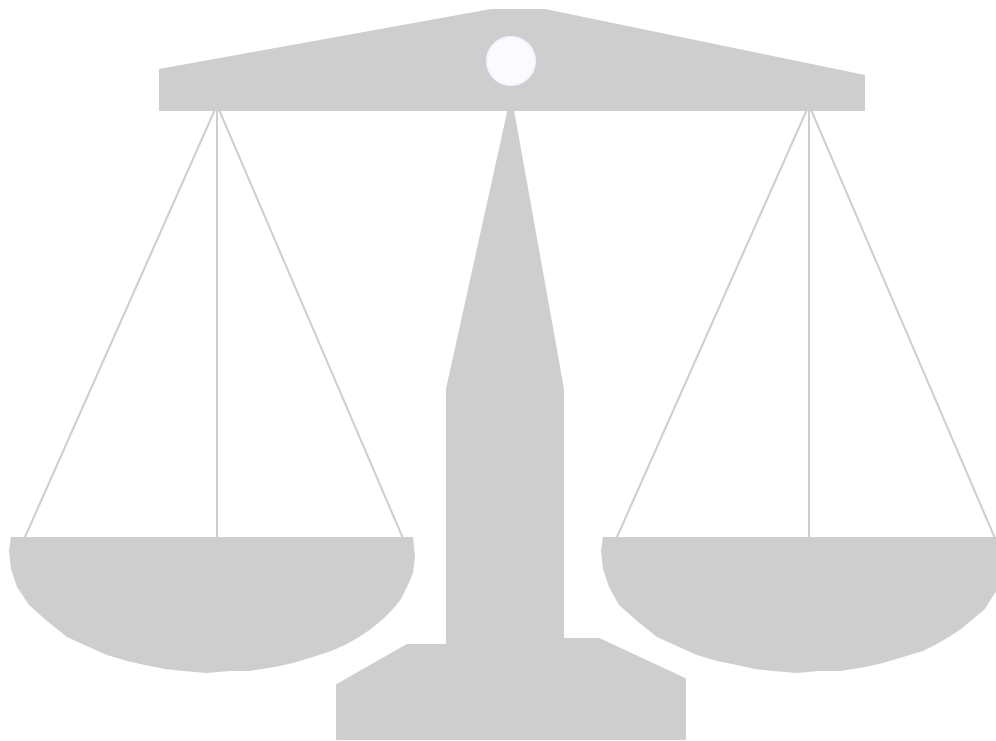


# **THE CIVIL RIGHTS REQUIREMENTS FOR EDUCATING ENGLISH LANGUAGE LEARNERS**



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## I. INTRODUCTION

As you are already probably aware, there has been a significant increase of immigrants in the United States with limited English language skills. According to statistical information, Arkansas has also been experiencing a significant surge of recent immigrants that possess very limited English language skills, if any at all. As a result of this increase, schools around the country to include the state of Arkansas are facing increase enrollment of students who have limited English language skills. Moreover, the inability of these students to communicate in English is affecting their ability to participate meaningfully in education programs. Consequently, school districts are facing a tremendous task in not only teaching these students English, but also educating these students in the appropriate educational curriculum present within these school districts.

If school districts fail to have a framework of quantitative goals, plans, and structures in place for educating students that are limited English proficient, then these students will often fail in the classroom and ultimately drop out of school. Furthermore, school districts will also fail in preparing these students for higher education or providing them the necessary skills to obtain productive employment. In order for these issues to be resolved, it is critical that these students have an equal opportunity to benefit from the educational programs offered by school districts.

Today, my goal is to provide you with guidance, insight, and explanations regarding how our courts and legislation have provided protections for language minority students. In effect providing clarification regarding the responsibilities that school districts and teachers have in providing an equal educational opportunity to limited English proficient students or as the trend is today, English Language Learners, thereby highlighting the positive connotation of the student learning English instead of the negative deficiency. I plan to discuss with you the various laws, court cases, Office for Civil Rights (OCR) polices, procedures and structures for an alternative language program, and finally, your role as an educator in the educational life of these students.

## II. PERTINENT CIVIL RIGHTS LAWS

The following are respective laws, court cases, and policy documents that provide for an understanding regarding the education of language minority students who are limited-English proficient (LEP) or English Language Learners (ELL). (Exhibit A)

### A. Title VI of the Civil Rights Act of 1964<sup>i</sup>

“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

Title VI is the focal point and center to all interpretations regarding any legal challenges regarding the provision of equal opportunity to all group that are found in a protect class. The triggering mechanism for Title VI is the receipt of financial assistance from the federal government. Consequently, almost all public schools in the United States receive some form of financial assistance from the federal government. Therefore, the Act was the catalyst for the education of all children in a setting that was all-inclusive.

An example of some of the prohibited actions under Title VI include:

1. Providing services, financial aid, or other benefits that are different or provided in a different manner;
2. Restricting an individual’s enjoyment of an advantage or privilege enjoyed by others;
3. Denying an individual the right to participate in federally assisted programs; and
4. Defeating or substantially impairing the objective of federally assisted programs.

Additionally, Title VI has been interpreted to prohibit denial of equal access to education because of a language minority student’s limited proficiency in English. This means that language minority students that are limited in their English language skills such that they are unable to participate in or benefit from regular or special education school instructional programs are protected under Title VI.

### B. OCR’s May 25, 1970 Memorandum<sup>ii</sup>

The OCR which was a part of the Department of Health, Education and Welfare at the time issued the commonly know May 25<sup>th</sup> Memorandum to provide school districts with some guidance and clarification on the responsibilities of education and providing opportunities for LEP students.

This policy document stated “that where the 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, the district must take affirmative

steps to rectify the language deficiency in order to open its instructional program to these students.”

