaluating whether [LLHK] required special education services or accommodations for his disability.
>
> There is also probable cause that the [School District] failed to accommodate [LLHK] by refusing to evaluate him for a disability, suggesting his parents pay for a medical evaluation and not compensating them for the cost, and causing a significant and unreasonable delay in providing him the necessary accommodations.

(Ex. A, MOF, Page 38 of 39.)

10. In addition, the Minnesota Department of Education ("MDE") recently issued a report, attached as Exhibit B, finding that the School District's ELL program was not in compliance in numerous different ways. *Elementary and Secondary Education Act (ESEA): Title III Monitoring Review Compliance Report*, Saint Paul Public School District, Minn. Dep't of Educ. (January 17, 2017). For instance, it found that:

a. Effective implementation of ELD [English Language Development] standards is inconsistent across the School District;

b. Students assessed at certain English language levels were not served at all sites;

c. The School District submitted no evidence that evaluation of the EL [English Learner] program has been done; and

d. Identification of special education needs for EL students is inconsistent and often delayed, which may "contribute to delayed progress in all academic areas."

(Ex. B, MDE Report, pp. 3-4.)

11. As detailed further below, on behalf of themselves and other members of the classes they seek to represent, Plaintiffs request that the Court enter declaratory and injunctive relief, including a preliminary injunction, to cease the School District's illegal, improper, and discriminatory practices toward immigrant ELL students.

JURISDICTION AND VENUE

12. This Court has subject-matter jurisdiction over Plaintiffs' claims arising under federal law pursuant to 28 U.S.C. §§ 1331 and 1343.

13. This Court has jurisdiction to award declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202.

14. This Court may exercise supplemental jurisdiction over the pendent state law claims pursuant to 28 U.S.C. § 1367.

15. Venue in this district is proper pursuant to 28 U.S.C. § 1391(b) because the School District resides in the District of Minnesota and the events that gave rise to this action occurred within the District of Minnesota.

FACTUAL BACKGROUND

16. Through this reference, Plaintiffs incorporate the extensive and detailed Findings of Fact set forth in the City of Saint Paul Human Rights Division's Memorandum of Findings, attached as Exhibit A.

A. The Parties

1. Plaintiff LLK

17. LLK is a Karen refugee.

18. The Karen have traditionally resided in the southern and southeastern parts of Burma (Myanmar). Since the mid-twentieth century, the Karen have been embroiled in an ongoing conflict with the military regime currently controlling Myanmar.

19. As a result of this conflict – when he was four months old – LLK and his father (Thawmoo) were forced to flee their home to escape killings, torture, rape, landmines, forced labor, and other atrocities committed by that country's military regime. They took sanctuary in Thailand, where they lived in refugee camps and temporary housing for years.

20. LLK grew up speaking Karen and some Burmese. He received sporadic education while living in Thailand, often from teachers who were not qualified and lacked necessary skills and materials.

21. In October 2012, LLK resettled in the United States.

22. LLK had little exposure to the English language prior to arriving in the United States, and he did not know any English when he arrived. He did not receive any schooling in the previous two years before arriving in the United States.

23. LLK is a student with Limited or Interrupted Formal Education (SLIFE).[1] SLIFE learners like LLK have no or very limited prior education, literacy in any language, English proficiency, and are typically refugees. SLIFE learners need to acquire basic academic skills and literacy in order to learn the required material. This is because the older a student is at the onset of literacy and schooling, the longer it takes to acquire English and academic proficiency, and the harder it is to acquire the skills and the greater the need for customized instruction.

24. LLK has been an ELL student within the School District since he arrived in the United States, and he still is today.

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[1] Minnesota defines SLIFE as an English learner with interrupted formal education who (1) comes from a home where the language usually spoken is other than English, or usually speaks a language other than English, (2) enters school in the United States after grade 6, (3) has at least two years less schooling than the English learner’s peers, (4) functions at least two years below expected grade level in reading and mathematics, and (5) may be preliterate in the English learner’s native language. Minn. Stat. § 124D.59, subd. 2a.

25. LLK is currently matriculated at Como Park Senior High School ("Como Senior High"), which is a high school within the School District. When school starts in the fall, LLK will be a twelfth grader.

26. As a Karen refugee, LLK is a member of a protected class on the basis of national and ethnic origin.

2. Plaintiff LLHK

27. LLHK is LLK's brother. He is also a Karen refugee.

28. LLHK was born and lived for several years in Thailand, where his father (Thawmoo) and older brother (LLK) had fled to escape the atrocities committed by the military regime in control of their home country.

29. Like his brother, LLHK grew up speaking Karen and some Burmese.

30. In October 2012, LLHK resettled in the United States.

31. LLHK had little exposure to the English language prior to arriving in the United States, and he did not know any English when he arrived. He did not receive any schooling in the previous two years before arriving in the United States.

32. Like his brother, LLHK is also a SLIFE learner. LLHK received sporadic education while living in Thailand, often from teachers who were not qualified and lacked necessary skills and materials.

33. Today, LLHK reads English at a fourth-grade level, and reads fourth-grade level books from the children's section.

34. LLHK is an ELL student within the School District.

35. In addition, LLHK has been diagnosed with a learning disability, specifically Attention Deficit Disorder-Inattentive Type and Adjustment Disorder with Mixed Anxiety/Depression.

36. LLHK is matriculated at Como Senior High. When school starts in the fall, LLHK will be an eleventh grader at Como Senior High.

37. As a Karen refugee, LLHK is a member of a protected class on the basis of national and ethnic origin.

3. Plaintiffs Thawmoo and Sommerville

38. Thawmoo, also a Karen refugee, is the father of LLK and LLHK.

39. Sommerville is married to Thawmoo, and is LLK's and LLHK's stepmother.

40. Sommerville and Thawmoo are actively involved in LLK's and LLHK's education. They have incurred significant time, effort, and expense in obtaining equal educational opportunities for their children, only to have the School District repeatedly ignore, refuse, and improperly delay their requests. For example, they have spent large amounts of time organizing meetings or otherwise communicating with teachers, school counselors, assistant principals, principals, assistant superintendents, school board members, academic officers, the Karen Parent Advisory Council, the PACER Center, and others to address the School District's improper treatment of ELL students within the School District.

41. Thawmoo and Sommerville have spent their own money as a result of the School District's conduct, including, for example, money on medical evaluations insisted

upon by the School District and supplemental tutoring for their sons to try to remedy the lack of proper education being provided by the School District.

42. Sommerville and Thawmoo have also suffered significant and continuing distress seeking proper educational services for LLK and LLHK.

43. On April 13, 2015, on behalf of her minor stepson LLHK, Sommerville filed a Charge of Discrimination with the Saint Paul Department of Human Rights & Equal Economic Opportunity, Human Rights Division asserting national origin and disability discrimination by the School District. The findings attached at Exhibit A, issued over two years later, are the culmination of that effort.

4. The School District

44. The School District is a school district within the State of Minnesota organized pursuant to Minn. Stat. ch. 123B. The School District's headquarters are at 360 Colborne Street, Saint Paul, Minnesota 55102.

45. As a public entity, the School District receives federal funds.

46. The School District is a Local Educational Agency ("LEA") responsible for ensuring that students receive an education consistent with federal and state law.

47. The School District is also required to comply with state educational laws.

48. The School District is a State actor and, at all relevant times, acted under color of state law as defined by 42 U.S.C. § 1983.

B. <u>Legal Framework</u>

1. Federal Requirements

49. The United States Supreme Court has recognized that "[b]asic English skills are at the very core of what [] public schools teach." *Lau v. Nichols*, 414 U.S. 563, 567 (1974). The Supreme Court has held that school districts must take affirmative steps to ensure that students learn sufficient English skills to have a meaningful opportunity to participate in a district's educational program. *Id.* "[T]here is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; *for students who do not understand English are effectively foreclosed from any meaningful education*." *Id.* at 566 (emphasis added).

50. Numerous federal laws provide that students with limited English proficiency are entitled to equal access to all public school programs and services offered by their school districts. The Equal Educational Opportunities Act ("EEOA") provides that "[n]o State shall deny equal educational opportunity to an individual on account of his or her … national origin, by … the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703(f). Title VI of the Civil Rights Act of 1964 ("Title VI") prohibits recipients of federal financial assistance, including school districts, from discriminating on the basis of national origin and requires school districts to take "affirmative steps" to address language barriers so that ELL students can participate meaningfully in educational programs. *See, e.g.*, 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be

excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."); *Lau*, 414 U.S. at 566-67; 34 C.F.R. § 100.3.

51. Federal law also requires that ELL students who may have a disability be located, identified, and evaluated for special education and disability-related services in a timely manner. *See, e.g.*, 20 U.S.C. §§ 1400-1419 (the Individuals with Disabilities Education Act ("IDEA")); 29 U.S.C. § 794 (Section 504 of the Rehabilitation Act of 1973 ("Section 504")).

52. The Office for Civil Rights (OCR) at the U.S. Department of Education and the Civil Rights Division at the U.S. Department of Justice (DOJ) share authority for enforcing Title VI in the education context. DOJ is responsible for enforcing the EEOA. OCR and DOJ also share authority for enforcing Section 504 in the educational context, while the Department of Education's Office of Special Education Programs administers the IDEA. In January 2015, OCR and DOJ issued joint guidance to assist school districts and others in meeting their legal obligation to ensure that ELL students can meaningfully and equally participate in educational programs and services ("Joint Guidance").[2] The Joint Guidance is attached as Exhibit C.

53. The Joint Guidance identifies several areas that "frequently result in noncompliance" in meeting a school district's obligations to ELL students, including:

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[2] *See* Catherine E. Lhamon & Vanita Gupta, United States Department of Justice & United States Department of Education, *Dear Colleague Letter: English Learner Students and Limited English Proficient Parents,* pp. 1, 24 (Jan. 7, 2015), *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf.

a. Failure to provide EL students with a language assistance program that is educationally sound and proven successful;

b. Failure to 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;

c. Failure to evaluate the effectiveness of a school district's language assistance program(s) 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

d. Failure to ensure that EL students with disabilities under the 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.

(Ex. C, Joint Guidance, pp. 8-9.)

54. The Joint Guidance further relates that:

> To provide appropriate and adequate EL program services based on each EL student's individual needs, and to facilitate transition out of such services within a reasonable time period, a school district will typically have to provide more EL services for the least English proficient EL students than for the more proficient ones. In addition, districts should provide designated English Language Development (ELD)/English as a Second Language (ESL) services for EL students at the same or comparable ELP levels to ensure these services are targeted and appropriate to their ELP levels.

(*Id.*, p. 13.)

55. The Joint Guidance explains that compliance issues arise when school districts: (i) exclude EL students with scheduling conflicts from the EL program; (ii) supplement regular education instruction with only aides who tutor EL students as opposed to teachers adequately trained to deliver the EL program; (iii) fail to offer a program to a certain subset of EL students, such as students with disabilities or students speaking particular languages; (iv) stop providing language assistance services when EL students reach higher levels of English proficiency but have not yet met exit criteria (including proficiency on a valid and reliable ELP assessment); or (v) fail to address the needs of EL students who have not made expected progress in learning English and have not met exit criteria despite extended enrollment in the EL program. (*Id.*, p. 14.)

56. The Joint Guidance provides that school districts must also adequately monitor and exit EL students from EL programs and services. (*Id.*, pp. 32-35.) Compliance issues arise when school districts: (i) 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; and (ii) prematurely exit students before they are proficient in English, especially in the specific language domains of reading and writing. (*Id.*, p. 34.)

57. In addition, school districts must evaluate the effectiveness of their EL programs for compliance. As the Joint Guidance explains:

> 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. The Departments will not view a program as successful unless it meets these two goals.

(*Id.*, p. 35.)

58. With respect to disability screening and accommodations, the Joint Guidance explains that school districts must "ensure that all EL students who may have a disability, like all other students who may have a disability and need services under IDEA or Section 504, are located, identified, and evaluated for special education and disability-related services in a timely manner." (*Id.*, p. 24.) Under IDEA, a school district must also implement education programs that meet the student's language and special education needs. (*Id.*, pp. 26-27.) Parents must also be informed of, and consulted regarding, these programs. (*Id.*, pp. 24-27.)

59. Compliance issues surrounding disability services include when school districts: (i) deny English language services to EL students with disabilities; (ii) evaluate EL students for special education services only in English when the native and dominant language of the EL student is other than English; (iii) fail to include staff qualified in EL instruction and second language acquisition in placement decisions under the IDEA and Section 504; or (iv) fail to provide interpreters to LEP parents at meetings to ensure that LEP parents understand the proceedings. (*Id.*, p. 29.)

60. In particular, the Joint Guidance identifies that a practice of delaying disability evaluations of EL students for special education and related services for a specified period of time based on their EL status, or allowing students to have *either* EL

or disability services but *not both*, are "impermissible under the IDEA and Federal civil rights laws." (*Id.*, p. 25.)

2. State Requirements

61. Education is a fundamental right under the Minnesota Constitution. *See* Minn. Const. art. XIII, § 1 ("The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools. The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state."); *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993) ("[W]e hold that education *is* a fundamental right under the state constitution, not only because of its overall importance to the state but also because of the explicit language used to describe this constitutional mandate.") (emphasis in original).

62. Public schools in Minnesota are free to any resident of the district up to age 21. Minn. Stat. § 120A.20, subd. 1.

63. State law sets out certain minimum requirements for ELL programs in Minnesota. *See*, *e.g.*, Minn. Stat. § 124D.61; 2014 Minn. Laws ch. 272 (Learning English for Academic Proficiency and Success Act ("LEAPS")).

64. The MDE administers the state's ELL program. In 2011, the MDE joined the World-Class Instructional Design and Assessment ("WIDA") Consortium, which advances social, instructional, and academic language development and achievement for linguistically diverse students. *See English Language Education in Minnesota*, Fall 2016 Report, Minn. Dep't of Educ.

65. Minnesota has adopted the WIDA English Language Proficiency ("ELP") standards and the ACCESS for ELLs 2.0 (Assessing Comprehension and Communication in English State-to-State for English Language Learners) as the annual state English Language Proficiency Assessment. (*Id.*, p. 6.)

66. ACCESS for ELLs has six levels of proficiency, starting from an entry level for students who have few English language skills (Level 1) to the final level (Level 6) at which students are deemed proficient. (*Id.*, p. 6.)

67. Under these standards, at the end of Level 2, students should achieve skills like comprehension of compound grammatical constructions and speaking in phrases or short sentences. At the end of Level 3, students should achieve skills like listening to or reading a series of extended sentences and speaking and writing with short and some expanded sentences with emerging complexity. (*Id.*, pp. 8-9.)

C. <u>The School District's Discriminatory ELL Policies and Practices</u>

68. As set forth below, in or around the middle of the 2013-2014 school year, the School District implemented policies and practices that transitioned ELL students at all levels into mainstream classes where they were not provided the language resources they needed to succeed. LLK, LLHK, and other immigrant and refugee students like them, including SLIFE students, could not keep up in classes taught predominantly in English, and began to fall behind. The School District graduated ELL students even though their language skills remained at grade-school levels, and they could not succeed at any two-year college without additional remedial English instruction. As a result,

LLK, LLHK and others similarly situated have been and continue to be denied an equal opportunity to education, and have suffered and continue to suffer harm.

1. The School District's Change to "Mainstreaming" ELL Students

69. Midway through the 2013-2014 school year, the School District made a drastic change as to how it taught ELL students. At that time, it decided to mainstream ELL students. Some Level 1 and Level 2 students were placed in mainstream classes. Level 3 and Level 4 students – who were improperly grouped together despite having different educational needs – were required to move from their sheltered ELL classes into mainstream classes regardless of whether the students were ready for mainstream instruction. Level 5 students were released to mainstream classes without support or monitoring.

70. When the School District introduced this new and dramatically different policy, the then Assistant Superintendent of the Multilanguage Learner Program stated: "How can students succeed if they don't fail?" (Ex. A, MOF, Page 10 of 39.) That statement demonstrates that the School District expected ELL students to fail.

71. The School District's Assistant Superintendent at the time also accused ELL teachers of "coddling" the ELL students. She has cited an example of a high school ELL classroom using "Twinkle, Twinkle Little Star" as an example of "coddling." (*Id.*)

72. The School District did not notify parents of this change to its policy before it was implemented. Instead, parents of ELL students learned of the change when the teachers informed them their students would be moved to mainstream classes in early 2014. Further, the School District's Superintendent wrote a letter about the change only

after it had already been implemented. Parents were notified of the change after the open-enrollment application process had closed.

73. The City of Saint Paul Human Rights Division determined that the School District's policy change was "clear and memorable," stating:

> [T]he evidence clearly shows that midway through the 2013-2014 school year, ELL students that were in sheltered classes in the Fall of 2013, were shifted to mainstream classes the next quarter in 2014. The evidence shows that this was a clear and memorable change because of the sudden shift between quarters was not what students, parents, or teachers were expecting or prepared for.

(Ex. A, MOF, Page 32 of 39.)

74. The City of Saint Paul further determined that this change was not compliant with state or federal law:

> The switch to mainstreaming ELL students included a heavy reliance on co-taught classes which included a mainstream teacher and an ELL teacher, sometimes would include English Language Development support, but sometimes it would not. Sometimes Level 3 students are in a core content class and receive no ELL services; there is only a mainstream teacher and no additional supports. The MLL Department controls the funding for the ELL program. Evidence shows that the School District allowed each principle [sic] to determine the schedule and staffing for ELL classes and that budget was a primary consideration. This practice has been specifically identified as noncompliant with applicable Civil Rights Laws.

(*Id.*)

75. The City of Saint Paul concluded that the School District implemented its mainstreaming policy without having a method to identify students who were struggling in mainstream classes, without a plan to evaluate the effectiveness of its mainstreaming

approach, and without attempting to compare the progress of ELL students before the mainstreaming policy with the progress of ELL students after the mainstreaming policy. (*Id.*, Pages 32-33 of 39.)

2. The Effect of the School District's Noncompliant Mainstreaming Policy

76. When he arrived in the United States, LLK was enrolled in Como Senior High as a freshman. He was placed in ELL Level 1 for the 2012-2013 school year. For the 2013-2014 school year, he was at ELL Level 2. For the first two years, he was primarily enrolled in ELL supported classes, where he received As, Bs, and a small number of Cs.

77. In contrast, for the 2014-2015 school year, the School District placed LLK into mainstream classes as a Level 3 ELL student. In addition to classes like biology and economics, the mainstream classes included eleventh-grade English and Social Studies classes, which have heavy reading requirements that are very difficult for students whose English is not at the same reading level. By way of example, by spring of 2014, LLK had only learned limited English starting two years earlier, was reading at a second grade level, and was consequently reading level-appropriate books from the children's section. The eleventh-grade English curriculum includes studying American literature and performing advanced research and analyses (such as in-depth study of irony and sarcasm).

78. LLK's ability to learn the content of his classes was impaired when the School District put him in mainstream classes because the classes exceeded his English level, which is demonstrated by the fact that his grades suffered significantly. Whereas

he had previously achieved As, Bs, and a small number of Cs, LLK began receiving Ds (for the first time since he arrived in the United States) and many Cs because the classes were above his English level.

79. The following year, Sommerville and Thawmoo requested that LLK be held at ELL Level 3 in light of these difficulties. However, the School District continued to place him in mainstream classes. Despite retaking biology, he did not perform well or understand the content. He failed Algebra 2.

80. LLK's brother, LLHK, was also harmed by the School District's mainstreaming policy. When he first arrived in the United States, LLHK attended a middle school in Roseville, outside the School District. There, he was enrolled in a Level 1 ELL course. His class size was approximately 17 students, he received one-on-one instruction, and he performed at an average level.

81. In 2013, LLHK enrolled as a ninth grader at Como Senior High, a school within the District. He was placed in ELL Level 2 classes and, at least initially, was provided additional support services and kept out of mainstream courses.

82. In the first quarter of 2014, while in ELL Level 2, LLHK was mainstreamed in two out of seven courses. Like his older brother, LLHK had difficulty understanding his mainstream instructors and course materials. He did not perform well, and was not receiving adequate ELL services or the individual support he needed to have a meaningful education.

83. The sudden transition to mainstream classes was very hard on many students, including LLK and LLHK.

84. Since the School District's mainstreaming policy came into effect, Level 3 ELL students in mainstream classes have achieved lower grades than ELL classes teaching the same content.

85. Moreover, mainstream teachers have been giving ELL students passing grades, even though they lack proficiency in the subject matter and their work does not merit a passing grade. This was based, in part, on mainstream teachers who perceived that Karen ELL students, who generally do not speak up or say much, had good behavior and work ethic.

86. As a result, many ELL students at high school graduation do not have basic language skills. Some ELL students graduate with a below sixth-grade reading level. Other ELL students who are not on track to graduate in four years have been encouraged to transfer to another school or an Alternative Learning Center so that the public school can maintain graduation rates, even though they are allowed to attend public school until they turn 21 years old.

87. Mainstreaming has also had an adverse impact on ELL students' postsecondary school opportunities. Even though they technically pass and can graduate, in general, students with a C- average are not ready for a two-year college. Karen ELL students in postsecondary education have been forced to spend the first two years of their education focusing on continuing language development, before they can focus on content classes. These students use up their PELL grant funds on remedial English classes and do not receive college credit for these classes. Karen ELL students that

graduated under the previous instruction model were reported to perform better in post-secondary system than those that were mainstreamed across the board at Level 3.

88. The City of Saint Paul determined that mainstreaming at ELL Level 3 is "not effective for many Karen students who had limited formal education." It noted how the School District's policies have negatively affected these ELL students:

> The ELL services do not provide Karen students, including [LLHK], a meaningful opportunity to participate in the [School District's] academic program to the same extent as mainstream students. The [School District] also does not provide a dual-language ELL program in Karen that is available to Hmong and Spanish-speaking students. Simply moving the Karen students in the mainstream courses without monitoring has been insufficient to ensure meaningful participation. Particularly when there have been numerous and consistent reports that Karen students have not been able to access the curriculum and their learning needs have been overlooked because as a group, they tend to be quiet, respectful and cooperative.

(Ex. A, MOF, Page 33 of 39.)

89. In addition, compared to ELL classes, ELL students in mainstream classes do not receive the same level of individual attention and skill development to be able to progress with English language skills.

3. The School District's Refusal to Address the Consequences of Mainstreaming Despite Findings of Discrimination

90. The impact of the School District's mainstreaming policy on ELL students, including the Karen refugee students, was repeatedly brought to the School District's attention.

91. The topic was frequently raised at the Professional Issues Committee ("PIC"). Teachers in the School District identified issues with Karen students in mainstream classes, including that they acquired English at a slower rate, adopted coping strategies to get passing grades (including copying other students), were being passed by mainstream teachers even though they had not learned the material, and needed to take remedial English classes at post-secondary schools for a year or more before they were ready for post-secondary courses. School District staff attended PIC meetings, so the School District knew of these complaints.

92. At the PIC meetings and through other communications, the School District was informed that many SLIFE students, because of their limited formal education, still needed to master basic literacy skills that other students would have learned early on in their education. Therefore, the School District was informed that the mainstreaming policy was not appropriate for a significant number of SLIFE students, who are at an elementary English level and are expected to keep up in high school level English, Social Studies, and literacy-intensive classes.

93. Concerns were also being voiced in the Karen community. The Karen Parent Advisory Council received an "outpouring of calls from Karen parents expressing their concern about the struggle their children are experiencing in the classroom due to the changes [in ELL-Levels] in secondary schools." (Ex. A, MOF, Page 16 of 39.) At council meetings, parents shared concerns that the mainstreamed students were not able to understand the curriculum, and were graduating without the English skills they needed to succeed.

94. Thawmoo and Sommerville raised specific concerns with the School District regarding LLK and LLHK's placement in mainstream classes. Sommerville repeatedly expressed serious concerns to LLK's and LLHK's teachers and counselors that they were not understanding the content of their classes (getting lower grades in mainstream classes), and identified the challenges that they faced in learning in a new environment and culture.

95. Sommerville wrote a detailed letter to the Saint Paul School Board outlining her concerns.

96. In response to such complaints, the School District's Assistant Superintendent responded: "I can't isolate any longer and drill to kill in grammar." (Ex. A, MOF, Pages 17 and 21 of 39.)

97. Because the School District refused to address the problem, LLHK began repeating EL levels in 2014-2015 and LLK began repeating EL levels in 2015-2016 in an attempt to get language development support they needed. Thawmoo and Sommerville were concerned that with limited or no support offered in co-taught classes, their children would not receive effective instruction to grasp core concepts.

98. Concerns regarding the School District's mainstreaming policies continued to mount throughout the 2014-15 school year.

99. At an October 9, 2014, ELL PIC meeting, a teacher reported that twelfth-grade ELL students were going to graduate with only a second- or third-grade level of English, but would have learned more if they were in an ELL Level 3 class. (Ex. A, MOF, Page 22 of 39.)

100. At a Karen Parent Advisory Committee meeting on November 7, 2014, parents expressed concerns about their students being mainstreamed, being unable to understand the curriculum, and graduating without the necessary English skills to access postgraduate opportunities without first having remedial English classes. (*Id.*, Page 25 of 39.)

101. At a December 16, 2014, meeting, Sommerville presented a petition with 512 signatures from School District students, parents, faculty, staff, and community members regarding concerns about the School District's mainstreaming policy. She reported that students in the School District were being rushed into mainstream classes and were not being provided the necessary support. She further noted that the pedagogy employed by the School District for ELL students was not research-based. (*Id.*, Page 27 of 39.)

102. On April 13, 2015, Sommerville filed a charge of discrimination with the City of Saint Paul asserting national origin discrimination based on the School District's new "mainstreaming" policy. On May 5, 2017, after a multi-year investigation, the City of Saint Paul Human Rights Division determined that "the evidence shows probable cause that the [School District] discriminated against [LLHK] because of his national origin." (*Id.*, Page 38 of 39.)

103. As recognized by the City of Saint Paul, despite ample knowledge regarding the adverse effects of the mainstreaming policy, the School District has failed to ensure that Karen ELL students are provided a meaningful educational opportunity, and failed to even implement methods to evaluate its change in policy:

> Even though the [School District] knew or should have known that Karen students would be particularly vulnerable to struggle under the mainstreaming policy, the [School District] has not made any efforts to ensure that Karen students would not be left behind. Moreover, although evaluation is required, the [School District] has had no plan to evaluate its mainstreaming approach, even as it has been learning of serious consequences for Karen students.

(*Id.*, Page 33 of 39.)

104. In January 2017, after an audit that involved more than 100 witness interviews and a comprehensive policy review, the MDE issued a report regarding the School District's ELL policies. Many of its findings confirmed concerns that had been raised by Thawmoo and Sommerville along with other members of the community. (*See generally* Ex. B, MDE Report.)

105. Regarding the quality of the School District's language instructional educational programs for ELL students, the MDE Report made the following finding:

> Finding 2.1.1: The [School District] provided evidence that effective implementation of ELD standards is inconsistent across the district. While evidence provided demonstrates some training on the ELD standards, other evidence reveals that few people received such training. Secondary-level syllabi provided in the evidence binder do not demonstrate understanding of ELD standards implementation.

(Ex. B, MDE Report, p. 3.)

106. The MDE Report found a lack of evidence that the School District evaluated the programs and activities to determine effectiveness:

> Finding 2.3.1: No evidence was provided that evaluation of the EL program has been done.

(*Id.*, p. 4.)

107. The MDE Report found that the School District failed to provide consistent services to students at or above Level 3:

> Recurring Finding 2.5.1: Evidence was provided that students assessed at WIDA levels 3-5 are not served at all sites.

(*Id.*)

108. The MDE Report found that there was a lack of appropriate licensure and qualifications of ELL teachers in the School District. (*Id.*, p. 5 ["Evidence was provided that some teachers of Sheltered Content courses are not appropriately licensed."]; *id.* ["Little evidence was provided to support that core content teachers and administrators receive EL training …. training around EL education does not include professional development directly relevant to culturally responsive pedagogy that enables students to master content, develop skills to access content, and build relationships."].)

109. Although the School District is aware of the adverse impacts of its mainstreaming policies and practices, the School District continues to mainstream ELL students at Level 3 and fails to otherwise provide full and proper services to ELL students to overcome their language barrier.

110. The School District's policies and practices have harmed, and continue to harm, Plaintiffs and members of the class.

D. <u>The School District's Improper Disability Practices</u>

111. As set forth below, the School District has an improper practice of refusing or delaying evaluations for ELL students who are referred for special education services as a result of a suspected disability.

1. The School District's Failure to Evaluate or Accommodate LLHK's Disability

112. In late 2013, Sommerville first approached the School District with concerns that LLHK's academic performance may have been suffering due to a medical condition. She explained that he was having challenges in organization and understanding and completing his schoolwork. She shared her concerns that this may have been caused by a disability.

113. When Sommerville first contacted the School District, Sommerville and Thawmoo were not provided an overview of the process or options for accommodations available for LLHK. For instance, the School District did not inform Sommerville or Thawmoo that there were two separate avenues to receive accommodations or special education services – a special education process and a Section 504 accommodation process. As a result, Thawmoo and Sommerville did not know that there was a Section 504 accommodation process or that it would be faster and easier to qualify for accommodations through this option. (Ex. A, MOF, Page 38 of 39.)

114. On multiple occasions through late 2013 and early 2014, Sommerville requested from the School District special education testing and immediate steps to help LLHK. Instead of offering options for LLHK or evaluating him for a disability, the School District instructed Sommerville to schedule an appointment with his physician to determine whether there was a diagnosis.

115. Sommerville and Thawmoo were forced to use their own insurance and funds for LLHK's medical evaluation. The School District did not offer to reimburse them for these costs.

116. Four months after LLHK's parents first requested an evaluation by the School District, LLHK's medical provider diagnosed him with Attention Deficit Disorder — Inattentive and Adjustment Disorder with Mixed Anxiety/Depression. His physician noted that this diagnosis "appear[s] to be causing [LLHK's] significant academic impairment." (Ex. A, MOF, Page 16 of 39.) His physician recommended that LLHK's parents request comprehensive school assessment and an evaluation to determine whether he qualified for an IEP.

117. Sommerville promptly informed the School District of the diagnosis and recommendation and requested a special education evaluation be performed in the same school year, so that LLHK could obtain the necessary accommodations that year and during summer school.

118. Despite knowledge of LLHK's diagnosis and medical recommendations, the School District refused to perform the special education evaluation. The School District also rejected pursuing a Section 504 Plan.

119. The School District's decision to deny special education evaluation was based on the erroneous conclusion that LLHK was performing at average levels at Como Senior High, and had performed well at his middle school in a different district. The School District did not consider: (i) that Thawmoo and Sommerville (who is a native-English speaker) were spending a considerable amount of time assisting LLHK with

homework and organizing his materials; (ii) that two of his teachers had made informal accommodations for him; or (iii) that LLHK's "average" grades were achieved in middle school, where he was in a school with smaller class sizes and more one-on-one attention, and tools and instruction to help him stay organized (the exact accommodations that he needed on a going-forward basis). (*See* Ex. A, MOF, Page 36 of 39.)

120. As part of its justification for denying LLHK a special education evaluation, the School District noted that he had only been in the country for one year.

121. The School District's 2013-2014 checklist for determining whether a referral for special education is appropriate includes the student's length of time in the United States and/or education history. (Ex. A, MOF, Page 11 of 39.)

122. The City of Saint Paul Human Rights Division specifically determined that LLHK's status as an ELL student contributed to the School District's decision to initially reject conducting a special education evaluation. (*Id.*, Pages 34-35 of 39.)

123. Nevertheless, Thawmoo and Sommerville, on LLHK's behalf, persisted in their request for special education evaluation and accommodations. After they informed the School District that they were considering legal action, the School District finally agreed to perform a special education evaluation.

124. The evaluation, which began in May 2015, took more than three months. LLHK's teachers observed that he had difficulty with fidgeting, easy distraction, trouble paying attention, organization, and other characteristics. The evaluation, however, only observed his performance in math class. The School District's September 9, 2014, Evaluation Report found that LLHK's academic performance was lower than his siblings,

that he had difficulty understanding directions, that he needed assistance from his stepmother to understand the directions, that he needed assistance completing his homework, that he often became distracted when doing homework, and that he needed reminders to direct his attention back to his homework. The report notes that LLHK performed better after being transferred to a smaller ELL class and when receiving individualized attention. Nevertheless, the Evaluation Report concluded that LLHK still did not demonstrate a need for special educational services.

125. Because the School District refused to evaluate LLHK for special education services when Thawmoo and Sommerville first requested them in November 2013, LLHK attended the second half of the 2013-2014 school year and a semester of summer school, without accommodations. During this time, and despite the pendency of the request for evaluation, the School District did not explore possible accommodations, even once it became clear that the evaluation would be postponed over summer break.

126. Because the Evaluation Report was based on observations from LLHK's math class, Thawmoo and Sommerville requested a new evaluation to review his performance in all classes. The School District ultimately conducted a second evaluation, and a report was issued in October 2014, when LLHK was in tenth grade. The report indicated that LLHK was diagnosed with Attention Deficit Disorder — Inattentive Type and Adjustment Disorder with Mixed Anxiety/Depression. Nevertheless, it remarkably determined that LLHK still did not meet the eligibility requirements for an educational disability.

127. Finally, more than one year after Sommerville first requested accommodations, in late 2014, the School District offered to prepare a Section 504 plan for LLHK.

128. On January 16, 2015 – more than one year after Sommerville requested a special education evaluation – the School District's Section 504 evaluation team concluded that LLHK had a mental impairment of ADD/ADHD, which substantially limits a major life activity of learning and concentrating. The evaluation team concluded that the LLHK's ADD limits him at school due to distractions and the inability to concentrate and focus without accommodations. The team concluded that he met eligibility standards to be identified as having a Section 504 disability, and required reasonable accommodations.

129. The requested accommodations were not provided until 14 months after Thawmoo and Sommerville, on behalf of LLHK, made the initial request for disability accommodation and evaluation. The delay in providing required evaluation, and lack of accommodations during this period, impaired LLHK's academic development, academic progress, and timeline for graduation.

130. The City of Saint Paul Human Rights Division concluded that the School District's behavior was discriminatory on the basis of national origin and disability. (Ex. A, MOF, Page 38 of 39.)

2. The School District's Refusal to Address its Discriminatory Disability Services

131. While the School District claims that it does not have a policy that specifically prohibits special education testing for ELL students, it has been widely observed that it is very difficult for ELL students to be tested for special education until the student's third or fourth *year* in the country.

