

“Lo Podemos Hacer!”: Providing FAPE to the English Language Learner

Presented by

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English Language Learners (ELL)

- **Definition**

1. ages 3 through 21;
2. enrolled or preparing to enroll in an elementary school or secondary school;
3. not born in the U.S. or whose native language is a language other than English; is a 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; and
4. difficulties in speaking, reading, writing, or understanding English language may be sufficient to deny individual the ability to meet the state's proficient level of achievement on state assessments, the ability to successfully achieve in classrooms where the language of instruction is English, or the opportunity to participate fully in society.



English Language Learners (ELL)

- **Definition**

Note—IDEA regulations borrow the definition of ELL from the definition in the ESSA (“Every Student Succeeds Act,” current version of the ESEA). See 34 C.F.R. §300.27; 20 U.S.C. §7801(20).

ELL students, as of 2015, made up 9% of the public school student population in the U.S. See *Dear Colleague Letter*, 115 LRP 524 (OCR 2015).

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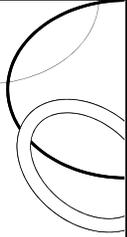
English Language Learners (ELL)

- **ELL Determination**

“The language proficiency assessment committee in conjunction with the admission, review, and dismissal (ARD) committee shall identify a student as an English learner if the student's ability in English is so limited or the student's disabilities are so severe that the English language proficiency assessment described in subsection (c) of this section cannot be administered. The decision for entry into a bilingual education or ESL program shall be determined by the language proficiency assessment committee in conjunction with the ARD committee....”

19 Tex. Admin. Code §89.1226(h)

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English Language Learners (ELL)

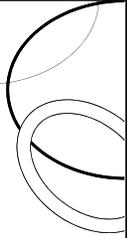
- **ELL Determination**

TEA guidance notes that “annual meetings to review student progress and make recommendations for program exit may occur but must be conducted by the ARD committee in conjunction with the LPAC.”

TEA Website “*Guidance Related to ARD Committee and LPAC Collaboration*”

Note—Likely, an acknowledgement that the authority of ARD committees under federal law with respect to IDEA students supersedes, and incorporates, the role of the LPAC in exit decisions.

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Evaluation Issues

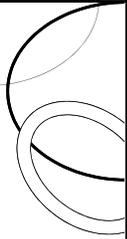
- **IDEA Regulations Include Safeguards for ELL Students**

34 C.F.R. §300.304—Assessments must be “administered in the child’s native language,” unless it is clearly not feasible to do so.

Note—Commonly used assessments of cognitive functioning and achievement are available in Spanish-language versions and other languages as well.

Section 504 regulations have a similar requirement, which reflects the nondiscrimination requirements of Title VI of the Civil Rights Act of 1964. See 34 C.F.R. §104.35(b)(3); Appendix A to the §504 regulations.

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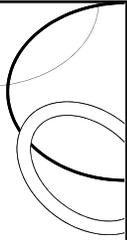
Evaluation Issues

- **IDEA Regulations Include Safeguards for ELL Students**

Note—Hearing Officers have held that schools are required to provide prior written notice to parents of their intent to conduct an evaluation in the child’s native language. See, e.g., *Manor Ind. Sch. Dist.*, 114 LRP 27305 (SEA Texas 2014).

This notice can be included in the notice of initial evaluation...

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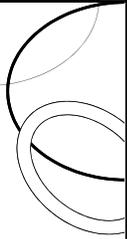


Evaluation Issues

- **IDEA Regulations Include Safeguards for ELL Students**

Note—The failure to test in a child’s native language can undermine the usefulness and reliability of a private evaluation. In *Brownsville Ind. Sch. Dist.*, 104 LRP 30637 (SEA Texas 2004), the Hearing Officer found a District evaluation more credible, as it assessed the student in the native language, while the independent psychologist had not.

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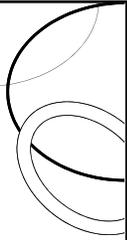
Evaluation Issues

- **IDEA Regulations Include Safeguards for ELL Students**

SLD Identification—A student cannot be determined to have an SLD if the “determinant factor” is the student’s limited English proficiency. 34 C.F.R. §300.306(b)(1)(iii).

