

Articles

Right of Limited English Proficient Students with Disabilities and Their Parents to Be Served in Their Native Language

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I.	INTRODUCTION.....	128
II.	ENGLISH LANGUAGE LEARNERS IN SPECIAL EDUCATION.....	130
	A. Identification.....	131
	B. Appropriate Assessment.....	133
	C. Meeting the Instructional Needs of ELL Students and ELL Students with Disabilities.....	136
III.	LIMITED ENGLISH PROFICIENT PARENTS OF STUDENTS WITH DISABILITIES.....	140
IV.	LEGAL REMEDIES TO ADDRESS SCHOOL DISTRICTS' FAILURE TO PROVIDE LEP PARENTS INFORMATION IN THEIR NATIVE LANGUAGE.....	144
	A. Systemic Complaints Through the Special Education Complaint Process.....	144
	B. Complaints with the Office for Civil Rights.....	146
	C. Special Education Due Process Hearings.....	148
V.	STEPS SCHOOL DISTRICTS CAN TAKE TO ENSURE ADEQUATE LEP PARENT PARTICIPATION.....	151

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VI. CONCLUSION..... 153

I. INTRODUCTION

Currently, 20.7% of the United States population speaks a language other than English at home.¹ In Texas, it is as high as 34.7%.² The English language learner (ELL)³ population has steadily increased over the last several decades. In 2011–2012, the ELL student population increased to approximately 4.4 million students, or 9.1% of the total student population.⁴ Seventeen percent of students in Texas receive bilingual or English as a second language (ESL) services.⁵ Although there are approximately 400 languages represented by the ELL population, Spanish is spoken by 75%.⁶ With changes in demographics in Texas and the United States, due to birth rates and immigration patterns, it is projected that the number of people speaking a language other than English will only continue to grow.⁷

In this increasingly diverse nation, school districts are faced with the challenge of serving students with disabilities who have limited English proficiency,⁸ as well as ensuring that their parents are able to understand and participate in the development of their education program.⁹ Schools have a legal duty to ensure that both parents and students are able to access the programs, services, and information they offer to students and parents whose primary language is English,¹⁰ yet they often fail to provide even the most basic information in a language

¹ U.S. CENSUS BUREAU, LANGUAGE OTHER THAN ENGLISH SPOKEN AT HOME, <http://quickfacts.census.gov/qfd/states/00000.html>, <<https://perma.cc/3G49-VRBQ>>.

² U.S. CENSUS BUREAU, ST. & CTY. QUICK FACTS, <http://quickfacts.census.gov/qfd/states/48000.html>, <<https://perma.cc/FSJ4-L397>>.

³ For purposes of this paper, we will refer to students as English language learners (ELL) and parents as limited English proficient (LEP) in accordance with professional practice. 20 U.S.C. § 7801(20) (2012); LIMITED ENGLISH PROFICIENCY, <http://www.lep.gov>, <<https://perma.cc/H8KB-PVK4>> (noting individuals who do not speak English as their primary language and who have a limited ability to read, speak, write, or understand English are considered LEP).

⁴ GRACE KENA ET AL., NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 52 (2014), <http://nces.ed.gov/pubs2014/2014083.pdf>, <<https://perma.cc/8RJJ-FRGT>>.

⁵ TEX. EDUC. AGENCY, SNAPSHOT 2014 SUMMARY TABLES: STATE TOTALS, <http://ritter.tea.state.tx.us/perfreport/snapshot/2014/state.html>, <<https://perma.cc/D6RP-2UKW>>.

⁶ Alfredo J. Artiles & Alba A. Ortiz, *English Language Learners with Special Education Needs: Contexts and Possibilities*, in ENGLISH LANGUAGE LEARNERS WITH SPECIAL EDUCATION NEEDS: IDENTIFICATION, ASSESSMENT, AND INSTRUCTION 18 (Alfredo J. Artiles & Alba A. Ortiz eds., 2002).

⁷ HYON B. SHIN & JENNIFER M. ORTMAN, LANGUAGE PROJECTIONS: 2010 TO 2020 5–6 (2011), http://www.census.gov/hhes/socdemo/language/data/acs/Shin_Ortman_FFC2011_paper.pdf, <<https://perma.cc/23Z2-2SJF>>.

⁸ Catherine E. Lhamon & Vanita Gupta, “Dear Colleague” Letter, U.S. DEPT. OF JUST. & U.S. DEPT. OF EDUC. 2 (Jan. 7, 2015).

⁹ *Id.*

¹⁰ See 20 U.S.C. § 6318(f) (2012) (requiring that local educational agencies and schools provide full opportunities for the participation of parents with limited English proficiency, including providing information and school reports, in a language such parents understand).

other than English.¹¹

The effect of these discriminatory practices is to leave ELL students with disabilities in classroom settings where they have no hope of being able to follow instruction or receive any meaningful benefit from their education no matter how appropriate their plan for services may be. These practices render parents of students with disabilities unable to meaningfully participate in the planning to address their children's disability-related needs at school. Parents of students with disabilities were meant to play a major role in the development of their children's educational services,¹² but without access to appropriate interpreter services during meetings, as well as translated copies of important disability-related documents, limited English proficient (LEP) parents are denied the same level of participation afforded to English-speaking parents.

Title VI of the Civil Rights Act of 1964 prohibits school districts that receive federal financial assistance from excluding students from participating in, denying the benefits of, or subjecting them to discrimination through, any of their programs or activities on the basis of national origin, color, or race.¹³ Federally funded districts also may not engage in practices that "have the effect of subjecting individuals to discrimination because of their race, color, or national origin."¹⁴ Courts,¹⁵ the Department of Education,¹⁶ and a president of the United States¹⁷ have interpreted Title VI to require federally funded districts to provide the same meaningful access to educational benefits and equal participation to students with limited English proficiency as is provided to all other students.¹⁸ Limited English proficiency is, therefore, treated

¹¹ Orange (CA) Unified Sch. Dist., 111 LRP 65098, 1 (OCR 2011); Victor Valley (CA) Union High Sch. Dist., 50 IDELR 141, 600-01 (OCR 2007); Letter from Jennifer Coco, Staff Attorney, Southern Poverty Law Center, and Caren Short, Staff Attorney, Southern Poverty Law Center, to the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Civil Rights Division, to file a complaint against the Jefferson Parish Public School System 17 (Aug. 22, 2012) (on file with author).

¹² See 34 C.F.R. §§ 300.116(a)(1), 300.321(a)(1), 300.324(a)(ii), 300.327, 300.502(a), (c) (2015) (explaining parental involvement in placement decisions, IEP development, and educational evaluations).

¹³ 42 U.S.C. § 2000d (2012); Ex. Order No. 13160, 65 Fed. Reg. 39,775 § 1-101 (June 23, 2000).

¹⁴ 34 C.F.R. § 100.3(b)(2) (2015).

¹⁵ *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974); *Castaneda v. Pickard*, 648 F.2d 989, 1015 (5th Cir. 1981).

¹⁶ Memorandum from Michael L. Williams, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to OCR Senior Staff (Sept. 27, 1991); Memorandum from William L. Smith, Acting Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to OCR Senior Staff (Apr. 6, 1990); Memorandum from J. Stanley Pottinger, Dir., OCR, to selected school districts with students of National Origin-Minority Groups (May 25, 1970).

¹⁷ Exec. Order No. 13166, 65 Fed. Reg. 50,121 (Aug. 11, 2000) (ordering federal agencies to implement "compliance standards that recipients [of federal financial assistance] must follow to ensure that the programs and activities they normally provide in English are accessible to LEP persons").

¹⁸ 20 U.S.C. § 1703(f) (2012) ("...the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs" will constitute discrimination on the basis of race, color, or national origin).

as “an immutable characteristic like skin color . . . or place of birth.”¹⁹

Title VI also bestows these rights on parents. In order to avoid national origin discrimination, federally funded school districts must provide the same information about school programs, reports, and activities to LEP parents as they do to English-speaking parents.²⁰ In fact, the Office for Civil Rights, with the Department of Education, has made clear that “[s]chool districts have a responsibility to adequately notify national-origin minority parents of school activities that are called to the attention of other parents.”²¹ Furthermore, the Office for Civil Rights has found that “Title VI is violated if . . . parents whose English is limited do not receive school notices and other information in a language they can understand.”²² Thus, school districts have a significant legal obligation to ensure all students and parents with limited English proficiency are aware of the programs and services available to them through the school system and can access those programs and services in a meaningful way.

II. ENGLISH LANGUAGE LEARNERS IN SPECIAL EDUCATION

No Child Left Behind refers to LEP students,²³ but recent professional practice uses “English language learner” (ELL).²⁴ A basic definition of ELL students is students, ages three through twenty-one, who are enrolled, or preparing to enroll, in elementary or secondary school, that are born outside of the United States or whose native language is other than English.²⁵ A lack of proficiency in speaking, writing, reading, or understanding English makes it difficult for students to meet the State’s proficient level of achievement on State assessments,

¹⁹ *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980).

²⁰ 20 U.S.C. § 6318(f) (2012) (“[L]ocal educational agencies and schools . . . shall provide full opportunities for the participation of parents with limited English proficiency . . . , including providing information and school reports . . . in a language such parents understand.”); Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595 (July 18, 1970) (“School districts have the responsibility to adequately notify national origin-minority group parents of school activities which are called to the attention of other parents. Such notice in order to be adequate may have to be provided in a language other than English”).