132. Like LLHK, other ELL students also face excessive delays, noticeably longer than mainstream students, in obtaining special education evaluations and accommodations. This is true even if the student's disability is obvious. In one example cited by the City of Saint Paul, a vision impaired ELL student waited nine months before receiving an Individualized Education Plan ("IEP"). While this student was waiting for the IEP, the student had to stand inches from the board to see what was written. Similarly, a hearing-impaired ELL student had to wait 16 months to receive an IEP. Another student had serious behavioral issues suggesting a developmental delay. When the student was referred for a special education evaluation, his behavior was described as "[refugee] camp" behavior and not related to a disability. The student stayed in the classroom the entire year before his parents transferred him to another school, where he was ultimately evaluated for and diagnosed with a disability and received special education services. (Ex. A, MOF, Pages 12 and 21 of 39.)

133. At an April 16, 2015, PIC meeting, teachers specifically reported concerns about the delays ELL students experienced in being referred for special education. School District staff informed teachers that they would not consider ELL students for

special education, that too many ELL students were being referred, and that students need to be in the country for three years before they could be referred for special education. Teachers reported that ELL students with medical diagnoses were not receiving special education services. Teachers gave examples of students with traumatic brain injuries or developmental delays that were told they do not qualify for services. They gave examples of students with clear developmental delays and diagnoses waiting 15 months for services. When parents requested ELL services for a child that had a rock dropped on his head, they were told to take him to the doctor. (Ex. A, MOF, Page 28 of 39.)

134. As the City of Saint Paul summarized:

> The Professional Issues Committee discussed numerous cases where even students with apparent disabilities such as developmental delay or vision impairment did not receive serves [sic] for 9 to 15 months after beginning school in the District. Enough professionals identified a pattern in the delay for special education referrals and evaluations for accommodations[] that they asked whether there was a policy to delay evaluations for ELL students until they had lived in the United States for three years. Although the district denies having such a policy remains in place, the practice of delaying evaluations due to ELL status has persisted. Some teachers at the Professional Issues Committee meetings reported that they were told not to refer ELL students because students of color were overrepresented in referrals of students of color for disability services. Although school districts are cautioned against mistaking a students' English Language Level for a disability, in this case the [School District] failed to promptly evaluate valid referrals and requests for ELL students because they were ELL students. U.S. born students that were not learning English were not subjected to these delays. This is national origin discrimination in the provision of services and prohibited by the Ordinance.

(*Id.*, Pages 34-35 of 39.)

135. As a result of the School District's discriminatory practices, LLHK and members of the class have been denied, and continue to be denied, access to educational opportunities. Accordingly, Plaintiffs (other than LLK) have suffered, and continue to suffer, harm as a result of the School District's conduct.

CLASS ACTION ALLEGATIONS

136. Plaintiffs bring this suit individually and as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2) on behalf of all similarly-situated individuals.

137. Plaintiffs seek to represent an "ELL Class," defined as follows:

> All foreign-born, English Language Learner (ELL) students who attend school within the School District.

138. Plaintiffs, except LLK, also seek to represent the "Disability Class," defined as follows:

> All foreign-born, English Language Learner (ELL) students who attend school within the School District and who have had a desire expressed on their behalf (such as by a parent, guardian, teacher, or counselor) for an evaluation concerning suspected disability, for disability accommodations, or for special education and related services.

A. Rule 23(a)(1): Numerosity

139. The ELL Class and the Disability Class are each so numerous that individual joinder of all members is impracticable.

140. According to the School District's website, the School District has more than 39,000 students. *See* http://www.spps.org/domain/1235 (available as of June 28, 2017).

141. According to the School District's website, "[a]pproximately 34% of students are English Language Learners." *See* http://www.spps.org/domain/1235 (available as of June 28, 2017). According to the School District, over 14,000 students are English Language Learners.

142. Upon information and belief, the School District has approximately 1,000 SLIFE students. Upon information and belief, approximately half of the SLIFE students within the School District are Karen.

143. According to the School District's website, "16% of students require special education services." *See* http://www.spps.org/domain/1235 (available as of June 28, 2017). Thus, counting only the students that the School District has already acknowledged, over 6,000 students require special education services. Upon information and belief, additional students within the School District need to be properly evaluated to determine if they have disabilities such that they need special education and related services.

144. The exact number of members of each class is not currently known to Plaintiffs but, based on the above, will be thousands of students.

145. In addition to the large number of students within each of the classes, joinder of the members of the classes would also be impracticable because the proposed class members are foreign-born students who are not proficient in English or familiar with the United States legal system. In addition, many parents or guardians of ELL students will themselves have limited English proficiency, lack familiarity with the

United States legal system, and lack resources necessary to effectively advocate for their children.

B. Rule 23(a)(2): Commonality

146. There are questions of law and fact common, respectively, to the ELL Class and to the Disability Class.

147. With respect to the ELL Class, LLK, LLHK, and all proposed class members are ELL immigrants. Members of the proposed ELL Class have been or will be adversely affected by the School District's discriminatory and illegal policies in its ELL program. For example, and without limitation, each member of the ELL Class raises the same fundamental and vital question of law: whether the School District's policies concerning how ELL students are taught violate the law?

148. Similarly, with respect to the Disability Class, LLHK and all proposed class members are ELL immigrants who also have expressed a desire for potential disability accommodations, special education, and related services. The School District's improper practices of impeding referrals of ELL students for special education services and delaying evaluations due to ELL status has persisted. For example, and without limitation, each member of the Disability Class raises the same fundamental and vital question: whether the School District's practices concerning identifying, evaluating, and accommodating ELL students for disabilities violate the law?

149. Determination of these common questions will turn on an evaluation of the same legal standards, requirements, and policies and practices of the School District.

C. <u>Rule 23(a)(3): Typicality</u>

150. Plaintiffs' claims are typical of those of the proposed classes.

151. LLK and LLHK, like the proposed class members, are ELL students. LLHK, like the proposed members of the Disability Class, is a student with a disability. Plaintiffs' claims, like the proposed class members, arise from the School District's improper policies and practices with respect to how it educates ELL students and how it fails to properly identify, locate, evaluate, and accommodate students with disabilities who require special education. Plaintiffs' claims are based on the same injuries and application of the same legal theories as those of the classes they seek to represent.

152. All class members will benefit from an end to the School District's illegal, discriminatory, and unconstitutional policies and practices.

D. <u>Rule 23(a)(4): Adequacy of Representation</u>

153. Plaintiffs will fairly and adequately protect the interests of the classes.

154. LLK and LLHK are ELL immigrants who were directly harmed by the School District's illegal and discriminatory policies concerning ELL students.

155. LLHK also has a diagnosed learning disability and has been directly harmed by the School District's systematic failures with respect to ELL students with disabilities.

156. Plaintiffs have vigorously pursued LLK's and LLHK's rights as ELL students and as a student with a disability. Indeed, Plaintiffs obtained the extensive Memorandum of Findings from the City of Saint Paul Human Rights Division. (Ex. A, MOF.)

157. Plaintiffs seek declaratory and injunctive relief to provide relief to all class members.

158. Plaintiffs have also retained, on a *pro bono* basis, counsel experienced in handling complex federal class action litigation. Plaintiffs' counsel are qualified and prepared to pursue this litigation on behalf of the classes.

159. Plaintiffs and their counsel will vigorously and competently prosecute this action on behalf of the ELL Class and the Disability Class.

E. Rule 23(b)(2): Final Injunctive and Declaratory Relief is Appropriate

160. Plaintiffs challenge policies and practices by the School District that are generally applicable, respectively, to the ELL Class and the Disability Class as a whole. In particular, the School District is (a) discriminating against and failing to afford equal educational opportunities to its ELL students, and (b) failing to provide appropriate public education to members of the Disability Class by failing to affirmatively identify, locate, evaluate, and accommodate students with disabilities.

161. The School District has acted or refused to act on grounds that apply generally to the two proposed classes, such that classwide final injunctive and declaratory relief is appropriate.

CAUSES OF ACTION

Count I
Violation of the Equal Educational Opportunities Act

(On Behalf of Plaintiffs and the ELL Class)

162. Plaintiffs reallege and incorporate by reference each of the preceding paragraphs of this Complaint as if set forth in full herein.

163. The federal Equal Educational Opportunities Act of 1974 ("EEOA"), 20 U.S.C. § 1703, applies to the School District.

164. The EEOA provides in pertinent part:

> No State shall deny educational opportunity to an individual on account of his or her race, color, sex, or national origin, by - … (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

20 U.S.C. § 1703(f).

165. National origin discrimination has been defined to include the denial of equal opportunities due to an individual's, or his or her ancestor's, place of origin, or because an individual has the physical, cultural, or linguistic characteristics of a national origin group, including limited English proficiency.

166. The School District is an educational agency under 20 U.S.C. § 1703(f) and 20 U.S.C. § 1720(a). Indeed, the EEOA expressly contemplates "local educational agencies," like the School District, in defining an "educational agency." *See* 20 U.S.C. §1720(a).

167. The EEOA permits a private right of action. *See* 20 U.S.C. § 1706.

168. LLK, LLHK, and all members of the ELL Class are foreign-born immigrants who face language barriers that impede their equal participation in the School District's instructional programs.

169. Through its actions and inactions, the School District has failed to take appropriate action to overcome the language barriers faced by the limited English

proficiency students who comprise the ELL Class. The School District's failure to take appropriate action to overcome language barriers includes, but is not limited to:

a. Placing ELL students in mainstream educational classes that are taught in English that far exceed their English language skills;

b. Depriving ELL students of individualized assistance in ELL and mainstream classes they need to develop English proficiency and understanding of the underlying subject matter; and

c. Passing or graduating students who read at grade school level English and who are unprepared for post-secondary educational or job opportunities.

170. Because of the School District's failure to take appropriate action to overcome their language barriers, LLK, LLHK, and the members of the ELL Class have been denied equal educational opportunities on account of their national origin. As a result, LLK, LLHK, and members of the ELL Class have been denied an appropriate public education, have been denied the equal opportunity to learn the skills and subject matter set forth for Minnesota schools, and have been denied the equal opportunity to reach their full learning and earning potential.

171. The School District's conduct violates the rights of Plaintiffs and members of the ELL Class under the EEOA.

172. As a result of the School District's actions and inactions, Plaintiffs and members of the ELL Class have suffered and will continue to suffer irreparable harm, including without limitation the loss of education and instruction time, the inability or increased difficulty in overcoming language barriers, diminished educational and future

employment opportunities, the loss of time and energy in seeking appropriate education and instruction of ELL students, and the need for prolonged financial support of ELL students due to their diminished educational and future employment opportunities.

173. Pursuant to the EEOA, Plaintiffs and members of the ELL Class request declaratory and injunctive relief as set forth herein to remedy the School District's violation of their rights.

Count II
Violation of Title VI of the Civil Rights Act of 1964
(On Behalf of Plaintiffs and the ELL Class)

174. Plaintiffs reallege and incorporate by reference each of the preceding paragraphs of this Complaint as if set forth in full herein.

175. Title VI of the Civil Rights Act of 1964 provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

176. Federal regulations promulgated under Title VI forbid the School District from utilizing methods of administration that subject individuals to discrimination because of national origin or that have the effect of defeating or substantially impairing accomplishment of the objections of the program with respect to individuals of a particular national origin. *See, e.g.,* 34 C.F.R. §§ 100.3(b)(1)(i)-(vi).

177. As a recipient of federal funding, the School District is prohibited from discriminating against LLK, LLHK, and the members of the ELL Class, including by

failing to provide appropriate instruction and language services and by providing unequal education services on the basis of national origin.

178. Title VI permits a private right of action. *See* 42 U.S.C. § 2000c-8.

179. The School District has deprived, and continues to deprive, LLK, LLHK, and the members of the ELL Class of their right to an appropriate public education on the basis of their national origin.

180. The School District has acted intentionally or with deliberate indifference in discriminating against LLK, LLHK, and the members of the ELL Class. Indeed, midway through a school year and without notifying parents in advance, the School District intentionally chose to mainstream ELL students, apparently so these foreign-born immigrants and refugees would not be "coddled." As a result of the School District's intentional acts, Level 3 ELL students and higher were put into mainstream classes *regardless* of whether the students were ready for mainstream instruction, without adequate support or monitoring. As a result of the School District's intentional acts, even some Level 1 and Level 2 ELL students were placed in mainstream classes. As a result of the School District's intentional acts, LLK and LLHK – ELL students then reading at a far lower level – were thrust into mainstream content classes with wholly inadequate support for their limited English proficiency.

181. As a result of the School District's intentional or deliberate indifference to their educational and language needs, LLK, LLHK, and the members of the ELL Class have been denied an appropriate program of language instruction and access to comprehensible instruction in critical course content areas.

182. As a result of the School District's intentional or deliberate indifference to their educational and language needs, Plaintiffs and the members of the ELL Class have been deprived of vital and effective communications with their parents or guardians in the parents' or guardians' preferred language and mode of communication to enable meaningful parent participation in education decisions, which further fails to ensure equal access to education opportunities.

183. As a result of the School District's intentional or deliberate indifference to their educational and language needs, Plaintiffs and the members of the ELL Class have suffered and will continue to suffer irreparable harm, including without limitation the loss of education and instruction time, the inability or increased difficulty in overcoming language barriers, diminished educational and future employment opportunities, the loss of time and energy in seeking appropriate education and instruction of ELL students, and the need for prolonged financial support of ELL students due to their diminished educational and future employment opportunities.

184. As a result of the School District's intentional or deliberate indifference to educational and language needs of LLK and LLHK, Plaintiffs, including Thawmoo and Sommerville, have also suffered compensable injuries, entitling Plaintiffs to compensatory damages.

185. Plaintiffs and members of the ELL Class request declaratory and injunctive relief as set forth herein to remedy the School District's violation of their rights under Title VI of the Civil Rights Act of 1964. Plaintiffs, individually, also seek recovery of compensatory damages.

Count III
Violation of the Fourteenth Amendment of the United States Constitution
(On Behalf of Plaintiffs and the ELL Class)

186. Plaintiffs reallege and incorporate by reference each of the preceding paragraphs of this Complaint as if set forth in full herein.

187. The equal protection clause of the Fourteenth Amendment of the United States Constitution provides that "[n]o State shall … deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1.

188. Through its actions and inactions as summarized herein, the School District has acted and continues to act pursuant to a policy and practice to deprive LLK, LLHK, and the members of the ELL Class of the right to equal protection of the laws under the Fourteenth Amendment. In particular, as alleged in detail herein, the School District acted pursuant to a policy, practice, or custom to deprive these foreign-born immigrants and refugees of an appropriate public education on the basis of their national origin.

189. The due process clause of the Fourteenth Amendment of the United States Constitution provides that no State "shall … deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend XIV, § 1.

190. Students in Minnesota are entitled to receive an appropriate public education through the age of 21. *See* Minn. Stat. § 120A.20, subd. 1. This statutorily-created right qualifies as a property interest protected by the due process clause of the Fourteenth Amendment.

191. Through its actions and inactions as summarized herein, the School District has deprived LLK, LLHK, and the members of the ELL Class of their constitutionally-

protected property interest to an appropriate public education without providing them with notice or a meaningful opportunity to be heard, in violation of procedural protections guaranteed by the due process clause. In particular, as alleged in detail herein, the School District deprived these foreign-born immigrants and refugees of an appropriate public education on the basis of their national origin. When Plaintiffs had the opportunity to be heard before the Saint Paul Human Rights Division after the School District had already implemented its improper policies and practices, the Human Rights Division determined in May 2017 that the evidence demonstrated probable cause that the School District was discriminating against LLHK and not providing him with a proper education on the basis of his national origin.

192. As a result of the School District's violation of their constitutional rights to equal protection and due process, Plaintiffs and the members of the ELL Class have suffered and will continue to suffer irreparable harm, including without limitation the loss of education and instruction time, the inability or increased difficulty in overcoming language barriers, diminished educational and future employment opportunities, the loss of time and energy in seeking appropriate education and instruction of ELL students, and the need for prolonged financial support of ELL students due to their diminished educational and future employment opportunities.

193. As a result of the School District's violation of their constitutional rights to equal protection and due process, Plaintiffs, including Thawmoo and Sommerville, have also suffered compensable injuries, entitling Plaintiffs to compensatory damages.

194. The School District is liable for violation of Plaintiffs' and the class members' constitutional rights under 42 U.S.C. § 1983.

195. Plaintiffs and members of the ELL Class request declaratory and injunctive relief as set forth herein to remedy the School District's violations of their constitutional rights to equal protection and due process. Plaintiffs, individually, also seek recovery of compensatory damages.

Count IV
Violation of the Saint Paul Human Rights Ordinance
(On Behalf of Plaintiffs and the ELL Class)

196. Plaintiffs reallege and incorporate by reference each of the preceding paragraphs of this Complaint as if set forth in full herein.

197. Section 183.02(9) of the Saint Paul Human Rights Ordinance (the "Ordinance") defines discrimination to include "all unequal treatment of any person by reason of race, creed, religion, color, sex, sexual or affectional orientation, national origin, ancestry, familial status, age, disability, marital status or status with regard to public assistance." Saint Paul, Minn. Code § 183.02(9).

198. The Ordinance provides that it is unlawful to discriminate in any manner with respect to access to, or use or benefit from, the services and facilities provided by an education institution. Saint Paul, Minn. Code § 183.05(1).

199. The Saint Paul Human Rights Division "interprets the Ordinance to be consistent with applicable federal laws." (Ex. A, MOF, Page 29 of 39.)

200. On May 5, 2017, the Saint Paul Human Rights Division concluded that, based on the actions and inactions described herein, "there is probable cause that the

[School District] discriminated against [LLHK] on the basis of his national origin," in violation of the Ordinance. (Ex. A, MOF, Pages 30-33 of 39.)

201. The Ordinance permits a private right of action. *See* Saint Paul, Minn. Code §§ 183.02, 183.202.

202. Through its actions and inactions as summarized herein, the School District has discriminated against LLK, LLHK, and members of the ELL Class on the basis of national origin with respect to their access to and benefit from appropriate public education.

203. As a result of the School District's violation of the Ordinance, Plaintiffs and the members of the ELL Class have suffered and will continue to suffer irreparable harm, including without limitation the loss of education and instruction time, the inability or increased difficulty in overcoming language barriers, diminished educational and future employment opportunities, the loss of time and energy in seeking appropriate education and instruction of ELL students, and the need for prolonged financial support of ELL students due to their diminished educational and future employment opportunities.

204. As a result of the School District's violation of the Ordinance, Plaintiffs, including Thawmoo and Sommerville, have also suffered compensable injuries, entitling Plaintiffs to compensatory damages.

205. Plaintiffs and members of the ELL Class request declaratory and injunctive relief as set forth herein to remedy the School District's violation of the Ordinance. Plaintiffs, individually, also seek recovery of compensatory damages.

Count V
Violation of the Minnesota Human Rights Act
(On Behalf of Plaintiffs and the ELL Class)

206. Plaintiffs reallege and incorporate by reference each of the preceding paragraphs of this Complaint as if set forth in full herein.

207. The Minnesota Human Rights Act provides that "[i]t is an unfair discriminatory practice to discriminate in any manner in the full utilization of or benefit from any educational institution, or the services rendered thereby to any person because of race, color, creed, religion, national origin, sex, age, marital status, status with regard to public assistance, sexual orientation, or disability, or to fail to ensure physical and program access for disabled persons." Minn. Stat. § 363A.13, subd. 1.

208. On May 5, 2017, the Saint Paul Human Rights Division, based on the actions and inactions described herein, concluded that "there is probable cause that the [School District] discriminated against [LLHK] on the basis of his national origin." (Ex. A, MOF, Pages 30-33 of 39.)

209. The Minnesota Human Rights Act authorizes a private right of action. *See* Minn. Stat. §§ 363A.28, 363A.33.

210. Through its actions and inactions as summarized herein, the School District has discriminated against LLK, LLHK, and the members of the ELL Class on the basis of national origin with respect to their access to and benefit from appropriate public education.

211. As a result of the School District's violation of the Minnesota Human Rights Act, Plaintiffs and the members of the ELL Class have suffered and will continue

to suffer irreparable harm, including without limitation the loss of education and instruction time, the inability or increased difficulty in overcoming language barriers, diminished educational and future employment opportunities, the loss of time and energy in seeking appropriate education and instruction of ELL students, and the need for prolonged financial support of ELL students due to their diminished educational and future employment opportunities.

212. As a result of the School District's violation of the Minnesota Human Rights Act, Plaintiffs, including Thawmoo and Sommerville, have also suffered compensable injuries, entitling Plaintiffs to compensatory damages.

213. Plaintiffs and members of the ELL Class request declaratory and injunctive relief as set forth herein to remedy the School District's violation of the Minnesota Human Rights Act. Plaintiffs, individually, also seek recovery of compensatory damages.

Count VI
Violation of the Individuals with Disabilities Education Act
(On Behalf of Plaintiffs, except LLK, and the Disability Class)

214. Plaintiffs reallege and incorporate by reference each of the preceding paragraphs of this Complaint as if set forth in full herein.

215. So that all children with disabilities may receive an appropriate public education, the Individuals with Disabilities Education Act, 20 U.S.C. § 1401 *et seq.* ("IDEA"), provides that school districts have a duty to ensure that:

> All children with disabilities residing in the State … regardless of the severity of their disabilities, and who are in need of special education and related services, are identified,

> located, and evaluated and a practical method is developed to determine which children with disabilities are currently receiving needed special education and related services.

20 U.S.C. § 1412(a)(3)(A).

216. The IDEA defines children with disabilities, in part, as children who "need[] special education and related services." 20 U.S.C. § 1401(3)(A)(ii).

217. The IDEA authorizes a private right of action. *See* 20 U.S.C. 1415(i)(2)(A).

218. The United States Supreme Court has stated that the school district's "child find" obligation is of "paramount importance." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 245 (2009).

219. The IDEA's child find requirement is an affirmative duty on, and the sole responsibility of, the School District. The School District *cannot* pass the burden on to parents or to other educators.

220. If a parent suspects that his or her child may have a disability, the parent has the right to request that the School District conduct an evaluation to determine whether the student has a disability. *See* 34 C.F.R. Part 104. The School District's own policies reflect this right.

221. Even if a parent does not request an evaluation, the School District still has an obligation to identify and evaluate all students who are reasonably suspected of having a disability.

222. On May 5, 2017, the Saint Paul Human Rights Division concluded that there was probable cause that the School District violated the IDEA with respect to LLHK. (Ex. A, MOF, Pages 33-38.)

223. The School District violated the IDEA with respect to LLHK in numerous ways, including:

(a) The School District refused to evaluate LLHK for a disability, instead suggesting that Thawmoo and Sommerville pay for a medical evaluation at their own cost;

(b) The School District significantly and unduly delayed evaluating whether LLHK required special education services or accommodations for a disability;

(c) The School District failed to provide necessary accommodations for LLHK until 14 months after Thawmoo and Sommerville requested accommodations on his behalf, which delayed LLHK's academic progress and timeline for graduation.

224. LLHK is not alone. Other ELL students similarly suffered from significant delays by the School District in evaluating them for disability and ultimately providing proper accommodations for their disability. Indeed, after reviewing the evidence, the Saint Paul Human Rights Division stated that the School District's "practice of delaying evaluations due to ELL status has persisted," that "[s]ome teachers at the Professional Issues Committee meetings reported that they were told not to refer ELL students because students of color were overrepresented," and that the School District "failed to promptly evaluate valid referrals and requests for ELL students because they were ELL students." (Ex. A, MOF, Page 34-35 of 39.)

225. As a result of the School District's violation of the IDEA, Plaintiffs (other than LLK) and the members of the Disability Class have suffered and will continue to suffer irreparable harm, including without limitation not receiving timely evaluation of diagnosed or suspected disabilities, timely and appropriate accommodations for disabilities, timely development of an appropriate Individualized Education Program, full educational opportunities, timely and appropriate special education and related services, and timely and appropriate communications with parents of ELL students concerning their rights and the disability process in a form and language that they understand.

226. As a result of the School District's violation of the IDEA, Plaintiffs, including Thawmoo and Sommerville, have also suffered compensable injuries, entitling Plaintiffs to compensatory damages.

227. Plaintiffs and members of the Disability Class request declaratory and injunctive relief as set forth herein to remedy the School District's violation of the IDEA. Plaintiffs, individually, also seek recovery of compensatory damages.

Count VII
Violation of Section 504 of the Rehabilitation Act of 1973
(On Behalf of Plaintiffs, except LLK, and the Disability Class)

228. Plaintiffs reallege and incorporate by reference each of the preceding paragraphs of this Complaint as if set forth in full herein.

229. Section 504 of the Rehabilitation Act of 1973 prohibits the School District, which receives federal funds, from discriminating against students based on an individual's disability. 29 U.S.C. § 794(a).

230. Students with disabilities, like LLHK, are entitled to full and equal participation in and the benefits of the School District's programs and activities, including effective methods of making instruction and instructional materials accessible and free from discrimination under Section 504. *See* 29 U.S.C. § 794; 34 C.F.R. § 104.4.

231. On May 5, 2017, the Saint Paul Human Rights Division explicitly found that LLHK has a qualified disability, stating:

> [LLHK] is a student of eligible age to attend secondary school and receive services. He has been diagnosed with Attention Deficit Disorder – Inattentive and Adjustment Disorder with Mixed Anxiety/Depression. This impairment substantially limits him in the major life activities of concentrating, thinking, learning, and brain functions. He struggles with organization, including organizing and keeping track of his assignments, following multi-step instructions, and concentrating on tasks. Therefore, [LLHK] is a student with a qualified disability.

(Ex. A, MOF, Page 37 of 39.)

232. As an individual with a qualified disability, LLHK qualifies for protection from discrimination pursuant to Section 504.

233. Section 504 authorizes a private right of action. *See* 29 U.S.C. § 794a(2).

234. LLHK was discriminated against based on his disability and was denied the benefits of a program or activity of the School District. Indeed, as alleged herein, the School District initially refused to evaluate him for disability, delayed his eventual disability evaluation, used the incorrect standard in evaluating whether he was a student with a disability, did not inform LLHK or his parents (Thawmoo and Sommerville) of their rights to ensure a timely consideration of the accommodation request, did not

initiate timely accommodations discussions with LLHK's family, and unreasonably failed to provide him with disability accommodations for over 14 months.

235. The School District's conduct toward LLHK and other foreign-born ELL students – as alleged in detail herein – demonstrates bad faith and/or gross misjudgment, departing substantially from accepted professional judgment, practice, or standards. It is bad faith and/or gross misjudgment for the School District to refuse to adhere to its own policies and federal requirements and to delay the needed and required evaluations and accommodations to LLHK as alleged herein, resulting in LLHK going without necessary accommodations for over a year. It is bad faith and/or gross misjudgment for the School District to inform teachers in the School District – as reported by the teachers themselves – that ELL students would not be considered for special education, that too many ELL students were being referred for special education, and that students need to arbitrarily be in the United States for a certain number of years before they could be referred for special education. It is bad faith and/or gross misjudgment to refuse to provide disability services for an ELL student on the offensive basis that the student was exhibiting "[refugee] camp" behavior. It is bad faith and/or gross misjudgment to make a vision-impaired ELL student stand inches from the board for months on end before finally receiving an IEP. It is bad faith and/or gross misjudgment to make a hearing-impaired ELL student wait 16 months to receive an IEP. It is bad faith and/or gross misjudgment to determine that ELL students with traumatic brain injuries do not qualify for disability services. It is bad faith and/or gross misjudgment to make ELL students with clear developmental delays and diagnoses wait 15 months for services. It is bad faith and/or

gross misjudgment to tell the parents of an ELL student who had a rock dropped on his head, who sought disability services for their child, to take him to the doctor.

236. As a result of the School District's violation of Section 504, Plaintiffs (other than LLK) and the members of the Disability Class have suffered and will continue to suffer irreparable harm, including without limitation not receiving timely evaluation of diagnosed or suspected disabilities, timely and appropriate accommodations for disabilities, timely development of an appropriate Individualized Education Program (IEP), full educational opportunities, timely and appropriate special education and related services, and timely and appropriate communications with parents of ELL students concerning their rights and the disability process in a form and language that they understand.

237. As a result of the School District's violation of Section 504, Plaintiffs, including Thawmoo and Sommerville, have also suffered compensable injuries, entitling Plaintiffs to compensatory damages.

238. Plaintiffs and members of the Disability Class request declaratory and injunctive relief as set forth herein to remedy the School District's violation of Section 504. Plaintiffs, individually, also seek recovery of compensatory damages.

Count VIII
Violation of Title II of the Americans with Disabilities Act

(On Behalf of Plaintiffs, except LLK, and the Disability Class)

239. Plaintiffs reallege and incorporate by reference each of the preceding paragraphs of this Complaint as if set forth in full herein.

240. Title II of the Americans with Disabilities Act ("ADA") prohibits the School District from discriminating against students based on an individual's disability. 42 U.S.C. § 12131, *et seq.*

241. Students with disabilities, like LLHK, are entitled to full and equal enjoyment of and benefit from the services, programs, or activities of the School District, including effective methods of making instruction and instructional materials accessible and free from discrimination under the ADA. *See* 42 U.S.C. § 12132 *et seq*.

242. On May 5, 2017, the Saint Paul Human Rights Division explicitly found that LLHK has a qualified disability. (Ex. A, MOF, Page 37 of 39.)

243. As an individual with a qualified disability, LLHK qualifies for protection from discrimination pursuant to Title II of the ADA.

244. The ADA authorizes a private right of action. *See* 42 U.S.C. § 12133.

245. LLHK was discriminated against based on his disability and was excluded from participation in or denied the benefits of the School District's services, programs, or activities. Indeed, as alleged herein, the School District initially refused to evaluate him for disability, delayed his eventual disability evaluation, used the incorrect standard in evaluating whether he was a student with a disability, did not inform LLHK or his parents (Thawmoo and Sommerville) of their rights to ensure a timely consideration of the accommodation request, did not initiate timely accommodations discussions with LLHK's family, and unreasonably failed to provide him with disability accommodations for over 14 months.

246. The School District's conduct toward LLHK and other foreign-born ELL students – as alleged in detail herein – was bad faith and/or gross misjudgment, departing substantially from accepted professional judgment, practice, or standards. It is bad faith and/or gross misjudgment for the School District to refuse to adhere to its own policies and federal requirements and to delay the needed and required evaluations and accommodations to LLHK as alleged herein, resulting in LLHK going without necessary accommodations for over a year. It is bad faith and/or gross misjudgment for teachers in the School District to be informed – as reported by the teachers themselves – that ELL students would not be considered for special education, that too many ELL students were being referred for special education, and that students need to arbitrarily be in the United States for three years before they could be referred for special education. It is bad faith and/or gross misjudgment to refuse to provide disability services for an ELL student on the offensive basis that the student was exhibiting "[refugee] camp" behavior. It is bad faith and/or gross misjudgment to make a vision-impaired ELL student stand inches from the board for months on end before finally receiving an IEP. It is bad faith and/or gross misjudgment to make a hearing-impaired ELL student wait 16 months to receive an IEP. It is bad faith and/or gross misjudgment to determine that ELL students with traumatic brain injuries do not qualify for disability services. It is bad faith and/or gross misjudgment to make ELL students with clear developmental delays and diagnoses wait 15 months for services. It is bad faith and/or gross misjudgment to tell the parents of an ELL student who had a rock dropped on his head, who sought disability services for their child, to take him to the doctor.

247. As a result of the School District's violation of Title II of the ADA, Plaintiffs (other than LLK) and the members of the Disability Class have suffered and will continue to suffer irreparable harm, including without limitation not receiving timely evaluation of diagnosed or suspected disabilities, timely and appropriate accommodations for disabilities, timely development of an appropriate Individualized Education Program, full educational opportunities, timely and appropriate special education and related services, and timely and appropriate communications with parents of ELL students concerning their rights and the disability process in a form and language that they understand.

248. As a result of the School District's violation of Title II of the ADA, Plaintiffs, including Thawmoo and Sommerville, have also suffered compensable injuries, entitling Plaintiffs to compensatory damages.

249. Plaintiffs and members of the Disability Class request declaratory and injunctive relief as set forth herein to remedy the School District's violation of Title II of the ADA. Plaintiffs, individually, also seek recovery of compensatory damages.

Count IX
Violation of Title VI of the Civil Rights Act of 1964
(On Behalf of Plaintiffs, except LLK, and the Disability Class)

250. Plaintiffs reallege and incorporate by reference each of the preceding paragraphs of this Complaint as if set forth in full herein.

251. Title VI of the Civil Rights Act of 1964 provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from

participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

252. Federal regulations promulgated under Title VI forbid the School District from utilizing methods of administration that subject individuals to discrimination because of national origin or that have the effect of defeating or substantially impairing accomplishment of the objections of the program with respect to individuals of a particular national origin. *See, e.g.,* 34 C.F.R. §§ 100.3(b)(1)(i)-(vi).

253. As a recipient of federal funding, the School District is prohibited from discriminating against LLHK and the members of Disability Class, including by failing to provide appropriate instruction and by providing unequal education services on the basis of national origin.

254. Title VI permits a private right of action. *See* 42 U.S.C. § 2000c-8.

255. The School District has deprived, and continues to deprive, LLHK and the members of the Disability Class to disability, special education, or related services on the basis of their national origin. Indeed, on May 5, 2017, the Saint Paul Human Rights Division concluded that the School District discriminated against ELL students based on their national origin by failing to promptly evaluate and provide accommodations to those foreign-born students, stating:

> Although school districts are cautioned against mistaking a[] students' English Language Level for a disability, in this case the [School District] failed to promptly evaluate valid referrals and requests for ELL students because they were ELL students. U.S. born students that were not learning English were not subjected to these delays. This is national origin discrimination in the provision of services ….

(Ex. A, MOF, Pages 34-35 of 39.)

256. The School District has acted intentionally or with deliberate indifference in discriminating against LLHK and the members of the Disability Class.

257. As a result of the School District's violation of Title VI of the Civil Rights Act, Plaintiffs (other than LLK) and the members of the Disability Class have suffered and will continue to suffer irreparable harm, including without limitation not receiving timely evaluation of diagnosed or suspected disabilities, timely and appropriate accommodations for disabilities, timely development of an appropriate Individualized Education Program, full educational opportunities, timely and appropriate special education and related services, and timely and appropriate communications with parents of ELL students concerning their rights and the disability process in a form and language that they understand.

258. As a result of the School District's violation of the Title VI of the Civil Rights Act, Plaintiffs, including Thawmoo and Sommerville, have also suffered compensable injuries, entitling Plaintiffs to compensatory damages.

259. Plaintiffs and members of the Disability Class request declaratory and injunctive relief as set forth herein to remedy the School District's violation of Title VI of the Civil Rights Act. Plaintiffs, individually, also seek recovery of compensatory damages.

Count X
Violation of the Saint Paul Human Rights Ordinance
(On Behalf of Plaintiffs, except LLK, and the Disability Class)

260. Plaintiffs reallege and incorporate by reference each of the preceding paragraphs of this Complaint as if set forth in full herein.