Testing students in both native language and English can help address the question of whether the deficits are due to language or an LD. See, e.g., *In re: Student with a Disability*, 111 LRP 39017 (SEA New Mexico 2011)(testing using both Spanish and English maximized chances of obtaining accurate results)

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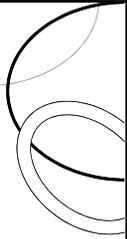
Evaluation Issues

- **IDEA Regulations Include Safeguards for ELL Students**

In that case, however, school used wrong standard in applying the exclusionary factor, as the proper standard is whether limited English proficiency is the “primary factor” in the LD finding.

Admittedly, it can be a difficult call as to whether limited English proficiency is a “primary factor” in the score profile, as opposed to a contributing factor...

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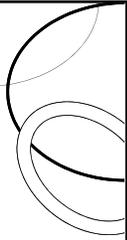


Evaluation Issues

- **IDEA Regulations Include Safeguards for ELL Students**

See, e.g., *Bridgeport Bd. of Educ.*, 28 IDELR 1043 (SEA Connecticut 1998); *New York City Dept. of Educ.*, 106 LRP 63717 (SEA New York 2006), for other examples of how testing in both languages (native and English) has been held to be consistent with IDEA.

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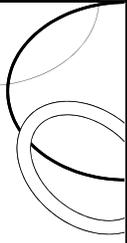


Evaluation Issues

- **IDEA Regulations Include Safeguards for ELL Students**

On SLD eligibility, see also 34 C.F.R. §300.309(a)(3), which requires assessment teams to determine that its findings of SLD are not “primarily the result of...limited English proficiency.”

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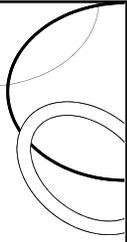
Evaluation Issues

- **IDEA Regulations Include Safeguards for ELL Students**

In situations of ELL students, it may be helpful to conduct some preliminary assessment of language proficiency, to make decisions on conducting the rest of the evaluation.

See e.g., *Houston Ind. Sch. Dist.*, 30 IDELR 564 (SEA Texas 1999), where a hearing officer upheld a district's decision to conduct the evaluation of a Spanish-speaking student in English where the results of language dominance testing indicated that the student demonstrated higher levels of receptive and expressive proficiency in English than in Spanish.

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Evaluation Issues

- **Eligibility challenge based on ELL status**

In the case of *Grapevine-Colleyville Ind. Sch. Dist.*, 115 LRP 15682 (SEA Texas 2015), a parent challenged an eligibility determination that a bilingual student receiving ESL services was not eligible under the speech impairment category, after the student was reevaluated after transferring from another district that had provided speech services.

HO noted that two separate evaluations by different schools had concluded that the student's speech and language development was typical of that of an ELL student (evidence showed that "ESL students typically lag somewhat behind their peers in language development but catch up as they age.")

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Evaluation Issues

- **Eligibility challenge based on ELL status**

In addition, the student was performing on grade level, teachers testified that the student's speech was intelligible, and the student interacted appropriately with peers.

And, teachers indicated that the student's language abilities were improving as her English was improving.

HO upheld the school's ineligibility determination, despite a private evaluation that diagnosed a mild language disorder.

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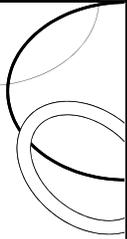


Evaluation Issues

- **Situations where assessment in native language is not feasible**

Bensalem Township Sch. Dist., 114 IDELR 24883 (SEA Pennsylvania 2014) involved a student adopted from Eastern Europe, where the District conducted the evaluation in English. The HO agreed that use of assessments normed in native language populations was not feasible, and noted that the school used interpreters during the assessments, which was allowed by the assessment's instructions. HO agreed that scores indicated supported the conclusion that limited English proficiency accounted for student's academic weaknesses in the classroom.

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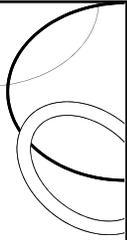
Evaluation Issues

- **Situations where assessment in native language is not feasible**

HO stated that “it may well be that Student needs more intensive regular education services, but those can be provided with or without eligibility for special education.”

