



U.S. Department of Justice

Office of Justice Programs

Office for Civil Rights

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VIA E-MAIL AND CERTIFIED MAIL

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Building 2
1220 Washington Avenue
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Michael Sheahan
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6600 State Route 96
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Re: A.A.¹ v. New York State Dep't of Corr. and Cmty. Supervision (11-OCR-0249)
Investigative Findings

Dear Messrs. Fischer and Sheahan:

The Office for Civil Rights (OCR), Office of Justice Programs (OJP), U.S. Department of Justice (DOJ) has completed its investigation into the above-referenced complaint of discrimination against the New York State Department of Corrections and Community Supervision (DOCCS or Department). Below, you will find our investigative findings summarizing the results of the investigation. In short, the OCR finds that the DOCCS is not fully in compliance with its legal obligations to provide oral language assistance to limited English proficient (LEP) inmates at the Five Points Correctional Facility (Five Points or Facility). An LEP person is an individual whose primary language is not English and who has a limited ability to read, write, speak, or understand English.

I. Jurisdiction

As you are aware, federal law prohibits services discrimination on the basis of race, color, national origin, religion, sex, disability, or age by recipients of federal financial assistance from the Office of Community Oriented Policing Services (COPS), the Office on Violence Against Women (OVW), the OJP, and OJP components. The OCR has administrative responsibility for investigating complaints alleging that a recipient of COPS, OVW, or OJP funds has violated Title VI of the Civil Rights Act of 1964 (Title VI) or the Omnibus Crime Control and Safe Streets Act of 1968 (Safe Streets Act). As a recipient of funding through OJP's Bureau of Justice Assistance and the Office for Victims of Crime, the DOCCS is subject to the OCR's jurisdiction.

¹ The OCR will use this pseudonym throughout the letter, which is a public document, to protect the identity of the Complainant.

II. Procedural History

On October 21, 2010, A.A., who was an inmate at Five Points, filed a timely Complaint with the Civil Rights Division of the DOJ alleging that, since early 2010, the DOCCS had not provided effective oral language assistance to LEP offenders at the Facility.² During the relevant time period, the DOCCS received OJP funding. On February 24, 2011, the Civil Rights Division concluded that it lacked jurisdiction over the Complaint and forwarded it to the OCR. The OCR initiated an investigation into A.A.'s claims that the DOCCS, through its methods of administering services and benefits, discriminates against inmates based on their national origin.³ On February 2, 2012, the OCR notified the DOCCS of A.A.'s Complaint and asked it to provide information related to the OCR's investigation. On March 16, 2012, the DOCCS responded to the OCR's information request. The DOCCS supplemented its response on the following dates in 2012: April 9, June 14, August 14, and September 7.

After considering all of the evidence provided to the OCR by the parties, the OCR issues this Letter of Findings, which concludes that the evidence supports the following findings: the DOCCS is not fully in compliance with the requirements of Title VI and the Safe Streets Act because Five Points does not (1) adequately assess the number or proportion of LEP individuals in its service population, (2) adequately assess the frequency of its contacts with LEP inmates, (3) provide sufficient oral language assistance when it imposes disciplinary action, administers healthcare services, or handles offender grievances, or (4) evaluate whether it provides cost-effective oral language services to LEP inmates. To address these findings, the Department should take specific corrective actions, as discussed below, to ensure that Five Points provides LEP inmates with meaningful access to its services and benefits.

² A.A. also alleges that, on January 17, 2012, correctional officers at Five Points used excessive force against him and subjected him to various forms of sexual abuse, including rape. After he reported this alleged misconduct to the DOCCS, the Department transferred him to a different facility. On April 27, 2012, A.A. submitted an additional Complaint to the OCR about these allegations. The OCR forwarded this Complaint to the Criminal Section of the DOJ's Civil Rights Division on May 30, 2012. In the cover letter to this Complaint, A.A. generally alleges that the DOCCS deprived him of oral language assistance in connection with the hearings and interviews related to these asserted incidents. After carefully considering the contents of this correspondence, the OCR determines that there is insufficient *prima facie* evidence to support a disparate treatment claim against the Department under Title VI or the Safe Streets Act, although the instant Letter of Findings concludes that the DOCCS should refine its systems, policies, and procedures for providing language assistance to LEP inmates during its grievance process.

³ In his October 2010 Complaint, A.A. also alleged that, while he was incarcerated at Five Points, DOCCS discriminated against him based on his national origin and retaliated against him after he filed a grievance. Because there is insufficient *prima facie* evidence that the DOCCS engaged in prohibited disparate treatment or retaliation against A.A., as alleged in this Complaint, the OCR declined to initiate an investigation of these claims.

III. Statement of Facts

A.A. alleges that the DOCCS violated its civil rights obligations as a recipient of federal financial assistance by failing to provide adequate oral language assistance to LEP inmates at Five Points. In this section of the Letter of Findings, the OCR describes the Complainant's allegations as well as the DOCCS and its Five Points facility.

A. A.A.'s Allegations

A.A. is a native Spanish speaker from the Dominican Republic who speaks and understands English less than very well. He is proficient in writing English. The DOCCS housed A.A. at Five Points until approximately February of 2012.

A.A. alleges that the Department fails to provide effective oral language assistance to LEP inmates based on their national origin. *First*, A.A. claims that the DOCCS employs inappropriate standards in determining which offenders require oral language assistance. He asserts that the Department provides language assistance only to non-English-speaking inmates rather than to offenders with limited English proficiency, and that this practice denies services and benefits to many inmates. According to A.A., the DOCCS also fails to acknowledge that an offender may be considered LEP for the purposes of speaking English or understanding oral communications in English, even though an inmate may be proficient in writing English. As a result, A.A. alleges that the Department provides insufficient language assistance in connection with those services and benefits that involve oral communications. *Second*, A.A. contends that these unnecessarily narrow standards adversely affect LEP offenders when Five Points imposes discipline, provides healthcare services, and investigates grievances.

