

Challenges In Evaluating, Classifying, And Programing For ELL Students Under The IDEA

Tri-State Regional Special Education Law
Conference

November 4, 2016

Isabel Machado, Esq.
Machado Law Group, LLC
136 Central Avenue
Clark, New Jersey 07066
732-540-8276

imachado@machadolawgroup.com

This presentation is for informational and discussion purposes only. Nothing herein should be construed as legal advice. Specific facts and circumstances can significantly impact the analysis of law and decisions outlined herein.

What we will cover today?

- I. Intersection of ELL and Special Education**
- II. How to determine eligibility**
- III. How to address exclusionary factors**

ELL Students

- Under the Every Student Succeeds Act of 2015, an English Language Learner (“ELL”) is a student who:
 - (a) Is between the ages of 3 through 21; and
 - (b) Is enrolled or preparing to enroll in an elementary or secondary school; and

ELL Students

- (c)
 - (i) Was not born in the United States or whose native language is not English;
 - (ii)
 - I. Who is a Native American or Alaska Native, or a native resident of the outlying areas; and
 - II. 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
 - (iii) Who is migratory, whose native language is not English, and who comes from an environment where a language other than English is dominant; and

ELL Students

- (d) Whose difficulties in speaking, reading, writing, or understanding the English language may be sufficient to deny the 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
 - Every Student Succeeds Act of 2015, Pub. L. No. 114-95, Sec. 8101(25)

ELL Students

- District's providing language instruction for ELL students must, no later than 30 days after the beginning of the school year, inform parents of ELL students:
 - The reasons for the identification of their child as an ELL
 - The child's need of placement in a language instruction educational program
 - The methods of instruction used in the program in which their child is, or will be, participating and the methods of instruction used in other available programs including how such programs differ in content, instructional goals, and the use of English and a native language in instruction
 - Every Student Succeeds Act of 2015, Pub. L. No. 114-95, Sec. 1112(b)(3)(A).

General Duties

- Title VI of the Civil Rights Acts of 1964 and Section 504 prohibit public schools discriminating against students based upon race, and national origin
 - Notice of school activities, parent-teacher conferences, etc. to parents in native language
 - Ensure students are included in extracurricular activities

Determining Eligibility

- Gifted Students:
 - Prohibited from categorically excluding ELL students from gifted and talented programs or advanced placement courses
 - Particular G & T programs or program components may require proficiency in English language skills
 - Evaluation and testing procedures should not screen out ELL students
 - Hazelton Area School District, 114 LRP 17013 (OCR 04/10/14)

General

- Must provide ELL students with required special education and related services
 - Includes services to enable student to become proficient in English
 - Duty extends to all students whose inability to speak and understand English excludes them from effective participation in the district's educational program

- Lau v. Nichols, 414 U.S. 563 (1974)

Classification

- ELL students may be over or under-classified
 - Latino students are considered under-represented in special education
 - Latino students are overrepresented in the following categories:
 - LSD, Hearing Impairment, and Speech and Language issues
 - U.S. Department of Education, Office of Special Education and Rehabilitative Services. (2003). Twenty-second Annual Report to Congress on the Implementation of the Individual with Disabilities Education Act Vol. 1; Levinson, Bradley, et al., Center for Evaluation & Education Policy (2007). Latino Language Minority Students in Indiana: Trends, Conditions, and Challenges

Classification

- Under-classification:
 - Characteristics of students learning a new language often overlap with characteristics of students with learning disabilities
 - District's inclined to be "lenient" on ELL students due to language barrier and are reluctant to refer students for evaluation
 - Over-reliance on ELL specific-programs prior to considering special education referral
 - Unclear policies regarding how to consider ELL students' language acquisition issues
 - Levinson, Bradley, et al., Center for Evaluation & Education Policy (2007). Latino Language Minority Students in Indiana: Trends, Conditions, and Challenges

Classification

- Over-classification:
 - Significant disproportionality may be the result of inappropriate regular education responses to academic and behavioral issues
 - Failure to separate language proficiency issues from disability related issues
 - 71 Fed. Reg. 46,627 (2006)
- In order to address over-classification:
 - States must design policies and procedures designed to prevent the inappropriate over-identification and disproportionate representation by race and ethnicity of children as children with disabilities
 - 34 C.F.R. 300.173

