I. SUMMARY/OVERVIEW


In recent years, there has been a surge of immigrants with limited English language skills to the United States. In addition, many children of immigrant parents and children who are Native American and Alaskan Native enter school with limited ability to learn in English.

The insufficient English language proficiency of these students often results in classroom failure and school dropout. Many students either are ill-equipped for higher education or lack the required skills to obtain productive employment. To resolve these problems, students must have an equal opportunity to benefit from education programs offered by their school districts.

Federal civil rights laws help ensure that English Language Learners (ELLs) receive equal educational opportunity. These laws interact with the Individuals with Disabilities Education Act (IDEA) and Section 504 to ensure nondiscrimination and a Free Appropriate Public Education (FAPE) to ELLs with disabilities. The focus of the presentation will be on how to navigate these laws to ensure against overrepresentation, underrepresentation, disproportionality and FAPE challenges.

II. FEDERAL CIVIL RIGHTS LAWS

Federal law sets the standards for ensuring equal educational opportunity for English language learner (ELL) students. The three relevant federal nondiscrimination (civil rights) laws are Title VI of the Civil Rights Act of 1965, 42 U.S.C. § 2000d; 20 U.S.C. § 1703(f) of the Equal Educational Opportunities Act (EEOA); and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794(a). Corresponding compliance documents by the Office for Civil Rights (OCR) and Department of Justice
(DOJ) are useful in providing specific guidance for school districts as well as state education agencies. Titles I and III of the No Child Left Behind Act of 2001 (NCLB) help school districts meet their obligations under the civil rights laws. However, only the EEOA and Title VI create federally enforceable rights relating to ELL students.

A. Title VI of the Civil Rights Act of 1964

Title VI prohibits discrimination on the basis of race, color, and national origin by recipients of federal funds as follows:

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. 42 U.S.C. § 2000d.

B. Equal Educational Opportunities Act of 1974

The EEOA provides that all children enrolled in public schools are entitled to equal educational opportunities without regard to race, color, sex, or national origin as follows:

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. 20 U.S.C. § 1703(f).

C. Section 504 of the Rehabilitation Act of 1973 (Section 504)

Section 504 prohibits discrimination on the basis of disability by those who receive federal funds as follows:

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. 29 U.S.C. § 794(a).

The OCR enforces these civil rights nondiscrimination laws (Title VI, EEOA and Section 504). OCR investigates complaints that allege discrimination under these laws. OCR conducts compliance reviews to determine if policies, procedures and actions of school districts are consistent with these civil rights laws. OCR issues guidance documents to educate school districts about their obligations, and to educate those protected by these laws about their rights. OCR does not have jurisdiction over the IDEA. However, there are many parallels between Section 504 and the IDEA.

III. Leading Civil Rights Cases


*Lau v. Nichols* was a class action suit brought by parents of non-English-proficient Chinese students against the San Francisco Unified School District. The district court and Ninth Circuit court of appeals held in favor of the school system. The class appealed to the U.S. Supreme
Court, and relying on the Civil Rights Act of 1964, the Supreme Court reversed the lower courts and found that the school system had violated the Civil Rights Act.

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<th>Ninth Circuit</th>
<th>U.S. Supreme Court</th>
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<td>Every student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school system. … However commendable and socially desirable it might be for the School District to provide special remedial educational programs to disadvantaged students in those areas, or to provide better clothing or food to enable them to more easily adjust themselves to their educational environment, we find no constitutional or statutory basis upon which we can mandate that these things be done.</td>
<td>[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.</td>
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With regard to methodology, the *Lau* Court acknowledged that there is no mandated method of providing education to students from non-English-speaking backgrounds. Although this case is no longer good law on certain points, it remains good law on the points discussed in this handout.

**B. *Castañeda v. Pickard*, 648 F.2d 989 (5th Cir. 1981)**

*Castañeda v. Pickard* was a class action suit brought by Mexican-American parents and their children, challenging the adequacy of the bilingual education and language remediation programs offered by the Raymondville (Texas) Independent School District. In that case, the Fifth Circuit articulated a three-part test for determining adequacy under Title VI.

**(1) Is the theory (methodology) sound?**

“First, the court must examine carefully the evidence the record contains concerning the soundness of the educational theory or principles upon which the challenged program is based. … The court's responsibility, insofar as educational theory is concerned, is only to ascertain that a school system is pursuing a program informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy.”

**(2) Does the program and practice effectively implement the theory?**

“The court's second inquiry would be whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school. We do not believe that it may fairly be said that a school
system is taking appropriate action to remedy language barriers if, despite the adoption of a promising theory, the system fails to follow through with practices, resources and personnel necessary to transform the theory into reality.”

(3) Is the program working?

“Finally, a determination that a school system has adopted a sound program for alleviating the language barriers impeding the educational progress of some of its students and made bona fide efforts to make the program work does not necessarily end the court's inquiry into the appropriateness of the system's actions. If a school's program, although premised on a legitimate educational theory and implemented through the use of adequate techniques, fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned. We do not believe Congress intended that under § 1703(f) a school would be free to persist in a policy which, although it may have been ‘appropriate’ when adopted, in the sense that there were sound expectations for success and bona fide efforts to make the program work, has, in practice, proved a failure.”

IV. LEADING GUIDANCE DOCUMENTS

The Office for Civil Rights (OCR) under the U.S. Department of Education provides school districts and state departments of education guidance in satisfying federal requirements for ELL students. There are three primary policy documents used by OCR in enforcing the Civil Rights Act and EEOA:

(A) May 1970 Memorandum titled, “Identification of Discrimination and Denial of Services on the Basis of National Origin” (addresses some of the initial problems that the Office for Civil Rights identified not long after the Civil Rights Act was enacted);
(B) 1985 Guidance Document titled, “The Office for Civil Rights’ Title VI Language Minority Compliance Procedures” (provides more extensive guidance on identifying the need for an alternative program and steps to take to ensure effectiveness of a program); and
(C) September 1991 Policy Update titled, “Policy Update on Schools’ Obligations Toward National Origin Minority Students with Limited-English Proficiency (LEP)” (follows the Fifth Circuit’s decision in Castañeda v. Pickard).