B. DOCCS and Five Points

Five Points is one of approximately sixty correctional facilities operated by the DOCCS. It is a maximum security men's prison located in Romulus, New York. As of February 4, 2012, Five Points housed 1,350 inmates. The Facility has the capacity to hold 1,500 offenders and includes a fifty-bed special housing unit for inmates in disciplinary confinement.

IV. Findings Regarding Alleged Violations

Title VI, the Safe Streets Act, and their implementing regulations require that recipients of federal financial assistance ensure meaningful access to their programs and activities for LEP individuals. To assist financial aid recipients comply with these requirements, the DOJ published guidance in June of 2002 about taking reasonable steps to provide meaningful access to programs and activities for LEP persons. *See* Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455 (June

18, 2002) (DOJ Guidance). Given the wide range of recipients of federal funds and the even wider range of types of contacts those recipients may have with LEP individuals, the DOJ Guidance establishes an analytical framework that balances four factors in determining what measures are reasonably required to ensure meaningful access: (1) the number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of the service provided by the program to people's lives; and (4) the resources available to the recipient and costs. *Id.* at 41,459-61. In this section of the Letter of Findings, the OCR analyzes the instant Complaint under the DOJ Guidance's four-factor framework and recommends that the DOCCS take specific corrective actions to improve its provision of language assistance to LEP inmates. As part of these recommendations, the OCR encourages the DOCCS to adopt a comprehensive language access plan that would govern the interactions between its personnel at Five Points and all LEP individuals.

A. Assessing the Number or Proportion of LEP Individuals in the Service Population

One factor in determining what language services a recipient should provide is the number or proportion of LEP persons from a particular language group served or eligible for service—the greater the number or proportion of these persons, the more language services a recipient must provide.

During its intake process, the DOCCS and Five Points rely on two assessment tools to evaluate the foreign-language proficiency of inmates placed in their custody. Personnel assigned to the Five Points reception center identify an offender's dominant language by conducting an oral interview of an inmate. During this interview, a staff person asks questions from a language dominance questionnaire prepared by the Department. DOCCS Resp. to Information Req. No. 6; Directive No. 4804, Academic Education Program Policies, at 1-2 (May 20, 2008); Memorandum from Linda Hollmen, Director of Education, DOCCS, to Deputy Superintendents for Programs at Reception Centers, at 1 (Dec. 7, 2007). Based on the results of this interview, personnel assign one of the following codes to an offender: Spanish dominant or Spanish monolingual; English dominant or English monolingual; other (dominant language is something other than English or Spanish); or no preference (bilingual). Directive No. 4804 at 1.

The DOCCS uses the results of the language dominance questionnaire to determine what additional testing it should administer to an inmate. When an offender's dominant language is not English and he is not bilingual, DOCCS staff members may administer *New York State's Placement Test for English as a Second Language Adult Students (New York State Place Test)* to determine his level of oral English proficiency, if any. The

Department administers the *New York State Place Test* in English and Spanish⁴ and requires English- and Spanish-speaking offenders to take the examination.

The DOCCS collects data on the number of LEP offenders within its facilities, although the Department appears to share only limited information with Five Points about this segment of its inmate population. During the intake process, personnel update an offender's profile to include his language dominance code and any related score on the *New York State Place Test*. The DOCCS gathers this information about the language-related characteristics of its inmates and provides the data to the Department's Program Planning and Research Division, which tracks the number and primary languages of LEP inmates at each facility. This division, in turn, shares this information with the Department's Division of Education, which uses the data to generate a monthly educational-needs report that it distributes to education supervisors at individual facilities. This report identifies the number of LEP offenders at each facility but does not identify their primary language.

In response to the OCR's information request, the DOCCS provided foreign-language data on the inmate population at Five Points for thirteen points in time from April 1, 2011, through March 31, 2012. For each point in time, the Department provided information about (1) the number of offenders at Five Points whose dominant language is not English, and (2) the level of English proficiency among those inmates. This report provides useful data about the size of the Spanish-speaking LEP inmate population at Five Points and shows that, as of March 31, 2012, there were forty-six Spanish-speaking LEP inmates at the Facility. It is difficult, however, to use the reported information to identify the prevalence of other language groups at Five Points because, for a non-Spanish-speaking LEP inmate, the DOCCS only tracks that offender's place of birth, and not his primary language. As a result, and merely as an example, the report shows that, as of March 31, 2012, there were two inmates at Five Points who were born in Puerto Rico and China, respectively. This information, standing alone, is insufficient to accurately identify either inmate's primary language.

Recommendations

The DOCCS should obtain more detailed data regarding the foreign-language proficiency of inmates at Five Points and provide comprehensive information to the Facility about its LEP population.⁵ Under the DOJ Guidance, a prison should determine the size of its LEP

⁴ The DOCCS relies on its language dominance questionnaire to assess the English-language proficiency of LEP offenders whose primary language is not Spanish.