²¹ DEP’T. OF EDUC., OFFICE FOR CIVIL RIGHTS, THE PROVISION OF AN EQUAL EDUCATION OPPORTUNITY TO LIMITED-ENGLISH PROFICIENT STUDENTS, <http://www2.ed.gov/about/offices/list/ocr/eeolep/index.html>, <<https://perma.cc/T4GT-6JPM>>.

²² *Id.*

²³ 20 U.S.C. § 7801(20) (2012).

²⁴ NAT’L COUNCIL OF TEACHERS OF ENGLISH, ENGLISH LANGUAGE LEARNERS 2 (2008), <http://www.ncte.org/library/NCTEFiles/Resources/PolicyResearch/ELLResearchBrief.pdf>, <<https://perma.cc/5PPE-F8WV>>.

²⁵ 20 U.S.C. § 7801(20) (2012). Students who are Native American or Alaska Native, or a native resident of the outlying areas; and 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 who is migratory, whose native language is a language other than English, and who comes from an environment where a language other than English is dominant also meet the definition.

successfully achieve in classrooms, or to participate fully in society.²⁶

A. Identification

With the growing number of ELL students in the United States, schools struggle to appropriately identify ELL students who have disabilities and qualify for special education services.²⁷ Since the 1980s, ELLs have been overrepresented in special education. Some estimates suggest that nearly 70% of all ELL students in special education are misidentified.²⁸ State reports identify from 0% to over 17% of their ELL populations have disabilities.²⁹ Furthermore, within special education, ELL students are overrepresented in the areas of specific learning disabilities, speech-language impairments, and intellectual disabilities at a rate of more than twice the rate of non-ELL students.³⁰ The misidentification of ELL students causes many of them to be excluded from the general education experience due to more restrictive placements.³¹

Unfortunately, overidentification of ELL students is not limited to one single cause. Part of the problem is due to language deficits and lack of language support in large districts.³² Data shows that overrepresentation is linked to the size of the ELL population in a school district and the number of language support programs available.³³ When there is a large ELL population with little to no support through language programs, more students tend to be classified as special education students.³⁴ Additionally, as the ELL population moves from elementary to secondary schools, they become more likely to be misidentified.³⁵

Others are misidentified due to an inability to distinguish between various types of educational struggles. Students that struggle in school

²⁶ *Id.*

²⁷ NAT'L EDUC. ASS'N., ENGLISH LANGUAGE LEARNERS FACE UNIQUE CHALLENGES 1 (2008), [http://www.nea.org/assets/docs/HE/ELL_Policy_Brief_Fall_08_\(2\).pdf](http://www.nea.org/assets/docs/HE/ELL_Policy_Brief_Fall_08_(2).pdf), <<https://perma.cc/5CUZ-6MLC>>; see NAT'L CENTER FOR EDUC. STATISTICS, ENGLISH LANGUAGE LEARNERS, http://nces.ed.gov/programs/coe/indicator_cgf.asp, <<https://perma.cc/9TA4-LU4T>> (showing that ELL populations are increasing).

²⁸ MEGAN MIKUTIS, THE DISPROPORTIONATE REPRESENTATION OF LIMITED ENGLISH PROFICIENCY (LEP) STUDENTS IN SPECIAL EDUCATION PROGRAMS 2 (2013), <http://www.law.uh.edu/center4clp/policy/mikutis.pdf>, <<https://perma.cc/LF6Z-NH9N>>.

²⁹ Amanda L. Sullivan, *Disproportionality in Special Education Identification and Placement of English Language Learners*, 77 EXCEPTIONAL CHILD 317, 319 (2011). National disparities in the number of ELL students in special education have been recorded at even greater differences in the 1990s. In 1993, 26.5% of ELL in Massachusetts was in special education, while Colorado, North Carolina and Maryland had less than 1% of the ELL population in special education. Artiles and Ortiz, *supra* note 8, at 8.

³⁰ Sullivan, *supra* note 31, at 319

³¹ Artiles and Ortiz, *supra* note 8, at 9.

³² *Id.* at 8–9.

³³ *Id.*

³⁴ *Id.* at 9.

³⁵ *Id.*

are often classified into three categories: (1) those that have difficulty because of the teaching-learning environment, (2) those with academic difficulties not related to a disability, and (3) students who are evaluated and found to have a disability.³⁶ For ELL students, placement in special education is due to an inability to distinguish between these three types of difficulties.³⁷ ELL students are found to be eligible for special education due to lower proficiency levels in either their native language or English, instead of the presence of a real disability.³⁸ Part of this problem is caused by similar signs of frustration existing for students with disabilities and those learning a new language. For example, ELL students struggle with grade-level academic language and concepts and may have difficulty paying attention or remembering important information.³⁹

Furthermore, students are misidentified through assessments that are not adapted for ELL students.⁴⁰ Often those that need special education services have to wait months or even years before they are referred for an evaluation, and once they are, the evaluation may not be appropriate.⁴¹ New students may need time to adjust in their surroundings, and learning a new language presents additional difficulties.⁴² Unfortunately, some school districts try to impose artificial time frames on that adjustment period, postponing referrals for a year.⁴³

Studies also indicate that the disproportionate representation of ELL students in special education is more than a misunderstanding of cultural, socioeconomic, and linguistic differences.⁴⁴ Some of the overrepresentation is a result of the assessments' failure to produce the necessary data needed to properly identify ELL students with disabilities.⁴⁵ There are few instruments available in languages other than English, and when adapted or translated, they often become unreliable.⁴⁶ The use of interpreters during evaluations also adversely affects the validity and reliability of assessments.⁴⁷ Additionally, most diagnosticians are not qualified to assess for both special education and

³⁶ *Id.* at 31–32.

³⁷ *Id.* at 32.

³⁸ Sullivan, *supra* note 31, at 319.

³⁹ CONN. ADM'R OF PROGRAMS FOR ENGLISH LANGUAGE LEARNERS, ENGLISH LANGUAGE LEARNERS AND SPECIAL EDUCATION: A RESOURCE HANDBOOK 11 (2011), <http://www.capellct.org/documents/SPEdresourceguideupdated6-23-11-ABSOLUTEFINAL.pdf>, <<https://perma.cc/VS3J-ADJT>>. Assessing and identifying the causes of academic frustration in ELL students is a complex task, these similarities often lead to misdiagnosis as they can be signs of language difficulty, learning environment deficits, or other non-disability related academic difficulties. Artilles and Ortiz, *supra* note 8, at 41.

⁴⁰ *Id.* at 21, 52–53.

⁴¹ *Id.* at 41, 43.

⁴² Kristina Robertson, *How to Address Special Education Needs in the ELL Classroom*, ¡COLORÍN COLORADO! (Jan. 6, 2015), <http://www.colorincolorado.org/article/19960/>, <<https://perma.cc/P59S-37EE>>.

⁴³ *Id.*

⁴⁴ Artilles and Ortiz, *supra* note 8, at 16.

⁴⁵ *Id.* at 74.

⁴⁶ *Id.*

⁴⁷ *Id.* at 54.

ELL services.⁴⁸ These shortcomings in assessing ELL students for special education leave decisions to be based on social constructions, rather than scientifically based diagnostic evaluations.⁴⁹

B. Appropriate Assessment

In order to ensure ELL students are not inappropriately identified, schools must follow the assessment requirements under the Individuals with Disabilities Education Act (IDEA), No Child Left Behind Act (NCLB), and best practices for culturally and linguistically diverse environments. First, as mentioned above, school timelines for initial evaluations can result in delayed evaluations for struggling ELL students with disabilities. Although NCLB allows the state to wait one year before requiring an ELL student to take state assessments, there is no rule requiring a school district to wait a year before assessing for ESL services or special education.⁵⁰ Schools must provide notices within thirty days from the beginning of the school year, or from when a student arrives at school, to determine an ELL student's identification and placement.⁵¹ This means that schools must evaluate for ESL services well before the thirty-day notice requirement.⁵² Under the IDEA, it is the school's responsibility to locate, identify, and evaluate all students suspected of having a disability.⁵³ The school is also required to respond to any parent request for evaluation.⁵⁴ When a parent requests a special education evaluation, the IDEA requires the district to obtain consent or provide prior written notice.⁵⁵ If a school provides prior written notice denying a parent's request for evaluation, the parent has a right to request an independent education evaluation.⁵⁶

In order to avoid a premature referral for special education misidentification, children can, and should be, monitored for both obvious signs of disabilities and struggles in the academic setting.⁵⁷ If a student is making the same academic progress as other ELL students with similar backgrounds, then assessment for special education may not

⁴⁸ *Id.* at 74.

⁴⁹ *Id.* at 54.

⁵⁰ Robertson, *supra* note 44.

⁵¹ 20 U.S.C. §§ 6312(g)(1), 7012(a) (2012).

⁵² Lhamon & Gupta, *supra* note 10, at 10.

⁵³ 20 U.S.C. § 1412(a)(3)(A) (2012).

⁵⁴ *See* 20 U.S.C. § 1414(a)(1)(B) (2012) (explaining that a parent may request the initial evaluation to determine if the child has a disability).

