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## The Over-and-Under-Identification of English Language Learners into Special Education

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### Executive Summary

This brief discusses the higher rates of over-and-under-identification of English Language Learners in special education due to: 1) difficulties in differentiating language acquisition and learning disabilities; 2) lack of professional expertise and education by school staff; 3) poor assessment tools and policies; and, 4) lack of parental involvement in the special education process. There are federal laws in place to address each of these deficiencies but they are often not known, understood or utilized on-site at schools, during the evaluation process and in the classroom. The federal government, states, parents, and advocates, must improve use of the current legal framework to ensure students are correctly identified. Recommendations are offered to educate readers and help provide practical solutions through the use of the current legal framework.

### Introduction

At a recent National Education Summit<sup>1</sup> organized by the White House Initiative on Educational Excellence for Hispanics, educators from across the country gathered in Washington, D.C. to address issues facing Latinos in education and discussing best practices across their areas of expertise. Among the most common area of concern cited by these professionals in their post summit commentary was the placement of English Language

Learners (ELL) in special education.<sup>2</sup> ELL students face greater rates of both over and under identification for special education.<sup>3</sup> Students can be over-identified as requiring special education in part due to difficulties in their English language acquisition which may often affect their academic performance and classroom interactions, thus leading to evaluation and the possible misdiagnosis of learning disabilities. Conversely, ELL also face risks of under-identification for needed services because learning disabilities may be attributed to language acquisition difficulties rather than learning difficulties. In either instance, misidentification is problematic. "Inappropriate referral to special education can be stigmatizing and costly, inhibiting [ELL] students from achieving their full academic potential and diverting special education resources from students with actual disabilities and needs."<sup>4</sup>

Gaining exact figures for the population of ELL students over-or-under identified for special education is difficult as there is no measure of "misdiagnosis." The potential impact of misidentification is large and will grow as the population of ELL students in the United States continues to grow. The inappropriate placement of students in special education is particularly problematic for the Latino community as its school age population has steadily increased over the past few decades.<sup>5</sup> From 2000-01 to 2007-08, the representation of Whites in public school

enrollment decreased from 61 to 56 percent. During the same period, Hispanic representation increased from 17 to 21 percent of the total student enrollment and Asian/Pacific Islander representation increased from 4 to 5 percent; Black enrollment increased from 16-17 percent.<sup>6</sup> Latino children will represent one out of every three children/students by the year 2025<sup>7</sup>. Also, while less than 20% of Latino students in K-12 are ELL, about 75% of ELLs are Spanish-speakers.<sup>8</sup> The over-or under representation of ELL in special education is not just a Latino issue but one that adversely affects other communities with large ELL and special education populations, such as the growing Asian American/ Pacific Islander community and the Native American/Alaska Native community. As of 2007, 5.9 million children ages 6-21 years old received services under the Individuals with Disabilities Education Act (IDEA), the federal law that regulates the provision of special education services. Fourteen percent of American Indians/Alaska Native students, 12 percent of Blacks, 9 percent of Hispanics, 8 percent of Whites, and 5 percent of Asians/Pacific Islander students received special education services.

Beyond the educational harms and stigma faced by misidentified students, one of the most troubling aspects of the misidentification of ELL students in special education is that it is in direct conflict with federal laws governing special

education and services for ELL. The laws state that limited English proficiency cannot be the determinate factor for placement in special education. Yet, the current literature on ELL and special education continues to address this as a central concern; given the state of federal law, there seems to be a disconnect between those who enforce the legal framework and how the process functions on the ground<sup>9</sup>. This brief seeks to explore the misidentification of ELL in special education, the legal framework governing provision of special education, and the relationship between the two. This brief will also offer policy recommendations for dealing with the conflict between the law and what occurs on the ground in classrooms. It is important to note that regardless of whether it is an instance of over or under-representation, federal law may be violated.

