



**EDUCATION
LAW CENTER**

**Meeting the Needs of English Learners and Limited English Proficient Families in the
School District of Philadelphia**

*Comments to the Student Achievement & Support Committee of the
Board of Education of the School District of Philadelphia¹*

March 14, 2019

My name is Kristina Moon, and I am a staff attorney at the [Education Law Center-PA](#) (“ELC”), a non-profit legal advocacy organization dedicated to ensuring that all Pennsylvania’s children have access to a quality public education. We advocate on behalf of educationally at-risk students including children of color, children living in poverty, children with disabilities, English Learners, LBGQT students, as well those in foster care, the juvenile justice system, and children experiencing homelessness. ELC has a long history of advocacy on behalf of English Learners (“ELs”) and our attorneys are recognized across the state and nationally as experts in education law, the rights of immigrant students, and the rights of English learners under civil rights and disability laws.

We are grateful to the Committee for prioritizing this important issue. ELC joins with parents, students, and other community members and advocates to highlight the following needs and opportunities relating to policies, practices and programming for English Learners and limited English proficient (“LEP”) families across the District.

For any Board or Committee members less familiar with this unique population, we provide an overview of the rights of English Learners and LEP parents first, followed by a discussion of the particular needs and concerns of ELs and LEP families in schools across the District.

ENGLISH LEARNERS AND LEP PARENTS ARE PROTECTED UNDER FEDERAL AND STATE LAWS

The rights of ELs are safeguarded by federal and state laws that entitle these students to both a “meaningful” education and equal access to learning. School districts have a duty to identify English Learner students and limited English proficient parents in order to (i) provide instruction for ELs that enables them to overcome their language barriers and (ii) the language assistance supports that parents need to participate in their child’s education. English Learners are entitled to equal access to educational opportunities and cannot be discriminated against or denied participation on the basis of their national origin or limited English proficiency.

¹ An abridged version of these comments will be presented in oral testimony at the Committee’s March 14, 2019 meeting.

Every school must provide a program of English language instruction for EL students. This obligation is rooted in federal civil rights statutes and constitutional law and reflected in Pennsylvania state law.²

Title VI of the Civil Rights Act of 1964³ prohibits districts from excluding students from participating in, or being “denied the benefits of” or otherwise “subjected to discrimination” on the basis of national origin. Title VI’s protections extend to prohibiting a district from placing an EL student in a regular program taught in English where she is unable to participate meaningfully in that program because of her limited English proficiency.⁴ Title VI requires a school to take “affirmative steps” to address language barriers so that EL students may participate meaningfully in schools’ educational programs.⁵ This duty encompasses identifying students who may be LEP, providing translation and interpretation services, and ensuring access to educational programs and services. Title VI prohibits intentional discrimination, and the Third Circuit has held that intentional discrimination includes “deliberate indifference” which may be based on actual knowledge of the alleged misconduct and the failure of a school district to correct it.⁶

Under Title VI and the Equal Educational Opportunities Act of 1974 (“EEOA”)⁷, school districts must “identify and assess EL students in need of language assistance in a timely, valid, and reliable manner.”⁸ Specifically, schools must provide a home language survey, assess students’ English proficiency, and notify parents regarding their child’s identification and placement in a language instruction program within thirty days from the beginning of the school year.⁹ Schools must also identify an LEP parent’s preferred language and provide translation and interpretation support sufficient to allow parents the opportunity for meaningful participation in their child’s education.¹⁰

The EEOA reinforces and refines Title VI protections by requiring schools to provide students *equal* educational opportunities by “tak[ing] appropriate action to overcome language barriers that impede equal participation by its students in instructional programs.”¹¹ Under the EEOA, school districts may choose among programs designed for instructing ELs, but the selected program must be both educationally sound in theory and effective in practice. As delineated in the landmark case *Castaneda v. Pickard*,¹² the program must be “informed by an educational theory recognized as sound by some

² See 22 Pa Code § 4.26 (“Every school district shall provide a program for each student whose dominant language is not English for the purpose of facilitating the student’s achievement of English proficiency and the academic standards...”).

³ 42 U.S.C. § 2000d.

⁴ See *Lau v. Nichols*, 414 U.S. 563 (1974).

⁵ *Id.* at 566-557; 34 C.F.R. § 100.3(b)(1), (2).

