No. 16-3528

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

KHADIDJA ISSA, *et al.*,

Plaintiffs-Appellees

v.

THE SCHOOL DISTRICT OF LANCASTER,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE ON THE ISSUE ADDRESSED HEREIN

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STATEMENT OF THE ISSUE

Whether the district court properly applied *Castaneda* v. *Pickard*, 648 F.2d 989 (5th Cir. 1981), to conclude that plaintiffs established a likelihood of success on the merits of their claim that the School District of Lancaster's decision to divert them to an alternative school for "underachieving" students instead of

enrolling them in the regular high school program violates Section 1703(f) of the Equal Educational Opportunities Act of 1974 (EEOA), 20 U.S.C. 1701 *et seq.*[1]

INTEREST OF THE UNITED STATES

This case concerns the interpretation and application of Section 1703(f) of the EEOA, which requires state and local educational agencies to take "appropriate action to overcome language barriers that impede equal participation by [their] students in [their] instructional programs." 20 U.S.C. 1703(f). The Attorney General is authorized to bring civil actions to enforce the EEOA and to intervene in private actions brought under the statute. 20 U.S.C. 1706, 1709. In January 2015, the Department of Justice and the Department of Education issued joint federal guidance reiterating the obligation of state and local educational agencies to

[1] The United States takes no position on the other claims on appeal or on the correctness of the district court's conclusions regarding the other preliminary injunction factors. We assume for purposes of this filing that the district court's preliminary findings of fact are not clearly erroneous. See *Delaware Strong Families* v. *Attorney Gen.*, 793 F.3d 304, 308 (3d Cir. 2015) (stating that on appeal from a preliminary injunction this Court reviews findings of fact for clear error, legal conclusions de novo, and the decision to grant or deny the injunction for abuse of discretion), cert. denied, 136 U.S. 2376 (2016).

Although the United States also has enforcement responsibilities under Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. 2000d *et seq.*, the district court did not reach plaintiffs' Title VI claim and no party seeks to have this Court reach that claim on appeal.

assist English Learner (EL) students[2] in surmounting language barriers that impede their equal participation in standard instructional programs. See Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., and Vanita Gupta, Acting Assistant Atty. Gen. for Civil Rights, U.S. Dep't of Justice, *Dear Colleague Letter: English Learner Students and Limited English Proficient Parents* (Jan. 7, 2015) (DCL) (Attach. 1); see also Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Philip H. Rosenfelt, Deputy Gen. Counsel, U.S. Dep't of Educ., and Jocelyn Samuels, Acting Assistant Atty. Gen. for Civil Rights, U.S. Dep't of Justice, *Dear Colleague Letter: School Enrollment Procedures* (May 8, 2014) (Attach. 2) (likewise reiterating that school districts cannot deny students a public education based on their or their parents' or guardians' citizenship or immigration status).

The United States has a significant interest in ensuring that this Court interprets and applies Section 1703(f) of the EEOA to require school districts to adequately develop, implement, and monitor instructional programs to ensure that ELs overcome their language barriers and obtain a meaningful public education equal to that of their never-EL peers.

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[2] Though the terms are interchangeable, limited English proficient (LEP) students are now more commonly referred to as English Learners or English Language Learner students. We thus refer to such students as ELs in this brief.

STATEMENT OF THE CASE

1. "Appropriate Action" Under The EEOA

The EEOA prohibits state and local educational agencies, including school districts, from denying equal educational opportunity to any person "on account of his or her race, color, sex, or national origin." 20 U.S.C. 1703; see also 20 U.S.C. 1720(a), 7801(30) (defining state and local educational agencies). The denial of such opportunity includes, among other things, an agency's failure "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). By its terms, Section 1703(f) does not require a showing of discriminatory intent. See *Castaneda* v. *Pickard*, 648 F.2d 989, 1007-1008 (5th Cir. 1981).

The EEOA does not define "appropriate action." More than 30 years ago, however, a seminal Fifth Circuit decision established a three-part framework for assessing whether educational agencies have taken such action to ensure equal opportunities for ELs. See *Castaneda*, 648 F.2d at 1007-1010. In interpreting "appropriate action," the Fifth Circuit relied not only on Section 1703(f)'s "plain meaning" but also on the "essential requirement" recognized in *Lau* v. *Nichols*, 414 U.S. 563 (1974), that school districts afford ELs appropriate language instruction and supports to enable their meaningful participation in school.

Castaneda, 648 F.2d at 1007-1008.[3] Under *Castaneda*'s three-part framework, a court considers whether the language remediation program chosen by the state or local education agency: (1) is based upon sound educational theory; (2) is reasonably calculated to implement effectively that theory; and (3) has produced results, after a legitimate trial period, indicating that ELs are actually overcoming language barriers. See *id.* at 1009-1010; see also *Horne* v. *Flores*, 557 U.S. 433, 440-441 (2009) (quoting Section 1703(f) and citing *Castaneda*); *id.* at 458 n.8 (stating that "appropriate action" requires educational agencies to "(1) formulate a sound English language instruction educational plan, (2) implement that plan, and (3) achieve adequate results").

This Court has yet to interpret Section 1703(f) of the EEOA. This Court should follow the lead of other federal circuit courts and district courts, including those in the Third Circuit, that have properly turned to *Castaneda* to analyze claims brought against educational agencies under Section 1703(f).[4]

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[3] Congress codified the Supreme Court's decision in *Lau* by including Section 1703(f) among the EEOA's provisions. See *Castaneda*, 648 F.2d at 1008. *Lau* held that failing to provide English language instruction to ELs denies those students a meaningful opportunity to participate in educational programs and constitutes a form of national origin discrimination prohibited under federal regulations implementing Title VI. See 414 U.S. at 566-569.

[4] See, *e.g.*, *United States* v. *Texas*, 601 F.3d 354, 365-366 (5th Cir. 2010); *Gomez* v. *Illinois State Bd. of Educ.*, 811 F.2d 1030, 1040-1042 (7th Cir. 1987); *McFadden* v. *Board of Educ.*, 984 F. Supp. 2d 882, 894 (N.D. Ill. 2013); *C.G.* v.

(continued…)

2. Facts And Proceedings Below

a. In July 2016, plaintiffs filed a class action complaint alleging a denial of their right to equal educational opportunities and a meaningful public education based on the School District of Lancaster's (Lancaster) failure to enroll older immigrant ELs in its regular high school program, in violation of Section 1703(f) of the EEOA, Title VI, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and Pennsylvania law. J.A. 55, 65-66, 74, 87-96.[5] The named plaintiffs – four students between the ages of 18 and 21, and two minor students of high school age and their parents – are LEP refugees who reside in the school district.[6] J.A. 55, 58-61. They allege that rather than being admitted to the regular high school (McCaskey), Lancaster offered them enrollment, if any, only at

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(…continued)
Pennsylvania Dep't of Educ., 888 F. Supp. 2d 534, 574-575 (M.D. Pa. 2012), aff'd, 734 F.3d 229 (3d Cir. 2013); *Valeria G.* v. *Wilson*, 12 F. Supp. 2d 1007, 1017-1021 (N.D. Cal. 1998), aff'd, 307 F.3d 1036 (9th Cir. 2002); *Quiroz* v. *State Bd. of Educ.*, No. Civ.S-97-1600WBS/GGH, 1997 WL 661163, at *4-6 (E.D. Cal. Sept. 10, 1997); *Keyes* v. *School Dist. No. 1*, 576 F. Supp. 1503, 1509-1510 (D. Colo. 1983); cf. *Flores* v. *Huppenthal*, 789 F.3d 994, 1002, 1007 (9th Cir. 2015) (citing *Castaneda*'s framework but misinterpreting its attendant obligations).

[5] "J.A. ___" refers to pages in the parties' joint appendix on appeal. "ECF No. ___" refers to filings on the district court docket sheet.

[6] Under state law, children ages 6 to 21 have the right to a free public education in their school district of residence. J.A. 61. A child who turns 21 during the school year who has not graduated has the right to attend school through the end of that school year. J.A. 61; see also Def.'s Prelim. Inj. Opp'n 1-3, ECF No. 16.

Phoenix Academy (Phoenix), an alternative high school for "underachieving" students that resembles a disciplinary school and is operated by a private contractor. J.A. 56-57; see also J.A. 67-68, 76-84.

As relevant here, plaintiffs allege that McCaskey offers students a markedly different education from that provided at Phoenix, citing gross disparities between the schools with respect to their student-to-teacher ratios, percentages of classes taught by "highly qualified teachers," performance profiles, opportunities for advanced coursework and Advanced Placement testing, students' college readiness, and extracurricular activities. J.A. 56-57, 68-69. Plaintiffs allege that McCaskey also offers a one-year transition program called the International School that is "designed to address the needs of students who are new to the country or the district and who have limited English proficiency." J.A. 56-57. According to plaintiffs, the International School responds to particular challenges that newly arrived immigrant ELs face, offers intensive English classes and "sheltered instruction" in core content areas, involves students' families in their education, and prepares students to enter mainstream classes. J.A. 69-70.

By contrast, Plaintiffs allege that Phoenix lacks sufficient supports to address their language barriers and enable their equal participation in the core curriculum. Among other things, they cite an absence of staff certified to teach English as a Second Language (ESL), as well as a lack of any transitional program

for newcomers, proficiency-based instruction or modifications, "sheltered instruction" or other classroom supports, and testing accommodations. J.A. 56, 70-71. They also allege that Phoenix's "accelerated-credit instructional model," in which students earn credits and graduate at a much faster rate than they could in a regular high school, is not a sound means of educating immigrant ELs. J.A. 67-68, 74. Plaintiffs sought declaratory and injunctive relief directing Lancaster to enroll them at McCaskey and make available to them the full range of curricular and extracurricular programs, including access to the International School and appropriate language instruction and supports. J.A. 57, 96-97.

b. In addition to filing individual and class claims, plaintiffs sought a preliminary injunction to (1) enable their enrollment at McCaskey for the 2016-2017 school year, and (2) ensure their proper assessment for English language proficiency and receipt of an appropriate instructional program. J.A. 174-176; see also J.A. 57. Plaintiffs sought preliminary relief under the EEOA, Title VI, the Due Process Clause, and state law; they did not seek a preliminary ruling on their equal protection claim. J.A. 339 n.9.

As for their EEOA claim, plaintiffs argued that they were likely to succeed on the merits because Lancaster had failed to take "appropriate action" to overcome their language barriers. Pls.' Mot. for Prelim. Inj. Memo. 16-27, ECF No. 7. In particular, plaintiffs argued that placing older immigrant ELs in

Phoenix's accelerated program is not based on sound educational theory and actually impedes their education (in violation of *Castaneda*'s first prong); is not reasonably calculated to implement any such theory, even if sound, because the program lacks the practices, resources, and personnel necessary to effectively assist ELs in overcoming language barriers (in violation of *Castaneda*'s second prong); and has not proven effective (in violation of *Castaneda*'s third prong). Pls.' Mot. for Prelim. Inj. Memo. 18-26, ECF No. 7.

Lancaster opposed the issuance of a preliminary injunction, arguing that it lawfully placed the students at Phoenix based on their age at enrollment and lack of sufficient graduation credits. Def.'s Prelim. Inj. Opp'n 3-4, 6, ECF No. 16.[7]

c. The district court held a five-day preliminary injunction hearing, after which the parties submitted proposed findings of fact and conclusions of law. J.A. 284-355, 360-426. Among other things, plaintiffs cited evidence that Lancaster refused to enroll older ELs at McCaskey for numerous reasons, including: (1) Lancaster's subjective beliefs that older ELs lack sufficient motivation and would rather work than go to school, are unable to timely graduate from McCaskey,

[7] Lancaster further argued that its enrollment decisions are constrained only by orders of the State's Human Relations Commission, and that any such decisions based on a student's LEP status do not amount to national origin discrimination under the EEOA. Def.'s Prelim. Inj. Opp'n 3, 6-7, ECF No. 16. Lancaster has not raised these arguments on appeal with respect to the EEOA ruling below. See Appellant Br. 38-46. Thus, the United States does not address them in this brief.

benefit more from obtaining a high school diploma from Phoenix than receiving a potentially diploma-less education at McCaskey, and present a risk to younger students; (2) budget savings Lancaster reaps by placing older ELs at Phoenix; and (3) concerns about maintaining high graduation rates. J.A. 291-293, 295-300. Plaintiffs also cited evidence that Phoenix's restrictive school environment and accelerated credit recovery program impede their ability to learn because Phoenix's program is premised on attending class and changing antisocial behavior and not on academic proficiency and mastery of core curriculum. J.A. 305-313. They further cited expert testimony and other evidence, including testimony from Lancaster personnel, that Phoenix's model is not based on sound educational theory, is not reasonably calculated to implement that theory, and has not been successful. J.A. 313-328, 334-335 (proposed findings of fact); see also J.A. 339-342 (proposed conclusions of law).

In its post-hearing brief, Lancaster reiterated that plaintiffs could not prove national origin discrimination under the EEOA based on language barriers. J.A. 362-363. It also argued that the evidence did not show that its program was unsound, not effectively implemented, or unsuccessful. J.A. 368-373.

d. On August 26, 2016, the district court issued an opinion granting plaintiffs' motion for a preliminary injunction. J.A. 25-39. It decided plaintiffs' motion on the basis of their EEOA and state law claims, finding a likelihood of

success as to both, and did not reach their Title VI and constitutional claims. J.A. 32. The court stated, and the parties agreed, that for plaintiffs to prevail under the EEOA, they must show "(1) language barriers; (2) defendant's failure to take appropriate action to overcome these barriers; and (3) a resulting impediment to students' equal participation in instructional programs." J.A. 34 (quoting *C.G.* v. *Pennsylvania Dep't of Educ.*, 888 F. Supp. 2d 534, 575 (M.D. Pa. 2012), aff'd, 734 F.3d 229 (3d Cir. 2013)); see also J.A. 340, 369-370.

The court stated that plaintiffs' challenge primarily concerned whether Lancaster was taking "appropriate action" as interpreted by *Castaneda*. J.A. 34-35.[8] It concluded that plaintiffs were likely to succeed under *Castaneda* because they had shown that Phoenix's accelerated model for teaching ELs was neither sound nor successful. J.A. 35-36. The court first found that teaching these ELs in an accelerated credit recovery program was not informed by sound educational theory or based on a legitimate experimental strategy. J.A. 35. The court found plaintiffs' expert "testified convincingly that the 'accelerated recovery program is totally inappropriate for [the plaintiffs]' and that there is 'absolutely no [contrary research.]'" J.A. 35 (alterations in original). It rejected Lancaster's broad defense

[8] As for the other elements of plaintiffs' showing under *C.G.*, the parties did not dispute plaintiffs' language barriers and the court credited plaintiffs' evidence to conclude that their equal participation had been impeded by Lancaster's failure to take appropriate action. J.A. 36 n.5.

that "structured immersion" models generally are considered educationally sound, emphasizing that Lancaster offered no evidence that such techniques address these ELs' language barriers when used in an accelerated credit recovery program. J.A. 35. The court further found that Lancaster could not show that Phoenix's program had been successful – that is, that ELs actually had overcome their language barriers – where it did not evaluate the effectiveness of the program or disaggregate combined high school data to focus specifically on EL student outcomes at each high school. J.A. 35-36; see also J.A. 29.