Placement

- 36% of Latino students classified as having learning disabilities are removed from the general education population for a majority of the day
- Compared to 20% of white students classified as having a learning disability
 - Education Law Center. (2004). *Still separate, still unequal*. Retrieved from http://www.edlawcenter.org/ELCPublic/elcnews_040518_summaryoffindings.htm

Placement

- Latino students in need of special education services are ~ twice as likely to be removed from general education population compared to white students
 - The Civil Rights Project at Harvard University. (2002). *Racial inequity in special education: Executive summary for federal policy makers*. Cambridge, MA
- Remember:
 - LRE requirement applies to ELL students

Determining Eligibility

- Child-Find:
 - States and local school districts have an affirmative obligation to identify and evaluate all children within their jurisdiction who are in need of special education and related services
 - Also includes:
 - Students attending private schools
 - 34 C.F.R. 300.111(a)(1)(i)
 - Children progressing from grade to grade
 - Highly mobile children, including migrant children
 - 34 C.F.R. 300.111(c)

Determining Eligibility

- Child-Find:
 - District is required to affirmatively seek out potentially eligible students
 - Look for red flags:
 - Academic problems
 - Behavioral problems
 - Missed classes

Determining Eligibility

- Failure to fulfill child-find obligation may be considered a denial of FAPE
 - Tuition reimbursement for unilateral placements
 - Compensatory education
 - From the time the district should have suspected the disability
 - Lakin v. Birmingham Pub. Schs., 70 F. App'x 295 (6th Cir. 2003)

Determining Eligibility

- Child-Find:
 - District's obligation not waived by:
 - Parents' failure to request evaluation
 - Parents' interference/lack of cooperation with process
 - Failure to attend referral meetings
 - District of Columbia Pub. Schs., 12 ECLPR 109 (SEA DC 2015)
- Consent is required prior to conducting evaluations
 - 34 C.F.R. 300.300(a)(1)(i)

Determining Eligibility

- Every Student Succeeds Act of 2015:
 - Requires districts to annually assess the English proficiency of all ELL students in their school in the following areas:
 - Speaking
 - Listening
 - Reading
 - Writing
 - Pub. L. 114-95 Sec. 1111(b)(1)(F)

Determining Eligibility

- **Every Student Succeeds Act of 2015:**
 - English Language Learners must also participate in statewide assessments in reading/language arts, science, and math
 - Students to be provided with appropriate accommodations:
 - Native language assessments
 - Linguistic simplifications
 - Using simple words when testing content knowledge and skills
 - Simplified instruction
 - Extra time
 - Use of Dictionary
 - Audiotaped instructions in student's native language
 - U.S. Department of Education, Part II: Final Non-regulatory Guidance On The Title Iii State Formula Grant Program -- Standards, Assessments And Accountability (February 2003)

Evaluations

- Presentation Accommodation
 - Directions should be read or printed in student's primary language
 - Translators may not:
 - Change the content of a question by paraphrasing or providing clues
 - Offering additional information not provided in the test booklet
 - Coaching students during testing
 - Encouraging students to change responses

Determining Eligibility

- Rely on assessment results to determine to what extent:
 - A student is academically struggling
 - A student's academic struggles are correlated to student's English proficiency
 - Student overcomes academic struggles as English proficiency increases

Determining Eligibility

- Accommodations offered during standardized testing should be offered in the classroom
 - Better allows districts to separate language proficiency issues from disability related issues
 - Intended only to mitigate effects of a student's lack of English language proficiency
 - Should not reduce the assessment expectations of any student

Evaluations/Consent

- Consent must be “fully informed”:
 - General understanding of the evaluations which are being proposed
 - Letter to Johnson, 56 IDELR 51 (OSEP 2010)
 - Must agree in writing to the proposed evaluations
 - Lists of activities which will be conducted
 - List of records that will be released
 - To whom
 - 34 C.F.R. 300.9