⁶ *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 272-73 (3d Cir. 2014).

⁷ 20 U.S.C. § 1703. *et seq.*

⁸ See Dear Colleague Letter: English Learner Students and Limited English Proficient Parents, U.S. Department of Justice, Civil Rights Division and U.S. Department of Education, Office of Civil Rights (January 7, 2015) at *8, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf>.

⁹ *Id.*; 20 U.S.C. §§ 613(g)(1) (Title I), 7012(a) (Title III).

¹⁰ See Title VI, 42 U.S.C. § 2000d. See *e.g.*, 34 C.F.R. § 300.322(e) (schools “must take whatever action is necessary to ensure that the parent understands the proceedings of the IEP Team meeting” including providing an interpreter for parents whose native language is other than English); 20 U.S.C. § 1415(b)(3) (limited English proficient parents must receive prior written notice in a language they understand when a school proposes to initiate or change a child’s identification, evaluation, or educational placement unless it “clearly is not feasible to do so.”).

¹¹ 20 U.S.C. § 1703(f). See *C.G. v. Pa. Dep’t of Educ.*, 888 F. Supp. 2d 534, 575 (M.D. Pa. 2012).

¹² 648 F.2d 989 (5th Cir. 1981).

experts in the field or, at least, deemed a legitimate experimental strategy” reasonably calculated to effectively implement that theory; and it must produce “results indicating that the language barriers confronting students are actually being overcome.”¹³

Through an evidence-based program, the requisite level of language instruction services and modifications to instruction, an EL student is able to overcome language barriers and access the curriculum as required under federal and state law.¹⁴ As state guidance issued by the Pennsylvania Department of Education makes clear, English Language Development (ELD) is a required component of all language instruction programs and takes place every day throughout the day, as delivered by both ESL teachers and non-ESL teachers.¹⁵

To this end, school districts like Philadelphia must provide quality ESL programs with sufficient resources to ensure the programs are effectively implemented through qualified teachers, support staff, and appropriate instructional materials.¹⁶ Federal and state law require annual assessment of ELs’ proficiency in English language reading, writing, speaking, and listening or understanding.¹⁷ Only with periodic assessments of their students’ English proficiency based on objective standards that test reading, writing, speaking, and listening can a school district gauge whether ELs are able to participate meaningfully in the regular educational program.

The importance of effectively meeting the educational needs of ELs is now reinforced by *The Every Student Succeeds Act* (“ESSA”). Under ESSA, all states must now include progress in proficiency for English Learners as one of the academic factors in their Title I state accountability plan.

It is increasingly clear that when school districts fail to meet their legal obligations to ensure a meaningful education and equal access to educational opportunities for ELs, they may be held accountable in court. For example, recent cases in Utica, New York and Lancaster illustrate that districts will be held liable for denying immigrant EL students sufficient ESL instruction in inferior alternative programs.¹⁸

Finally, children with disabilities, including those who are English Learners, are entitled to specially-designed instruction and support services to enable them to make meaningful progress. School districts have a “child find” obligation to identify all students who may have a disability and to provide a timely evaluation to assess that child’s needs and provide necessary services. Students’ English language proficiency cannot be grounds for denying or delaying an evaluation to determine eligibility for special

¹³ *Castenada*, 648 F.2d at 1009-10. See *Fact Sheet, Ensuring English Learner Students Can Participate Meaningfully and Equally in Educational Programs* (Jan. 2015) available at <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-el-students-201501.pdf>.

¹⁴ See EEOA, 20 U.S.C. § 1703. *et seq.*; 22 Pa Code § 4.26.

¹⁵ See [Educating English Learners, Pa. Dep’t of Educ. Basic Education Circular](#), at 1.

¹⁶ See 20 U.S.C. § 6821 (Title III).

¹⁷ [Educating English Learners, Pa. Dep’t of Educ. Basic Education Circular](#), at 4 (citing 20 U.S.C. §§ 6311(b)(7), (6826(b)(3)(C),(d)(2)).