261. Section 183.02(9) of the Saint Paul Human Rights Ordinance defines discrimination to include "all unequal treatment of any person by reason of race, creed, religion, color, sex, sexual or affectional orientation, national origin, ancestry, familial status, age, disability, marital status or status with regard to public assistance." Saint Paul, Minn. Code § 183.02(9).

262. The Ordinance provides that it is unlawful to discriminate in any manner with respect to access to, or use or benefit from, the services and facilities provided by an education institution. Saint Paul, Minn. Code § 183.05(1).

263. The Saint Paul Human Rights Division "interprets the Ordinance to be consistent with applicable federal laws." (Ex. A, MOF, Page 29 of 39.)

264. With respect to the Disability Class and the School District's failure to timely and appropriately provide special education services, the School District violated the Ordinance by improperly discriminating based on both (i) national origin, and (ii) disability.

265. On May 5, 2017, the Saint Paul Human Rights Division concluded that the School District discriminated against ELL students based on their national origin by failing to promptly evaluate and provide accommodations to those foreign-born students, stating:

> Although school districts are cautioned against mistaking a[] students' English Language Level for a disability, in this case the [School District] failed to promptly evaluate valid referrals and requests for ELL students because they were ELL students. U.S. born students that were not learning English were not subjected to these delays. This is national origin discrimination in the provision of services and prohibited by the Ordinance.

(Ex. A, MOF, Pages 34-35 of 39.)

266. In addition, on May 5, 2017, the Saint Paul Human Rights Division also concluded that the School District discriminated against LLHK by failing to ensure program access for persons with disabilities. (Ex. A, MOF, Pages 35-38.)

267. The Ordinance permits a private right of action. *See* Saint Paul, Minn. Code §§ 183.02, 183.202.

268. Through its actions and inactions as summarized herein, the School District has discriminated against LLHK and the members of the Disability Class on the basis of national origin and/or disability with respect to their access to and benefit from disability, special education, and related services provided by the School District.

269. As a result of the School District's violation of the Ordinance, Plaintiffs (other than LLK) and the members of the Disability Class have suffered and will continue to suffer irreparable harm, including without limitation not receiving timely evaluation of diagnosed or suspected disabilities, timely and appropriate accommodations for disabilities, timely development of an appropriate Individualized Education Program, full educational opportunities, timely and appropriate special education and related services,

and timely and appropriate communications with parents of ELL students concerning their rights and the disability process in a form and language that they understand.

270. As a result of the School District's violation of the Ordinance, Plaintiffs, including Thawmoo and Sommerville, have also suffered compensable injuries, entitling Plaintiffs to compensatory damages.

271. Plaintiffs and members of the Disability Class request declaratory and injunctive relief as set forth herein to remedy the School District's violation of the Ordinance. Plaintiffs, individually, also seek recovery of compensatory damages.

Count XI
Violation of the Minnesota Human Rights Act
(On Behalf of Plaintiffs, except LLK, and the Disability Class)

272. Plaintiffs reallege and incorporate by reference each of the preceding paragraphs of this Complaint as if set forth in full herein.

273. The Minnesota Human Rights Act provides that "[i]t is an unfair discriminatory practice to discriminate in any manner in the full utilization of or benefit from any educational institution, or the services rendered thereby to any person because of race, color, creed, religion, national origin, sex, age, marital status, status with regard to public assistance, sexual orientation, or disability, or to fail to ensure physical and program access for disabled persons." Minn. Stat. § 363A.13, subd. 1.

274. The Minnesota Human Rights Act authorizes a private right of action. *See* Minn. Stat. §§ 363A.28, 363A.33.

275. For the same reasons set forth above with respect to the Ordinance, the School District has discriminated against LLHK and the members of the Disability Class

on the basis of national origin and/or disability with respect to their access to and benefit from disability, special education, and related services provided by the School District and by failing to ensure physical and program access for disabled persons.

276. As a result of the School District's violation of the Minnesota Human Rights Act, Plaintiffs (other than LLK) and the members of the Disability Class have suffered and will continue to suffer irreparable harm, including without limitation not receiving timely evaluation of diagnosed or suspected disabilities, timely and appropriate accommodations for disabilities, timely development of an appropriate Individualized Education Program, full educational opportunities, timely and appropriate special education and related services, and timely and appropriate communications with parents of ELL students concerning their rights and the disability process in a form and language that they understand.

277. As a result of the School District's violation of the Minnesota Human Rights Act, Plaintiffs, including Thawmoo and Sommerville, have also suffered compensable injuries, entitling Plaintiffs to compensatory damages.

278. Plaintiffs and members of the Disability Class request declaratory and injunctive relief as set forth herein to remedy the School District's violation of the Minnesota Human Rights Act. Plaintiffs, individually, also seek recovery of compensatory damages.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Certify the ELL Class and the Disability Class pursuant to Federal Rule of Civil Procedure 23(b)(2).

B. With respect to Plaintiffs and the ELL Class:

1. Enter declaratory relief providing that the School District's actions and inactions, as described in this Complaint or proven at trial, violate (i) the EEOA, (ii) Title VI of the Civil Rights Act of 1964, (iii) the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution, (iv) the Saint Paul Human Rights Ordinance, and (v) the Minnesota Human Rights Act;

2. Enter preliminary and permanent injunctive relief enjoining the School District as follows:

   a. Cease violating applicable federal, state, and local laws, including implementing recommendations from state and local agencies;

   b. Cease "mainstreaming" ELL students until each student is individually determined to be ready to appropriately participate in each such "mainstream" class, and provide appropriate and consistent support for ELL students upon their entry into mainstream classes;

   c. Immediately provide and implement an appropriate, research-based ELL model that provides full servicing to ELL students as required by law and publicize the new model to class members in a language and form of communication that they understand. Upon information and belief, Plaintiffs state that such a program may include, but is not limited to, the following features:

      - Offer ELL courses and individual support through ACCESS Level 5, which will include at least Levels 1, 1.5, 2, 2.5, 3, 4, and 5;

      - Provide ELL courses consistently and equitably in all schools that will not be dependent on school leadership or budgetary concerns;

      - Build master schedules at schools around ELL needs;

      - Designate ELL counselors at each school;

- Limit ELL courses to a maximum of 20 students per class for Levels 1-2 and 30 students per class for Levels 3-5; and

- Formally evaluate the effectiveness of the ELL program using an expert in research-based ELL pedagogy on a regular basis;

d. Recognize the existence of SLIFE students and provide full and appropriate steps to fully service those students as required by law. Upon information and belief, Plaintiffs state that such steps may include, but are not limited to, the following:

- Offer SLIFE students the option of a six-year graduation path, effective immediately;

- Designate a qualified SLIFE coordinator, who has appropriate ELL licensure and who has experience working with SLIFE populations;

- Implement curriculum designed for SLIFE students;

- Implement an intensive ELL program for SLIFE students;

- Offer SLIFE students courses relating to study skills, college and career readiness;

- Partner secondary schools with the Career & College Readiness office to create a transition program for SLIFE students; and

- Provide mandatory SLIFE professional development for mainstream teachers, counselors, special education staff, and administration, which would include identification of trauma in the ELL population;

e. Involve families of ELL students in ELL programming decisions and communicate with such families in a clear, consistent, and transparent manner. Upon information and belief, Plaintiffs state that this may include, but is not limited to, the following:

- Ensure that any changes to ELL programming will first be discussed with parents of ELL students, with feedback solicited at least one year prior to implementation of such change;

- Ensure that ELL counselors meet with parents of ELL students at the beginning of each school year and at least twice per academic year; and

- Ensure that communications with parents of ELL students are in a form and language that they understand, including in the parents' native language as necessary;

f. Provide supplemental educational services to remedy the deprivation of a meaningful education caused by the School District's unlawful actions and inactions, including providing targeted services to individual class members, without additional out-of-pocket expenses.

C. With respect to Plaintiffs (except LLK) and the Disability Class:

1. Enter declaratory relief providing that the School District's actions and inactions, as described in this Complaint or proven at trial, violate (i) the IDEA, (ii) Section 504 of the Rehabilitation Act of 1973, (iii) Title II of the Americans with Disabilities Act, (iv) Title VI of the Civil Rights Act of 1964, (v) the Saint Paul Human Rights Ordinance, and (vi) the Minnesota Human Rights Act;

2. Enter preliminary and permanent injunctive relief enjoining the School District as follows:

a. Cease violating applicable federal, state, and local laws;

b. Cease discriminating against ELL students who are members of the Disability Class based on their national origin or disability as it pertains to the provision of the School District's special education and related services;

c. Immediately and timely provide all required evaluations, accommodations, special education services, and related services to ELL students who are members of the Disability Class; and

d. Ensure that communications with parents of ELL students who are members of the Disability Class concerning their rights and the disability process are in a form and language that they understand, including in the parents' native language as necessary.

D. Award full compensatory damages to Plaintiffs for their causes of action that seek recovery of compensatory damages, in an amount to be determined at trial.

E. Award Plaintiffs reasonable attorneys' fees, costs, and disbursements pursuant to all applicable laws or rules, including without limitation 42 U.S.C. § 1988, 29 U.S.C. § 794a(b), 42 U.S.C. § 2000e-5(k), and Minn. Stat. § 363A.33 subd. 7.

F. Appoint Plaintiffs' counsel to monitor the School District's implementation of the injunctive relief entered by this Court.

G. Retain jurisdiction over this matter until such time as the School District demonstrates full and ongoing compliance with applicable federal, state, and local laws.

H. Grant such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury.

Respectfully submitted,

Dated: July 14, 2017

s/ Aron J. Frakes

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Exhibit A

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Human Rights Division
Jeffry Martin, Deputy Director

CITY OF SAINT PAUL
Christopher B. Coleman, Mayor

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15 West Kellogg Boulevard
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May 5, 2017

MEMORANDUM OF FINDINGS

Mary Jane Sommerville o/b/o minor child v. Independent School District #625
Case# A5311

Pursuant to the provisions of the Saint Paul Human Rights Ordinance, a full and impartial investigation of the allegations in the above-referenced charge was conducted by this Department. Based on the results of that investigation, which are stated below, this Department has made a determination that probable cause exists to believe that Respondent unlawfully discriminated against Complainant:

I. STATEMENT OF THE CASE

The Complainant is a Karen child with a disability who receives services for English Language Learners (ELL). On February 26, 2014, the Complainant's parents learned that the Respondent had changed its services for ELL students. Previously, students were eligible for ELL support services up to language level 5. However, during the 2014-2015 academic year, ELL students were placed in mainstream courses with very limited support beginning at level 3.

This new policy, that is still in effect, has left ELL students without the necessary support to grasp academic concepts. Because the Complainant and some other Karen students have limited formal education, this policy unfairly discriminates against them. Because of this policy, the Complainant's parents kept him in level 2 shelter classes because he would not have access to the supports as a level 3 student in a mainstream class.

The Complainant believes he was discriminated against when the Respondent failed to perform a special education assessment on him when his parents requested it in February 2014. The Complainant's parents believe there is a policy or practice that the Respondent will not assess ELL students for disabilities until they have been in the country for three years. The Complainant's parents have observed substantial delays in assessments for the Complainant and other ELL students with disabilities and believe this policy discriminates against ELL students. The Complainant's parents paid for him to be assessed by a doctor and he was diagnosed as having a disability. Even with medical verification of the Complainant's disability, the Respondent refused to perform an assessment on April 18, 2014. After the Complainant's repeated requests, the Respondent finally did perform an assessment, but determined on October 28, 2014 that the Complainant did not meet

qualifications for special education services in contradiction to his medical diagnosis. As a result, he is not receiving the accommodations he needs to succeed. The Complainant's parents are also aware of several other ELL students with disabilities that the Respondent is refusing to asses for special education.

Therefore, the Complainant believes the Respondents discriminated against him in the area of education based on his national origin and disability of Saint Paul Human Rights Ordinance Section 183.06.

II. RESPONDENT'S POSITION STATEMENT

The Respondent denies discriminating against the Complainant on the basis of his national origin and/or disability. It states there is no new mainstreaming policy; their model of collaboration and co-teaching has not changed.

At the time of the complaint, the Complainant was a tenth grade student at Como Senior High. He came to the United States in October 2012, enrolled as an eighth grader at the time and then enrolled as a ninth grader at Como in the fall of 2013. He was placed in a 2L English Language Learner (ELL) class. English Language Levels span from the lowest level of 1L, which needs the most support, to the highest level of 5L needing the least support.

According to the Complainant's parents' account of their son's educational history, he was attending school in a refugee camp and then a Karen school in Thailand. Prior to coming to the United States, he experienced many interruptions in his schooling and had teachers who were not qualified and lacked the necessary skills and materials. He reached 5th grade before coming to the United States.

The first two quarters of the 2013-2014 school year, the Complainant's son received all passing grades except for one "N" in his second quarter social studies class. However, the Complainant had concerns about her son's school performance. She spoke to the school counselor about having him tested for a learning disorder. She provided him with information about obtaining HealthPartners' evaluation testing. On or around February 11, 2014, the Complainant's stepmother requested a special education evaluation for the Complainant. The Respondent determined he did not demonstrate severe academic underachievement and therefore a special education evaluation was not warranted. The Child Study Team (CST) informed the Complainant's stepmother that it would consider evaluation if a medical diagnosis demonstrated the need for it.

The Complainant's received a psychological evaluation and a developmental pediatric evaluation at HealthPartners. The evaluations gave the diagnostic impressions of Attention Deficit Disorder and Adjustment Disorder with Mixed Anxiety/Depression. The evaluations recommended that the parents request a comprehensive school assessment to develop an individual education plan (IEP) under the Other Health Disability (OHD) classification.

In April 2014, the Complainant's parents provided these results to the Respondent and again requested a special education evaluation. The CST again denied the request for a formal evaluation because he was making steady academic progress. Because the Complainant was passing all of his classes and all but one credit, the school counselor concluded that his health conditions did not appear to adversely affect his educational performance. If the son's health care professionals were to provide additional recommendations for accommodations, the school counselor would discuss whether these would be appropriate to incorporate into a Section 504 plan to document his accommodations.

The Respondent eventually agreed to hold an evaluation planning meeting with the Complainant's parents. On May 2, 2014, they indicated they did not agreed with the proposal to evaluate their son and refused the evaluation. Shortly thereafter, the Complainant's father agreed to the evaluation. The evaluation was completed September 9, 2014 within 30 school days of parental consent to evaluate. At the request of the parents, a new evaluation was completed on October 28, 2014 to gather more information about his performance in his classes.

The evaluation team determined the Complainant did not have a disability or qualify as a student with a disability under Minnesota's criteria of Other Health Disabilities and did not demonstrate a need for special education service. The evaluation determined that his medical diagnosis is not significantly impacting his education performance and therefore he was not demonstrating eligibility or a need for special education services. The Complainant's parents did not challenge this conclusion.

The District informed the Complainant's parents that he may qualify for special services under Section 504 of the Rehabilitation Act of 1973. On January 4, 2015, the Complainant requested a 504 plan for her stepson. On January 16, 2015, the school prepared a 504 Evaluation Plan due to his ADD diagnosis. The Respondent notes that the Complainant and her husband did not dispute the 504 Plan or file a grievance per the 504 grievance procedures.

On March 9, 2014, the Complainant objected to the ELL Curriculum at Como Park Senior High School and carbon copied the Minnesota Department of Education. The Multilingual Learning Office held a meeting with Karen Parents on April 9 to explain the MML and ELL services to the Karen Families. These offices had another meeting on November 14, 2014 to discuss these services again.

Staff from the Minnesota Department of Education met with the Assistant Superintendent of Multilingual Learning ("Assistant Superintendent"). The Respondent stated that her description of the service model was not accurate. Assistant Superintendent explained ELL service delivery model and a charge summarizing the service model for grades nine through twelve for the 2013-2014 school year. They state the MDE's Assistant Commissioner complement the Respondent on its model and suggested color-coding it for clearing understanding. This model remained the same the following year. The Complainant was eligible to move to level 3 for the 2014-2015 school year, but the Complainant's parents requested he to stay in level 2 shelter classes. The Respondent honored that request.

III. COMPLAINANTS' REBUTTAL

The Complainant's stepmother states that she sought an intervention for him because he was not passing his classes. She was also advised by his teachers that he needed to be retained. Her older stepson has had less academic support and less school, but is progressing better than the Complainant. The Complainant should be progressing more quickly than his older brother, but he is not. Therefore, he is underperforming from what he would be expected to do given his exposure to English and age when entering the U.S. Her requested accommodations would be one-on-one support or small group support.

The specific issues the Complainant's stepmother noticed were problems turning in assignments and his grades on tests. On December 18, 2013, the Complaint's stepmother met with the school counselor and two of her son's teachers about his academic struggles. At this meeting, she specifically requested a special education evaluation and was told there is not a formal process and she should go to her son's

pediatrician. The next day she emailed the school that the Complainant had previously been in a car accident and the resulting injuries may be contributing to his learning difficulties. The Respondent did not respond to her request until February 11, 2014. The evaluation was not completed until September 9, 2014, but her stepson was in summer school, so their evaluation was not timely as the Respondent states.

She states that the Respondent was not receptive to having an evaluation planning meeting until she had spoken with the PACER Center (nonprofit advocacy organization for parents with students with disabilities) and became aware of her legal rights to advocate for her stepson. Upon providing the Respondent with her son's diagnosis, they did not discuss what accommodations he may need while the decision to evaluate him for an IEP was pending. Her stepson did not receive a 504 plan until nearly a year later in January 2015.

The Complainant's stepmother denies refusing to give permission to evaluate him. Rather, she asked what measurements would be used to evaluate him and whether these measurements were appropriate for his language level. She had requested specific tests based on her son's doctor's recommendation. She states that the Evaluation Team told her to refuse the recommended evaluation, and then write down the tests that would be appropriate given the Complainant's background and experience.

She states that the Evaluation Teams initial evaluation was insufficient. They evaluated him in one or two of his classes, one of which was math, which is a universal skill set.

The Complainant's stepmother also stated that a 2.5 Level class would be more appropriate for students such as the Complainant who are not ready to be in a mainstream environment, but who score higher than a Level 2.

The Complainant's stepmother states she did not cancel a meeting with the Vice Superintendent. She was unable to attend the meeting in person because of her work obligations, but she did have a phone conference with the Vice Superintendent. She felt the Vice Superintendent was very disrespectful, hostile, and threatening towards her. The Vice Superintendent said, "How dare you contact the board of education about this. You should have come to me." Therefore, she felt compelled to email school board members and chief of staff. After escalating her concerns, the Vice Superintendent stopped contact with her. The Complainant's stepmother states that in response to her concerns that her son stay in sheltered classes to meet his language acquisitions needs, the Vice Superintendent accused her of wanting to isolate him.

The Complainant's stepmother states that the Respondent did change their pedagogical approach. Parents were not informed of this. The Complainant's parents are members of the Karen Parent Advisory council and they organized a meeting where experts on English Language acquisition presented. A speaker from the Saint Paul College Admissions department stated that Karen students were graduating without the skills to go into college level classes and needed to take remedial coursework. Under the mainstream model, Karen students are expected to do curriculum that is five, six, or more grade levels above their English language comprehension.

The Complainant's stepmother also states that the Respondent does not consistently offer English Language Learner support through a dually licensed teacher or a co-taught class. Her older stepson was placed in level 3 and had no English Language Development (ELD) supports. Availability of ELL support in mainstream classes varies each semester according to how the schedule was set at the individual school. Supports are not offered in every mainstream class that an ELL student may take.

Every school sets this schedule differently and so a Saint Paul Public School student will get different access to ELL services depending on which school he or she goes to. She states that this is counter to the requirement of equal access in education.

The Complainant's stepmother states that she and her husband chose to keep the Complainant at a Level 2 in consultation with his teachers who indicated that he needed more support to develop his English skills. They determined the Complainant would not be able to keep up in his academics with the limited English language support he would receive when mainstreamed as a level 3. Her older stepson had Biology with no ELL Co-teacher or ELD support and received a D.

The Complainant's stepmother has laid out her concerns at Professional Interest Committee (PIC) meetings. District Administration is aware of these equity issues, but has not addressed them. She states that she and her husband have met with the Chief Academic Officer about unequal access and unequal education for Karen students being a form of intentional discrimination. She has been in PIC meetings where staff have discussed significant delays of a school year or more for ELL students with disabilities – including a blind student and a student with a Traumatic Brain Injury – before receiving special education evaluations and ultimately receiving services.

The Complainant's stepmother states that ELL experts have given presentation at parent meetings showing that students cannot learn if they are not understanding 90% of the words in the curriculum. Therefore, the Respondent's philosophy that an ELL student will acquire the language through participation in mainstream classes is unsupported by research.

The Complainant's stepmother states that it is futile for her to pursue the school's processes under the Individuals with Disabilities Education Act (IDEA). She feels administration has been resistant to all of her concerns about her son's academic progress and treated her in a hostile manner. She did not believe the Respondent would be fair towards her.

Under the Latino Consent Decree, the Respondent has clear responsibilities to ensure Latino students have equal access to education. However, this oversight is not applied to ensure equal access to education for Karen students.

IV. ISSUES:

1. Did the Respondent discriminate against the Complainant against because of his national origin?
2. Did the Respondent fail to accommodation the Complainant's disability?

V. FINDINGS OF FACT:

1. The Complainant lived in a refugee camp in Thailand prior to coming to the United States.
2. Many Karen students are refugees and they and their families have experienced persecution from their government. Generally, they are unlikely to complain against institutions or government in the United States because of their previous experiences.
3. Both English and Karen are spoken in the Complainant's home.
4. The Complainant had multiple interruptions in his schooling before coming to the United States and again missed some schooling when moving within the United States. Fifth grade was the highest grade level he achieved before coming to the United States.

5. The Complainant came to the United Stated in October 2012.

6. The Complainant attended Roseville Middle School prior to attending 9th Grade in the Respondent's District. In the Roseville District, he had a maximize class size of 17 students and the same teacher for the entire day other than his physical education class. The pace was slower and the Complainant earned As and Bs.

7. The Complainant was diagnosed with Attention Deficit Disorder - Inattentive Type and Adjustment Disorder with Mixed Anxiety/Depression.

8. The Complainant's 10th grade transcript indicates he has a cumulative GPA of 2.84. His lowest grade was a D+ in Woodworking, otherwise his grade ranged from a C- to an A.

9. As of Spring 2014, the Complainant was reading at a second grade level and reading books from the children's section.

10. Students with Limited or Interrupted Formal Education (SLIFE) have no or very limited prior education, literacy in any language, English proficiency, and are typically refugees. SLIFE learners need to acquire basic academic skills and literacy in order to learn the required material. Learning these literacy skills at a later age is more challenging and takes more time that for people who learn these skills as young children. These are skills that other English Language ("EL") learners acquired at an early age and allows them to learn more quickly than a SLIFE learner.

11. The District has 1000 SLIFE students and half of them are Karen.

12. The older a student is at the onset of literacy and schooling, the longer it takes to acquire English and academic proficiency, the harder it is to acquire the skills and the greater the need for customized instruction.

13. A shelter content class is defined by Office of Civil Rights and Department of Justice as "an instructional approach used to make academic instruction in English understandable to EL students."

14. Karen students have been attending schools in the Respondent's district for about five years.

15. There are three categories of ELL students. Students born in the US to non-native English speaking parents, but have not acquired English at the same level as their peers.

16. The largest percentage of ethnicities represented in the Respondent's ELL program are 35% Hmong, 21% Latino, 19% Karen. The Respondent offers dual-language programs (instruction in both English and native language) in Hmong and Spanish, but not Karen. The Respondent also offers immersion programs for fluent/native English speakers in Chinese, French, and German. There are eight students in the German immersion program.

17. The Respondent's ELL placement plan places students according to a ratio of time in. On September 11, 2013, the Assistant Director of the Office of Multilingual Learning sent an email "Grades 7-12 Level/Placement" to teachers "If a student is born in the US or has attended a US school for 3 or more years with a composite proficiency 1 or 2, they should not be categorized as an LA student and should not be in a sheltered classes." The combination of years in a US school and a level of a high 1 may suggest there are other needs this student requires, therefore, sheltered instruction would be an inappropriate option."

18. The Respondent groups Level Three and Level Four students together. Level Three

students have lower English Language Level and require more English Language support than Level Four students.

19. The Respondent has modelled its ELL policies based on the State Department of Education's World-class Instructional Design and Assessment (WIDA) framework and service model. This policy has been in place since around 2011.

20. According to the WIDA (World-Class Instructional Design Consortium) EL Level Definitions student that tests:

    Level 3 has: 1) general and some specific language of the content areas, 2) Expended sentences in oral interaction or written paragraphs, 3) and oral or written language with phonological, syntactic, or semantic errors that may impede community, but retain much of its meaning, when presented with oral or written, narrative, or expository descriptions with sensory, graphic, or interactive support.

    Level 4: Specific and some technical language of the content areas

    A variety of sentence lengths of varying linguistic complexity.

    Oral or written language with minimal errors that do not impeded the overall meaning of the communication when presented with oral or written connected discourse with sensory, graphic, or interactive support.

21. The Complainant's stepmother filed a complaint against the Assistant Superintendent with the Respondent's District Chief Executive Officer, but did not receive a response. She also wrote an email to Ombudsman's office.

22. The Office of Multilingual Learning looks to the ACCESS test as an indicator of the services that ELL students are receiving. The ACCESS covers speaking, reading, listening, and writing. ELL students are expected to move to the next language level by spring of the following year.

23. The Respondent takes grades are taken into account for graduation, but not as a measure of ELL program. Not all schools have standard-based grading. The Office of Multi-lingual Learning does not view grades as a reliable measurement for students English Language Level.

24. The Respondent's 2013-2014 EL Service model (revised 4/23/13) provides that EL Levels 1-2 should be in content-based ESL courses and EL Levels 3-4 should be scheduled in co-taught content courses. English Language Development support classes should be scheduled for students based on student needs in the co-taught content classes and that EL Levels 3-4 should be scheduled for ELD Support E401261. This model's status, "Availability of course offerings may vary based on site-specific needs and student enrollment. Co-taught course options are not available at all sites, EL Levels 3-4 can be scheduled into the mainstream grade-level content courses."

25. The Assistance Superintendent of the Office of Multi-Lingual Learning has a policy on student scheduling which states:

    > Secondary EL students in Levels 3, 4, and 5 are scheduled into general education classes throughout the day. Level 3 students should be scheduled into core classes co-taught by both a content teacher as well as an EL teacher to support language development. If a teacher or department feels that an exception needs to be made, please work with your school administrator and Multi-Lingual Learning district coach to determine scheduling options.

When teaching a co-taught course both the Content and EL teacher should work together to determine how to best different instruction to support the language needs of students while maintaining a clear focus on standards for each unit/lesson. Differentiation may include additional modeling, scaffolds, and group work as well as adaptations to instruction material and methods, pacing, and classroom assessments. MLL coaches are available to support where needed.

An EL student may earn contact credit in a clustered EL class taught solely by a dual-licensed EL teacher if the following criteria are met:

1. Course and required syllabus are approved the Office of Teaching and Learning and Multi-lingual Learning
2. Content of the course is aligned to same grade level or content standards as the mainstream course
3. If an EL teacher is not dual-licensed, but is highly qualified through the HOUSSE process in a specific content area, the school principal can determine whether to assign the teacher to teach the content course.

When scheduling and staffing allows, students should also be enrolled in an aligned ELD course. This allows for explicit language teacher and practice in the content areas as well as previewing and reviewing the core contents.

26. The Respondent's EL Service Model for 2014-2015 revised on May 12, 2014 requires that EL services are provided in sheltered classes for Level 1 and 2 EL Students. For levels 3and 4, EL services are provided in a co-taught setting with an EL teacher and a content teacher and each subject area also has an EL teacher providing English Language Development support. This service models notes that Level 1 and Level 2 EL students should be placed in math classes according to their math skills and not their EL level. Students in EL "levels 3-4 should be scheduled in co-taught content courses and then, based on individual student need, scheduled into the aligned ELD support class." The service model notes that the availability of course offerings for levels 3 and 4 "may vary based on site-specific needs and student enrollment."

27. The Respondent's policy states that co-taught classes are provided for Level 3 and Level 4 students. There are two teachers in a co-taught class, one in the content area of English, Social Studies, Science, and Math, and one that is an ELL teacher. Students in the co-taught class receive an additional class period for English Language Development ("ELD") related to the content area based on budget and staffing availability. Some students do not receive the associated ELD class.

28. All four content classes are not co-taught in any given quarter. Each school's administrators decide which classes will be provided based on budget. If a class is not offered as a co-taught class, the school decides whether the student will be in a mainstream class or a sheltered class.

29. Each high school principle in the Respondent's district can decide which classes will be co-taught, how many classes will be co-taught overall, and bases this decision in part on funding.

30. ELL Students at Como Senior High are mainstreamed at level 3 and only receive co-teaching and/or English Language Development support if it is available. Access to this support is not consistently offered. Como Senior High offers some, but not many, co-taught classes.

31. ELL services are inconsistent across the high schools within the school district so some Karen students will transfer to another school that offers ELL instruction that is more effective at meeting their needs.

32. Some secondary Level 3 ELL students are in mainstream classes without English Language Development related to the core content area. Level 5 students do not receive services.

33. An ELL student does not receive graduation credit for classes taught by ELL teachers that are not also licensed in the content area.

34. Karen Education Assistants are in the schools and are able to use Karen as a support to a student's understanding of the material.

35. In 2013, the Respondent launched an equity initiative around mainstreaming of students with disabilities and ELL students.

36. Mid-way through the 2013/2014 school year, the Respondent decided to mainstream Level 3 students. Level 3 ELL students were required to move from their sheltered ELL classes into mainstream classes regardless of whether the students were ready for mainstream instruction. It was observed that this was very hard on many students. Level 5 students were released to mainstream without support or monitoring.

37. The Respondent did not notify parents of this change prior to the change. Parents of ELL students learned of the change when the teachers informed them their students would be moved to mainstream classes. The Superintendent wrote a letter about the change after it had already been implemented.

38. Prior to the change in 2013/2014 school year, the ELL department would work closely with counselors to transition students to a higher ELL level based on the readiness and needs of the individual student. If there were concerns that a student was not ready to move to the next level, then they would have the student repeat the same ELL level. Students with limited formal education who had arrived in the U.S. relatively recently were more likely to need to repeat the same English language level. Students with formal education were generally able to progress through the language levels faster and were generally more ready to be mainstreamed at Level 3. These students were equipped with the academic skills and background knowledge and did not have to spend time acquiring these foundation skills.

39. Prior to the 2013/2014 school year, Level 1and Level 2 ELL students tend to be in ELL classes except for one or two electives in mainstream classes. Counselors and ELL teachers would coordinate to ensure these students were in mainstream classes with a bilingual Education Assistant or in co-taught class. Levels 3 and 4 would have more elective classes and the counselors and ELL teachers coordinated to group these students with an Education Assistant to provide language support. ELL students were in co-taught science classes with language support. Fifth year students would be supported with a reading-intensive class to help them grow their skills. They would be supported as needed and slowly transitioned to fully mainstream classes without support when ready.

40. Mainstream English and Social Studies classes have heavy reading requirements.

41. Mainstream classes tend to be large with 36 to 37 students. Compared to their ELL classes, ELL students do not receive the same level of individual attention and skill development to be able to progress with their English Language skills. Since the policy to mainstream students at Level 3 has been implemented, it has been difficult for the counselors and ELL teachers to group the EL students together to arrange for a co-teacher or Education Assistant. EL students of different levels are grouped together in mainstream classes,

making it difficult to ensure the information is directed appropriately to their language level and development.

42. At Como Senior High School, some ELL classes have 40 students. There is a need for more teachers and resources, but the Assistant Superintendent has not provided the funds for these.

43. The Administration was made aware of concerns of ELL students' declining performance and difficulties with the mainstreaming initiative. Administration did not make any changes in response to these concerns or evaluate the student progress and outcomes to ensure effectiveness.

44. Level 3 ELL students have been mainstreamed tended to have lower grades in their mainstream classes than ELL classes teaching the same content. This has had a negative impact on students' GPA.

45. Karen students have been generally observed not to speak up much or say much. As a group, they have been observed to have good behavior and work hard, but grades in the D or F range. Mainstream teachers have been given higher grades than the work product merited because of the behavior and work ethic. This has resulted in Karen students receiving a passing grade even if she or he has not become proficient in the subject matter.

46. Students with a C- average are not ready for a 2-year college even if the student is technically passing the class.

47. Staff are aware of Karen students needing to spend the first two years of post-secondary education focusing on continuing language development before they can begin post-secondary courses. These students use up their PELL grant funds on remedial English classes and do not receive college credit for these classes.

48. Karen ELL students that graduated under the previous ELL instruction model of assessing individual readiness were reported to perform better in post-secondary system than those that were mainstreamed across the board at Level 3.

49. At a public meeting in summer 2016, the Superintendent promised the Complainant's stepmother that they would offer a 2.5 EL level class. As a result, Como Senior High is the only high school that offers a 2.5.

50. The Respondent has based its mainstreaming policy, in part, on research of ELL learners in California that have been in school their entire lives.

51. The Assistant Superintendent has accused ELL teachers of "coddling" the ELL students. She has cited an example of a high school ELL classroom using "Twinkle, Twinkle Little Star" as an example of "coddling." She has said, "how can students succeed if they don't fail."

52. The ELL program falls within the same department as foreign language program for native or fluent English speakers. Instruction that is effective for fluent English speakers is not effective for ELL student.

53. ELL students are allowed to attend school until they turn 21 years old. Karen students not on track to graduate in four years have been observed to be encouraged to transfer to another school or an Alternative Learning Center so the secondary school can maintain their graduation rates.

54. It has been reported that some Karen students are graduating with a below sixth grade reading level.

55. The Respondent's Special Education policy allows for initial evaluations to be initiated by a teacher or a parent. If a parent makes a verbal or written request for a Special Education Evaluation, then the principal discusses concerns with the parent and the possibility of General Education Interventions. The Parent can choose to request an evaluation or agree to explore additional general education options. If the parent requests an evaluation, then General Education completes the online referral form and the Child Study Team should review the parent request upon notification of the request. The Child Study Team should not wait for the completion of the referral to review the request. The Respondent must notify the parent of the decision whether to evaluate within 14 calendar days of the parent request.

56. The Child Study Team reviews the referral. If there is no need for evaluation, the parent is notified and sent information on parents' rights. If the Child Study Team determines there is a need for evaluation, the evaluation is developed along with parent's rights information. The evaluations are completed after signed parent consent received. Within 30 school days an evaluation report is written and reported to the parents. If the child is not eligible, the parent is notified. If the child is eligible, the parent sends a notice of the team meeting and an Initial Individual Education Plan(IEP) must be developed within 30 calendar days of eligibility. A final IEP is sent after the IEP Team meeting and the parent signature is required before starting service.