## The Legal Framework

The provision of special education services in the United States is governed by the Individuals with Disabilities in Education Act (IDEA) which was most recently reauthorized in 2004<sup>10</sup>. The IDEA outlines the process by which students are to be evaluated and provides a series of safeguards for parents to challenge their child's placement in special education. The special education process begins with the child being referred for evaluation; this initial referral is most often made by the child's teacher, but can also be made by the parent. If the parent consents, the child is then evaluated for qualifying disabilities. If the parent disagrees with the evaluation results, they may challenge the evaluation and request an Independent Educational Evaluation (IEE) to be paid for by the school. After the child is evaluated and determined to be eligible for special education services, the parent is asked to consent to a meeting which is usually referred to as an Individualized Education Program (IEP) meeting because its objective is to produce an IEP for the student that details the services that the child will receive and educational objectives for the school year. This decision

is made by a team that should include parents, teachers, and other school staff. If the parent agrees with the placement decision and services included in the IEP, the child will begin receiving services and be reevaluated annually. If the parent disagrees with the evaluation, he or she can attempt to resolve the disagreement with the child's school, seek mediation or file a complaint with the state educational agency seeking a due process hearing known as a resolution session. The guiding principles of the IDEA and IEP process are that students with disabilities be provided a free and appropriate public education (FAPE) in the least restrictive environment (LRE), meaning that special education students should be given services and instruction appropriate to their needs, at no additional cost, in an environment that allows them to be educated with their general education peers to the extent it is appropriate. A misidentified student is not being given the services and instruction they need, whether over- or under-identified and therefore is not receiving a FAPE.

ELL are given specific mention throughout the IDEA with the explicit provision that "a child must not be determined to be a child with a disability under this part if the determinant factor for that determination is limited English proficiency."<sup>11</sup> Assessments are to be given in child's native language "or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to provide or administer."<sup>12</sup> Limited English Proficient parents are also provided procedural safeguards by the law which requires school decision makers to "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...whose native language is other than English."<sup>13</sup> The most recent reauthorization of the IDEA also tried to address the overrepresentation of some racial and ethnic groups in special education, including those groups overrepresented in a specific diagnosis.

Another addition to the IDEA was the implementation of Early Intervention Services. For schools displaying instances of disproportionality in representation, 15% of Part B (the segment of IDEA dealing with students age 3-21) funds are to be directed toward professional development of staff and faculty to assist in the academic development and understanding of student needs prior to evaluation.<sup>14</sup> The IDEA also promotes (though does not define) the use of Response to Intervention models, which are different methods of instruction and support meant to aid vulnerable students prior to their referral for special education evaluation.

## Compliance

ELL program compliance is governed by the United States Department of Education, Office for Civil Rights (OCR), through their authority to enforce Title VI of the Civil Rights Act of 1964 (Title VI), which prohibits discrimination in programs and activities that receive federal financial assistance on the basis of race, color or national origin; and Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II), which prohibit discrimination based on disability. Title VI has been interpreted to prohibit denial of equal access to education due to a student's limited proficiency in English.<sup>15</sup> OCR has released policies regarding ELL students and special education. In a May 1970 memorandum the Office for Civil Rights stated that "school districts must not assign national origin-minority group students to classes for the mentally retarded on the basis of criteria which essentially measure or evaluate English language skills: nor may school districts deny national origin-minority group children access to college preparatory courses on a basis directly related to the failure of the school system to inculcate English language skills."<sup>16</sup> Section 504 requires that valid tests be used for evaluations, and that placement decisions be made by a group of persons knowledgeable about the student, the evaluation data and placement options.<sup>17</sup> In this

instance, limited English proficiency can affect the validity of the evaluation and impact placement options. OCR has also provided guidance regarding districts' obligation to provide parents of language minority or ELL students with notices that provide the same information provided to other parents, in a language appropriate to the parents.<sup>18</sup>

OCR investigates complaints of civil rights violations filed through its 12 regional offices. The office evaluates each complaint to determine if it has the legal authority to proceed to investigation. The complaint must include a violation of a law enforced by OCR such as Title VI or Section 504. The office then begins its investigation where it acts as a neutral fact finder and issues a letter of findings which details the results of the investigation. If a violation of the law is found, OCR attempts to reach a voluntary resolution with the violating entity, in a process known as a compliance review. If the party is unwilling to negotiate, OCR provides a letter of finding, to detail non-compliance and has the option to refer the violation to the Department of Justice for enforcement or to initiate administrative enforcement proceedings within the Department of Education to suspend or terminate federal funding to the entity. OCR has provided instruction regarding the initiation of compliance reviews related to placement of ELL students in special education stating "compliance reviews should continue to include an inquiry into the placement of limited-English-proficient students into special education programs where there are indications that LEP students may be inappropriately placed in such programs, or where special education programs provided for LEP students do not address their inability to speak or understand English."<sup>19</sup>