After finding plaintiffs were likely to succeed on the merits of at least two claims and had satisfied the other preliminary injunction factors (J.A. 36-38), the court directed Lancaster to (1) permit plaintiffs to attend McCaskey; (2) assess their language proficiency and ensure they have appropriate language supports; and (3) provide them equal access to the full range of curricular and extracurricular programs (J.A. 40-41). The court stated that its injunction would apply only to the named plaintiffs pending class certification, yet it urged the parties to apply its order's reasoning to currently similarly situated students. J.A. 30 n.3, 40 n.1.

e. Upon entry of the district court's order, Lancaster filed a timely appeal. J.A. 1-2. It also sought a stay of the preliminary injunction pending appeal, which this Court denied. See Order, Sept. 21, 2016.

SUMMARY OF ARGUMENT

This Court should uphold the district court's determination that plaintiffs established a likelihood of success on the merits of their EEOA claim. In so doing, this Court should adopt *Castaneda*'s three-part framework as the governing legal standard for analyzing EEOA claims challenging the appropriateness of EL programs and services under Section 1703(f). Adopting *Castaneda*'s standards would ensure that local school districts such as Lancaster provide all ELs with appropriate English language instruction, access to the core curriculum, and accompanying classroom supports to enable them to participate equally in the standard instructional program within a reasonable period of time.

Although plaintiffs need only show a defendant's failure to take "appropriate action" under a single prong of *Castaneda* to prevail on a Section 1703(f) claim, the district court here concluded that plaintiffs had shown a likelihood of success under *Castaneda*'s first *and* third prongs. To be sure, under prong one, Lancaster retains wide latitude to choose between educationally sound EL programs. But, as the district court correctly recognized, school districts cannot rely on unsound educational theories under prong one or unsuccessful instructional methods under prong three. To do so would deny ELs the opportunity guaranteed by Section 1703(f) to participate equally in their school districts' instructional programs. The district court reasonably concluded that the accelerated credit recovery program

that Lancaster uses for older, underachieving students is not an educationally sound method of teaching older immigrant ELs (in violation of *Castaneda*'s first prong) and has not been shown to enable these ELs to overcome their language barriers and participate fully in the standard instructional program (in violation of *Castaneda*'s third prong).

Although the district court did not reach *Castaneda*'s second prong, the United States addresses it here to provide this Court a complete analysis of the three-part test for "appropriate action." The record below suggests that, even if Phoenix's accelerated credit recovery program were an educationally sound means of teaching older immigrant ELs, the district court reasonably could find on the merits that the program has not been implemented effectively to enable these ELs to surmount their language barriers, access core content, and participate in the full range of activities offered to their never-EL peers.

ARGUMENT

PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIM THAT THEIR INVOLUNTARY PLACEMENT IN PHOENIX'S ACCELERATED CREDIT RECOVERY PROGRAM VIOLATES SECTION 1703(f) OF THE EEOA

A. This Court Should Apply Castaneda*'s Three-Part Framework To Claims Arising Under Section 1703(f) Of The EEOA*

This Court has yet to announce a governing standard for evaluating alleged violations of Section 1703(f) of the EEOA. This Court should adopt *Castaneda*'s

three-part framework as the method for analyzing "appropriate action" under Section 1703(f). *Castaneda*'s fact-based inquiry into whether a school district's EL programs and services are sound, appropriate, and effective ensures that Section 1703(f)'s language is given practical force by securing for all ELs an equal opportunity to participate in the standard instructional program.

Castaneda interpreted Section 1703(f) to require state and local educational agencies to adopt educationally sound English language programs that allow ELs to attain not only English proficiency but also "parity of participation in the standard instructional program." *Castaneda* v. *Pickard*, 648 F.2d 989, 1011 (5th Cir. 1981). Under *Castaneda*, educational agencies must assist ELs in overcoming their language barriers and also enable them to participate meaningfully in the public education program, including by ensuring their equal access to core curriculum and other programs. See *ibid.* As the Supreme Court aptly recognized in *Lau* v. *Nichols*, "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." 414 U.S. 563, 566 (1974). The Court explained that it makes "a mockery of public education" to "[i]mpos[e] a requirement that, before a child can effectively participate in the educational program, he must already have acquired * * * basic [English] skills," stating that "those who do not understand English are

certain to find their classroom experiences wholly incomprehensible and in no way meaningful." *Ibid.* *Castaneda*'s interpretation of "appropriate action" responds to Congress's and the Supreme Court's concern that ELs receive an equal and meaningful public education by requiring school districts to: (1) adopt sound EL programs; (2) dedicate adequate personnel and resources to fully implement those programs, thereby enabling ELs to overcome language barriers and access core content; and (3) evaluate the programs to ensure ELs' actual success.

Consistent with *Castaneda*'s three-part framework and attendant obligations, the United States has long interpreted Section 1703(f) of the EEOA to require state and local educational agencies to ensure that all students have equal access to a high-quality education and the opportunity to achieve their full academic potential. The United States considers the following program elements, among others, in determining a school district's compliance with Section 1703(f):

- Identify and assess students in need of English language assistance in a timely, valid, and reliable manner;
- Provide ELs with a language assistance program that is educationally sound and has proven successful;
- Sufficiently staff and support the chosen language assistance programs;
- Ensure ELs have equal opportunities to participate in all curricular and extracurricular activities, including the core curriculum, specialized and advanced courses and programs, graduation requirements, sports, and clubs;
- Avoid unnecessary segregation of ELs;

- Monitor and evaluate ELs in language assistance programs to ensure they are acquiring English proficiency and grade level core content;

- Exit ELs from language assistance programs when they are proficient in English and monitor their progress to ensure they were not prematurely exited and that any academic deficits they incurred while in language assistance programs have been remedied; and

- Evaluate the effectiveness of language assistance programs to ensure ELs acquire English proficiency and that each program is reasonably calculated to allow ELs to attain parity of participation in the standard instructional program within a reasonable period of time.

DCL 8-9 (outlining these elements), 10-40 (further explaining these elements); see also *Castaneda*, 648 F.2d at 1009-1014. Such comprehensive examination of "appropriate action," as required under *Castaneda*, ensures that school districts provide ELs effective and educationally sound language instruction that actually enables them to participate equally in the standard instructional program within a reasonable period of time.

B. The District Court Properly Applied Castaneda *In Finding Plaintiffs Likely To Succeed On The Merits Of Their EEOA Claim*

Castaneda's framework for analyzing Section 1703(f) claims ensures that school districts do not deny ELs an opportunity to participate equally and fully in the standard instructional program, whether by denying them enrollment outright or by placing them in instructional settings that are educationally unsound, inadequate, or unresponsive to their needs. To find a violation of Section 1703(f), a court need only determine that a state or local educational agency has failed to

take "appropriate action" under one of *Castaneda*'s three prongs. The district court here correctly analyzed plaintiffs' claim to conclude that plaintiffs are likely to succeed under *Castaneda*'s first and third prongs because Lancaster's EL program at Phoenix is neither sound in theory nor successful in fact for older immigrant ELs. The record evidence further suggests that, even if the EL program were educationally sound, the district court reasonably could find on the merits that the program does not constitute "appropriate action" under *Castaneda*'s second prong because it has not been implemented effectively to assist these ELs to overcome their language barriers and achieve equal participation in the standard program.

1. Lancaster primarily disputes plaintiffs' likelihood of success by invoking its discretion to place students among district schools as it sees fit – namely, by requiring ELs who are allegedly overage and lacking sufficient graduation credits to attend Phoenix. Appellant Br. 39-41. In Lancaster's view, plaintiffs are invoking the EEOA to demand enrollment at McCaskey simply because they want to attend what they perceive to be a "*better program*." Appellant Br. 40. But Lancaster misinterprets both the basis for the district court's decision and the discretion afforded it under *Castaneda*'s first prong.

To be sure, educational authorities retain substantial latitude under the EEOA to develop and adopt the types of language remediation programs that will

be most responsive to their students' needs. See *Castaneda*, 648 F.2d at 1008-1009; see also *Horne* v. *Flores*, 557 U.S. 433, 454 (2009). *Castaneda* recognized, however, that "by including an obligation to address the problem of language barriers in the EEOA and granting * * * a private right of action to enforce that obligation," Congress must have intended to ensure that school districts make "a genuine and good faith effort, consistent with local circumstances and resources, to remedy the language deficiencies of their students and deliberately placed on federal courts the difficult responsibility of determining whether that obligation had been met." 648 F.2d at 1009. In discharging that duty, the Fifth Circuit explained that examining the soundness of an educational theory "is not to be done with any eye toward discerning the relative merits of sound but competing bodies of expert educational opinion" but rather "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." *Ibid.*

Here, the district court found on the basis of unrebutted expert evidence and testimony by school personnel that Phoenix's accelerated instructional program is unsound when applied to these older immigrant ELs. J.A. 35. The court did not find, as Lancaster contends, that certain EL programs and techniques – such as structured English immersion or sheltered instruction – are generally considered

unsound. Appellant Br. 41-44. Rather, the district court held that there was no sound basis for placing these ELs in Phoenix's accelerated credit recovery program, which seeks to have them learn English and master core content at twice the speed of Lancaster's standard instructional program. J.A. 28, 30, 35. By so finding, the district court did not supplant Lancaster's authority to decide between various theories that experts deem sound – for example, bilingual education versus structured English immersion or simultaneous versus sequential instruction of English language and core content. See *Castaneda*, 648 F.2d at 1008-1009, 1011; see also DCL 12 & n.35. Instead, it simply sought to ensure that Lancaster had chosen an English language instructional model that was educationally sound for these older ELs, see *Castaneda*, 648 F.2d at 1009, and reasonably designed to enable their equal participation in the standard instructional program, see *id.* at 1011.

Significantly, the fact that school districts retain a "broad" spectrum of permissible instructional choices under Section 1703(f) "does not mean that the spectrum is without discernible boundaries." *Gomez* v. *Illinois State Bd. of Educ.*, 811 F.2d 1030, 1041 (7th Cir. 1987) (quoting *Achacoso-Sanchez* v. *INS*, 779 F.2d 1260, 1265 (7th Cir. 1985)). Although the term "appropriate action" in Section 1703(f) must incorporate "the EEOA's allocation of responsibilities between the courts and the schools," the duty remains on federal courts "to interpret and

enforce congressional enactments." *Ibid.* Accordingly, courts "cannot accord such sweeping deference to [school districts] that judicial review becomes in practice judicial abdication." *Ibid.* Here, the district court did not misinterpret or misapply *Castaneda* in finding it unsound to educate these older immigrant ELs in an accelerated credit recovery model that elevates classroom attendance, good behavior, and the formal receipt of a diploma over their actual mastery of the English language and core content.

2. The district court also correctly determined that Lancaster's program at Phoenix fails to constitute "appropriate action" under *Castaneda*'s third prong. J.A. 35-36. Despite its obligations under *Castaneda*, Lancaster has not even evaluated whether – let alone demonstrated that – the EL program at Phoenix has, in practice, enabled these ELs to overcome their language barriers and attain equal participation in the standard instructional program.

In *Castaneda*, the Fifth Circuit emphasized that "a determination that a school system has adopted a sound [EL] program * * * 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." 648 F.2d at 1010. Rather, if, "after being employed for a period of time sufficient to give the plan a legitimate trial," the program fails to produce results indicating that students are actually surmounting their language barriers, then it no longer constitutes "appropriate

action." *Ibid.* The Fifth Circuit explained that Congress did not intend that schools "would be free to persist in a policy which, although it may have been 'appropriate' when adopted, * * * has, in practice, proved a failure." *Ibid.*; see also *Gomez*, 811 F.2d at 1042 (stating that an otherwise legitimate program may violate the EEOA "either because the theory upon which it was based did not ultimately provide the desired results or because the authorities failed to adapt the program to the demands that arose in its application"); DCL 35-37 (explaining that disaggregated and longitudinal performance data enables local school districts to evaluate the effectiveness of their chosen EL program over time).

Here, the district court properly applied *Castaneda*'s third prong to conclude that Phoenix's program has been unsuccessful. J.A. 35-36. The district court found that, although Phoenix issued one of the named plaintiffs a high school diploma under its accelerated program, that student displayed little actual English proficiency. J.A. 30 & n.2. The district court further found that Lancaster does not evaluate the effectiveness of Phoenix's EL program despite having the raw data available to do so. J.A. 29; see also J.A. 35-36. Significantly, Lancaster does not assert before this Court that it evaluates the success of Phoenix's EL program or disaggregates combined high school data to ensure that the accelerated credit recovery program is working effectively to educate older ELs. See Appellant Br. 44-45. Based on the record evidence, the district court did not clearly err in

crediting the testimony of plaintiffs' expert and finding that these older immigrant ELs are not actually overcoming language barriers and achieving parity of participation in Lancaster's standard instructional program. J.A. 36.

3. The district court did not reach (and did not need to reach) *Castaneda*'s second prong – namely, whether the programs Lancaster adopted at Phoenix are "reasonably calculated to implement effectively" the chosen educational theory, *Castaneda*, 648 F.2d at 1010. The record evidence indicates that the district court reasonably could find that Lancaster also has failed to take "appropriate action" under *Castaneda*'s second prong because its EL program at Phoenix lacks adequate personnel and resources to assist these students in surmounting their language barriers and accessing core content.

A school system cannot be said to have taken "appropriate action" under Section 1703(f) where, "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." *Castaneda*, 648 F.2d at 1010; see also *Gomez*, 811 F.2d at 1042 ("[P]ractical effect must be given to the pedagogical method adopted."). *Castaneda* explained that "[i]n order to be able ultimately to participate equally with the students who entered school with an English language background," ELs "will have to * * * recoup any deficits which they may incur in other areas of the curriculum as a result of th[e] extra expenditure of time on

English language development." 648 F.2d at 1011. The Fifth Circuit thus reasoned that Section 1703(f) "impose[s] on educational agencies not only an obligation to overcome the direct obstacle to learning which the language barrier itself poses, but also a duty to provide limited English speaking ability students with assistance in other areas of the curriculum where their equal participation may be impaired" because of their limited English proficiency. *Ibid.* Otherwise, ELs face a "lingering and indirect impediment" to their equal participation in the standard instructional program. *Ibid.*

Here, the record evidence indicates and ultimately could support a finding by the district court that Phoenix's program may not be reasonably calculated to enable ELs to acquire English language skills and other academic content. In particular, students apparently receive only one 80-minute ESL class per day regardless of their English proficiency; do not have certified ESL teachers; lack meaningful modifications and supports in core content areas; are not provided testing accommodations; and are not assessed periodically for English proficiency. J.A. 315-326. Accordingly, Lancaster's EL program at Phoenix lacks many of the elements that *Castaneda* found and the United States considers key for a program to be reasonably calculated to enable ELs to attain both English proficiency and parity of participation within a reasonable period of time. See *Castaneda*, 648 F.2d at 1012-1013 (emphasizing the importance of qualified teachers to the

adequate implementation of a chosen theory); *id.* at 1013-1014 (examining the adequacy of testing and evaluation of ELs); DCL 12-24, 32-35 (explaining key elements of an adequate EL program); see also *Schneiderman* v. *Utica City Sch. Dist.*, No. 6:15-CV-1364, 2016 WL 1555399, at *1-3, *10 (N.D.N.Y. Apr. 18, 2016) (finding EEOA claim viable where school district diverted older ELs into "educational dead-ends" that lacked adequate content instruction and extracurricular activities).