⁵⁵ 20 U.S.C. § 1414(a)(1)(D)(i)(I) (2012). Under IDEA each state can set its own timeline for an initial evaluation. In Texas, a school must provide consent forms or prior written notice within 15 school days. Following receipt of signed consent forms, the school must complete the initial evaluation within 60 school days and hold an individualized education program meeting within 30 calendar days following the completion of the evaluation. 29 TEX. EDUC. CODE ANN. § 29.004(a-1) (West 2013).

⁵⁶ 34 C.F.R. § 300.502(a)(1) (2015).

⁵⁷ Robertson, *supra* note 44.

be necessary.⁵⁸ Initial steps need to be taken, however, if a student is struggling in comparison to similarly situated peers, or has a history of educational difficulties.⁵⁹ Additionally, though IDEA allows for the use of response to intervention (RTI) and data collection prior to a referral for special education, these steps cannot delay evaluation.⁶⁰

Second, once a school initiates the evaluation process and consents are signed, evaluations need to be appropriate and completed by qualified personnel. The IDEA requires that students be evaluated in their native language, with tests that are free of racial and cultural biases, that are validated for their purposes, and that are administered in accordance with the instruction of test publishers.⁶¹ Assessment for special education must include a variety of assessment tools and strategies; it cannot be a single assessment.⁶² NCLB also requires annual assessments in English language proficiency and that ELL students take state assessments, which can be in native languages if available.⁶³ Through ELL assessments, students must make adequate yearly progress, and states must establish standards and benchmarks to increase English language proficiency.⁶⁴

The assessment tools and strategies must be appropriate to provide relevant information that directly assists in determining the educational needs of the child.⁶⁵ Therefore, the evaluation process should be tailored to meet a child's educational need. Evaluators should not rely solely on the traditional assessment tools. All relevant information should be taken into consideration, including the annual ELL assessments and performance on state assessments in either English or their native language.⁶⁶ Research indicates that multiple forms of data collection are useful in conducting effective and reliable evaluations.⁶⁷ Data collection should include information from all personnel working with the student, including any ELL teachers or other professionals with expertise in second language acquisition. It should also include a parent survey to see if similar struggles are occurring in the home⁶⁸ because parents can provide "functional, developmental, cultural, and linguistic information that professionals cannot find on their own."⁶⁹ Evaluators should also rely on a more comprehensive observation process of the student in the general education classroom, in the ELL classroom, and at home to

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Memorandum from Melody Musgrove, Dir. of the Office of Special Educ. Programs, to State Dirs. of Educ. 1 (Jan. 21, 2011).

⁶¹ 20 U.S.C. § 1414(b)(3)(a) (2012).

⁶² *Id.*

⁶³ *Id.* § 6311(b)(2)(G).

⁶⁴ *Id.* § 6311(b)(2)(A).

⁶⁵ *Id.* § 1414(b)(2).

⁶⁶ Artiles and Ortiz, *supra* note 8, at 71.

⁶⁷ ELIZABETH BURR ET AL., IDENTIFYING AND SUPPORTING ENGLISH LEARNER STUDENTS WITH LEARNING DISABILITIES: KEY ISSUES IN THE LITERATURE AND STATE PRACTICES 4 (2015).

⁶⁸ Artiles and Ortiz, *supra* note 8, at 98.

⁶⁹ BURR ET AL., *supra* note 69, at 6.

better rule out language struggles.⁷⁰ By considering other factors, such as cultural background and environment, schools can decrease misidentification.⁷¹

In addition to appropriate assessment tools, the IDEA requires that all assessments be administered by trained and knowledgeable personnel.⁷² Qualified teachers and diagnosticians are required under the IDEA and NCLB.⁷³ NCLB requires all ELL teachers to be fluent in English and any other language used for instruction.⁷⁴ This must include both written and oral proficiency.⁷⁵ ELL teachers must also receive high-quality professional development.⁷⁶ Under the IDEA, all teachers must meet the applicable requirements of § 9101 of the Elementary and Secondary Education Act (ESEA) and 34 C.F.R. § 200.56(b) or (c), which includes fully licensed teachers who meet all NCLB requirements.⁷⁷ But even with these requirements, there are only a limited number of bilingual diagnosticians or licensed school psychologists who are qualified to evaluate ELL students.⁷⁸ Additionally, most general and special education teachers providing feedback to evaluators do not receive the same training as ELL instructors.⁷⁹ In order to overcome these deficits, parents and advocates should request and require more preparation on the part of evaluators.

If the evaluator is not bilingual, the use of an interpreter will be necessary. Just as it is inappropriate to use a student to translate for a parent, it is inappropriate to use unqualified personnel for evaluation interpretation.⁸⁰ If there is not a bilingual instructor on campus, the school must either request assistance from the district or use outside services.⁸¹ The evaluator should meet with the interpreter to review procedures and content before testing.⁸² Additionally, the evaluator should make observations about the interpreter's effectiveness, noting body language, patterns of reinforcement, cueing, and the amount of talk.⁸³

Following an evaluation, the eligibility determination must include all persons that are knowledgeable about and able to interpret evaluations, a person who is able to discuss available programming, and others who are knowledgeable about or have special expertise regarding

⁷⁰ Artiles and Ortiz, *supra* note 8, at 56–57.

⁷¹ BURR ET. AL, *supra* note 69, at 6.

⁷² 20 U.S.C. § 1414(b)(3)(A)(iv) (2012).

⁷³ *Id.* § 6311(b)(8)(C) (2012) (amended 2015).

⁷⁴ *Id.* § 6826(c).

⁷⁵ *Id.*

⁷⁶ 34 C.F.R. § 200.56(a)(2)(ii)(A)(1) (2015).

⁷⁷ 20 U.S.C. § 1401(10) (2012) (amended 2015).

⁷⁸ Artiles and Ortiz, *supra* note 8, at 66.

⁷⁹ *Id.* at 67–69.

⁸⁰ *Id.* at 70.

⁸¹ *Id.* at 68.

⁸² *Id.* at 70.

⁸³ *Id.*

the student.⁸⁴ A student's special education team must be able to ensure that the results of the evaluations are not due to lack of academic support or limited English proficiency,⁸⁵ and be able to support these assurances with data.⁸⁶

C. Meeting the Instructional Needs of ELL Students and ELL Students with Disabilities

Once an ELL student is appropriately identified as a student with a disability, the school must provide appropriate educational services to ensure the student receives meaningful educational benefit.⁸⁷ School districts must take affirmative steps to address language barriers and ensure ELL students that qualify for special education "may participate meaningfully in schools' educational programs."⁸⁸ In order to meet these requirements, a student's individualized education program (IEP)⁸⁹ must include modifications and instruction for both native language and ESL education in order to help the student improve academically and socially.

However, ELL students with disabilities are often removed from language services after becoming eligible for special education resulting in English-only instruction.⁹⁰ The Department of Justice (DOJ) and the Department of Education (ED) are aware that districts have both formal and informal policies that deny students access to both ELL programs and special education programs.⁹¹ Not only does NCLB require the continued use of ELL services after a student enters special education, but Title III of NCLB contains its own non-discrimination provision stating that a student cannot be excluded from any federally assisted program on the basis of language status.⁹²

⁸⁴ 34 C.F.R. § 300.321(a) (2007). The Texas Education Code also ensures that appropriately trained personnel are involved in the diagnostic and evaluative procedures operating in all districts and that those personnel routinely serve on district admissions, review, and dismissal committees. TEX. EDUC. CODE ANN. § 29.001(6) (West 2013).

⁸⁵ 20 U.S.C. § 1414(b)(4)–(5) (2012).

⁸⁶ Artiles and Ortiz, *supra* note 8, at 72.

⁸⁷ 34 C.F.R. § 300.306(c)(2) (2015); 20 U.S.C. § 1414(d)(1)(A)(iv) (2012). *See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 192 (1982) (explaining that Congress intended to make education available to handicapped children).

⁸⁸ Lhamon & Gupta, *supra* note 10, at 5; 34 C.F.R. § 100.3(b)(1), (2) (2015); *Lau v. Nichols*, 414 U.S. 563, 568 (1974).

⁸⁹ The IEP is a document required by law under the IDEA for students with disabilities who receive special education services. *See* 34 C.F.R. §§ 300.320–300.324 (2015) (defining the IEP and how it is to be developed). This is the document that lays out the student's entire service program including the student's eligibility for special education services; what goals and objectives the school district will measure and monitor to determine whether the student is making progress; all of the accommodations and modifications the student will receive; the related services that will be provided; and the student's placement. *Id.*

⁹⁰ Janette K. Klingner & Lucinda Soltero-Gonzalez, *Culturally and Linguistically Responsive Literacy Instruction for English Language Learners with Disabilities*, 12 MULTIPLE VOICES FOR ETHNICALLY DIVERSE EXCEPTIONAL LEARNERS 4, 4 (2009).

⁹¹ Lhamon & Gupta, *supra* note 10, at 25.

⁹² *Id.* at 7.