### Profile of ELL and Special Education

According to the federal government, a limited English Proficient student is one who is aged 3–21 and currently enrolled in a US elementary or secondary school and who:

- 1.) was not born in the United States or whose native language is not English;
- 2.) is a Native American, Alaskan Native, or a resident of outlying areas;
- 3.) comes from an environment in which a language other than English has had a significant impact on [the] individual's English language proficiency;
- 4.) is migratory and comes from an environment where English is not the dominant language; and,
- 5.) had difficulties in speaking, reading, writing, or understanding the English language that may deny the individual the ability to meet the state's proficient level of achievement in classrooms where English is the language of instruction or to participate fully in society.<sup>20</sup>

According to the National Center for Education Statistics, in 2007, an estimated 11 million elementary and secondary students, or 21 percent of all students, spoke a language other than English at home. Among the races/ethnicities, higher percentages of Hispanic (69 percent) and Asian (64 percent) elementary and secondary students spoke a language other than English at home than students of other racial/ethnic groups. About 18 percent of Hispanic and 17 percent of Asian students spoke English with difficulty, compared with 7 percent of Native Hawaiians or Other Pacific Islanders, 3 percent of American Indians/Alaska Natives, and 1 percent each of Whites and Blacks.<sup>21</sup> Students are identified as ELL through the use of Home Language Surveys which are administered by schools during enrollment; the surveys typically ask the first language acquired by the child, the language spoken at the home, and the preferred language used by the child. States maintain different standards for the Home Language Survey but typically a child who meets a threshold on the survey is referred for further testing to determine language skills. ELL students who are not appropriately acquiring English language skills and are not making adequate progress are typically referred for evaluation for special education services.

### Over-and-Under Representation of ELL

There are many possible reasons for the over-and-under-representation of ELL students in special education but this brief addresses four potential reasons: 1) the difficulty in differentiating language acquisition problems and a learning disability, 2) the lack of professional development and expertise on the part of those evaluating students, 3) poor assessment tools and policies and, 4) lack of parental involvement in the evaluation or IEP process.

### Differentiating Language and Disability and the Lack of Professional Expertise

Many professionals have difficulty differentiating between second language acquisition (learning English) and language difficulties that may be the result of learning, or other qualifying disabilities. It is difficult to determine when a child is ready to be evaluated in English as a child's oral performance in English may not reflect their actual abilities.<sup>22</sup> Without proper training or familiarity with the student, it can be difficult to determine whether the child has difficulties learning English, that affect his or her academic performance, or whether the child has a learning disability which would affect his or her academic performance regardless of the language in which the material is being presented. In both scenarios, students face two troubling possibilities.

- 1.) The student who struggles to learn English because of the complexities of learning a second language can be inappropriately diagnosed as having a qualifying disability, be placed in special education, and receive inappropriate services.
- 2.) A student who is struggling due to a disability may go without services because those struggles are being incorrectly attributed to his language difficulties. This area requires more research and supplemental training to assist both those tasked with teaching ELL students, and those who refer and evaluate students for special education.

After students are referred and evaluated, the lack of professional expertise can further compound the issue and make a misidentification more likely. The IEP process, while federally regulated and detailed can vary among schools. In researching the referral and decision-making process for ELL students, Klinger and Harry observed a number of IEP team meetings and found that the meetings varied in length from five minutes to over an hour and that the level of expertise and involvement of the IEP team members also varied among school districts.<sup>23</sup> More research is needed in the area of language acquisition and disability but students and staff would benefit from further professional development in these areas.

### Poor Assessment Tools and Policies

The difficulty of accurate evaluation for the ELL community extends to the use of invalid assessments. According to Jamal Abedi, a leading expert in the field of psychometrics, “research has clearly demonstrated that assessments designed and normed mainly for native English speakers may not be as reliable and valid for ELL students.”<sup>24</sup> As mentioned previously, the IDEA requires students be evaluated in their native language, and the unavailability of quality assessments in those languages can make valid evaluation all the more problematic. “Assessment results that are influenced by linguistic factors as construct-irrelevant may not be valid criteria in the classification of ELL students. This situation becomes even more complex when ELL students are being assessed for eligibility in special education. Unfortunately...the likelihood of misclassification of low performing ELL students as students with a learning disability is not negligible.”<sup>25</sup> Assessments should be examined for validity and special attention should be paid when instruments are being used to assess ELL students for special education.

