

Challenges in Evaluating, Classifying and Programming for ELL Students under the IDEA.

November 13, 2017

Isabel Machado, Esq.
Machado Law Group
1 Cleveland Place
Springfield, New Jersey 07081
732-540-8276
imachado@machadolawgroup.com

This presentation is for informational and discussion purposes only. Nothing herein should be construed as legal advice. Specific facts and circumstances can significantly impact the analysis of law and decisions outlined herein.

(1)

ELL Laws

- I. Every Student Succeeds Act (2016)
- II. IDEA
- III. Section 504
- IV. ADA (Title II and Title Iii)

(2)

What we will cover today:

- I. Intersection of ELL and Special Education
- II. How to determine eligibility
- III. How to address exclusionary factors (Rule out limited English proficiency)

(3)

General Duties

- Title VI of the Civil Rights Acts of 1964 and Section 504 prohibit public schools from discriminating against students based upon race, and national origin
 - Notice of school activities, parent-teacher conferences, etc. to parents in native language
 - Ensure students are included in extracurricular activities

(4)

Every Student Succeeds Act of 2015

- In 2015, the Every Student Succeeds Act of 2015 was passed, replacing its predecessor, the No Child Left Behind Act
- One of the primary goals of the Act was to prepare all students, regardless of race, income, disability, or English language proficiency, for academic success

(5)

Every Student Succeeds Act of 2015

- replaced "limited English proficient" with "English learner."
- IDEA states "limited English proficient,"
- IDEA regulations
 - "Limited English proficient has the meaning given the term 'English learner' in section 8101 of the ESEA."
 - 34 CFR Sec. 300.27

(6)

Every Student Succeeds Act of 2015

- Under the Every Student Succeeds Act of 2015, an English Learner (“EL”) is a student who:
 - (a) Is between the ages of 3 through 21; and
 - (b) Is enrolled or preparing to enroll in an elementary or secondary school; and

[7]

Every Student Succeeds Act of 2015

- (c)
 - (i) Was not born in the United States or whose native language is not English; or
 - (ii)
 - I. Who is a Native American or Alaska Native, or a native resident of the outlying areas; and
 - II. who comes from an environment where a language other than English has had a significant impact on the individual's level of English language proficiency; or
 - (iii) Who is migratory, whose native language is not English, and who comes from an environment where a language other than English is dominant; and

[8]

Every Student Succeeds Act of 2015

- (d) Whose difficulties in speaking, reading, writing, or understanding the English language may be sufficient to deny the individual:
 - The ability to meet the state’s proficient level of achievement on state assessments;
 - The ability to successfully achieve in classrooms where the language of instruction is English; or
 - The opportunity to participate fully in society

- Every Student Succeeds Act of 2015, Pub. L. No. 114-95, Sec. 8101(25)

[9]

Every Student Succeeds Act of 2015

District's providing language instruction for ELL students must, no later than 30 days after enrollment, inform parents of ELL students:

- The reasons for the identification of their child as an ELL
- The child's need of placement in a language instruction educational program

- 20 U.S.C. 6312(e)(3)(A)

[10]

Every Student Succeeds Act of 2015

District's providing language instruction for ELL students must, no later than 30 days after enrollment, inform parents of ELL students:

- The methods of instruction used in the program in which their child is, or will be, participating and the methods of instruction used in other available programs including how such programs differ in content, instructional goals, and the use of English and a native language in instruction

- 20 U.S.C. 6312(e)(3)(A)

[11]

Every Student Succeeds Act of 2015

District's providing language instruction for ELL students must, no later than 30 days after enrollment, inform parents of ELL students:

- How the program the child is in will meet the educational strengths and needs of the child;
- How the program will help their child learn English and meet age-appropriate academic achievement standards grade promotion and graduation; and

- 20 U.S.C. 6312(e)(3)(A)

[12]

Every Student Succeeds Act of 2015

District's providing language instruction for ELL students must, no later than 30 days after enrollment, inform parents of ELL students:

- The specific exit requirement for the program, including:
 - The expected rate of transition from such program into a classroom not tailored for ELL's; and
 - The expected rate of graduation from high school

13

- 20 U.S.C. 6312(e)(3)(A)

Every Student Succeeds Act of 2015

- Parents must also be informed of their parental rights in **writing**:
 - Parents have the right to immediately remove their child from the proposed program;
 - Detailing alternative programs which the parent may enroll their child in; and
 - Assisting parents in selecting among the various programs and methods of instruction

14

- 20 U.S.C. 6312(e)(3)(A)

Every Student Succeeds Act of 2015

The Every Student Succeeds Act requires that each state ensure that each district annually assess student's English language proficiency in the following skill areas:

- Reading;
- Writing;
- Speaking; and
- Listening.