57. The Respondent's ELL Assessment Considerations & Checklist 2013-2014 includes the following considerations when determining whether a referral for special education is appropriate. These considerations include:

a. Whether the child has the opportunity to acquire the expected skills;

b. Whether instruction is provided at the student's level;

c. Whether the student is making progress with appropriate interventions;

d. The length of time in the US and/or education history.

58. At Como Senior High School, the special education process is separate from the 504 accommodation process and different teams are responsible for each process.

59. The Special Education Team is not certified or qualified to diagnose a disability. If concerns are academic based, the Special Education team can determine whether a learning disability is a contributing factor.

60. If there is a medical diagnoses of ADD/ADHD, the process for providing a 504 evaluation and accommodation is faster and more clear-cut than a special education evaluation process. Parents may choose to waive interventions to address a student's challenges and go directly to the Child Study Team review. Parents have this right, but the Respondent does not notify parents of this option.

61. The Respondent does not have a policy barring special education testing for ELL students, but it has been widely observed that it is very difficult for ELL learners to be tested for Special Education until the 3rd or 4th year in the county.

62. An outside medical evaluation will speed up the special education evaluation process for students that have ADD or other mental health disabilities affecting attention

and/or behavior.

63. The Section 504 accommodation plan process can be initiated when a parent notifies school staff that the student has a disability that is impacting education. The school counselor is responsible to bring the concern to the student assistance team to evaluate whether there is an impact on the student's education.

64. The Respondent determines that a diagnosis is impacting education based on overall grades, work completion, test scores, what the student is capable of performing and teacher input of their observations of the student. If attendance is a factor, the Respondent will attempt to improve attendance to see if that addresses academic performance issues. The evaluation is student-specific and dependent on the disability. Mental impairments are more difficult for the Respondent to determine than physical disabilities.

65. The Complainant and his older brother were in the same ELL class. It was observed that the Complainant's performance was better when he was in the same class as his brother and suspected that that his older brother was helping the Complainant with his schoolwork or doing the schoolwork for him.

66. In November 2013, when the Complainant's stepmother first approached the Respondent with concerns that the Complainant's academic performance may be due to a medical condition, she was not provided with an overview of the process or the options for accommodation available to her son.

67. During the Respondent's evaluation process and meetings with the Complainant's ELL teachers, the Respondent learned that the Complainant was struggling with attention to turning in homework on time and completing his work. These challenges could not be attributed to his status as an ELL student.

68. The Complainant's status as an ELL student contributed to the Respondent's decision to initially reject conducting a special education evaluation.

69. It is recognized that some parents of ELL students frequently have limited English proficiency themselves and may have a lack of familiarity with the US education system. They may be unlikely to know to request a special education evaluation or request accommodations for their child. The Respondent does not take proactive steps to inform parents of their rights. They may have a table at events at Community Meetings, but staff responsible did not know what languages the materials are in or verbally inform parents that these rights and protection exist.

70. Information about the special education department is provided to all parents, but the Respondent was not aware whether that information was translated into Karen.

71. ELL teachers were more likely than parents of ELL students to initiate interventions required for testing. They can identify the difference between the impacts on learning related to language acquisition compared to the impact of a disability on learning. It was frequently observed that ELL Teachers would request an evaluation, but the special education team would refuse to test.

72. A vision impaired ELL student waited nine months before receiving an Individualized Education Plan. While this student was waiting for the plan, the student had to stand inches from the board to see what was written. A hearing-impaired ELL student had to wait 16 months to receive an Individualize Education Plan.

73. The Respondent does not have an official policy requiring ELL students to wait three years before receiving a special education evaluation. However, it has been widely reported that it is extremely difficult for an ELL student, even with an obvious disability to receive an evaluation and accommodations.

74. Younger children learn a new language more quickly than older children, but the Complainant was learning English more slowly than his older brother.

75. Teachers requested a list of interventions to accommodate the Complainant's disability, but the Respondent did not have a list of interventions to try. The Complainant received no accommodations or interventions during the evaluation process.

76. Special Education services have been eliminated from Respondent's Alternative Learning Center school that exists to serve only ELL learners. Students must be bussed from the ALC to another High School to receive services. They must miss classes in order to receive services. Some students have chosen not to receive services rather than be bussed to another High School where special education services are available.

77. The Child Study Team was unable to provide a reason why they chose to evaluate the Complainant in his math class, even though his performance was better in that class compared to other classes.

78. According the Minnesota Department of Education, English Language Learner should exit the English language support services when they score a Level 5 or higher on the composite and a level 4 or above in all four domains.

79. ELL students whose parents speak limited English receive very little assistance from their parents to complete their homework and are performing better than the Complainant who is receiving intensive homework assistance from his stepmother, a native English speaker with a Master's in Education. With this level of assistance and exposure to English, the Complainant should be progressing much faster than he has. His disability and a significant delay in accommodations for these disabilities have led to a delay in his academic progress.

80. In November 2013, the stepmother requested special education testing for the Complainant. The school counselor explained the process which is lengthy and suggested the Complainant take her children to the doctor. The stepmother took the Complainant to the doctor for an evaluation and requested the necessary forms from the teachers. The Child Study team discussed the Complainant's situation determined that they would not test for special education, but would look into the request again if there was a diagnosis.

81. On December 16, 2013, the Complainant's stepmother emailed his school counselor and informed her that the Complainant is not performing well in several classes, did not have the opportunity to discuss these concerns at conferences. She said she is increasingly concerned about her stepson's performance and asked to meet with his teachers and counselors. She asked to discuss immediate steps to help the Complainant. The school counselor replied that she would reach out the teachers to schedule a meeting, but if not all the teachers were available she asked whether they could meet when they get back from break. The school counselor was able to schedule a meeting with herself, one of the Complainant's teachers, and the Complainant's stepmother for December 18, 2013. On December 19, 2013, the School Counselor emailed Ms. Sommerville and said she had spoken with the nurse and instructed Ms. Sommerville to bring the Complainant to his pediatrician to assess the impact on him from his previous car accident. "There isn't

anything that she can do, so she said to start there."

82. On December 20, 2013, the stepmother emailed one of the Complainant's teacher indicating she was concerned about his poor grade and has hope to hear from her before the holidays to see if he could do extra work over break to increase his grade.

83. On December 20, 2013, the Complainant emailed the principle and said she had spoken with the Assistant Principal concerned with the computer class that the Complainant was taking. She stated it had been very challenging to contact the computer teacher; he has not been at conferences or able to meet. She was trying to ascertain why the Complainant was performing poorly and asked the teacher for a syllabus and lesson plans, but the teacher did not have any, this teacher stated he keeps the work on a website and indicated the Complainant could get partial credit. The stepmother went to this website, saw four assignments were overdue, but could only understand one assignment and explain it to the Complainant. The stepmother indicated she could not work on the assignment on her home computer, the teacher does not stay after school and her stepson does not have a free period to go to the computer lab to complete the assignment. The stepmother said that her son would not be successful in computer class if the instructions were as confusing as she had seen. The Complainant said she has raised concerned about the mainstream classes her sons are in because they are getting worse grades in these classes. The stepmother said she had helpful discussions with some of the Complainant's teachers. The stepmom attended conferences by one teacher only discussed her other stepson. She found the school counselor helpful and ask if she could identify a mentor for the Complainant. The stepmother identified the challenges that her Complainant was facing in a new country, culture, family, and language and believed he can succeed with combined effort between parents and teachers.

84. On January 2, 2014, the Complainant's mother emailed the school counselor and carbon copied four teachers requesting the completion of forms as part of his medical provider's evaluation for a learning disorder.

85. On January 21, 2014, the school counselor emailed the stepmother informing her the forms were ready.

86. On February 10, 2014, the stepmother at the school counselor to transfer the Complainant out of woodworking class because of poor grade. The counselor responded and offered to move the Complainant into a physical education class because he had discussed that option with an ELL teacher.

87. On February 25, 2014, the stepmother emailed the Como Sr. High principle and the school administrator and stated that she is concerned about her stepsons' performance at school and has had numerous conversation with their teachers, counselor and other staff. The school counselor provided the administrator with background information. She noted that the stepmother had requested a class syllabus, but the school counselor explained that it is difficult to provide that in high school as activities may take longer than expected and recommended the stepmother speak with the teachers to know what is expected over the next month. She indicated that an ELL teacher offered to send home an extra book for the parents to follow along. The school counselor stated that teachers report that the students are not organized, don't used their planner or have separate folders. She suggested to have separate folders for each class and use a planner.

88. On March 20, 2014, the Assistant Superintendent with the Office of Multilingual Learning emailed the stepmother and asked for a number to reach her regarding her concerns about

ELL offerings for level 2 students.

89. On March 9, 2014, the Complainant's stepmother wrote to the Saint Paul School Board. She outlined her concerns which included having two of seven courses in which they are mainstreamed at a Level 2 and having great difficulty. She was shocked to see that four of their seven classes would be in mainstream classes. She noted that for the bridge class, there would be no co-teaching for Level 3 social student classes. She has heard from other families that the co-teaching model is not implemented as it appears on paper and some children are in mainstream classes with no support. She stated this was a "significant departure" from past policy. She quoted the Respondent's description of their EL program which stated "student take about 6 years to acquire the necessary language skills to transition out of EL programs" and "By level 5 students spend their entire day in mainstream." Respondent "recommends that students receive EL services until they demonstrate proficiency in academic and social English…" The Complainant's stepmother also informed the schoolboard of the of challenges facing students with limited formal education and increased drop-out rate for SLIFE students. She wrote, "Karen are the majority of new arrivals in St. Paul and are dominant in the ELL program and most children have had interrupted educations. At Como, these students make up approximately 75% of ELL classes." She noted that proficiency takes longer depending on previous education and socio-economic factors. She cited research that students mainstreamed too quickly run a risk of dropping out. She pointed out that her children learned the alphabet a year ago and would be unprepared to read advanced materials such as Shakespeare. She questioned why there was no community input about this change.

90. On March 11, 2014, the Assistant Superintendent from the Office of Multilingual Learning invited the Complainant's stepmother to a meeting on March 18, 2014. The stepmother emailed her on March 17, 2014 indicating that she would not be able to meet the next day.

91. On February 11, 2014, the Specialized Instruction Building Coach ("Building Coach"), contacted the Complainant's mother regarding her request for a special education evaluation. The Complainant indicated she would be writing a formal letter of request to expedite the process. The Building Coach received this formal request on February 17, 2014. On February 24, 2014, the Building Coach contacted the Complainant's mother denying her request because of a lack of evidence of severe academic underachievement. The Special Education evaluation team would reconsider the request if a medical diagnosis was made. The Complainant's mother requested a phone conference and the Building Coach coordinated one for March 12, 2014.

92. On February 24, 2014, Ms. Somerville emailed the Specialized Instruction Building Coach ("Building Coach") to follow up on her request. The Building Coach replied that they discussed the Complainant and "based on his current grades and successful 8th grade school year, the Child Study team found he's not demonstrating severe academic underachievement in any area and would not meet eligibility for a learning disability…. Please send us medical information once the Complainant's medical assessment is completed, as we may be able to look at another area for consideration. Do you know if the test will be provided in Karen?" Ms. Somerville replied the following day and requested more specifics and to schedule a phone conference because of her work schedule.

93. On February 26, 2014, the Complainant brought home enrollment forms for year 2014-2015. They allowed for three "bridge" classes and the rest of the courses were mainstream classes.

94. On March 12, 2014, the Building Coach and Evaluation Coach, had a phone conference with the Complainant's stepmother explaining that the Complainant did not meet the criteria for a special education evaluation. The Complainant's stepmother said she was following up with a doctor and would provide a medical diagnosis if one was made. In the event a medical diagnosis was made, Specialized Instruction Building Coach and Evaluation Coach provided the Complainant's mother with information regarding a 504 plan.

95. On March 25, 2014, the Complainant's medical provider provided a "Pediatric Developmental and Behavioral Consultation Report." This report indicated that the Complainant presented with Attention Deficit Hyperactivity Disorder – inattentive presentation. For the Complainant, this condition manifested with "significant inattention, distractibility poor task completion, and disorganization. These behaviors have been observed in multiple settings, specifically home and classroom and appear to be causing [the Complainant's] significant academic impairment." The report recommended that the Complainant's parents "request comprehensive school assessment in order to develop Individual Education Plan under the Other Health Disability classification. Suggest assessment include speech/language evaluation as well as cognitive and achievement/academic skill testing to evaluate for possible language disorder as well as cognitive weaknesses/learning disorder. A psychological Evaluation signed by the medical provider on April 8, 2014 concluded that the Complainant met the criteria for Attention Deficit Disorder – Inattentive and Adjustment Disorder with Mixed Anxiety/Depression. Five of the six respondents (Complainant's birth father, stepmother, and four current classroom teachers) indicated that the Complainant shows the behavior of failing to finish tasks and poor concentration. The Psychiatrist recommended that that the Complainant's parents share this assessment with the Respondent, request an evaluation to determine whether the Complainant qualified for an IEP under the classification of Other Health Disability. He stated that the school evaluation should include speech/language, cognitive and academic achievement testing with appropriate support for his native language. The Psychiatrist also recommended the Respondent consider accommodations such as "organizational supports and instruction, preferential seating, assignment and tests accommodations, and instructional support for any associated learning or language disorder." The Respondent did not discuss these recommendations with the Complainant and his parents.

96. The Complainant emailed the Assistant MLL Director and the Como Senior High School Principle informing them of this recommendation. She stated that she had provided this information to the Building Coach who could not be in any classes until the process was completed. The Building Coach informed the Complainant's stepmother that there was a tight timeline to complete the Special Education Evaluation. The stepmother said she has requested to have him tested for several months and spent "an inordinate amount of time and money to get him doctor's assessments." She requested her son be tested the same school year so he can receive intervention. She also stated that he will be in summer school and she hoped the testing would be completed and he would have an Individualized Education Plan.

97. The Chair of the Karen Parent Advisory Council sent out a meeting notice of a Karen Parent Advisory Council Meeting on April 9, 2014. In this meeting notice, he indicated that they had receiving an "outpouring of calls from Karen parents expressing their concern about the struggle their children are experiencing in the classroom due to the changes [in ELL-Levels] in secondary schools." At this meeting, parents shared concern that the

mainstreamed students were not able to understand the curriculum and graduated without the English Language skills they need. An employee of Saint Paul College in the Admissions department also reported that Karen students were graduating from the district without the skills to go into the classes and needed remedial coursework.

98. On April 11, 2014, the Complainant's stepmother emailed school board members thanking them for speaking with her and her husband regarding the Respondent's ELL program. She provided the School Board with notes detailed concerns about Karen students in the ELL program. Although the Assistant Superintendent stated that ELL program was successful, the Complainant's stepmother states that fifty teachers voiced concerns about the model. The notes list comments from various teachers expressing concerns about the Karen students that are not proficient in English, there are students that cannot read or understand a textbook or worksheet and classes are too large to provided assistance. Other teachers expressed concerns that previously, Level 3 students have been left behind in a mainstream classroom. They do not have the concepts, vocabulary and academic skills and this has had a negative impact on their grades and educational opportunities. The School Board did not respond or inquire into her concerns. Teachers reported that mainstreaming Level 3 students was too early and slowed or stop English Language Development. Another teacher reported that Level 3 students were happy and had "voices" and positive attitudes, but after being mainstreamed are earning low grades and working so hard for D grades. The Assistant Superintendent responded: "I can't isolate any longer and drill to kill in grammar." A teacher reported that co-teaching SLIFE students and mainstream students means that the pace of the class goes much slower. Some teachers reported that students were being taken out of biology support classes and put into other content classes so they can graduate. Another teacher reported that the Multi-Lingual and Learning department provide researched related to long-term learners, not SLIFE students.

99. On April 16, 2014, Professional Issues Committee meeting, the teachers expressed concerned that their students are being rushed through the ELL levels and were concerned that these students are graduating prematurely. They expressed concerns that students were reading at a 2nd or 3rd grade level and could learn more in a sheltered class than a mainstream class. Teachers reported that SLIFE students would copy the content without understanding it.

100. On April 18, 2014, the Building Coach emailed Ms. Sommerville and said that the Complainant's health diagnoses do not appear to adversely affect his educational performance because of his 8th grad performance and passing grades in all but one class. If the Psychologist or doctors could provide additional accommodation recommendation she could request a 504 Plan through the School Counselor.

101. On April 18, 2014, the stepmother contacted the Assistant MLL Director and said she wished to speak with her immediately and would ask if PACER could be on the call as she wishes to discuss possible legal action against the school district.

102. In its communication to the Complainant's parents on April 23, 2014, the Child Study Team informed them that the Respondent is proposing an evaluation planning meeting in response to the parents' request for an evaluation. The Child Study Team considered the Complainant's psychological evaluation, the Pediatric Developmental and Behavioral Consultation Report, and transcripts and school records. The Child Study Team rejected pursing a 504 Plan [disability accommodations plan] to gather more information through the evaluation process. The Child Study Team also noted the following in the

Psychological Evaluation, "[the Complainant] has been in the country for only one year… due to the language difference, it is difficult to determine whether the data presented is a valid representation of current functioning. Therefore, caution should be exercised when interpreting results."

103. The Complainant's stepmother did not cancel a meeting with Assistant Superintendent, but instead had a phone conference because her work schedule did not allow her to attend the meeting in person.

104. On April 24, 2014, the stepmother informed the school counselor that the Complainant started taking medication for ADHD that day and asked her to notify them if any side effects were observed. The school counselor informed the school nurse of the new medication.

105. On April 25, 2015, 2014, the Building Coach, Special Education evaluator, and the Assistant MLL Director met with the Complainant's parents, conducted the evaluation planning meeting, and completed the parent interview. They estimated that he understands English about 50% of the time and his older brother will interpret for the Complainant if he does not understand something. His parents indicated that he has difficulty following multiple step directions. Compared to his siblings, the Complainant's speech and language skills are about the same in Karen, but lower in English. They indicated that he has difficulty understanding directions and is frequently distracted when working on homework and need many reminders to complete the work. His academic performance is lower than his siblings. His parents stated that individual attention was very good for him and the more organization assistance the better.

106. On April 29, 2014, the Complainant's stepmother emailed the Specialized Instruction Building Coach asking for a description of the tests/evaluations planned for the Complainant's special education evaluation.

107. On April 29, 2014, the Complainant's stepmother requested a description of the tests and evaluations that the Respondent would use to conduct its special education evaluation. The Evaluation Coach responded that the Respondent would conduct its evaluation using the Curriculum-Based Measures which are standardized, locally-normed academic assessments to determine the Complainant's skill level in math, reading, and writing to create an index of basic skills. An evaluation requirement includes a special education teacher observing the Complainant in an academic setting to document his academic performance in class. This special education teacher would also review his academic records and state and local assessments to document his educational history.

108. On May 1, 2014, the Building Coach explained that the Systematic Interview/Observation Worksheet would address the effect of the Complainant's medical diagnosis on his school performance, and at home and in the community. The Building Coach would collect information from the Complainant's parents and his teachers to evaluate his performance in these settings.

109. On May 2, 2014, the Respondent sent the Complainant's parents a letter requesting permission to evaluate the Complainant's education function for an initial evaluation to determine the Complainant's eligibility for special education under Individuals with Disabilities Education Act. The Respondent indicated that it must receive the signed permission of the Complainant's parents before it can begin the evaluation. The Respondent stated the parents' request, as well as the Complainant's Psychological Evaluation, Pediatric Developmental and Behavioral Consultation Report, transcripts and

school records to form the basis for their proposal to evaluate the Complainant. This letter also indicated that it will take measure to reduce potential cultural or linguistic bias in testing and interpretations of results by considering the Complainant's language, cultural background, and educational history. The Respondent would use an interpreter to complete documented procedures in articulation, voice, fluency, and language. The Child Study Team noted that the Psychological Evaluation indicated that the Complainant "has been in the country for only one year… due to the language difference it is difficult to determine whether the data presented is a valid representation of current functioning. Therefore, caution should be exercised when interpreting results." Tests to be conducted included: Communication Development, Academic Performance, Health/Physical Assessment, Self-Help/Functional Skills, Transition." The Complainant's parents checked that they do not agree with the entire proposal and do not give permission for the school to proceed. Handwritten is "unclear what tests/eval. Is being done to measure cognitive ability/functioning. Requested clarification via email in 4/29/14. Have not received response. In the interest of expediency, I give my permission to proceed. The Complainant's stepmother signed the form on April 30, 2014.

110. On May 2, 2014, the Complainant parents stated they did not agree with the entire evaluation proposal and therefore checked the box saying they did not give permission to proceed with the evaluation. They wrote they do give their permission in the interest of expediency. The Evaluation Coach emailed them explaining that the Respondent would not conduct evaluations to measure the Complainant's cognitive ability or functions because that is not an assessment area required for the area of "Other Health Disability." The Evaluation Coach informed them that they could not proceed with an evaluation as long as the box is check that the parents do not give permission even though they indicated in the notes that they do give their permission.

111. The Complainant's stepmother replied that she either checked the wrong box or misunderstood the box she checked. She said that they do give permission and would resign the form to bring to the office on Monday.

112. On May 3, 2014, the evaluation coach informed the Complainant's stepmother that the special education evaluation would include testing to determine whether he had a speech or language disorder.

113. The Complainant's father dropped off the corrected signed evaluation permission form giving consent for his son's evaluation on May 5, 2014. On May 12, 2014, the Complainant's stepmother followed up with those involved in the special education evaluation process requesting a timeline with dates that the evaluations and tests would be conducted. She indicated that the Complainant had a follow up appointment with his behavioral health physician and could obtain more documentation if needed at that time.

114. In May 2014, the Special Education teacher reviewed Brigance Comprehensive Inventory of Basic Skills, Achievement: Curriculum- Based Measures, and interviewed the Complainant's parents. The School Nurse reviewed the Complainant's health history, and two speech pathologists gave the Complainants several assessments.

115. On May 13, 2014, the Building Coach replied that the evaluation would be completed by September 9, 2014.

116. On May 20, 2014, a School Nurse provided a health status noting the Complainant's diagnoses, his father's observations, and a teacher monitoring report that observed that the Complainant had difficulty with fidgeting, remaining seated, waiting turns, interrupting

others, 'on the go' behavior, easy distraction, fails to complete assigned tasks, trouble paying attention, careless/messy work and difficult following direction. These difficulties affected peer relationships and classroom learning 'quite a lot' and the Complainant completed 50% of assigned work in a one- week period of poor quality." The School Nurse provided the observation that the Complainant needs support to gain skills in managing distractibility, difficult with working memory, problem solving, verbal fluency, self-regulation, and analysis/synthesis, contemplations to optimize classroom learning.

117. On May 30, 2014, the Special Education Teacher interviewed two of the Complainant's ELL teachers who reported that the Complainant performs better in a smaller-size classroom, has trouble concentrating, and is not progressing as quickly as his older brother. One instructor expressed concern that the Complainant was not progressing more quickly even with an English speaking parent at home. This report concluded that the Complainant's use of his native language was normal, and his English language skills are within normal limits for a student that arrived in 2012 and is learning English.

118. In June 2014, the Work Coordinator reviewed assessments and the Special Education Teacher reviewed the Complainant's Academic Records and an Observation Worksheet.

119. On June 2, 2014, the stepmother notified the Complainant's school counselor and ELL teacher that they have decided to keep the Complainant in Level 2 for the 2014-2015 school year.

120. On June 3, 2014, Ms. Sommerville contacted the Building Coach, Assistant MLL Director, asking for an update and stating her concern that the school year was going to wrap up soon. The Building Coach replied that one teacher has provided an evaluation form but not the others. She stated that they would be at the beginning of the 2014/2015 school year to review the evaluation data and make a determination on qualification for services.

121. On June 12, 2014, the Special Education Teacher provided an assessment narrative of the Complainant's Self-Help Functional Skills and noted his diminished alertness. The Complainant's stepmother reported he has difficulty in the areas of distractibility and remaining focused. The Special Education Teacher spoke with two of the Complainant's teachers, one of whom did not observe the Complainant having issues with heightened or diminished alertness. The other teacher reported that the Complainant was sometimes off-task and would wander around the classroom. "Moving the Complainant to a smaller class with more structure was very helpful in assisting [the Complainant] in remaining on task." Under the area of Managing and Organizing Materials, the Complainant's stepmother stated that he demonstrates very poor organizational skills and they have addressed these issues at home and have also asked teachers to use notebooks and folders to help him organize his materials. One teacher reported that the Complainant will occasionally lose an assignment and is not organized, but the other teacher did not state this was a concern. In the area of following directions and task completion, his stepmother said that he is unable to follow multiple step instructions. One teacher echoed these concerns of task completion.

122. On August 25, 2014, the stepmother contact Building Coach, Assistant MLL Director for an update. She informed them the Complainant had met with his physician to follow up on his medication, but required an evaluation in order to evaluate whether the medication was effective. The Building Coach replied that one more academic observation still needed to be completed. She offered to schedule a meeting on September 8th or 9th to review the findings. The meeting was scheduled for September 15, 2014 to accommodate the

Complainant's father's schedule.

123. On September 5, 2014, the Complainant's stepmother requested that the Complainant's ELL teachers be present at the Special Education Evaluation meeting because they "interact with him daily and would have more insight" about the Complainant. The Specialized Instruction Building Coach said that she would invite these teachers. Prior to the Complainant's stepmother's request, only one of the Complainant's teacher – a mainstream teacher was invited.

124. On September 12, 2014, the stepmother emailed the Complainant's ELL teacher asking for the Complainant's English score. The Complainant's score is 2.9 and his older brother's is 3. The ELL teacher wrote in this email that the older brother seems more functional and is "having higher grades in general (B/C for Complainant, A/B for his older brother)." Having a native English speaker at home, he would expect the Complainant to be testing at a higher level than he was at the time.

125. The special education evaluation compared the Complainant's performance against other ELL Learners, not mainstream students.

126. The Respondent takes noticeably longer to process a special education referral for an ELL student compared to a mainstream student.

127. A number of teachers expressed concerns to the Assistant Superintendent about seeing ELL students struggling with mainstream classes and not having the supports they need. The Assistant superintendent responded that she was open to looking into their concerns, but "ELL teachers are not reading teachers.... I can't isolate any longer and drill to kill in grammar." Teachers responded that the model she is referring to is not appropriate for students with no education or interrupted education. Teachers who knew the family knew they would be untrusting of an unknown person contacting them.

128. A student for whom 16 weeks of interventions were not improving his academic performance did not receive a special education evaluation despite the request of his parents and teachers. The Respondent did not allow a trusted interpreter to contact the family and the family would report there were no problems when an unknown interpreter called them. Another student had serious behavioral issues suggesting a developmental delay. When the student was referred for a special education referral, the team reviewed the behavior and said it was "[refugee] camp" behavior and not related to a disability. The student stayed in the classroom the entire year. His parents transferred him to another school where he was ultimately evaluated for and diagnosed with a disability and then received special education services.

129. In a meeting with ELL teacher and the Assistant Superintendent and the Assistant MLL Director, and ELL teachers from various schools expressed concerns that the ELL students in a mainstream class needed more time to understand the material, but the mainstream students were frustrated at the slower pace. There were also concerns that some ELL students were graduating, but only by barely passing their classes and not acquiring the foundational knowledge they need. Others observed that the ELL secondary students who were only at a first or second grade reading level were put in mainstream classes where a much higher reading level is required to understand and learn the content. Other teachers mentioned that ELL Students will spend an excessive amount of time studying to get a barely passing grade in a mainstream class when they would have more success with ELL support. Other ELL teachers stated that other models have been much more successful with ELL students that the mainstreaming model.

130. The Evaluation Coach contacted the Complainant's parents on September 9, 2014 with the evaluation report and contacted them on October 21, 2014 and scheduled a meeting for October 28, 2014.

131. In the Special Education Teacher's systemic observations of the Complainant in math, she compared the Complainant to three other male Karen students. She noted that the Complainant was on task 93% of the time compared to the comparators at 60%. The Complainant participated in class 7 times and his peers did not. The Complainant was observed assisting his peers and completing two tasks and one of his peers completed a task. His math teacher observed that the Complainant is very smart mathematically and will occasionally lose an assignment he has completed. The overall summary of the results noted that the Complainant's skills are within the range of what could reasonably be expected of a student in their second year. The report notes that the parents' concerns at home have not translated to the same level of severity or concern at school. The report conclude that the Complainant has not demonstrated a need for special education services.

132. The Evaluation Report of the Complainant, dated September 9, 2014, notes that the Complainant's speech and language skills in Karen are about the same as his siblings, but are lower in English. This report also noted that the Complainant's academic performance is lower than his siblings. The report states that the Complainant has difficulty understanding directions and needs assistance from his stepmother to understand the directions and have assistance completing his homework. He often becomes distracted when doing homework and needs reminders to direct his attention back to his homework.. The report notes that the Complainant has performed better after being transferred to a smaller ELL class and when receiving individualized attention. He has been staying after school with his ELL teachers for one-on-one help. The parents noted that his previous school provided tools to help the Complainant stay organized and on top of assignments and the more organization he can have, the better. His parents also stated that he needs a lot of attention, supervision, and hands-on learning.

133. On September 15, 2014, the team discussed that the parents could meet with the Complainant's counselor to discuss whether a 504 plan would be appropriate

134. At the October 9, 2014 ELL PIC meeting, a Professor with 20 years' experience and responsible for researching ELL students and language and wrote a thesis on best practices of teaching ELL students in public schools attended. She reported that academic language learning is essential for students to understand to content. Students tune out to texts that are more than five years above their reading level. She reported that thirty years of research show that students stay engaged if they understand approximately 90% of the reading. If not, they develop coping mechanism such as copying or pretending to follow along. Older students that are new to literacy need to be and given time to develop academic literacy. The Assistant Superintendent said she needed time to think about it. A teacher at this meeting reported that she was concerned with level 3 students being placed in mainstream classes. Students scoring below a 3.7 on their ACCESS were struggling with content even with co-teaching, scaffolding and support. The Assistant Superintendent acknowledged that some students were not understanding the materials and that those students are the exception. A teacher reported that teachers across the district were given a survey about curriculum and were told that, in their ELL classes, they need to give the same curriculum and assessments as those provided in the mainstream classes. The Assistant MLL Director said that the pacing guide should be a

guide and scaffolding should be provided to assist students in learning the material. Teachers reported that EL teachers have not been informed of this. The Assistant Superintendent reported she had purchased leveled materials for middle school, but these materials had not been purchased for high school. The teachers requested that administration send out a communique to the schools to clarify that ELL teachers do not need to use the same instructional materials as the mainstream courses. This was not the message that principles were providing to ELL teachers. Another teacher reported that language needs of 12th grade EL students are not being met. They are at 2nd and 3rd grade level and are going to graduate with only a 2nd or 3rd grand level. She reported that they would learn more if they had a 3L ELL class. She reported that these students are copying the content in their co-taught EL class. There was also a concern expressed that dual licensed teachers were not allowed to teach content. The teachers expressed that the principles give a different message at each school.

135. On October 15, 2014, the stepmother emailed the Chief Academic Officer and said that she and her husband, as parent leaders in the Karen community, have met with many parents who are concerned about the ELL curriculum and requested a meeting to address these concerns. The stepmother followed up on April 21, 2015 because she had not received a response. The Chief Academic Offer apologized for missing her October email and wanted to meet about her concerns.

136. October 15, 2014: In his Language Development and Reading 2L, the Complainant was next to the teacher during a class discussion. The Complainant participated 7 times. The Complainant moved when directed. He was observed on task and working to completed the assigned task 92% of the time, while his peers were at 91%. The Complainant was the second student to complete a spelling test. He was asked to rewrite the material to make it legible. He independently followed directions 92% of the time compared to his peers at 82%. His materials were organized 92% of the time while his peers were at 91%. The Complainant and his peers completed three assigned tasks, but the Complainant again rewrote the sentences to improve legibility. The teacher reported that this was a typical day for the Complainant.

137. October 21, 2014: In his ELL Language Arts/Science Class it was noted that he matched his peers in following directions, being on time and prepared for class, and completing his class work within routine timelines. It was observed that the Complainant remained engaged and completed. This teacher noted he has "good oral reading skills in the area of fluency and pronunciation."

138. October 21, 2014: In his Woodworking Class, the Complainant was prepared one time. He independently followed directions 90% of the time compared to his peer that followed directions 100% of the time. He was observed on task and completing class work within routine timelines at a rate of 90% while his peer was at 100%. The Complainant was briefly not on task and studying the push stick he had just finished making instead of beginning a work sheet like the rest of the class. His teacher reported he "does great without extra help or supports in class"

139. On October 22, 2014: In his Language/Social Students 2H class, the Complainant was seated in the second row of desks in the middle of the room. The Complainant participated in the teacher-led discussion 17 times and his peers participated 3 times. Both her and his peers were on-task and working on the assignment 100% of the time. He independently followed directions 100% of the time, whereas his peers followed direction 80% of the time. He had his materials 100% of the time observed, whereas his peers were at 93%.

He was helping a peer in writing the assignment in his planner. The teacher said the complainant is doing well, is ahead of the curve, and understands more this year with the level 2 class change from US to World History.

140. On October 23, 2014: In his Beginning Ceramics class, the Complainant was sitting at a table in the middle of the classroom. The Complainant answered a question whereas his peers did not. The Complainant was on task and working on the assigned tasks 100% of the time, whereas his peers were 60% of the time. The Complainant independently followed directions 90% of the time, whereas his peers were at 70% of the time. The Complainant had his materials organized 100% of the time, whereas his peers were at 80%. His teacher reported this was a typical day and the Complainant is "good."

141. On October 28, 2014, the Respondent conducted a second evaluation of the Complainant. He was in 10th grade at the time of the evaluation. This report indicated that the initial evaluation was completed in September 2014, but because the evaluation team only observed his math calls, his parents requested a new evaluation to review the Complainant's performance in all of his class. The report indicated the Complainant's diagnosis of Attention Deficit Disorder – Inattentive Type and Adjustment Disorder with Mixed Anxiety/Depression. His parents indicated that he struggles with schooling but otherwise is doing okay.

142. On October 28, 2014, the Respondent notified the Complainant's parents of their evaluation determination that the Complainant does not meet the eligibility for an educational disability.

143. In October 2014, the Complainant was observed in each of his classes for twenty to thirty minutes comparing his behavior to his peers. Behaviors observed were organization of materials, following directions, and the ability to stay on task and complete work within routine timelines. Overall, it was noted that the Complainant is repeated ELL Level 2 classes and earning: Language/Science A+, Geometry C+, Language Development and Reading B+, Language/Social Studies B-, Beginning Ceramic A, Beginning Woodworking D-. The evaluation report concluded that the additional observations demonstrated that the Complainant's behavior was not significantly different from his peers and that his health diagnosis is not significantly impacting his education performant. The report also noted that the Complainant is independently organizing materials 98% of the time, on-task 95% of the time, independently following directions 95% of the time, whereas his peers' demonstrated these behaviors less often than the Complainant at 93%, 89%, and 85% respectively. The report concluded his communications skills are within normal for an ESL student arriving in 2012. There were no concerns with his articulation, voice and fluency and his Academic skills fall within or above the range of skills reasonably expected for a student in his second year of English instruction. Although his parents report concerns in three areas of Other Health disability, teachers and observations do not show this level of severity or concern. His needs related to job skills, work experience, financial literacy, and career planning can be address through regular classes. The report concluded that his medical diagnosis is not significantly impacting his education performance and therefore his is not demonstrating a need for special education services.

