

# *English Language Learners:* *What You Need to Know*

OSBA CAPITAL CONFERENCE,  
OCSBA SCHOOL LAW WORKSHOP  
GREATER COLUMBUS CONVENTION CENTER  
THURSDAY, NOVEMBER 9, 2010

*Presented by:*

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## I. Federal Legislation

- A. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d  
“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”
- B. The Bilingual Education Act of 1968, 20 U.S.C. § 880(b)
1. The "BEA" was the first piece of major U.S. federal legislation to address English Language Learners (ELLs). Its goal was to provide funding to local educational agencies to meet the education needs of children with limited English speaking ability.
  2. The BEA was inadequately funded and lacked a coherent strategy. It was also completely voluntary. This law was repealed in 2002 by the passage of No Child Left Behind.
- C. The Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701, *et seq.*
1. The "EEOA" prohibits educational discrimination based on race, color, gender or national origin:  
  

*No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by... (f) 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. 20 U.S.C. § 1703(f)*
  2. The elements of a cause of action under the EEOA are:
    - a) Establishing the existence of educational barriers due to language;
    - b) Establishing that the defendant, usually a school district, has failed to act to eliminate the barriers; and
    - c) Establishing a hindrance of students' equal participation in school programs.
- D. No Child Left Behind, 20 U.S.C. §§ 6801-7014  
"NCLB" includes several provisions with regard to ELL students:

1. Funding is granted to local educational agencies (LEA) based on the number of limited English proficient students enrolled in the LEA and the percent that make Adequate Yearly Progress (AYP).
2. NCLB requirements focus on data collection, tracking of student progress, and ELL student performance.
  - a) State Education Agencies (SEAs) are expected to establish English Language Proficiency standards and create annual measurable objectives.
  - b) LEAs are expected to provide high quality instruction educational programs and professional development.

## II. Case Law

### A. Supreme Court Cases:

1. *Meyer v. Nebraska*, 262 U.S. 390 (1923) – The Supreme Court ruled that a Nebraska State law prohibiting the teaching of foreign languages (to students who had not passed the 8th grade) restricted liberty and was thus unconstitutional under the 14th Amendment's Due Process clause.
2. *Lau v. Nichols*, 414 U.S. 563 (1974) –
  - a) San Francisco's failure to provide English Language courses to Chinese-Americans violated the Civil Rights Act of 1964, 42 U.S.C. 2000d.
  - b) "[T]here is no equality of treatment by providing students with the same facilities, textbooks, teachers and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." *Id.* at 566.
  - c) Federal government established basic guidelines for schools with Limited English Proficient students. The guidelines require districts are required to engage in the identification and assessment of "LEP" students. The schools are also required to provide services by qualified teachers and to establish student exit requirements.
3. *Horne v. Flores*, 129 S.Ct. 2579 (2009) –
  - a) In 1992, a class of ELL students from Arizona filed an action claiming that the State violated EEOA when it failed to assist them in overcoming language barriers by underfunding language programs. Although Plaintiffs prevailed at the trial court level, the State failed to

follow through with the court order to provide adequate funding to ELL classes. Eventually the State filed a Motion to Vacate Judgment under Fed. Civ. R. P. 60(b)(5), because it claimed that changed circumstances and improved programs made further State compliance with the order unnecessary. The lower courts denied the motion and Arizona appealed to the U.S. Supreme Court.

b) The Supreme Court held that an analysis of whether the EEOA was violated could not rest on an analysis of underfunding alone. Instead, courts should assess compliance with the EEOA by looking not only at increased funding but also at changes in effective educational methodology as well as structural and management reforms. The judgment of the lower court was reversed and the case was remanded for further proceedings.

c) Supreme Court also stated that compliance with NCLB did not necessarily mean automatic compliance with EEOA.

d) In addition, the Court expressed concerns about federalism. It emphasized that that under NCLB, States have a substantial amount of latitude in terms of determining which ELL programs to adopt. State and Local educational authorities have considerable flexibility in deciding how to take appropriate action to meet their EEOA obligations and it is not the place of a court to substitute its own policy judgments for those of the state and local officials.