15

- 20 U.S.C. 6311; 34 C.F.R. 200.5

Every Student Succeeds Act of 2015

- The Act further requires that the states adopt English Language Proficiency Standards which addresses the different proficiency levels of English Language Learners
- The purpose of same being to:
 - Assess each student's language proficiency;
 - Measure each student's growth towards proficiency; and
 - Document each student's acquisition of the English language

- 20 U.S.C. 6311; 34 C.F.R. 200.6(h)

16

Every Student Succeeds Act of 2015

- An ELL taking the English/Language Arts tests administered pursuant to the Act may generally take the tests in their native language for the first three years in the United States
- Unless they are able to obtain English proficiency prior to the expiration of the three year period
- A district may extend the three year limit for up to an additional two years on a case-by case basis

- 20 U.S.C. 6311; 34 C.F.R. 200.6

17

Every Student Succeeds Act of 2015

- ELL students may not be exempt from state testing on the basis of their ELL status

- 20 U.S.C. 6311; 34 C.F.R. 200.6

18

Every Student Succeeds Act of 2015

- When assessing student’s mastery of skills other than English, the Act requires that student be provided with appropriate accommodations with respect to a student’s status as an ELL:
 - The assessments should, to the extent practicable, assess the student’s ability in the language and form “most likely to yield accurate and reliable information on what those students know and can do”
 - Accommodations should be provided until the student has achieved “English language proficiency”
- 20 U.S.C. 6311; 34 C.F.R. 200.6(f)

19

Every Student Succeeds Act of 2015

State Assessments

In the first year an ELL student attends a district, the district may either:

- Exclude the student from one administration of its reading/language arts assessment and exclude the student results on the Act’s annual mathematics proficiency test during the student’s first year of the student’s enrollment;

OR

20

Every Student Succeeds Act of 2015

State Assessments

- Allow the student to participate in the administration of its reading/language arts assessment, but:
 - Exclude the student’s results from its annual report;
 - Measure the student’s English/Language Arts growth during their second year of enrollment; AND
 - Measure the student’s proficiency during their third year of enrollment

21

Every Student Succeeds Act of 2015

General Accommodations:

- Native language assessments
- Linguistic simplifications
 - Using simple words when testing content knowledge and skills
- Simplified instruction
- Extra time
- Use of Dictionary or glossary
- Audiotaped instructions in student's native language

- U.S. Department of Education, Part II: Final Non-regulatory Guidance On The Title III State Formula Grant Program -- Standards, Assessments And Accountability (February 2003)

22

Remember!

- Districts must assess student's for ELL status within 30 days of their enrollment, REGARDLESS of whether or not there is a suspected disability
- ELL students must be offered placement in a language instruction educational program
 - Parents may opt to remove their child from the program
- ELL students must be offered accommodations on Statewide assessments

23

Determining Eligibility

- Gifted Students:
 - Prohibited from categorically excluding ELL students from gifted and talented programs or advanced placement courses
 - Particular G & T programs or program components may require proficiency in English language skills
 - Evaluation and testing procedures should not screen out ELL students

- Hazelton Area School District, 114 LRP 17013 (OCR 04/10/14)

24

Hazelton Area School District

- OCR investigated PA school district
- Found that they failed to identify students who may need English language development (ELD) program services

{ 25 }

Hazelton Area School District

- Appropriate Survey used in Spanish and English
- Follow-up testing
- Some students who would otherwise qualify for ELL program, would be exempted because of grades.
- Students with final grades of B or better in a core subject would exempt the student from placement in an ELL program

{ 26 }

Hazelton Area School District

- Although the District had developed proper methodologies of testing students, they had failed to implement them
- “OCR found that 102 students were exempted . . . but twelve of these students lacked the grades required by the criteria. Several students had grades of F, D, or both in content areas. In addition, grade information was not made available in the files of 17 of the 102 students who were exempted.”