¹⁸ See *e.g., Tuyizere, et al. v. Utica City School District B.O.E.*, et al. 6:15-cv-00488-TJM-TWD (S.D.N.Y. 2015) (settled in favor of refugee students following ruling in related case that diverting older EL immigrant students into “alternative, unequal” settings was sufficient to state a claim under Title VI); *Issa, et al. v. School District of Lancaster*, 847 F.3d 121 (3d Cir. 2017) (district held liable where older EL immigrant youth were denied sufficient ESL instruction in inferior alternative program that was not evaluated by school district).

education services. An evaluation for an EL must be conducted in a language the student understands to accurately assess eligibility with bilingual evaluations when feasible.¹⁹ Parents must be offered the district's interpretation and translation services to ensure meaningful participation in the special education process.²⁰

Providing all our English Learners with the supports they need as required by federal and state law is critical to ensuring that these students learn in school, thrive in our communities, and live the life they hoped for in our country of immigrants.

EDUCATIONAL NEEDS OF ENGLISH LEARNERS AND LEP FAMILIES IN THE SCHOOL DISTRICT OF PHILADELPHIA

While many of district's formal policies appropriately restate its legal obligations, the families and students we hear from report that those policies are not implemented effectively and consistently. The most common concerns and need for improvement presented by parents, students and their advocates can be described in three broad categories: (1) Ensure English Learners' prompt enrollment in appropriate programming and reliable access to language assistance for LEP parents; (2) Ensure quality ESL instruction to all ELs across the District; and (3) Ensure equal access and opportunities for all English Learners, particularly with regard to special admission high schools.

Some recommendations can and must be addressed immediately, while other specific recommendations may be effectively addressed by convening a small task force of committed community stakeholders to meet regularly over a one-year period to address longer-term improvements to the implementation of ESL instruction policy and data analysis needs.

(1) Ensure English Learners' prompt enrollment in appropriate programming and reliable access to language assistance for LEP parents.

English Learners should be identified through the completion of the Home Language Survey upon their enrollment, but there are many instances where the school districts' paper forms and online record systems do not accurately and consistently identify a parent as limited English proficient in need of interpretation at school meetings and translated correspondence into the family's first language. **The district's record systems must be amended to align across general education, special education and other programming to consistently alert staff to the family's need for language assistance and all forms must be reviewed to ensure that the district is not asking questions regarding the immigration status of any child.** In addition, neighborhood schools should be required to refer newly arrived immigrant students to the newcomer program.

The district needs additional thoughtfully implemented newcomer programs to meet the needs of newly arrived immigrant students. These programs provide sheltered instruction, intensive English language programs, and literacy skills in a context that introduces students to formal education and American culture. The District should expand newcomer programming at all levels for our newly

¹⁹ 34 C.F.R. § 300.324(a)(2)(ii); see 20 U.S.C. § 1414(b)(3)(A).

²⁰ See 34 C.F.R. § 300.322(e).

arrived English Learners – elementary, middle and high school levels. At present, only one high school, Franklin Learning Center, offers a newcomer program and too often those students are required to leave Franklin Learning Center, a school they come to know and feel comfortable in, after they complete the newcomer program. Hundreds of students would benefit from independent, comprehensive programs designed to address the significant and unique needs of new arrivals to the United States.

(2) Ensure quality ESL instruction for all English Learners.

There are over 15,000 English Learners who speak more than 100 home languages in the District.²¹ All EL students are entitled to a robust and effective language instruction bilingual-bicultural or English as a second language (ESL) instruction program supported by trained ESL instructors and subject matter teachers who are equipped to meet the diverse language and learning needs of these students.

We consistently hear that the level, duration, and intensity of ESL instruction is insufficient to meet the needs of students in many schools. In particular, this year we are hearing about reductions in ESL support at schools with high EL populations and the absence of *daily* ESL instruction for beginner level students at many schools. Providing adequate ESL instruction is essential to ensure that ELs obtain equitable access to academic content and are not left behind. The language model used and the number of hours of language instruction provided must be driven by the student’s level of proficiency and delivered in accordance with [WIDA English Language Development Standards as required by the Pennsylvania Department of Education](#). **ESL instruction must be based on the student’s level of need, not which particular school a child attends.** For example, a Level II child should not receive minimal weekly ESL instruction at one school and daily language instruction in a different school. However, there is currently great inconsistency across the District with too many children receiving less robust ESL instruction than they need to eliminate language barriers.