144. On November 5, 2014, the Section 504 Lead Resource contacted counselors at Como Senior High School asking if it would be appropriate to offer to write a 504 accommodation plan for the Complainant. The Respondent is aware of the Complainant's disability and recognized its duty to offer an evaluation for eligibility for a 504 accommodation plan. The Lead Resource felt that the counselor could

likely determine whether the Complainant would be eligible, given the completion of the 504 plan. The Lead Resource recognized that the family has "great concern about the student needing support." She indicated that the Respondent could make the offer and allow the Complainant's parents to decide whether to accept the offer. A counselor responded that they would need the student's name in order to proceed.

145. On November 5, 2014, the Assistant Superintendent sent ELL guidance to teachers and administrators. Secondary EL students in levels three, four, and five are scheduled in general education classes. Level 3 should be in core classes that are co-taught by a content teacher and an EL teacher. She instructed the content and EL teacher should work together to differentiate instructions and support the language need while also focusing on the standards for each lesson. Suggestions for differentiation included modeling, scaffolds, group work, and adaptations to instructional materials, pacing, and classroom assessment.

146. In a Karen Parent Advisory Committee meeting on November 7, 2014, parents expressed concerns about their students being mainstreamed and being unable to understand the curriculum and also graduating not have the necessary English skills to access post-graduate opportunities without first having remedial English classes.

147. The counselor left a message with the Complainant's parents on November 12, 2014 and as of November 11, 2014, the Complainant's parents were deciding how to proceed for the 504 plan.

148. The Minnesota Department of Education provided an English Learner Plan of Service Feedback to the Assistant Superintendent, Office of Multilingual Learning. The Respondent's ELL program met all Part I requirements related to English Learner Identification Criteria and Procedures. The ELL program did not meet Part II requirements regarding the amount and scope of service of the English Learner Program. Specifically, further action was required to provide clarify on the types of programs that are provided and to whom, and "Notification of EL/LCD Services," and further detail of scope of service and how years of formal school in English will determine service. MDE provided comments that the Respondent "must provide an adequate language acquisition program to English Learners in a consistent and reliable manner. It is essential that ELs at all grade levels and proficiency levels designated as receiving services actually receive regular English language instruction from an ESL licensed teacher. This comment was in response to the Respondent's description of the secondary programs which stated the following:

> "students at level 3 or higher *may be served* through a co-teaching model in the content areas," "these EL students *may have* one or more LD classes associated with the co-taught contents classes."

This comment cited the *Equal Educational Opportunities Act of 1974* which states that violations made include failure to provide adequate language services to its ELL students; and/or fails to provide resources to implement its language acquisition program effectively. The MDE also noted that if students are classified as EL they should receive English language development instruction in an English Language program unless the parents decline services.

149. On December 10, 2014, the counselor reached out to the Complainant's primary counselor who had returned from leave. The counselor had invited the Complainant's father to a meeting on November 26, 2014, but he did not respond with his availability.

150. A December 18, 2014 Professional Issues Committee meeting, an attendee from the district said that the administration cannot tell the principals how to make their schedule. A teacher reported that a 1.5 Level class was helpful to SLIFE students and allowed other students the ability to move faster through the material. That level was eliminated.

151. A district representative at this meeting said that there are not enough staff to service all of the ELL students. When there is a co-taught class, and ELL student may be denied access because it would require dropping mainstream students from the class.

152. At the December 18, 2014 PIC meeting, it was reported Principals were unsure about scheduling dual-licensed teachers to teach an ELL class for credit. The Chief Academic Officer said the administration of each school makes their schedule and central administration cannot make their schedule for them. It was reported at Como Senior High School that level 3 students were taking a biology class that was previously attended by Level 4 students. Level 4 students had performed better in that class than the Level 3 students. Previously, the Level 3 students had a survey course where they developed the skills they needed to go into higher level science classes. That class has since been eliminated and Level 3 students are in biology and chemistry classes without the necessary science skills. Chief Academic Officer said that they want schools to look at individual students and whether they need to be in a more sheltered environment. This would be for those cases where students are really struggling. They do not want the policy that no level three students should be in a mainstream biology class. SPFT would like more urgency on the issue of creating a sub-committee to develop the graduation path for ELL students and SLIFE students. Teachers requested access to materials and permission to differentiate instruction for ELL students and build access to different texts and materials. A teacher reported that a 1.5 Level class was very helpful to SLIFE students and also gave other students the ability to move faster through the material. A teacher expressed concern about Level 4 and 5 students receiving no service from an ELL teacher. These students are denied access to co-taught classes because the scheduler does not want to drop mainstream students from the class. The Research Analyst said principals are not hiring more ELL staff and therefore there are not enough staff to service all the ELL students. Chief Academic Officer identified funds that can go to staffing for ELL students. She referenced Title 3 funding and other funds that ELL students bring into the district that could be used. The Research Analyst reiterated that the budget is a problem for sufficient staffing of ELL teachers.

153. On January 4, 2015, the Complainant's stepmother contacted the school counselor asking how to proceed with having a 504 plan in place. The 504 plan was suggested by the evaluation team after it was determined he was not eligible for special education services. Before winter break, the stepmother had provided the signed permission form to evaluate to the 504 Coordinator.

154. On January 5, 2015, the school counselor invited the Complainant's stepmother to meet with staff to discuss his educational status, determine Section 504 eligibility and developed an accommodation plan. That same day the Emotional Behavior Disorder Teacher sent the Complainant's stepmother a notice of proposed action to initiate a Section 504 Individual Accommodation Plan.

155. On January 6, 2015, the school counselor emailed the Complainant's teachers with recommendations including break from large tests, physical breaks in class, and breaking down instruction for larger assignments into smaller sections. They also discussed the Complainant joining AVID (organizational skills training), possibly being a TA for ELL

and staying in gym class for physical exercise.

156. On January 15, 2015, the stepmother emailed the Respondent to follow up on the petition she presented on December 16, 2014 at the Board of Education meeting. The petition had 512 signatures from SPPS students, parents, faculty, staff, and community members. She did not receive an acknowledgement that it was received or reviewed by the board. She said that students in the district have been "rushed into mainstreamed classes and not been provided the support they need. The pedagogy employed by SPPS is not researched based." On February 2, 2015, the secretary to the board of Education replied to Ms. Sommerville with the following response:

a. Students are placed based on ACCESS test scores

b. The district is committed to revisiting level 1.5 designation with appropriate curriculum in place

c. The concept of SLIFE is subjective. The district uses WIDA standards to place students based on WAPT placement test and ACCESS. ELL teachers are mindful of students' literacy and differentiated needs.

d. Level 2 Social Studies and Science curricula were reviewed and revised to align with state content standards and WIDA standards.

e. The District has made a commitment to provide professional development on ELL strategies for mainstreams teachers which is done in conjunction with ELL teachers. These opportunities will be offered during summer workshops because there is a substitute shortage which limits the professional development opportunities available to teachers during the school year.

157. On January 16, 2015, the Section 504 representative made a Section 504 eligibility report on the Complainant which concluded that he had a mental impairment of ADD/ADHD, the team agrees that the Complainant's mental impairment substantially limits a major life activity of learning and concentrating. The evaluation team concluded that the Complainant's ADD limits him at school due to distractions and he is unable to concentrate and focus without accommodations. Therefore, the team concluded that the complainant meets eligibility standards to be identified as having a Section 504 disability. Reasonable accommodations necessary for the Complainant to have equal access to the program are the following:

a. Assignments/Homework: Teachers will provide an overview and will break down large assignments into easily completed segments.

b. Instructional Methods: Teachers will simplify directions for work

c. Testing: Staff will allow breaks needed for a health condition

d. Other/details – Student can move around – drink, restroom, stretching

e. Organizations: Family and staff will plan for structured ongoing communications: Family/student will use portals, school district calendars, school and department websites to provide access to assignments in writing and for planning. Students schedule will have breaks in the day

158. The Complainant's school performance has improved since being on medication and receiving accommodations.

159. The Complainant's parents felt exhausted by the process to request English Language

support and accommodations for the Complainant.

160. At a February 19, 2015 ELL PIC meeting, teachers expressed concern that some students are not receiving any ELL services or seeing an ELL teacher. The Assistant Superintendent was working on introducing a Level 1.5 option.

161. On April 16, 2015, at the Professional Issues Committee Meeting, attendees discussed concerns about delays in ELL students receiving special education referrals. They gave examples of students with obvious disabilities having significant delays in receiving services. A child with developmental delays waited 15 months to receive services even though the parents requested an evaluation at intake. A student that was blind did not receive an Individualized Education Plan for eight months. Teachers reported that they were told they were referring too many children of color for special education services, 3914391539153913391439153914391439153943953963973983993910391139123913391439143915391 5 discussed that special education services were eliminated from an Area Learning Center for ELL students. Students needing special education services had to bus to another school. Teachers also reported that a Level 2 Karen student is in mainstream classes who sits with other Karen students that help her. This student is passing her classes even though she does not understand the content. A district representative acknowledged that teachers are feeling pressure to pass students. When the administration from the Multi-Lingual Learning Officer were asked if there was a plan to evaluate the effectiveness of co-teaching, the administrators said no.

162. At the April 16, 2015 ELL PIC meeting, the committee discussed EL student referrals to Special Education and Special Education Services. Teachers reported that participants at Special Education PIC meeting discussed that there was concern about ELL students being referred for Special Education and the length of time it would take to get them qualified. Teachers reported that Special Education staff told them they will not consider the student for special education. This happens before the matter is referred to the Child Study Team. . It was also reported that there was a concern that too many ELL students were referred for Special Education. Teachers asked if students need a specific disability or behavioral concern when seeking to refer an ELL student for a special education evaluation. Chief Academic Officer told them that a child cannot be pre-labeled with a disability and behavior and academics should not be separated when making a referral or identifying areas of concern. Teachers reported that ELL students with medical diagnoses are not receiving special education services. Teachers reported that they were told that students need to be in the country three years before they can be referred for special education. Chief Academic Officer said they would investigate what messages are out there. Teachers gave examples of students with traumatic brain injuries or developmental delays that were told they do not qualify for services. They gave examples of students with clear developmental delays and diagnosis waiting 15 months for services. When parents requested ELL services for a child that had a rock dropped on his head, they were told to take him to the doctor. A teacher stated that ELL teachers know what language development looks like and when students are nor making normal progress, but when ELL teachers make referrals they get a lot of push back and it is implied that ELL teachers are not competent to judge whether a student have special needs. Some teachers have stopped making referrals because of how they have been treated. It was reported that this resistance to evaluating ELL students for special education began taking place about four years prior. Teachers reported that they were told they were referring too many children of color. Nearly or all students an ELL teacher would refer would be students of color. Teachers reported that the process to evaluate a student took a

very long time. A teacher gave the example of a totally blind student that did not receive an IEP for eight months. Chief Academic Officer asked where this was happening and a teacher responded that it is happening at all the schools. Many teachers are being told not to refer students for Special Education because they are "over-referring" ELL students for special education. A teacher stated that ELL teachers have to follow up when a referral is made, but no one else is advocating for the students. Teachers also expressed concern that onsite special education services were eliminated alternative learning center for English Language Learners. These students were bused to two other schools. A teacher expressed concern about the instruction time these students would lose while riding the bus. The Chief Academic Officer agreed it wasn't efficient. They discussed the possibility of levels 1.5 and 2.5. Teachers expressed the need for these levels and properly coordinating standards and curriculum affects schools with SLIFE students. Teachers reported that their input is being disregarded.

The Research Analyst reported that a higher rate of ELL students pass co-taught classes than mainstream classes. Passing was defined as the student getting credit for that class. A teacher responded that a Level 2 Karen student is placed in five mainstream content courses and is passing because she sits with other Karen girls that help her. The Chief Academic Officer responded that the student should not be in that many content courses at the same time and said the issue is the system that is placing her in these classes. Teachers responded that the bigger issue is the student is passing her classes only because she is getting help from other students and that teachers feel a lot of pressure to pass students. Teachers also responded that ELL students have a right to services, so the District should be comparing success of ELL students in co-taught classes versus sheltered ELL classes. Teachers asked whether the District had a plan to evaluate the effectiveness and the Chief Academic Officer said they did not know. The Chief Academic Officer said they need to push students to gain 1.5 levels each year and also look at supporting students who are struggling. She said they would look into a formal evaluation of co-teaching plans and self-contained classes. The Chief Academic Officer acknowledged that passing rates are interesting, but teachers do not have a standardized way of grading.

163. Some level 1 and level 2 students are placed in mainstream classes.

VI. APPLICABLE LAW AND ANALYSIS

Section 183.02 (5) of the Saint Paul Human Rights Ordinance ("the Ordinance") defines discrimination to include "all unequal treatment of any person by reason of race, creed, religion, color, sex, sexual or affectional orientation, national origin, ancestry, familial status, age, disability, marital status or status with regard to public assistance." Nothing in the Ordinance restricts or limits the rights, procedures and remedies available under section 504 of the Rehabilitation Act of 1973, United States Code, Title 29, Section 794, or the Individuals with Disabilities Education Act, United States Code, title 20, section 1400 et seq. *Id.* (d).

The Human Rights Division interprets the Ordinance to be consistent with applicable federal laws.

Complainant alleges that Respondent discriminated against him on the basis of national origin and disability.

A. National Origin

1. ELL Mainstreaming Practices

The Ordinance provides that it is an unfair discriminatory practice in education to discriminate with respect to the access to or benefit from the services and facilities provided by an educational institution. Saint Paul, Minn. Code § 183.05(1).

Relying on Title VI of the Civil Rights Act of 1964 and applicable regulations, the Supreme Court held in *Lau v. Nichols et. al,* 414 U.S. 563, 567 (1974) that federally assisted school districts discriminate against English Language Learners on the basis of National Origin if a district fails to take affirmative steps to ensure these students learn sufficient English skills to have a meaningful opportunity to participate in a district's educational program. The Supreme Court also stated, "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum, for students who do not understand English are effectively foreclosed from any meaningful education." *Id.* at 566.

The Office of Civil Rights (OCR) of the U.S. Department of Education and the Civil Rights Division of the U.S. Department of Justice (DOJ) jointly enforce Title VI of the Civil Rights Act. OCR does not require a specific methodology for ELL instruction, but districts are required to evaluate the effectiveness of the language assistance program.

On January 7, 2015, the OCR and the Civil Rights Division of the U.S. Department of Justice issued a joint "Dear Colleague" guidance letter to State Educational Agencies, school districts and public schools to assist them "in meeting their legal obligations to ensure that EL students can participate meaningfully and equally in educational programs and services."

The OCR and DOJ has identified common civil rights issues that "frequently result in noncompliance" in meeting their obligations to EL students. Some of these issues include:

1. Having sufficient staff and support for the language assistance programs for EL students.
2. Ensuring that EL students with disabilities under the Individuals with Disabilities in Education Act 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.
3. Avoiding unnecessary segregation of EL students.
4. 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 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.
5. 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 attain parity of participation in the standard instructional program within a reasonable period of time. *Id.* at 8 and 9

Consistent with *Castañeda v. Pickard,* the DOJ and OCR required that "language assistance service programs for EL students must educationally sound in theory and effective in practice; however,

the civil rights laws do not require any particular program or method of instruction for EL students. Students in EL program must receive appropriate language assistance services until they are proficient in English and can participate meaningfully in the district's educational program without language assistance services. EL programs must be designed and reasonably calculated to enable EL students to attain both English proficiency and parity of participation in the standard instructional program within a reasonable length of time."

Districts must "carry out their chosen program in the lease segregative manner consistent with achieving the program's stated educational goals." The DOJ and OCR "examine whether the nature and degree of segregation is necessary to achieve the goals of an educationally sound and effective EL program." These agencies direct districts to no retain EL students in EL programs for longer or shorter than necessary to achieve the program's educations; nor... retain EL students in EL-only classes for periods longer or shorter than required by each student' level of English proficiency, time and progress in the EL program and the stated goals of the EL program."

These agencies provide examples of districts meeting the needs of EL students with interrupted formal education in their country of origin due to war, dislocation, and other situations resulting in missed educational instruction. DOJ and OCR also direct districts to provide designated English Language Development and English as a Second Language services for EL students at the same or comparable English Language Proficiency (ELP) levels to ensure the services are targeted and appropriate to their ELP levels." *Id* at 12 and 13. "Districts are obligated to measure EL students' progress in core subjects to assess whether they are incurring academic deficits and provide assistance necessary to remedy content area deficits incurred during the time when the EL student was more focused on learning English."

OCR and DOJ consider whether districts "provide El programs that ensure EL students' access to their grade-level curricula so they can meet promotion and graduation requirements;" and its "secondary program establishes a pathway for EL students to graduate high school on time and EL students have equal access to high-level programs and instruction to prepare them for college and career."

Compliance issues exist when "districts stop providing language assistance services when EL students reach higher levels of English proficiency but have not yet met exit criteria... or fail to address the needs of EL students who have not made expected progress in learning English and have not met exist criteria despite extended enrollment in the EL program." *Id.* at 14 The OCR and DOJ "consider whether schools provide all EL students with language assistance services that address their level of English language proficiency and give them an equal opportunity to meaningfully and equally participate in the district's programs." *Id.*

"At a minimum, every school district is responsible for ensuring that there is an adequate number of teachers to instruct EL students and that these teachers have mastered the skills necessary to effectively teach in the district's program for EL students." *Id.*

OCR and DOJ have identified compliance issues when districts "offer language assistance services based on staffing levels and teacher availability rather than student need."

"Districts are expected to evaluate whether their EL program is producing results that indicate that students' language barriers are being overcome. They must look at performance data of current EL, former EL, and never EL students to demonstrate whether the programs... enable EL students to attain parity of participation in the standard instruction program within a reasonable length of time."

For a district to make that determination…, a district must periodically evaluate its EL programs, and modify them when they do not product these results." Continuing to use an EL program with sound educational design is not sufficient if the program, as implemented, proves ineffective." *Id. at 35.* Districts should also monitor EL students' progress from grade to grade to know whether the EL program is causing academic content area deficits."

Complying with civil rights in education requires a balance of providing EL students with the necessary instruction to meaningful benefit from and participate in the educational opportunities, with the need to not unduly segregate EL students from mainstream students.

2. Analysis

The Complainant is Karen and national origin is a protected class under the Ordinance. He is eligible to be a student at Como Senior High. The Complainant is an English Language Learner, and like many other Karen students, has had limited formal education.

The Respondent has denied making any change to its ELL mainstreaming policy. However, the evidence clearly shows that midway through the 2013-2014 school year, ELL students that were in sheltered classes in the Fall of 2013, were shifted to mainstream classes the next quarter in 2014. The evidence shows that this was a clear and memorable change because of the sudden shift between quarters was not what students, parents, or teachers were expecting or prepared for.

These changes appeared to have been motivated with the goal to avoid segregating ELL students from mainstream students. The switch to mainstreaming ELL students included a heavy reliance on co-taught classes which included a mainstream teacher and an ELL teacher, sometimes would include English Language Development support, but sometimes it would not. Sometimes Level 3 students are in a core content class and receive no ELL services; there is only a mainstream teacher and no additional supports. The MLL Department controls the funding for the ELL program. Evidence shows that the School District allowed each principle to determine the schedule and staffing for ELL classes and that budget was a primary consideration. This practice has been specifically identified as noncompliant with applicable Civil Rights Laws.

Although the Respondent states that language is not considered to fall within the definition of national origin and argues that disparate impact is not recognized in the education context, the Respondent was well-aware of the negative impact to Karen students in particular as a result of the Respondent's shift to mainstream students at Level 3. The particular impact on Karen students was frequently discussed at the Professional Issues Committee. Teachers there frequently identified issues with Karen students in mainstream classes, including acquiring English at a slower rate, coping strategies to get passing grades which included copying other students, mainstream teachers that were passing Karen students even though they had not learned the material, and Karen students who had graduated and who needed to take remedial English classes at post-secondary schools for a year or more before they were ready for post-secondary courses. At the PIC meetings and other communications, the Respondent was informed that many Karen students, because of their limited formal education, still needed to master basic literacy skills that other ELL students would have learned early on in their education. Therefore, the mainstreaming policy was not appropriate for a significant number of Karen students, who comprise half of the SLIFE students in the District, are at an elementary English level and are expected to keep up in high school level English, Social Studies, and literacy intensive classes.

The Respondent is required to assist students not meeting benchmarks for language acquisition. However, the Respondent has not had a method to identify students who were struggling, particularly students with limited formal education. Even though the Respondent knew or should have known that Karen students would be particularly vulnerable to struggle under the mainstreaming policy, the Respondent has not made any efforts to ensure that Karen students would not be left behind. Moreover, although evaluation is required, the Respondent has had no plan to evaluate its mainstreaming approach, even as it has been learning of serious consequences for Karen students. The Respondent has also failed to compare the progress of ELL students before the mainstreaming policy with the progress of ELL students after the mainstreaming policy.

The Respondent is required to provide ELL services until an ELL student tests out of the need for ELL services. With the Respondent moving Level 3 students into mainstream classes, which may be effective for ELL students of other national origins with formal education, is not effective for many Karen students who had limited formal education. The ELL services do not provide Karen students, including the Complainant, a meaningful opportunity to participate in the Respondent's academic program to the same extent as mainstream students. The Respondent also does not provide a dual-language ELL program in Karen that is available to Hmong and Spanish-speaking students. Simply moving the Karen students in the mainstream courses without monitoring has been insufficient to ensure meaningful participation. Particularly when there have been numerous and consistent reports that Karen students have not been able to access the curriculum and their learning needs have been overlooked because as a group, they tend to be quiet, respectful and cooperative.

With respect to the Complainant, he tested close to a Level 3, but his parents, in consultation with his teachers, kept him in level 2 classes so he could get the language development support that he needed. He had not been performing well in his mainstream classes. His parents were concerned that with limited or no support offered in co-taught classes he would not receive the appropriate and effective instruction to grasp core concepts. For example, the mainstream social studies class, a core curriculum class, would not be co-taught in the upcoming school year. In other words, he would be receiving no ELL services in that subject area. The Complainant, with a second-grade reading level, progressing slower than expected, would struggle to learn material taught in a mainstream 11th grade class. Having observed the struggles of other Karen students, including the Complainant's older brother, his parents kept him in Level 2 sheltered classes. The Respondent did not have the necessary supports in place, as required, to assist him and other students not progressing as expected.

The Complainant was ultimately placed in Level 2.5, but only after the then-Superintendent promised at a parent meeting that Level 2.5 would be offered at Como Sr. High. No other high school has this level, even though research shows that levels 1.5 and 2.5 are particularly helpful for SLIFE students.

Therefore, there is probable cause that the Respondent discriminated against the Complainant on the basis of his national origin.

3. Evaluation of ELL Students for Accommodations

"Districts must ensure that all EL students who may have a disability, like all other students who may have a disability and need services under IDEA or Section 504 are located, identified and evaluated for special education and disability-related services in a timely manner." "January 7, 2015 Dear Colleague Letter," page 24. The DOJ and OCR list impermissible policies under IDEA and federal civil rights laws which include "a policy of delaying disability evaluations of EL students for special education and related services for a specified period of time based on their EL status."

A district's failure to meet its obligations under IDEA and Section 504 also constitute violations of Title II of the ADA. 42 U.S.C. Section 12201 (a). Title II prohibits disability discrimination in access of the programs, services, and activities of state and local governments, including public school districts.

Compliance issues arise if a district fails "to include staff qualified in EL instruction and second language acquisition in placement decisions under IDEA and Section 504." Similarly, it is considered whether the EL student was promptly evaluated for disability-related services or whether there was an impermissible delay on account of his or her EL status and/or level of English proficiency. *Id.* at 29

The Complainant is Karen, moved to the United States in October 2012, and is an English Language Learner. Therefore, the protected class of National Origin applies. As analyzed in Part C below, the Complainant is also a student with a disability.

The Respondent initially denied the Complainant's parents' request for a special education evaluation and failed to properly consider the Complainant's needs for accommodation when first made aware of these concerns in November 2013. The Respondent did not provide accommodations for the Complainant until 14 months after the initial request for a disability evaluation and accommodations.

The Complainant's parents were very persistent in contacting the school regarding the Complainant's need for accommodation. Ultimately this persistence, together with the stepmother's assertion that she was considering legal action, was sufficient for the Child Study Team to grant the evaluation. The Child Study Team indicated upon receiving the initial evaluation request that they did not believe the Complainant qualified for special education services and, as analyzed in Part C below, failed to properly consider the evidence showing the Complainant's need for an accommodation. From the onset of the evaluation process, the Respondent knew of the Complainant's diagnosis, but did not take his need for accommodation seriously. The Respondent did not reach out to the Complainant's parents to discuss whether he would need accommodations for his diagnosis regardless of the outcome of the evaluation for special education services. The Respondent did not consider the seriousness of the Complainant's condition or the time-sensitivity of accommodations in part because the Complainant was also an ELL student. Several times, the Child Study Team responsible for evaluation decisions referenced the Complainant's time in the United States in their decision to deny evaluation. This team also decided against informing the Complainant's parents of the option of 504 accommodation discussions even knowing the special education evaluation process would be lengthy.

It is significant that the Complainant is not the only ELL student with a disability who experienced a significant delay prior to receiving an evaluation and ultimately accommodations for his disability. The Professional Issues Committee discussed numerous cases where even students with apparent disabilities such as developmental delay or vision impairment did not receive serves for 9 to 15 months after beginning school in the District. Enough professionals identified a pattern in the delay for special education referrals and evaluations for accommodations, that they asked whether there was a policy to delay evaluations for ELL students until they had lived in the United States for three years. Although the district denies having such a policy remains in place, the practice of delaying evaluations due to ELL status has persisted. Some teachers at the Professional Issues Committee meetings reported that they were told not to refer ELL students because students of color were overrepresented in referrals of students of color for disability services. Although school districts are cautioned against mistaking an students' English Language Level for a disability, in this case the Respondent failed to promptly evaluate valid referrals and requests for ELL students

because they were ELL students. U.S. born students that were not learning English were not subjected to these delays. This is national origin discrimination in the provision of services and prohibited by the Ordinance.

Therefore, there is probable cause that the Respondent discriminated against the Complainant because of his national origin when it caused an undue delay in evaluating him and ultimately providing him with accommodations for his disability.

B. Disability

Under the Saint Paul Human Rights Ordinance, it is an unlawful discriminatory practice in education to fail to ensure program access for persons with disabilities. Saint Paul, Minn. Code § 183.05. (4)

1. Evaluation Process

If a parent suspects his or her child may have a disability due to behavioral and/or academic difficulties the child exhibits, the parent has the right to request that the District conduct an evaluation to determine whether the student has a disability. 34 C.F.R. Part 104. App A, *July 26, 2016 Dear Colleague Letter*, the United States Department of Education Office of Civil Rights, page 14. A medical assessment is not required prior to evaluating whether a student has a disability. However, if a school district determine that a medical assessment is necessary to determine whether a student has ADHD, the district "must ensure that the student receives this assessment at no cost to the student's parents." 34 C.F.R. Section 104.33, 104.35, App.A

A School District violates Section 504 by denying or causing a delay in the evaluation of a student with a diagnosed or suspected disability. 34 C.F.R. Section 104.35, *July 26, 2016 Dear Colleague Letter.* If a student is experiencing challenges at school, the district may choose to implement interventions prior to conducting an evaluation. *Id.*

District must consider evaluation if a parent or teacher reports that a child shows signs of needing services, which include "trouble organizing tasks and activities." *July 26, 2016 Dear Colleague Letter*, page 11. Evaluations may also identify other disorders, such as depression which may impact the services a student needs. *Id.*

The Department of Education Office of Civil Rights highlights a particular issue with students with inattentive type ADHD: "School districts that are reluctant to evaluate students who exhibit behaviors consistent with inattentive-type ADHD could be doing a disservice to teachers who feel frustration about not being able to reach a generally quiet and cooperative student. These school districts could also be doing a disservice to families who are making extraordinary efforts to compensate for what is not learned in school by assisting the student and struggling nightly over homework and other assignments." *July 26, 2016 Dear Colleague Letter.*

The Complainant's stepmother contacted the Respondent in November 2013 and requested a special education evaluation for the Complaint. She explained he was having challenges in organization as well as understanding and completing his schoolwork and was concerned it may be due to a disability. On December 16, 2013, the Complainant's stepmother followed up with his school counselor and informed her that the Complainant is not performing well in several classes and did not have the opportunity to discuss these concerns at conferences. She said she is increasingly concerned about her stepson's performance and asked to meet with his teachers and counselors.

She asked to discuss immediate steps to help the Complainant.

The Respondent did not evaluate the Complainant for a disability, but rather instructed the stepmother to schedule an appointment with his doctor to determine whether there was a diagnosis. The Complainant's family paid for the medical visits and diagnosis and the Respondent did not reimburse them for these costs.

The process for the evaluation was lengthy and the Complainant was diagnosed with ADHD – inattentive and depression on March 25, 2014, four months after the Complainant's stepmother had requested an evaluation for the Complainant.

Even after his diagnosis, the Respondent initially refused to evaluate the Complainant and determine whether accommodations were needed. The Respondent made this decision based on the Complainant's average performance at Como Senior High School and his good grades the previous year at a different district. The Respondent did not consider the great effort made by the Complainant's parents to assist the Complainant with his homework and help him organize his materials. The Respondent also did not take into account the informal accommodations that two of the Complainant's teachers had been making for him. Finally, the Respondent did not consider that the Complainant achieved high grades the previous year while he was in a school with smaller class sizes, more one-on-one attention, and tools and instruction to help the Complainant stay organized. Precisely the accommodations that the Complainant needed as a student as Como Senior High School.

Therefore, the Respondent failed in its duties to evaluate the Complainant for a disability at no cost to his family and failed to consider the additional efforts and previous academic environment that allowed him to perform well.

2. Whether Complainant has a Qualified Disability

A public elementary or secondary student is qualified if he or she is of an age during which students without disabilities are provided such services. 34 C.F.R. Section 104.3(l)(2). A student has a qualified disability if he or she has a physical or mental impairment that substantially limits one or more major life activities. 29 U.S.C. Section 705(9) (B). Major life activities include concentrating, reading, thinking, learning, and brain functions. 42 U.S.C. Section 12102. School Districts must consider all of the major life activities that may be affected by the ADHD and not limit their evaluation only to whether the student is substantially limited in learning. OCR, *Dear Colleague Letter and Resource Guide on Students with ADHD* (July 26, 2016), page 10, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201607-504-adhd.pdf. A diagnosis of ADHD creates the presumption that a student is substantially limited in one or more major life activities. *Id.*

School Districts must not consider the "ameliorative effects of mitigating measures" such as medication or coping strategies when determining how an impairment impacts a student's major life activities. 42 U.S.C. Section 12102 (2). When determining whether to evaluate a student, a district must consider whether the student exhibits either academic and/or behavioral difficulties. A district cannot rely on a student's average or above-average GPA to conclude that a student does not have a disability or that the student does not have needs related to that disability. *July 26, 2016 Dear Colleague Letter*, page 12, 43.C.F.R. Section104.35(b)(2)-(3). A district must also consider "the additional time or effort [a student] must spend to read, write, or learn compared to others" as well as

"family-provided academic supports outside of school." *Id.*

Under the Individuals with Disabilities in Education Act (IDEA), a child with a disability is a child evaluated as having an intellectual disability, hearing impairment, speech or language impairment, visual impairment, serious emotional disturbance, orthopedic impairment, autism, traumatic brain injury, other health impartment such as a specific learning disability.... Who by reason thereof, needs special education and related services." 20 USC Section 1403(3); 34 C.F.R. Section 330.8. A District can meet its obligations under Section 504 of the Rehabilitation Act, by following the requirements of IDEA. *July 26, 2016 Dear Colleague Letter,* page 6.

The Complainant is a student of eligible age to attend secondary school and receive services. He has been diagnosed with Attention Deficit Disorder – inattentive and Adjustment Disorder with Mixed Anxiety/Depression. This impairment substantially limits him in the major life activities of concentrating, thinking, learning, and brain functions. He struggles with organization, including organizing and keeping track of his assignments, following multi-step instructions, and concentrating on tasks. Therefore, the Complainant is a student with a qualified disability.

The Complainant's academic performance is average due to the significant amount of time his parents spend each night to help him do his homework and organize his materials. Some of his teachers have also independently offered him informal accommodations to help him stay focused, including having him sit closer to the front of the class.

The Respondent used the incorrect standard in evaluating whether the Complainant was a student with a disability. The Child Study Team only considered his grades to determine whether he was substantially limited in learning and denied the Complainant's request for an evaluation. The Child Study Team did not consider the additional effort made by his parents. The Child Study Team also did not consider his delay in language acquisition taking into account his exposure to English at home and his age upon entering the United States.

Only after the Complainant's parents significant follow up, effort, and assertion of their legal rights did the Respondent agree to evaluate the Complainant for eligibility to receive accommodations and special education services. On May 2, 2014, the Respondent requested the Complainant's parents' permission to evaluate their son for eligibility for special education services. After seeking clarification on the tests to be administered and expressing confusion about what box to check, the Complaint's' parents provided their permission on May 5, 2014. The initial evaluation was not completed until September 9, 2014. The Complainant was only evaluated in two of his classes, one of which was math – a class he performed well in. The Respondent denied the Complainant's request for special education services. The Complainant's parents requested a more thorough evaluation to include more of the Complainant's classes. This additional evaluation was completed on October 28, 2014. On November 5, 2014, the Section 504 Coordinator determined it appropriate to engage in accommodation discussions with the Complainant's parents. This was nearly a year after the Complainant's stepmother had initially contacted the Respondent with concerns about an undiagnosed disability causing his academic performance to suffer. The Respondent reached out to the Complainant's parents in mid-November 2014 and proposed a meeting in late November 2014 which the Complainant's parents did not confirm. The school counselor followed up a month later at which point the Complainant's parents signed the accommodations form. The Complainant's stepmother followed up with an email on January 4, 2015, the school counselor replied the next day. A formal accommodation plan was created and accepted by the Respondent and the Complainant's parents on January 16, 2015.