⁵ In reviewing the instant Complaint, the OCR focused its investigation on the DOCCS' provision of oral language assistance to LEP inmates at Five Points. We note, however, that, under Title VI, the Safe Streets Act, and their implementing regulations, a recipient of federal financial assistance should have the capacity to provide language services during all of its interactions with LEP persons. Given these broad compliance obligations, we encourage the Department to apply the Letter of Findings' recommendations to the other

offender population, as well as the primary language of those individuals.⁶ *Id.* at 41,469. Based on the Department's response to the OCR's information request, the OCR concludes that Five Points is not able to identify with precision the primary languages of all LEP inmates in its custody. To remedy this deficiency, Five Points should revise its language dominance assessment instrument to include fields for each of the foreign languages it encounters and require personnel to add this more detailed information to an offender's profile.⁷ Further, the DOCCS should expand the data it provides to Five Points to include information about the primary languages of all LEP offenders at the Facility, which will allow it to monitor the absolute and relative sizes of different LEP populations. Because the number and proportion of LEP persons will influence the scope and nature of Five Points' language access efforts, it is critical for the Facility to evaluate the evolving foreign-language composition of its inmate population.

B. Assessing the Frequency of Contacts with LEP Inmates

A recipient should evaluate how often LEP persons come into contact with its personnel. The DOCCS does not maintain records showing how many LEP inmates at Five Points request or receive oral language assistance. DOCCS Resp. to Information Req. No. 5. The Department does not explain its failure to maintain such records. Despite the DOCCS' lack of documentation regarding interactions between its own personnel and LEP offenders at Five Points, it provided a snapshot of information to the OCR about how often it relied on external contractors to provide language assistance. The Department has a contract with several vendors, including Language Line Services, Inc. (Language Line), for the provision of interpretation and translation services. The DOCCS provided a Language Line invoice for December 2011, which showed that Five Points utilized the service twice that month. DOCCS Resp. to Information Req. No. 14. The Facility incurred both charges on the same day, and they involved language services for Mandarin Chinese.

services and benefits provided to LEP persons at Five Points. The Department should also ensure that its language access systems, policies, and procedures comprehensively address how personnel are to interact with LEP persons in all of its corrections and community supervision settings. The OCR is willing to provide technical assistance to the DOCCS to ensure that it fully satisfies all of its language access obligations at Five Points and throughout its other operations.

⁶ An early assessment of an inmate's language ability is particularly important in order to provide LEP offenders with crucial information about Five Points and to ensure that the Facility appropriately classifies them. *See DOJ Guidance*, 67 Fed. Reg. at 41,469-70. If DOCCS personnel fail to conduct a prompt and accurate assessment of each inmate's foreign-language abilities, then an offender may fail to receive crucial information related to their incarceration at Five Points. This danger underscores the importance of assessing language abilities during the intake process.

⁷ To ensure that the language assistance services they provide are meaningful and useful to an inmate, the DOCCS and Five Points should also be mindful of inmate literacy levels. The DOJ Guidance cautions against relying on translated written materials to convey important information to illiterate inmates. *Id.* at 41,469. As a result, Five Points should consider the feasibility of testing reading comprehension skills in an inmate's dominant language at the same time that it assesses an inmate's English-language oral comprehension skills.

Recommendations

The DOCCS should enhance its systems for gathering information about its contacts with LEP inmates at Five Points, which would allow the Department to assess more accurately the needs of its LEP populations. It should, at a minimum, regularly analyze the use of each of its language services vendors, document the language services provided by bilingual staff, and document all interactions in which an LEP individual may have required language assistance but the DOCCS could not provide it. The DOCCS should also refine its ability to review the provision of language assistance to LEP offenders at Five Points in specific contexts. It can choose how it will collect and monitor this information, but it should ensure that its data collection tracks (1) the language spoken by the LEP inmate, (2) the location of the interaction, (3) the type of interaction, and (4) the DOCCS' response. The Department should then tabulate these data on a periodic basis to determine the evolving language needs of LEP offenders at the Facility. The Department's Division of Hispanic and Cultural Services, which is responsible for reviewing and responding to requests from all DOCCS inmates for language assistance, may be well suited to handle these data collection functions.

C. Assessing the Nature and Importance of the Services and Benefits Provided

In this section of the Letter of Findings, the OCR summarizes the DOCCS' language access resources, considers the Department's policies for determining whether an inmate should receive language assistance, and evaluates Five Points' efforts to provide language assistance services to LEP inmates in those contexts identified in A.A.'s Complaint.

1. DOCCS language access resources

The DOCCS relies on several internal and external resources to provide services and benefits to LEP inmates at Five Points. In particular, the Department provides interpretation and translation services to these individuals through its Hispanic and Cultural Services Division and bilingual employees, as well as through vendor contracts.⁸

a. *Division of Hispanic and Cultural Services*

The DOCCS largely relies on its Division of Hispanic and Cultural Services (Division), which is part of the Department's Education Division, to facilitate its interactions with LEP inmates and to ensure that LEP offenders receive appropriate language assistance

⁸ The DOCCS does not rely on family, friends, or other inmates to serve as interpreters for LEP offenders. DOCCS Resp. to Information Req. No. 16.

services. Directive No. 4490, Hispanic and Cultural Services, at 1 (Mar. 25, 2011)⁹ (noting that the Division's primary responsibility is "to improve communication between Hispanic inmates, as well as other limited English proficient inmates, and employees throughout the Department's correctional facilities"). In describing the Division's functions, the Department emphasizes that all LEP inmates should receive "the same resources and program opportunities" offered to English-speaking offenders. *Id.* To achieve this goal, the Division provides the following language assistance resources:

- Inmate Requests. In Directive No. 4490, the DOCCS summarily notes in one sentence that the Division reviews and responds to offender requests for language assistance. *Id.* The policy does not (1) explain how the Division notifies inmates of this resource, (2) detail how offenders make requests for language assistance, (3) identify what factors the Division considers in reviewing inmate requests, or (4) explain the mechanics of seeking language assistance through this process.
- Translation Services. The DOCCS also briefly notes in the directive that the Division provides translation services to all correctional facilities and Central Office units. *Id.* If Five Points seeks to translate an official document, it must submit that document to the Division for review and approval. The Division also translates materials received from inmate families and community representatives. The DOCCS emphasizes that these protocols are important to the maintenance of safety, security, and order in Department facilities. In describing available translation services, the Department does not provide any guidance to Five Points on (1) identifying documents to be translated, (2) identifying the foreign languages into which documents should be translated, or (3) the mechanics of seeking approval for document translation. The policy also does not explain how the Division notifies inmate families and community representatives of this resource.