{ 27 }

Classification

- IDEA regulations require each state to “have in effect...policies and procedures designed to prevent the inappropriate over-identification or disproportionate representation by race and ‘ethnicity of children as children with disabilities”

- 34 C.F.R. 300.173

Classification

- Latino students are considered under-represented in special education
- Latino students are overrepresented in the following categories:
 - LSD, Hearing Impairment, and Speech and Language issues
 - U.S. Department of Education, Office of Special Education and Rehabilitative Services. (2003). Twenty-second Annual Report to Congress on the Implementation of the Individual with Disabilities Education Act Vol. 1; Levinson, Bradley, et al., Center for Evaluation & Education Policy (2007). Latino Language Minority Students in Indiana: Trends, Conditions, and Challenges

Classification

- Under-classification:
 - Characteristics of students learning a new language often overlap with characteristics of students with learning disabilities
 - District's inclined to be “lenient” on ELL students due to language barrier and are reluctant to refer students for evaluation
 - Over-reliance on ELL specific-programs prior to considering special education referral
 - Unclear policies regarding how to consider ELL students' language acquisition issues
 - Levinson, Bradley, et al., Center for Evaluation & Education Policy (2007). Latino Language Minority Students in Indiana: Trends, Conditions, and Challenges

Classification

- Over-classification:
 - Significant disproportionality may be the result of inappropriate regular education responses to academic and behavioral issues
 - Failure to separate language proficiency issues from disability related issues

- 71 Fed. Reg. 46,627 (2006)

- Over-classification may trigger intervention from your local Office of Civil Rights

31

Placement

- 36% of Latino students classified as having learning disabilities are removed from the general education population for a majority of the day
- Compared to 20% of white students classified as having a learning disability

- Education Law Center. (2004). *Still separate, still unequal*. Retrieved from http://www.edlawcenter.org/ELCPublic/elcnews_040518_summaryoffindings.htm

32

Placement

- Latino students in need of special education services are twice as likely to be removed from general education population compared to white students

- The Civil Rights Project at Harvard University. (2002). *Racial inequity in special education: Executive summary for federal policy makers*. Cambridge, MA

- Remember:
 - LRE requirement applies to ELL students

33

Determining Eligibility

- Child-Find:
 - States and local school districts have an affirmative obligation to identify and evaluate all children within their jurisdiction who are in need of special education and related services
 - Also includes:
 - Students attending private schools
 - 34 C.F.R. 300.111(a)(1)(i)
 - Children progressing from grade to grade
 - Highly mobile children, including migrant children
 - 34 C.F.R. 300.111(c)

34

Determining Eligibility

- Child-Find:
 - District is required to affirmatively seek out potentially eligible students
 - Look for red flags:
 - Academic problems
 - Behavioral problems
 - Missed classes

35

Determining Eligibility

- Failure to fulfill child-find obligation may be considered a denial of FAPE
 - Tuition reimbursement for unilateral placements
 - Compensatory education
 - From the time the district should have suspected the disability
 - *Lakin v. Birmingham Pub. Schs.*, 70 F. App'x 295 (6th Cir. 2003)

36

Determining Eligibility

- Child-Find:
 - District’s obligation not waived by:
 - Parents’ failure to request evaluation
 - Parents’ interference/lack of cooperation with process
 - Failure to attend referral meetings
 - [District of Columbia Pub. Schs.](#), 12 ECLPR 109 (SEA DC 2015)
 - Consent is required prior to conducting evaluations
 - 34 [C.F.R.](#) 300.300(a)(1)(i)

37

Evaluations

- Prior to conducting evaluations, the District should:
 - **Assess student’s proficiency in both English and native language in order to determine in which language the eligibility evaluations should be conducted**
 - 34 C.F.R. 100.3
- Remember:
 - Evaluations must be designed to measure a student’s disability-related deficits, not their English-speaking ability