Additionally, the IDEA requires schools to create an IEP based on the educational needs of the student for each student who qualifies for special education.⁹³ The DOJ and ED reiterated in their recent guidance that an IEP team must consider the language needs of an ELL student, and language needs must be considered in review of IEP goals.⁹⁴ The IDEA also requires related services to include consulting with others with knowledge of the student's needs.⁹⁵ IDEA clearly states that people knowledgeable about the child must make a placement decision, which should include ELL instructors or evaluators.⁹⁶ But to ensure each student's language needs are met, it is "essential that the IEP team include participants who have the requisite knowledge of the child's language needs."⁹⁷

Once a student qualifies for ELL services and special education services, schools are required to educate students in the least restrictive environment (LRE).⁹⁸ Under IDEA, LRE means a student is educated with the student's non-disabled peers to the maximum extent appropriate.⁹⁹ LRE includes the right to participate in the general education curriculum with non-disabled peers, which would include non-disabled ELL students.¹⁰⁰

Outside of special education, ELL students cannot be segregated based on their ELL status.¹⁰¹ School districts are expected to use the least restrictive placement for ELL students, even though the student may need to spend some time receiving separate instruction.¹⁰² Students should not be arbitrarily segregated from peers, and the ED and DOJ have not found any justification for removing a student from physical education, art, music, or other extracurricular activities based on a student's ELL status.¹⁰³

Once a student is appropriately placed in special education and receiving ESL support, NCLB creates accountability requirements to ensure students are making progress in ELL programs.¹⁰⁴ School districts must ensure that ELL students are not only making progress acquiring

⁹³ 34 C.F.R. § 300.112 (2015). Outside of the IDEA, many state policies also support a child's right to participate in ELL programs. 19 TEX. ADMIN. CODE § 89.1201(a) (2016); see *ELL Resources by State*, ¡COLORÍN COLORADO!, http://www.colorincolorado.org/web_resources/by_state/, <<https://perma.cc/3LRN-C7KS>> (summarizing each states' policies and procedures to meet the requirements of NCLB).

⁹⁴ Lhamon & Gupta, *supra* note 10, at 26; 20 U.S.C. § 1414(d)(3)(B)(ii) (2012); 34 C.F.R. § 300.324(a)(2)(ii) (2015).

⁹⁵ 34 C.F.R. § 300.34(c)(10)(iv) (2015).

⁹⁶ *Id.* § 300.116(a)(1).

⁹⁷ Lhamon & Gupta, *supra* note 10, at 27.

⁹⁸ 34 C.F.R. § 300.114(a) (2015).

⁹⁹ *Id.* § 300.114(a)(2)(i).

¹⁰⁰ 20 U.S.C. § 1412(a)(5)(A) (2012).

¹⁰¹ Lhamon & Gupta, *supra* note 10, at 22.

¹⁰² *Id.*; memorandum from Michael L. Williams to OCR Senior Staff, *supra* note 18, at 7; *Castaneda v. Pickard*, 648 F.2d 989, 998 n.4 (5th Cir. 1981).

¹⁰³ Lhamon & Gupta, *supra* note 10, at 3.

¹⁰⁴ 20 U.S.C. § 6311(b)(1)(F) (2012).

English, but also gaining content knowledge for each grade level.¹⁰⁵ Students must be tested annually and show adequate yearly progress.¹⁰⁶ Students are required to be part of an ELL program, unless their parents choose to exempt them.¹⁰⁷ Students may also be exited from ELL programs for meeting the proficiency requirements in the four domains of speaking, listening, reading, and writing.¹⁰⁸ How a student is exited from ELL instruction is based on each state's and district's policies.¹⁰⁹ After a student is exited from ELL services, NCLB requires school districts to monitor an ELL student's progress for two years to make sure the student was not prematurely exited.¹¹⁰ A student who struggles can be reevaluated and reenter ESL programs after being exited.¹¹¹

In addition to maintaining access to both ELL and special education programs, this vulnerable population will benefit from culturally and linguistically responsive educational environments. Building classrooms with teachers that are culturally aware and responsive is a recommended strategy and evidence-based practice.¹¹² Culturally responsive instruction makes connections with students while also understanding the sociocultural history to these interactions. A successful program can bridge the gap between instruction in school and the student's world at home.¹¹³ Cultures are fluid and teachers should be adaptable to each student's culture, not just the mainstream.¹¹⁴

When culturally responsive programs are used, they consistently show high achievement among culturally and linguistically diverse students.¹¹⁵ In order to properly use culturally responsive instruction, teachers, administrators, and others who are responsible for creating an appropriate IEP need to understand the communication styles and literacy practices of their students.¹¹⁶ A teacher's lack of understanding of how ELL students learn is one of the major causes for misidentification.¹¹⁷ All teachers, not just ESL teachers, need to be provided professional development in this area.

Another best practice in culturally responsive programs is to involve families in the planning process. Much of a child's learning and education takes place at home, prior to ever coming to school.¹¹⁸

¹⁰⁵ Lhamon & Gupta, *supra* note 10, at 32.

¹⁰⁶ 20 U.S.C.A. § 6311(b)(2)(G) (2015).

¹⁰⁷ Lhamon & Gupta, *supra* note 10, at 29. If a parent chooses to opt-out, the school must still ensure that the student is making progress in the regular education setting. *Id.* at 32.

¹⁰⁸ *Id.*

¹⁰⁹ See *id.* at 34–35 (explaining that state education agencies and school districts should develop standards for defining EL status and success in an EL program).

¹¹⁰ *Id.* at 34

¹¹¹ *Id.*

¹¹² Artiles and Ortiz, *supra* note 8, at 198; Janette K. Klingner and Patricia A. Edwards, *Cultural Considerations with Response to Intervention Models*, 41 READING RES. Q. 108, 110 (2006).

¹¹³ *Id.* at 109.

¹¹⁴ Klingner and Soltero-Gonzalez, *supra* note 91, at 6.

¹¹⁵ TANDRIA CALLINS, CULTURALLY RESPONSIVE LITERACY INSTRUCTION 4 (2004).

¹¹⁶ Klingner and Edwards, *supra* note 114, at 109.

¹¹⁷ BURR ET. AL., *supra* note 69, at 6–7.

¹¹⁸ Klingner & Edwards, *supra* note 114, at 109.

Teachers should be encouraged to develop social connections with families and learn students' stories. Research suggests that schools should proactively reach out to parents and figure out ways to get them involved, such as hiring parent liaisons.¹¹⁹

Additionally, successful classrooms have instructors that are familiar with the education and language needs of students. Often times, general education teachers and special education teachers are not qualified ELL teachers, and never receive ELL professional development.¹²⁰ However, any teacher can implement culturally responsive instruction, as its goal is to build on the prior knowledge and interests of the students to connect what they are learning in school with their lives at home.¹²¹

It is important to note that culturally responsive instruction does not change the curriculum. The IDEA does not allow a parent to choose the type of curriculum or program used by a school district.¹²² Instead, culturally responsive instruction is an additional resource for teachers to reach the ELL and special education populations.¹²³ Culturally responsive instruction can be included in a student's IEP through the use of state regulations, district policies, and school handbooks, as well as through clearly defined accommodations and modifications for each student.

Culturally responsive instruction is a not a new concept. Studies dating back to 1968 show that minorities and children from lower socioeconomic backgrounds are overrepresented in special education.¹²⁴ The vast research on the topic was not ignored by state education agencies, district policies, or school handbooks.¹²⁵ In fact, many of the state ELL programs and district policies recognize the need for culturally diverse instruction.¹²⁶ Many schools and communities are "creating programs that recognize the heritage languages of EL[L] students as valuable assets to preserve."¹²⁷ It is important for parents and advocates to locate state or district policies or practices on instructing culturally

¹¹⁹ BURR ET. AL, *supra* note 69, at 8.

¹²⁰ Artiles & Ortiz, *supra* note 8, at 35.

¹²¹ See Klingner & Soltero-Gonzalez, *supra* note 91, at 6–7 (suggesting culturally responsive programs include multicultural literature, which should provide ELL students with opportunities to connect with their own lives).

¹²² See Ridley Sch. Dist. v. M.R., 680 F.3d 260, 269 (3rd Cir. 2012) (stating that an IEP need not incorporate every program requested by parents).

¹²³ Artiles & Ortiz, *supra* note 8, at 128; CALLINS, *supra* note 117, at 4.

¹²⁴ Mikutis, *supra* note 30, at 3.

¹²⁵ See generally CONN. ST. DEP'T. OF EDUC., CULTURALLY RESPONSIVE EDUCATION: BECOMING A CULTURALLY RESPONSIVE EDUCATOR (2012) http://www.sde.ct.gov/sde/lib/sde/pdf/curriculum/cali/cre_handbook.pdf, <<https://perma.cc/86ZW-KFJH>> (explaining the necessity and benefits of culturally responsive education); ANCHORAGE SCH. DIST., CULTURALLY RESPONSIVE EDUCATION, http://www.asdk12.org/media/anchorage/globalmedia/documents/curriculum/cre/CRE_Continuum.pdf, <<https://perma.cc/8TKH-LA2E>> (giving guidelines to educators and schools for enacting culturally responsive education).

¹²⁶ See, e.g. AUSTIN INDEP. SCH. DIST., <http://www.austinisd.org/about-us>, <<https://perma.cc/MSW3-FVVC>> (aiming to provide culturally responsive educational experience for students).

¹²⁷ Lhamon & Gupta, *supra* note 10, at 1.

diverse students. If they do not exist, parents and advocates should question the type of ELL professional development being provided to all teachers by the district.