CONCLUSION

This Court should affirm the district court's holding that plaintiffs demonstrated a likelihood of success on the merits of their EEOA claim.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Rules 28.3(d) and 46.1(a), I hereby certify that I am exempt from the Third Circuit's bar admission requirement as counsel to the United States.

s/ Erin H. Flynn
ERIN H. FLYNN
Attorney

Date: October 24, 2016

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Local Rule 31.1(c), I hereby certify that the foregoing brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman, 14-point font.

I further certify that the foregoing brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 5599 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Pursuant to Local Rule 31.1(c), I hereby certify that the text of the electronic brief is identical to the text in the paper copies of this brief. I further certify that a virus detection program (Symantec™ Endpoint Protection (version 12.1.6)) has been run on the electronic file and that no virus was detected.

s/ Erin H. Flynn
ERIN H. FLYNN
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the Appellate CM/ECF system. I further certify that on October 24, 2016, ten (10) paper copies identical to the brief filed electronically were sent to the Clerk of the Court by first-class mail. All case participants who are registered CM/ECF users will be served by the Appellate CM/ECF system.

I further certify that on October 24, 2016, one paper copy of the foregoing brief was sent to the following counsel by first-class mail, postage prepaid:

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s/ Erin H. Flynn
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ATTACHMENT 1

U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

January 7, 2015

Dear Colleague:

Forty years ago, the Supreme Court of the United States determined that in order for public schools to comply with their legal obligations under Title VI of the Civil Rights Act of 1964 (Title VI), they must take affirmative steps to ensure that students with limited English proficiency (LEP) can meaningfully participate in their educational programs and services.[1] That same year, Congress enacted the Equal Educational Opportunities Act (EEOA), which confirmed that public schools and State educational agencies (SEAs) must act to overcome language barriers that impede equal participation by students in their instructional programs.[2]

Ensuring that SEAs and school districts are equipped with the tools and resources to meet their responsibilities to LEP students, who are now more commonly referred to as English Learner (EL) students or English Language Learner students, is as important today as it was then. EL students are now enrolled in nearly three out of every four public schools in the nation, they constitute nine percent of all public school students, and their numbers are steadily increasing.[3] It is crucial to the future of our nation that these students, and all students, have equal access to a high-quality education and the opportunity to achieve their full academic potential. We applaud those working to ensure equal educational opportunities for EL students, as well as the many schools and communities creating programs that recognize the heritage languages of EL students as valuable assets to preserve.

The Office for Civil Rights (OCR) at the U.S. Department of Education (ED) and the Civil Rights Division at the U.S. Department of Justice (DOJ) share authority for enforcing Title VI in the education context. DOJ is also responsible for enforcing the EEOA. (In the enclosed guidance, Title VI and the EEOA will be referred to as "the civil rights laws.") In addition, ED administers the English Language Acquisition, Language Enhancement, and Academic Achievement Act, also known as Title III, Part A of the Elementary and Secondary Education Act of 1965, as amended (ESEA) (Title III).[4] Under Title III, ED awards grants to SEAs, which, in turn, award Federal funds through subgrants to school districts in order to improve the

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[1] *Lau v. Nichols*, 414 U.S. 563 (1974); 42 U.S.C. § 2000d to d-7 (prohibiting race, color, and national origin discrimination in any program or activity receiving Federal financial assistance).

[2] Pub. L. No. 93-380, § 204(f), 88 Stat. 484, 515 (1974) (codified at 20 U.S.C. § 1703(f)).

[3] U.S. Department of Education, National Center for Education Statistics, NCES 2013-312, *Characteristics of Public and Private Elementary and Secondary Schools in the United States: Results From the 2011-12 Schools and Staffing Survey*, at 9 (Table 2) (Aug. 2013); U.S. Department of Education, National Center for Education Statistics, NCES 2014-083, *The Condition of Education 2014*, at 52 (Indicator 12) (May 2014).

[4] 20 U.S.C. §§ 6801-6871.

education of EL students so that they learn English and meet challenging State academic content and achievement standards.[5]

The Departments are issuing the enclosed joint guidance to assist SEAs, school districts, and all public schools in meeting their legal obligations to ensure that EL students can participate meaningfully and equally in educational programs and services.[6] This guidance provides an outline of the legal obligations of SEAs and school districts to EL students under the civil rights laws.[7] Additionally, the guidance discusses compliance issues that frequently arise in OCR and DOJ investigations under Title VI and the EEOA and offers approaches that SEAs and school districts may use to meet their Federal obligations to EL students. The guidance also includes discussion of how SEAs and school districts can implement their Title III grants and subgrants in a manner consistent with these civil rights obligations. Finally, the guidance discusses the Federal obligation to ensure that LEP parents and guardians have meaningful access to district- and school-related information. We hope that you will find this integrated guidance useful as you strive to provide EL students and LEP parents equal access to your instructional programs.

As we celebrate the fortieth anniversaries of *Lau* and the EEOA and the fiftieth anniversary of Title VI, we are reminded of how much progress has been achieved since these milestones and how much work remains to be done. We look forward to continuing this progress with you.

Sincerely,

/s/
Catherine E. Lhamon
Assistant Secretary for Civil Rights
U.S. Department of Education

/s/
Vanita Gupta
Acting Assistant Attorney General for Civil Rights
U.S. Department of Justice

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[5] 20 U.S.C. §§ 6821(a), 6825(a); *see also* 34 C.F.R. § 200.1(b), (c) (explaining distinction between content standards and achievement standards).

[6] The terms "program," "programs," "programs and services," and "programs and activities" are used in a colloquial sense and are not meant to invoke the meaning of the terms "program" or "program or activity" as defined by the Civil Rights Restoration Act of 1987 (CRRA). Under the CRRA, which amended Title VI, Title IX of the Education Amendments of 1972 (Title IX), and Section 504 of the Rehabilitation Act of 1973 (Section 504), the term "program or activity" and the term "program," in the context of a school district, mean all of the operations of a school district. 42 U.S.C. § 2000d-4a(2)(B); 20 U.S.C. § 1687(2)(B); 29 U.S.C. § 794(b)(2)(B).

[7] As applied to Title VI, this guidance is consistent with and clarifies previous Title VI guidance in this area including: U.S. Department of Health, Education, and Welfare, Office for Civil Rights, *Identification of Discrimination and Denial of Services on the Basis of National Origin* (May 25, 1970), reprinted in 35 Fed. Reg. 11,595 (July 18, 1970) (*1970 OCR Guidance*) (the great majority of programs and functions assigned to ED at its creation in 1980 were transferred from HEW); OCR, *The Office for Civil Rights' Title VI Language Minority Compliance Procedures* (December 1985) (*1985 OCR Guidance*); and OCR, *Policy Update on Schools' Obligations Toward National-Origin Minority Students with Limited-English Proficiency* (September 1991) (*1991 OCR Guidance*). These guidance documents are available at http://www2.ed.gov/about/offices/list/ocr/ellresources.html. This guidance clarifies these documents and does so consistent with legal developments since 1991. When evaluating compliance under the EEOA, DOJ applies EEOA case law as well as the standards and procedures identified in this guidance, which are similar to those identified in OCR's previous Title VI guidance.

Notice of Language Assistance

Notice of Language Assistance: If you have difficulty understanding English, you may, free of charge, request language assistance services for this Department information by calling 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), or email us at: Ed.Language.Assistance@ed.gov.

Aviso a personas con dominio limitado del idioma inglés: Si usted tiene alguna dificultad en entender el idioma inglés, puede, sin costo alguno, solicitar asistencia lingüística con respecto a esta información llamando al 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o envíe un mensaje de correo electrónico a: Ed.Language.Assistance@ed.gov.

給英語能力有限人士的通知： 如果您不懂英語， 或者使用英语有困难， 您可以要求獲得向大眾提供的語言協助服務，幫助您理解教育部資訊。這些語言協助服務均可免費提供。如果您需要有關口譯或筆譯服務的詳細資訊， 請致電 1-800-USA-LEARN (1-800-872-5327) (聽語障人士專線：1-800-877-8339),或電郵: Ed.Language.Assistance@ed.gov.

Thông báo dành cho những người có khả năng Anh ngữ hạn chế: Nếu quý vị gặp khó khăn trong việc hiểu Anh ngữ thì quý vị có thể yêu cầu các dịch vụ hỗ trợ ngôn ngữ cho các tin tức của Bộ dành cho công chúng. Các dịch vụ hỗ trợ ngôn ngữ này đều miễn phí. Nếu quý vị muốn biết thêm chi tiết về các dịch vụ phiên dịch hay thông dịch, xin vui lòng gọi số 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), hoặc email: Ed.Language.Assistance@ed.gov.

영어 미숙자를 위한 공고: 영어를 이해하는 데 어려움이 있으신 경우, 교육부 정보 센터에 일반인 대상 언어 지원 서비스를 요청하실 수 있습니다. 이러한 언어 지원 서비스는 무료로 제공됩니다. 통역이나 번역 서비스에 대해 자세한 정보가 필요하신 경우, 전화번호 1-800-USA-LEARN (1-800-872-5327) 또는 청각 장애인용 전화번호 1-800-877-8339 또는 이메일주소 Ed.Language.Assistance@ed.gov 으로 연락하시기 바랍니다.

Paunawa sa mga Taong Limitado ang Kaalaman sa English: Kung nahihirapan kayong makaintindi ng English, maaari kayong humingi ng tulong ukol dito sa inpormasyon ng Kagawaran mula sa nagbibigay ng serbisyo na pagtulong kaugnay ng wika. Ang serbisyo na pagtulong kaugnay ng wika ay libre. Kung kailangan ninyo ng dagdag na impormasyon tungkol sa mga serbisyo kaugnay ng pagpapaliwanag o pagsasalin, mangyari lamang tumawag sa 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o mag-email sa: Ed.Language.Assistance@ed.gov.

Уведомление для лиц с ограниченным знанием английского языка: Если вы испытываете трудности в понимании английского языка, вы можете попросить, чтобы вам предоставили перевод информации, которую Министерство Образования доводит до всеобщего сведения. Этот перевод предоставляется бесплатно. Если вы хотите получить более подробную информацию об услугах устного и письменного перевода, звоните по телефону 1-800-USA-LEARN (1-800-872-5327) (служба для слабослышащих: 1-800-877-8339), или отправьте сообщение по адресу: Ed.Language.Assistance@ed.gov.

Dear Colleague Letter: English Learner Students and Limited English Proficient Parents

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[8] The Departments have determined that this document is a "significant guidance document" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), *available at* www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf. This and other policy guidance is issued to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that the Departments enforce. The Departments' legal authority is based on those laws and regulations. This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how the Departments evaluate whether covered entities are complying with their legal obligations. If you are interested in commenting on this guidance, please send an e-mail with your comments to OCR@ed.gov and education@usdoj.gov, or write to the following addresses: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, D.C. 20202, and the Educational Opportunities Section, Civil Rights Division, U.S. Department of Justice, 950 Pennsylvania Avenue, NW, PHB, Washington, D.C. 20530.

I. State Educational Agency and School District Obligations to EL Students

SEAs and school districts share an obligation to ensure that their EL programs and activities comply with the civil rights laws and applicable grant requirements.[9] Title VI prohibits recipients of Federal financial assistance, including SEAs and school districts, from discriminating on the basis of race, color, or national origin.[10] Title VI's prohibition on national origin discrimination requires SEAs and school districts to take "affirmative steps" to address language barriers so that EL students may participate meaningfully in schools' educational programs.[11]

The EEOA requires SEAs and school districts to take "appropriate action to overcome language barriers that impede equal participation by [their] students in [their] instructional programs."[12]

In determining whether a school district's programs for EL students comply with the civil rights laws,[13] the Departments apply the standards established by the United States Court of Appeals

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[9] *See* Department of Education Title VI regulations: 34 C.F.R. § 100.4(b) (every application by a State or State agency for continuing Federal financial assistance "shall . . . provide or be accompanied by provision for such methods of administration for the program as are found by the responsible Departmental official to give reasonable assurance that the applicant and all recipients of Federal financial assistance under such program will comply with all requirements imposed by or pursuant to this [Title VI] regulation"); *id*.§ 80.40(a) ("[g]rantees must monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements and that performance goals are being achieved."); *id*. §§ 76.500, 76.770 (requiring SEAs to have procedures "necessary to ensure compliance with applicable statutes and regulations," including non-discrimination provisions of Title VI). *See also* Department of Justice Title VI regulations: 28 C.F.R. § 42.105(a)(1) ("[e]very application for Federal financial assistance [to carry out a program] to which this subpart applies, and every application for Federal financial assistance to provide a facility shall … contain or be accompanied by an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this subpart."); *id.* § 42.410 ("[e]ach state agency administering a continuing program which receives Federal financial assistance shall be required to establish a Title VI compliance program for itself and other recipients which obtain Federal assistance through it. The Federal agencies shall require that such state compliance programs provide for the assignment of Title VI responsibilities to designated state personnel and comply with the minimum standards established in this subpart for Federal agencies, including the maintenance of records necessary to permit Federal officials to determine the Title VI compliance of the state agencies and the sub-recipient.").

[10] Any Federal agency, such as the Department of Education or Justice, that provides Federal funds to an SEA or school district may initiate a compliance review to ensure compliance with, or investigate a complaint alleging a violation of, Title VI and its implementing regulations. DOJ also may initiate a Title VI suit if, after notice of a violation from a Federal funding agency, a recipient of Federal funds fails to resolve noncompliance with Title VI voluntarily and the agency refers the case to DOJ. Furthermore, DOJ coordinates enforcement of Title VI across Federal agencies and can participate in private litigation involving Title VI.

[11] *Lau*, 414 U.S. at 566-67 (affirming *1970 OCR Guidance* and stating that where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, Title VI requires that the district take affirmative steps to rectify the language deficiency to open its instructional program to these students); 34 C.F.R. §100.3(b)(1), (2).