38

Evaluations

- Testing may be conducted in English, even if same is not the student’s first language
 - Look at levels of receptive and expressive proficiency in English, as well as native language
 - [Houston Indep. Sch. Dist.](#), 30 IDELR 564 (SEA TX 1999)

39

Evaluations

- IDEA regulations require that evaluation materials:
 - Are selected and administered so as not to be discriminatory on a racial or cultural basis; and
 - Are provided and administered in the student's native language or other mode of communication and in the form most likely to yield accurate information on what the child can do academically, developmentally, and functionally

34 C.F.R 300.3004(c)

40

Evaluations

- Unless clearly not feasible to provide or administer
 - 34 C.F.R. 304(c)(1)
 - Should not be used to improperly limit evaluation in child's native language
 - 71 Fed. Reg. 46,642 (2006)
- Assessments of student's family must be conducted in the native language of the family member being assessed
 - Family/Social History Evaluation
 - 34 C.F.R. 303.321(a)(6)

41

Evaluations

- IDEA permits districts to conduct evaluations in two languages
 - Where interchangeable use of two languages will maximize the chance of obtaining accurate evaluation results
 - *In re Student with a Disability*, 111 LRP 39017 (SEA NM 03/25/11)

42

Evaluations

- Remember, IDEA timelines apply
- District must make effort to locate appropriately qualified staff to translate or administer evaluations
 - Initial evaluations must be completed within 60 days after receiving parental consent
 - Unless altered by state law
 - 34 C.F.R. 300.301(c)(1)

43

Evaluations

- Presentation Accommodation
 - Directions should be read or printed in student's primary language
 - Translators may not:
 - Change the content of a question by paraphrasing or providing clues
 - Offering additional information not provided in the test booklet
 - Coaching students during testing
 - Encouraging students to change responses

44

Evaluations

- Accommodations offered during standardized testing should be offered in the classroom
 - Better allows districts to separate language proficiency issues from disability related issues
 - Intended only to mitigate effects of a student's lack of English language proficiency
 - Should not reduce the assessment expectations of any student

45

Evaluations/Consent

- Consent must be “fully informed”:
- General understanding of the evaluations which are being proposed
 - Letter to Johnson, 56 IDELR 51 (OSEP 2010)
- Must agree in writing to the proposed evaluations
 - Lists of activities which will be conducted
 - List of records that will be released
 - To whom
 - 34 C.F.R. 300.9

46

Evaluations/Consent

- Consent:
- Parent must be informed that consent may be revoked at any time
 - Revocation of consent does not invalidate evaluations which have taken place
 - Evaluations may remain in student’s record
 - District may not conduct further evaluations
 - 34 C.F.R. 300.9

47

Evaluations/Consent

- Information regarding the proposed activity must occur in the parents’ native language
 - The language normally used by that individual
 - 34 C.F.R. 300.29(a)
- Obligation follows parents with respect to consent
 - Applies even for English-speaking students

48

Evaluations

- Case Study: In re Student with a Disability

- Facts:

- Student adopted from foreign country at 16
 - Not proficient in English
- Parents requested that student be evaluated for special education services
 - Specifically requested that the student be tested in both his native language, as well as English

- In re Student with a Disability, 111 LRP 39017 (SEA NM 03/25/11)

49

Evaluations

- Case Study: In re Student with a Disability

- Facts:

- Standardized tests were not available in student's native language
 - Determined that to translate test would "break standardization of the achievement assessments"
- Tests nonetheless administered by translator

- In re Student with a Disability, 111 LRP 39017 (SEA NM 03/25/11)

50

Evaluations

- Case Study: In re Student with a Disability

- Facts:

- Parents filed for due process alleging district failed to evaluate student in his native language
 - District unable to make a determination as to whether student's limited English proficiency was the primary factor impacting his performance

- In re Student with a Disability, 111 LRP 39017 (SEA NM 03/25/11)

51

Evaluations

- Case Study: In re Student with a Disability

- Holding:

- Evaluation revealed that the student’s language-based skills in his native language had decreased to the point that an evaluation performed only in his native language would no longer yield valid results
 - Not proficient enough to conduct evaluation solely in English
- Evaluators interchangeable use of English and student’s native language maximized the chance of obtaining accurate evaluation results