These leading guidance documents are available at: http://www2.ed.gov/about/offices/list/ocr/ell/legal.html.

A. Need for a Formal Program

Relying on Castañeda, the September 1991 Policy Update elaborates on the previously articulated requirements for determining the need for a formal program, as follows:

Title VI does not require an alternative program if, without such a program, LEP students have equal and meaningful access to the district's programs. It is extremely rare for an alternative program that is inadequate under Castañeda to provide LEP students with such access. If a recipient contends that its LEP students have meaningful access to the district's programs, despite the lack of an alternative program or the presence of a program that is inadequate under Castañeda, some factors to consider in evaluating this claim are: (1) whether LEP students are performing as well as their non-LEP peers in the
district, unless some other comparison seems more appropriate; (2) whether LEP students are successfully participating in essentially all aspects of the school's curriculum without the use of simplified English materials; and (3) whether their dropout and retention-in-grade rates are comparable to those of their non-LEP peers. *Policy Update on Schools’ Obligations Toward National Origin Minority Students with Limited-English Proficiency (LEP)* (OCR 1991).

| TEC §29.053(c) requires: “Each district with an enrollment of 20 or more students of limited English proficiency in any language classification in the same grade level shall offer a bilingual education or special language program.”

TEC §29.053(c) requires:

Each district that is required to offer bilingual education and special language programs under this section shall offer the following for students of limited English proficiency:

(1) bilingual education in kindergarten through the elementary grades;

(2) bilingual education, instruction in English as a second language, or other transitional language instruction approved by the agency in post-elementary grades through grade 8; and

(3) instruction in English as a second language in grades 9 through 12.

TEA may grant exceptions to the requirement of bilingual education in in elementary school if criteria are met. See TEC §29.054.

B. Quality Programming

With respect to quality programming, OCR looks at whether the alternative program is being carried out in such a way as to ensure the effective participation of the language minority students as soon as reasonably possible. In its 1985 Guidance Document, *The Office for Civil Rights’ Title VI Language Minority Compliance Procedures* (OCR 1985), reissued April 6, 1990, OCR states:

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

C. Methodology

OCR does not specify methodology. Instead, OCR states:

In providing educational services to language minority students, school districts may use any method or program that has proven successful, or may implement any sound
educational program that promises to be successful. Districts are expected to carry out their programs, evaluate the results to make sure the programs are working as anticipated, and modify programs that do not meet these expectations. *The Office for Civil Rights’ Title VI Language Minority Compliance Procedures* (OCR 1985), reissued April 6, 1990.

TEC §20.055 prescribes program content; method of instruction as follows:

(a) A bilingual education program established by a school district shall be a full-time program of dual-language instruction that provides for learning basic skills in the primary language of the students enrolled in the program and for carefully structured and sequenced mastery of English language skills. A program of instruction in English as a second language established by a school district shall be a program of intensive instruction in English from teachers trained in recognizing and dealing with language differences.

(b) A program of bilingual education or of instruction in English as a second language shall be designed to consider the students' learning experiences and shall incorporate the cultural aspects of the students' backgrounds.

(c) In subjects such as art, music, and physical education, students of limited English proficiency shall participate fully with English-speaking students in regular classes provided in the subjects.

(d) Elective courses included in the curriculum may be taught in a language other than English.

(e) Each school district shall provide students enrolled in the program a meaningful opportunity to participate fully with other students in all extracurricular activities.

(f) If money is appropriated for the purpose, the agency shall establish a limited number of pilot programs for the purpose of examining alternative methods of instruction in bilingual education and special language programs.

D. Quality Staff

The 1991 Policy Update requires a district to require ELL teachers to satisfy equivalent standards as non-ELL teachers in the same district. A district may not “relegate LEP students to second-class status by indefinitely allowing teachers without formal qualifications to teach them while requiring teachers of non-LEP students to meet formal qualifications.”

Specifically, teachers of bilingual classes must be able to “speak, read, and write” in both languages and must have received “adequate instruction” in the methods of bilingual education. Districts must be prepared to prove that they certify that employed ELL teachers possess these skills. The ELL teachers must also be fully qualified to teach their given subject.
Further, if aides are used in native language support, the district must demonstrate that its aides have the appropriate level of skill in writing, reading, and speaking in both languages. However, aides should not provide exclusive instruction to ELL students; they must be under the direct supervision of a certified teacher.

In the event that a district has attempted to hire qualified ELL teachers, but finds difficulty in obtaining them, the district may satisfy Title VI by providing training to existing staff. However, such training must occur immediately in order to satisfy interim needs while the district attempts to hire qualified ELL instructors or train current staff more thoroughly.

E. Exit Criteria

Before students may exit an ELL program, they must show that they can participate meaningfully in a regular educational program. The 1991 Policy Update sets forth three factors that districts should consider in determining if it is appropriate to move students over to a regular educational program:

(1) whether they are able to keep up with their non-LEP peers in the regular educational program; (2) whether they are able to participate successfully in essentially all aspects of the school's curriculum without the use of simplified English materials; and (3) whether their retention in-grade and dropout rates are similar to those of their non-LEP peers. Policy Update on Schools’ Obligations Toward National Origin Minority Students with Limited-English Proficiency (LEP)(OCR 1991).

While OCR allows districts a great degree of latitude in determining exit criteria, it does require that the criteria be based upon objective standards such as standardized test scores. Further, exited students must be able to read, write, and comprehend English sufficiently to participate in the regular program. Oral language proficiency alone is not sufficient to move a student into a regular program. However, OCR restates that alternative programs cannot be “dead-end tracks” that effectively segregate minority students permanently.

Finally, once students are classified as English-proficient, they are required to provide additional subject-area support if the ELL program focused heavily upon English at the expense of other academic subjects. Thus, even after a student has exited the ELL program, the district is under an obligation to provide educational services that assist former ELL students in catching up with other non-ELL students in all academic subjects.