Basically, a school district is required to take affirmative steps in remedying a student’s limited English proficiency. However, the policy document did not provide school districts with guidance directing how the issue was to be addressed. Nevertheless, some direction was provided on how Title VI was violated under certain circumstances. These include:

1. Students are excluded from effective participation in school because of the inability to speak and understand the language of instruction;
2. National origin minority students who are LEP are misassigned to classes for the mentally retarded on the basis of criteria which essentially measure or evaluate English language skills;
3. School districts may not deny national origin-minority group children access to college preparatory courses on a basis directly related to the failure of the school system to inculcate English language skills;
4. Programs for students whose English is less than proficient are not designed to teach them English as soon as possible, or operate as a dead-end track; or
5. Parents whose English is limited are not adequately notified of school activities which are called to the attention of other parents.

The underlying issues regarding the memo was that the OCR was having school districts establish an identification process that would identify all LEP students who need assistance and if the identified students that needed assistance were being provided with that assistance.

### C. Lau v. Nichols<sup>iii</sup>

This is one of two of the most significant cases regarding the education of national origin minority students who are LEP. This case was initiated by parents on behalf of approximately 3,000 Chinese students who were unable to understand the language of instruction in the San Francisco Public School District. These students had been required to attend classes taught exclusively in English and had received no assistance in learning English. The parents basically argued that the basic skills in English were the very foundation of what the public schools of San Francisco teach.

The United States Supreme Court held that the San Francisco school system violated Title VI by denying the students a meaningful opportunity to participate in the educational program. The Court declared that the San Francisco schools were making a mockery of public education when they imposed a requirement that, before children can effectively participate in the educational program, they must already have acquired those basic skills. The Court further declared “those who do not understand English are certain to find their classroom experience wholly incomprehensible and nonmeaningful.” Lastly, the Court stated, “the Chinese-speaking minority receive fewer benefits than the

English-speaking majority from the respondents' school system which denies them a meaningful opportunity to participate in the educational program.”

However, the Court did not require a particular method for teaching LEP students, such as bilingual education, English as a Second Language, Structured Immersion, etc. The Court did provide that the May 25<sup>th</sup> Memorandum was a valid interpretation of the requirements of Title VI. This was summarily stated by the Courts opinion in the following:

1. An equal educational opportunity is not accomplished by the provision of “the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education”
2. OCR has the authority to establish regulation for Title VI enforcement that among other things, prohibit “discrimination which has the effect even though no purposeful design is present”

Consequently, after the Lau decision, Congress got into the fray and provided additional protections to LEP students through the passage of the Equal Educational Opportunities Act (EEOA) of 1974.

#### D. Equal Educational Opportunities Act of 1974<sup>iv</sup>

The passage of the EEOA establish the following law:

“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 of an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.”

Basically, the EEOA required schools to “rectify appropriately a limited English proficient student’s English opportunities.” This created some unrest regarding how school districts were going to rectify the opportunities. In response to this confusion, the OCR stepped in to formulate the Lau remedies. The Lau remedies provide a cognizable standard of approaches and methods for school districts to follow. Ultimately, these remedies set the approach for OCR to determine if a school district was in compliance.

The Lau remedies provided guidelines for school districts to follow, such as:

1. identifying and evaluating the English language skills of language minority students;
2. determining appropriate instructional treatments;
3. deciding when LEP children were ready for mainstream classrooms; and
4. determining the professional standards to be met by teachers of language minority children.

E. Cintron v. Brentwood Union Free School District<sup>v</sup> and Rios v. Read<sup>vi</sup>

After the Lau decision and EEOA, was in place for a few years, the above-mentioned cases provided additional guidance regarding the provision of services to students with limited English proficiency. The Cintron was the initial case to utilize the Lau remedies as guidelines in the education of LEP students. In this case the school district proposed a plan for the education of students through a pullout basis. The court ruled that the proposal submitted by the school district was not legally sufficient because it substituted tutoring on a pullout basis for full-time bilingual education. When considering this case, keep in mind that the case centered on bilingual education. Despite, the focus on the nature of bilingual education, the case is important since it set out the larger frame work no providing support in the form of pullout programs for education LEP students.

Further, in Rios, the court provided for the establishment of alternative language programs that provide for the full range of support in teacher instruction, assessment, materials, and program procedures. The court stated, “while the district’s goals of teaching Hispanic children the English language is certainly proper, it cannot be allowed to compromise a student’s right to meaningful education before proficiency in English is obtained.”

Consequently, the above cases further clarified the approach that school district should take when implementing the Lau remedies. Additionally, the decisions stood for the proposition that LEP students should be provided with a program that would effectively assist them in achieving English proficiency.

F. Castañeda v. Pickard<sup>vii</sup>

The second of the two most significant cases in the education of students that are LEP. This is the seminal post-Lau decision concerning the education of language minority students. This case was not decided under Title VI but under the Equal Educational Opportunities Act of 1974<sup>viii</sup>, however, OCR determined that the standards reasoned by the Court was appropriate in determining whether programs for language minority students meet the requirements of Title VI. As a result, the three-part test developed by the Court to evaluate the adequacy of a district’s program is crucial to meeting the needs of language minority students. The test is as follows:

1. Whether the school system is pursuing a program informed by an educational theory recognized as sound by some experts in the field or at least deemed to be a legitimate experimental strategy?
2. Whether the program and practices actually used by the school system are effectively implementing the educational theory adopted by the school?
3. If the program fails to produce results indicating that language barriers are being overcome, that program may no longer constitute appropriate action as far as that school is concerned.

The above may cause some confusion regarding what a school district needs to implement; however, if you keep in mind that the first part requires a school district to choose an educational theory, the second addresses if the programs and practices associated with the educational theory, including resources and personnel, are reasonably calculated to implement the educational theory effectively, and thirdly does the school evaluate its programs and make adjustments where needed to ensure language barriers are actually being overcome?

G. Plyler v. Doe<sup>viii</sup>

This Supreme Court was decided in 1981 regarding the issue of the provision of educational services to children that are not in the United States under legal immigration status. The case came out of the Tyler Independent School District in Texas. Basically, the court ruled that schools are required to provide full access for any student to instructional programs, irrespective of the student's immigration status. Consequently, this case established that if students attend school and they may be undocumented immigrants could not be excluded from provisions of Title VI of the Civil Rights Act. Thereby, not having schools enforce immigration laws within their district boundaries.