To enhance the interactions between DOCCS personnel and LEP inmates, the Division conducts seminars and training workshops for employees that discuss the linguistic, cultural, and ethnic differences within offender populations.

b. Employees who are bilingual in Spanish

The DOCCS participates in New York's statewide system for certifying a state employee's proficiency in Spanish. The test is administered by the New York State Department of Civil Service and places qualified Spanish speakers in one of three proficiency levels. Decentralization of the Oral Proficiency Test: Spanish, Advisory Memorandum No. 97-05, State Personnel Management Manual, New York State Department of Civil Service, at 1 (Sept. 5, 1997). Five Points primarily uses this testing process to ensure that it relies on employees who are qualified to provide bilingual Spanish-language assistance to LEP

⁹ The Central Office of the DOCCS, which is located in Albany, New York, issues policies and directives applicable to all of the Department's correctional facilities. DOCCS Resp. to Information Req. No. 2.

inmates. In its response to the OCR's request for information, the Department identified five employees at Five Points who are bilingual in Spanish.¹⁰ According to the DOCCS, each of these employees has demonstrated a high level of proficiency in Spanish-language interpretation and translation. Four of these personnel took New York's proficiency test and demonstrated advanced proficiency, which is the exam's highest rating category; the other employee has a teacher's certification in Spanish. DOCCS Resp. to Information Req. No. 11. The Department does not require its employees, including those at Five Points, to participate in any process to recertify their Spanish-language proficiency.

c. *Vendor contracts for interpretation and translation services*

In addition to the internal resources noted above, the DOCCS has a statewide contract to provide interpretation and translation services that Five Points uses to communicate with its LEP inmates. DOCCS Resp. to Information Req. No. 14. Under this statewide contract, Five Points can secure interpretation and translation services through eight vendors: Geneva Worldwide, Inc.; Language Line; Language Services Associates, Inc.; Languages R Us, Inc.; Legal Interpreting Services; Omni Lingual Services, Inc. (d/b/a Network Omni); SOS International, Ltd.; and The Trustforte Corporation (d/b/a Trustforte Language Services). Contract Award Notification, Translating and Interpreting Service, State of New York Executive Department, at 5-6 (Aug. 10, 2007). Five Points primarily relies on Language Line to provide language assistance to its LEP offenders. DOCCS Resp. to Information Req. Nos. 10, 14. Language Line provides on-site and over-the-phone interpretation services that are available twenty-four hours per day every day of the week. Contract Award Notification at 1, 5. This vendor also offers written language assistance services to the Department (*e.g.*, translating, localizing, proofreading, and formatting documents, as well as formulating lexicons). *Id.*

2. The DOCCS' determination of offender eligibility to receive language assistance resources

Before the OCR evaluates the DOCCS' provision of services and benefits in specific contexts, it is important to highlight that, under several DOCCS directives, Five Points may not provide any interpretation or translation assistance to LEP inmates. According to Department policy, if an offender is limited in their English proficiency but speaks a modicum of English, then he is not eligible to receive language assistance in various contexts. *See, e.g.*, Directive No. 4932, Chapter V, Standards Behavior & Allowances, at 1 (Aug. 3, 2010) (limiting the provision of language assistance to a non-English-speaking inmate); Policy No. 1.01, Inmate Orientation to Health Care Services, Health Care

¹⁰ The DOCCS does not provide additional compensation or benefits to employees who are qualified to provide language assistance to LEP inmates. DOCCS Resp. to Information Req. No. 13. While the Department may take an individual's language skills into account in making certain employment decisions, it is governed by a collective bargaining agreement that requires the Department to make transfer and promotion decisions based predominantly on an employee's seniority. DOCCS Resp. to Information Req. No. 12.

Services, at 1 (Dec. 7, 1998) (same); Directive No. 4040, Inmate Grievance Program, at 1 (July 12, 2006) (same).¹¹ These policies employ an unduly narrow definition to identify who should receive language assistance services. The DOJ Guidance clearly states that a recipient has an obligation to provide language assistance to inmates with the limited ability to read, write, speak, or understand English—a different standard than the one found in the identified Department policies. DOJ Guidance, 67 Fed. Reg. at 41,459. By relying on terms other than “LEP inmates,” the DOCCS creates a material risk that it may deny language assistance to an offender who speaks some English but not enough to meaningfully access specific services or benefits, such as those related to disciplinary actions, healthcare services, or grievances.

The Department’s directives also do not adequately weigh the nature and context of services or benefits in evaluating whether an inmate should be classified as LEP and receive interpretation or translation assistance. Under the DOJ Guidance, it is imperative that a recipient consider how a person would access specific services or benefits. *See id.* at 41,460. For example, if an offender needs to communicate orally with personnel in order to participate meaningfully in a disciplinary hearing, then a prison should provide an interpreter to an inmate whose primary language is not English and who has a limited ability to speak English (even if he can write proficiently in English). Similarly, a recipient should evaluate whether, during certain interactions, an individual may be subjected to stressors or specialized terms that would make it especially difficult for him to communicate in English. For example, an offender who can easily converse in English with another inmate in an informal setting may need an interpreter for communications that either occur in formal settings, such as disciplinary hearings, or involve complex concepts, such as those that arise during a medical appointment.