F. Evaluating Programs Based on Outcomes

When evaluating programs, OCR looks at outcomes. OCR examines whether the district is evaluating its own programs and making modifications when the data indicate that there is a need. OCR states:

A district will be in compliance with Title VI when it has adopted an alternative educational program that, when viewed in its entirety, effectively teaches language minority students English, and moves them into the regular educational program within a reasonable period of time. A more difficult compliance determination arises when a district implements an educational approach which, by all available objective measures, does not provide language minority students with the opportunity for effective participation. The Office for Civil Rights’ Title VI Language Minority Compliance Procedures (OCR 1985), reissued April 6, 1990.
V. RECENT GUIDANCE: DEAR COLLEAGUE LETTER (JANUARY 7, 2015)

On January 7, 2015, the DOJ and OCR jointly issued a Dear Colleague Letter on English Language Learner Students and Limited English Proficient Parents. The comprehensive (40 page) letter, offers guidance regarding a State and local school district’s obligations under the EEOA in ten areas.

The letter also more broadly reminds school districts of their obligations under Federal law to:

1. Enroll all students regardless of the students’ or their parents’ or guardians’ actual or perceived citizenship or immigration status;
2. Protect students from discriminatory harassment on the basis of race, color, national origin (including EL status), sex, disability, or religion;
3. Not prohibit national origin-minority group students from speaking in their primary language during the school day without an educational justification; and
4. 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.

A. Identifying and Assessing All Potential ELL Students

DOJ and OCR emphasize timeliness. There is a 30 day timeline from the beginning of the school year to notify parents regarding identification and placement in a language instruction educational program. Additionally, DOJ and OCR stress that identification and assessment must be done in a valid and reliable manner.

DOJ/OCR examples of compliance issues in this area:

[W]hen 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).


B. Providing ELL Students with a Language Assistance Program

DOJ and OCR affirm its longstanding position that while the law does not dictate a particular program or methodology, services and programs must be educationally sound in theory, proven
successful and effective in practice.

DOJ/OCR examples of compliance issues in this area:

[W]hen 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.

C. Staffing and Supporting ELL Programs

DOJ and OCR discuss the duty to have an adequate number of qualified personnel, and the duty to commit the necessary resources to effectively implement the district’s chosen ELL programs and methodologies. The duty includes either hiring teachers with the necessary formal qualifications, or requiring that teachers already on staff pursue the necessary formal qualifications and do so within a reasonable period of time. The duty also includes adequately and meaningfully evaluating teacher and program performance. Finally, the duty includes committing adequate and appropriate resources for program success. Ensuring against the misuse of paraprofessionals, aides, or tutors is a feature of this compliance, as well as ensuring that these individuals are adequately trained and supervised to perform their duties.

DOJ/OCR example of adequate teacher evaluation:

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 6)

DOJ/OCR examples of compliance issues in this area:

[W]hen 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.

D. Providing Meaningful Access to All Curricular and Extracurricular Programs

DOJ and OCR emphasize that the duty to provide meaningful access goes beyond the core curriculum and further includes equal opportunities to meaningfully participate in all curricular and extracurricular activities, graduation requirements, specialized and advanced courses and programs, sports, and clubs. DOJ/OCR provides the following examples of programs and activities to which meaningful access must be afforded: 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.

When investigating complaints against a school district, the DOJ and OCR look at whether:
1. ELL programs are reasonably calculated to enable ELL students to attain both English proficiency and parity of participation in the standard instructional program within a reasonable period of time;
2. ELL programs ensure ELL students’ access to their grade-level curricula so that they can meet promotion and graduation requirements;
3. ELL students have equal opportunities to meaningfully participate in specialized programs – whether curricular, co-curricular, or extracurricular; and
4. The district has established a pathway for ELL students to graduate from high school on time and whether at the secondary level, ELL students have equal access to high-level programs and instruction to prepare them for college and a career.

DOJ/OCR examples of compliance issues with respect to Gifted and Talented Educate (GATE) programs:

[W]hen 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.

E. Avoiding Unnecessary Segregation of ELL Students

DOJ and OCR “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.”

DOJ/OCR examples of compliance issues in this area:

[W]hen 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.

F. Evaluating ELL Students for Special Education Services and Providing Special Education and English Language Services

DOJ and OCR emphasize the importance of ensuring that ELL students who may be disabled under either the IDEA or Section 504 are timely and appropriately evaluated for special education and disability-related services, and that their language needs are considered in evaluations and the delivery of services.

DOJ/OCR examples of compliance issues in this area:
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.

G. Meeting the Needs of ELL Students Who Opt Out of ELL Programs or Particular ELL Services

DOJ and OCR recognize that parents do have the right to opt their child out of an ELL program or decline particular services within an ELL program. However, DOJ and OCR caution school districts as follows:

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. 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.

DOJ and OCR explain:

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.

Even when parents exercise their right to opt out or decline services, the school district’s duty to these children does not end. They “retain their status as EL students, and the school district remains obligated to take the ‘affirmative steps’ required by Title VI and the ‘appropriate action’ required by the EEOA to provide these EL students access to its educational programs.”

H. Monitoring and Exiting ELL Students from ELL Programs and Services

DOJ and OCR emphasize that school districts are required to monitor and evaluate ELL students to ensure their progress with respect to acquiring English proficiency and grade level core content. “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.” With respect to monitoring and evaluating progress toward acquiring English proficiency, “their performance on the annual ELP assessment and their progress with respect to the ELP standards during the school year should inform their instruction.”

ELL students should be exited from language assistance programs when they are proficient in English. Exited students must be monitored to ensure they were not prematurely exited and that any academic deficits incurred in the language assistance program have been remedied.

DOJ/OCR examples of compliance issues with respect to exiting ELL students:

[W]hen 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.