Evaluations/Consent

- Consent:
 - Parent must be informed that consent may be revoked at any time
 - Revocation of consent does not invalidate evaluations which have taken place
 - Evaluations may remain in student's record
 - District may not conduct further evaluations
 - 34 C.F.R. 300.9

Evaluations/Consent

- Information regarding the proposed activity must occur in the parents' native language
 - The language normally used by that individual
 - 34 C.F.R. 300.29(a)
- Obligation follows parents with respect to consent
 - Applies even for English-speaking students

Evaluations

- Tests and other materials used to assess child must be:
 - Selected and administered so as not to be discriminatory on a racial or cultural basis
 - Provided and administered in the child's native language or other mode of communication

- 34 C.F.R. 304(c)(1)

Evaluations

- Must be conducted in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally
 - Unless clearly not feasible to provide or administer
 - 34 C.F.R. 304(c)(1)
- Assessments of student's family must be conducted in the native language of the family member being assessed
 - Family/Social History Evaluation
 - 34 C.F.R. 303.321(a)(6)

Evaluations

- Must be conducted in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally
 - Unless clearly not feasible to provide or administer
 - 34 C.F.R. 304(c)(1)
 - Should not be used to improperly limit evaluation in child's native language
 - 71 Fed. Reg. 46,642 (2006)
- Assessments of student's family must be conducted in the native language of the family member being assessed
 - Family/Social History Evaluation
 - 34 C.F.R. 303.321(a)(6)

Evaluations

- To comply:
 - District must first assess the student's proficiency in English, as well as their native language
 - Results determine which language remaining eligibility evaluations should be conducted in
 - Testing may be conducted in English, even if same is not the student's first language
 - Look at levels of receptive and expressive proficiency in English, as well as native language

- Houston Indep. Sch. Dist., 30 IDELR 564 (SEA TX 1999)

Evaluations

- Case Study: In re Student with a Disability
 - Facts:
 - Student adopted from foreign country at 16
 - Not proficient in English
 - Parents requested that student be evaluated for special education services
 - Specifically requested that the student be tested in both his native language, as well as English
 - In re Student with a Disability, 111 LRP 39017 (SEA NM 03/25/11)

Evaluations

- Case Study: In re Student with a Disability
 - Facts:
 - Standardized tests were not available in student's native language
 - Determined that to translate test would “break standardization of the achievement assessments”
 - Tests nonetheless administered by translator

- In re Student with a Disability, 111 LRP 39017 (SEA NM 03/25/11)

Evaluations

- Case Study: In re Student with a Disability
 - Facts:
 - Parents filed for due process alleging district failed to evaluate student in his native language
 - District unable to make a determination as to whether student's limited English proficiency was the primary factor impacting his performance
 - In re Student with a Disability, 111 LRP 39017 (SEA NM 03/25/11)

Evaluations

- Case Study: In re Student with a Disability
 - Holding:
 - Evaluation revealed that the student's language-based skills in his native language had decreased to the point that an evaluation performed only in his native language would no longer yield valid results
 - Not proficient enough to conduct evaluation solely in English
 - Evaluators interchangeable use of English and student's native language maximized the chance of obtaining accurate evaluation results

- In re Student with a Disability, 111 LRP 39017 (SEA NM 03/25/11)

Evaluations

- Takeaway:
 - Evaluations may be conducted in two languages
 - Student's language proficiency changes over time
 - Remember to re-consider English/Native language proficiency when conducting tri-annual re-evaluations

Classification

- When evaluating/classifying an ELL student, the IEP team must document the extent, if any, that a student's limited English proficiency has had on the student's achievement level
 - 34 C.F.R. 300.311(a)(6)

Classification

- Pay careful attention when considering an SLD classification
- May not be the primary result of:
 - Cultural factors
 - Environmental or economic disadvantage
 - Limited English proficiency
 - 34 C.F.R. 300.309(a)(3)

Takeaways

- Watch out for under-classification
 - Don't use lack of English proficiency to excuse poor performance
- Watch out for over-classification
 - Evaluate in student's native language
 - Don't confuse cultural differences for Emotional Disturbance
- LRE applies to ELL students
 - Avoid secluding ELL students

Questions?