Recommendations

The DOCCS should ensure that its systems, policies, and procedures provide language assistance to all LEP inmates at Five Points. Based on the directives described above, in some instances, it does not appear that the Department provides appropriate language assistance, as contemplated by Title VI or the Safe Streets Act. The DOCCS should ensure that all of its policies regarding the provision of language assistance accurately define who is eligible to receive interpretation or translation assistance; namely, anyone whose primary

¹¹ In supplementing its response to the OCR’s information request, the DOCCS provided policies regarding the Department’s library services. Because A.A. does not suggest that the DOCCS fails to provide language access in this context, the OCR does not consider whether the Department, through the administration of these policies, violates Title VI or the Safe Streets Act. We note, however, that these directives—like several of the policies directly at issue in the instant Complaint—appear to limit the provision of language assistance to a person who does not speak or read any English. *See Directive No. 4470, General Library Services, at 4 (Jan. 11, 2012); Directive No. 4483, Law Libraries, Inmate Legal Assistance and Notary Public Services, at 1 (Nov. 18, 2010).* As explained above, the DOCCS should provide interpretation and translation services to any inmate who is limited in their English proficiency, instead of merely to inmates who speak or read absolutely no English.

language is not English and who has a limited ability to read, write, speak, or understand English. The Department should also revise its systems, policies, and procedures to ensure that personnel at Five Points consider the nature and context of services and benefits in providing language assistance resources to offenders.

3. Provision of language assistance services in specific contexts

In this section of its Letter of Findings, the OCR considers whether the DOCCS takes reasonable steps to ensure that LEP inmates at Five Points can access those services and benefits that are the subject of A.A.'s Complaint. At the outset, it is helpful to emphasize that, in considering this third factor of the DOJ Guidance, there is a proportional relationship between the importance of the service and the need for language assistance. For instance, when the denial of prompt access to services or benefits could cause substantial harm to an LEP offender, then a department of corrections bears a higher burden of showing that its language assistance measures are reasonable. In his Complaint, A.A. alleges that the DOCCS fails to provide adequate oral language assistance to LEP inmates at Five Points when the Facility (1) conducts hearings related to the imposition of discipline, (2) provides medical and mental health services, and (3) investigates grievances.

a. *Disciplinary action*

A.A. alleges that DOCCS personnel at Five Points fail to provide adequate oral language assistance during its disciplinary process. The DOJ Guidance specifically addresses a correctional recipient's language access obligations in imposing inmate discipline, which is one of the "most critical situations under the four-factor analysis." DOJ Guidance, 67 Fed. Reg. at 41,469. Under the DOJ Guidance, a correctional facility should provide language assistance to an LEP offender whenever he is the subject of disciplinary action. As part of its language access efforts in this context, a recipient should ensure that an LEP inmate receives adequate notice of the rule in question and can understand and participate in the disciplinary process. *Id.* at 41,470.

The DOCCS has a written policy that establishes standards of behavior and procedures for disciplining inmates. Directive No. 4932 at 1. This policy emphasizes that certain LEP offenders are eligible to receive language assistance in connection with the Department's disciplinary process.¹² Under this directive, a non-English-speaking inmate can select an employee from an established list of persons to provide language assistance if he is the

¹² In 1985, the coordinator of the Department's inmate disciplinary program issued a memorandum to all facility superintendents requiring each facility to provide LEP offenders with a translated version of the charges against them and the disposition form. Memorandum from Donald Selsky, Coordinator, Inmate Disciplinary Program, New York State Dep't of Corr. Servs., to All Superintendents, at 1 (July 11, 1985). The memorandum also instructed facilities to provide an interpreter to LEP inmates when they participate in disciplinary hearings. *Id.* Because this document predates and differs from Directive No. 4932, it does not appear to describe the Department's current approach to providing language assistance to LEP offenders at Five Points.

subject of a misbehavior report or if he is required to participate in a violation, a disciplinary, or a Superintendent's hearing.¹³ *Id.* at 4-5, 7, 9. The DOCCS does not explain, either in its policies or in its response to the OCR's information request, which employees appear on this list of assistants and whether they are qualified to provide language assistance to LEP offenders. Under Directive No. 4932, the Department must provide written translation assistance to non-English-speaking inmates who are disciplined. *Id.* at 5-8. These mandatory translation services include two types of assistance: (1) the translation of documents that are relevant to a hearing, including notices of charges, statements of evidence relied upon, and reasons for actions taken; and (2) the presence of a "translator" at the hearing.¹⁴ *Id.* The directive does not explain how the Department provides this language assistance to offenders.