By using the IDEA, NCLB, and state and district policies, culturally responsive instruction can arguably qualify as accommodations and modifications for ELL students with disabilities. For example, in terms of literacy, the goal of culturally responsive instruction is to connect to students' prior knowledge, build on their interests, and connect what they are learning at school to their home lives.¹²⁸ An IEP can accomplish these goals by using books of interest for assignments, using real life examples during instruction, pairing ELL students with peers, allowing students to use native languages, and emphasizing connections between subject areas.¹²⁹

Like most other best practices, culturally responsive instruction also requires high expectations—IEPs should include academic, behavior, and language goals.¹³⁰ The IDEA states that any person with specific expertise related to the student should be present to develop an IEP.¹³¹ If a student qualifies for ELL services, then a bilingual or English language instructor should be present at all IEP meetings.¹³² Education teams, which include general education and special education instructors, should have additional meetings at appropriate intervals outside of the IEP process to discuss student data. The student's IEP should outline the frequency of these meetings.

IEPs should also outline parent involvement. Parent and school relationships are always key to a student's success, but especially for ELL students with disabilities.¹³³ IEPs should incorporate parent-teacher conferences to discuss family history, changes in the home, student interests, or family traditions that can be incorporated in the student's IEP.¹³⁴ School districts and teachers need to ensure parents can fully participate in their student's education, regardless of their English proficiency.

III. LIMITED ENGLISH PROFICIENT PARENTS OF STUDENTS WITH DISABILITIES

As with students, school districts have a responsibility to provide Limited English Proficient (LEP) parents with information in their native

¹²⁸ Klingner & Soltero-Gonzalez, *supra* note 91, at 6–7.

¹²⁹ *Id.* at 14.

¹³⁰ Artiles & Ortiz, *supra* note 8, at 119–120.

¹³¹ 34 C.F.R. § 300.321 (a)(6) (2015).

¹³² See Artiles & Ortiz, *supra* note 8, at 127 (recommending that meetings be conducted in the parents' language and be translated for school personnel).

¹³³ *Id.* at 34.

¹³⁴ See *id.* at 102 (concluding that family involvement is crucial to understanding the culture and needs of the student).

language.¹³⁵ Title VI of the Civil Rights Act of 1964 requires school districts that receive federal funding to provide the same information about school programs, reports, and activities to LEP parents as they do to English-speaking parents.¹³⁶ This does not mean, however, that school districts must translate every document into another language. Rather, entities subject to Title VI are permitted to identify certain written materials as “vital documents” and as long as those documents are translated for LEP individuals, entities do not have to translate all documents they regularly provide in English.¹³⁷ The U.S. Department of the Interior issued guidance explaining that whether a document is vital “may depend on the importance of the program, information, encounter, or service involved, and the consequence to the LEP person if the information is not provided accurately or in a timely manner.”¹³⁸

Similarly, the Limited English Proficiency website, a federal interagency website, describes vital documents as those that contain “information that is critical for obtaining the federal services and/or benefits, or is required by law.”¹³⁹ The IEP contains information a parent must be able to read and understand in order to properly access the services and benefits of the special education system, making it the most important document for LEP parents of students with disabilities to receive in their native language.

Although all LEP parents have the right to receive information in their native language, LEP parents of students who receive special education services arguably have an enhanced right to receive documents pertaining to their child’s disability-related services in their native language because those documents should be classified as vital documents. Undoubtedly, there are significant consequences for parents who cannot read or understand what disability-related services and programs are being provided to their children. If a parent cannot fully participate in the complex decision-making processes and procedures used by school districts to determine what services will be provided to a student with disabilities, the student could fail to make progress at school, receive excessive discipline for disability-related behaviors, or be placed in an inappropriate, restrictive classroom setting.

While the IDEA requires school districts to provide parents with a

¹³⁵ 20 U.S.C. § 6318(f) (2012); *see* Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595 (July 18, 1970) (“School districts have the responsibility to adequately notify national origin-minority group parents of school activities which are called to the attention of other parents. Such notice in order to be adequate may have to be provided in a language other than English.”).

¹³⁶ *Id.*

¹³⁷ U.S. DEP’T OF THE INT., GUIDANCE TO FEDERAL FINANCIAL ASSISTANCE RECIPIENTS REGARDING TITLE VI PROHIBITION AGAINST NATIONAL ORIGIN DISCRIMINATION AFFECTING LIMITED ENGLISH PROFICIENT PERSONS, <http://www.doi.gov/pmb/eo/LEP-Guidance.cfm>, <<https://perma.cc/KZJ5-BLQF>>.

¹³⁸ *Id.*

¹³⁹ LIMITED ENGLISH PROFICIENCY, COMMONLY ASKED QUESTIONS AND ANSWERS REGARDING LIMITED ENGLISH PROFICIENT (LEP) INDIVIDUALS, <http://www.lep.gov/faqs/faqs.html>, <<https://perma.cc/RCX9-5N95>>.

great deal of information in their native language, it does not specifically require school districts to translate IEPs into a parent's native language.¹⁴⁰ The IDEA states that school districts must provide parents with prior written notice and procedural safeguards in their native language, unless it is clearly not feasible to do so.¹⁴¹ If the parent's native language is not a written language, the district must take steps to ensure that: (1) the notice is translated orally or by other means to the parent in the parent's native language or other mode of communication, (2) the parent understands the content of the notice, and (3) there is written evidence that the parent has received and understood the information.¹⁴² Furthermore, before a parent can sign consent for evaluations or services, school districts must ensure that: (1) the parent has been fully informed of all information relevant to the activity for which consent is sought in the parent's native language, (2) the parent understands and agrees to allow the district to take the action requested, and (3) the consent describes the activity and lists any records that will be released, and to whom, in order to complete the evaluation or provide the service.¹⁴³

In addition, the IDEA requires school districts to ensure parents are able to meaningfully participate in IEP meetings.¹⁴⁴ The regulations state that school districts "must *take whatever action is necessary* to ensure that the parent understands the proceedings of the IEP Team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English."¹⁴⁵ This is strong language mandating that school districts make a concerted effort to ensure parents are able to understand the IEP development process. But with the IDEA's silence on the matter of providing parents with IEPs in their native language, many parents have attempted to record IEP team meetings so that they can listen to the recording and translate the discussion themselves.¹⁴⁶ These efforts have been thwarted by some school districts that choose to limit a parent's ability to record IEP meetings.¹⁴⁷ The Office for Special Education Programs (OSEP) in the Department of Education has made clear, however, that if a school district has a policy of limiting recordings of IEP meetings, the policy must provide for exceptions that ensure a parent is able to understand the

¹⁴⁰ Letter from Patricia J. Guard, Acting Dir., Office of Special Educ. Programs, to Linda Boswell (Sept. 4, 2007); Adams Cty. Sch. Dist., 55 IDELR 210, 1027 (SEA CO 2010); *In re: Student with a Disability*, 111 LRP 39015, 11 (SEA NM 2011).

¹⁴¹ 34 C.F.R. § 300.503(c) (2015).

¹⁴² *Id.*

¹⁴³ *Id.* § 300.9(a), (b).

¹⁴⁴ *Id.* § 300.322(e).

¹⁴⁵ *Id.* (emphasis added).

¹⁴⁶ See generally *E.H. v. Tirozzi*, 735 F. Supp. 53 (D. Conn. 1990) (regarding a school that refused to provide tape recordings to a parent); see also, *Dall. Indep. Sch. Dist.*, 110 LRP 36304, 6 (SEA TX 2010) (Tape recording IEP meetings might have maximized a parent's grasp of the IEP process, but that alone did not require her Texas district to allow it. The district's policy prohibited tape recording unless all participants consented).

¹⁴⁷ *Id.*; *In re: Norwood Pub. Sch.*, 44 IDELR 104, 500 (SEA MA 2005).

IEP or IEP process.¹⁴⁸

At least one federal court has held that the IDEA permits parents to audiotape meetings in cases where it will help them understand the program and participate meaningfully in the process.¹⁴⁹ In *E.H. v. Tirozzi*, an LEP parent asked the district for permission to tape record her child's IEP meeting so she could review it at home with her dictionary to help her understand what was said, but the district refused.¹⁵⁰ The court ordered the district to allow the parent to record the meeting, and specifically stated that:

tape recording would allow E.H. to go home and review what was said at the meeting with the aid of a dictionary. It would allow her to go over the meeting again and again, until she was absolutely clear about what her child's IEP for the coming year entailed. It is therefore an essential part of her participation in the planning and evaluation of the IEP, a right she is guaranteed under the [IDEA].¹⁵¹

While the IDEA does not require school districts to translate the IEP document into a parent's native language, states may create this duty for school districts on their own.¹⁵² In Texas, the legislation that implements the IDEA states that school districts must provide LEP Spanish-speaking parents "a written or audiotaped copy of the child's individualized education program translated into Spanish if Spanish is the parent's native language."¹⁵³ For LEP parents whose native language is other than Spanish, Texas requires school districts to meet the above requirement to the best of their ability.¹⁵⁴

Although Texas has decided to go above and beyond the federal requirement for translation of IEP documents, many school districts still fail, or even actively refuse, to meet this obligation.¹⁵⁵ Failure of school districts to comply with state and federal law begs the question: What legal remedies exist for LEP parents of students with disabilities who are not being provided information in their native language?