The Complainant did not have the necessary accommodations in place until 14 months after his parents requested accommodations on his behalf. The Respondent did not explain to his parents the two different avenues through which he could receive accommodations or special education services. The Respondent acknowledges that the special education evaluation process is lengthy, and the Child Study Team decided against initiating the 504 accommodation discussions with the Complainant's parents. His parents did not know what the 504 accommodation process was or that it would be faster and easier to qualify for accommodations through this option. It was the Respondent's responsibility to inform the Complainant's parents of their rights and ensure a timely consideration of the accommodation requests and identification of effective accommodations. However, the Complainant's parents took the initiative to frequently check in about the status of their request, request meetings and follow up discussions. Had they not done so, there is no evidence the Respondent was prepared to initiate accommodation discussions for the Complainant.

Although a District may meet their 504 obligations through following the requirements of IDEA, in this case, the Respondent's decision not to initiate timely accommodation discussions with the Complainant's family resulted him in receiving no accommodations for over one year.

The Respondent did not explore possible accommodations while the special education evaluation was underway, even when it became clear that the process would be postponed over the summer break. The Respondent did so even though, as noted by the school nurse in the evaluation materials, that the Complainant needs support to gain skills in managing distractibility, and identified difficulties with working memory, problem solving, verbal fluency, self-regulation, and analysis/synthesis, contemplations to optimize classroom learning. The Complainant did not have a summer break and took summer classes without accommodations.

The lack of accommodations delayed the Complainant's academic progress and timeline for graduation. It has also resulted in the Complainant's parents investing significant time and resources to ensure he received passing grades, far beyond what would be expected of them. Therefore, there is probable cause that the Respondent failed to accommodate the Complainant because of the excessive delay from learning of a need for accommodation to when the accommodations were provided.

C. Summary of Determinations

The evidence shows probable cause that the Respondent discriminated against the Complainant because of his national origin for failing to offer effective instruction that he and other Karen students needed. As a result, the Respondent denying him the equal opportunity to benefit from his education that was offered to mainstream students.

The evidence also shows probable cause that the Respondent improperly considered the Complainant's national origin in determining his eligibility for special education services or accommodations. The Respondent's discriminatory treatment of the Complainant resulted in significant delays in evaluating whether the Complainant required special education services or accommodations for his disability.

There is also probable cause that the Respondent failed to accommodate the Complainant by refusing to evaluate him for a disability, suggesting his parents pay for a medical evaluation and not compensating them for the cost, and causing a significant and unreasonable delay in providing him the necessary accommodations.

It should also be noted that although the HREEO Department will not disclose the identity of witnesses and retaliation is prohibited by the ordinance, several witnesses expressed serious fear of retaliation. The Respondent is advised that retaliation is prohibited by the Ordinance and other civil rights laws.

In view of the foregoing, this Department concludes that there is probable cause for discrimination based on disability and national origin indicating that Respondent violated the Saint Paul Human Rights Ordinance as Complainant had alleged.

Jeffry Martin
Deputy Director

May 5, 2017
Date

Exhibit B

1500 Highway 36 West
Roseville, MN 55113-4266 651-582-8200

January 17, 2017

Dr. John Thein – Superintendent
360 Colborne St.
St. Paul, MN 55102-3299

Dear Interim Superintendent Thein:

Title III services are governed by the Elementary and Secondary Education Act (ESEA) of 1965 as amended under the No Child Left Behind Act of 2001 (NCLB), Public Law 107-110. As a state grantee, Minnesota Department of Education (MDE) is required to monitor funded activities to assure compliance with federal requirements and progress toward achieving the goals of the authorizing statute. Each local educational agency (LEA) receiving ESEA and state funds is under the general supervision of the MDE. In order to evaluate these programs, MDE's staff has the authority to review all relevant information necessary to enable it to carry out oversight responsibility.

On October 31 - November 10, 2016, a team from the Minnesota Department of Education's (MDE) Division of Student Support reviewed Saint Paul Public School District's (SPPS's) language instructional educational program (LIEP) for English Learners (ELs). Enclosed is a report based upon that review.

MDE is committed to working closely with LEAs to provide the best educational programs possible. The MDE EL team, part of the Division of Student Support, uses a review process that encompasses state EL program requirements and is aligned to the requirements set forth in Title III of the No Child Left Behind (NCLB) Act of 2001. Prior to and during the onsite review, the MDE EL team conducted a number of activities to verify compliance with critical elements. Such activities included meeting with administrative staff, interviewing teachers, students and parents, as well as observing classrooms.

The enclosed report contains a description of the scope of the review as well as recommendations and findings. The report is based on the EL Program Review Critical Elements. Saint Paul Public School District is required to develop and implement a Corrective Action Plan (CAP) to address each finding of non-compliance in the report and achieve compliance. The CAP should include the following items:

- a cover letter stating the purpose of the communication and introducing which critical elements have been addressed in the CAP,
- clearly labeled critical elements (that were findings in the report) and numbers,
- a list of action steps necessary to correct the compliance (written as SMART Goals),
- an appendix of documentation specifically requested to address the critical element described under "Corrective Action Required", and
- the projected date when the corrective action will be completed and compliance achieved (not to exceed one year from the date of the report) and person(s) responsible.

The content of the CAP is to be submitted in a table format with the following header row:

Critical Element	Corrective Action Required	Corrective Action to be taken	Date of Action Completion	Person(s) Responsible

Please mail the CAP to Julie Chi at the address in the header of this letter, or it may be emailed to julie.chi@state.mn.us within 45 business days of the receipt of this letter.

The MDE EL team would like to commend the staff at Saint Paul Public School District for the hard work prior to and during the visit in gathering materials, setting up a schedule, and providing access to information in a timely manner.

The monitoring process emphasizes a partnership between the LEA and MDE to identify areas in need of training, technical assistance, and corrective action. MDE is committed to supporting LEAs in their efforts to educate ELs and meet state and federal laws. MDE will provide technical assistance as needed and may conduct a follow-up site visit to confirm compliance.

We look forward to working further with staff members in any follow up activities and in assisting them to improve the delivery of the language instructional education program for ELs. Questions may be directed to Julie at julie.chi@state.mn.us or 651-582-8444.

Sincerely,

Leigh Schleicher, Supervisor
Division of Student Support

Enclosures

Elementary and Secondary Education Act (ESEA)

Title III Monitoring Review

Compliance Report

Title III: Language Instruction for English Learner and Immigrant Students

Date Issued:	January 17, 2017
Local Education Agency Reviewed:	Saint Paul Public School District
Dates of Review:	October 31 - November 10, 2016

Report Prepared By:

Julie Chi, EL Education Specialist
Email Address: julie.chi@state.mn.us
Phone Number: (651) 582-8444

Summary of English Learner (EL) Program Review
Saint Paul Public School District
October 31 - November 10, 2016

Scope of the Review:

This report contains findings of the on-site monitoring review of the Title III English learner (EL) education program in Saint Paul Public School District. A team from the Division of Student Support at the Minnesota Department of Education (MDE) conducted the review on October 31 - November 10, 2016. This was a comprehensive review of the district's administration and implementation of the EL program including Title III of the No Child Left Behind (NCLB), Part A.

In conducting this review, the MDE EL team carried out a number of activities. The MDE EL team analyzed evidence of implementation and effectiveness of the language instruction educational program (LIEP) and professional development processes established by the district. Furthermore, the MDE EL team evaluated compliance with fiscal and administrative oversight activities required of the local education agency (LEA), St. Paul Public School District. During the onsite visit, the MDE EL team observed instruction in classrooms; interviewed staff, students, and parents; and met with administrative, support, and instructional staff as follows:

Activity		Number Completed
Interviews	Administrative Staff	22 at schools; 15 at district office
	Instructional Staff	98
	Non-instructional Staff (Liaisons, Counselors, Specialists, etc.)	24
	Parents	13 parents/groups of parents
	Students	40 students/groups of students
Observations	Classrooms	87
	Site Tours and Walkthroughs	22 schools

MDE recognizes the LEA's efforts to improve the language instruction educational program for ELs and its commitment to a high quality management process. MDE is committed to working further with the district on follow-up activities to improve the language instructional education program for ELs.

Review of Critical Elements:

As part of MDE's commitment to supporting school districts in improving academic achievement, the following report, aligned with the *English Learner (EL) Onsite Program Review Critical Elements,* found in entirety on MDE's website at http://education.state.mn.us/MDE/SchSup/EngLearnSup/index.html, include findings and recommendations that may further improve the effectiveness of Saint Paul Public School District's LIEP. Items labeled "No finding" require no further action, based on the current situation of the district at the time of the visit. An item labeled "Finding" requires a corrective action. Findings labeled "Recurring" were identified during MDE's review in 2010. While MDE closed the 2010 findings based on Saint Paul Public School District's actions, these same issues were identified again in 2016.

Minnesota Department of Education (MDE) Title III Review Report

Read and respond to any "Finding/Corrective Action Required" ***within 45 business days.***

Critical Element 1 Student Identification and Reclassification, Program Placement and Exit: LEAs must identify and place ELs in appropriate programs.

Element 1.1 The LEA documents uniform determination of home language.

MDE Response: *No findings at this time – MDE recognizes improvements made to the home language survey since the 2010 review.*

Recommendation: Evidence provided induded both a Home Language Survey and an intake form, both asking for home language. MDE recommends that the district not request this information in duplication.

Element 1.2 The LEA uses a valid English language development (ELD) assessment and developmentally appropriate measures to identify and place English learners in a program.

MDE Response: *No findings at this time*

Recommendation: Placement testing will soon be moving from the WIDA W-APT to the WIDA Screener. It is recommended that the district make concrete plans for moving forward. With the new version being online, there may be greater flexibility and we recommend revisiting procedures and timelines.

Element 1.3 The LEA uses English language proficiency assessment scores, including oral academic language and teacher judgment, to exit and reclassify English learners.

MDE Response: *Findings - See explanation and required corrective action below*

Recurring Finding 1.3.1: Evidence was provided that exit and reclassification procedures are not fully understood by stakeholders across the district and that the term "monitoring" is being used inconsistently throughout the district. According to the US Department of Education, and taken from feedback provided by MDE during the Plan of Service Review, *monitoring* refers to the federal requirement that states track English Learners for two years following reclassification in order to ensure that students are making progress. During this time, students no longer take the WIDA ACCESS test (as they have been reclassified as non-EL) however, their scores on MCA content tests continue to impact the EL subgroup. The Office for Civil Rights often refers to *tracking* as what a district might do to watch student progress after exiting a student but prior to reclassification. While communication goes out to some stakeholders, evidence was provided that relatively few stakeholders receive the information in a timely and accessible manner.

Corrective Action Required: The LEA must submit written procedures for effectively communicating exit and reclassification information to all stakeholders (including staff members, family and community members) in a timely and accessible manner. The LEA must clarify with all staff that tracking of student progress happens *after* a student is exited from EL programming.

Element 1.4 The LEA identifies English learners with limited or interrupted formal education (SLIFE).

MDE Response: *No findings at this time*

Recommendation: Continue to refine the SLIFE identification process.

Element 1.5 The LEA communicates with parents regarding their children's participation in the language instruction education program in an understandable and uniform format and in a primary language of the pupils.

MDE Response: *No findings at this time*

Recommendation: MDE recommends continuing to find means to communicate information to parents regarding programming and second language acquisition using multiple modes including expanding language options and accessibility. Additionally, ensure that staff are informed of these processes.

Element 1.6 The LEA parent notice includes [all required elements (See subpoints *"a"* through *"h"*)].

MDE Response: *Findings - See explanation and required corrective action below*

Finding 1.6.1: Subpoint "a" ("The reasons why the child has been placed in the program") is unclear as the letter simply states "based on a combination of the Home Language Survey (HLS), and your student's most recent test scores" and does not specify what about the HLS identified the student as an English Learner.

Finding 1.6.2: Subpoint "b" ("The child's level of English proficiency, how the level was assessed and the child's current level of academic achievement") is incomplete. There is no explanation of when the test was taken, the student's domain levels are not listed nor is the student's current level of academic achievement provided.

Corrective Action Required: The district must submit a revised parent letter to MDE. The revision must include the pieces missing as specified in findings 1.6.1 and 1.6.2. Once the revised parent letter is confirmed to contain the missing subpoints, the district should begin its use it immediately.

Critical Element 2 Appropriate Programs: LEAs must implement high-quality language instruction educational programs for English learners and evaluate their effectiveness.

Element 2.1 Programs for English learners address English language development (ELD) standards and [comply with items *"a"* and *"b"*].

MDE Response: *Finding – See explanation and required corrective action below*

Finding 2.1.1: The LEA provided evidence that effective implementation of ELD standards is inconsistent across the district. While evidence provided demonstrates some training on the ELD standards, other evidence reveals that few people received such training. Secondary-level syllabi provided in the evidence binder do not demonstrate understanding of ELD standards implementation.

Corrective Action Required: The LEA must submit to MDE evidence that Minnesota's ELD standards are reflected in the curriculum scope and sequence and the professional development plans for all staff working with English Learners.

Element 2.2 The LEA has in place a written plan of service that [complies with *"a"* through *"c"*].

MDE Response: *No findings at this time*

Recommendation: MDE recommends broader inclusion of stakeholders in future revisions of the plan of service. The plan's intent is to serve as a basis for communication with district stakeholders regarding service for English Learners.

Element 2.3 The programs and activities are evaluated to determine effectiveness [compliant with items *"a"* through *"c"*].

MDE Response: *Finding – See explanation and required corrective action below*

Finding 2.3.1: No evidence was provided that evaluation of the EL program has been done.

Corrective Action Required: The district must submit to MDE an evaluation plan and timeline for evaluation implementation to include Title III and EL programs and activities as part of the district's overall evaluation plan. In addition, the LEA must submit to MDE the Title III program evaluation for 2016-2017 on or before September 15th, 2017.

Element 2.4 English language programs are coordinated with other relevant programs and services for maximal use of resources.

MDE Response: *No findings at this time*

Recommendation: No recommendations at this time

Element 2.5 Students receive all services for which they are eligible and have access to programming in which all other children are eligible to participate.

MDE Response: *Finding – See explanation and required corrective action below*

Recurring Finding 2.5.1: Evidence was provided that students assessed at WIDA levels 3-5 are not served at all sites.

Corrective Action Required: The LEA must submit to MDE written procedures to ensure ELD service that increases students' English language proficiency is provided to all students identified as English Learners in the district.

Comment: The LEA provided evidence that while related policies exist at the district level, knowledge at the building level of practices around identification of special education for students identified as English Learners is inconsistent. It is believed by staff that a special education identification wait time exists ranging from 2 interventions of 6-8 weeks to 2-3 years of wait time. Delaying special education services may contribute to delayed progress in all academic areas, including English language development.

Recommendation: It is recommended that the LEA disseminate information about processes for identification of special education for English Learners to ensure consistent practice and implementation across the district.

Element 2.6 If applicable, the LEA has implemented specific programs for immigrant children and youth.

MDE Response: *Not applicable at this time*

Recommendation: The district did not receive immigrant funds in 2016-2017. MDE recommends a thorough review of procedures to identify immigrant students in order to ensure quality of data and inclusion in the Title III immigrant program.

Critical Element 3 Appropriate Staff and Professional Development:
LEAs must utilize appropriate staff to serve ELs.

Element 3.1 The LEA assures that ELs have access to teachers who are licensed and highly qualified in their teaching assignment.

MDE Response: *Finding – See explanation and required corrective action below*

Finding 3.1.1: Evidence was provided that some teachers of Sheltered Content courses are not appropriately licensed.

Corrective Action Required: The district must submit evidence of a plan to review its sites' staffing for English Learners and a plan to provide appropriate staffing for English Learners at sites that are out of compliance. Additionally, the plan must include analysis by site of staff who are working to obtain appropriate licensure as well as completion timelines.

Recommendation: Evidence was provided that EL staffing allocations are not transparent. MDE recommends developing written policies around allocation of EL staff and clearly disseminating it to district stakeholders.

Element 3.2 The LEA assures that all teachers in any language instruction education program for English learners are fluent in English and in any other language used for instruction, including having written and oral communication skills.

MDE Response: *No findings at this time*

Recommendation: No recommendations at this time

Element 3.3 The LEA assures that instructional paraprofessionals work under the supervision of a certified or licensed teacher including individuals employed in the language instruction education program.

MDE Response: *No findings at this time*

Recommendation: No recommendations at this time

Element 3.4 Professional development (PD) related to EL education is [based on factors "*a*" through "*j*"].

MDE Response: *Findings – See explanation and required corrective action below*

Finding 3.4.1: Insufficient evidence was provided to support subpoint "a" (that professional development is based on a comprehensive needs assessment…).

Recurring Finding 3.4.2: Little evidence was provided to support that core content teachers and administrators receive EL training (see Subpoint "c"). It is unclear who was provided professional development opportunities found in the evidence binder.

Finding 3.4.3: The LEA provided evidence that training around EL education does not include professional development directly relevant to culturally responsive pedagogy that enables students to master content, develop skills to access content, and build relationships (See subpoint "h").

Finding 3.4.4: The LEA provided evidence that it does not provide PD of sufficient intensity, frequency and duration to have a lasting impact on teacher performance (See subpoint "i").

Corrective Action Required: The LEA must submit to MDE evidence that the district's overall professional development plan includes PD on EL and culturally responsive pedagogy – based on a comprehensive needs assessment – provided for all staff and of sufficient frequency and duration to have a lasting impact on teacher performance.

Critical Element 4 Family and Community Engagement: LEAs must involve family and community members in the planning, development and implementation of the language instruction education program.

Element 4.1 The LEA has implemented an effective means of outreach to parents of English learners, [informing them how they can do items "*a*" through "*c*"].

MDE Response: *No findings at this time - MDE recognizes efforts made to provide more opportunities for family and community engagement since the 2010 review.*

Recurring Recommendation: The MDE recommends that the LEA review its history of parental involvement and consider ways it could reach out to a broader range of parents.

Element 4.2 The LEA sends parents of English Learners notices of such meetings in a language and format accessible to them.

MDE Response: *Finding – See explanation and required corrective action below*

Finding 4.2.1: Evidence was provided that translated notices and interpretation is not happening consistently across the district.

Corrective Action Required: The LEA must submit to MDE a copy of its language access policy and copies of event notifications/flyers in multiple languages. If it does not have such a policy, the LEA must submit a timeline in which it is able to provide the policy.

Element 4.3 The LEA provides training to enable teachers and principals to involve parents in their child's education, especially parents of English learners and immigrant children.

MDE Response: *No findings at this time*

Recommendation: It is recommendation that such trainings be made more accessible and accommodating to principals' and teachers' schedules.

Element 4.4 The LEA involves family and community in the planning, development and implementation of programs for English Learners and the pursuit of community support to accelerate the academic and native literacy and achievement of ELs with varied needs, from young children to adults.

MDE Response: *No findings at this time*

Comment: The district provided some evidence of Parent Advisory Committees receiving feedback from parents on EL identification (the Home Language Survey) and Parent Academies' work to solicit parent feedback on the development and implementation of programs for ELs with regard to native language literacy.

Recommendation: It is recommended that the LEA utilize methods to increase parent participation in the committees and academies while focusing on the planning, development and implementation of programs for English Learners, including those with regard to native literacy development, from a diverse range of EL parents at multiple sites in the district

Element 4.5 World's Best Workforce planning addresses the needs of English learners and their families as outlined in Minnesota state statutes.

MDE Response: *No findings at this time*

Recommendation: No recommendations at this time

Critical Element 5 Accountability Requirements: LEAs must adhere to state and federal accountability requirements.

Element 5.1 The LEA ensures that all English Learners are annually assessed for their English language and native language development, if the native language is used for instruction, and assessment is in accordance with state and federal requirements.

MDE Response: *Finding – See explanation and required corrective action below*

Finding 5.1.1: While evidence was provided that the LEA annually assesses ELs for English language development, the LEA provided no evidence of an assessment or assessment data collected for native language (i.e. target language) development in programs where the native language is used for instruction.

Corrective Action Required: The LEA must develop and submit a plan to acquire/create, use and maintain results of, reliable language development assessments for all languages of instruction at its sites. See the following link for suggestions on available assessments: http://education.state.mn.us/MDE/EdExc/StanCurri/K-12AcademicStandards/WorldLang/

Element 5.2 The LEA, which has not met AMAO for the preceding four or more years, has a Modification Plan on site and is implementing the modification plan accordingly.

MDE Response: *No findings at this time*

Recommendations: *No recommendations at this time*

Element 5.3 Policies and procedures related to individual student data collection, which adhere to state and federal requirements, are in place.

MDE Response: *Finding – See explanation and required corrective action below*

Finding 5.3.1: The LEA provided evidence that it does not have a policy related to individual student data collection.

Corrective Action Required: The LEA must submit to MDE the final draft of the student data collection policy which it reported it is in the process of developing.

Recommendation: MDE recommends providing more guidance around what sites should keep in their students' cum folders so that there is consistency across the district.

Element 5.4 For Title III Immigrant Children and Youth, LEA has a data collection procedure to ensure that the immigrant student count submitted to MDE includes only eligible immigrant students.

MDE Response: *No findings at this time*

Recommendation: As per critical element 2.6, the district did not receive immigrant funds in 2016-2017. MDE recommends a thorough review of procedures to identify immigrant students in order to ensure quality of data and inclusion in the Title III immigrant program.

Critical Element 6 Fiscal Requirements: LEAs must adhere to state and federal fiduciary requirements.

Element 6.1 State and Federal funds are utilized to benefit English learners. Title III funds are not used to provide services that are required to be made available under state or local laws or other federal laws; Title III funds are not used to provide services that were provided in the previous year with state, local or other federal funds.

MDE Response: *Findings – See explanation and required corrective action below*

Finding 6.1.1: Evidence was provided that bilingual paraprofessionals are funded through ELL General funds and Title III funds. However, it is unclear how Title III is supplementing, not supplanting, General funds in this regard.

Corrective Action Required: The LEA must submit evidence that Title III funds are not being used to fund activities that are currently being funded by state or other federal dollars, as related to bilingual paraprofessionals.

Comment: Additionally, evidence was provided that bilingual paraprofessionals are performing duties outside of supporting language acquisition/development and cultural adjustment outside the district policy disallowing "non-instructional duties such as breakfast, lunch, bus, recess in excess of 30 minutes per day". Moreover, the language of the bilingual paraprofessionals is not always aligned with the needs of the school.

Recommendation: It is recommended that the district review 1) the amount of time bilingual paraprofessionals are spending on duties outside of instruction and adjust to fit the district's policy to ensure their work focuses on supporting the language and cultural needs of ELs and 2) the language/culture needs at each school and allocate bilingual paraprofessionals based on need

Element 6.2 Fiscal management procedures ensure state and federal requirements are met including appropriate time and effort record keeping, meeting the two percent (2%) administrative cap, and that purchased equipment is properly labeled and inventoried.

MDE Response: *No findings at this time*

Recommendation: No recommendations at this time

Critical Element 7 Nonpublic School Participation in Language Instruction Education Program: The LEA must include nonpublic school participation in the language instruction education program.

Element 7.1 The LEA annually consults with nonpublic schools to determine services for English learners that are located in the geographic area served by the LEA. Consultation includes [See items *a – i*].

MDE Response: *Findings – See explanation and required corrective action below*

Finding 7.1.1: Evidence was provided that while consultation is happening, meaningful consultation in the areas of critical element 7.1.c) *What services will be offered to meet the language development needs of ELs as well as professional development needs of their teachers and other educational personnel*, and 7.1.d) *The size and scope of the services to be provided to the nonpublic school children and educational personnel* is not happening.

Corrective Action Required: The LEA must submit to MDE a plan to provide meaningful consultation to its non-public schools.

Recommendation: Work with MDE to review guidelines around using Title III funds to support F1 Visa holders. The LEA should review its form as it appears the name of a previous consultant is still listed on a form dated recently.

Element 7.2 The LEA ensures equitable participation in the Title III program [in accordance with *a-c]*.

MDE Response: *Findings – See explanation and required corrective action below*

Finding 7.2.1: Evidence was provided that a process for oversight of the items in this critical element ("a" and "b") does not exist.

Corrective Action Required: The LEA must develop and submit a process for oversight of the following sub elements: a) the LEA assesses, evaluates and addresses the needs and progress of public and nonpublic school students and educational personnel on a comparable basis; and b) the LEA provides an equitable amount of services to students and educational personnel with similar needs.

Element 7.3 The LEA ensures use of Title III funds is in alignment with [items *a - c*].

MDE Response: *No findings at this time*

Recommendation: It is recommended that St. Paul Public Schools provide more guidance to nonpublics on ways to use the funds to effectively support ELs at the nonpublic while remaining compliant with state and federal laws and regulations.

Exhibit C

U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

January 7, 2015

Dear Colleague:

Forty years ago, the Supreme Court of the United States determined that in order for public schools to comply with their legal obligations under Title VI of the Civil Rights Act of 1964 (Title VI), they must take affirmative steps to ensure that students with limited English proficiency (LEP) can meaningfully participate in their educational programs and services.[1] That same year, Congress enacted the Equal Educational Opportunities Act (EEOA), which confirmed that public schools and State educational agencies (SEAs) must act to overcome language barriers that impede equal participation by students in their instructional programs.[2]

Ensuring that SEAs and school districts are equipped with the tools and resources to meet their responsibilities to LEP students, who are now more commonly referred to as English Learner (EL) students or English Language Learner students, is as important today as it was then. EL students are now enrolled in nearly three out of every four public schools in the nation, they constitute nine percent of all public school students, and their numbers are steadily increasing.[3] It is crucial to the future of our nation that these students, and all students, have equal access to a high-quality education and the opportunity to achieve their full academic potential. We applaud those working to ensure equal educational opportunities for EL students, as well as the many schools and communities creating programs that recognize the heritage languages of EL students as valuable assets to preserve.

The Office for Civil Rights (OCR) at the U.S. Department of Education (ED) and the Civil Rights Division at the U.S. Department of Justice (DOJ) share authority for enforcing Title VI in the education context. DOJ is also responsible for enforcing the EEOA. (In the enclosed guidance, Title VI and the EEOA will be referred to as "the civil rights laws.") In addition, ED administers the English Language Acquisition, Language Enhancement, and Academic Achievement Act, also known as Title III, Part A of the Elementary and Secondary Education Act of 1965, as amended (ESEA) (Title III).[4] Under Title III, ED awards grants to SEAs, which, in turn, award Federal funds through subgrants to school districts in order to improve the

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[1] *Lau v. Nichols*, 414 U.S. 563 (1974); 42 U.S.C. § 2000d to d-7 (prohibiting race, color, and national origin discrimination in any program or activity receiving Federal financial assistance).

[2] Pub. L. No. 93-380, § 204(f), 88 Stat. 484, 515 (1974) (codified at 20 U.S.C. § 1703(f)).

[3] U.S. Department of Education, National Center for Education Statistics, NCES 2013-312, *Characteristics of Public and Private Elementary and Secondary Schools in the United States: Results From the 2011-12 Schools and Staffing Survey*, at 9 (Table 2) (Aug. 2013); U.S. Department of Education, National Center for Education Statistics, NCES 2014-083, *The Condition of Education 2014*, at 52 (Indicator 12) (May 2014).

[4] 20 U.S.C. §§ 6801-6871.

education of EL students so that they learn English and meet challenging State academic content and achievement standards.[5]

The Departments are issuing the enclosed joint guidance to assist SEAs, school districts, and all public schools in meeting their legal obligations to ensure that EL students can participate meaningfully and equally in educational programs and services.[6] This guidance provides an outline of the legal obligations of SEAs and school districts to EL students under the civil rights laws.[7] Additionally, the guidance discusses compliance issues that frequently arise in OCR and DOJ investigations under Title VI and the EEOA and offers approaches that SEAs and school districts may use to meet their Federal obligations to EL students. The guidance also includes discussion of how SEAs and school districts can implement their Title III grants and subgrants in a manner consistent with these civil rights obligations. Finally, the guidance discusses the Federal obligation to ensure that LEP parents and guardians have meaningful access to district- and school-related information. We hope that you will find this integrated guidance useful as you strive to provide EL students and LEP parents equal access to your instructional programs.

As we celebrate the fortieth anniversaries of *Lau* and the EEOA and the fiftieth anniversary of Title VI, we are reminded of how much progress has been achieved since these milestones and how much work remains to be done. We look forward to continuing this progress with you.

Sincerely,

/s/
Catherine E. Lhamon
Assistant Secretary for Civil Rights
U.S. Department of Education

/s/
Vanita Gupta
Acting Assistant Attorney General for Civil Rights
U.S. Department of Justice

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[5] 20 U.S.C. §§ 6821(a), 6825(a); *see also* 34 C.F.R. § 200.1(b), (c) (explaining distinction between content standards and achievement standards).

[6] The terms "program," "programs," "programs and services," and "programs and activities" are used in a colloquial sense and are not meant to invoke the meaning of the terms "program" or "program or activity" as defined by the Civil Rights Restoration Act of 1987 (CRRA). Under the CRRA, which amended Title VI, Title IX of the Education Amendments of 1972 (Title IX), and Section 504 of the Rehabilitation Act of 1973 (Section 504), the term "program or activity" and the term "program," in the context of a school district, mean all of the operations of a school district. 42 U.S.C. § 2000d-4a(2)(B); 20 U.S.C. § 1687(2)(B); 29 U.S.C. § 794(b)(2)(B).

[7] As applied to Title VI, this guidance is consistent with and clarifies previous Title VI guidance in this area including: U.S. Department of Health, Education, and Welfare, Office for Civil Rights, *Identification of Discrimination and Denial of Services on the Basis of National Origin* (May 25, 1970), reprinted in 35 Fed. Reg. 11,595 (July 18, 1970) (*1970 OCR Guidance*) (the great majority of programs and functions assigned to ED at its creation in 1980 were transferred from HEW); OCR, *The Office for Civil Rights' Title VI Language Minority Compliance Procedures* (December 1985) (*1985 OCR Guidance*); and OCR, *Policy Update on Schools' Obligations Toward National-Origin Minority Students with Limited-English Proficiency* (September 1991) (*1991 OCR Guidance*). These guidance documents are available at http://www2.ed.gov/about/offices/list/ocr/ellresources.html. This guidance clarifies these documents and does so consistent with legal developments since 1991. When evaluating compliance under the EEOA, DOJ applies EEOA case law as well as the standards and procedures identified in this guidance, which are similar to those identified in OCR's previous Title VI guidance.

Notice of Language Assistance

Notice of Language Assistance: If you have difficulty understanding English, you may, free of charge, request language assistance services for this Department information by calling 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), or email us at: Ed.Language.Assistance@ed.gov.

Aviso a personas con dominio limitado del idioma inglés: Si usted tiene alguna dificultad en entender el idioma inglés, puede, sin costo alguno, solicitar asistencia lingüística con respecto a esta información llamando al 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o envíe un mensaje de correo electrónico a: Ed.Language.Assistance@ed.gov.

給英語能力有限人士的通知: 如果您不懂英語， 或者使用英语有困难，您可以要求獲得向大眾提供的語言協助服務，幫助您理解教育部資訊。這些語言協助服務均可免費提供。如果您需要有關口譯或筆譯服務的詳細資訊，請致電 1-800-USA-LEARN (1-800-872-5327) (聽語障人士專線：1-800-877-8339),或電郵: Ed.Language.Assistance@ed.gov.

Thông báo dành cho những người có khả năng Anh ngữ hạn chế: Nếu quý vị gặp khó khăn trong việc hiểu Anh ngữ thì quý vị có thể yêu cầu các dịch vụ hỗ trợ ngôn ngữ cho các tin tức của Bộ dành cho công chúng. Các dịch vụ hỗ trợ ngôn ngữ này đều miễn phí. Nếu quý vị muốn biết thêm chi tiết về các dịch vụ phiên dịch hay thông dịch, xin vui lòng gọi số 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), hoặc email: Ed.Language.Assistance@ed.gov.

영어 미숙자를 위한 공고: 영어를 이해하는 데 어려움이 있으신 경우, 교육부 정보 센터에 일반인 대상 언어 지원 서비스를 요청하실 수 있습니다. 이러한 언어 지원 서비스는 무료로 제공됩니다. 통역이나 번역 서비스에 대해 자세한 정보가 필요하신 경우, 전화번호 1-800-USA-LEARN (1-800-872-5327) 또는 청각 장애인용 전화번호 1-800-877-8339 또는 이메일주소 Ed.Language.Assistance@ed.gov 으로 연락하시기 바랍니다.

Paunawa sa mga Taong Limitado ang Kaalaman sa English: Kung nahihirapan kayong makaintindi ng English, maaari kayong humingi ng tulong ukol dito sa inpormasyon ng Kagawaran mula sa nagbibigay ng serbisyo na pagtulong kaugnay ng wika. Ang serbisyo na pagtulong kaugnay ng wika ay libre. Kung kailangan ninyo ng dagdag na impormasyon tungkol sa mga serbisyo kaugnay ng pagpapaliwanag o pagsasalin, mangyari lamang tumawag sa 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o mag-email sa: Ed.Language.Assistance@ed.gov.

Уведомление для лиц с ограниченным знанием английского языка: Если вы испытываете трудности в понимании английского языка, вы можете попросить, чтобы вам предоставили перевод информации, которую Министерство Образования доводит до всеобщего сведения. Этот перевод предоставляется бесплатно. Если вы хотите получить более подробную информацию об услугах устного и письменного перевода, звоните по телефону 1-800-USA-LEARN (1-800-872-5327) (служба для слабослышащих: 1-800-877-8339), или отправьте сообщение по адресу: Ed.Language.Assistance@ed.gov.

Dear Colleague Letter: English Learner Students and Limited English Proficient Parents

TABLE OF CONTENTS[8]

I. State Educational Agency and School District Obligations to EL Students 5

II. Common Civil Rights Issues 8

A. Identifying and Assessing All Potential EL Students 10

B. Providing EL Students with a Language Assistance Program 12

C. Staffing and Supporting an EL Program 14

D. Providing Meaningful Access to All Curricular and Extracurricular Programs 17

1. Core Curriculum 18

2. Specialized and Advanced Courses and Programs 21

E. Avoiding Unnecessary Segregation of EL Students 22

F. Evaluating EL Students for Special Education Services and Providing Special Education and English Language Services 24

1. Individuals with Disabilities Education Act (IDEA) 25

2. Section 504 of the Rehabilitation Act (Section 504) 27

G. Meeting the Needs of EL Students Who Opt Out of EL Programs or Particular EL Services 29

H. Monitoring and Exiting EL Students from EL Programs and Services 32

I. Evaluating the Effectiveness of a District's EL Program 35

J. Ensuring Meaningful Communication with Limited English Proficient Parents 37

Conclusion 40

[8] The Departments have determined that this document is a "significant guidance document" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), *available at* www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf. This and other policy guidance is issued to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that the Departments enforce. The Departments' legal authority is based on those laws and regulations. This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how the Departments evaluate whether covered entities are complying with their legal obligations. If you are interested in commenting on this guidance, please send an e-mail with your comments to OCR@ed.gov and education@usdoj.gov, or write to the following addresses: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, D.C. 20202, and the Educational Opportunities Section, Civil Rights Division, U.S. Department of Justice, 950 Pennsylvania Avenue, NW, PHB, Washington, D.C. 20530.