Note—In addition, due to the child’s social background, his past educational experiences were unknown, which could have meant lack of educational advantage as a factor in his academic deficits as well...

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Evaluation Issues

- **Child-find misconceptions involving ELL students**

A common misconception is that ELL students must participate in ELL programming for a time certain before they can be assessed for special education

The Department of Education, however, has held that this approach denies ELL students access to IDEA services they may potentially need. **See *Dear Colleague Letter, 115 LRP 524 (OCR 2015)***. In fact, any “no dual services” policy is impermissible. “School districts must provide students with disabilities with both the language assistance and disability-related services to which they are entitled under Federal law.”

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Evaluation Issues

- **Child-find misconceptions involving ELL students**

The letter makes clear ELL students with suspected disabilities are entitled to IDEA evaluation even if their parents have opted out of ELL services.

See *Mumid v. Abraham Lincoln High Sch.*, 55 IDELR 33 (8th Cir. 2010) for an example of a District that was required to take corrective action due to a policy of not evaluating ELL students for special education unless they had been in ELL programming for at least 3 years.

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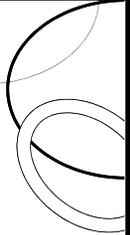


Services Issues

- **IEP Factor for Consideration**

IDEA regulations require that the ARD committee, in the case of a student with limited English proficiency, “consider the language needs of the child as those needs relate to the child’s IEP.” 34 C.F.R. §300.324(a)(2)(ii).

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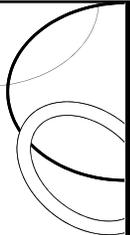


Services Issues

- **IEP Factor for Consideration**

But, there is not an absolute requirement for instruction in a student's native language. **See, e.g., *Carrollton-Farmers Branch Ind. Sch. Dist.*, 109 LRP 74049 (SEA Texas 2008)**(when parents argued a failure to provide instruction in native language, HO noted that IDEA requires (1) evaluation in native language, if feasible, and (2) IEP team consideration of language needs, but not necessarily instructional services in the native language.

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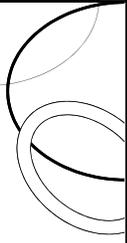


Services Issues

- **Challenges to Services**

In the case of ***Dallas Ind. Sch. Dist.*, 109 LRP 74049 (SEA Texas 2008)**, parents argued a failure to provide homework support in Spanish for their ELL child with LDs and OHI. The HO noted that Spanish interpreters were provided at ARDC meetings, contacts were made in Spanish, assessment was both in English and Spanish, student was provided ESL services, and contacts about homework were in Spanish, thus meeting the District's duties with respect to the student's ELL needs.

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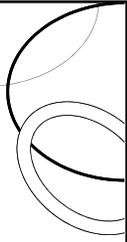
Services Issues

- **Challenges to Services**

Note—Apparently, the parents argued that the school had a legal duty to provide assistance to them and the student in the evenings in Spanish to help with homework obligations.

The parents also argued that the District was failing to meet the student’s non-academic needs with respect to his ESL status, but the HO found that the student “progressed in this ESL skill acquisition based on the evidence....”

And, there was some evidence that the student was making some poor choices (not turning in work, not going to tutoring, etc).



Services Issues

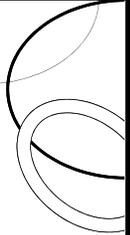
- **Selected Service Points**

Ideally, the student’s ELL needs are addressed while the disability needs are addressed

The input of the LPAC member is crucial to understanding the ELL needs and how they might impact receipt of sp ed services

The most difficult cases involve ELL students with a need for significant special education instruction in their native language

ARD committees must monitor progress in ELL programs



Procedure and Safeguards Issues

- **ARD Committees**

In Texas, ARD committees must include a member of Language Proficiency Assessment Committee (LPAC), who could be a regular ed teacher of the child or a sp ed teacher of the child if they sit on the LPAC, for any ELL student.

19 Tex. Admin. Code §89.10509(c)(j).

Note—This requirement assists ARDCs in ensuring that the language needs of IDEA students are considered, as required under the IDEA regulations.