IV. LEGAL REMEDIES TO ADDRESS SCHOOL DISTRICTS' FAILURE

¹⁴⁸ Stephanie S. Lee, *Letter to Anonymous*, OFFICE OF SPECIAL EDUC. PROGRAMS, 40 IDELR 70, 272-73 (June 4, 2003).

¹⁴⁹ *E.H. v. Tirozzi*, 735 F. Supp. 53, 59 (D. Conn. 1990).

¹⁵⁰ *Id.* at 57.

¹⁵¹ *Id.*; *but see, In re: Norwood Pub. Sch.*, 44 IDELR 104, 500 (SEA MA 2005) (A parent was not harmed by the district's refusal to allow her to tape the IEP meeting as she requested. Although English was her second language, the parent did not allege that she did not understand what was discussed at the meeting).

¹⁵² U.S. CONST. amend. X.

¹⁵³ TEX. EDUC. CODE ANN. § 29.005(d) (West 2013).

¹⁵⁴ *Id.*

¹⁵⁵ *See, e.g.*, Diane Wann, Program Specialist, Hous. Indep. Sch. Dist., TEA Corrective Action: Individualized Education Program in Native Language (Sept. 23, 2014) (on file with author) (explaining that procedures require providing interpreters and sending notices in native languages).

TO PROVIDE LEP PARENTS INFORMATION IN THEIR NATIVE LANGUAGE

A. Systemic Complaints Through the Special Education Complaint Process

The IDEA establishes a special education complaint process that requires State Education Agencies (SEAs) to investigate alleged violations of the IDEA.¹⁵⁶ Where an SEA finds that a local school district has violated the IDEA, it can issue corrective actions against the district in an effort to remedy the harm experienced by an individual special education student, or to address systemic problems that affect many special education students within a district.¹⁵⁷ The scope of an SEA's investigative authority is very broad. SEAs have the authority and responsibility to investigate complaints filed by an organization or individual alleging a school district has violated any requirement of Part B of the IDEA.¹⁵⁸ In its discussion of state complaint procedures, the Department of Education explained that "state complaint procedures can be used to resolve any complaint . . . [regarding] matters concerning the identification, evaluation or educational placement of the child, or the provision of [free appropriate public education] to the child."¹⁵⁹ This means SEAs have the authority to investigate systemic violations that affect multiple students.¹⁶⁰ From experience with SEA complaints, the most successful SEA complaints involve both policy issues and individual stories.

For example, parents in Texas were able to achieve a systemic victory using the special education complaint process against Houston Independent School District (ISD), the largest district in the state, by obtaining an order from the Texas Education Agency (TEA) for the district to provide all monolingual, Spanish-speaking parents of students with disabilities with a copy of their child's IEP in their native language.¹⁶¹ As stated above, Texas law requires school districts to provide LEP Spanish-speaking parents "a written or audiotaped copy of the child's individualized education program translated into Spanish if Spanish is the parent's native language."¹⁶² The IDEA plainly defines an

¹⁵⁶ 34 C.F.R. § 300.151 (2015).

¹⁵⁷ *Id.* § 300.152.

¹⁵⁸ *Id.* § 300.153(b)(1).

¹⁵⁹ Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46,540, 46,601 (Aug. 14, 2006).

¹⁶⁰ *Id.*

¹⁶¹ Special education complaint investigative report by Tex. Educ. Agency to Sarah Beebe, staff attorney, Disability Rights Tex., Terry Grier, Superintendent, Hous. Indep. Sch. Dist., and Sowmya Kumar, Spec. Educ. Director, Hous. Indep. Sch. Dist. 1 (Feb. 6, 2015) (on file with author).

¹⁶² TEX. EDUC. CODE ANN. § 29.005(d) (West 2013).

IEP as “a *written statement* for each child with a disability.”¹⁶³ The U.S. Supreme Court confirmed that the IEP “consists of a written document.”¹⁶⁴ Thus, section 29.005(d) of the Texas Education Code confers on LEP Spanish-speaking parents the right to receive a Spanish-translated copy of a written statement for each child with a disability.¹⁶⁵

Houston ISD, along with many other school districts in Texas, only provide LEP Spanish-speaking parents of students with disabilities (1) an audio-cassette tape or CD of the IEP meeting, which does not typically include a verbatim reading of each section of the IEP document; (2) a copy of the IEP in English; (3) a copy of the meeting minutes or deliberations in English; and (4) a copy of prior written notice in English. Houston ISD portends to comply with the Texas law requiring IEPs to be provided to parents in Spanish, when that is their native language, by providing them with an audio recording of the poorly translated IEP meeting.¹⁶⁶

Disability Rights Texas (DRTx), the federal protection and advocacy organization for people with disabilities in the state, filed a complaint with the Texas Education Agency (TEA) in March 2014 on behalf of three named complainants at three different Houston ISD campuses, and all similarly-situated LEP Spanish-speaking parents of students with disabilities.¹⁶⁷ The complaint alleged that Houston ISD’s compliance was inadequate at best, and deliberately offensive at worst, since an audio recording of the IEP meeting is neither functionally, nor logically, equivalent to an audiotaped copy of the child’s IEP translated into Spanish.¹⁶⁸ To properly comply with Texas law, Houston ISD would either have to provide LEP Spanish-speaking parents of students with disabilities a written copy of their child’s IEP translated into Spanish, or, if the parent cannot read Spanish, the district could provide an audio recording in which a person reads the written IEP verbatim in Spanish.¹⁶⁹ DRTx also included IDEA violations in the complaint alleging that Houston ISD violated Code of Federal Regulations Section 300.503, which requires school districts to provide LEP parents prior written notice in their native language.¹⁷⁰

The TEA investigated the complaint and issued its final report in May 2014 substantiating all claims. Through their investigation, TEA “found no evidence to show that the parents were provided with a copy, either in written or audio format, of a Spanish translation of the student’s

¹⁶³ 20 U.S.C. § 1414(d)(1)(A)(i) (2012) (emphasis added).

¹⁶⁴ Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 182 (1982) (emphasis added).

¹⁶⁵ TEX. EDUC. CODE ANN. § 29.005(d) (West 2013).

¹⁶⁶ Wann, *supra* note 162.

¹⁶⁷ Complaint against Hous. Indep. Sch. Dist. by Sarah Beebe, staff attorney, Disability Rights Tex., to Tex. Educ. Agency 2 (Mar. 12, 2014) (on file with author).

¹⁶⁸ *Id.* at 3.

¹⁶⁹ TEX. EDUC. CODE ANN. § 29.005(d) (West 2013).

¹⁷⁰ Complaint by Sarah Beebe to Tex. Educ. Agency, *supra* note 171, 6.

IEP.”¹⁷¹ TEA required Houston ISD to provide Spanish translated versions of IEPs and other documents to parents of all students with disabilities at the three campuses named in the complaint if Spanish was the language spoken at home and the parent required an interpreter at IEP meetings.¹⁷²

Because TEA failed to remedy the problem for all monolingual, Spanish-speaking parents in Houston ISD, DRTx filed a second complaint with TEA on December 11, 2014 on behalf of an individual client and all similarly situated parents of special education students in Houston ISD.¹⁷³ On February 6, 2015, TEA confirmed that, as a whole, Houston ISD does not provide Spanish-speaking parents with copies of their students’ IEP in their native language.¹⁷⁴ TEA ordered Houston ISD to provide all monolingual, Spanish-speaking parents of students with disabilities a copy of their student’s most recent IEP in Spanish and ensure that, going forward, Houston ISD continues to provide parents who need a translated version of the IEP with copies of that documentation in Spanish.¹⁷⁵ This is concrete evidence that where a school district actively fails to provide LEP parents of students with disabilities copies of special education documents in their native language, the State Education Agency can be called upon to investigate and remedy the systemic violation.

B. Complaints with the Office for Civil Rights

The Office for Civil Rights (OCR) in the U.S. Department of Education has the authority to investigate complaints alleging that a public entity, including a public school district, has discriminated on the basis of race, color, national origin, sex, disability and age.¹⁷⁶ In its January 7, 2015 joint guidance, the DOJ and ED outlined several areas of concern that they are willing to investigate.¹⁷⁷ Some of those issues include: providing language assistance programs that are proven successful, sufficiently staffing the language assistance programs, determining whether the disability determination of an ELL student is based on criteria that measures the student’s abilities—not language skill—and ensuring ELL students have equal access to participate in

¹⁷¹ Special education complaint investigative report by Tex. Educ. Agency to Sarah Beebe, staff attorney, Disability Rights Tex., Terry Grier, Superintendent, Hous. Indep. Sch. Dist., and Sowmya Kumar, Spec. Educ. Director, Hous. Indep. Sch. Dist. 4 (May 30, 2014) (on file with author).

¹⁷² *Id.* at 5.

¹⁷³ Complaint against Hous. Indep. Sch. Dist. by Sarah Beebe, staff attorney, Disability Rights Tex., to Tex. Educ. Agency 1 (Dec. 5, 2014) (on file with author).

¹⁷⁴ Report by Tex. Educ. Agency to Sarah Beebe, Terry Grier, and Sowmya Kumar, *supra* note 165, at 4.

¹⁷⁵ *Id.* at 6.

¹⁷⁶ 6 C.F.R. § 21.1 (2016).