I. State Educational Agency and School District Obligations to EL Students

SEAs and school districts share an obligation to ensure that their EL programs and activities comply with the civil rights laws and applicable grant requirements.[9] Title VI prohibits recipients of Federal financial assistance, including SEAs and school districts, from discriminating on the basis of race, color, or national origin.[10] Title VI's prohibition on national origin discrimination requires SEAs and school districts to take "affirmative steps" to address language barriers so that EL students may participate meaningfully in schools' educational programs.[11]

The EEOA requires SEAs and school districts to take "appropriate action to overcome language barriers that impede equal participation by [their] students in [their] instructional programs."[12]

In determining whether a school district's programs for EL students comply with the civil rights laws,[13] the Departments apply the standards established by the United States Court of Appeals

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[9] *See* Department of Education Title VI regulations: 34 C.F.R. § 100.4(b) (every application by a State or State agency for continuing Federal financial assistance "shall . . . provide or be accompanied by provision for such methods of administration for the program as are found by the responsible Departmental official to give reasonable assurance that the applicant and all recipients of Federal financial assistance under such program will comply with all requirements imposed by or pursuant to this [Title VI] regulation"); *id.*§ 80.40(a) ("[g]rantees must monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements and that performance goals are being achieved."); *id.* §§ 76.500, 76.770 (requiring SEAs to have procedures "necessary to ensure compliance with applicable statutes and regulations," including non-discrimination provisions of Title VI). *See also* Department of Justice Title VI regulations: 28 C.F.R. § 42.105(a)(1) ("[e]very application for Federal financial assistance [to carry out a program] to which this subpart applies, and every application for Federal financial assistance to provide a facility shall ... contain or be accompanied by an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this subpart."); *id.* § 42.410 ("[e]ach state agency administering a continuing program which receives Federal financial assistance shall be required to establish a Title VI compliance program for itself and other recipients which obtain Federal assistance through it. The Federal agencies shall require that such state compliance programs provide for the assignment of Title VI responsibilities to designated state personnel and comply with the minimum standards established in this subpart for Federal agencies, including the maintenance of records necessary to permit Federal officials to determine the Title VI compliance of the state agencies and the sub-recipient.").

[10] Any Federal agency, such as the Department of Education or Justice, that provides Federal funds to an SEA or school district may initiate a compliance review to ensure compliance with, or investigate a complaint alleging a violation of, Title VI and its implementing regulations. DOJ also may initiate a Title VI suit if, after notice of a violation from a Federal funding agency, a recipient of Federal funds fails to resolve noncompliance with Title VI voluntarily and the agency refers the case to DOJ. Furthermore, DOJ coordinates enforcement of Title VI across Federal agencies and can participate in private litigation involving Title VI.

[11] *Lau*, 414 U.S. at 566-67 (affirming *1970 OCR Guidance* and stating that 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, Title VI requires that the district take affirmative steps to rectify the language deficiency to open its instructional program to these students); 34 C.F.R. §100.3(b)(1), (2).

[12] 20 U.S.C. § 1703(f) ("No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by. . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs"). After providing notice of an EEOA violation, DOJ may institute a civil action if an SEA or school district has not taken "appropriate remedial action" within a reasonable time. *Id.* §§ 1706, 1710. DOJ also has the authority to intervene in private EEOA cases. *Id.* § 1709.

for the Fifth Circuit more than 30 years ago in *Castañeda v. Pickard.*[14] Specifically, the Departments consider whether:

(1) 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;

(2) The program and practices used by the school system are reasonably calculated to implement effectively the educational theory adopted by the school; and

(3) 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.

The Departments also apply *Castañeda*'s standards when evaluating an SEA's compliance with the civil rights laws. Even if an SEA does not provide educational services directly to EL students, SEAs have a responsibility under the civil rights laws to provide appropriate guidance, monitoring, and oversight to school districts to ensure that EL students receive appropriate EL services.[15] For example, to the extent that SEAs select EL instructional program models that their school districts must implement or otherwise establish requirements or guidelines for such programs and related practices, these programs, requirements, or guidelines must also comply with the *Castañeda* requirements.

In addition, Title III requires SEAs and school districts that receive funding under Title III subgrants to provide high-quality professional development programs and implement high-quality language instruction education programs, both based on scientifically-based research, that will enable EL students to speak, listen, read, and write English and meet challenging State

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[13] Throughout this guidance, "school district" or "district" includes any local educational agency (LEA) that is a recipient of Federal financial assistance directly from ED or indirectly through an SEA or LEA, including public school districts, public charter schools, and public alternative schools. 42 U.S.C. § 2000d-4a (incorporating 20 U.S.C. §7801(26)). "School district" and SEA also include, respectively, any LEA or SEA as defined by the EEOA. 20 U.S.C. § 1720(a), (b) (incorporating 20 U.S.C. §7801(26), (41)). In some cases, an SEA and LEA may be the same entity. (Hawaii and Puerto Rico are two examples.)

[14] 648 F.2d 989 (5th Cir. 1981); *see United States v. Texas*, 601 F.3d 354, 366 (5th Cir. 2010) (reaffirming and applying the *Castañeda* test); *see 1991 OCR Guidance* ("In view of the similarity between the EEOA and the policy established in the 1970 OCR memorandum, in 1985 OCR adopted the *Castañeda* standard for determining whether recipients' programs for LEP students complied with the Title VI regulation.").

[15] *See, e.g.*, *Horne v. Flores*, 557 U.S. 433, 439 (2009) ("The question at issue in these cases is not whether [the State of] Arizona must take 'appropriate action' to overcome the language barriers that impede ELL students. Of course it must."); *Texas*, 601 F.3d at 364-65 (applying EEOA to SEA); *United States v. City of Yonkers*, 96 F.3d 600, 620 (2d Cir. 1996) ("The EEOA also imposes on states the obligation to enforce the equal-educational-opportunity obligations of local educational agencies [LEAs]."); *Gomez v. Illinois State Bd. of Educ.*, 811 F.2d 1030, 1042-43 (7th Cir. 1987) (holding that SEAs set "general guidelines in establishing and assuring the implementation of the state's [EL] programs" and that "§ 1703(f) requires that [SEAs], as well as [LEAs]. . .ensure that the needs of LEP children are met"); *Idaho Migrant Council v. Bd. of Educ.*, 647 F.2d 69, 71 (9th Cir. 1981) (holding that an SEA "has an obligation to supervise the local districts to ensure compliance" with the EEOA); *see also supra* note 9 (quoting regulations regarding SEAs' obligations as recipients of any Federal funds to oversee subgrantees).

standards.[16] Not all school districts that enroll EL students receive such subgrants from their SEA under Title III, Part A. Some school districts have too small a population of EL students to meet the minimum subgrant requirement and are not members of a consortium of districts that is receiving a subgrant.[17] Nonetheless, several key school district requirements for recipients under Title III that are discussed in this letter are also required by Title I of the ESEA, which has no such minimum subgrant requirement.[18]

Title III, Part A funds must be used to supplement other Federal, State, and local public funds that would have been expended absent such funds.[19] Because the civil rights laws require SEAs and school districts to take appropriate action to overcome language barriers for EL students, Title III, Part A funds may not be used to fund the activities chosen to implement an SEA's or school district's civil rights obligations. Thus, SEAs and school districts can use these funds only for activities beyond those activities necessary to comply with Federal civil rights obligations. It is important to remember, however, that the legal obligations of an SEA and a school district under Title VI and the EEOA are independent of the amount or type of State or Federal funding received. Thus, for example, any change to State funding dedicated to EL programs and services, including State limitations on funding after a child has received EL services for a specified period of time, does not change an SEA's or school district's Federal civil rights obligations to EL students.

Title III also contains its own non-discrimination provision, which provides that a student shall not be admitted to, or excluded from, any federally assisted education program on the basis of a surname or language-minority status.[20] In addition, SEAs and school districts that receive funding under Title III are required to regularly determine the effectiveness of a school district's program in assisting EL students to attain English proficiency and meet challenging State

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[16] 20 U.S.C. §§ 6823(b)(2), 6825(c)(1),(2), 6826(d)(4). Currently, all SEAs receive Federal funds under Title III, Part A because they all have an approved plan. *See id.* §§ 6821, 6823. SEAs may reserve no more than 5 percent of the funds for certain State-level activities, and no more than 15 percent of the funds for subgrants to school districts that have experienced a significant increase in the number or percentage of immigrant children. *Id.* §§ 6821(b)(2), 6824(d)(1). When referring to Title III, Part A subgrants to school districts, this guidance is referring to the portion of Federal funds (which must be at least 80 percent of the total) that must be provided to school districts based on the population of EL students in each district. *Id.* § 6824(a). For more information on Title III grants, see http://www2.ed.gov/programs/sfgp/index.html.

[17] 20 U.S.C. §§ 6824(b), 6871.

[18] This includes the requirement that school districts annually assess EL students for English proficiency, *id.* §§ 6311(b)(7) (Title I), 6823(b)(3)(C) (Title III); the provision of specific written notices for parents of EL students, *id.* §§ 6312(g)(1)-(3) (Title I), 7012(a)-(d) (Title III); prohibitions on discrimination on the basis of surname and language-minority status, *id.* §§ 6312(g)(5)(Title I), 7012(f) (Title III); and provisions regarding adequate yearly progress, *id.* §§ 6311(b)(2)(C)(v)(II)(dd), 6311(b)(3)(C)(ix)(III) (Title I), 6842(a)(3)(A)(iii) (Title III).

[19] 20 U.S.C. § 6825(g).

[20] *Id.* §§ 6312(g)(5) (Title I), 7012(f) (Title III).

academic content and student academic achievement standards.[21] SEAs have a responsibility to assess whether and ensure that school districts receiving Title III subgrants comply with all Title III requirements.[22]

II. Common Civil Rights Issues

Through OCR's and DOJ's enforcement work, the Departments have identified several areas that frequently result in noncompliance by school districts and that SEAs at times encounter while attempting to meet their Federal obligations to EL students. This letter offers guidance on these issues and explains how the Departments would evaluate whether SEAs and school districts met their shared obligations to:

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;*

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[21] *Id.* § 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 to determine the effectiveness of and improve the LEA's programs and activities).

[22] *Id.* §§ 6823(b)(3)(C) & (D), (b)(5), 6841(b)(3), 6842; *see also supra* note 9 (quoting regulations regarding SEA's obligations as recipient of any Federal funds to oversee subgrantees).

I. *Evaluate the effectiveness of a school district's language assistance program(s) 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;*[23] *and*

J. *Ensure meaningful communication with LEP parents.*

This guidance also provides a non-exhaustive set of approaches that school districts may take in order to meet their civil rights obligations to EL students. In most cases, however, there is more than one way to comply with the Federal obligations outlined in this guidance.

In addition to the common civil rights issues discussed in this guidance with respect to EL student programs, Federal law also prohibits all forms of race, color, national origin, sex, disability, and religious discrimination against EL students. For example, among other requirements, SEAs, school districts, and schools:

- Must enroll all students regardless of the students' or their parents' or guardians' actual or perceived citizenship or immigration status;[24]
- Must protect students from discriminatory harassment on the basis of race, color, national origin (including EL status), sex, disability, or religion;[25]
- Must not prohibit national origin-minority group students from speaking in their primary language during the school day without an educational justification;[26] and
- Must not retaliate, intimidate, threaten, coerce, or in any way discriminate against any individual for bringing civil rights concerns to a school's attention or for testifying or participating in any manner in a school, OCR, or DOJ investigation or proceeding.[27]

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[23] *Castañeda*, 648 F.2d at 1011; *see* discussion *infra* in Part II. I, "Evaluating the Effectiveness of a District's EL Program."

[24] More information about the applicable legal standards regarding student enrollment practices is included in the Departments' *Dear Colleague Letter: School Enrollment Procedures* (May 8, 2014), *available at* www.ed.gov/ocr/letters/colleague-201405.pdf.

[25] More information about the legal obligations to address discriminatory harassment under the Federal civil rights laws is available in OCR's *Dear Colleague Letter: Harassment and Bullying* (Oct. 26, 2010), *available at* www.ed.gov/ocr/letters/colleague-201010.pdf. DOJ shares enforcement authority with OCR for enforcing these laws and can also address harassment on the basis of religion under Title IV of the Civil Rights Act of 1964.

[26] *See, e.g.*, *Rubio v. Turner Unified Sch. Dist. No. 402*, 453 F. Supp. 2d 1295 (D. Kan. 2006) (Title VI claim was stated by a school's prohibition on speaking Spanish). EL students, like many others, often will feel most comfortable speaking in their primary language, especially during non-academic times or while in the cafeteria or hallways.

[27] More information about the legal obligations concerning the prohibition against retaliation under the Federal civil rights laws is available in the Department of Education's *Dear Colleague Letter: Retaliation* (Apr. 24, 2013) *available at* www.ed.gov/ocr/letters/colleague-201304.html. *See also* 34 C.F.R. § 100.7(e) (Title VI); 34 C.F.R. § 106.71 (Title IX) (incorporating 34 C.F.R. §100.7(e) by reference); 34 C.F.R. § 104.61 (Section 504)

Although these issues are outside the primary focus of this guidance, the Departments strongly encourage SEAs and school districts to review these and other non-discrimination requirements to ensure that EL students, and all students, have access to equal educational opportunities.

A. Identifying and Assessing All Potential EL Students

One of the most critical "affirmative steps" and "appropriate action[s]" that school districts must take to open instructional programs to EL students and to address their limited English proficiency is to first identify EL students in need of language assistance services in a timely manner.[28] School districts must provide notices within thirty days from the beginning of the school year to all parents of EL students regarding the EL student's identification and placement in a language instruction educational program.[29] School districts must, to the extent practicable, translate such notices in a language that the parent can understand.[30] If written translations are not practicable, school districts must offer LEP parents free oral interpretation of the written information.[31] In light of these obligations and the duty to timely identify all EL students, school districts will need to assess potential EL students' English proficiency and identify non-proficient students as EL as soon as practicable and well before the thirty-day notice deadline.

Most school districts use a home language survey (HLS) at the time of enrollment to gather information about a student's language background (*e.g.*, first language learned, language the student uses most often, and languages used in the home). The HLS identifies those students who should be referred for an English language proficiency ("ELP") assessment to determine whether they should be classified as EL students, who are entitled to language assistance services. Students initially identified by an HLS or other means for English proficiency testing are often referred to as those with a Primary or Home Language Other than English (PHLOTE).

School districts must have procedures in place to accurately and timely identify PHLOTE students and determine if they are EL students through a valid and reliable ELP assessment.[32]

(incorporating 34 C.F.R. §100.7(e) by reference); 28 C.F.R. § 42.107(e) (Title VI); 28 C.F.R. § 54.605 (Title IX) (incorporating 28 C.F.R. § 42.107(e) by reference); 28 C.F.R. § 35.134 (Title II). DOJ interprets the EEOA to prohibit retaliation, consistent with the Supreme Court's interpretation of several similar anti-discrimination statutes to encompass a prohibition on retaliation. *See, e.g., Gomez-Perez v. Potter*, 553 U.S. 474 (2008) (recognizing a right of action for retaliation under the Federal-sector provisions of the Age Discrimination in Employment Act of 1967); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008) (recognizing a right of action for retaliation under 42 U.S.C. § 1981); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (recognizing a right of action for retaliation under Title IX of the Education Amendments of 1972).

[28] *See supra* text accompanying notes 9-11 (discussing Title VI, its regulations and guidance, and *Lau*) and note 12 (discussing the EEOA).

[29] 20 U.S.C. §§ 6312(g)(1) (Title I), 7012(a) (Title III).

[30] *Id.* §§ 6312(g)(2) (Title I), 7012(c) (Title III).

[31] *See* 67 Fed. Reg. 71,710, 71,750 (2002). This obligation is consistent with Title VI and EEOA obligations of school districts to ensure meaningful communication with LEP parents. *See* discussion *infra* in Part II. J, "Ensuring Meaningful Communication with Limited English Proficient Parents."

[32] *See 1991 OCR Guidance*; *see also, Rios v. Read*, 480 F. Supp. 14, 23 (E.D.N.Y. 1978) (requiring "objective, validated tests conducted by competent personnel"); *Cintron v. Brentwood*, 455 F. Supp. 57, 64 (E.D.N.Y. 1978)

ELP assessments must assess the proficiency of students in all four domains of English (*i.e.*, speaking, listening, reading, and writing).[33] The Departments recognize that some SEAs and school districts use ELP assessments for entering kindergarten PHLOTE students that evaluate listening, speaking, pre-reading, and pre-writing.[34]

- Example 1: To expedite appropriate placements of EL students, many school districts have parents complete an HLS and assess PHLOTE students' English proficiency levels before school starts. Some school districts have parents complete an HLS before classes commence, and then test PHLOTE students within a week of when classes start to minimize the disruption caused by possible changes in EL students' placements.

Some examples of when the Departments have identified compliance issues in the areas of EL student identification and assessment include when school districts: (1) do not have a process in place to initially identify the primary or home language of all enrolled students; (2) use a method of identification, such as an inadequate HLS, that fails to identify significant numbers of potential EL students; (3) do not test the English language proficiency of all PHLOTE students, resulting in the under-identification of EL students; (4) delay the assessment of incoming PHLOTE students in a manner that results in a denial of language assistance services; or (5) do not assess the proficiency of PHLOTE students in all four language domains (*e.g.*, assessing the students in only the listening and speaking domains and as a result missing large numbers of EL students).

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

✓ *School districts have procedures in place for accurately identifying EL students in a timely, valid, and reliable manner so that they can be provided the opportunity to participate meaningfully and equally in the district's educational programs; and*

(requiring "validated" tests of English proficiency); *Keyes v. Sch. Dist. No. 1*, 576 F. Supp. 1503, 1513-14, 1518 (D. Colo. 1983) (absence of a formal valid testing process to identify EL students violated the EEOA).

[33] *See 1991 OCR Guidance*; *Rios*, 480 F. Supp. at 23-24 (finding the school district's bilingual program to violate Title VI and the EEOA in several areas including identifying EL students by testing their listening and vocabulary skills but "not measur[ing] reading or writing skills in English" and explaining that the "district has the obligation of identifying children in need of bilingual education by objective, validated tests conducted by competent personnel"); *Keyes*, 576 F. Supp. at 1518-19 (noting that "emphasis on the acquisition of oral English skills for LEP students is another cause for concern" as "reading and writing skills are also necessary…[for] parity in participation"); *see also* 20 U.S.C. § 7801(25) (classifying as LEP under the ESEA students born outside the U.S. or who are non-native English speakers and who have "difficulties in speaking, reading, writing, or understanding the English language"), § 1401(18) (same for the IDEA); *Notice of Final Interpretations for Title III of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the No Child Left Behind Act of 2001*, 73 Fed. Reg. 61831 (Oct. 17, 2008) (hereinafter "2008 NOI for Title III"); 34 C.F.R. § 200.6(b)(3)(i).

[34] For the purposes of this document, "listening" and "understanding" are interchangeable terms. Congress has often referred to "listening" as one of the "four recognized domains." 20 U.S.C. § 6823(b)(2) (Title III); *see also id.* § 6841(d)(1) (Title III). *But see id.* §§ 6826(d)(4) (Title III) ("comprehend"), 7801(25) ("understanding"). ED likewise has referred to the domain as "listening" in several more recent documents regarding EL students. *See, e.g.*, 2008 NOI for Title III, 73 Fed. Reg. 61828, 61829 n.5 (Oct. 17, 2008); 34 C.F.R. § 200.6(b)(3)(i). By contrast, OCR has historically used the term "understanding" to describe the domain described in the text as "listening."

✓ *When SEAs mandate the manner in which school districts identify and/or assess EL students, the State-imposed mechanism meets the requirements described in this section.*

B. Providing EL Students with a Language Assistance Program

When EL students are identified based on a valid and reliable ELP test, school districts must provide them with appropriate language assistance services. Language assistance services or programs for EL students must be educationally sound in theory and effective in practice; however, the civil rights laws do not require any particular program or method of instruction for EL students.[35] Students in EL programs must receive appropriate language assistance services until they are proficient in English and can participate meaningfully in the district's educational programs without language assistance services.

EL programs must be designed and reasonably calculated to enable EL students to attain both English proficiency and parity of participation in the standard instructional program within a reasonable length of time.[36] Each EL student's English proficiency level, grade level, and educational background, as well as language background for bilingual programs, must be considered to determine which EL program services are appropriate for EL students. For example, some school districts have designed programs to meet the unique needs of EL students whose formal education has been interrupted in their country of origin (perhaps due to dislocation, war, disease, famine, or other situations resulting in missed educational instruction).

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[35] *Castañeda*, 648 F.2d at 1009-10. Some common EL programs for learning English that are considered educationally sound in theory under *Castañeda's* first prong include:

- English as a Second Language (ESL), also known as English Language Development (ELD), is a program of techniques, methodology, and special curriculum designed to teach EL students explicitly about the English language, including the academic vocabulary needed to access content instruction, and to develop their English language proficiency in all four language domains (*i.e.*, speaking, listening, reading, and writing). ESL instruction is usually in English with little use of the EL students' primary language(s).
- Structured English Immersion (SEI) is a program designed to impart English language skills so that the EL student can transition and succeed in an English-only mainstream classroom once proficient. All instruction in an immersion strategy program is in English. Teachers have specialized training in meeting the needs of EL students (*e.g.*, an ESL teaching credential and/or SEI training), and have demonstrated strong skills in promoting ELD and SEI strategies for ensuring EL students' access to content.
- Transitional Bilingual Education (TBE), also known as early-exit bilingual education, is a program that utilizes a student's primary language in instruction. The program maintains and develops skills in the primary language while introducing, maintaining, and developing skills in English. The primary purpose of a TBE program is to facilitate the EL student's transition to an all-English instructional program, while the student receives academic subject instruction in the primary language to the extent necessary.
- Dual Language Program, also known as two-way or developmental, is a bilingual program where the goal is for students to develop language proficiency in two languages by receiving instruction in English and another language in a classroom that is usually comprised of half primary-English speakers and half primary speakers of the other language.

In school districts or schools where the number of EL students is small, EL students still must receive language assistance services; however, the EL program may be less formal. Additional EL programs not mentioned above may also meet civil rights requirements.

[36] *Castañeda*, 648 F.2d at 1011.

To provide appropriate and adequate EL program services based on each EL student's individual needs, and to facilitate transition out of such services within a reasonable time period, a school district will typically have to provide more EL services for the least English proficient EL students than for the more proficient ones. In addition, districts should provide designated English Language Development (ELD)/English as a Second Language (ESL) services for EL students at the same or comparable ELP levels to ensure these services are targeted and appropriate to their ELP levels.

- Example 2: A beginner-level EL student in a transitional bilingual education (TBE) program who is a primary Spanish speaker may receive 80 percent of her core instruction in Spanish and two periods of ESL per day. As her English proficiency increases to an intermediate level, the district may decrease the percentage of her core instruction that she receives in Spanish by transitioning her to one content class in Spanish, one period of ESL, and sheltered content classes[37] in English with non-EL students.[38]

- Example 3: A beginner-level EL student may receive two periods of ELD instruction per day, EL-only sheltered content classes in social studies and language arts, and sheltered content classes in math and science with both EL and non-EL students. As his English proficiency increases to a high intermediate level, he transitions into a daily period of ELD targeted to his lack of English proficiency in writing, and sheltered content classes with EL and non-EL students.

- Example 4: A school district enrolls EL students at the high school with a range of English proficiency levels and years of study in the EL program. Recognizing that different EL students have different needs, the district creates EL-only ELD classes that appropriately target the English proficiency levels of students and the specific needs of long-term EL students. These ELD courses, which EL students take in addition to grade-level English, are designed to provide language development services with an emphasis on advanced academic vocabulary and expository writing. The EL students also receive

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[37] This guidance uses the term "sheltered content classes" to mean Sheltered English Instruction, which is an instructional approach used to make academic instruction in English understandable to EL students. Sheltered instructional approaches assist EL students in developing grade-level content area knowledge, academic skills, and increased English proficiency. In sheltered content classes, teachers use a wide range of instructional strategies to make the content (*e.g.*, math, science, social studies) comprehensible to EL students while promoting their English language development (*e.g.*, connecting new content to student's prior knowledge, scaffolding, collaborative learning, and visual aids).

[38] This guidance uses the term "non-EL" students to mean both "former-EL" students and "never-EL" students. "Former EL" students are those who were identified as EL or enrolled in an EL program, but then met the criteria for exiting EL status. "Never-EL" students are those who have never been identified as EL or never enrolled in an EL program. This group includes PHLOTE students who test "proficient" in English on the valid and reliable assessment - *i.e.*, the Initially Fluent English Proficient (IFEP). Students who were identified as EL students but whose parents opted them out of EL programs are either "EL" or "former-EL" students (depending on whether they meet the criteria that would have been necessary for them to exit EL status), not "Never-EL" students.

integrated ELD instruction in their grade-level content classes from content-certified teachers who are adequately trained in ELD and sheltering techniques.

Some examples of when the Departments have identified compliance issues include when school districts: (1) exclude kindergarteners, or EL students with scheduling conflicts, from their EL program; (2) supplement regular education instruction with only aides who tutor EL students as opposed to teachers adequately trained to deliver the EL program; (3) fail to offer an EL program to a certain subset of EL students, such as students with disabilities or students speaking particular languages; (4) stop providing language assistance services when EL students reach higher levels of English proficiency but have not yet met exit criteria (including proficiency on a valid and reliable ELP assessment); or (5) fail to address the needs of EL students who have not made expected progress in learning English and have not met exit criteria despite extended enrollment in the EL program.

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

- ✓ *Schools provide all EL students with language assistance services that address their level of English language proficiency and give them an equal opportunity to meaningfully and equally participate in the district's programs;*
- ✓ *Each language assistance program for EL students that a school district provides meets the Castañeda standards described throughout this document; and*
- ✓ *When SEAs mandate the manner in which school districts provide EL programming, the State-imposed requirements meet the standards described in this subsection.*

C. Staffing and Supporting EL Programs

School districts have an obligation to provide the personnel and resources necessary to effectively implement their chosen EL programs. This obligation includes having highly qualified teachers to provide language assistance services, trained administrators who can evaluate these teachers, and adequate and appropriate materials for the EL programs.

At a minimum, every school district is responsible for ensuring that there is an adequate number of teachers to instruct EL students and that these teachers have mastered the skills necessary to effectively teach in the district's program for EL students.[39] Where formal qualifications have

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[39] SEAs that receive ESEA Title I funds, which is currently all SEAs, must ensure that all teachers in core academic subjects, including teachers of EL students, are "highly qualified." 20 U.S.C. § 6319(a). Being highly qualified means (1) holding at least a bachelor's degree, (2) obtaining full State certification or licensure, and (3) demonstrating subject-matter competency. *Id.* § 7801(23). If an SEA or school district uses a sheltered instruction model for serving EL students that includes core academic subjects at the secondary school level (*e.g.*, "ESL math" or "ESL science"), the teacher must be adequately trained in the sheltering techniques, meet any State requirements for EL teachers, and be highly qualified in the core academic subject (*e.g.*, math or science) as well. If the only English teacher of record is the EL teacher, that teacher must be highly qualified in English as well. In addition, teachers in school districts that receive funds under Title III must be fluent in English and any other

been established, *e.g.*, the SEA requires authorization or certification to teach in particular EL programs, or a school district generally requires its teachers in other subjects to meet formal requirements, a school district must either hire teachers who already have the necessary formal qualifications to teach EL students or require that teachers already on staff be trained or work towards attaining the necessary formal qualifications and obtain the formal qualifications within a reasonable period of time.

In some instances, however, SEA endorsements or other requirements may not be rigorous enough to ensure that teachers of EL students have the skills necessary to carry out the school district's chosen EL program. For example, in *Castañeda*, the SEA and school district considered teachers qualified to teach in a bilingual EL program once they had completed a 100-hour training designed to provide instruction in bilingual education methods and had a 700-word Spanish-language vocabulary. Because many of the teachers who completed the specified training were found to be unable to teach effectively in a Spanish bilingual program, the court required the SEA and school district to improve training for bilingual teachers and to develop adequate methods for assessing the qualifications of teachers who completed the training.[40]

As *Castañeda* recognizes, SEAs, through their guidance and monitoring responsibilities, must also have procedures in place for ensuring that districts have adequately trained teachers to implement their EL programs. This is especially true when the design of particular EL program(s) is required by the State. For example, if a State requires a specific bilingual education program, both the SEA and its school districts must ensure teachers are sufficiently trained so that they can effectively deliver the program.[41]

SEAs and school districts that provide EL teacher training are also responsible for evaluating whether their training adequately prepares teachers to implement the EL program effectively.[42] To meet this obligation, school districts need to ensure that administrators who evaluate the EL program staff are adequately trained to meaningfully evaluate whether EL teachers are appropriately employing the training in the classroom and are adequately prepared to provide the instruction that will ensure that the EL program model successfully achieves its educational objectives.[43]

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language used for instruction, including having written and oral communications skills. *See id.* § 6826(c); *Castañeda*, 648 F.2d at 1013 (requiring teachers who are trained and qualified to deliver the type of language support instruction required by the chosen EL program(s)).

[40] *Castañeda*, 648 F.2d at 1005, 1013.

[41] *Id.* at 1012-13 (directing the district court to "require both [the State and school district] to devise an improved in-service training program [for bilingual teachers] and an adequate testing or evaluation procedure to assess the qualifications of teachers completing this program"); *Castañeda v. Pickard*, 781 F.2d 456, 470-72 (5th Cir. 1986) (reviewing State and district changes and finding teachers adequately trained); *see also supra* notes 9, 12, 14 & 15.

[42] *Castañeda*, 648 F.2d at 1012-13.

[43] To implement an EL program effectively, there must be a meaningful evaluation of whether the teachers who deliver the program are qualified to do so. *See Castañeda*, 648 F.2d at 1013. This includes ensuring that those tasked with evaluating the instruction of EL program teachers, such as principals, are qualified to do so. *See Rios*,

- Example 5: An SEA receives complaints that teachers who acquired the State's ESL endorsement do not have some of the skills needed for effective ESL instruction. In response to the complaints, the SEA surveys ESL-endorsed teachers in the State and the administrators who evaluate them to identify areas where the teachers need additional training and support. The SEA develops teacher training supplements specific to those identified needs, requires the trained teachers to deliver an ESL lesson as part of the SEA evaluation of whether teachers mastered the training's content, and provides training for administrators on how to evaluate teachers on appropriate ESL instruction.

- Example 6: Because a school district does not have a sufficient number of principals with the State's bilingual credentials to evaluate teachers of its bilingual classes, the school district uses bilingual-credentialed district-level administrators to accompany English-only-speaking principals to bilingual classroom evaluations.

- Example 7: A school district with a Structured English Immersion program, consisting of ESL and sheltered content instruction, does not have a sufficient number of either qualified ESL-licensed teachers to provide ESL services or qualified content area teachers who are adequately trained to shelter content for EL students. The school district creates an in-service training on sheltering techniques, requires all core content teachers to successfully complete the training within two years, and requires a quarter of its new hires to obtain an ESL license within two years of their hiring date.

In addition to providing qualified teachers, school districts must also provide EL students with adequate resources and, if appropriate, qualified support staff. For example, EL students are entitled to receive appropriate instructional materials in the EL program, including adequate quantities of English language development materials available at the appropriate English proficiency and grade levels and appropriate bilingual materials for bilingual programs. If the Departments find that a school district's materials are inadequate and/or not appropriate for its EL students, the Departments expect the district to obtain sufficient, appropriate materials in a timely manner.

Paraprofessionals, aides, or tutors may not take the place of qualified teachers and may be used only as an interim measure while the school district hires, trains, or otherwise secures enough qualified teachers to serve its EL students.[44] And if a school district uses paraprofessionals to provide language assistance services to EL students that supplement those provided by qualified

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480 F. Supp. at 18, 23-24 (district's bilingual program violated the EEOA based on findings that included using administrators who were not bilingual and lacked relevant training to evaluate bilingual teachers).

[44] *Castañeda*, 648 F.2d at 1013 (explaining that bilingual aides cannot take the place of bilingual teachers and may be used only as an interim measure while district makes concerted efforts to secure a sufficient number of qualified bilingual teachers within a reasonable period of time).

teachers, it may do so only if the paraprofessional is trained to provide services to EL students and instructs under the direct supervision of a qualified teacher.[45]

Some examples of when the Departments have identified compliance issues in staffing and resourcing an EL program include when school districts: (1) offer language assistance services based on staffing levels and teacher availability rather than student need; (2) utilize mainstream teachers, paraprofessionals, or tutors rather than fully qualified ESL teachers for ESL instruction; or (3) provide inadequate training to general education teachers who provide core content instruction to EL students.

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

- ✓ *School districts provide qualified staff and sufficient resources, including adequate and appropriate materials, to effectively implement their chosen program, and if they lack either, they are taking effective steps to obtain them within a reasonable period of time;*
- ✓ *School districts regularly and adequately evaluate whether EL program teachers have met the necessary training requirements, and if not, ensure that they meet them in a timely manner;*
- ✓ *A school district's training requirements adequately prepare EL program teachers and administrators to effectively implement the district's program and provide supplemental training when necessary; and*
- ✓ *SEAs ensure, through guidance, monitoring, and evaluation, that school districts have qualified teachers to provide their EL programs to all EL students.*

D. Providing Meaningful Access to All Curricular and Extracurricular Programs

To be able to participate equally and meaningfully in instructional programs, EL students have to acquire English proficiency and recoup any deficits that they may incur in other areas of the curriculum as a result of spending extra time on ELD.[46] Thus, SEAs and school districts share a dual obligation to provide EL students language assistance programs as well as assistance in other areas of the curriculum where their equal participation may be impaired by academic deficits incurred while they were learning English.[47] This dual obligation requires school districts and SEAs to design and implement EL programs that are reasonably calculated to enable EL students to attain both English proficiency and parity of participation in the standard instructional program within a reasonable period of time.[48]

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[45] 20 U.S.C. § 6319(c)-(g).
[46] *Castañeda*, 648 F.2d at 1011.
[47] *Id.; see also supra* notes 9, 12, 14, & 15.
[48] *Castañeda*, 648 F.2d at 1011; *see also supra* notes 9, 12, 14, & 15.

In addition to ensuring EL students have access to the core curriculum, SEAs and school districts must provide EL students equal opportunities to meaningfully participate in all programs and activities of the SEA or school district–whether curricular, co-curricular, or extracurricular.[49] Such programs and activities include pre-kindergarten programs, magnet programs, career and technical education programs, counseling services, Advanced Placement and International Baccalaureate courses, gifted and talented programs, online and distance learning opportunities, performing and visual arts, athletics, and extracurricular activities such as clubs and honor societies.