Recommendations

The DOCCS recognizes the importance of providing language assistance to LEP inmates who are the subject of disciplinary action. In several respects, however, the Department should strengthen Directive No. 4932. *First*, the DOCCS can more clearly distinguish between translation and interpretation. As written, the policy provides for "the presence of a translator" at disciplinary hearings. Translation involves rendering written text from one language into another language. DOJ Guidance, 67 Fed. Reg. at 41,463. Given that a hearing involving disciplinary action is an oral proceeding, the DOCCS should make clear that an interpreter is available and that, for documents that are not already translated, the interpreter will provide a sight translation of those materials for an LEP offender. *Second*, the DOCCS should revise Directive No. 4932 and related written protocols to state clearly that it will provide an interpreter to an LEP inmate in connection with all hearings involving disciplinary action. The Department suggests to the OCR that it provides LEP offenders with interpreters for disciplinary hearings and Superintendent's hearings. DOCCS Resp. to Information Req. No. 7. The DOCCS should revise Directive No. 4932 to reflect this practice and to guarantee interpretation services to LEP inmates who are subject to any disciplinary action. *Third*, the Department should ensure that the employees who assist LEP offenders during the disciplinary process are qualified interpreters. At present, Directive No. 4932 merely states that inmates may select an employee from an established list of persons who can assist them. The directive does not state that the

¹³ The type of hearing in which an inmate must participate depends on the severity of the penalty that could be imposed—violation hearings evaluate the merits of minor asserted infractions while disciplinary hearings determine whether an offender engaged in more serious misconduct. Directive No. 4932 at 3. An inmate would participate in a Superintendent's hearing if he allegedly committed a major rule violation that, if substantiated, would result in the imposition of severe discipline. *Id.*

¹⁴ There is a critical definitional difference between the terms translator and interpreter. A translator renders written text from one language into an equivalent written text in another language while retaining the same meaning, while an interpreter listens to a communication in one language and orally converts it to another language while retaining the same meaning. In the context of a disciplinary hearing, and given the DOCCS' earlier policy guidance on this issue, the OCR presumes that the Department requires a facility to provide an interpreter, rather than a translator, at disciplinary hearings.

Department has determined that the employees on this list are qualified to interpret. In practice, this list should only include those employees who successfully completed all DOCCS requirements for certification as an interpreter.

b. Healthcare services

A.A. claims that DOCCS personnel at Five Points fail to provide adequate oral language assistance to LEP inmates who seek mental and medical health services. The DOJ Guidance specifically addresses the provision of health-related services to LEP persons at a correctional facility. It ranks contacts affecting health and safety as one of the “most critical situations under the four-factor analysis.” DOJ Guidance, 67 Fed. Reg. at 41,469. In evaluating applicable language access obligations, a prison should also consult related guidance from the U.S. Department of Health and Human Services (HHS Guidance). *Id.* The HHS Guidance mirrors its DOJ counterpart and utilizes the same four-factor test to explain an entity’s obligations to provide language assistance within the health-services context. *See Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*, 68 Fed. Reg. 47,311, 47,312-14 (Aug. 8, 2003). With respect to oral language assistance, both guidance documents recommend that a facility consider a range of interpretation services based on the frequency of its healthcare-related contacts with LEP individuals. For each language group encountered, these oral language assistance options include hiring bilingual medical staff, hiring staff interpreters who are familiar with medical terms, contracting for in-person interpreters, using telephonic interpreter lines, and using community volunteers. *Id.* at 47,317; DOJ Guidance, 67 Fed. Reg. at 41,470.

The DOCCS notes that it provides interpreters to LEP offenders who receive medical and mental health services at Five Points. DOCCS Resp. to Information Req. No. 7. Despite this stated practice, the Department did not provide any written policy or procedure to the OCR on language access in this context. The DOCCS does have a policy that requires each facility to provide orientation information on that facility’s medical, dental, and psychiatric care to non-English-speaking inmates “in a language they can understand.” Policy No. 1.01 at 1. The Department also translated its Patient Bill of Rights into Spanish. Policy No. 1.04, Patient Bill of Rights, Health Care Services, at 1-2 (Apr. 14, 2000).

Recommendations

The DOCCS should strengthen its efforts to ensure meaningful access to healthcare services for its LEP inmates at Five Points. To ensure that personnel at Five Points are aware of and adhere to the DOCCS’ practice of ensuring language access for LEP inmates in the healthcare setting, the Department should create and enforce a directive stating that it will provide language assistance to LEP offenders who seek any mental or medical health services at the Facility. In crafting this policy, the DOCCS should review the DOJ Guidance and the HHS Guidance to identify those oral language assistance options that are

most appropriate for the specific language groups at Five Points. Given the vital importance of these services, the Department should also revise Policy No. 1.01 to require the provision of interpretation assistance to all LEP offenders during orientation.

c. *Grievances*

A.A. alleges that DOCCS personnel at Five Points fail to provide adequate oral language assistance to LEP inmates who file grievances. Specifically, he claims that these employees do not provide interpretation assistance when they investigate offender grievances. In evaluating this claim, the OCR emphasizes that grievances are important mechanisms through which inmates can bring problematic practices to a facility's attention and seek to resolve them. Although grievances can address many aspects of an offender's experience, some may involve especially important issues, such as those related to health, safety, and length of stay. Because an inmate grievance program may be the only means of redress for some offenders, it is critical that LEP inmates be able to access its procedures and protections. *See* DOJ Guidance, 67 Fed. Reg. at 41,470.

The Department asserts that it provides interpreters for LEP inmates involved in its grievance investigations; however, its policies are, at best, ambiguous on this point. DOCCS Resp. to Information Req. No. 7. The DOCCS has a written policy that describes its Inmate Grievance Program, which seeks to provide each offender with "an orderly, fair, simple, and expeditious method for resolving grievances." Directive No. 4040 at 1. Directive No. 4040 does not require personnel to provide interpretation services to LEP inmates during the grievance process, although it requires facilities to provide translators "to facilitate access" to the grievance process for non-English-speaking offenders. *Id.* at 2.