H. OCR's December 3, 1985 Memorandum<sup>ix</sup>

This policy commonly known as the December 3<sup>rd</sup> Memorandum outlines the adoption of the standards set out in the Castañeda case. Moreover, it reiterated the need for school district to follow the May 25<sup>th</sup> Memorandum even if the district has only a single limited English proficient student. This provided an important instrument for the provision of equitable access and services to students in rural school district.

Also, the document provides a description of the procedures followed by OCR in making determinations of compliance with Title VI with regard to the education of limited-English proficient students. The policy further recognizes that school districts need discretion in how they ensure equal educational opportunity to language minority students. Consequently, many educational approaches may reasonably be expected to ensure the effective participation of non-English speaking students in the total educational program. Thus, school districts may utilize educational techniques that are most suited to the district's unique characteristics.

Additionally, school districts and teachers will want to consider two general issues regarding compliance with all the aforementioned legal guidance when devising and structuring an alternative language program.

1. Whether there is a need for the district to provide a special language service program to meet the educational needs of all language minority students; and
2. Whether the district's alternative language program is likely to be effective in meeting the educational needs of its language minority students.

In determining the need for alternative language programs school districts need to determine if language minority students are participating effectively in the regular instructional program. When students are not, a school district must provide an alternative language program. If a school district has few LEP students, the program may be informal. Alternatively, if the numbers are great, then a school district will need a more structured and formal type of alternative language program. Consequently, many factors affect the types of educational programs that schools districts may offer, including the number of students, number of qualified teachers, resources, and the variety of languages involved.

#### I. OCR's September 27, 1991 Memorandum<sup>x</sup>

The policy update is designed to determine whether schools are complying with their obligation under the Title VI regulation, to provide any alternative language programs necessary to ensure that LEP students have meaningful access to the school's programs.

The more important aspects of the policy update pointed to the adequacy of the program and the need for a formal program. The policy provided for staffing requirements, exit criteria, and access to the full range of programs found at the school (e.g., honors, gifted and talented). Moreover, the policy established that a school district may not relegate LEP students to "second-class status" by having these students instructed by teachers that do not have formal qualifications, "while requiring teachers of non-LEP students to have formal requirements.

Also, this policy update readily points to why teachers undergo training and endorsement classes. The policy placed responsibility on school districts to train teachers in the methods of the second language acquisition theory that it selects. For example if the district utilizes ESL, then the district must train their teachers in those methods and theories. Furthermore, the district also had to provide for evaluators of these teachers to be familiar with the method being utilized. Moreover, if the district was not able to hire adequately trained teachers, then they would have to "grow there on" in essence provide for adequate training to teachers already on staff to comply with Title VI requirements. The end result was for these teachers to obtain the credential of the method utilized in the district.

The update also established that students should not be exited from the program until objective standards are met. To meet these standards, district should be able to point to standards that demonstrate that students are able to participate meaningfully in the regular classroom. This meant that students could not exit the program until they could read, write, speak, and comprehend English.

Lastly, the policy update established a framework for the development of staff. More, specifically, provided guidance on inservice training, formal college work or both necessary for the district to determine that teachers have mastered the skills needed for providing a quality education to English language learners. Moreover, it addressed the

issue of the use of bilingual aides in alternative language programs. Providing that aides should have the appropriate level of skill in speaking, reading, and writing in both languages. While at the same time work under the direct supervision of a certified teacher in providing instruction.

J. Section 504 of the Rehabilitation Act<sup>xi</sup>

This federal regulation prohibits recipients of federal financial assistance and public entities from discriminating against qualified persons with disabilities by denying them an opportunity to participate in any aid, benefit, or service or providing them with any aid, benefit or service that is not as effective as that provided to others.

Also, a recipient that operates a public elementary or secondary education program shall conduct an evaluation of any person, who because of disability needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program.

Moreover, the recipient must establish a system of procedural safeguards for students who need or are believed to need special education or related aids and services that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parent or guardian, representation by counsel, and a review procedure. The foregoing provides a general overview of what is required under Section 504 and its implementing regulation.

Although, school districts have broad discretion in implementing an alternative language program—districts need to remain cognizant that certain issues need to be addressed when implementing their respective programs. The following section will address the various components that need to be present in a school district's alternative language program.

K. No Child Left Behind Act of 2001<sup>xii</sup>

The primary goal or purpose of this reenactment and reform of the Elementary and Secondary Education Act (ESEA). With the focus on ensuring that “all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.”

In the area of student that are ELL, the Act will assist ELL in learning English through teaching methods that are considered proven for the remediation of limited English proficiency, in essence, teaching methods based on sound and scientific principles. Moreover, all students that are identified as LEP will be required to be assessed in reading and English-language arts after they have attending schools in the United States for a period of three consecutive years. Provide for core content knowledge and achievement of State standards in addition to English proficiency. In addition to the

assessment requirements, school are required to notify parents that their child needs instruction in English and demonstrates limited English proficiency. The preparation of ELL students to enter classrooms and receive instruction in English. This is basically a similar provision that is currently required under Title VI and that most school districts have implemented in various degrees.

In any respect, many of the aforementioned issues are nothing new to schools districts and teacher, since Title VI has provided for the provision of education services to students since its enactment. Nevertheless, the major changes under the Act are the requirements that it is placing on States to provide a meaningful education to students. First, the Act requires mandates the submission of State plans thereby establishing standards and benchmarks for LEP students aligned with State standards. Secondly, the other significant area is in the accountability that States must demonstrate in the provision of an education to students that are limited English proficient that is meeting its objectives.

The Act in the area of English language learners, provides that States must establish annual achievement objects that are related to gains and aligned to Title I achievement standards; the annual assessment requirements in English for students and the accountability for demonstrating adequate yearly progress. Consequently, in order to demonstrate these and all mandates of the Act, the States will more likely than not require the school districts in order to receive monies under the grant provided by the Act to submit a plan containing information about their programs.