¹⁷⁷ See generally Lhamon & Gupta, *supra* note 10 (describing what the Departments consider in their investigations).

specialized programs, just to name a few.¹⁷⁸

OCR has investigated complaints where ELL students were denied access to programs available to non-ELL students under Title III of the ESEA.¹⁷⁹ In 2011, the OCR Western Division investigated Orange Unified School District (OUSD) for its discriminatory policies excluding special education and ELL students from magnet school lotteries.¹⁸⁰ Following OCR's decision to investigate, OUSD agreed to revise the lottery system, making it clear that the lottery was open to ELL and special education students.¹⁸¹ OUSD also agreed to implement a school improvement plan for the inclusion of ELL and special education students.¹⁸²

The OCR has investigated many complaints regarding discrimination on the basis of national origin where a school district has failed to provide LEP parents information in their native language in violation of Title VI of the Civil Rights Act. In *Victor Valley (CA) Union High Sch. Dist.*, OCR criticized the district for failing to provide a Spanish interpreter at an IEP meeting or to inform the parent of her right to request a copy of the IEP in her native language.¹⁸³ OCR noted that the student's IEP included a line that allowed the parent to request a copy of the document in her native language, but pointed out that the provision was written in English.¹⁸⁴ OCR stated that, "[a]s a result, [the parent] was not aware that she could request a translated copy of the IEP."¹⁸⁵ OCR ordered the district to develop policies regarding the oral interpretation and translation services it offered to LEP parents.¹⁸⁶

The Southern Poverty Law Center (SPLC), a legal non-profit organization, sought to address the failure of a school district to provide information to parents in their native language through a complaint it filed against Louisiana's Jefferson Parish Public School System (JPPSS) in August 2012.¹⁸⁷ SPLC alleged discrimination on the basis of national origin in its complaint to the DOJ and OCR asserting that JPPSS failed to provide adequate translation and interpretation services for Spanish-speaking parents.¹⁸⁸ While the district provided school notices in English to English-speaking parents, they failed to provide this information to Spanish-speaking parents in their native language.¹⁸⁹ Through the Early Complaint Resolution process, SPLC entered into a settlement agreement with JPPSS where the district agreed to amend their policies and

¹⁷⁸ *Id.*

¹⁷⁹ Orange (CA) Unified Sch. Dist., 111 LRP 65098, 1 (OCR 2011).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 2.

¹⁸² *Id.* at 3.

¹⁸³ Victor Valley (CA) Union High Sch. Dist., 50 IDELR 141, 600 (OCR 2007).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 599.

¹⁸⁶ *Id.* at 600-02.

¹⁸⁷ Letter from Jennifer Coco and Caren Short to U.S. Department of Education and U.S. Department of Justice, *supra* note 13, 1-2 (on file with author).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

procedures to ensure LEP parents would be provided interpreter services as well as the same information and notices in their native language that are provided to English-speaking parents.¹⁹⁰

C. Special Education Due Process Hearings

One of the primary legal remedies available to students who receive special education services and their parents to address violations of the IDEA is the special education due process hearing.¹⁹¹ Due process hearings are administrative proceedings that address both procedural and substantive violations of the IDEA.¹⁹² When a parent or school district does not prevail at the administrative hearing level, the case can be appealed to a district court,¹⁹³ then the circuit court, and finally, to the United States Supreme Court.

One of the most common issues addressed through the due process hearing system is whether a student who receives special education services has been provided a Free Appropriate Public Education (FAPE)¹⁹⁴ by the school district. In its landmark special education decision, *Board of Education of Hendrick Hudson Central School District v. Rowley*, the Supreme Court laid out a two-prong test for determining whether a student has been provided a FAPE.¹⁹⁵ The first inquiry is whether the school district complied with the IDEA's procedural requirements, and the second is whether the student's IEP is reasonably calculated to confer an educational benefit to the student.¹⁹⁶ Typically, the failure of a school district to meet the procedural requirements of the IDEA will not amount to a finding that a student has been denied a FAPE; that outcome usually requires the court to find that they have failed both prongs of the *Rowley* test.¹⁹⁷ Where a court finds that procedural violations alone amount to a denial of a FAPE, the court need not address the second prong.¹⁹⁸ One scenario in which courts have found that a procedural violation is so egregious as to lead to a denial of a FAPE is where a parent is denied the opportunity to participate in the

¹⁹⁰ Press Release, Department of Justice, Departments of Justice and Education Reach Settlement Agreement with Jefferson Parish Public School System Ensuring Equal Access and Non-discrimination in Schools, 2014 WL 3345066 (July 9, 2014).

¹⁹¹ 34 C.F.R. §§ 300.507, 300.508 (2015).

¹⁹² *Id.*

¹⁹³ *Id.* § 300.516.

¹⁹⁴ *Id.* § 300.17.

¹⁹⁵ *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 459 U.S. 176, 206–07 (1982).

¹⁹⁶ *Id.*

¹⁹⁷ *See Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 811–12 (5th Cir. 2003) (finding that procedural violations amount to a denial of FAPE only when the error impedes the student's right to a FAPE, significantly interferes with the parents' ability to participate in the decision-making process regarding the provision of FAPE, or causes a deprivation of an educational benefit).

¹⁹⁸ *Doug C. ex. rel. Spencer C. v. Hawaii Dep't of Educ.*, 720 F.3d 1038, 1043 (9th Cir. 2013).

IEP development process.¹⁹⁹

The importance of parent participation in the IEP development process is evident in the numerous procedural protections outlined in the IDEA. Parents are mandatory members of the IEP team.²⁰⁰ School districts must take parents' suggestions into consideration and, to the extent appropriate, incorporate them into the student's IEP.²⁰¹ School districts must consider outside evaluations provided by parents,²⁰² discuss placement options with parents,²⁰³ and include parents in any decision-making.²⁰⁴ School districts must also provide parents with copies of the child's IEP at no cost to the parents to ensure they are always able to refer to that document and know what services are being provided to their child.²⁰⁵

In *Doug C. v. Hawaii*, the Ninth Circuit Court of Appeals found that a school district's refusal to schedule an IEP meeting at a time convenient for the student's father resulted in a change of placement that was inappropriate for the student and denied him a FAPE.²⁰⁶ The fact that it was difficult or frustrating to schedule the meeting did not excuse the district's failure to include the student's father in the meeting after he had made clear that he wanted to participate.²⁰⁷ The Ninth Circuit found that the IDEA obligates schools to prioritize parents' schedules, not school members' schedules.²⁰⁸ A follow-up IEP meeting to inform the parent of decisions made at the original meeting did not cure the harm caused by the school district's failure to include the parent.²⁰⁹ The IDEA requires parental participation during the creation process, not after the fact.²¹⁰

Despite acknowledgement from courts that failure to adequately include parents in the IEP development process can amount to a denial of a FAPE, due process complaints filed by parents do not often raise this issue where a school district has failed to provide the parent with information and documentation in their native language as required by the IDEA and the Civil Rights Act of 1964. Perhaps this oversight is due to the fact that due process hearing decisions affect only one child and the issue of failure to provide parents with information in their native language tends to be a systemic issue better addressed through the special education state complaint or OCR complaint processes described

¹⁹⁹ *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 859 (6th Cir. 2004); see *Adam J.*, 328 F.3d at 811–12 (explaining that circuit courts consistently hold that procedural defects alone can constitute a violation of the right to a FAPE when they result in the loss of an educational opportunity).

²⁰⁰ 34 C.F.R. § 300.321(a)(1) (2015).

²⁰¹ *Id.* § 300.324(a)(1)(ii).

²⁰² *Id.* § 300.502(c)(1).

²⁰³ *Id.* § 300.116(a)(1).

²⁰⁴ *Id.* § 300.327.

²⁰⁵ *Id.* § 300.502(a)(3)(ii).

²⁰⁶ *Doug C. ex. rel. Spencer C. v. Hawaii Dep't of Educ.*, 720 F.3d 1038, 1044–45 (9th Cir. 2013).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 1045.

²¹⁰ *Id.* at 1044 (citing 34 C.F.R. § 300.322(d) (2015)).

above. However, because a judge can find a FAPE denial due to a procedural violation without having to reach the second prong of the *Rowley* test, which is far more burdensome, parents and their advocates would be wise to include the denial of parent participation in due process complaints where a school district has failed to provide an interpreter at IEP meetings, procedural safeguards, prior written notice, or IEPs in the parents' native language, and this failure has resulted in the parents' inability to fully understand and participate in the IEP development process.

The second, and more challenging, prong of the *Rowley* test relates to the services being provided directly to the student. In order to determine whether the student's IEP is reasonably calculated to confer an educational benefit, the Fifth Circuit created a four part test: (1) is the program individualized on the basis of the student's assessment and performance, (2) is the program administered in the LRE, (3) are the services provided in a coordinated and collaborative manner by the key stakeholders, and (4) are positive academic and non-academic benefits demonstrated?²¹¹ These *Michael F.* factors provide an opportunity for parents of ELL students with disabilities to request a due process hearing, alleging a denial of FAPE on the basis that a student has not been provided appropriate ESL services.