Recommendations

The DOCCS should provide oral language assistance to any LEP inmate at Five Points who files a grievance. Given the importance of the grievance process and the DOCCS' acknowledgement that it already provides interpretation assistance in this context, the Department should revise Directive No. 4040 and any related written protocols to more clearly distinguish between a translator and an interpreter and to require the provision of interpretation assistance to LEP inmates in connection with its Inmate Grievance Program.¹⁵ As with its provision of interpretation in other contexts, the DOCCS should

¹⁵ On June 20, 2012, pursuant to the Prison Rape Elimination Act (PREA) of 2003, 42 U.S.C. §§ 15601–09 (2006) (Pub. L. No. 108-79, 117 Stat. 972), the DOJ published the final rule, National Standards To Prevent, Detect, and Respond to Prison Rape (National Standards). National Standards To Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37,106 (June 20, 2012) (to be codified at 28 C.F.R. pt. 115). Under the National Standards, a covered state department of corrections:

shall take reasonable steps to ensure meaningful access to all aspects of the agency's efforts to prevent, detect, and respond to sexual abuse and sexual harassment to inmates who are limited English proficient, including steps to provide interpreters who can interpret

ensure that those employees who assist LEP inmates during the grievance process are qualified interpreters.

D. Assessing Resources and Costs

A recipient's level of resources is an important consideration in determining whether it is taking reasonable steps to ensure that LEP persons have meaningful access to its programs and activities. As the DOJ Guidance explains, “[s]maller recipients with more limited budgets are not expected to provide the same level of language services as larger recipients with larger budgets.” DOJ Guidance, 67 Fed. Reg. at 41,460. In evaluating which language assistance resources may be most appropriate, recipients should explore cost-effective techniques that will minimize the expense—but not the quality—of interpretation and translation services.

Five Points operates with a sizeable budget. In its response to the OCR's information request, the DOCCS reported the following financial information for Five Points:

Operational Budget for Five Points in Fiscal Years 2011 and 2012¹⁶

	FY 2011	FY 2012
Personal Service Operational Budget	\$40,997,940	\$42,325,567
Non-Personal Service Operational Budget	\$ 5,364,960	\$ 3,943,484
Total Operational Budget	\$46,362,900	\$46,269,051

DOCCS Resp. to Information Req. No. 18. The Department's fiscal year begins on April 1 and ends on March 31. *Id.*

Compared to the size of its operational budget, Five Points' vendor costs of providing language assistance in fiscal years 2011 and 2012 were minimal and represented a small

effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary.

Id. at 37,202 (§ 115.16). Because the DOCCS receives grant funding from the DOJ to support its correctional operations, it is governed by the National Standards. *Id.* at 37,196-97. As the Department implements the OCR's recommendations regarding grievance protocols at Five Points, the OCR urges it to evaluate its compliance with section 115.16 of the National Standards at this and other facilities.

¹⁶ These figures do not include budget allocations for the Division of Parole, which merged with the Department of Correctional Services on April 1, 2011.

fraction of its operational budget.¹⁷ For fiscal year 2011, Five Points spent the following amounts on vendor language assistance services: \$0.00 in the corrections setting and \$990.00 in the parole context. *Id.* As of March 16, 2012, Five Points spent the following amounts on vendor language assistance services during fiscal year 2012: \$440.50 in the corrections setting and \$832.40 in the context of community supervision.

Recommendations

The DOCCS' reported vendor costs related to language assistance services are surprising. They show that, in fulfilling its corrections functions, Five Points did not ask any vendor to provide interpretation or translation services for an entire fiscal year. As a result, because the bilingual staff members at Five Points only speak Spanish, it appears that Five Points provided no language assistance, in any context, to those LEP inmates whose primary language was not Spanish. This possibility is troubling. The DOCCS should review the human and capital resources available at Five Points to assess how well the Facility responds to the needs of its LEP populations. As part of this review, the Department should ensure that Five Points dedicates sufficient resources to providing language assistance to the LEP offenders in its care.

E. Creating a Language Access Plan

After a recipient determines how it will provide language assistance services to LEP persons, it should develop a language access plan (LAP). DOJ Guidance, 67 Fed. Reg. at 41,464. The LAP documents a recipient's compliance efforts and provides a framework for providing timely and reasonable assistance to LEP persons. *Id.* Through various directives and practices, the DOCCS notifies its personnel at Five Points that it is important to provide language assistance to certain LEP inmates in various contexts. At the same time, the Department does not have a comprehensive policy on providing such assistance to all LEP individuals in connection with each critical interaction at Five Points.

Recommendations

The DOCCS should develop an LAP that will apply to Five Points.¹⁸ In developing this plan, the DOCCS should follow five steps described in the DOJ Guidance: (1) identify LEP individuals who need language assistance; (2) describe language assistance measures; (3) train staff members; (4) provide notice to LEP persons; and (5) monitor and update the plan. *Id.* at 41,464-65. The DOJ Guidance provides helpful information regarding the appropriate content for each of these five sections. *Id.*

¹⁷ The Department's figures do not capture those costs related to bilingual staff members who provide oral language assistance services to inmates. DOCCS Resp. to Information Req. No. 18.

¹⁸ In crafting its LAP, the Department may wish to consider the feasibility of applying this plan to all of its programs and activities, including those that relate to both corrections and community supervision.