These school district plans will contain the description of the programs developed, implemented, and administered, annual measurable achievement objectives for LEP students, the measurement of progress for LEP students in English and core contents, and the promotion of parental involvement. Moreover, the implementation of improvement plans for the modification of the curriculum, program, and method of instruction. Also, the Act provides for additional requirements, the above represent the main focus of the goals and objectives.

Lastly, additional requirements imposed are the certification that teachers are fluent in English and any other language used for instruction, including having written and oral communications skills. That a program evaluation is conducted to demonstrate to the progress and achievement of the students, as well as the progress in English in the four modalities of speaking, reading, writing and comprehension, similar to the requirements in Castañeda. More importantly, the Act does not provide for the contravention or construction of the language in the Act to infringe on any Federal law that guarantees a civil right.

Although, it may seem that the Act places additional requirements on school districts and teachers, many of the requirements if not all should already be occurring or incorporated in an alternative language program that is based on the postscripts of Title VI.

### III. ALTERNATIVE LANGUAGE PROGRAM COMPONENTS

Seemingly, school districts have all this legal guidance on how to theoretically comply with federal law. In practice, all the legal guidance fails to address how a school district should appropriately structure an alternative language program that will meet all the requirements in providing a program that will allow language minority students who are LEP to participate meaningfully in the school district's educational program. In addition to fulfilling other requirements imposed by federal law and OCR policy statements. As previously mentioned, this section will address these issues by introducing the components of an alternative language program. (Exhibit B) Moreover, the components of the alternative language program in essence compose all the various interpretations of the Court cases, and OCR policy.

After a school district has determined that there is a need to provide an alternative language program, the district needs to ensure that certain components are part of the formal structure.

#### A. IDENTIFICATION

A school district should have procedures in place for identifying students that may be LEP. These procedures should be reasonably calculated to ensure that all children in the district who have a primary home language other than English and who may have a need for English language services are identified. This usually takes the form of a home language survey or questionnaire. The survey includes questions that will indicate whether there is any use of a language other than English in the home. In order for the survey to be effective, it should include at a minimum three questions: (Exhibit C)

1. What was the first language spoken by the child?
2. What language(s) are spoken in the home?
3. What language(s) are spoken or understood by the child?

Moreover, a school district may decide to ask additional questions, or to ask these questions in a different form. Also, the purpose of the questions is not to determine if that student is "dominant" in English but if the student is "proficient" in English. Proficiency refers to how well the student can speak, read, write, and comprehend the language; referred to as the four modalities. This proficiency level will allow a student to participate meaningfully in the academic setting of a school district.

In identifying a student, any survey that identifies a language other than English present in the home will provide the school district a good idea of which students may need language services. This will result in the student being referred for assessment for English language proficiency.

Alternatively, the survey will not properly identify that a student may have a potential need for English language services. Accordingly, it is important for teachers to be aware of the possibility of having students in the classroom that were not identified

appropriately by the home language survey. The teacher should observe their pupils for difficulties that may arise with students that don't understand their instruction. If this should arise, the teacher is obligated to refer the student to the appropriate department or staff for assessment of English language proficiency.

## B. ASSESSMENT

Once a school district has identified students who may need assistance, then it must determine how to assess these students. School districts should assess students objectively in four areas (speaking, reading, writing, and comprehension). By assessing in these areas, a school district will be able to determine how well a student can presently use English. Accordingly, school districts may use various assessment methods and procedures. The appropriateness depends on variables such as languages present, ages of student, size of school, and the reliability of the assessment instruments. Additionally, the assessment instruments must be validated to ensure proper assessments of these students. Many school districts utilize the Language Assessment Scales as their instrument of choice.

The administration of these assessments should be carried out as soon as a student has been identified as having a primary home language other than English. This will allow the placement of the student in the appropriate educational program. Consequently, an assessment within 10 to 20 days of enrollment is likely to be least disruptive to the students' educational placement and progress.

Moreover, the assessment needs to be carried out by individuals that are trained on the administration of the respective instrument. These individuals should be trained by the test publisher or other qualified personnel according to the publisher's recommendations. After the assessment, the information regarding the proficiency of the student should be recorded and maintained in the student's permanent record folder. Additionally, procedures need to be in place that will ensure that each identified student who is LEP is recognized as such as the student moves within the school district.

## C. PROGRAM DESIGN AND IMPLEMENTATION

Once a school district identifies the need for an alternative language program, it must implement the program effectively. The program must be based on a sound educational approach. A specific type of program is not required under federal law, however, the educational theory relied on by the district should be recognized by experts as a legitimate English language remediation theory. When choosing a program, the district must have a description of the program components and activities. This must be supported by rational methodologies and reasonably calculated to succeed in meeting the needs of the students. Furthermore, after a school district has chosen its respective program, then the district must properly implement the program to comply with Title VI. Again, the programs may take the form of bilingual education, English as a Second Language, English Language Development, Structure Immersion, etc. Please note that experts have not recognized tutoring (pullout) or translation as sound. These techniques

usually refer to services delivered by paraprofessionals who are not certified to teach. Such services may be effective to augment a recognized alternative language service model to help limited-English students keep up academically with peers. However, used in the absence of such approaches, as ESL or bilingual education taught by qualified teachers are not legally acceptable approaches to educating limited-English proficient students.

## 1. Placement/service delivery

In implementing the program, the school district should establish procedures for appropriate placement of LEP students into programs appropriate to their educational needs. The district may choose to provide different types of services for students with different proficiency and language needs. Moreover, districts may place students in a program that temporarily emphasizes English over other subjects. While district may discontinue special instruction in English once the student becomes proficient in English—schools retain an obligation to provide assistance necessary to remedy academic deficits that may have occurred in other subjects while the student was focusing on learning English.

Furthermore, the program model selected by the district should be described or summarized in writing as well as including an explanation of how it will assist LEP students to become proficient in English. Moreover, the school sites and grades at which the program is implemented should be specified.