[12] 20 U.S.C. § 1703(f) ("No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by. . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs"). After providing notice of an EEOA violation, DOJ may institute a civil action if an SEA or school district has not taken "appropriate remedial action" within a reasonable time. *Id*. §§ 1706, 1710. DOJ also has the authority to intervene in private EEOA cases. *Id*. § 1709.

for the Fifth Circuit more than 30 years ago in *Castañeda v. Pickard*.[14] Specifically, the Departments consider whether:

(1) The educational theory underlying the language assistance program is recognized as sound by some experts in the field or is considered a legitimate experimental strategy;

(2) The program and practices used by the school system are reasonably calculated to implement effectively the educational theory adopted by the school; and

(3) The program succeeds, after a legitimate trial, in producing results indicating that students' language barriers are actually being overcome within a reasonable period of time.

The Departments also apply *Castañeda*'s standards when evaluating an SEA's compliance with the civil rights laws. Even if an SEA does not provide educational services directly to EL students, SEAs have a responsibility under the civil rights laws to provide appropriate guidance, monitoring, and oversight to school districts to ensure that EL students receive appropriate EL services.[15] For example, to the extent that SEAs select EL instructional program models that their school districts must implement or otherwise establish requirements or guidelines for such programs and related practices, these programs, requirements, or guidelines must also comply with the *Castañeda* requirements.

In addition, Title III requires SEAs and school districts that receive funding under Title III subgrants to provide high-quality professional development programs and implement high-quality language instruction education programs, both based on scientifically-based research, that will enable EL students to speak, listen, read, and write English and meet challenging State

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[13] Throughout this guidance, "school district" or "district" includes any local educational agency (LEA) that is a recipient of Federal financial assistance directly from ED or indirectly through an SEA or LEA, including public school districts, public charter schools, and public alternative schools. 42 U.S.C. § 2000d-4a (incorporating 20 U.S.C. §7801(26)). "School district" and SEA also include, respectively, any LEA or SEA as defined by the EEOA. 20 U.S.C. § 1720(a), (b) (incorporating 20 U.S.C. §7801(26), (41)). In some cases, an SEA and LEA may be the same entity. (Hawaii and Puerto Rico are two examples.)

[14] 648 F.2d 989 (5th Cir. 1981); *see United States v. Texas*, 601 F.3d 354, 366 (5th Cir. 2010) (reaffirming and applying the *Castañeda* test); *see 1991 OCR Guidance* ("In view of the similarity between the EEOA and the policy established in the 1970 OCR memorandum, in 1985 OCR adopted the *Castañeda* standard for determining whether recipients' programs for LEP students complied with the Title VI regulation.").

[15] *See, e.g.*, *Horne v. Flores*, 557 U.S. 433, 439 (2009) ("The question at issue in these cases is not whether [the State of] Arizona must take 'appropriate action' to overcome the language barriers that impede ELL students. Of course it must."); *Texas*, 601 F.3d at 364-65 (applying EEOA to SEA); *United States v. City of Yonkers*, 96 F.3d 600, 620 (2d Cir. 1996) ("The EEOA also imposes on states the obligation to enforce the equal-educational-opportunity obligations of local educational agencies [LEAs]."); *Gomez v. Illinois State Bd. of Educ.*, 811 F.2d 1030, 1042-43 (7th Cir. 1987) (holding that SEAs set "general guidelines in establishing and assuring the implementation of the state's [EL] programs" and that "§ 1703(f) requires that [SEAs], as well as [LEAs]. . .ensure that the needs of LEP children are met"); *Idaho Migrant Council v. Bd. of Educ.*, 647 F.2d 69, 71 (9th Cir. 1981) (holding that an SEA "has an obligation to supervise the local districts to ensure compliance" with the EEOA); *see also supra* note 9 (quoting regulations regarding SEAs' obligations as recipients of any Federal funds to oversee subgrantees).

standards.[16] Not all school districts that enroll EL students receive such subgrants from their SEA under Title III, Part A. Some school districts have too small a population of EL students to meet the minimum subgrant requirement and are not members of a consortium of districts that is receiving a subgrant.[17] Nonetheless, several key school district requirements for recipients under Title III that are discussed in this letter are also required by Title I of the ESEA, which has no such minimum subgrant requirement.[18]

Title III, Part A funds must be used to supplement other Federal, State, and local public funds that would have been expended absent such funds.[19] Because the civil rights laws require SEAs and school districts to take appropriate action to overcome language barriers for EL students, Title III, Part A funds may not be used to fund the activities chosen to implement an SEA's or school district's civil rights obligations. Thus, SEAs and school districts can use these funds only for activities beyond those activities necessary to comply with Federal civil rights obligations. It is important to remember, however, that the legal obligations of an SEA and a school district under Title VI and the EEOA are independent of the amount or type of State or Federal funding received. Thus, for example, any change to State funding dedicated to EL programs and services, including State limitations on funding after a child has received EL services for a specified period of time, does not change an SEA's or school district's Federal civil rights obligations to EL students.

Title III also contains its own non-discrimination provision, which provides that a student shall not be admitted to, or excluded from, any federally assisted education program on the basis of a surname or language-minority status.[20] In addition, SEAs and school districts that receive funding under Title III are required to regularly determine the effectiveness of a school district's program in assisting EL students to attain English proficiency and meet challenging State

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[16] 20 U.S.C. §§ 6823(b)(2), 6825(c)(1),(2), 6826(d)(4). Currently, all SEAs receive Federal funds under Title III, Part A because they all have an approved plan. *See id.* §§ 6821, 6823. SEAs may reserve no more than 5 percent of the funds for certain State-level activities, and no more than 15 percent of the funds for subgrants to school districts that have experienced a significant increase in the number or percentage of immigrant children. *Id*. §§ 6821(b)(2), 6824(d)(1). When referring to Title III, Part A subgrants to school districts, this guidance is referring to the portion of Federal funds (which must be at least 80 percent of the total) that must be provided to school districts based on the population of EL students in each district. *Id*. § 6824(a). For more information on Title III grants, see http://www2.ed.gov/programs/sfgp/index.html.

[17] 20 U.S.C. §§ 6824(b), 6871.

[18] This includes the requirement that school districts annually assess EL students for English proficiency, *id*. §§ 6311(b)(7) (Title I), 6823(b)(3)(C) (Title III); the provision of specific written notices for parents of EL students, *id*. §§ 6312(g)(1)-(3) (Title I), 7012(a)-(d) (Title III); prohibitions on discrimination on the basis of surname and language-minority status, *id.* §§ 6312(g)(5)(Title I), 7012(f) (Title III); and provisions regarding adequate yearly progress, *id.* §§ 6311(b)(2)(C)(v)(II)(dd), 6311(b)(3)(C)(ix)(III) (Title I), 6842(a)(3)(A)(iii) (Title III).

[19] 20 U.S.C. § 6825(g).

[20] *Id.* §§ 6312(g)(5) (Title I), 7012(f) (Title III).

academic content and student academic achievement standards.[21] SEAs have a responsibility to assess whether and ensure that school districts receiving Title III subgrants comply with all Title III requirements.[22]

II. Common Civil Rights Issues

Through OCR's and DOJ's enforcement work, the Departments have identified several areas that frequently result in noncompliance by school districts and that SEAs at times encounter while attempting to meet their Federal obligations to EL students. This letter offers guidance on these issues and explains how the Departments would evaluate whether SEAs and school districts met their shared obligations to:

A. *Identify and assess EL students in need of language assistance in a timely, valid, and reliable manner;*

B. *Provide EL students with a language assistance program that is educationally sound and proven successful;*

C. *Sufficiently staff and support the language assistance programs for EL students;*

D. *Ensure EL students have equal opportunities to meaningfully participate in all curricular and extracurricular activities, including the core curriculum, graduation requirements, specialized and advanced courses and programs, sports, and clubs;*

E. *Avoid unnecessary segregation of EL students;*

F. *Ensure that EL students with disabilities under the Individuals with Disabilities Education Act (IDEA) or Section 504 are evaluated in a timely and appropriate manner for special education and disability-related services and that their language needs are considered in evaluations and delivery of services;*

G. *Meet the needs of EL students who opt out of language assistance programs;*

H. *Monitor and evaluate EL students in language assistance programs to ensure their progress with respect to acquiring English proficiency and grade level core content, exit EL students from language assistance programs when they are proficient in English, and monitor exited students to ensure they were not prematurely exited and that any academic deficits incurred in the language assistance program have been remedied;*

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[21] *Id.* § 6841(b)(2) (requiring every school district receiving Title III, Part A funds to engage in a self-evaluation every two years and provide it to the SEA to determine the effectiveness of and improve the LEA's programs and activities).

[22] *Id.* §§ 6823(b)(3)(C) & (D), (b)(5), 6841(b)(3), 6842; *see also supra* note 9 (quoting regulations regarding SEA's obligations as recipient of any Federal funds to oversee subgrantees).

I. *Evaluate the effectiveness of a school district's language assistance program(s) to ensure that EL students in each program acquire English proficiency and that each program was reasonably calculated to allow EL students to attain parity of participation in the standard instructional program within a reasonable period of time;*[23] *and*

J. *Ensure meaningful communication with LEP parents.*

This guidance also provides a non-exhaustive set of approaches that school districts may take in order to meet their civil rights obligations to EL students. In most cases, however, there is more than one way to comply with the Federal obligations outlined in this guidance.

In addition to the common civil rights issues discussed in this guidance with respect to EL student programs, Federal law also prohibits all forms of race, color, national origin, sex, disability, and religious discrimination against EL students. For example, among other requirements, SEAs, school districts, and schools:

- Must enroll all students regardless of the students' or their parents' or guardians' actual or perceived citizenship or immigration status;[24]
- Must protect students from discriminatory harassment on the basis of race, color, national origin (including EL status), sex, disability, or religion;[25]
- Must not prohibit national origin-minority group students from speaking in their primary language during the school day without an educational justification;[26] and
- Must not retaliate, intimidate, threaten, coerce, or in any way discriminate against any individual for bringing civil rights concerns to a school's attention or for testifying or participating in any manner in a school, OCR, or DOJ investigation or proceeding.[27]

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[23] *Castañeda*, 648 F.2d at 1011; *see* discussion *infra* in Part II. I, "Evaluating the Effectiveness of a District's EL Program."

[24] More information about the applicable legal standards regarding student enrollment practices is included in the Departments' *Dear Colleague Letter: School Enrollment Procedures* (May 8, 2014), *available at* www.ed.gov/ocr/letters/colleague-201405.pdf.

[25] More information about the legal obligations to address discriminatory harassment under the Federal civil rights laws is available in OCR's *Dear Colleague Letter: Harassment and Bullying* (Oct. 26, 2010), *available at* www.ed.gov/ocr/letters/colleague-201010.pdf. DOJ shares enforcement authority with OCR for enforcing these laws and can also address harassment on the basis of religion under Title IV of the Civil Rights Act of 1964.

[26] *See, e.g.*, *Rubio v. Turner Unified Sch. Dist. No. 402*, 453 F. Supp. 2d 1295 (D. Kan. 2006) (Title VI claim was stated by a school's prohibition on speaking Spanish). EL students, like many others, often will feel most comfortable speaking in their primary language, especially during non-academic times or while in the cafeteria or hallways.

[27] More information about the legal obligations concerning the prohibition against retaliation under the Federal civil rights laws is available in the Department of Education's *Dear Colleague Letter: Retaliation* (Apr. 24, 2013) *available at* www.ed.gov/ocr/letters/colleague-201304.html. *See also* 34 C.F.R. § 100.7(e) (Title VI); 34 C.F.R. § 106.71 (Title IX) (incorporating 34 C.F.R. §100.7(e) by reference); 34 C.F.R. § 104.61 (Section 504)

Although these issues are outside the primary focus of this guidance, the Departments strongly encourage SEAs and school districts to review these and other non-discrimination requirements to ensure that EL students, and all students, have access to equal educational opportunities.

A. Identifying and Assessing All Potential EL Students

One of the most critical "affirmative steps" and "appropriate action[s]" that school districts must take to open instructional programs to EL students and to address their limited English proficiency is to first identify EL students in need of language assistance services in a timely manner.[28] School districts must provide notices within thirty days from the beginning of the school year to all parents of EL students regarding the EL student's identification and placement in a language instruction educational program.[29] School districts must, to the extent practicable, translate such notices in a language that the parent can understand.[30] If written translations are not practicable, school districts must offer LEP parents free oral interpretation of the written information.[31] In light of these obligations and the duty to timely identify all EL students, school districts will need to assess potential EL students' English proficiency and identify non-proficient students as EL as soon as practicable and well before the thirty-day notice deadline.

Most school districts use a home language survey (HLS) at the time of enrollment to gather information about a student's language background (*e.g.*, first language learned, language the student uses most often, and languages used in the home). The HLS identifies those students who should be referred for an English language proficiency ("ELP") assessment to determine whether they should be classified as EL students, who are entitled to language assistance services. Students initially identified by an HLS or other means for English proficiency testing are often referred to as those with a Primary or Home Language Other than English (PHLOTE).

School districts must have procedures in place to accurately and timely identify PHLOTE students and determine if they are EL students through a valid and reliable ELP assessment.[32]

(incorporating 34 C.F.R. §100.7(e) by reference); 28 C.F.R. § 42.107(e) (Title VI); 28 C.F.R. § 54.605 (Title IX) (incorporating 28 C.F.R. § 42.107(e) by reference); 28 C.F.R. § 35.134 (Title II). DOJ interprets the EEOA to prohibit retaliation, consistent with the Supreme Court's interpretation of several similar anti-discrimination statutes to encompass a prohibition on retaliation. *See, e.g.*, *Gomez-Perez v. Potter*, 553 U.S. 474 (2008) (recognizing a right of action for retaliation under the Federal-sector provisions of the Age Discrimination in Employment Act of 1967); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008) (recognizing a right of action for retaliation under 42 U.S.C. § 1981); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (recognizing a right of action for retaliation under Title IX of the Education Amendments of 1972).

[28] *See supra* text accompanying notes 9-11 (discussing Title VI, its regulations and guidance, and *Lau*) and note 12 (discussing the EEOA).

[29] 20 U.S.C. §§ 6312(g)(1) (Title I), 7012(a) (Title III).

[30] *Id.* §§ 6312(g)(2) (Title I), 7012(c) (Title III).

[31] *See* 67 Fed. Reg. 71,710, 71,750 (2002). This obligation is consistent with Title VI and EEOA obligations of school districts to ensure meaningful communication with LEP parents. *See* discussion *infra* in Part II. J, "Ensuring Meaningful Communication with Limited English Proficient Parents."

[32] *See 1991 OCR Guidance*; *see also, Rios v. Read*, 480 F. Supp. 14, 23 (E.D.N.Y. 1978) (requiring "objective, validated tests conducted by competent personnel"); *Cintron v. Brentwood*, 455 F. Supp. 57, 64 (E.D.N.Y. 1978)

ELP assessments must assess the proficiency of students in all four domains of English (*i.e.*, speaking, listening, reading, and writing).[33] The Departments recognize that some SEAs and school districts use ELP assessments for entering kindergarten PHLOTE students that evaluate listening, speaking, pre-reading, and pre-writing.[34]

- Example 1: To expedite appropriate placements of EL students, many school districts have parents complete an HLS and assess PHLOTE students' English proficiency levels before school starts. Some school districts have parents complete an HLS before classes commence, and then test PHLOTE students within a week of when classes start to minimize the disruption caused by possible changes in EL students' placements.