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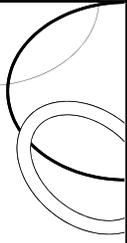
Procedure and Safeguards Issues

- **ARDC Interpreters**

34 C.F.R. §300.322(e)—“The public agency must take whatever action is necessary to ensure 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.”

Note—This requirement is usually met by having an interpreter attend the meeting to translate for the parent, although some Texas school districts meet the requirement by holding the meeting primarily in Spanish, for Spanish-speaking parents.

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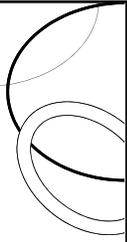


Procedure and Safeguards Issues

- **ARDC Interpreters**

Note—With parents that speak other languages, a district interpreter may not be available, so districts usually enlist the help of family members or community advocates that are bilingual. If any costs are involved, the district would have to defray such costs.

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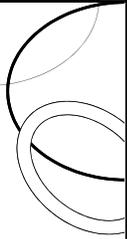
Procedure and Safeguards Issues

- **ARDC Interpreters**

Ultimately, the key requirement is that parents understand the ARDC proceedings to the point that they have a meaningful opportunity to participate.

See, e.g., *Manor Ind. Sch. Dist.*, 114 LRP 27305 (SEA Texas 2014)(HO held that “a review of ARD audio of the ARD Committee meetings supports the finding that the parent did in fact understand the proceedings”).

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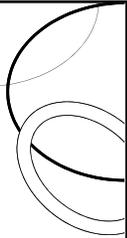
Procedure and Safeguards Issues

- **ARDC Interpreters**

Must interpreters be “certified” interpreters? There is no requirement for training or certification, but the translation must be sufficiently accurate that parents understand the proceedings.

Note—In the case of ***Los Angeles Unified Sch. Dist., 63 IDELR 24 (OCR 2013)***, the school used paraprofessionals to translate at IEP team meetings, but they were unable to accurately translate the proceedings

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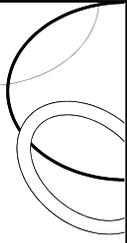


Procedure and Safeguards Issues

- **ARDC Interpreters**

Note—Districts can consider some interpreter training, so that its uncertified interpreters can translate common special education terminology and know to translate all discussions of the ARD committee.

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Procedure and Safeguards Issues

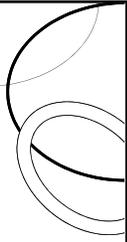
- **Documents**

The Commissioner's Rules require that notices of ARD committee meetings (and notices of refusals to convene a meeting) be provided in the parents' native language, "unless clearly no feasible to do so."

If the parents' native language is not a written language, then the notice must be transmitted orally or by other means.

19 Tex.Admin. Code §89.1050(f)

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Procedure and Safeguards Issues

- **IEP Documents**

Texas Education Code §29.005(d)—If the child's parent is unable to speak English, the district shall provide the parent with a written or audiotaped copy of the child's IEP translated into Spanish

If the parents' native language is not Spanish, schools must "make a good faith effort to provide the parents with a written or audiotaped copy" of the child's IEP.

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Procedure and Safeguards Issues

- **IEP Documents**

If the school chooses to provide an audiotape as the means of translation, "all of the content in the student's IEP in English is accurately translated into the target language and recorded with an audio device."

19 Tex. Admin. Code §89.1050(i)(2).

Note—The provision says districts that provide interpreters can also provide the translation by means of audiotapes, as long as the oral translation includes *all* the IEP content.

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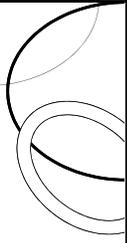
Procedure and Safeguards Issues

- **IEP Documents**

In the case of ***Progreso Ind. Sch. Dist.*, 34 IDELR 103 (SEA Texas 2000)**, the parents of a student with a hearing and speech impairment alleged that the school had failed to provide information about the student's education in Spanish.

The HO noted that the parent had introduced into evidence numerous documents that had been translated by the District into Spanish. Moreover, "virtually all communications with the Petitioner about Juan's educational plan/progress have been in Spanish, so the HO denied all relief.

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Procedure and Safeguards Issues

- **IEP Documents**

Note—In fact, the law does not require that *all* oral or written communications with parents be in their native language.