## 2. Participation

The participation aspect focuses on the specifics of the program, specifically the amount and kinds of services provided, accesses to the full school curriculum, etc. Moreover, a school district must also keep in mind the numbers of LEP students served. This will provide a school district with a determination of whether all language minority students in need of services have been served. Additionally, if it is determined those students in need of services are not being served then a district runs the risk of being in violation of Title VI. Furthermore, by maintaining a roster or other database to record names, schools, grade levels, and programs a district will ensure that students are receiving the appropriate services. Also, the roster ensures that identified students continue to be recognized as requiring appropriate services, despite changes in program, classroom and school assignment.

During your tenure as a teacher, you may face situations in which LEP students' parents have refused participation in a formal alternative language program. Although there are no Federal requirements requiring approval, schools districts should inform all parents of the programs available that would enrich a student's educational career. In any event, most of the parental denials can be attributed to misconceptions regarding the program. To avoid this dilemma, districts should fully inform parents of the program and its goals before accepting the refusal or denial. Many districts provide for teachers to hold

conferences with parents explaining and informing them about the benefits of the program.

If after the parent is informed, and the parent still refuses placement of the student a district is not relieved of the obligation to ensure an equal educational opportunity for LEP students. The district is still under a continued obligation to provide a student appropriate educational services to meet the student's English language and academic remediation needs. This can be met by providing services outside of the formal program through an informal type of delivery of services.

### 3. Staffing

After a school district has chosen its respective program model, the district has an obligation to provide the staff necessary to implement the chosen program properly within a reasonable period of time. As you are probably aware, many states and school districts have established formal qualifications for teachers working in a program for LEP students. Consequently, when formal qualifications have been established, and when a district generally requires its teachers in other subjects to meet formal qualifications, a district must either hire formally qualified teachers for LEP students or require that teachers already on staff work toward those formal qualifications. Thus, a school district must not in effect relegate LEP students to second-class status by indefinitely allowing teachers without formal qualifications to teach these students while requiring teachers of non-LEP students to meet formal qualifications.

However, for many school districts, hiring teacher that are qualified to teach limited-English proficient students has been a problem for many. As a result school districts will "grow their own" teachers. This refers to a concept that school districts select teachers to proceed through a formal qualification process, for instance an ESL Academy or course work at a local university that leads to an ESL or Bilingual endorsement. The district must also ensure that the program's teachers have received adequate training in the specific teaching methods required by that program. Moreover, the district should ensure, through evaluation and classroom observation that teachers have actually mastered the skills necessary to teach in the program successfully.

In addition to having the qualified staff necessary to carry out the program, the district must also carry out the program effectively with appropriate staff. The appropriateness of staff refers to whether the staffs' training, qualifications, and experience are consonant with the requirements of the program. For example, if a district has established an English-as-a-Second-Language (ESL) program, but the staff has no ESL training and there is no provision for ESL teacher training. That is why it is important for staff (teachers and aides) at school district to undergo not only formal qualification programs, but receive continuous training in the respective program model.

#### 4. Student Exit and Follow-up (Monitoring)

Once students have been placed in an alternative language program, they must be provided with services until they can speak, read, write, and comprehend English well enough to participate meaningfully in the district's regular program. The criteria should not simply measure a student's oral language skills. Determinations should include:

1. Whether exited students are able to keep up with their non-LEP students in the regular educational program;
2. Whether they are able to participate successfully in essentially all aspects of the school's curriculum without the use of simplified English materials; and
3. Whether their retention-in-grade and dropout rates are similar to those of their non-LEP peers.

Moreover, the exit criteria should be based on objective standards, such as test scores, and districts should be able to explain why students meeting those criteria will be able to participate meaningfully in the regular classroom. At times, teacher recommendations, parental or student input and other subjective criteria are incorporated in the exiting process; however, such criteria should not override objective measures. In essence, students should not be exited from the program unless they can read, write, speak, and comprehend English well enough to participate in the school districts programs.

The exiting procedure should be based on a team approach. Many school districts provide a Language Proficiency Assessment Committee (LPAC) that determines whether a student is ready to participate meaningfully in the general curriculum. This committee is generally made up of alternative language program teachers (ESL or Bilingual), administrators (principal), counselor, etc. Consequently, if your district utilizes this concept, you may be asked to serve on the committee. That is why it is important to conceptualize and understand your role in the process of exiting students. (Exhibit D)

Furthermore, school districts should monitor the progress of students that have been exited from the alternative language program for approximately two years. This will ensure that they are succeeding in the general academic program provided in English. For the monitoring to be effective, a process should be implemented which allows teachers to know which students in their classes are former LEP students. This will allow for the student's grades and attendance to be reviewed by designated staff. The process will assist in identifying any academic weakness, thus allowing for appropriate interventions to address the respective needs of the student. At times, this may take the form of placing the student back into the alternative language program. Timely and appropriate interventions are significant in ensuring the student a meaningful opportunity to participate and succeed.

## 5. Materials

Along with having qualified staff on hand to carry out the respective program, it is equally important to have appropriate materials to carry out the program effectively. To ensure effectiveness, the district should have materials that correspond to the program that it has selected. The materials need to be appropriate for the grade level, age of student, and program model. Moreover, the district should account for enough materials to meet the needs of its increasing LEP student population. Please note that merely providing students with the same materials that are provided to their English proficient peers does not constitute providing those students with equal access to the school districts program.

## 6. Parent Involvement

School districts have the responsibility to effectively notify national origin minority group parents of school activities that are called to the attention of other parents. Such a notice, in order to be effective, may have to be provided in a language other than English. The first step in communicating with parents in an appropriate language is to identify which parents require communication in a language other than English. Additionally, parents can be asked if they require translation and in what language. Lastly, the district may choose to translate forms frequently used in language most common to the district.