I. Evaluating the Effectiveness of a District’s ELL Program

DOJ and OCR discuss the duty of districts to evaluate the effectiveness of their language assistance program(s). An effective program means that (1) ELL students in each program are acquiring English proficiency, and (2) that ELL students are attaining parity of participation (comparable to never-ELL peers) in the standard instructional program within a reasonable period of time. Districts need to have a good handle on outcomes since “[c]ontinuing to use an EL program with a sound educational design is not sufficient if the program, as implemented, proves ineffective.”

DOJ and OCR state:

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.

This type of program evaluation will involve collecting and analyzing longitudinal data:

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. 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, 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.

J. Ensuring Meaningful Communication with Limited English Proficient Parents

DOJ/OCR examples of compliance issues in this area:

[W]hen 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.

VI. NO CHILD LEFT BEHIND ACT (NCLB), THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT
(IDEA) 2004, AND RESPONSE TO INTERVENTION (RTI)

A. NCLB

The Elementary and Secondary Education Act of 1965 (ESEA) was originally enacted in 1965
(P.L. 89–10). In 1978, the Act was amended (P.L. 95–561). In 1994, it was again amended (P.L.
103–382). The 1994 Amendments to the Act, known as “Improving America’s Schools Act,”
made significant revisions as well as moved the Act to its current location, Chapter 70 of
These Amendments, adopted on January 8, 2002, are known as the “No Child Left Behind Act”

The ESEA, as amended by NCLB, consists of nine subchapters or titles. The most notable titles
are Titles I through V. Title I of the ESEA is “Improving the Academic Achievement of the
Disadvantaged.” Title II is “Preparing, Training, and Recruiting High Quality Teachers and
Principals.” Title III is the “English Language Enhancement and Academic Achievement Act”
(formerly Title VII “The Bilingual Education Act”). Title IV is “21st Century Schools” and deals
with safe and drug-free schools. Title V is “Promoting Informed Choice and Innovative
Programs.” Title I is used to influence states to establish challenging state academic content,
student achievement standards, and teacher quality standards. The receipt of Title I funds by the
state is conditioned on the establishment of these standards. These standards then become the
measuring stick by which states, school districts, and campuses, in improving the academic
achievement of the disadvantaged, are judged. While many of these “reforms” were initiated
under earlier versions of the ESEA, particularly the Improving America’s Schools Act, they have
received a significant amount of public attention due to the timetable and enforcement
mechanisms established by NCLB.

In United States v. Texas, 601 F.3d 354 (5th Cir. 2010), the Fifth Circuit observed that “the No
Child Left Behind Act of 2001 (NCLB) does not replace [the EEOA] (and compliance with the
former does not necessarily constitute compliance with the latter).”

The U.S. Supreme Court in Horne v. Flores, 129 S.Ct. 2579 (2009) explains:
[B]ecause of significant differences in the two statutory schemes, compliance with NCLB will not necessarily constitute “appropriate action” under the EEOA. …Approval of a NCLB plan does not entail substantive review of a State’s ELL programming or a determination that the programming results in equal educational opportunity for ELL students. …Moreover, NCLB contains a saving clause, which provides that “[n]othing in this part shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right.” …[Citations omitted.]

B. IDEA 2004

IDEA 2004 reflects Congress’ concerns regarding overidentification, misidentification and disproportionality.

1. Wrongly labeled kids

It is clear that the Congress that reauthorized and amended the IDEA in 2004 believed that some children are wrongly labeled as “disabled.” We think it very significant that Congress made this “finding” in support of its new law:

Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—… providing incentives for whole-school approaches, scientifically based early reading programs, positive behavioral interventions and supports, and early intervening services to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children. 20 U.S.C. § 1401(c)(5)(F).

2. Early intervening services

One significant change in the IDEA 2004 is with respect to the emphasis on early intervening services. Under IDEA 2004, a school district may use up to 15 percent of its Part B funds, “to develop and implement coordinated, early intervening services, which may include interagency financing structures, for students in kindergarten through grade 12 (with a particular emphasis on students in kindergarten through grade 3) who have not been identified as needing special education or related services but who need additional academic and behavioral support to succeed in a general education environment.” 20 U.S.C. § 1413(f)(1).

3. What is disproportionality?

Disproportionality is the disproportionate representation of minority children in special education including within a particular category or categories of disability, disproportionate representation in particular types of special education settings, or subjecting minority children with disabilities to disciplinary action or placing them in disciplinary settings in disproportionate numbers.
4. How is overidentification or disproportionality being addressed under the IDEA?

The IDEA regulations provide as follows:

The State must have in effect, consistent with the purposes of this part and with section 18(d) of the Act, policies and procedures designed to prevent the inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities, including children with disabilities with a particular impairment described in § 300.8. 34 C.F.R. § 300.173.

To accomplish this task, the federal regulations require that:

Each State that receives assistance under Part B of the Act, and the Secretary of the Interior, must provide for the collection and examination of data to determine if significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State with respect to—

(1) The identification of children as children with disabilities, including the identification of children as children with disabilities in accordance with a particular impairment described in section 602(3) of the Act;
(2) The placement in particular educational settings of these children; and
(3) The incidence, duration, and type of disciplinary actions, including suspensions and expulsions. 34 C.F.R. § 300.646(a).

5. What happens when there is significant disproportionality in identification?

When “significant disproportionality” is identified, among other things, the use of Part B monies for early intervening services becomes nonnegotiable. The federal regulations provide as follows:

In the case of a determination of significant disproportionality with respect to the identification of children as children with disabilities, or the placement in particular educational settings of these children, in accordance with paragraph (a) of this section, the State or the Secretary of the Interior must—

(1) Provide for the review and, if appropriate revision of the policies, procedures, and practices used in the identification or placement to ensure that the policies, procedures, and practices comply with the requirements of the Act.
(2) Require any LEA identified under paragraph (a) of this section to reserve the maximum amount of funds under section 613(f) of the Act to provide comprehensive coordinated early intervening services to serve children in the LEA, particularly, but not exclusively, children in those groups that were significantly overidentified under paragraph (a) of this section; and
(3) Require the LEA to publicly report on the revision of policies, practices, and procedures described under paragraph (b)(1) of this section.” 34 C.F.R. § 300.646(b).