### Lack of Parental Involvement

The IDEA makes provisions for parental involvement throughout the process. Par-

ents begin the process by referring the child for evaluation, asked for consent at every step of the process, given the opportunity to review and challenge the evaluation and subsequent placement decisions. Parents receive the task of functioning as their child’s advocate with regard to special education, but the system may be asking too much of parents, particularly those parents who themselves may be limited English proficient (LEP). There are many reasons why LEP parents may be less involved in the IEP process. First there are the obvious language considerations. The parent of an ELL student may not be able to understand the process due to limited English proficiency or illiteracy in both English and their primary language. Further, LEP parents may also have difficulty assessing the language acquisition skills of their children—who may speak more English than their recent immigrant parents. Once more, the law provides for this situation by requiring notice be given to the parent in a language that they can understand and that translation services be provided. With regard to LEP parent involvement in the IEP process, Klinger and Harry found that parents were treated unprofessionally, disregarded and even mocked during these meetings.<sup>26</sup> While the IDEA mandates accommodations for parents on timing, location and even translation of the process, this may not always occur in practice. Also, due to cultural considerations, LEP parents may be less likely to challenge the opinion of the “experts” available at the meetings. Consideration should be given by school staff and teachers to cultural differences that may affect a parent’s ability to fully participate in the process.

### Recommendations

Understanding how complex the areas of special education and English language learner instruction can be and the necessity for additional research in the area, the following recommendations are intended to be practical and possible through utilization of the current legal framework. The responsibility to correct errors in the special education placement process is multi-tiered. The federal government

should continue to enforce compliance with federal law through the Office for Civil Rights (OCR) and its complaint procedures; State educational agencies have the ability to control funding for further research and professional development and to ensure that assessment tools are continually improved for increased validity; Schools should give evaluations in students native language; Parents and advocates should continue to educate themselves and participate in the process as necessary by demanding compliance with federal laws and filing complaints with State Educational Agencies and the Department of Education’s Office for Civil Rights. The following are recommendations for action at multiple levels:

- **States should improve differentiation difficulties and lack of expertise.** States should ensure they are complying with the early intervention services under the IDEA which allows for no more than 15 percent of funding to be directed to professional development of early intervening services.<sup>27</sup> A portion of this funding should be directed at conducting research in the area of ELL and special education and preparing staff to evaluate and assess these students for services with a better understanding of the concerns they face.
- **State education agencies should improve evaluations.** Evaluations should be reviewed to ensure that they reflect the most current educational developments and that they do not negatively impact certain racial or ethnic groups.
- **Special education evaluations should always be given in the child’s native language** as mandated by the IDEA.
- **Advocates should increase parent participation.** Education advocates should encourage parents to participate in the evaluation process by demanding the safeguards provided them under the IDEA. They should challenge any instances of impropriety and ensure that they are attending meetings (and that their schedules are being accommodated accordingly).
- **Parents must exercise their rights.** Parents should review all materials and



demand that they be made available to them in their native language or translated accordingly and challenge any evaluation results or placements with which they do not agree. Becoming familiar with the IDEA provisions can also allow parents to truly act as advocates for their children. Parents should also avail themselves of complaint procedures by requesting resolution sessions with their state educational agency with regard to their child's IEP.

- **Parents and advocates must use the existing support structures.** If they believe that ELL students in their community are being inappropriately placed in special education services, parents and education advocates should avail themselves of the complaint process of the Office for Civil Rights.
- **The Department of Education's OCR should more strictly enforce parents' rights.** OCR enforces LEP parent communication. "School districts have a responsibility to adequately notify national-origin minority parents of school activities that are called to the attention of other parents. Notification must be sufficient so that parents can make well-informed decisions about the participation of their children in a district's programs and services. Districts may be required to provide notification in the parents' home language." If insufficient notification is being given, parents are encouraged to notify the Office for Civil Rights through one of its 12 regional offices.<sup>28</sup>

## Conclusion

English Language Learners are a growing population and misidentification of these students into special education will continue to be a harm and injustice. ELL students are faced with the risk of over-and-under-identification for special education, either of which harms the students and limits their academic potential in violation of the law. The recommendations in this brief should be put into practice to limit over –and-under-identification for special education in the future.