## D. SEGREGATION AND FACILITIES

Providing services to LEP students can at times have the effect of segregating students by national origin during at least part of the school day. Segregation is permissible only where the benefits that accrue to LEP students by remedying the language barriers outweigh the adverse effects of such segregation. As a result, school districts' focus should be on whether the district has carried out its chosen program in the least segregative manner consistent with achieving its stated goals. Furthermore, based upon the general prohibitions of differential treatment, LEP students should receive the benefits of facilities, equipment, and services that are comparable to those available to other students with respect to such factors as space, quantity, quality, condition, availability, appearance, and usefulness.

In analyzing what settings can be considered segregative, school districts' staff must view how the facilities that serve limited-English students are composed. Completely separate schools and facilities are more segregative than services provided at the home school. Services provided at the home school in separate buildings and trailers are more segregative than those provided in the same buildings. As you can ascertain certain situations lead to a more or less segregative environment. Please note as was previously mentioned that some degree of segregation is permissible as long as the educational benefits provided in overcoming language barriers outweigh the detriments of segregation.

Some situations that are considered segregation settings are segregating LEP students for both academic and nonacademic subjects, such as recess, physical education, art, and music; or maintaining students in an alternative language program longer than necessary to achieve the district's goals for the program. Also, facilities provided to LEP students must be comparable in size and quality to those provided to other students. Thus, if other students are taught in regular classroom settings, LEP students should not be taught in hallways, offices or other makeshift classes.

#### E. SPECIAL OPPORTUNITY PROGRAMS

To ensure that LEP students have an equal educational opportunity, school districts can not refuse to consider admitting LEP students to their special opportunity programs. These programs are usually identified as gifted and talented, magnet schools, "choice" programs and advanced placement courses. Moreover, if a school district has a process for locating and identifying participants for such programs, it must also locate and identify LEP students who could benefit from the programs.

A school district must also ensure that qualifying criteria, evaluation and testing procedures do not screen out LEP students because of their limited-English proficiency. To the extent feasible, tests used to place students in specialized programs should not be of a type that the student's limited-English proficiency will prevent the student from qualifying for a program for which they would otherwise be qualified. Consequently, alternative-qualifying criteria should be considered, such as testing for requisite skills in another language, and teacher parent, student or committee recommendations. Many school districts utilize non-verbal assessment instruments for appropriately evaluating LEP students for special opportunity programs. These types of evaluation tools measure in essence the characteristics of a true gift as opposed to evaluating English language skills.

Educational justifications for excluding a particular LEP student from a specialized program should be comparable to those in excluding a non-LEP peer and may include:

1. That time for the program would unduly hinder the student's participation in an alternative language program;
2. The specialized program itself requires proficiency in English language skills for meaningful participation.

Moreover, school districts may not deny national origin-minority group students access to college preparatory courses on a basis directly related to the failure of the school district to inculcate English language skills.

Lastly, it is important for school districts to encourage parents and staff to refer LEP students for the program. As with other communications with the parents of LEP students, information regarding the gifted and talented program should be transmitted in a language the students and parents can understand. Accordingly, you as a teacher should

actively encourage and refer LEP students to these programs, if you think a student is qualified and benefit from the programs offered.

### **III. SPECIAL EDUCATION AND LEP STUDENTS**

The area of special education along with Section 504 gives rise to many difficult and complex issues regarding the education of LEP students. First and foremost, school district may not assign students to special education programs on the basis of criteria that essentially measures and evaluates English language skills. Conversely, school districts must also ensure that LEP students are not excluded from participation in special education or Section 504 because of the student's limited-English proficiency. Consequently, school districts must ensure that each LEP student receives an appropriate education, considering both the student's language background and need for special education.

#### **A. PRE-REFERRAL/REFERRAL PROCESS**

Under the general framework of referring LEP students, as was previously mentioned, the referral criteria should not be based on essentially measuring and evaluating English-language skills. Thus, a referral process should consider current English language proficiency information in the four skill areas (oral, reading, comprehension, and writing) based upon objective measures before the referral process begins. Along these lines, the assessment results should be shared with, and considered by those persons who are to consider the student's appropriate interventions.

Also, when a school district schedules any meetings regarding the LEP student, staff knowledgeable (ESL teacher, etc.) about the student should be present at all times. The attendance of alternative language program staff will aid the group considering interventions by providing information regarding the student's performance, language, and cultural background. Please keep in mind that since you comprise a part of the alternative language program staff, you will probably be asked to participate in special education/Section 504 meetings and provide input. Moreover, translators should also be provided for parents and students when necessary to communicate with them in a language they can best understand. Furthermore, any information gathered by the alternative language program pertaining to language background and proficiency information should be documented in the student's special education folder.

The question that often arises in this area is if school districts should wait before referring LEP students for special education often arises. The simple answer to this is no. Accordingly, school districts should consider all appropriate interventions including participation in an effective alternative language program to develop English skills. However, if there is a belief that the student has special education needs the student should be referred for appropriate special education testing. LEP status should not be a bar or delay participation by LEP students in special education.

## B. EVALUATION AND PLACEMENT

When a school district considers evaluation and placement of LEP students, a district should draw upon information from a variety of sources, including:

1. Aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;
2. Establish procedures to ensure that information obtained from all such sources is documented and carefully considered;
3. Ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and
4. Ensure that the placement decision is made to confirm with IDEA and Section 504.

Turning specifically to the evaluation component, a school district wherever possible should use diagnosticians, psychologists, and speech and language pathologists who are bilingual in the student's language and trained in alternative language assessments as the staff conducting the special education evaluations of LEP students. If this proves to be difficult for the district because of a lack of qualified staff, then where appropriate, trained translators may also assist the special education evaluators. Please note that there are risks associated with translating assessments. Some of these risks occur when the translators are not appropriately trained to administer the test so as to invalidate the test results. Also translators should also be objectively assessed to be proficient in English and the other language. This will maintain the continuity and integrity of the assessment.

Furthermore, after all the evaluation information is gathered, the group of persons knowledgeable about the child, the evaluation data, and the placement options gives due consideration before the student is placed in special education or receives Section 504 services. Moreover, the student's special education records should contain documentation of any staffing discussions to ensure placement is not based upon criteria that essentially measured English language skills.