C. RTI

RTI is a tool for helping struggling learners succeed in general education. Many states mandate some form of RTI. RTI helps achieve the goals of NCLB and the IDEA, and helps ensure nondiscrimination and equal educational opportunity for ELL students. RTI addresses the
problem of disproportionality through its emphasis on high-quality, differentiated instruction by qualified personnel, and data-driven decision-making.

Although not defined in federal law, “RTI is the practice of (1) providing high-quality instruction/intervention matched to student needs and (2) using learning rate over time and level of performance to (3) make important educational decisions. These three components of RTI are essential.” *Response to Intervention Policy Considerations and Implementation*, NASDSE, Inc. (2005).

In *Lee v. Lee County Bd. of Educ.*, 47 IDELR 156 (M.D. Ala. 2007), the court issued rulings on the state-wide issue of special education, only one of two remaining issues in a desegregation case that dated back to the early sixties. The court declared the State as having achieved unitary status after it implemented a consent decree and underwent the requisite monitoring to show compliance. Among other things, the consent decree required the state to establish a Building Based Student Support Team (BBSST) model to be implemented in every school in order to provide educators with a system of working together to address the instructional and behavioral needs of at-risk students. The court explained, “[t]he intent is to solve the instructional and behavioral issues of students through interventions, thus obviating any need for a referral to special education.”

VII. **IDENTIFICATION AND EVALUATION OF ELL STUDENTS FOR SPECIAL EDUCATION**

A. **Child Find**

The IDEA requires each state to have in effect policies and procedures to ensure that:

(i) All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated; and

(ii) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services. 34 C.F.R. § 300.111(a)(1).

Section 504 regulations also indicate a Child Find duty, as follows:

A recipient that operates a public elementary or secondary education program or activity shall annually:

(a) Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and

(b) Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient's duty under this subpart. 34 C.F.R. § 104.32.

In *Dear Colleague Letter on English Language Learner Students and Limited English Proficient Parents* (January 7, 2015), the DOJ and OCR state:

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.
The DOJ and OCR explain that when conducting investigations, compliance reviews or monitoring activities, the Departments consider whether:

- 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. Dear Colleague Letter on English Language Learner Students and Limited English Proficient Parents (January 7, 2015).

In *Fair Lawn (NJ) Sch. Dist.*, 55 IDELR 176 (OCR 2010), OCR found that a New Jersey school district violated Section 504 by refusing to evaluate for an articulation deficit in a 5-year-old ESL student whose home language was Russian. The complainant alleged that the district refused the complainants' requests for evaluation on three occasions. On the first occasion, the speech therapist told the complainant to come back in 3 to 4 weeks after the student had transitioned to kindergarten. On the second occasion, the speech therapist told the complainant “that she could not evaluate the Student until he spoke more English and suggested that he find a Russian-speaking speech therapist.” OCR found that this was consistent with the practice of the district:

District witnesses advised OCR that consistent with its practices, the District could not evaluate the Student for a possible articulation deficit or other speech-related disability until he learned sufficient English. The District asserted that this was necessary to allow the District to determine whether the Student's difficulties were related to having a first language other than English. The principal advised OCR that the School does not conduct evaluations in Russian.

OCR found that these practices violated Section 504 and Title VI. As a result, the district entered into a voluntary resolution agreement.

### B. Evaluation

When assessing a child under the IDEA, the regulations require that each public agency ensure that:

- Assessments and other evaluation materials used to assess a child under this part—
  - (i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;
  - (ii) 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;
  - (iii) Are used for the purposes for which the assessments or measures are valid and reliable;
  - (iv) Are administered by trained and knowledgeable personnel; and
  - (v) Are administered in accordance with any instructions provided by the producer of the assessments. 34 C.F.R. § 300.304(c)(1).

Section 504 has similar regulatory requirements to ensure evaluation procedures are nondiscriminatory. See 34 C.F.R. § 104.35.
In Dear Colleague Letter on English Language Learner Students and Limited English Proficient Parents (January 7, 2015), the DOJ and OCR explain that when conducting investigations, compliance reviews or monitoring activities, it considers, 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.

A review of OCR decisions confirm that OCR looks at whether staff accounts for the effect of language development and language proficiency. If a student is not proficient in the language skills required to complete an assessment instrument, the results may not be valid. Ogden City Sch. Dist., 21 IDELR 387 (OCR 1994). Thus, when evaluating students with second languages for special education, the student should first be assessed objectively for language proficiency, using instruments designed for language-minority persons. West Las Vegas Sch. Dist., 20 IDELR 1409 (OCR 1993).

Language proficiency should not be confused with language dominance. School district staffs often use the terms “dominant language” and “primary language” interchangeably. However, as OCR points out, determining that a student is dominant in English is not equivalent to determining that the student is proficient in the language skills required to produce valid, reliable results on an assessment instrument. OCR tells us that language dominance is simply a relative measure of two or more languages spoken by an individual, indicating the one language that the individual uses most commonly, productively, and comfortably. Language proficiency, on the other hand, is a measure of how well an individual can speak, read, write, and comprehend a language relative to the individual’s peers. A person whose dominant or primary language is English is not necessarily proficient in English. Ogden City Sch. Dist., 21 IDELR 387 (OCR 1994). In Portland (ME) Pub. Schs., 113 LRP 32022 (OCR 2013), OCR approved a Resolution Agreement that requires that “[a]t least one member of the Team must have expertise in second language acquisition and how to distinguish between ELL student performance on assessments that are attributable to a learning disability, as opposed to the student’s level of English language proficiency.”