- In re Student with a Disability, 111 LRP 39017 (SEA NM 03/25/11)

52

Evaluations

- Takeaway:

- Evaluations may be conducted in two languages
- Student’s language proficiency changes over time
 - Remember to re-consider English/Native language proficiency when conducting tri-annual re-evaluations

53

Determining Eligibility

- Rely on assessment results to determine to what extent:

- A student is academically struggling
- A student’s academic struggles are correlated to student’s English proficiency
 - Student overcomes academic struggles as English proficiency increases

54

Classification

- When evaluating/classifying an ELL student, the IEP team must document the extent, if any, that a student’s limited English proficiency has had on the student’s achievement level

- 34 C.F.R. 300.311(a)(6)

55

Classification

- Special rule . . . a child shall not be determined to be a child with a disability if the **determinant factor** for such determination is—
 . . .
- (C) limited English proficiency.

20 USC 1414 (b)(5)

56

Classification

- Pay careful attention when considering an SLD classification
- May not be the primary result of:
 - Cultural factors
 - Environmental or economic disadvantage
 - Limited English proficiency

- 34 C.F.R. 300.309(a)(3)

57

Dear Colleague Letter (2014)

- Charter School case, but good guidance
- Districts must take affirmative steps to help English-language learners overcome language barriers so that they can participate meaningfully in their schools' educational programs
- Must timely identify language-minority students who have limited proficiency in reading, writing, speaking, or understanding English

63 IDELR 138

(58)

Dear Colleague Letter (2014)

- must provide those students with an effective language instruction educational program that also affords meaningful access to the school's academic content.
- Federal civil rights laws do not . . . require [Districts] . . . to adopt or implement any particular educational model or program of instruction for English-language learners;
- schools have substantial flexibility to determine how they will satisfy their legal obligations to meet these students' needs.

63 IDELR 138

(59)

Louisa County (VA) Pub. Schs (2014)

- 504 case
- Office for Civil Rights resolution agreement
- Allegations that District failed to provide FAPE under Section 504 to English Language Learners
 - misclassifying their disabilities and
 - not timely evaluating them for special education and/or related services

<https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11141261-a.pdf>

(60)

Louisa County (VA) Pub. Schs (2016)

- Individuals conducting evaluations must have the qualifications, training, and experience needed to identify the student's unique needs
- Section 504 regulations do not require that assessments are administered in a student's native language
- However, OCR routinely takes the position that districts must use appropriate testing measures for students with limited English proficiency

<https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11141261-a.pdf>

61

Louisa County (VA) Pub. Schs (2016)

Resolution Agreement provided for:

- training to its staff involved in identifying and/or evaluating students with disabilities and English Language Learners
- ensuring that qualified translators and interpreters are available to participate in the evaluation of ELL students who need or are believed to need special educational and related services
- conducting additional evaluations of students who may have been misclassified because of their limited English proficiency.

<https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11141261-a.pdf>

62

Salt Lake City (UT) School District (2016)

- OCR determined that district may have "over-identified" ELs as students with disabilities under the IDEA and Section 504
- Section 504, Title II, and Title VI prohibits discriminating against students on the basis of disability and national origin
- ensure that all EL students, including those who have disabilities, have an equal opportunity to participate in and benefit from all district program

<https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/08161193-a.pdf>

63

Salt Lake City (UT) School District (2016)

- District admitted "it needs to update its policies and procedures regarding the evaluation and placement of EL students to ensure that EL students ... are not placed in special education solely based on language."
- EL students with disabilities were not provided special education or EL services on a consistent basis
- Districts policies permitted school staff to terminate a student's EL services **before** the student became proficient in the four English skill areas

<https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/08161193-a.pdf>

64

Salt Lake City (UT) School District (2016)

Resolution Agreement provided:

- Redo district policies
- reevaluating all EL students currently receiving services under an IEP or 504 plan.

<https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/08161193-a.pdf>

65

Schenectady (NY) City School District (2013)

- Office of Civil Rights, Resolution Agreement
- Its all about disproportionality!!!! Look at your numbers
- VERY Good Read for disproportionality
- Hispanic students represented 23% of the classified students with learning disabilities
- But, only 16% of the overall student population was Hispanic
- African-American students represented 49% of classified students with learning disabilities,
- But only 35% of the overall student population was African-American.