## C. DUAL SERVICES

A school district should not have any policies or procedures, written or unwritten, prohibiting LEP students from receiving special education services and alternative language program services, if they are in need of both services. Accordingly, a district should have policies and procedures outlining their responsibility in providing dual services to LEP students if there is a need for those services. Please keep in mind that LEP students are entitled to receive all services for which they qualify. As a result, dual services should be coordinated so there is no conflict in schedules between special education services and alternative language services offered by the district. Moreover, there should also be a continuity of services appropriate to the needs of the child.

#### D. PROCEDURAL SAFEGUARDS

School districts should have policies and procedures requiring staff to provide the parents and guardians of students that have a primary home language other than English with rights and procedural safeguards in a language they can best understand. As a result, the district should have a means of determining which parents or guardians require notice of their rights and procedural safeguards in a language other than English. Parents and guardians should be asked in an appropriate language if they require translation services, and responses should be documented.

Parental rights and procedural safeguards can be printed in languages other than English by district and distributed as needed. Commonly used forms, such as notices of staffing, parent handbooks and other pertinent documents can also be translated for distribution. Please be aware that you as a teacher and a vital part of a school district should not place upon the parents or students the responsibility for effective communication.

#### IV. PROGRAM EVALUATION

This component of an alternative language program comports to the issue that was previously mentioned that a program after a legitimate trial succeeds if it is producing results that indicate that students' language barriers are actually being overcome. Along the same lines, if a school district's program is not succeeding in enabling LEP students to overcome their language barriers then a district must take steps to modify the program. Consequently, a district must not only periodically evaluate the program, but also make modifications when the program is not meeting the intended results.

An alternative language program when viewed in its entirety, effectively teaches language minority students English, and moves them into the regular educational program within a reasonable period of time. As a result, sufficient data should be collected throughout the year at the school sites to be analyzed in support of these determinations. Although there is no specific data that a district must keep, it is expected that a sound educational program will include the maintenance of reasonably accurate and complete data regarding its implementation and the progress of students who move through it.

Some of the data involved are original assessment and reassessment scores, grade level performance information, standardized test score results, drop out and retention rates, and participation rates in gifted and talented, honors programs, etc. Teachers, parents or students can also be surveyed for important information regarding the adequacy of program materials, equipment and services. To demonstrate gains made through the program, the data should include comparison of LEP student performance over time. A comparison of former limited-English proficient students and non-LEP students performance, should demonstrate the extent to which former LEP students are keeping up with their peers and able to meaningfully participate in all general curriculum.

Moreover, the report can also assess the aspects of special opportunity programs and special education. These areas should consider how students are participating in these areas. Whether there is an over inclusion or under inclusion of students being placed in these programs. Also, the analysis should also consider the type of services LEP students are LEP being provided. This includes teacher resources, materials, assessment instruments, training, etc. With the underlying factor to determine if LEP students have access to the full curriculum.

Furthermore, the evaluation should be conducted timely and with frequency to allow for appropriate monitoring of program effectiveness and to provide for any necessary modifications after a reasonable trial period. Data in this instance should be collected at least at the end of the school year. This will allow for recommendations to be made timely and appropriate to the curriculum being offered for the following school year. Accordingly, the evaluation report should be prepared at least annually.

Preparing an evaluation report is a multi-step process, which can involve many different individuals. Accordingly, the plan should specify who is to input data, who will collect and organize data, who will conduct the analysis, and who will make the recommendations. As a result, you as a teacher may be asked to participate in this process of preparing the evaluation report or asked to contribute information or data. The end result of the evaluation is a report that establishes a longitudinal study of the program. This will allow for a specific study of how the program is meeting the objectives that have been set out. Moreover, the report will also demonstrate the achievement and progress that students are making.

After the report is prepared, and the program has undergone a [reasonable] trial period in which program deficiencies are identified, appropriate modifications should be promptly implemented. The amount of time considered as “reasonable” will depend upon the magnitude of the recommended modifications. However, steps should be taken as of the school year following the evaluation report to implement the recommended program improvements or modifications.

## V. CONCLUSION

Now you are aware that the education of language-minority students that are limited-English proficient can be a very challenging endeavor especially when considering the respective legal requirements. Not only are you as a teacher of these students responsible for maintaining effective instructional standards, methods, and techniques, but you are also responsible for complying with legal requirements when providing that instruction. Nonetheless, consider that you as a teacher are not the only link in the chain, but you compose a vital link in the chain called the “alternative language program.” Accordingly, by attending endorsement programs, continuing education, and professional development seminars, you will be able to effectively meet and exceed the goals of any alternative language program. Thereby giving students that are limited-English proficient an equal educational opportunity to participate in the respective educational system. Which is in essence the right thing to do.

**EXHIBIT A**

Title VI of the Civil Rights Act of 1964

May 25, 1970 and Subsequent Policy Memorandum

Lau v. Nichols, 414 U.S. 563, 94 S.Ct. 786 (1974).

Equal Educational Opportunities Act of 1974

Cintron v. Brentwood Union Free School District, 455 F. Supp 57  
(D.C.N.Y.1978)

Rios v. Read, 73 FRD 589 (E.D.N.Y. 1977)

Castañeda v. Pickard, 648 F2d 289 (5<sup>th</sup> Cir. 1981).

December 3, 1985, Policy Memorandum

Plyler v. Doe 457 U.S. 202, 72 L.Ed 2d 786

September 27, 1991, Policy Memorandum

Section 504 of the Rehabilitation Act of 1973

Title II of the Americans with Disabilities Act

Individuals with Disabilities Education Act

No Child Left Behind Act of 201

**EXHIBIT B**

**PROGRAM COMPONENTS**

IDENTIFICATION

ASSESSMENT

PROGRAM DESIGN AND IMPLEMENTATION

SEGREGATION AND FACILITIES

SPECIAL OPPORTUNITY PROGRAMS

SPECIAL EDUCATION AND LEP STUDENTS

PROGRAM EVALUATION

## EXHIBIT C

Independent School District

### Home Language Survey

Please Print or Type

Student \_\_\_\_\_ School No. \_\_\_\_\_  
Last Name First Middle

I.D. No. \_\_\_\_\_ Grade \_\_\_\_\_ Age \_\_\_\_\_ Date \_\_\_\_\_

INSTRUCTIONS TO THE PARENT OR GUARDIAN: Federal and state education agencies require schools to determine the language(s) spoken in the home of each new student enrolling in the district in order to provide meaningful instruction for all students. Please help us meet this important requirement by answering the following questions. (You are required to complete this form one time only while your child is a student in the Independent School District. Please sign and date the form.