OCR looks at the qualifications of the evaluator to assess students with second languages. OCR tells us that an evaluator proficient in the child’s dominant language should be the primary person to evaluate a student who is not proficient in English. If such personnel are not available, non-verbal tests or trained interpreters may be used. West Las Vegas Sch. Dist., 20 IDELR 1409 (OCR 1993); San Francisco Unified Sch. Dist., 16 IDELR 194 (OCR 1989). Districts must ensure the availability of certified staff to evaluate ELL students in their dominant languages. Schenectady (NY) City Sch. Dist., 62 IDELR 93 (OCR 2013).

Finally, OCR looks at the assessment instruments that are used to evaluate students with second languages, and the language in which the evaluation is conducted. OCR tells us that a bilingual assessor should be responsible for reviewing all documentation and assessment reports (including the most recent proficiency scores for language assessments conducted by the district’s bilingual education department), and determining the language(s) to be used in assessing the child. San Francisco Unified Sch. Dist., 16 IDELR 194 (OCR 1989). The school should document how each assessment or evaluation was used, who administered it, and how it
ensured that the results were a valid assessment of the ELL student's abilities in the areas assessed, and not a reflection of the ELL student's level of English language development. *Portland (ME) Pub. Schs.*, 113 LRP 32022 (OCR 2013). The evaluation report should identify the language in which each instrument was administered as well as a discussion of the possible effects of the student’s language on the test results. *West Las Vegas Sch. Dist.*, 20 IDELR 1409 (OCR 1993).

C. Identification

The determination of eligibility (identification of a child as a child with a disability under the IDEA) is made by a group of qualified professionals and the parent. 34 C.F.R. § 300.306(a)(1). Section 504 has similar requirements (i.e. group of qualified professionals) when interpreting evaluation data and making placement decisions. See 34 C.F.R. § 104.35(c).
The IDEA provides a special rule for eligibility determination, as follows:

A child must not be determined to be a child with a disability under this part—
(1) If the determinant factor for that determination is—
   (i) Lack of appropriate instruction in reading, including the essential components of reading instruction (as defined in section 1208(3) of the ESEA);
   (ii) Lack of appropriate instruction in math; or
   (iii) Limited English proficiency; and
(2) If the child does not otherwise meet the eligibility criteria under § 300.8(a). 34 C.F.R. § 300.306(b).

In *Bensalem Twp. Sch. Dist.*, 114 LRP 24883 (SEA Pa. 2014), a student who had recently been adopted from an Eastern European country was determined ineligible for special education services. Instead, it was deemed that the determinant factor for the student’s academic difficulties was limited English proficiency. The parents requested an Independent Educational Evaluation and the district requested a due process hearing to show that its evaluation was appropriate. In ruling in favor of the District, the hearing officer observed:

[The] record as a whole, supports the conclusion that Student's academic weaknesses at the time of the [eligibility review] were related to Student's very limited English proficiency, and would have been the determining factor for Student's eligibility for special education. At the time of the evaluation, Student was also making progress in the ESL program and continuing to acquire English language. … It is also important to note the Parents' apparent belief throughout the hearing that merely because Student was performing academically well below peers, Student was and is eligible for special education… Eligibility for special education, however, requires both a disability, and a need for special education because of that disability. Special education is not automatic merely because a child is not performing where one might hope or expect in comparison to same-age peers.

**VIII. DEVELOPING AN IEP AND ENSURING EQUAL EDUCATIONAL OPPORTUNITY AND FAPE FOR AN ELL STUDENT WITH DISABILITIES**

**A. Addressing the Language Needs of ELL Students in the IEP**

IDEA regulations state that “the IEP Team must … In the case of a child with limited English proficiency, consider the language needs of the child as those needs relate to the child’s IEP.” 34 C.F.R. § 300.324(a)(2)(ii).

In *Dear Colleague Letter on English Language Learner Students and Limited English Proficient Parents* (January 7, 2015), the DOJ and OCR explain:

To implement this requirement [34 C.F.R. § 300.324(a)(2)(ii)], 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.
B. “No Dual Services” Policies/Practices Violate the EEOA and Title VI

In *Dear Colleague Letter on English Language Learner Students and Limited English Proficient Parents* (January 7, 2015), the DOJ and OCR state:

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. 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.

The DOJ and OCR explain that when conducting investigations, compliance reviews or monitoring activities, the Departments consider whether:

- [ ] 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. *Dear Colleague Letter on English Language Learner Students and Limited English Proficient Parents* (January 7, 2015).

In *De Queen School District (AR)*, Docket No. 06-10-5001 (OCR 2013), OCR found that the district was not in compliance with Title VI. Among other things, OCR identified six high school ELL students who were identified as special education and did not receive any direct instruction from an ESL teacher. Citing its “longstanding policy” against “no dual services” policies or practices for ELL students with disabilities, OCR found “that the District failed to provide alternative language services to all identified special education students.” OCR ordered a review of all files of ELL students with disabilities to ensure “that students who require both ELL services and special education receive both, and determine what, if any, compensatory services are deemed necessary for each student.”

C. FAPE for ELL Students

In *Letter to Ralabate*, 103 LRP 22729 (OSEP 2002), OSEP addressed the question: “What should local districts do to address the needs of English Language Learners who have disabilities?” OSEP’s response was as follows:

The Act requires that the IEP team consider the language needs of a child with limited English proficiency (LEP) as those needs relate to the child's IEP. It is important that the IEP team consider how the child's level of English language proficiency affects the special education and related services that the child needs in order to receive FAPE. Any decisions regarding the extent a child with limited English proficiency will receive instruction in English or the child's native language, the extent to which a child with limited English proficiency with a disability can participate in the general curriculum, or whether English language tutoring is a service that must be included in a child's IEP, must be made by the child's IEP team and based on the individual needs of the child. *Title VI of the Civil Rights Act of 1964* also requires school districts to provide children with limited English proficiency with alternative language services to enable them to
acquire proficiency in English and to provide them access to the total range of educational services provided by the school, including special education and related services. The IEP team must also address whether the special education and related services that the child needs will be provided in a language other than English.