Some examples of when the Departments have identified compliance issues in the areas of EL student identification and assessment include when school districts: (1) do not have a process in place to initially identify the primary or home language of all enrolled students; (2) use a method of identification, such as an inadequate HLS, that fails to identify significant numbers of potential EL students; (3) do not test the English language proficiency of all PHLOTE students, resulting in the under-identification of EL students; (4) delay the assessment of incoming PHLOTE students in a manner that results in a denial of language assistance services; or (5) do not assess the proficiency of PHLOTE students in all four language domains (*e.g.*, assessing the students in only the listening and speaking domains and as a result missing large numbers of EL students).

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

- ✓ *School districts have procedures in place for accurately identifying EL students in a timely, valid, and reliable manner so that they can be provided the opportunity to participate meaningfully and equally in the district's educational programs; and*

(requiring "validated" tests of English proficiency); *Keyes v. Sch. Dist. No. 1*, 576 F. Supp. 1503, 1513-14, 1518 (D. Colo. 1983) (absence of a formal valid testing process to identify EL students violated the EEOA).

[33] *See 1991 OCR Guidance*; *Rios*, 480 F. Supp. at 23-24 (finding the school district's bilingual program to violate Title VI and the EEOA in several areas including identifying EL students by testing their listening and vocabulary skills but "not measur[ing] reading or writing skills in English" and explaining that the "district has the obligation of identifying children in need of bilingual education by objective, validated tests conducted by competent personnel"); *Keyes*, 576 F. Supp. at 1518-19 (noting that "emphasis on the acquisition of oral English skills for LEP students is another cause for concern" as "reading and writing skills are also necessary…[for] parity in participation"); *see also* 20 U.S.C. § 7801(25) (classifying as LEP under the ESEA students born outside the U.S. or who are non-native English speakers and who have "difficulties in speaking, reading, writing, or understanding the English language"), § 1401(18) (same for the IDEA); *Notice of Final Interpretations for Title III of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the No Child Left Behind Act of 2001*, 73 Fed. Reg. 61831 (Oct. 17, 2008) (hereinafter "2008 NOI for Title III"); 34 C.F.R. § 200.6(b)(3)(i).

[34] For the purposes of this document, "listening" and "understanding" are interchangeable terms. Congress has often referred to "listening" as one of the "four recognized domains." 20 U.S.C. § 6823(b)(2) (Title III); *see also id*. § 6841(d)(1) (Title III). *But see id*. §§ 6826(d)(4) (Title III) ("comprehend"), 7801(25) ("understanding"). ED likewise has referred to the domain as "listening" in several more recent documents regarding EL students. *See, e.g.*, 2008 NOI for Title III, 73 Fed. Reg. 61828, 61829 n.5 (Oct. 17, 2008); 34 C.F.R. § 200.6(b)(3)(i). By contrast, OCR has historically used the term "understanding" to describe the domain described in the text as "listening."

- ✓ *When SEAs mandate the manner in which school districts identify and/or assess EL students, the State-imposed mechanism meets the requirements described in this section.*

B. Providing EL Students with a Language Assistance Program

When EL students are identified based on a valid and reliable ELP test, school districts must provide them with appropriate language assistance services. Language assistance services or programs for EL students must be educationally sound in theory and effective in practice; however, the civil rights laws do not require any particular program or method of instruction for EL students.[35] Students in EL programs must receive appropriate language assistance services until they are proficient in English and can participate meaningfully in the district's educational programs without language assistance services.

EL programs must be designed and reasonably calculated to enable EL students to attain both English proficiency and parity of participation in the standard instructional program within a reasonable length of time.[36] Each EL student's English proficiency level, grade level, and educational background, as well as language background for bilingual programs, must be considered to determine which EL program services are appropriate for EL students. For example, some school districts have designed programs to meet the unique needs of EL students whose formal education has been interrupted in their country of origin (perhaps due to dislocation, war, disease, famine, or other situations resulting in missed educational instruction).

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[35] *Castañeda*, 648 F.2d at 1009-10. Some common EL programs for learning English that are considered educationally sound in theory under *Castañeda's* first prong include:

- English as a Second Language (ESL), also known as English Language Development (ELD), is a program of techniques, methodology, and special curriculum designed to teach EL students explicitly about the English language, including the academic vocabulary needed to access content instruction, and to develop their English language proficiency in all four language domains (*i.e.*, speaking, listening, reading, and writing). ESL instruction is usually in English with little use of the EL students' primary language(s).
- Structured English Immersion (SEI) is a program designed to impart English language skills so that the EL student can transition and succeed in an English-only mainstream classroom once proficient. All instruction in an immersion strategy program is in English. Teachers have specialized training in meeting the needs of EL students (*e.g.*, an ESL teaching credential and/or SEI training), and have demonstrated strong skills in promoting ELD and SEI strategies for ensuring EL students' access to content.
- Transitional Bilingual Education (TBE), also known as early-exit bilingual education, is a program that utilizes a student's primary language in instruction. The program maintains and develops skills in the primary language while introducing, maintaining, and developing skills in English. The primary purpose of a TBE program is to facilitate the EL student's transition to an all-English instructional program, while the student receives academic subject instruction in the primary language to the extent necessary.
- Dual Language Program, also known as two-way or developmental, is a bilingual program where the goal is for students to develop language proficiency in two languages by receiving instruction in English and another language in a classroom that is usually comprised of half primary-English speakers and half primary speakers of the other language.

In school districts or schools where the number of EL students is small, EL students still must receive language assistance services; however, the EL program may be less formal. Additional EL programs not mentioned above may also meet civil rights requirements.

[36] *Castañeda*, 648 F.2d at 1011.

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

- Example 2: A beginner-level EL student in a transitional bilingual education (TBE) program who is a primary Spanish speaker may receive 80 percent of her core instruction in Spanish and two periods of ESL per day. As her English proficiency increases to an intermediate level, the district may decrease the percentage of her core instruction that she receives in Spanish by transitioning her to one content class in Spanish, one period of ESL, and sheltered content classes[37] in English with non-EL students.[38]

- Example 3: A beginner-level EL student may receive two periods of ELD instruction per day, EL-only sheltered content classes in social studies and language arts, and sheltered content classes in math and science with both EL and non-EL students. As his English proficiency increases to a high intermediate level, he transitions into a daily period of ELD targeted to his lack of English proficiency in writing, and sheltered content classes with EL and non-EL students.

- Example 4: A school district enrolls EL students at the high school with a range of English proficiency levels and years of study in the EL program. Recognizing that different EL students have different needs, the district creates EL-only ELD classes that appropriately target the English proficiency levels of students and the specific needs of long-term EL students. These ELD courses, which EL students take in addition to grade-level English, are designed to provide language development services with an emphasis on advanced academic vocabulary and expository writing. The EL students also receive

[37] This guidance uses the term "sheltered content classes" to mean Sheltered English Instruction, which is an instructional approach used to make academic instruction in English understandable to EL students. Sheltered instructional approaches assist EL students in developing grade-level content area knowledge, academic skills, and increased English proficiency. In sheltered content classes, teachers use a wide range of instructional strategies to make the content (*e.g.*, math, science, social studies) comprehensible to EL students while promoting their English language development (*e.g.*, connecting new content to student's prior knowledge, scaffolding, collaborative learning, and visual aids).

[38] This guidance uses the term "non-EL" students to mean both "former-EL" students and "never-EL" students. "Former EL" students are those who were identified as EL or enrolled in an EL program, but then met the criteria for exiting EL status. "Never-EL" students are those who have never been identified as EL or never enrolled in an EL program. This group includes PHLOTE students who test "proficient" in English on the valid and reliable assessment - *i.e.*, the Initially Fluent English Proficient (IFEP). Students who were identified as EL students but whose parents opted them out of EL programs are either "EL" or "former-EL" students (depending on whether they meet the criteria that would have been necessary for them to exit EL status), not "Never-EL" students.

integrated ELD instruction in their grade-level content classes from content-certified teachers who are adequately trained in ELD and sheltering techniques.

Some examples of when the Departments have identified compliance issues include when school districts: (1) exclude kindergarteners, or EL students with scheduling conflicts, from their EL program; (2) supplement regular education instruction with only aides who tutor EL students as opposed to teachers adequately trained to deliver the EL program; (3) fail to offer an EL program to a certain subset of EL students, such as students with disabilities or students speaking particular languages; (4) stop providing language assistance services when EL students reach higher levels of English proficiency but have not yet met exit criteria (including proficiency on a valid and reliable ELP assessment); or (5) fail to address the needs of EL students who have not made expected progress in learning English and have not met exit criteria despite extended enrollment in the EL program.

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

- ✓ *Schools provide all EL students with language assistance services that address their level of English language proficiency and give them an equal opportunity to meaningfully and equally participate in the district's programs;*
- ✓ *Each language assistance program for EL students that a school district provides meets the Castañeda standards described throughout this document; and*
- ✓ *When SEAs mandate the manner in which school districts provide EL programming, the State-imposed requirements meet the standards described in this subsection.*

C. Staffing and Supporting EL Programs

School districts have an obligation to provide the personnel and resources necessary to effectively implement their chosen EL programs. This obligation includes having highly qualified teachers to provide language assistance services, trained administrators who can evaluate these teachers, and adequate and appropriate materials for the EL programs.

At a minimum, every school district is responsible for ensuring that there is an adequate number of teachers to instruct EL students and that these teachers have mastered the skills necessary to effectively teach in the district's program for EL students.[39] Where formal qualifications have

[39] SEAs that receive ESEA Title I funds, which is currently all SEAs, must ensure that all teachers in core academic subjects, including teachers of EL students, are "highly qualified." 20 U.S.C. § 6319(a). Being highly qualified means (1) holding at least a bachelor's degree, (2) obtaining full State certification or licensure, and (3) demonstrating subject-matter competency. *Id.* § 7801(23). If an SEA or school district uses a sheltered instruction model for serving EL students that includes core academic subjects at the secondary school level (*e.g.*, "ESL math" or "ESL science"), the teacher must be adequately trained in the sheltering techniques, meet any State requirements for EL teachers, and be highly qualified in the core academic subject (*e.g.*, math or science) as well. If the only English teacher of record is the EL teacher, that teacher must be highly qualified in English as well. In addition, teachers in school districts that receive funds under Title III must be fluent in English and any other

been established, *e.g.*, the SEA requires authorization or certification to teach in particular EL programs, or a school district generally requires its teachers in other subjects to meet formal requirements, a school district must either hire teachers who already have the necessary formal qualifications to teach EL students or require that teachers already on staff be trained or work towards attaining the necessary formal qualifications and obtain the formal qualifications within a reasonable period of time.

In some instances, however, SEA endorsements or other requirements may not be rigorous enough to ensure that teachers of EL students have the skills necessary to carry out the school district's chosen EL program. For example, in *Castañeda*, the SEA and school district considered teachers qualified to teach in a bilingual EL program once they had completed a 100-hour training designed to provide instruction in bilingual education methods and had a 700-word Spanish-language vocabulary. Because many of the teachers who completed the specified training were found to be unable to teach effectively in a Spanish bilingual program, the court required the SEA and school district to improve training for bilingual teachers and to develop adequate methods for assessing the qualifications of teachers who completed the training.[40]

As *Castañeda* recognizes, SEAs, through their guidance and monitoring responsibilities, must also have procedures in place for ensuring that districts have adequately trained teachers to implement their EL programs. This is especially true when the design of particular EL program(s) is required by the State. For example, if a State requires a specific bilingual education program, both the SEA and its school districts must ensure teachers are sufficiently trained so that they can effectively deliver the program.[41]

SEAs and school districts that provide EL teacher training are also responsible for evaluating whether their training adequately prepares teachers to implement the EL program effectively.[42] To meet this obligation, school districts need to ensure that administrators who evaluate the EL program staff are adequately trained to meaningfully evaluate whether EL teachers are appropriately employing the training in the classroom and are adequately prepared to provide the instruction that will ensure that the EL program model successfully achieves its educational objectives.[43]

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language used for instruction, including having written and oral communications skills. *See id*. § 6826(c); *Castañeda*, 648 F.2d at 1013 (requiring teachers who are trained and qualified to deliver the type of language support instruction required by the chosen EL program(s)).

[40] *Castañeda*, 648 F.2d at 1005, 1013.

[41] *Id*. at 1012-13 (directing the district court to "require both [the State and school district] to devise an improved in-service training program [for bilingual teachers] and an adequate testing or evaluation procedure to assess the qualifications of teachers completing this program"); *Castañeda v. Pickard*, 781 F.2d 456, 470-72 (5th Cir. 1986) (reviewing State and district changes and finding teachers adequately trained); *see also supra* notes 9, 12, 14 & 15.

[42] *Castañeda*, 648 F.2d at 1012-13.

[43] To implement an EL program effectively, there must be a meaningful evaluation of whether the teachers who deliver the program are qualified to do so. *See Castañeda*, 648 F.2d at 1013. This includes ensuring that those tasked with evaluating the instruction of EL program teachers, such as principals, are qualified to do so. *See Rios*,

- Example 5: An SEA receives complaints that teachers who acquired the State's ESL endorsement do not have some of the skills needed for effective ESL instruction. In response to the complaints, the SEA surveys ESL-endorsed teachers in the State and the administrators who evaluate them to identify areas where the teachers need additional training and support. The SEA develops teacher training supplements specific to those identified needs, requires the trained teachers to deliver an ESL lesson as part of the SEA evaluation of whether teachers mastered the training's content, and provides training for administrators on how to evaluate teachers on appropriate ESL instruction.

- Example 6: Because a school district does not have a sufficient number of principals with the State's bilingual credentials to evaluate teachers of its bilingual classes, the school district uses bilingual-credentialed district-level administrators to accompany English-only-speaking principals to bilingual classroom evaluations.

- Example 7: A school district with a Structured English Immersion program, consisting of ESL and sheltered content instruction, does not have a sufficient number of either qualified ESL-licensed teachers to provide ESL services or qualified content area teachers who are adequately trained to shelter content for EL students. The school district creates an in-service training on sheltering techniques, requires all core content teachers to successfully complete the training within two years, and requires a quarter of its new hires to obtain an ESL license within two years of their hiring date.

In addition to providing qualified teachers, school districts must also provide EL students with adequate resources and, if appropriate, qualified support staff. For example, EL students are entitled to receive appropriate instructional materials in the EL program, including adequate quantities of English language development materials available at the appropriate English proficiency and grade levels and appropriate bilingual materials for bilingual programs. If the Departments find that a school district's materials are inadequate and/or not appropriate for its EL students, the Departments expect the district to obtain sufficient, appropriate materials in a timely manner.