1. What language other than English, if any, is commonly spoken in the home?  
\_\_\_\_\_
2. Does the student speak or understand a language other than English? \_\_\_\_\_ If yes, write the name of the language. \_\_\_\_\_
3. What is the first language the student learned to speak? \_\_\_\_\_
4. Does the student live with someone who commonly speaks a language other than English? \_\_\_\_\_ If yes, write the name of the language. \_\_\_\_\_
5. What language does the student speak most of the time? \_\_\_\_\_
6. If a language other than English is indicated on any one of the above questions does the parent or guardian need to communicate with the school in a language other than English? \_\_\_\_\_ If yes, write the name of the language. \_\_\_\_\_

INSTRUCCIONES AL LOS PADRES OR GUARDIANES: Las agencias de educación federales y estatales requieren que las escuelas determinen el idioma(s) que hablan en el hogar de cada estudiante nuevo en el distrito para que las escuelas provean instrucción significativa para todos los estudiantes. Favor ayudarnos en este importante requisito contestando las siguientes preguntas. (Se requiere completar esta forma solamente una vez mientras niño/a es un estudiante en el distrito escolar de Independent School District) Por favor firme y ponga la fecha en esta forma.

1. ¿Qué otro idioma que no sea inglés, normalmente se habla en el hogar? \_\_\_\_\_
2. ¿Entiende o habla el estudiante otro idioma aparte de el inglés? \_\_\_\_\_ Si contesta sí, escriba el nombre del idioma. \_\_\_\_\_
3. ¿Cuál fué el primer idioma que el estudiante aprendió a hablar?  
\_\_\_\_\_
4. ¿Vive el estudiante con alguien quien normalmente habla otro idioma aparte de inglés? \_\_\_\_\_ Si contesta sí, escriba el nombre del idioma. \_\_\_\_\_
5. ¿Qué idioma habla el estudiante la mayoría del tiempo? \_\_\_\_\_
6. Si otro idioma es indicado en cualquiera del las preguntas, ¿necesita el padre o guardián comunicarse con la escuela en otro idioma que no sea inglés? \_\_\_\_\_ Si contesta que sí, escriba el nombre del idioma. \_\_\_\_\_

## **EXHIBIT D**

### **ROLE of TEACHER**

- Help Identify LEP Students
- Participate With Administrators In Designing The Alternative Language Program That Meets The Needs Of Students
- Communicate With Other Teachers In Planning For The Teaching Of The LEP Student In The English-Only Classroom
- Demonstrate Awareness Of Current Trends In The Education of Language Minority Students
- Use English As The Principal Medium Of Instruction In The Areas Of Pronunciation, Comprehension, Speaking, Structure, Reading, and Writing
- Select Activities and Materials For The Alternative Language Program Which Indicate An Understanding Of The Language Proficiency Level Of The Students
- Express Interest In, And Have An Understanding For The Native Culture Of The Students
- Provide Experiences That Encourage Positive Student Self-Concept
- Promote And Understand The Supportive Role And Responsibilities Of Parents/Guardians And Explain The Alternative Language Program To Them

## EXHIBIT E

### TERMS ALL TEACHERS SHOULD KNOW

- ALP-- Alternative Language Program. A program model, instruction or methodology reasonably calculated to remediate English language skills, implemented by a school district.
- ESL-- English as a Second Language. ESL is a program model, instruction or methodology recognized by experts in the field.
- LEP-- Limited English Proficient. This term refers to students who are limited in their ability to speak, read, comprehend, or write English proficiently, as determined by objective assessments. This term is widely recognized and used by governmental agencies when describing these students.
- ELL-- English Language Learner. This term refers to students who are in the process of learning English in a formal or informal program; the term is at times used synonymously with LEP. The term connotes the positive aspect of the student learning English.
- PHLOTE-- Primary or Home Language Other Than English. This term is not limited to considerations of language dominance. Rather, it includes any student with a language background other than English.
- OCR-- The U.S. Department of Education, Office for Civil Rights. The federal agency is charged with the enforcement of anti-discrimination statutes and regulations prohibiting discrimination on the basis of race, color, national origin, disability, sex, or age in education.

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<sup>i</sup> Title VI of the Civil Rights Act of 1964

<sup>ii</sup> “Identification of Discrimination and Denial of Services on the Basis of National Origin,” issued May 25, 1970 (35 Fed. Reg. 11595; PCS 18).

<sup>iii</sup> Lau v. Nichols, 414 U.S. 563, 94 S. Ct. 786 (1974).

<sup>iv</sup> Equal Educational Opportunities Act of 1974

<sup>v</sup> Cintron v. Brentwood Union Free School District, 455 F. Supp. 57 (D.C.N.Y.1978)

<sup>vi</sup> Rios v. Read, 73 FRD 589 (E.D.N.Y. 1977)

<sup>vii</sup> Castañeda v. Pickard, 648 F 2d 989 (5<sup>th</sup> Cir. 1981).

<sup>viii</sup> Plyler v. Doe, 457 U.S. 202, 72 L.Ed. 2d 786

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<sup>ix</sup> OCR's December 3, 1985 Memorandum

<sup>x</sup> OCR's September 27, 1991 Memorandum

<sup>xi</sup> Section 504 of the Rehabilitation Act

<sup>xii</sup> Public Law 107-110, The No Child Left Behind Act of 2001.