The case of *Marple Newtown Sch. Dist. v. Rafael N.*, 48 IDELR 184 (E.D. Pa. 2007), involved a student, Rafael, who immigrated to the U.S. from the Dominican Republic at age 9 to live with his father. Rafael was found eligible for IDEA services by his Pennsylvania school district as a student with mild to moderate intellectual disabilities. He also suffered from a severe seizure disorder. After a hearing officer ruled in the district’s favor regarding Rafael’s FAPE claims related to his ESL instruction, the appeals panel reversed, and the district court affirmed the appeals panel. The court pointed out that IDEA requires an IEP team to take the language needs of the child into account. The court further held that Rafael’s language needs were not being met. “A review of Student's IEPs from 2002 to 2006 shows no meaningful progress in his acquisition of English. … The IEPs note the continual language barriers Student experienced in the English-only classroom.” The court found that the “push-in” program of English instruction did not provide the explicit instruction that Rafael required because of his cognitive impairment. The court was persuaded by expert testimony that since Rafael had learned Spanish reasonably well, there was no reason why he could not also learn English through intense ESL instruction. The court affirmed the appeals panel’s finding that “the District denied Student FAPE because Student's IEP was not reasonably calculated to address his language needs and ensure he receive a meaningful educational benefit.” The court also upheld the appeals panel’s award of compensatory education in an amount equivalent to three academic years.

D. **Parent Participation**

In *Dear Colleague Letter on English Language Learner Students and Limited English Proficient Parents* (January 7, 2015), the DOJ and OCR state:

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.

The case of *Marple Newtown Sch. Dist. v. Rafael N.*, 48 IDELR 184 (E.D. Pa. 2007), reported above, also presented issues of parent participation. Rafael’s father spoke but could not read Spanish, and could neither read nor speak English. According to the court: “The District failed to communicate with Parent in his native language until 2006; specifically, the District never provided Parent with invitations to meetings, notices, or procedural safeguards in Spanish.” In 2005, with the assistance of an attorney, the father began to understand the problems with the education services being provided to Rafael, who was in high school. In 2006, the father filed a
request for a due process hearing against the district. The hearing officer, appeals panel and
district court found that the two-year statute of limitations did not apply because “the District did
not always provide translation services at IEP meetings; and that Parent may have signed notices
he did not understand.” The hearing officer described the situation as a “disturbing pattern of
insensitivity to that fact that the Parent is monolingual Spanish speaking and illiterate.”

In Victor Valley (CA) Union High Sch. Dist., 50 IDELR 141 (OCR 2007), OCR found that the
failure of the district to provide a Spanish-speaking interpreter at an IEP meeting or translate IEP
documents into Spanish violated Section 504 and Title VI. The parent reported that at one IEP
meeting, the assistant principal was designated as the interpreter. According to the parent, the
AP did not provide a complete interpretation. Instead, “there were lengthy discussions in
English and then what appeared to be a quick translation of a summary of what was said. She
also alleged that the AP stepped out for the last ten minutes of the meeting and that no one
interpreted the questions in the informed consent section when she was asked to sign the IEP
document.” The AP acknowledged being called out of more than one IEP meeting “because he
is responsible for all discipline on the campus.” Staff does not receive any training regarding
oral interpretation. Moreover, the student’s IEPs were not translated. With respect to
translation, OCR noted:

The District stated that this was because the Complainant did not request a translation. However, the evidence gathered by OCR showed that, while IEPs contain a line on which
a LEP parent can request a written translation of the IEP, the District does not translate
this line for LEP parents or explain the option to them. In this case the District only asked
the Complainant to sign the line stating than an oral interpretation of the IEP had been
provided. The evidence further showed that the District does not have an established
process for translating IEPs.

With regard to interpreters, the DOJ and OCR state:

It is not sufficient for the staff merely to be bilingual. For example, some bilingual staff
and community volunteers may be able to communicate directly with LEP parents 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. Dear Colleague Letter on English Language Learner Students

IX. U.S. DEPARTMENTS OF JUSTICE AND EDUCATION FIND SCHOOL DISTRICTS FALL SHORT OF MARK IN
RECENT YEARS

School systems in Arizona and Boston came under recent scrutiny for failing to identify ELL students,
ailing to evaluate their progress as ELL students, and also dropping them from ELL classification
prematurely.

A. Arizona

1. Identification
On March 25, 2011, the DOJ and OCR announced a settlement with the Arizona Department of Education that is designed to ensure the proper identification of ELL students. In August 2010, the DOJ and OCR sent the head of Arizona’s Department Education letters describing where the agency had fallen short. The letter states that the identification process of Arizona ELL students is flawed because the state replaced its traditional three-question survey provided to parents with a single-question form, which asks only, “What is the primary language of the student?” The letter points out that in the previous questionnaire, three questions were asked:

- “What is the primary language used in the home regardless of the language spoken by the student?”
- “What is the language most often spoken by the student?”
- “What is the language that the student first acquired?”

Even when a teacher referral process supplements the questionnaire, the federal agencies state that EEOA and the Civil Rights Act are potentially violated. “If [ELL students] are not identified, they do not receive [Title VI and EEOA] services… We have particular concerns regarding how the new processes are underidentifying Hispanic and American Indian students who may be English language learners.”

In the settlement, the Arizona Department of Education agreed “that an answer other than English to any of the three questions on the HLS will trigger timely assessment of the student’s English language proficiency.”

2. Measure of Proficiency

On August 31, 2012, the DOJ and OCR announced another settlement agreement with the Arizona Department of Education to remedy the violations that resulted in “tens of thousands of English Language Learner (ELL) students [being] prematurely exited or incorrectly identified as Initially Fluent English Proficient (IFEP) over the past five school years.”

This agreement stemmed from findings regarding Arizona’s use of the Stanford English Language Proficiency (SELP) test and its own Arizona English Language Learner Assessment (AZELLA). The departments investigated complaints from parents and other concerned citizens and determined that even after students received adequate overall scores on these tests, they were not proficient in particular categories, including reading and writing. Thus, when ELL students are reclassified as English proficient, they continued to lack the essential English language skills that ELL programs should provide.