Though due process complaints alleging failure to provide ESL services are not common, the concerns outlined by the ED and DOJ's joint guidance are in line with a FAPE analysis under *Michael F.*²¹² A failure by the district to complete evaluations in a student's native language or to consider multiple forms of data would result in the creation of an inappropriate IEP.²¹³ Since the evaluation results would not be accurate, it would be difficult to decide what related services a student would need in order to make progress. Segregating an ELL student from their non-ELL peers or denying them access to special education services would violate *Michael F.*'s LRE requirement.²¹⁴

A due process complaint for a failure to provide ESL services resulting in a denial of a FAPE may be strongest under *Michael F.*'s third factor: whether services are provided in a coordinated and collaborative manner with key stakeholders.²¹⁵ ESL services are provided through general education programs, and ESL service providers are often left out of IEP meetings. Furthermore, the IDEA itself makes clear that the development and implementation of an IEP for a student who qualifies for ESL and special education services should include general education, special education, and ESL instructors.²¹⁶ A failure to bring all three

²¹¹ *Cypress Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997).

²¹² *Michael F.*, 118 F.3d at 253; *See generally* Lhamon & Gupta, *supra* note 10 (recommending educational programs that track the factors of *Michael F.*).

²¹³ 34 C.F.R. §§ 300.304(c)(1)(ii), 300.324(a)(1)(i)-(iv) (2015).

²¹⁴ *Michael F.*, 118 F.3d at 247.

²¹⁵ *Id.*

²¹⁶ 34 C.F.R. § 300.324(a)(2) (2015).

groups to the table is a violation of the IDEA and should be challenged through a due process hearing.

Finally, a FAPE requires that a student make progress in all areas, not just academics.²¹⁷ Therefore, when the communication needs of an ELL student who is also eligible for special education services are not being met, a due process complaint can be filed.²¹⁸ With the requirement from NCLB for school districts to provide services to ensure ELL students make progress, a strong case for finding a denial of a FAPE can be made when an ELL student with disabilities does not receive related services. However, proving a denial of a FAPE may be more difficult where a student does not make adequate progress in speaking, listening, writing, reading, or core content.

In *Los Angeles Unified School District (LAUSD)*, a hearing officer found that the district provided a FAPE to a student, even though the student did not make adequate progress in the four domains.²¹⁹ Though the Van Nuys' school provided the student with ESL services, the hearing officer noted that the "student's performance in 2010, 2011, and 2012 placed her in the beginning range in all domains, without significant progress year after year."²²⁰ However, the hearing officer also found that the school provided a FAPE because ESL services were provided by a certified bilingual special education teacher, the district had a master plan for ELL students in special education, and the school modified their evaluations of students after they failed to make progress.²²¹

It is likely that decisions similar to the *LAUSD* decision discourage parents and attorneys from filing due process complaints against school districts. However, with so few cases to compare, it is hard to say whether other parents may have more success. Parents and attorneys should use the due process avenue for FAPE denials, especially now that the ED and DOJ have issued strong guidance clearly outlining common violations seen in school districts.

V. STEPS SCHOOL DISTRICTS CAN TAKE TO ENSURE ADEQUATE LEP PARENT PARTICIPATION

The ED and DOJ's guidance highlights several corrective action steps school districts can take to avoid violations of both Title VI of the Civil Rights Act and the IDEA for failure to provide appropriate language services to special education students or translation and interpreter services to LEP parents, including the following:

²¹⁷ *Mr. I. ex rel. L.I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1, 7–8 (1st Cir. 2007).

²¹⁸ 34 C.F.R. § 300.508(a) (2015).

²¹⁹ *L.A. Unified Sch. Dist.*, 114 LRP 53431, 3 (SEA CA 2014).

²²⁰ *Id.* at 6.

²²¹ *Id.* at 5, 8.

- Develop a process for notifying LEP parents, in a language they will understand, of the availability of free translation and interpreter services through the school district;²²²
- Develop a process for identifying LEP parents who need language assistance and appropriately identifying ELL students for both language and special education services;²²³
- Develop procedures that do not delay evaluation of ELL students or special education students;²²⁴
- Monitor students to ensure they are making adequate progress in all four domains: speaking, listening, reading, and writing;²²⁵
- Create a policy that parents do not have to be limited English proficient in speaking, reading, writing, and comprehension to be considered LEP, but rather they need only to be LEP in one of those areas;²²⁶
- A policy that the district will accept parents' claims that they need language assistance without requiring proof;²²⁷
- A process that ensures the school district and individual campuses have a list of LEP parents, including the type of language assistance they need, and a log of the language assistance that has been provided to them;²²⁸
- A process to ensure that the information about a parent's need for language assistance transfers when the student transfers schools;²²⁹
- A process that ensures students are not inappropriately segregated from non-ELL peers and have equal access to grade level curricula, specialized programs, and high level programs;²³⁰
- A process for the school staff to obtain qualified translators and interpreters in a timely and appropriate manner;²³¹
- A process by which the school district ensures their translators and interpreters are properly trained and have knowledge of any specialized terms or concepts that pertain to the program or activity being provided to the student;²³²
- Provide appropriate and qualified staff for ELL instruction, including professional development for teachers regarding ELL learning styles;²³³

²²² Lhamon & Gupta, *supra* note 10, at 39.

²²³ *Id.* at 10, 38.

²²⁴ *Id.* at 11, 25.

²²⁵ *Id.* at 10–11.

²²⁶ *Id.* at 37.

²²⁷ *Id.* at 38.

²²⁸ *Id.* at 39.

²²⁹ *Id.* at 28–29.

²³⁰ *Id.* at 21.

²³¹ *Id.* at 39.

²³² *Id.*

²³³ *Id.* at 6.

- Notice to all staff that using family members and friends for language assistance is not acceptable as it may raise issues of confidentiality, privacy and conflict of interest,²³⁴ and
- A process for identifying and translating vital written documents into the language of each frequently encountered LEP parent group eligible to be served.²³⁵

Rather than being forced or ordered to amend policies and procedures to ensure LEP parents have access to information in their native language through complaint processes, the Office for Special Education Programs (OSEP) in the ED has suggested school districts should have an incentive to provide translated documents and interpreter services on their own.²³⁶ In *Letter to Boswell*, OSEP informed the superintendent of an Arkansas district that, while the IDEA does not require school districts to translate IEP documents into a parent's native language, districts that offer to provide a translated IEP can protect themselves from subsequent claims that it did not obtain consent for proposed services or placements.²³⁷ In other words, a district that provides parents information in their native language should be able to demonstrate that the parent was fully informed about the IEP process when they agreed to the actions the district proposed, making potential future claims that the district violated the IDEA's procedural protections or failed to provide a FAPE less likely to succeed.

VI. CONCLUSION

As the country becomes more culturally diverse, it is important that our schools do as well. The IDEA, NCLB, and Title VI of the Civil Rights Act of 1964 provide numerous strategies to ensure that ELL students with disabilities receive a FAPE and that LEP parents are able to fully participate in their child's education in their native language.

The OCR of ED and the DOJ have recognized that culturally responsive instruction is a strategy school personnel should be using to ensure that students are receiving a FAPE.²³⁸ When an ELL student with disabilities is not receiving a FAPE because teachers are not implementing culturally responsive strategies and the student is not receiving any meaningful benefit, then as advocates, our next step is to challenge this practice through impartial due process hearings and state complaints as a violation of the IDEA.

Although the IDEA does not specifically require school districts to

²³⁴ *Id.* at 39.

²³⁵ *Id.* at 38.

²³⁶ Letter from Patricia J. Guard, Acting Director, Office of Special Education Programs, to Linda Boswell, 2 (Sep. 4, 2007).

²³⁷ *Id.*

²³⁸ Lhamon & Gupta, *supra* note 10, at 29.

provide LEP parents with copies of their child's IEP, it enumerates the many other steps districts must take to ensure parent participation in the IEP development process, including translation of many other special education documents and providing interpreters at IEP meetings.²³⁹ Failure to provide parents the opportunity to participate in the IEP decision-making process can amount to a denial of FAPE under the IDEA and is one of the only procedural violations that, by itself, can result in that heightened level of harm to students.²⁴⁰ More parents and advocates should include denial of parent participation claims in due process hearing complaints where school districts fail to provide parents with IEPs in their native language, or interpreters at IEP meetings, and the result is an inability on the part of the parent to make decisions about their child's disability-related services at school.

In addition, there are arguments to be made that an IEP is a vital document, and the failure of a school district to translate that document into a parent's native language constitutes discrimination on the basis of national origin, and is therefore a violation of Title VI of the Civil Rights Act of 1964.²⁴¹ Those who encounter discrimination by a school district's refusal to provide IEPs and other important disability-related documents in a parent's native language should consider filing a complaint with the OCR of ED or the DOJ citing a violation of Title VI.

²³⁹ 34 C.F.R. §§ 300.503(c)(1), 300.504(d), 300.9, 300.322(e) (2015).

²⁴⁰ *Doug C. ex. rel. Spencer C. v. Hawaii Dep't of Educ.*, 720 F.3d 1038, 1047 (9th Cir. 2013).

²⁴¹ See LIMITED ENGLISH PROFICIENCY, *supra* note 142. ("A document will be considered vital if it contains information that is critical for obtaining the federal services and/or benefits, or is required by law." Vital documents include, for example: applications; consent and complaint forms; notices of rights and disciplinary action; notices advising LEP persons of the availability of free language assistance; rule books; written tests that do not assess English language competency, but rather competency for a particular skill for which English competency is not required; and letters or notices that require a response).