## B. Circuit Court Cases

1. *Mumid v. Abraham Lincoln High Sch.*, 2010 U.S. App. Lexis 17748 (8<sup>th</sup> Cir. 2010): The Eighth Circuit Court of Appeals found that monetary damages are not available under the EEOA.
2. *Castaneda v. Pickard*, 648 F.2d 989 (5<sup>th</sup> Cir. 1981): The Fifth Circuit presented standards for examining programs for LEP students. Districts are expected to have a pedagogically sound plan for students, sufficiently qualified staff to implement the plan, and a system of evaluation in place.
3. *Idaho v. Migrant Council*, 647 F.2d 69 (9<sup>th</sup> cir. 1981): The Ninth Circuit held that it is the responsibility of the State Department of Education to monitor the implementation of programming for LEP students.

4. *Illinois v. Gomez*, 811 F.2d 1030( 7<sup>th</sup> Cir. 1987): Court held that it is the State's responsibility to establish and enforce minimums for implementation of language remediation programs.

### **III. Federal Requirements for States:**

#### **A. NCLB Requirements:**

1. SEAs must establish English language proficiency standards and create statewide annual measurable achievement objectives (AMAOs).

a) The English Proficiency standards have to be linked to state academic content and achievement standards in English Language Arts, Math & Science.

b) AMAOs hold LEAs accountable for ensuring progress in terms of percentage of students attaining proficiency.

c) Optional: LEP Partnership Initiative.

2. LEAs have to provide effective language instruction and professional development.

a) "Effective Language Instruction" – states, districts, and schools have flexibility in deciding what is an effective program.

(1) No specific programs are mandated, but decisions should be based on scientific research.

(2) Can include classes that use the students' native language as well, and can include children who are already English-proficient.

(3) All programs must demonstrate improved classroom practices and academic achievement.

b) Districts have to measure AYP.

(1) English Language Proficiency must be assessed annually for each child in K-12 who is classified as LEP.

(a) This assessment must include speaking, listening, reading, writing, and comprehension skills.

(b) This assessment is separate from the regular state reading and math assessments that all children take.

- (c) To be classified as LEP, the student must be:
  - (i) 3-21 years of age;
  - (ii) Enrolled in elementary or secondary school;
  - (iii) Either not born in U.S., native language is not English, be Native American or an Alaska Native, or come from a background where English is a nonmajor language, or be migratory and from a non-English language environment; and
  - (iv) His or her level of English proficiency denies him or her the ability to reach a proficient achievement level on state tests or to succeed in English led classrooms or to participate fully in society.
- (2) LEP students must also take regular reading, math, and science assessments as per the standard schedule.
  - (a) Math and English Language Arts must be assessed "in a valid and reliable manner" for LEP students.
    - (i) Accommodations are permitted, including: extra time; flexible scheduling; dictionaries; small-group administration; simplified instruction; and audiotaped instructions in the native language.
    - (ii) LEP students should be assessed in English after they have attended school in the U.S. for three consecutive years, unless reliable data cannot be collected that way.
    - (iii) Greater flexibility in assessment is allowed if the student has been in a U.S. school less than one year.
- (3) In determining AYP, former LEP students can be counted for up to two years after they have exited.
- c) Highly qualified language instruction is taught by highly qualified teachers who are "fluent in English and any other language used for instruction, including having written and oral communication skills."

3. Parent Notification: Schools must notify parents of LEP students participating in LEP programs:
  - a) Schools must provide notification regarding Identification and Placement – within 30 days of the start of the year or within two weeks of placement. Notification must include:
    - (1) Reasons for identification and placement;
    - (2) The child's level of proficiency, how it was assessed, and the status of the child's academic achievement;
    - (3) Type of language acquisition program and method of instruction used in the program.;
    - (4) How the program will meet the educational strengths & needs of the child;
    - (5) How the program will help the child learn English and meet age-appropriate academic achievement standards for grade promotion and graduation;
    - (6) Program exit requirements, expected rate of transition, and expected rate of graduation; and
    - (7) If student has an IEP, explain how the program meets the IEP goals.
  - b) Schools must notify parents of the district's failure to progress on measurable objections (within 30 days).
  - c) Schools need to implement an effective means of outreach to the parents to inform them about how they can be involved in the education of their children.
  - d) Schools need to provide this information in an understandable and uniform format and when possible, in a language that the parent can understand.
4. Private School Requirements: NCLB 2001 Title X, Part E §§ 9501-9506
  - a) LEAs receiving Title III funds must provide educational services to LEP children in private schools located in the geographical area served by the LEA.

b) The LEA must have a "timely and meaningful" consultation with private school officials. This consultation will assist the LEA in designing the Title III programming for the LEP students and should address issues such as:

- (1) How the students' needs will be identified.
- (2) What services will be offered.
- (3) How, where, and by whom the services will be provided.
- (4) How the services will be assessed and how the results of the assessments will be used to improve those services.
- (5) The size and scope of services to be provided to the private school children and educational personnel.

c) The Title III services provided to private school LEP children must be:

- (1) Timely and equitable, and address their educational needs.
  - (a) Equitable means:
    - (i) Funds provided for educational services for children and personnel must be equal (taking into account the number and student needs) to funds provided for participating public school children.
    - (ii) LEA assesses, addresses, and evaluates the needs and progress of the public and private school children and personnel in the same manner.
    - (iii) LEA provides in the aggregate approximately the same amount of services to students and educational personnel with the same needs.
    - (iv) Provides both groups of students and educational personnel equal opportunities to participate in program activities.

- (b) Secular, neutral and non-ideological.
  - (i) Providers of the educational services to the children and personnel must be independent of the private school and of any religious organization.
  - (ii) Providers' employment contract must be under the control of the LEA.
- (c) Provided either by the LEA directly or through a contract with a 3rd party.
  - (i) Control of funds used to provide services and the title to materials and equipment must be retained by the LEA.
  - (ii) Funds for these services must not be commingled with non-federal funds.
- d) If LEA fails to provide equitable services to private school children:
  - (1) This is appealed first to SEA.
  - (2) The SEA failure is then appealed to U.S. Department of Education.
  - (3) Secretary of U.S. Department of Education may arrange for the provision of services by another entity and bypass the LEA. This will result in a deduction of funds from the SEA's Title III allocation.
- e) Reporting Requirements:
  - (1) States are not required to include private school students in annual LEP testing. But LEA must determine how the students it serves will be assessed for English language proficiency and how the results will be used to improve services.
  - (2) State English language proficiency standards and annual measurable achievement objectives only apply to those private school students served under Title III.
  - (3) Private schools do not have to report results from English language proficiency assessments to LEA.

(4) Private schools do not have to monitor and report on academic progress of students who have received Title III services in the past but are no longer in service.

f) Teacher Qualification: Teachers providing Title III services in private schools are subject to the same qualification requirements as for public school students (i.e. they must be fluent in English and in any other language used for instruction).

B. OCR Requirements:

1. Identification and Assessment:

a) School districts must identify all students whose primary or home language is other than English (PHLOTE).

(1) Sample form available on ODE site.

(2) List of commercial tests for assessing proficiency available on ODE site (e.g. B-VAT, Woodcock-Munoz, etc.).

b) Districts must then assess all PHLOTE students to see if they are LEP and need special language assessment to participate in the district's educational programs.

c) After identifying PHLOTE students who are LEP, districts must determine what sort of special language programs should be provided.

(1) Ohio does not prescribe a specific intervention program, so school districts can be flexible in deciding which educational approach meets their needs.

(a) Programs, however, must be based on "sound theory" and "best practice."

(b) Programs must provide effective instruction that leads to academic achievement and timely acquisition of proficiency in English.

(2) Programs must be taught by properly trained staff.

(a) Teachers with teaching certificates can get TESOL endorsements (Teachers of English to Speakers of Other Languages).

- (b) Endorsement is given following completion of coursework from approved university program or completion of comparable training.
  - (3) Programs must have appropriate curricular materials.
  - (4) Programs must take place in classroom facilities that are comparable to those used by other students.
  - (5) Once a program is implemented, student progress must be monitored on a regular basis and the program must be modified if there is a lack of reasonable progress.
- d) School districts must effectively notify national origin minority parents of school activities which are called to the attention of other parents. Such a notice may have to be in native language.

#### **IV. Additional Resources**

A. <http://www.migrationinformation.org/integration/ellcenter.cfm>. Among other useful information, this website provides the following useful information: In Ohio, children in immigrant families (under the age of 18) total 162,470. As a percentage of all children under the age of 18, children in immigrant families comprise 6.3% of that population. The total number of English Language Learners in Ohio is 38,026, which is 2.1% of the total public school enrollment.

B. <http://www.eschoolnews.com/e/eSN/092310ResourceCenter.htm>. In addition to discussing how an iPad can assist English Language Learners, this site notes: The ELL population has more than doubled since 1990 and numbers more than 5 million students today. The Pew Hispanic Center estimates that by 2025, there will be 18 million ELL students in the U.S. The most recent statistics available from the U.S. Census Bureau, from 2003, estimate the foreign-born population to make up 11.7 percent of the U.S. population.