As a result of these violations, the Arizona Department of Education agreed to offer targeted reading and writing intervention services to the impacted students, and to further develop proficiency criteria that accurately identify and exit ELL students.

3. Lessons Learned from Arizona

Although some of Arizona’s problems are rooted at the state level (particularly with regard to the achievement tests), individual districts should be concerned with their formal policies for identifying students for ELL programs. Their identification practices should be designed to capture all ELL students irrespective of budgetary constraints that might incentivize some districts to underidentify the ELL population. School districts
must be careful when classifying students as “ELL” or when reclassifying ELL students as English proficient. As the Arizona cases illustrate, federal agencies will investigate complaints and conduct a thorough review of the identification process and whether classification of ELL students as English proficient is warranted.

B. Boston, Massachusetts

On Friday, October 1, 2010, the Department of Justice reached a settlement with the Boston School Committee following a lengthy joint investigation by OCR and DOJ under the EEOA and Title VI.

1. Use of Opt-Out Provision

While conducting a joint investigation, DOJ and OCR determined that, since 2003, the Boston Public Schools had failed to properly identify and adequately serve thousands of ELL students as required by the EEOA and Title VI. The Boston School Committee was found out of compliance with federal law primarily for its improper use of the opt-out provision. Boston school officials told parents to opt out of the alternative ELL program if the programs were full or if the child’s neighborhood school did not have a formal alternative ELL program. While Boston officials expressed their frustrations with a lack of guidance on ELL opt-out provisions, federal authorities from OCR and DOJ make clear that schools are not relieved of their duties under federal law in instances where programs are full, parents opt out, or some schools do not provide alternative ELL programs.

To remedy the opt-out violation, “the Boston Public Schools agreed to monitor the academic performance of current and former ELL students; to offer compensatory services to the ELL students who were recently identified and formerly misidentified as ‘opt outs;’ and to give the parents of those students the information they need to make informed decisions regarding the ELL services their children receive.”


The Boston example provides three lessons for school districts across the country. (1) It is a bad idea for school districts to ask parents or encourage parents of ELL students to opt out of an alternative ELL program. While a parent may opt out, it must be voluntary on the part of the parent. (2) Even if a parent or student voluntarily opts out of an alternative ELL program, services must be provided that target and monitor the English language progress of the student. OCR and other federal agencies indicate that teacher training and targeted monitoring of a student’s educational progress can help meet the needs of students who would qualify for ELL services, but opted out. (3) All schools must be prepared to meet the needs of ELL students, even if a formal ELL alternative program is not provided. The Boston case study shows that schools cannot tell ELL students that they must attend a different school if they want to receive ELL services.

2. English Proficiency Testing in All Four Domains

The DOJ and OCR further found that the district did not accurately assess ELL students. The ultimate settlement included an agreement to assess the English proficiency of an
estimated 7,000 students who were not previously tested in all four language domains of *listening, speaking, reading and writing.*

3. Special Education Testing

Finally, as a result of the findings, the Boston Public Schools agreed to “ensure that special education ELL students are properly assessed and served to address their unique needs.”

X. Texas Courts

*United States v. Texas*, 601 F.3d 354 (5th Cir. 2010), is a desegregation case originally brought by the United States in 1970. The intervenors (groups including LULAC representing all persons of Mexican-American decent or nationality in Texas) sought to have the court’s desegregation order enforced and modified order. In 1981, the United States District Court for the Eastern District of Texas held, among other things, that: (1) the state’s existing bilingual program was wholly inadequate to eradicate the disabling effects of pervasive historical discrimination suffered by Mexican-Americans in the field of education; (2) the state's failure to take “appropriate action” to meet language difficulties encountered by Spanish-speaking students in public schools constituted violation of Equal Educational Opportunities Act; and (3) defendants were required to provide bilingual instruction to all Mexican-American children of limited English proficiency in the Texas public schools. In 1982, the Fifth Circuit reversed, in part due to the Texas Legislatures 1981 enactment of the Bilingual and Special Language Programs Act. In 2006, the intervenors again sought further relief through a modified order. Ultimately, the District Court denied the request to modify the order. On appeal, among other things, the Fifth Circuit held that “the issues raised by intervenors’ EEOA claim have not been properly addressed in the absence of individual school districts as parties.” In its opinion, the Fifth Circuit noted that “local school districts are primarily responsible for the implementation of LEP programs, while TEA is responsible for ensuring compliance with federal and state law and evaluating and monitoring the effectiveness of LEP programs.” On June 10, 2014, the Plaintiff LULAC filed an amended complaint adding Southwest ISD and North East ISD as individual defendants in the lawsuit. The case has since been removed from the Eastern District to the Western District.

In *Morales v. E.P. Shannon*, 516 F.2d 411 (5th Cir. 1975), a class action lawsuit challenging Uvalde Consolidated ISD and its officials, the Fifth Circuit found segregation of Mexican-American students in the District’s elementary schools and remanded back to the district court to determine a remedy. Plaintiffs/Appellants further challenged the adequacy of ELL programs in the District and teacher and staff hiring and assignment. Citing the recently enacted EEOA, the Fifth Circuit observed: “It is now an unlawful educational practice to fail to take appropriate action to overcome language barriers.” The Court remanded these issues to the district court for further findings. On June 28, 1976, the United States District Court for the Western District of Texas, San Antonio Division entered a final decree, adopting the School District’s proposed desegregation and bilingual-bicultural plans which addressed student assignments; principals, faculty, staff and aide assignments, hiring, and reductions; bilingual-bicultural programs; classroom assignments; transportation; facilities; and annual reporting requirements. The Decree was modified in 1995 and 2002. In 2008, the parties entered into a Consent Order and Settlement Agreement. On October 26, 2012, the district court approved another Consent Order and Settlement Agreement. See attached Exhibit A to Consent Order and Settlement Agreement.