Paraprofessionals, aides, or tutors may not take the place of qualified teachers and may be used only as an interim measure while the school district hires, trains, or otherwise secures enough qualified teachers to serve its EL students.[44] And if a school district uses paraprofessionals to provide language assistance services to EL students that supplement those provided by qualified

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480 F. Supp. at 18, 23-24 (district's bilingual program violated the EEOA based on findings that included using administrators who were not bilingual and lacked relevant training to evaluate bilingual teachers).

[44] *Castañeda*, 648 F.2d at 1013 (explaining that bilingual aides cannot take the place of bilingual teachers and may be used only as an interim measure while district makes concerted efforts to secure a sufficient number of qualified bilingual teachers within a reasonable period of time).

teachers, it may do so only if the paraprofessional is trained to provide services to EL students and instructs under the direct supervision of a qualified teacher.[45]

Some examples of when the Departments have identified compliance issues in staffing and resourcing an EL program include when school districts: (1) offer language assistance services based on staffing levels and teacher availability rather than student need; (2) utilize mainstream teachers, paraprofessionals, or tutors rather than fully qualified ESL teachers for ESL instruction; or (3) provide inadequate training to general education teachers who provide core content instruction to EL students.

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

- ✓ *School districts provide qualified staff and sufficient resources, including adequate and appropriate materials, to effectively implement their chosen program, and if they lack either, they are taking effective steps to obtain them within a reasonable period of time;*
- ✓ *School districts regularly and adequately evaluate whether EL program teachers have met the necessary training requirements, and if not, ensure that they meet them in a timely manner;*
- ✓ *A school district's training requirements adequately prepare EL program teachers and administrators to effectively implement the district's program and provide supplemental training when necessary; and*
- ✓ *SEAs ensure, through guidance, monitoring, and evaluation, that school districts have qualified teachers to provide their EL programs to all EL students.*

D. Providing Meaningful Access to All Curricular and Extracurricular Programs

To be able to participate equally and meaningfully in instructional programs, EL students have to acquire English proficiency and recoup any deficits that they may incur in other areas of the curriculum as a result of spending extra time on ELD.[46] Thus, SEAs and school districts share a dual obligation to provide EL students language assistance programs as well as assistance in other areas of the curriculum where their equal participation may be impaired by academic deficits incurred while they were learning English.[47] This dual obligation requires school districts and SEAs to design and implement EL programs that are reasonably calculated to enable EL students to attain both English proficiency and parity of participation in the standard instructional program within a reasonable period of time.[48]

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[45] 20 U.S.C. § 6319(c)-(g).

[46] *Castañeda*, 648 F.2d at 1011.

[47] *Id.; see also supra* notes 9, 12, 14, & 15.

[48] *Castañeda*, 648 F.2d at 1011; *see also supra* notes 9, 12, 14, & 15.

In addition to ensuring EL students have access to the core curriculum, SEAs and school districts must provide EL students equal opportunities to meaningfully participate in all programs and activities of the SEA or school district–whether curricular, co-curricular, or extracurricular.[49] Such programs and activities include pre-kindergarten programs, magnet programs, career and technical education programs, counseling services, Advanced Placement and International Baccalaureate courses, gifted and talented programs, online and distance learning opportunities, performing and visual arts, athletics, and extracurricular activities such as clubs and honor societies.

1. Core Curriculum

During their educational journey from enrollment to graduation, EL students are entitled to instruction in the school district's core curriculum (*e.g.*, reading/language arts, math, science, and social studies). This includes equal access to the school's facilities, such as computer, science, and other labs or facilities, to ensure that EL students are able to participate meaningfully in the educational programs. Meaningful access to the core curriculum is a key component in ensuring that EL students acquire the tools to succeed in general education classrooms within a reasonable length of time.

One way to meet this obligation is to provide full access to the grade-appropriate core curriculum from the start of the EL program while using appropriate language assistance strategies in the core instruction so that EL students can participate meaningfully as they acquire English. In adapting instruction for EL students, however, school districts should ensure that their specialized instruction (*e.g.*, bilingual or sheltered content classes) does not use a watered-down curriculum that could leave EL students with academic deficits when they transition from EL programs into general education classrooms. Such specialized instruction should be designed such that EL students can meet grade-level standards within a reasonable period of time. School districts also should place EL students in age-appropriate grade levels so that they can have meaningful access to their grade-appropriate curricula and an equal opportunity to graduate.[50]

- Example 8: In a transitional bilingual program, an EL student who is taught math in Spanish should have access to the same math curriculum as her non-EL peers in general education classrooms. Similarly, a science class using sheltered instruction for EL

[49] 34 C.F.R. § 100.1-.2; 20 U.S.C. § 1703(f).

[50] The Departments recognize that students with interrupted formal education (SIFE students), especially in the higher grades, may be below grade level in some or all subjects when they enter a school district, and that some school districts provide appropriately specialized programs to meet their needs. The Departments would not view such programs as offering inappropriately watered-down instructional content where the program is age-appropriate, the content of the instruction relates to the core curriculum and is credit-bearing toward graduation or promotion requirements, and SIFE students have the opportunity to meet grade-level standards within a reasonable period of time. However, it would be inappropriate for a district to place high school-aged SIFE students in middle or elementary school campus programs because this would not permit SIFE students to meet high school grade-level standards and graduation requirements within a reasonable amount of time and the placements would not be age appropriate.

> students should offer the same content and the same access to laboratories as the general education science class. And while a ninth-grade EL student with interrupted formal education may need targeted help in math to catch up to his grade-level math curriculum, his EL program should provide access to that curriculum and not be restricted to an elementary-grade math curriculum.

Alternatively, school districts may use a curriculum that temporarily emphasizes English language acquisition over other subjects, provided that any interim academic deficits in other subjects are remedied within a reasonable length of time.[51] If districts choose to temporarily emphasize English language acquisition, they retain an obligation to measure EL students' progress in core subjects to assess whether they are incurring academic deficits and to provide assistance necessary to remedy content area deficits that were incurred during the time when the EL student was more focused on learning English.[52] To ensure that EL students can catch up in those core areas within a reasonable period of time, such districts must provide compensatory and supplemental services to remedy academic deficits that the student may have developed while focusing on English language acquisition. Similarly, SEAs must ensure through guidance and monitoring that school districts' EL programs (whether state-mandated or not) are designed to enable EL students to participate comparably in the core curriculum within a reasonable time period and that school districts timely remedy any academic deficits resulting from focusing on English language acquisition.[53]

For an EL program to be reasonably calculated to ensure that EL students attain equal participation in the standard instructional program within a reasonable length of time, if an EL student enters the ninth grade with beginner-level English proficiency, the school district should offer EL services that would enable her to earn a regular high-school diploma in four years. [54] In addition, EL students in high school, like their never-EL peers, should have the opportunity to be competitive in meeting college entrance requirements. For example, a school district should

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[51] *See Castañeda*, 648 F.2d at 1011 ("[A] curriculum, during the early part of [EL students'] school career, which has, as its primary objective, the development of literacy in English . . . [is permissible] even if the result of such a program is an interim sacrifice of learning in other areas during this period" provided "remedial action is taken to overcome the academic deficits" incurred during participation in this curriculum in ways that enable the "students' equal participation in the regular instructional program.").

[52] *See id.* at 1011-14 (recognizing that school districts may choose to "focus [] first on the development of English language skills and then later provid[e]. . . students with compensatory and supplemental education to remedy deficiencies in other areas which they may develop during this period" "so long as the schools design programs which are reasonably calculated to enable these students to attain parity of participation in the standard instructional program within a reasonable length of time after they enter the school system.").

[53] *See supra* notes 9, 12, 14 & 15; *see also* 20 U.S.C. § 6841 (Title III requires LEAs to provide SEAs with an evaluation including, among other things, the number and percentage of children in programs and activities attaining English proficiency at the end of each school year; and SEAs to use the LEA's evaluation to determine the effectiveness of and improve the LEA's programs and activities).

[54] *See Castañeda*, 648 F.2d at 1011 (requiring that districts "design programs which are reasonably calculated to enable [EL] students to attain parity of participation of the standard instructional program within a reasonable length of time after they enter the school system").

ensure that there are no structural barriers within the design of its academic program that would prevent EL students who enter high school with beginner-level English proficiency from graduating on time with the prerequisites to enter college.

To meet their obligation to design and implement EL programs that enable EL students to attain English proficiency and equal participation in the standard instructional program, school districts must use appropriate and reliable evaluation and testing methods that have been validated to measure EL students' English language proficiency and knowledge of the core curriculum. Only by measuring the progress of EL students in the core curriculum during the EL program can districts ensure that students are not incurring "irreparable academic deficits."[55] If EL students are receiving instruction in a core content subject in their primary language, the school's assessments of their knowledge of that content area must include testing in the primary language.[56]

- Example 9: A district has a Structured English Immersion (SEI) program, in which 20 percent of its EL students receive only part of their grade K-3 social studies and science curricula in their intensive ESL courses while the other 80 percent of EL students received their full grade-level science and social studies curricula in sheltered classes with non-EL students. The district finds that the 20 percent are not performing as well as the 80 percent on the third-grade assessments in social studies and science or on the annual ELP test. In light of this data, the district provides intensive, supplemental instruction in science and social studies during the school day to the lower-performing 20 percent of EL students when they start fourth grade. To further address their academic deficits, their period of designated ESL incorporates grade-level science and social studies texts in ESL exercises focused on the reading and writing domains. The district also adjusts its SEI program so that when EL students in grades K-3 reach an intermediate level of English proficiency, they transition out of the second period of ESL incorporating only some science and social studies into the sheltered classes of the full science and social studies curricula with non-EL students.

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[55] *Id.* at 1014.

[56] *Id.* (holding that it was not appropriate to test EL students in a bilingual program with only English language achievement tests and that "[t]he progress of . . . students in these other areas . . . must be measured by means of a standardized test in their own language because no other device is adequate to determine their progress vis-à-vis that of their English speaking counterparts"). SEAs must provide reasonable accommodations on assessments administered to EL students, including, to the extent practicable, providing assessments in the language most likely to yield accurate data on what such students know and can do in academic content areas. 20 U.S.C. § 6311(b)(3)(C)(ix)(III). SEAs also must make every effort to develop academic assessments in languages other than English that are needed and are not already available, *id.* § 6311(b)(6), and SEAs may not unduly postpone assessing EL students in reading/language arts in English, *id.* § 6311(b)(3)(C)(x).

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

- ✓ *SEAs and districts design and implement EL programs that are reasonably calculated to enable EL students to attain both English proficiency and parity of participation in the standard instructional program within a reasonable period of time;*
- ✓ *SEAs and districts provide EL programs that ensure EL students' access to their grade-level curricula so that they can meet promotion and graduation requirements;*
- ✓ *SEAs and districts provide EL students equal opportunities to meaningfully participate in specialized programs – whether curricular, co-curricular, or extracurricular; and*
- ✓ *A school district's secondary program establishes a pathway for EL students to graduate high school on time and EL students have equal access to high-level programs and instruction to prepare them for college and career.*

2. Specialized and Advanced Courses and Programs

School districts may not categorically exclude EL students from gifted and talented education (GATE) or other specialized programs such as Advanced Placement (AP), honors, or International Baccalaureate (IB) courses. Unless a particular GATE program or advanced course is demonstrated to require proficiency in English for meaningful participation, schools must ensure that evaluation and testing procedures for GATE or other specialized programs do not screen out EL students because of their limited English proficiency.[57] If a school district believes that there is an educational justification for requiring proficiency in English in a particular GATE or other advanced program, the Departments consider a school district's proffered rationale to assess whether it constitutes a substantial educational justification and, if so, to determine whether a school could use comparably effective alternative policies or practices that would have less of an adverse impact on EL students.[58]

- Example 10: An EL student demonstrates advanced math skills in the classroom but does not perform well on English language diagnostic tests. The student's math teacher recommends the student for the gifted math program. The school uses a different testing method, such as a non-verbal assessment or a math-only test with EL testing accommodations, to give the student an opportunity to demonstrate his or her readiness for entrance into the gifted math program.
- Example 11: A school requires at least a B+ math average and an overall B average to enroll in AP Calculus. The school learns that some interested EL students cannot take AP Calculus because they lack an overall B average due to their limited English proficiency. So that more EL students can take this course, the school drops the overall B

[57] *1991 OCR Guidance*; 34 C.F.R. § 100.3(b)(1), (2).
[58] *Id.*

average requirement for all students because it is not necessary to meaningful participation in AP Calculus.

Some examples of when the Departments have identified compliance issues in this area include when schools: (1) schedule EL language acquisition services during times when GATE programs meet; (2) exclude EL students from all components of a GATE program, even though proficiency in English is not necessary for a meaningful participation in a math, science, or technology component of the GATE program; (3) use arbitrarily high admissions criteria in English for a GATE math program that causes the exclusion of EL students who could meet the math requirement but not the arbitrarily high English requirement; or (4) solicit teacher recommendations of students for gifted programs from all teachers except teachers of EL program classes.

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

- ✓ *SEAs' or school districts' gifted evaluation and testing procedures screen out EL students because of their limited English proficiency when participation in particular gifted programs does not require proficiency in English; and*
- ✓ *SEAs and school districts monitor the extent to which EL and former EL students are referred for and participate in gifted and talented education programs, as well as honors and Advanced Placement courses, as compared to their never-EL peers.*

E. Avoiding Unnecessary Segregation of EL Students

EL programs may not unjustifiably segregate students on the basis of national origin or EL status. While EL programs may require that EL students receive separate instruction for a limited period of time, the Departments expect school districts and SEAs to carry out their chosen program in the least segregative manner consistent with achieving the program's stated educational goals.[59] Although there may be program-related educational justifications for providing a degree of separate academic instruction to EL students, the Departments would rarely find a program-related justification for instructing EL and non-EL students separately in subjects like physical education, art, and music or for separating students during activity periods outside of classroom instruction (*i.e.*, during lunch, recess, assemblies, and extracurricular activities).

In determining whether an SEA or school district is unnecessarily segregating EL students, the Departments examine whether the nature and degree of segregation is necessary to achieve the goals of an educationally sound and effective EL program. As discussed more thoroughly in Part II. H below, school districts should not retain EL students in EL programs for periods longer or

[59] *See 1991 OCR Guidance; Castañeda*, 648 F.2d at 998 n.4 ("We assume that the segregation resulting from a language remediation program would be minimized to the greatest extent possible and that the programs would have as a goal the integration of the Spanish-speaking student into the English language classroom as soon as possible.").

shorter than necessary to achieve the program's educational goals; nor should districts retain EL students in EL-only classes for periods longer or shorter than required by each student's level of English proficiency, time and progress in the EL program, and the stated goals of the EL program.

- Example 12: The goals of a Spanish transitional bilingual education program are to teach EL students English and grade-level content in Spanish so that they do not fall behind academically as they transition to literacy in English and more content classes in English over time. This program may segregate beginner-level EL students for their ESL instruction and their content classes that are taught in Spanish. As the EL students acquire higher levels of English proficiency, the program should transition them from EL-only content classes in Spanish to integrated content classes in English with continuing primary language or other support needed to access the content.