62 IDELR 93

<https://www2.ed.gov/about/offices/list/ocr/docs/investigations/02105001-a.html>

66

Schenectady (NY) City School District (2013)

- Evidence that teachers referred black or Hispanic students for interventions, put them in the “pipeline”
- But neglected to refer white students in the same class who engaged in similar or even more serious behavior
- District failed to set a maximum number of general education interventions that needed to be provided before a student was referred for a special education evaluation

62 IDELR 93

67

Schenectady (NY) City School District (2013)

- evaluated 10 Hispanic students for speech-language impairments.
- For 4 of 10 of the students, the district failed to specify how their primary language affected their academic performance,
- didn't assess students in Spanish even though Spanish was their dominant language

62 IDELR 93

68

Schenectady (NY) City School District (2013)

Resolution agreement:

- Hired an expert in addressing the overrepresentation of minority students in special education to review the District's procedures and make recommendations as to the measures the District should take to ensure that its determinations address the overrepresentation of minorities in special education and the root causes of this overrepresentation.
- develop and implement a plan to expand its universal screening process

62 IDELR 93

69

Schenectady (NY) City School District (2013)

Resolution agreement:

- develop written policies and procedures, which include
 - the extent to which informal classroom interventions should be attempted prior to referral to the building-level teams;
 - circumstances for referring students to the teams, and
 - oversight to ensure consistency in each school.

62 IDELR 93

[70]

Schenectady (NY) City School District (2013)

Resolution agreement:

- every school in the District has implemented a systematic, team-based means of providing intervention strategies for students experiencing academic or behavior difficulties;
- review and revise its materials regarding intervention strategies
- Distribute materials to District personnel, parents/guardians, students, and other stakeholders.

62 IDELR 93

[71]

Schenectady (NY) City School District (2013)

Resolution agreement:

Provide training to –

- all **teaching staff** designed to increase awareness of the overrepresentation of black and Hispanic students in special education and explain the purpose and significance of placement in special education;
- all **members of each school's building-level team** on the intervention process and on intervention strategies for students;
- and all **teachers** about the purpose, procedures, process, and documentation of the building-level team

62 IDELR 93

[72]

Schenectady (NY) City School District (2013)

Resolution agreement:

- District will review special education records to assess whether eligibility and placement decisions were appropriate, and take appropriate action in response
- the District will ensure that Building-Level Teams and special education personnel evaluate students who are ELL (as indicated by the student's PHLOTE and HLQ form), and who have or are suspected of having disabilities, utilizing tests and other evaluation materials in their dominant language
 - *Primary Home Language Other than English (PHLOTE)/Home Language Questionnaire (HLQ).*

62 IDELR 93

(73)

Schenectady (NY) City School District (2013)

Resolution agreement:

- District will adapt its disability pre-referral, referral, evaluation, and placement policies, procedures, and practices to ensure
 - that ELL students are not misidentified and placed as students with disabilities; and,
 - that they are not denied appropriate services because they are ELLs

62 IDELR 93

(74)

Schenectady (NY) City School District (2013)

Resolution agreement:

Data-driven:

- District will maintain data and
- use the data and other information gathered during the implementation of the resolution agreement to evaluate the effectiveness of its screening, intervention, evaluation, and placement processes; and
- will also analyze data related to the provision of team-prescribed interventions and data related to teacher referrals of elementary school students to the building-level team, to determine whether students of all races and national origins were treated equitably.

62 IDELR 93

(75)

Takeaways

- Students ELL status must be assessed within 30 days of enrollment
- Students should be provided appropriate accommodations on Statewide assessments, in the classroom, and on evaluations
- Parents have the authority to remove their child from an ELL or Special Education program

[76]

Takeaways

- Watch out for under-classification
 - Don't use lack of English proficiency to excuse poor performance
- Watch out for over-classification
 - Evaluate in student's native language
 - Don't confuse cultural differences for Emotional Disturbance
- LRE applies to ELL students
 - Avoid secluding ELL students

[77]

Questions?

[78]