1. Core Curriculum

During their educational journey from enrollment to graduation, EL students are entitled to instruction in the school district's core curriculum (*e.g.*, reading/language arts, math, science, and social studies). This includes equal access to the school's facilities, such as computer, science, and other labs or facilities, to ensure that EL students are able to participate meaningfully in the educational programs. Meaningful access to the core curriculum is a key component in ensuring that EL students acquire the tools to succeed in general education classrooms within a reasonable length of time.

One way to meet this obligation is to provide full access to the grade-appropriate core curriculum from the start of the EL program while using appropriate language assistance strategies in the core instruction so that EL students can participate meaningfully as they acquire English. In adapting instruction for EL students, however, school districts should ensure that their specialized instruction (*e.g.*, bilingual or sheltered content classes) does not use a watered-down curriculum that could leave EL students with academic deficits when they transition from EL programs into general education classrooms. Such specialized instruction should be designed such that EL students can meet grade-level standards within a reasonable period of time. School districts also should place EL students in age-appropriate grade levels so that they can have meaningful access to their grade-appropriate curricula and an equal opportunity to graduate.[50]

- Example 8: In a transitional bilingual program, an EL student who is taught math in Spanish should have access to the same math curriculum as her non-EL peers in general education classrooms. Similarly, a science class using sheltered instruction for EL

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[49] 34 C.F.R. § 100.1-.2; 20 U.S.C. § 1703(f).

[50] The Departments recognize that students with interrupted formal education (SIFE students), especially in the higher grades, may be below grade level in some or all subjects when they enter a school district, and that some school districts provide appropriately specialized programs to meet their needs. The Departments would not view such programs as offering inappropriately watered-down instructional content where the program is age-appropriate, the content of the instruction relates to the core curriculum and is credit-bearing toward graduation or promotion requirements, and SIFE students have the opportunity to meet grade-level standards within a reasonable period of time. However, it would be inappropriate for a district to place high school-aged SIFE students in middle or elementary school campus programs because this would not permit SIFE students to meet high school grade-level standards and graduation requirements within a reasonable amount of time and the placements would not be age appropriate.

students should offer the same content and the same access to laboratories as the general education science class. And while a ninth-grade EL student with interrupted formal education may need targeted help in math to catch up to his grade-level math curriculum, his EL program should provide access to that curriculum and not be restricted to an elementary-grade math curriculum.

Alternatively, school districts may use a curriculum that temporarily emphasizes English language acquisition over other subjects, provided that any interim academic deficits in other subjects are remedied within a reasonable length of time.[51] If districts choose to temporarily emphasize English language acquisition, they retain an obligation to measure EL students' progress in core subjects to assess whether they are incurring academic deficits and to provide assistance necessary to remedy content area deficits that were incurred during the time when the EL student was more focused on learning English.[52] To ensure that EL students can catch up in those core areas within a reasonable period of time, such districts must provide compensatory and supplemental services to remedy academic deficits that the student may have developed while focusing on English language acquisition. Similarly, SEAs must ensure through guidance and monitoring that school districts' EL programs (whether state-mandated or not) are designed to enable EL students to participate comparably in the core curriculum within a reasonable time period and that school districts timely remedy any academic deficits resulting from focusing on English language acquisition.[53]

For an EL program to be reasonably calculated to ensure that EL students attain equal participation in the standard instructional program within a reasonable length of time, if an EL student enters the ninth grade with beginner-level English proficiency, the school district should offer EL services that would enable her to earn a regular high-school diploma in four years.[54] In addition, EL students in high school, like their never-EL peers, should have the opportunity to be competitive in meeting college entrance requirements. For example, a school district should

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[51] *See Castañeda*, 648 F.2d at 1011 ("[A] curriculum, during the early part of [EL students'] school career, which has, as its primary objective, the development of literacy in English . . . [is permissible] even if the result of such a program is an interim sacrifice of learning in other areas during this period" provided "remedial action is taken to overcome the academic deficits" incurred during participation in this curriculum in ways that enable the "students' equal participation in the regular instructional program.").

[52] *See id.* at 1011-14 (recognizing that school districts may choose to "focus [] first on the development of English language skills and then later provid[e]. . . students with compensatory and supplemental education to remedy deficiencies in other areas which they may develop during this period" "so long as the schools design programs which are reasonably calculated to enable these students to attain parity of participation in the standard instructional program within a reasonable length of time after they enter the school system.").

[53] *See supra* notes 9, 12, 14 & 15; *see also* 20 U.S.C. § 6841 (Title III requires LEAs to provide SEAs with an evaluation including, among other things, the number and percentage of children in programs and activities attaining English proficiency at the end of each school year; and SEAs to use the LEA's evaluation to determine the effectiveness of and improve the LEA's programs and activities).

[54] *See Castañeda*, 648 F.2d at 1011 (requiring that districts "design programs which are reasonably calculated to enable [EL] students to attain parity of participation of the standard instructional program within a reasonable length of time after they enter the school system").

ensure that there are no structural barriers within the design of its academic program that would prevent EL students who enter high school with beginner-level English proficiency from graduating on time with the prerequisites to enter college.

To meet their obligation to design and implement EL programs that enable EL students to attain English proficiency and equal participation in the standard instructional program, school districts must use appropriate and reliable evaluation and testing methods that have been validated to measure EL students' English language proficiency and knowledge of the core curriculum. Only by measuring the progress of EL students in the core curriculum during the EL program can districts ensure that students are not incurring "irreparable academic deficits."[55] If EL students are receiving instruction in a core content subject in their primary language, the school's assessments of their knowledge of that content area must include testing in the primary language.[56]

- Example 9: A district has a Structured English Immersion (SEI) program, in which 20 percent of its EL students receive only part of their grade K-3 social studies and science curricula in their intensive ESL courses while the other 80 percent of EL students received their full grade-level science and social studies curricula in sheltered classes with non-EL students. The district finds that the 20 percent are not performing as well as the 80 percent on the third-grade assessments in social studies and science or on the annual ELP test. In light of this data, the district provides intensive, supplemental instruction in science and social studies during the school day to the lower-performing 20 percent of EL students when they start fourth grade. To further address their academic deficits, their period of designated ESL incorporates grade-level science and social studies texts in ESL exercises focused on the reading and writing domains. The district also adjusts its SEI program so that when EL students in grades K-3 reach an intermediate level of English proficiency, they transition out of the second period of ESL incorporating only some science and social studies into the sheltered classes of the full science and social studies curricula with non-EL students.

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[55] *Id.* at 1014.

[56] *Id.* (holding that it was not appropriate to test EL students in a bilingual program with only English language achievement tests and that "[t]he progress of . . . students in these other areas . . . must be measured by means of a standardized test in their own language because no other device is adequate to determine their progress vis-à-vis that of their English speaking counterparts"). SEAs must provide reasonable accommodations on assessments administered to EL students, including, to the extent practicable, providing assessments in the language most likely to yield accurate data on what such students know and can do in academic content areas. 20 U.S.C. § 6311(b)(3)(C)(ix)(III). SEAs also must make every effort to develop academic assessments in languages other than English that are needed and are not already available, *id.* § 6311(b)(6), and SEAs may not unduly postpone assessing EL students in reading/language arts in English, *id.* § 6311(b)(3)(C)(x).

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

- ✓ *SEAs and districts design and implement EL programs that are reasonably calculated to enable EL students to attain both English proficiency and parity of participation in the standard instructional program within a reasonable period of time;*
- ✓ *SEAs and districts provide EL programs that ensure EL students' access to their grade-level curricula so that they can meet promotion and graduation requirements;*
- ✓ *SEAs and districts provide EL students equal opportunities to meaningfully participate in specialized programs – whether curricular, co-curricular, or extracurricular; and*
- ✓ *A school district's secondary program establishes a pathway for EL students to graduate high school on time and EL students have equal access to high-level programs and instruction to prepare them for college and career.*

2. Specialized and Advanced Courses and Programs

School districts may not categorically exclude EL students from gifted and talented education (GATE) or other specialized programs such as Advanced Placement (AP), honors, or International Baccalaureate (IB) courses. Unless a particular GATE program or advanced course is demonstrated to require proficiency in English for meaningful participation, schools must ensure that evaluation and testing procedures for GATE or other specialized programs do not screen out EL students because of their limited English proficiency.[57] If a school district believes that there is an educational justification for requiring proficiency in English in a particular GATE or other advanced program, the Departments consider a school district's proffered rationale to assess whether it constitutes a substantial educational justification and, if so, to determine whether a school could use comparably effective alternative policies or practices that would have less of an adverse impact on EL students.[58]

- Example 10: An EL student demonstrates advanced math skills in the classroom but does not perform well on English language diagnostic tests. The student's math teacher recommends the student for the gifted math program. The school uses a different testing method, such as a non-verbal assessment or a math-only test with EL testing accommodations, to give the student an opportunity to demonstrate his or her readiness for entrance into the gifted math program.
- Example 11: A school requires at least a B+ math average and an overall B average to enroll in AP Calculus. The school learns that some interested EL students cannot take AP Calculus because they lack an overall B average due to their limited English proficiency. So that more EL students can take this course, the school drops the overall B

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[57] *1991 OCR Guidance*; 34 C.F.R. § 100.3(b)(1), (2).

[58] *Id.*

average requirement for all students because it is not necessary to meaningful participation in AP Calculus.

Some examples of when the Departments have identified compliance issues in this area include when schools: (1) schedule EL language acquisition services during times when GATE programs meet; (2) exclude EL students from all components of a GATE program, even though proficiency in English is not necessary for a meaningful participation in a math, science, or technology component of the GATE program; (3) use arbitrarily high admissions criteria in English for a GATE math program that causes the exclusion of EL students who could meet the math requirement but not the arbitrarily high English requirement; or (4) solicit teacher recommendations of students for gifted programs from all teachers except teachers of EL program classes.

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

- ✓ *SEAs' or school districts' gifted evaluation and testing procedures screen out EL students because of their limited English proficiency when participation in particular gifted programs does not require proficiency in English; and*
- ✓ *SEAs and school districts monitor the extent to which EL and former EL students are referred for and participate in gifted and talented education programs, as well as honors and Advanced Placement courses, as compared to their never-EL peers.*

E. Avoiding Unnecessary Segregation of EL Students

EL programs may not unjustifiably segregate students on the basis of national origin or EL status. While EL programs may require that EL students receive separate instruction for a limited period of time, the Departments expect school districts and SEAs to carry out their chosen program in the least segregative manner consistent with achieving the program's stated educational goals.[59] Although there may be program-related educational justifications for providing a degree of separate academic instruction to EL students, the Departments would rarely find a program-related justification for instructing EL and non-EL students separately in subjects like physical education, art, and music or for separating students during activity periods outside of classroom instruction (*i.e.*, during lunch, recess, assemblies, and extracurricular activities).

In determining whether an SEA or school district is unnecessarily segregating EL students, the Departments examine whether the nature and degree of segregation is necessary to achieve the goals of an educationally sound and effective EL program. As discussed more thoroughly in Part II. H below, school districts should not retain EL students in EL programs for periods longer or

[59] *See 1991 OCR Guidance; Castañeda*, 648 F.2d at 998 n.4 ("We assume that the segregation resulting from a language remediation program would be minimized to the greatest extent possible and that the programs would have as a goal the integration of the Spanish-speaking student into the English language classroom as soon as possible.").

shorter than necessary to achieve the program's educational goals; nor should districts retain EL students in EL-only classes for periods longer or shorter than required by each student's level of English proficiency, time and progress in the EL program, and the stated goals of the EL program.

- Example 12: The goals of a Spanish transitional bilingual education program are to teach EL students English and grade-level content in Spanish so that they do not fall behind academically as they transition to literacy in English and more content classes in English over time. This program may segregate beginner-level EL students for their ESL instruction and their content classes that are taught in Spanish. As the EL students acquire higher levels of English proficiency, the program should transition them from EL-only content classes in Spanish to integrated content classes in English with continuing primary language or other support needed to access the content.

In evaluating whether the degree of segregation is necessary in EL programs, the Departments consider whether entry and exit into a segregated EL program model are voluntary, whether the program is reasonably designed to provide EL students comparable access to the standard curriculum as never-EL students within a reasonable length of time, whether EL students in the program have the same range and level of extracurricular activities and additional services as do students in other environments, and whether the district at least annually assesses the English proficiency and appropriate level of language assistance services for its EL students and determines their eligibility to exit from the EL program based on valid and reliable exit criteria.

Some districts use newcomer programs as a bridge to general education classrooms. Districts operating newcomer programs or schools should take particular care to avoid unnecessary segregation. For example, it is unlikely the Departments would find a violation in the area of EL student segregation by a school district that offers a voluntary newcomer EL program with self-contained EL programs for a limited duration (generally for one year) so long as it schedules the newcomer EL students' nonacademic subjects, lunchtime, and recess with non-EL students; encourages newcomer EL students to participate in integrated after-school activities; and evaluates their English proficiency regularly to allow appropriate transitions out of the newcomer EL program throughout the academic year.

Some examples of when the Departments have found compliance issues involving segregation include when school districts: (1) fail to give segregated EL students access to their grade-level curriculum, special education, or extracurricular activities; (2) segregate EL students for both academic and non-academic subjects, such as recess, physical education, art, and music; (3) maintain students in a language assistance program longer than necessary to achieve the district's goals for the program; and (4) place EL students in more segregated newcomer programs due to perceived behavior problems or perceived special needs.

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

- ✓ *SEAs and school districts educate EL students in the least segregative manner consistent with the goals of the educationally sound and effective program selected by the SEA or the district; and*
- ✓ *SEAs' monitoring of school districts' EL programs assesses whether the programs unnecessarily segregate EL students and, if so, rectifies this noncompliance.*

F. Evaluating EL Students for Special Education Services and Providing Special Education and English Language Services

The Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973 (Section 504) address the rights of students with disabilities in the education context.[60] The Department of Education's Office of Special Education Programs, a component of ED's Office of Special Education and Rehabilitative Services, administers the IDEA. OCR and DOJ share authority for enforcing Section 504 in the educational context, and DOJ coordinates enforcement of Section 504 across Federal agencies.[61]

SEAs and school districts must ensure that all EL students who may have a disability, like all other students who may have a disability and need services under IDEA or Section 504, are located, identified, and evaluated for special education and disability-related services in a timely manner. When conducting such evaluations, school districts must consider the English language proficiency of EL students in determining the appropriate assessments and other evaluation materials to be used. School districts must not identify or determine that EL students are students with disabilities because of their limited English language proficiency.

School districts must provide EL students with disabilities with both the language assistance and disability-related services[62] to which they are entitled under Federal law. Districts must also

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[60] 20 U.S.C. §§ 1400-1419; 34 C.F.R. pt. 300 (IDEA, Part B and its implementing regulations); 29 U.S.C. § 794 and 34 C.F.R. pt. 104 (Section 504 and its implementing regulations).

[61] Any Federal agency, such as the Department of Education or Justice, that provides Federal funds to an SEA or school district may initiate a compliance review to ensure compliance with, or investigate a complaint alleging a violation of, Section 504 and its implementing regulations. DOJ may also initiate a Section 504 or IDEA suit if, after notice of a violation from the Federal funding agency, a recipient of Federal funds fails to resolve noncompliance with Section 504 or IDEA voluntarily and the agency refers the case to DOJ. Furthermore, DOJ can participate in private litigation involving Section 504 or IDEA.

[62] The term "disability-related services" is intended to encompass either special education and related services provided to children with disabilities who are eligible for services under the IDEA or regular or special education and related aids and services provided to qualified students with disabilities under Section 504.

inform a parent of an EL student with an individualized education program (IEP) how the language instruction education program meets the objectives of the child's IEP.[63]

The Departments are aware that some school districts have a formal or informal policy of "no dual services," *i.e.*, a policy of allowing students to receive either EL services or special education services, but not both. Other districts have a policy of delaying disability evaluations of EL students for special education and related services for a specified period of time based on their EL status.[64] These policies are impermissible under the IDEA and Federal civil rights laws, and the Departments expect SEAs to address these policies in monitoring districts' compliance with Federal law. Further, even if a parent of an EL student with a disability declines disability-related services under the IDEA or Section 504, that student with a disability remains entitled to all EL rights and services as described in this guidance.[65]

1. Individuals with Disabilities Education Act (IDEA)

The IDEA requires SEAs and school districts to, among other things, make available a free appropriate public education (FAPE) to all eligible children with disabilities.[66] Under the IDEA, FAPE means, among other things, special education and related services at no cost to parents provided in conformity with the student's IEP.[67]

Under the IDEA, school districts must also identify, locate, and evaluate all children who may have disabilities and who need special education and related services, regardless of the severity of their disabilities.[68] A parent or a school district may initiate a request for an initial evaluation

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[63] 20 U.S.C. §§ 6312(g)(1)(A)(vii) (Title I), 7012(a)(7) (Title III). If the parent is LEP, this information must be in a language the parent understands. *See* discussion *infra* in Part II. J, "Ensuring Meaningful Communication with Limited English Proficient Parents."

[64] The court in *Mumid v. Abraham Lincoln High School,* 618 F.3d 789 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 1478 (2011), rejected a private claim that such a policy was intentional national origin discrimination in violation of Title VI. The EEOA does not require proof of intentional national origin discrimination to establish a violation of section 1703(f), *see Castañeda*, 648 F.2d at 1004, and the court in *Mumid* assumed that such a policy would violate the EEOA, but did not reach the merits of that claim for other reasons. *Mumid*, 618 F.3d at 795-96. The court's discussion of Title VI was limited to a private right of action and did not discuss the Federal government's enforcement of Title VI or the other statutes discussed in this section.

[65] For more information regarding EL students with disabilities and Title III, *see* the Department of Education's Questions and Answers Regarding Inclusion of English Learners with Disabilities in English Language Proficiency Assessments and Title III Annual Measurable Achievement Objectives, *available at* http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/q-and-a-on-elp-swd.pdf. Among other matters, this guidance addresses requirements for including EL students with disabilities in the annual ELP assessment, including providing appropriate accommodations or alternate assessments when necessary.

[66] 20 U.S.C. §§ 1412(a)(1),1413(a)(1); 34 C.F.R. §§ 300.101-300.102, 300.201.

[67] 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.

[68] 20 U.S.C. §§ 1412(a)(3), 1413(a)(1); 34 C.F.R. §§ 300.111, 300.201. Under the IDEA, a child with a disability means a child evaluated as having an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in IDEA as emotional disturbance), an orthopedic impairment, autism, traumatic brain injury, other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special

to determine if a child is a child with a disability under the IDEA.[69] A school district must ensure that assessments and other evaluation materials used to evaluate a child with a disability are "provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer."[70] This is true even for those EL students whose parents have opted their children out of EL programs.[71] A student cannot be determined to be a child with a disability if the "determinant factor" is limited English proficiency and if the student does not otherwise meet the definition of a "child with a disability" under the IDEA.[72]

- Example 13: A teacher thinks that a Spanish-speaking EL student with beginner level English has a learning disability. She would like to have the student evaluated for a disability, but believes that the student must complete one year in the EL program or achieve intermediate proficiency in English before being evaluated for a disability or receiving special education and related services. She is incorrect. The principal explains to her that if she believes the student has a disability, the school district must seek parental consent for an initial evaluation and once consent is granted must evaluate the student in a timely manner. After the parents consent, the district arranges for a bilingual psychologist to conduct the evaluation in Spanish, given the EL student's ELP level and language background.

Once a school district determines that an EL student is a child with a disability under the IDEA and needs special education and related services, the school district is responsible for determining, through the development of an IEP at a meeting of the IEP Team (which includes the child's parents and school officials), the special education and related services necessary to make FAPE available to the child.[73] As part of this process, the IDEA requires that the IEP team consider, among other special factors, the language needs of a child with limited English

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education and related services. 20 U.S.C. § 1401(3); 34 C.F.R. § 300.8. *See infra* note 77 for the definition of an individual with a disability under Section 504.

[69] 34 C.F.R. § 300.301(b). Once parental consent, as defined in 34 C.F.R. § 300.9, is obtained, the evaluation must be conducted within 60 days from the date that parental consent is received, or if the SEA has established a timeframe within which the evaluation must be conducted, within the State-established timeframe. 34 C.F.R. § 300.301(c)(1); *see also* 34 C.F.R. §§ 300.300-300.311.

[70] 34 C.F.R. § 300.304(c)(1)(ii); 20 U.S.C. § 1414(b)(3)(A)(ii). For the purposes of this document, native language and primary language are interchangeable terms. In determining whether an EL student is a child with a disability under the IDEA, the school district must draw upon information from a variety of sources (*e.g.*, aptitude and achievement tests and social and cultural background), and ensure that all of this information is documented and carefully considered. 34 C.F.R. § 300.306(c)(1).

[71] *See* discussion *infra* in Part II. G, "Meeting the Needs of EL Students Who Opt Out of EL Programs or Particular EL Services."

[72] 20 U.S.C. § 1414(b)(5); 34 C.F.R. § 300.306(b)(1)(iii)-(b)(2).

[73] 20 U.S.C. § 1414(b)(4); 34 C.F.R. §§ 300.306(c)(2) and 300.323(c). For more information about IEPs, see 20 U.S.C. § 1414(d) and 34 C.F.R. §§ 300.320-300.324.

proficiency as those needs relate to the child's IEP.[74] To implement this requirement, it is essential that the IEP team include participants who have the requisite knowledge of the child's language needs. To ensure that EL children with disabilities receive services that meet their language and special education needs, it is important for members of the IEP team to include professionals with training, and preferably expertise, in second language acquisition and an understanding of how to differentiate between the student's limited English proficiency and the student's disability.[75] Additionally, the IDEA requires that the school district "take whatever action is necessary to ensure that the parent understands the proceedings of the IEP team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English."[76]

2. Section 504 of the Rehabilitation Act (Section 504)

Section 504 is a Federal law that prohibits disability discrimination by recipients of Federal financial assistance. Section 504 covers not only students with disabilities who have been found to be eligible for services under the IDEA but also students with disabilities who are not IDEA-eligible, but meet Section 504's broader definition of disability.[77] As is true under the IDEA, Section 504 requires school districts to provide FAPE to qualified students with disabilities in a school district's jurisdiction, regardless of the nature or severity of the student's disability.[78] Under Section 504, depending on the individual needs of the student, FAPE can include special education and related aids and services or can consist of regular education with related aids and

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[74] 20 U.S.C. § 1414(d)(3)(B)(ii); 34 C.F.R. § 300.324(a)(2)(ii). IEP Teams also must consider this special factor in the review and revision of IEPs. 34 C.F.R. § 300.324(b)(2).

[75] The Departments are aware that some States are using joint EL and IEP teams effectively to determine appropriate services for eligible students.

[76] 34 C.F.R. § 300.322(e); *see also id.* §§ 300.9, 300.503(c)(1)(ii), 300.612(a)(1). Under Title VI and the EEOA, for an LEP parent to have meaningful access to an IEP or Section 504 plan meeting, it also may be necessary to have the IEPs, Section 504 plans, or related documents translated into the parent's primary language. For information on the separate Title VI obligations of school districts to communicate with LEP parents, *see infra* Part II. J, "Ensuring Meaningful Communication with Limited English Proficient Parents."

[77] A person with a disability under Section 504 is an individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment. 29 U.S.C. § 705(9)(B), (20)(B) (as amended by the Americans with Disabilities Act Amendments Act of 2008); 34 C.F.R. § 104.3(j). For additional information on the broadened meaning of disability after the effective date of the 2008 Amendments Act, see OCR's 2012 Dear Colleague Letter and Frequently Asked Questions document, *available at* www.ed.gov/ocr/letters/colleague-201109.html, and www.ed.gov/ocr/docs/dcl-504faq-201109.html. With respect to public elementary and secondary educational services, a student with a disability is "qualified" under Section 504 if he or she is of an age during which students without disabilities are provided such services; of any age during which is it mandatory under State law to provide such services to students without disabilities; or is a person to whom a State is required to provide FAPE under IDEA. 34 C.F.R. § 104.3(*l*)(2).

[78] 34 C.F.R. §§ 104.33-104.36. OCR shares responsibility with DOJ in the enforcement of Title II of the Americans with Disabilities Act of 1990, which is a Federal law prohibiting disability discrimination in the services, programs, and activities of State and local governments (including public school districts), regardless of whether they receive Federal financial assistance. 42 U.S.C. § 12132. Violations of Section 504 that result from school districts' failure to meet the obligations identified in this guidance also constitute violations of Title II. 42 U.S.C. § 12201(a). Covered entities also must comply with Title II requirements.

services that are designed to meet the individual educational needs of the student as adequately as the needs of nondisabled students are met. While Section 504 and the IDEA are separate statutes that contain different requirements, as reflected in ED's regulations, one way to meet the requirements of Section 504 FAPE is to implement an IEP developed in accordance with the IDEA.[79]

As with evaluations under the IDEA, Section 504 evaluations of EL students must measure whether an EL student has a disability and not reflect the student's lack of proficiency in English. When administering written or oral evaluations to determine whether an EL student has a disability under Section 504, school districts must administer those evaluations in an appropriate language to avoid misclassification.[80] This is true even for those EL students whose parents have opted their children out of EL programs.[81] Prior to evaluating an EL student, school districts should, to the extent practicable, gather appropriate information about a student's previous educational background, including any previous language-based interventions.[82]

- Example 14: An EL student whose parents declined her school's EL services appears to be falling behind at school. The school decides to conduct an evaluation to determine if she has a disability under Section 504 and needs disability-related services, and obtains consent from the student's parents. Although the parents have opted out of the school's EL program, the principal nonetheless ensures that the student's language needs are considered during the evaluation process, including whether the evaluations should be conducted in the student's native language and whether they should be administered orally or in writing to help ensure that the evaluation determines whether the student has a disability rather than that the student has limited English proficiency.
- Example 15: An EL high school student recently transferred into his current school district and appears to be struggling in all of his classes. After consulting with his teachers and obtaining consent from his parents, the school district decides that it will evaluate the student to determine if he has a disability under Section 504 and needs special education or related aids and services. Prior to initiating the evaluation, the school district asks the student and his parents about the schools he attended before arriving in the school district and about his experience in those schools. The school district also obtains and reviews records from these previous schools and learns that the student's ELP was previously assessed, that he was determined to be a native Spanish

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[79] 34 C.F.R. § 104.33(b)(2).

[80] *Cf.* 20 U.S.C. § 1414(b)(3)(A)(ii); 34 C.F.R. § 300.304(c)(1)(ii); *see also* 34 C.F.R. pt. 104, App. A at number 25, discussion of § 104.35 (recognizing that Title VI requires evaluations in the primary language of the student).

[81] *See* discussion *infra* in Part II. G, "Meeting the Needs of EL Students Who Opt Out of EL Programs or Particular EL Services."

[82] In conducting the evaluation and making placement decisions, school districts must draw upon information from a variety of sources (*e.g.*, aptitude and achievement tests and social and cultural background). 34 C.F.R. § 104.35(c) (school district "shall . . . draw upon information from a variety of sources").

speaker, and that he was provided EL services, but was not evaluated to determine if he needed special education or related aids and services. The school district determines that its disability evaluation of this student should be provided in Spanish.

Some examples of when the Departments have identified compliance issues regarding EL students with disabilities eligible for services under Section 504 or the IDEA include when school districts: (1) deny English language services to EL students with disabilities; (2) evaluate EL students for special education services only in English when the native and dominant language of the EL student is other than English; (3) fail to include staff qualified in EL instruction and second language acquisition in placement decisions under the IDEA and Section 504; or (4) fail to provide interpreters to LEP parents at IEP meetings to ensure that LEP parents understand the proceedings.

When the Departments conduct investigations, compliance reviews, or monitoring activities to determine if an SEA or school district has met its obligations under the civil rights laws and to provide FAPE to an EL student with a disability, the Departments consider, among other things, whether:

- ✓ *The evaluations used to determine whether an EL student has a disability were conducted in the appropriate language based on the student's needs and language skills, and whether the special education and EL services were determined in light of both the student's disability and language-related needs;*
- ✓ *The disability determination of an EL student was based on criteria that measure and evaluate the student's abilities and not the student's English language skills;*
- ✓ *The EL student was promptly evaluated for disability-related services, or whether there was an impermissible delay on account of his or her EL status and/or level of English proficiency;*
- ✓ *Language assistance services and disability-related services are provided simultaneously to an EL student who has been evaluated and determined to be eligible for both types of services; and*
- ✓ *The individualized plans for providing special education or disability-related services address EL students' language-related needs.*

G. Meeting the Needs of EL Students Who Opt Out of EL Programs or Particular EL Services

Although school districts have an obligation to serve all EL students, parents have a right to decline or opt their children out of a school district's EL program or out of particular EL services

within an EL program.[83] For example, parents may choose to enroll their child in ESL classes, but decline to enroll their child in EL-only bilingual content classes. School districts may not recommend that parents decline all or some services within an EL program for any reason, including facilitating scheduling of special education services or other scheduling reasons. A parent's decision to opt out of an EL program or particular EL services must be knowing and voluntary.[84] Thus, school districts must provide guidance in a language parents can understand to ensure that parents understand their child's rights, the range of EL services that their child could receive, and the benefits of such services before voluntarily waiving them.[85]

During an investigation, the Departments consider whether a parent's decision to opt out of an EL program or particular EL services was knowing and voluntary. If a school district asserts that a parent has decided to opt out their child, the Departments will examine the school district's records, including any documentation of the parent's opt-out decision and whether the parent signed such documentation. Appropriate documentation is important to support school districts' assertions and for the Departments to evaluate school districts' legal compliance.

The Departments' past investigations have found high numbers of EL students whose parents have opted them out of EL programs or particular services within an EL program due to problematic district practices such as school personnel steering families away from EL programs, or providing incorrect or inadequate information to parents about the EL program, particular services within the program, or their child's EL status. The Departments have also found noncompliance where school personnel have recommended that families decline EL programs due to insufficient space in such programs or because school districts served only EL students with a basic or emerging level of English. Parents have also been found to have opted their children out of EL programs because the school district did not adequately address parental concerns expressed about the quality of the EL program, their lack of confidence in the EL program offered because the school district was not able to demonstrate the effectiveness of its program, or their belief that their child did not need EL services.

If parents opt their children out of an EL program or specific EL services, the children retain their status as EL students, and the school district remains obligated to take the "affirmative

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[83] *Cf.* 34 C.F.R. § 100.3(b)(1), (2); *see also* 20 U.S.C. §§ 6312(g)(1)(A)(viii) (Title I), 7012(a)(8) (Title III).

[84] Although not directly related to EL services, courts have found in other areas that a waiver must be informed and/or knowing as well as voluntary. *See, e.g., Town of Newton v. Rumery*, 480 U.S. 386, 393 (1987) (any waiver of statutory right of action must "be the product of an informed and voluntary decision"); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974) (waiver must be "voluntary and knowing").

[85] Parental notification of these rights must "be in an understandable and uniform format and, to the extent practicable, provided in a language that the parent can understand." 20 U.S.C. §§ 6312(g)(2) (Title I), 7012(c) (Title III). This means that whenever practicable, written translations of printed information must be provided to parents in a language that they understand; but if written translations are not practicable, SEAs and school districts must ensure parents are provided oral interpretations of the written information. *See* 67 Fed. Reg. 71,710, 71,750 (2002). This obligation is consistent with Title VI and EEOA obligations of school districts to ensure meaningful communication with LEP parents, discussed in Part II. J "Ensuring Meaningful Communication with Limited English Proficient Parents."

steps" required by Title VI and the "appropriate action" required by the EEOA to provide these EL students access to its educational programs. Thus, the Departments expect school districts to meet the English-language and other academic needs of their opt-out EL students under the civil rights laws.[86] To ensure these needs of opt-out EL students are being met, school districts must periodically monitor the progress of students who have opted out of EL programs or certain EL services.[87] If an EL student who opted out of the school district's EL programs or services does not demonstrate appropriate growth in English proficiency, or struggles in one or more subjects due to language barriers, the school district's affirmative steps include informing the EL student's parents of his or her lack of progress and offering the parents further opportunities to enroll the student in the EL program or at least certain EL services at any time.

- 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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[86] School districts also retain their EL obligations to a student even if parents opt their child out of IDEA or Section 504 services.

[87] *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.[88] 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.[89] 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.[90]

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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[88] 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).

[89] *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).

[90] *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.[91] 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.[92] 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.[93] 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.[94] 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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[91] 20 U.S.C. § 6823(b)(2).

[92] 20 U.S.C. §§ 6311(b)(7) (Title I), 6823(b)(3)(C), (D) (Title III).

[93] 20 U.S.C. §§ 6841(a)(3), 6842(a)(3).

[94] *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.[95] 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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[95] 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.[96] 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.[97] 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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[96] *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).

[97] 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.[98]

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.[99] 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,[100] 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.[101]

- 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

[98] *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).

[99] *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").

[100] *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)).

[101] *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.[102]

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 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.[103] It is not sufficient for the staff merely to be bilingual. For example, some bilingual staff and community

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[102] 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.

[103] 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 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 and www.justice.gov/crt/about/edu/documents/classlist.php#origin.

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS
Lor Ler Kaw, Lor Ler Hok Koh, Mary Jane Sommerville, and George Thawmoo, on behalf of themselves and all others similarly situated,

(b) County of Residence of First Listed Plaintiff: Ramsey
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Aron J. Frakes (#0396993), Christopher D. Pham (#0390165), Anupama D. Sreekanth (#0393417)
Fredrikson & Byron, P.A., 200 South Sixth Street, Suite 4000
Minneapolis, MN 55402
612-492-7000

DEFENDANTS
Independent School District #625

County of Residence of First Listed Defendant: Ramsey
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☒ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District *(specify)*
- ☐ 6 Multidistrict Litigation - Transfer
- ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
20 U.S.C. 1703, 42 U.S.C. 2000, 42 U.S.C. 1983, U.S. Const. Am. XIV, 20 U.S.C 1401, 29 U.S.C 794, 42 U.S.C. 12131, et seq.

Brief description of cause:
Unlawful discrimination on the basis of national origin and disability based on ISD 625's policies and practices with respect to English Language Learner students.

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $ preliminary and permanent injunction

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE ______ DOCKET NUMBER ______

DATE: 07/14/2017

SIGNATURE OF ATTORNEY OF RECORD: s/ Aaron J. Frakes

FOR OFFICE USE ONLY

JS 44 Reverse (Rev. 08/16)

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I.(a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use
(b) **County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the
(c) **Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. **Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X"
United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment
Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked**.** (See Section III below**; NOTE: federal question actions take precedence over diversity cases.**)

III. **Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. **Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: Nature of Suit Code Descriptions.

V. **Origin.** Place an "X" in one of the seven boxes.
Original Proceedings. (1) Cases which originate in the United States district courts.
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C.
Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statue.

VI. **Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service

VII. **Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. **Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: Four Claim MN School District Discriminates Against English-Learning Students