In evaluating whether the degree of segregation is necessary in EL programs, the Departments consider whether entry and exit into a segregated EL program model are voluntary, whether the program is reasonably designed to provide EL students comparable access to the standard curriculum as never-EL students within a reasonable length of time, whether EL students in the program have the same range and level of extracurricular activities and additional services as do students in other environments, and whether the district at least annually assesses the English proficiency and appropriate level of language assistance services for its EL students and determines their eligibility to exit from the EL program based on valid and reliable exit criteria.

Some districts use newcomer programs as a bridge to general education classrooms. Districts operating newcomer programs or schools should take particular care to avoid unnecessary segregation. For example, it is unlikely the Departments would find a violation in the area of EL student segregation by a school district that offers a voluntary newcomer EL program with self-contained EL programs for a limited duration (generally for one year) so long as it schedules the newcomer EL students' nonacademic subjects, lunchtime, and recess with non-EL students; encourages newcomer EL students to participate in integrated after-school activities; and evaluates their English proficiency regularly to allow appropriate transitions out of the newcomer EL program throughout the academic year.

Some examples of when the Departments have found compliance issues involving segregation include when school districts: (1) fail to give segregated EL students access to their grade-level curriculum, special education, or extracurricular activities; (2) segregate EL students for both academic and non-academic subjects, such as recess, physical education, art, and music; (3) maintain students in a language assistance program longer than necessary to achieve the district's goals for the program; and (4) place EL students in more segregated newcomer programs due to perceived behavior problems or perceived special needs.

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

- ✓ *SEAs and school districts educate EL students in the least segregative manner consistent with the goals of the educationally sound and effective program selected by the SEA or the district; and*
- ✓ *SEAs' monitoring of school districts' EL programs assesses whether the programs unnecessarily segregate EL students and, if so, rectifies this noncompliance.*

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

The Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973 (Section 504) address the rights of students with disabilities in the education context.[60] The Department of Education's Office of Special Education Programs, a component of ED's Office of Special Education and Rehabilitative Services, administers the IDEA. OCR and DOJ share authority for enforcing Section 504 in the educational context, and DOJ coordinates enforcement of Section 504 across Federal agencies.[61]

SEAs and school districts must ensure that all EL students who may have a disability, like all other students who may have a disability and need services under IDEA or Section 504, are located, identified, and evaluated for special education and disability-related services in a timely manner. When conducting such evaluations, school districts must consider the English language proficiency of EL students in determining the appropriate assessments and other evaluation materials to be used. School districts must not identify or determine that EL students are students with disabilities because of their limited English language proficiency.

School districts must provide EL students with disabilities with both the language assistance and disability-related services[62] to which they are entitled under Federal law. Districts must also

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[60] 20 U.S.C. §§ 1400-1419; 34 C.F.R. pt. 300 (IDEA, Part B and its implementing regulations); 29 U.S.C. § 794 and 34 C.F.R. pt. 104 (Section 504 and its implementing regulations).

[61] Any Federal agency, such as the Department of Education or Justice, that provides Federal funds to an SEA or school district may initiate a compliance review to ensure compliance with, or investigate a complaint alleging a violation of, Section 504 and its implementing regulations. DOJ may also initiate a Section 504 or IDEA suit if, after notice of a violation from the Federal funding agency, a recipient of Federal funds fails to resolve noncompliance with Section 504 or IDEA voluntarily and the agency refers the case to DOJ. Furthermore, DOJ can participate in private litigation involving Section 504 or IDEA.

[62] The term "disability-related services" is intended to encompass either special education and related services provided to children with disabilities who are eligible for services under the IDEA or regular or special education and related aids and services provided to qualified students with disabilities under Section 504.

inform a parent of an EL student with an individualized education program (IEP) how the language instruction education program meets the objectives of the child's IEP.[63]

The Departments are aware that some school districts have a formal or informal policy of "no dual services," *i.e.*, a policy of allowing students to receive either EL services or special education services, but not both. Other districts have a policy of delaying disability evaluations of EL students for special education and related services for a specified period of time based on their EL status.[64] These policies are impermissible under the IDEA and Federal civil rights laws, and the Departments expect SEAs to address these policies in monitoring districts' compliance with Federal law. Further, even if a parent of an EL student with a disability declines disability-related services under the IDEA or Section 504, that student with a disability remains entitled to all EL rights and services as described in this guidance.[65]

1. Individuals with Disabilities Education Act (IDEA)

The IDEA requires SEAs and school districts to, among other things, make available a free appropriate public education (FAPE) to all eligible children with disabilities.[66] Under the IDEA, FAPE means, among other things, special education and related services at no cost to parents provided in conformity with the student's IEP.[67]

Under the IDEA, school districts must also identify, locate, and evaluate all children who may have disabilities and who need special education and related services, regardless of the severity of their disabilities.[68] A parent or a school district may initiate a request for an initial evaluation

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[63] 20 U.S.C. §§ 6312(g)(1)(A)(vii) (Title I), 7012(a)(7) (Title III). If the parent is LEP, this information must be in a language the parent understands. *See* discussion *infra* in Part II. J, "Ensuring Meaningful Communication with Limited English Proficient Parents."

[64] The court in *Mumid v. Abraham Lincoln High School*, 618 F.3d 789 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 1478 (2011), rejected a private claim that such a policy was intentional national origin discrimination in violation of Title VI. The EEOA does not require proof of intentional national origin discrimination to establish a violation of section 1703(f), *see Castañeda*, 648 F.2d at 1004, and the court in *Mumid* assumed that such a policy would violate the EEOA, but did not reach the merits of that claim for other reasons. *Mumid*, 618 F.3d at 795-96. The court's discussion of Title VI was limited to a private right of action and did not discuss the Federal government's enforcement of Title VI or the other statutes discussed in this section.

[65] For more information regarding EL students with disabilities and Title III, *see* the Department of Education's Questions and Answers Regarding Inclusion of English Learners with Disabilities in English Language Proficiency Assessments and Title III Annual Measurable Achievement Objectives, *available at* http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/q-and-a-on-elp-swd.pdf. Among other matters, this guidance addresses requirements for including EL students with disabilities in the annual ELP assessment, including providing appropriate accommodations or alternate assessments when necessary.

[66] 20 U.S.C. §§ 1412(a)(1),1413(a)(1); 34 C.F.R. §§ 300.101-300.102, 300.201.

[67] 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.

[68] 20 U.S.C. §§ 1412(a)(3), 1413(a)(1); 34 C.F.R. §§ 300.111, 300.201. Under the IDEA, a child with a disability means a child evaluated as having an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in IDEA as emotional disturbance), an orthopedic impairment, autism, traumatic brain injury, other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special

to determine if a child is a child with a disability under the IDEA.[69] A school district must ensure that assessments and other evaluation materials used to evaluate a child with a disability are "provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer."[70] This is true even for those EL students whose parents have opted their children out of EL programs.[71] A student cannot be determined to be a child with a disability if the "determinant factor" is limited English proficiency and if the student does not otherwise meet the definition of a "child with a disability" under the IDEA.[72]

- Example 13: A teacher thinks that a Spanish-speaking EL student with beginner level English has a learning disability. She would like to have the student evaluated for a disability, but believes that the student must complete one year in the EL program or achieve intermediate proficiency in English before being evaluated for a disability or receiving special education and related services. She is incorrect. The principal explains to her that if she believes the student has a disability, the school district must seek parental consent for an initial evaluation and once consent is granted must evaluate the student in a timely manner. After the parents consent, the district arranges for a bilingual psychologist to conduct the evaluation in Spanish, given the EL student's ELP level and language background.

Once a school district determines that an EL student is a child with a disability under the IDEA and needs special education and related services, the school district is responsible for determining, through the development of an IEP at a meeting of the IEP Team (which includes the child's parents and school officials), the special education and related services necessary to make FAPE available to the child.[73] As part of this process, the IDEA requires that the IEP team consider, among other special factors, the language needs of a child with limited English

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education and related services. 20 U.S.C. § 1401(3); 34 C.F.R. § 300.8. *See infra* note 77 for the definition of an individual with a disability under Section 504.

[69] 34 C.F.R. § 300.301(b). Once parental consent, as defined in 34 C.F.R. § 300.9, is obtained, the evaluation must be conducted within 60 days from the date that parental consent is received, or if the SEA has established a timeframe within which the evaluation must be conducted, within the State-established timeframe. 34 C.F.R. § 300.301(c)(1); *see also* 34 C.F.R. §§ 300.300-300.311.

[70] 34 C.F.R. § 300.304(c)(1)(ii); 20 U.S.C. § 1414(b)(3)(A)(ii). For the purposes of this document, native language and primary language are interchangeable terms. In determining whether an EL student is a child with a disability under the IDEA, the school district must draw upon information from a variety of sources (*e.g.*, aptitude and achievement tests and social and cultural background), and ensure that all of this information is documented and carefully considered. 34 C.F.R. § 300.306(c)(1).

[71] *See* discussion *infra* in Part II. G, "Meeting the Needs of EL Students Who Opt Out of EL Programs or Particular EL Services."

[72] 20 U.S.C. § 1414(b)(5); 34 C.F.R. § 300.306(b)(1)(iii)-(b)(2).

[73] 20 U.S.C. § 1414(b)(4); 34 C.F.R. §§ 300.306(c)(2) and 300.323(c). For more information about IEPs, see 20 U.S.C. § 1414(d) and 34 C.F.R. §§ 300.320-300.324.

proficiency as those needs relate to the child's IEP.[74] To implement this requirement, it is essential that the IEP team include participants who have the requisite knowledge of the child's language needs. To ensure that EL children with disabilities receive services that meet their language and special education needs, it is important for members of the IEP team to include professionals with training, and preferably expertise, in second language acquisition and an understanding of how to differentiate between the student's limited English proficiency and the student's disability.[75] Additionally, the IDEA requires that the school district "take whatever action is necessary to ensure that the parent understands the proceedings of the IEP team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English."[76]

2. Section 504 of the Rehabilitation Act (Section 504)

Section 504 is a Federal law that prohibits disability discrimination by recipients of Federal financial assistance. Section 504 covers not only students with disabilities who have been found to be eligible for services under the IDEA but also students with disabilities who are not IDEA-eligible, but meet Section 504's broader definition of disability.[77] As is true under the IDEA, Section 504 requires school districts to provide FAPE to qualified students with disabilities in a school district's jurisdiction, regardless of the nature or severity of the student's disability.[78] Under Section 504, depending on the individual needs of the student, FAPE can include special education and related aids and services or can consist of regular education with related aids and

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[74] 20 U.S.C. § 1414(d)(3)(B)(ii); 34 C.F.R. § 300.324(a)(2)(ii). IEP Teams also must consider this special factor in the review and revision of IEPs. 34 C.F.R. § 300.324(b)(2).

[75] The Departments are aware that some States are using joint EL and IEP teams effectively to determine appropriate services for eligible students.

[76] 34 C.F.R. § 300.322(e); *see also id.* §§ 300.9, 300.503(c)(1)(ii), 300.612(a)(1). Under Title VI and the EEOA, for an LEP parent to have meaningful access to an IEP or Section 504 plan meeting, it also may be necessary to have the IEPs, Section 504 plans, or related documents translated into the parent's primary language. For information on the separate Title VI obligations of school districts to communicate with LEP parents, *see infra* Part II. J, "Ensuring Meaningful Communication with Limited English Proficient Parents."

[77] A person with a disability under Section 504 is an individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment. 29 U.S.C. § 705(9)(B), (20)(B) (as amended by the Americans with Disabilities Act Amendments Act of 2008); 34 C.F.R. § 104.3(j). For additional information on the broadened meaning of disability after the effective date of the 2008 Amendments Act, see OCR's 2012 Dear Colleague Letter and Frequently Asked Questions document, *available at* www.ed.gov/ocr/letters/colleague-201109.html, and www.ed.gov/ocr/docs/dcl-504faq-201109.html. With respect to public elementary and secondary educational services, a student with a disability is "qualified" under Section 504 if he or she is of an age during which students without disabilities are provided such services; of any age during which is it mandatory under State law to provide such services to students without disabilities; or is a person to whom a State is required to provide FAPE under IDEA. 34 C.F.R. § 104.3(*l*)(2).

[78] 34 C.F.R. §§ 104.33-104.36. OCR shares responsibility with DOJ in the enforcement of Title II of the Americans with Disabilities Act of 1990, which is a Federal law prohibiting disability discrimination in the services, programs, and activities of State and local governments (including public school districts), regardless of whether they receive Federal financial assistance. 42 U.S.C. § 12132. Violations of Section 504 that result from school districts' failure to meet the obligations identified in this guidance also constitute violations of Title II. 42 U.S.C. § 12201(a). Covered entities also must comply with Title II requirements.

services that are designed to meet the individual educational needs of the student as adequately as the needs of nondisabled students are met. While Section 504 and the IDEA are separate statutes that contain different requirements, as reflected in ED's regulations, one way to meet the requirements of Section 504 FAPE is to implement an IEP developed in accordance with the IDEA.[79]

As with evaluations under the IDEA, Section 504 evaluations of EL students must measure whether an EL student has a disability and not reflect the student's lack of proficiency in English. When administering written or oral evaluations to determine whether an EL student has a disability under Section 504, school districts must administer those evaluations in an appropriate language to avoid misclassification.[80] This is true even for those EL students whose parents have opted their children out of EL programs.[81] Prior to evaluating an EL student, school districts should, to the extent practicable, gather appropriate information about a student's previous educational background, including any previous language-based interventions.[82]

- Example 14: An EL student whose parents declined her school's EL services appears to be falling behind at school. The school decides to conduct an evaluation to determine if she has a disability under Section 504 and needs disability-related services, and obtains consent from the student's parents. Although the parents have opted out of the school's EL program, the principal nonetheless ensures that the student's language needs are considered during the evaluation process, including whether the evaluations should be conducted in the student's native language and whether they should be administered orally or in writing to help ensure that the evaluation determines whether the student has a disability rather than that the student has limited English proficiency.

- Example 15: An EL high school student recently transferred into his current school district and appears to be struggling in all of his classes. After consulting with his teachers and obtaining consent from his parents, the school district decides that it will evaluate the student to determine if he has a disability under Section 504 and needs special education or related aids and services. Prior to initiating the evaluation, the school district asks the student and his parents about the schools he attended before arriving in the school district and about his experience in those schools. The school district also obtains and reviews records from these previous schools and learns that the student's ELP was previously assessed, that he was determined to be a native Spanish

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[79] 34 C.F.R. § 104.33(b)(2).

[80] *Cf.* 20 U.S.C. § 1414(b)(3)(A)(ii); 34 C.F.R. § 300.304(c)(1)(ii); *see also* 34 C.F.R. pt. 104, App. A at number 25, discussion of § 104.35 (recognizing that Title VI requires evaluations in the primary language of the student).