## Endnotes

- 1 White House Initiative National Education Summit was held on October 18, 2010.
- 2 Several terms are used to discuss this population: federal law uses the terms Limited English Proficient (LEP) and language minority; English as a Second Language (ESL) and English Language Learner (ELL) are equally common. ELL will be used throughout this brief.
- 3 Klinger, J.K & Harry. B. (2006) The Special Education Referral and Decision-Making Process for English Language Learners; Child Study Teams and Placement Conferences. *Teachers College Record*, 108 (11), 2248; NCES, ARTILES ORTIZ
- 4 Minow, M. L. (2001). Limited English proficient students and special education. Wakefield, MA: National Center on Accessing the General Curriculum. Retrieved 2-23-11 from [http://aim.cast.org/learn/historyarchive/backgroundpapers/lep\\_sp\\_ed](http://aim.cast.org/learn/historyarchive/backgroundpapers/lep_sp_ed)
- 5 Twenty-Fourth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act. "Consistent with the increase in the Hispanic population, there was more than a fourfold increase in the proportion of students with disabilities who did not use primarily English at home: the percentage grew from 3% to 14%." Retrieved 2-23-11 from <http://www2.ed.gov/about/reports/annual/osep/2002/section-ii.pdf>
- 6 Status and Trends in the Education of Racial and Ethnic Groups July 2010 <http://nces.ed.gov/pubs2010/2010015.pdf>
- 7 Aizenman, N.C; Majority of Hispanic Children Have Immigrant Parents, May 29, 2009. Retrieved 2-23-11 <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/28/AR2009052801506.html>
- 8 Aud, S., Hussar, W., Planty, M., Snyder, T., Bianco, K., Fox, M., Frohlich, L., Kemp, J., Drake, L. (2010). *The Condition of Education 2010* (NCES 2010-028). National Center for Education Statistics, Institute of Education Sciences, U.S. Department of Education. Washington, DC.
- 9 Artiles, Alfredo J. and Alba A. Ortiz, "English Language Learners with Special Education Needs: Contexts and Possibilities", Delta Publishing Company, IL. (2002) "Existing policy, law, and judicial decisions are designed to ensure that English language learners with disabilities receive an appropriate education. Overrepresentation in special education, however, suggests that these safeguards are not familiar to educators, have not been effectively implemented, or are being ignored." Pg. 10
- 10 Individuals with Disabilities Education Act (2004) (IDEA) 34 CFR 300
- 11 IDEA 34 cfr 300.306 (b)(iii)(1)
- 12 IDEA 34 cfr 300.304 (c) (1) (ii)
- 13 IDEA 34 cfr 300.3229(e)
- 14 IDEA 34 CFT 300.226(b)(1)
- 15 OCR May 25 1970 Memo Retrieved 2-23-11 Available at <http://www2.ed.gov/about/offices/list/ocr/docs/lau1970.html>
- 16 OCR May 25 1970 Memo Retrieved 2-23-11 Available at <http://www2.ed.gov/about/offices/list/ocr/docs/lau1970.html>
- 17 Section 504 of the Rehabilitation Act of 1973. 34 CFR 104.35
- 18 OCR May 25 1970 Memo Retrieved 2-23-11 Available at <http://www2.ed.gov/about/offices/list/ocr/docs/lau1970.html>
- 19 OCR 1991 Memo Retrieved 2-23-11 Available at <http://www2.ed.gov/about/offices/list/ocr/ell/september27.html>
- 20 No child left behind title IX no. 25 NCLB (2001) from Abedi, J. Psychometric Issues in ELL Assessment and Special Education Eligibility. *Teachers College Record*, 108(11) 2296
- 21 Status and Trends in the Education of Racial and Ethnic Groups July 2010 <http://nces.ed.gov/pubs2010/2010015.pdf>
- 22 Klinger, 2248
- 23 Klinger, 2257
- 24 Abedi, 2283
- 25 Abedi, 2300
- 26 Klinger, 2271-74
- 27 IDEA 300.226(b)(1)
- 28 The Provision of an Equal Education Opportunity to Limited-English Proficient Students, August 2000 Retrieved 2-23-11; Available at <http://www2.ed.gov/about/offices/list/ocr/eeolep/index.html>