Students and parents complain that there is a lack of coordination between ESL instructors and subject matter teachers, and those core teachers do not provide sufficient and effective modifications to instruction to enable these students to make academic progress. **The district needs to require more training for subject matter teachers** on how to modify instruction for EL students and how to coordinate the provision of language instruction services to support access to content.

Significantly, **the district cannot know whether its ELs are receiving an effective English Language instruction program without robust data collection and annual analysis at each school building level throughout the district.** The district must annually review and assess all ACCESS test scores²² and track students’ progress through WIDA levels longitudinally to address the concerns presented by students and parents that the ESL instruction provided in particular schools is not sufficient or effective. The district should be annually reporting to the Board the school-level outcome data from its different

²¹ See School District website at <https://www.philasd.org/multilingual/>

²² Assessing Comprehension and Communication in English State to State for English Learners (ACCESS for ELLs), is a nationally used large-scale language proficiency test for K–12 students and is one component of the World-Class Instructional Design and Assessment (WIDA®) Consortium’s comprehensive, standards-driven system. The purpose of ACCESS is to monitor student progress in English language proficiency on a yearly basis and to serve as a criterion to aid in determining when ELs have attained language proficiency comparable to that of their English-proficient peers. See ACCESS for ELLs® INTERPRETIVE GUIDE FOR SCORE REPORTS, available at <https://www.nsbds.org/cms/lib/AK01001879/Centricity/Domain/781/ACCESS%20Interpretive%20Guide%202012.pdf>.

bilingual and ESL programming, including different ESL instruction modalities of sheltered classes, intensive ESL at newcomer program and ESL provided in other neighborhood schools. Moreover, students and families also report that Opportunity Network schools such as accelerated programs also fail to provide sufficiently rigorous language instruction for EL students. For example, while the district is responsible for providing effective ESL support to English Learners placed in the district's AEDY program at Camelot, students report to ELC that no ESL support or modification of instruction is actually provided.

(3) Ensure equal access and opportunities for English Learners.

ELC and other advocates have received a number of calls reporting bullying and harassment of English Learners and immigrant students. The district has an obligation to provide a robust investigation of all bullying and harassment complaints, which requires **training for all school building and district climate staff about the unique vulnerabilities of multicultural and multilingual students**. Additionally, the district's information about *how* to report bullying or harassment should be more accessible to multilingual families.

Another common call that ELC receives concerns ELs who are struggling in school and for whom parents seek special education evaluations. Under state and federal law, children with disabilities are entitled to specially-designed instruction and support services to enable them to make meaningful progress. School districts have a "child find" obligation to identify all students, including ELs, who may have a disability and to provide a timely evaluation to assess that child's needs and provide necessary services. Yet, **parents continue to report that they are told their child cannot be evaluated to determine eligibility for services due to the lack of English proficiency**, that there is a mythical waiting period of two years for all EL students, or that their requests for evaluations are ignored. Families who obtain evaluations report that they are often on "**waiting lists**" for **bilingual evaluations** – particularly for students who speak the common languages of Spanish or Mandarin.

In addition, we continue to receive complaints regarding **the need for consistent translation and interpretation services for limited English proficient families**. The lack of these vital services denies parents of students with disabilities their right to meaningful parent participation in the special education process, denies a student due process rights in the context of school discipline proceedings, and contributes to delays in enrollment and the placement of EL students in inappropriate classroom settings.

Finally, as ELC has highlighted in prior testimony to the Board, **the District must continue its work to actualize the *LeGare Consent Decree's (E.D. Pa. 1994)* promise of equal access to selective high schools for all EL students**. The District has made significant recent progress with a more expansive information campaign and a new appeal process for students that are rejected from all schools. Unfortunately, many immigrants and LEP families are still not aware of their rights, so **we urge the District to further increase community outreach and include all ESL instructors in their *LeGare* trainings** because they have regular contact and strong relationships with students. With respect to data, we urge the Board to request that the District provide a presentation of data on the specific language level of the EL students (and disability type for students with disabilities) that are admitted to selective high schools to help identify patterns and solutions to ensure all students have meaningful access and to increase the District's education to selective schools about their equity obligations and how EL students can be supported to succeed in their schools.

Thank you to the Committee for your commitment to ensuring that all our English Learner and immigrant students have the support they need to meet their greatest potential.

Respectfully submitted,

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