[81] *See* discussion *infra* in Part II. G, "Meeting the Needs of EL Students Who Opt Out of EL Programs or Particular EL Services."

[82] In conducting the evaluation and making placement decisions, school districts must draw upon information from a variety of sources (*e.g.*, aptitude and achievement tests and social and cultural background). 34 C.F.R. § 104.35(c) (school district "shall . . . draw upon information from a variety of sources").

speaker, and that he was provided EL services, but was not evaluated to determine if he needed special education or related aids and services. The school district determines that its disability evaluation of this student should be provided in Spanish.

Some examples of when the Departments have identified compliance issues regarding EL students with disabilities eligible for services under Section 504 or the IDEA include when school districts: (1) deny English language services to EL students with disabilities; (2) evaluate EL students for special education services only in English when the native and dominant language of the EL student is other than English; (3) fail to include staff qualified in EL instruction and second language acquisition in placement decisions under the IDEA and Section 504; or (4) fail to provide interpreters to LEP parents at IEP meetings to ensure that LEP parents understand the proceedings.

When the Departments conduct investigations, compliance reviews, or monitoring activities to determine if an SEA or school district has met its obligations under the civil rights laws and to provide FAPE to an EL student with a disability, the Departments consider, among other things, whether:

- ✓ *The evaluations used to determine whether an EL student has a disability were conducted in the appropriate language based on the student's needs and language skills, and whether the special education and EL services were determined in light of both the student's disability and language-related needs;*
- ✓ *The disability determination of an EL student was based on criteria that measure and evaluate the student's abilities and not the student's English language skills;*
- ✓ *The EL student was promptly evaluated for disability-related services, or whether there was an impermissible delay on account of his or her EL status and/or level of English proficiency;*
- ✓ *Language assistance services and disability-related services are provided simultaneously to an EL student who has been evaluated and determined to be eligible for both types of services; and*
- ✓ *The individualized plans for providing special education or disability-related services address EL students' language-related needs.*

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

Although school districts have an obligation to serve all EL students, parents have a right to decline or opt their children out of a school district's EL program or out of particular EL services

within an EL program.[83] For example, parents may choose to enroll their child in ESL classes, but decline to enroll their child in EL-only bilingual content classes. School districts may not recommend that parents decline all or some services within an EL program for any reason, including facilitating scheduling of special education services or other scheduling reasons. A parent's decision to opt out of an EL program or particular EL services must be knowing and voluntary.[84] Thus, school districts must provide guidance in a language parents can understand to ensure that parents understand their child's rights, the range of EL services that their child could receive, and the benefits of such services before voluntarily waiving them.[85]

During an investigation, the Departments consider whether a parent's decision to opt out of an EL program or particular EL services was knowing and voluntary. If a school district asserts that a parent has decided to opt out their child, the Departments will examine the school district's records, including any documentation of the parent's opt-out decision and whether the parent signed such documentation. Appropriate documentation is important to support school districts' assertions and for the Departments to evaluate school districts' legal compliance.

The Departments' past investigations have found high numbers of EL students whose parents have opted them out of EL programs or particular services within an EL program due to problematic district practices such as school personnel steering families away from EL programs, or providing incorrect or inadequate information to parents about the EL program, particular services within the program, or their child's EL status. The Departments have also found noncompliance where school personnel have recommended that families decline EL programs due to insufficient space in such programs or because school districts served only EL students with a basic or emerging level of English. Parents have also been found to have opted their children out of EL programs because the school district did not adequately address parental concerns expressed about the quality of the EL program, their lack of confidence in the EL program offered because the school district was not able to demonstrate the effectiveness of its program, or their belief that their child did not need EL services.

If parents opt their children out of an EL program or specific EL services, the children retain their status as EL students, and the school district remains obligated to take the "affirmative

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[83] *Cf.* 34 C.F.R. § 100.3(b)(1), (2); *see also* 20 U.S.C. §§ 6312(g)(1)(A)(viii) (Title I), 7012(a)(8) (Title III).

[84] Although not directly related to EL services, courts have found in other areas that a waiver must be informed and/or knowing as well as voluntary. *See, e.g.*, *Town of Newton v. Rumery*, 480 U.S. 386, 393 (1987) (any waiver of statutory right of action must "be the product of an informed and voluntary decision"); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974) (waiver must be "voluntary and knowing").

[85] Parental notification of these rights must "be in an understandable and uniform format and, to the extent practicable, provided in a language that the parent can understand." 20 U.S.C. §§ 6312(g)(2) (Title I), 7012(c) (Title III). This means that whenever practicable, written translations of printed information must be provided to parents in a language that they understand; but if written translations are not practicable, SEAs and school districts must ensure parents are provided oral interpretations of the written information. *See* 67 Fed. Reg. 71,710, 71,750 (2002). This obligation is consistent with Title VI and EEOA obligations of school districts to ensure meaningful communication with LEP parents, discussed in Part II. J "Ensuring Meaningful Communication with Limited English Proficient Parents."

steps" required by Title VI and the "appropriate action" required by the EEOA to provide these EL students access to its educational programs. Thus, the Departments expect school districts to meet the English-language and other academic needs of their opt-out EL students under the civil rights laws.[86] To ensure these needs of opt-out EL students are being met, school districts must periodically monitor the progress of students who have opted out of EL programs or certain EL services.[87] If an EL student who opted out of the school district's EL programs or services does not demonstrate appropriate growth in English proficiency, or struggles in one or more subjects due to language barriers, the school district's affirmative steps include informing the EL student's parents of his or her lack of progress and offering the parents further opportunities to enroll the student in the EL program or at least certain EL services at any time.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[91] 20 U.S.C. § 6823(b)(2).

[92] 20 U.S.C. §§ 6311(b)(7) (Title I), 6823(b)(3)(C), (D) (Title III).

[93] 20 U.S.C. §§ 6841(a)(3), 6842(a)(3).

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

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

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

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

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

- ✓ *School districts monitor the progress of all of their EL students, including opt outs, in achieving English language proficiency and acquiring content knowledge;*

- ✓ *SEAs monitor whether school districts' programs enable EL students to acquire English, content knowledge, and parity of participation in the standard instructional program;*

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

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

I. Evaluating the Effectiveness of a District's EL Program

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

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

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

[97] An EL program may have other goals such as bicultural goals or maintaining primary language literacy.

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

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

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

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

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

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

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

[101] *See id.* at 464 n.16 ("[An] absence of longitudinal data in the record precludes useful comparisons.").

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

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

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

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

- ✓ *SEAs and school districts monitor and compare the academic performance of EL students in the program and those who exited the program over time, relative to that of their never-EL peers; and*

- ✓ *SEAs and school districts evaluate EL programs over time using accurate data and timely modify their programs when they are not meeting the standards discussed herein.*

J. Ensuring Meaningful Communication with Limited English Proficient Parents

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

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

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

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

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

[103] Some school districts have used web-based automated translation to translate documents. Utilization of such services is appropriate only if the translated document accurately conveys the meaning of the source document, including accurately translating technical vocabulary. The Departments caution against the use of web-based automated translations; translations that are inaccurate are inconsistent with the school district's obligation to communicate effectively with LEP parents. Thus, to ensure that essential information has been accurately translated and conveys the meaning of the source document, the school district would need to have a machine translation reviewed, and edited as needed, by an individual qualified to do so. Additionally, the confidentiality of documents may be lost when documents are uploaded without sufficient controls to a web-based translation service and stored in their databases. School districts using any web-based automated translation services for documents containing personally identifiable information from a student's education record must ensure that disclosure to the web-based service complies with the requirements of the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g(b), and its implementing regulations at 34 C.F.R. Part 99. For more information on this issue, please review the "Protecting Student Privacy While Using Online Educational Services" guidance found at http://ptac.ed.gov/sites/default/files/Student%20Privacy%20and%20Online%20Educational%20Services%20%28February%202014%29.pdf.

volunteers may be able to communicate directly with LEP parents in a different language, but not be competent to interpret in and out of English (*e.g.*, consecutive or simultaneous interpreting), or to translate documents. School districts should ensure that interpreters and translators have knowledge in both languages of any specialized terms or concepts to be used in the communication at issue. In addition, school districts should ensure that interpreters and translators are trained on the role of an interpreter and translator, the ethics of interpreting and translating, and the need to maintain confidentiality.

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

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

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

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

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

Conclusion

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

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

ATTACHMENT 2

U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights
Office of the General Counsel

May 8, 2014

Dear Colleague:

Under Federal law, State and local educational agencies (hereinafter "districts") are required to provide all children with equal access to public education at the elementary and secondary level. Recently, we have become aware of student enrollment practices that may chill or discourage the participation, or lead to the exclusion, of students based on their or their parents' or guardians' actual or perceived citizenship or immigration status. These practices contravene Federal law. Both the United States Department of Justice and the United States Department of Education (Departments) write to remind you of the Federal obligation to provide equal educational opportunities to all children residing within your district and to offer our assistance in ensuring that you comply with the law. We are writing to update the previous Dear Colleague Letter on this subject that was issued on May 6, 2011, and to respond to inquiries the Departments received about the May 6 Letter. This letter replaces the May 6 Letter.

The Departments enforce numerous statutes that prohibit discrimination, including Titles IV and VI of the Civil Rights Act of 1964. Title IV prohibits discrimination on the basis of race, color, or national origin, among other factors, by public elementary and secondary schools. 42 U.S.C. § 2000c-6. Title VI prohibits discrimination by recipients of Federal financial assistance on the basis of race, color, or national origin. 42 U.S.C. § 2000d. Title VI regulations, moreover, prohibit districts from unjustifiably utilizing criteria or methods of administration that have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of a program for individuals of a particular race, color, or national origin. *See* 28 C.F.R. § 42.104(b)(2) and 34 C.F.R. § 100.3(b)(2).

Additionally, the United States Supreme Court held in the case of *Plyler v. Doe*, 457 U.S. 202 (1982), that a State may not deny access to a basic public education to any child residing in the State, whether present in the United States legally or otherwise. Denying "innocent children" access to a public education, the Court explained, "imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. . . . By denying these children a basic education, we deny

them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation." *Plyler*, 457 U.S. at 223. As *Plyler* makes clear, the undocumented or non-citizen status of a student (or his or her parent or guardian) is irrelevant to that student's entitlement to an elementary and secondary public education.

To comply with these Federal civil rights laws, as well as the mandates of the Supreme Court, you must ensure that you do not discriminate on the basis of race, color, or national origin, and that students are not barred from enrolling in public schools at the elementary and secondary level on the basis of their own citizenship or immigration status or that of their parents or guardians. Moreover, districts may not request information with the purpose or result of denying access to public schools on the basis of race, color, or national origin. To assist you in meeting these obligations, we provide below some examples of permissible enrollment practices, as well as examples of the types of information that may not be used as a basis for denying a student entrance to school.

In order to ensure that its educational services are enjoyed only by residents of the district, a district may require students or their parents to provide proof of residency within the district. *See*, *e.g.*, *Martinez v. Bynum*, 461 U.S. 321, 328 (1983).[1] For example, a district may require copies of phone and water bills or lease agreements to establish residency. While a district may restrict attendance to district residents, inquiring into students' citizenship or immigration status, or that of their parents or guardians would not be relevant to establishing residency within the district. A district should review the list of documents that can be used to establish residency and ensure that any required documents would not unlawfully bar or discourage a student who is undocumented or whose parents are undocumented from enrolling in or attending school.

As with residency requirements, rules vary among States and districts as to what documents students may use to show they fall within State- or district-mandated minimum and maximum age requirements, and jurisdictions typically accept a variety of documents for this purpose. A school district may not bar a student from enrolling in its schools because he or she lacks a birth certificate or has records that indicate a foreign place of birth, such as a foreign birth certificate.

[1] Homeless children and youth often do not have the documents ordinarily required for school enrollment such as proof of residency or birth certificates. A school selected for a homeless child must immediately enroll the homeless child, even if the child or the child's parent or guardian is unable to produce the records normally required for enrollment. *See* 42 U.S.C. § 11432(g)(3)(C)(1).

Moreover, we recognize that districts have Federal obligations, and in some instances State obligations, to report certain data such as the race and ethnicity of their student population. While the Department of Education requires districts to collect and report such information, districts cannot use the acquired data to discriminate against students; nor should a parent's or guardian's refusal to respond to a request for this data lead to a denial of his or her child's enrollment.

Similarly, we are aware that many districts request a student's social security number at enrollment for use as a student identification number. A district may not deny enrollment to a student if he or she (or his or her parent or guardian) chooses not to provide a social security number. *See* 5 U.S.C. §552a (note).[2] If a district chooses to request a social security number, it shall inform the individual that the disclosure is voluntary, provide the statutory or other basis upon which it is seeking the number, and explain what uses will be made of it. *Id.* In all instances of information collection and review, it is essential that any request be uniformly applied to all students and not applied in a selective manner to specific groups of students.

As the Supreme Court noted in the landmark case of *Brown v. Board of Education*, 347 U.S. 483 (1954), "it is doubtful that any child may reasonably be expected to succeed in life if he [or she] is denied the opportunity of an education." *Id.* at 493. Both Departments are committed to vigorously enforcing the Federal civil rights laws outlined above and to providing any technical assistance that may be helpful to you so that all students are afforded equal educational opportunities. As immediate steps, you first may wish to review the documents your district requires for school enrollment to ensure that the requested documents do not have a chilling effect on a student's enrollment in school. Second, in the process of assessing your compliance with the law, you might review State and district level enrollment data. Precipitous drops in the enrollment of any group of students in a district or school may signal that there are barriers to their attendance that you should further investigate.

We are also attaching frequently asked questions and answers and a fact sheet that should be helpful to you. Please contact us if you have additional questions or if we can provide you with assistance in ensuring that your programs comply with Federal law. You may contact the Department of Justice, Civil Rights Division, Educational Opportunities Section, at (877) 292-3804 or education@usdoj.gov, the Department of Education Office for Civil Rights (OCR) at (800) 421-3481 or ocr@ed.gov or the Department of Education Office of the General Counsel at (202) 401-6000. You may also visit http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm for the OCR enforcement office that serves

[2] Federal law provides for certain limited exceptions to this requirement. *See* Pub. L. No. 93-579, § 7(a)(2).

your area. For general information about equal access to public education, please visit our websites at http://www.justice.gov/crt/edo and http://www2.ed.gov/ocr/index.html.

We look forward to working with you. Thank you for your attention to this matter and for taking the necessary steps to ensure that no child is denied a public education.

Sincerely,

/s/

Catherine E. Lhamon
Assistant Secretary
Office for Civil Rights
U.S. Department of Education

/s/

Philip H. Rosenfelt
Deputy General Counsel
Delegated the Authority to
Perform the Functions and
Duties of the General Counsel
U.S. Department of Education

/s/

Jocelyn Samuels
Acting Assistant Attorney General
Civil Rights Division
U.S. Department of Justice

Attachments