- Identifying LEP individuals who need language assistance. In addressing this step, the DOCCS' LAP should closely track the first two factors of the DOJ Guidance. To address these elements, the Department should explain its process for assessing the foreign-language proficiency of inmates at Five Points and its system for documenting personnel interactions with LEP individuals. By assessing the size of the language-minority populations at Five Points and the frequency of the Facility's contacts with LEP individuals in the corrections and community supervision settings, the DOCCS will be able to focus its language assistance efforts.
- Describing language assistance measures. In this section of the LAP, the DOCCS should provide information about how its personnel at Five Points will provide language assistance to LEP persons during anticipated types of encounters. The Department should ensure that its LAP includes the following information: types of language services available to LEP individuals; how personnel should provide telephonic or in-person language assistance in connection with each identified category of interaction; how to respond to written communications from LEP persons; and how to ensure competency of interpreters and translation services. *Id.*
- Training staff members. Here, the DOCCS should address how it informs personnel at Five Points about how to interact with LEP persons. Through training, the Department should ensure that staff members know about applicable language access systems, policies, and procedures and can work effectively with in-person and telephonic interpreters. Staff members who have the most contacts with LEP individuals should receive in-depth training. *Id.* Helpful training topics include how staff persons can: identify the language needs of an LEP individual; access and provide necessary language assistance services; work with interpreters; request document translations; and track the use of language assistance services. See Language Access Assessment and Planning Tool for Federally Conducted and Federally Assisted Programs, Federal Coordination and Compliance Section, Civil Rights Division, DOJ, at 6 (May 9, 2011), available at http://www.lep.gov/resources/2011_Language_Access_Assessment_and_Planning_Tool.pdf.
- Providing notice to LEP individuals. This section of the DOCCS' LAP should include instructions for notifying LEP persons that Five Points provides language assistance in providing services and benefits related to its corrections and community supervision functions, at no cost to an LEP individual. The Department should provide this information to LEP individuals in a language and a medium that they will understand. In notifying LEP persons about available resources, the DOCCS may opt to distribute brochures or post signs in common areas. DOJ Guidance, 67 Fed. Reg. at 41,465.
- Monitoring and updating the plan. Here, the DOCCS should establish a process for determining whether it needs to provide additional or different language assistance

resources to LEP individuals. The Department should explain its process for re-evaluating the LAP at appropriate intervals. The DOCCS may also wish to develop metrics to evaluate whether the existing LAP is meeting the needs of affected LEP individuals and whether identified sources of assistance remain available and viable. *Id.*

Finally, in addition to these five sections, the LAP should set clear performance benchmarks, establish management accountability, and provide for input from personnel and stakeholders. *Id.* In the management portion of the plan, the DOCCS may choose to address pertinent personnel and human resource matters. For example, it likely would be especially helpful for the LAP to address the following issues: evaluating language needs and candidate language skills in recruitment, hiring, and promotion; seeking additional compensation for bilingual personnel; tracking composition of personnel by language ability; deploying bilingual personnel in a manner consistent with language assistance needs; and providing training opportunities to improve the language skills of personnel. See Planning Tool for Creating a Language Assistance Policy and Plan in a Department of Corrections, Federal Coordination and Compliance Section, Civil Rights Division, DOJ, at 9-10, available at http://www.lep.gov/LEP_Corrections_Planning_Tools.htm.¹⁹ The OCR also encourages the Department to designate at least one employee at Five Points to coordinate the day-to-day provision of the Facility's services and benefits to its LEP inmates. Once there is an assigned language access coordinator at Five Points, the Department should include their name and contact information in its LAP.

V. Conclusion

After carefully considering the evidence submitted by the Complainant and the DOCCS, the OCR concludes that the Department is not fully in compliance with its legal obligations to provide oral language assistance to its LEP inmates. It is clear the DOCCS needs to take further action to ensure that it satisfies its obligations under Title VI, the Safe Streets Act, and their implementing regulations. On request, the OCR is available to provide technical assistance to the DOCCS in implementing the recommendations contained in this Letter of Findings. Immediately upon receipt of this letter, we ask that the Department have a responsible agency official contact Attorney Advisor Christopher Zubowicz to develop timelines and goals for implementing specific recommendations. The OCR will review these responses and provide feedback to the DOCCS.

¹⁹ The DOCCS may also benefit from reviewing the language access plan developed by the New York City Department of Correction (NYCDOC). See New York City Department of Correction Language Access Plan (Feb. 26, 2009), available at http://www.nyc.gov/html/doc/downloads/pdf/lap_doc.pdf. The NYCDOC prepared its language access plan in response to an executive order issued by the New York City Office of the Mayor. See Exec. Order No. 120, Citywide Policy on Language Access to Ensure the Effective Delivery of City Services (July 22, 2008). In discussing a city agency's obligation to provide language assistance, Executive Order No. 120 adopts the DOJ's four-prong analytical framework, as detailed in the DOJ Guidance, to evaluate whether that agency is taking sufficient steps to ensure compliance with its obligations under local law.

Brian Fischer, Commissioner, New York State Department of Corrections and Community Supervision; Michael Sheahan, Superintendent, Five Points Correctional Facility
September 17, 2012
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Please note that this letter is a public document and will be posted on the OCR's Web site. This letter is not intended, and should not be construed, to cover any issues regarding compliance with Title VI, the Safe Streets Act, or their implementing regulations that the letter does not expressly address. Under the Freedom of Information Act, it may be necessary to release documents related to the instant Complaint. In the event that the OCR should receive such a request, we will seek to protect, to the extent provided by law, personal information which, if released, could constitute an unwarranted invasion of privacy.

You should also be aware that no one may intimidate, threaten, coerce, or engage in other discriminatory conduct against anyone because he or she has either taken action or participated in an action to secure rights protected under Title VI or the Safe Streets Act. Any individual alleging such retaliation may file a complaint with the DOJ. We would investigate such a complaint if the situation warrants.

Thank you for your cooperation during the investigation process. If you have any questions, please contact Mr. Zubowicz at 202.305.9012.

Sincerely,

/s/ Michael L. Alston

Michael L. Alston
Director

cc: Nancy J. Heywood, Associate Counsel
New York State Department of Corrections
and Community Supervision (Via E-Mail and Certified Mail)