



# Legal Protections for K-12 English Learner and Immigrant-Background Students

By Julie Sugarman

## Translating Policy into Practice

In the United States, education policy-making and service delivery are predominantly state and local responsibilities. All 50 state constitutions require the establishment of a system of free, public schools to serve children in primary and secondary grades.<sup>1</sup> The role the federal government plays in education has grown over the last fifty years, and it now has four main functions:

- ensuring equal access to education for all students, regardless of background;
- providing supplementary funding for students at risk of educational failure or in need of additional supports (sometimes called high-needs students);
- supporting educational research and development; and
- building the capacity of states and localities to improve their educational programs.<sup>2</sup>

In line with the first function, a variety of federal laws and court rulings act as safeguards to ensure English Learners (ELs) and students from an immigrant background have equitable access to a meaningful education. These legal provisions—overseen by federal agencies but implemented by states and localities—aim to protect students from discrimination and to tell states what systems they must have to qualify for federal funds that support the education of high-needs students. Some states and local education agencies<sup>3</sup> have laws or regulations that mirror those at the national level, or that provide additional protections, but this brief focuses on provisions that affect students nationwide.

The sections that follow describe seven key ways the federal government protects the educational rights of immigrant-background and EL students, the legal framework that underpins these protections, and how they can be seen in action in school systems. The first two rules are most relevant to students who are or have family members who are unauthorized immigrants. The remaining rules largely concern students and families with limited English proficiency.

## Legal Protections for Immigrant-Background Students

Policies that encourage immigrant parents to enroll their children in schools and to be actively engaged in their education affect a substantial share of the K-12 population. As of 2017, roughly one-quarter of U.S. children under age 18 were living with at least one immigrant

parent. Of those 18 million children of immigrants, about 88 percent were born in the United States while 12 percent were born abroad. About 7 percent of all U.S. children lived with an unauthorized-immigrant parent.<sup>4</sup>

The 1982 court case *Plyler v. Doe* and the *Family Educational Rights and Privacy Act* (FERPA), enacted in 1974, seek to ensure that immigrant parents feel safe that their immigration status will not be exposed if they enroll their child in school. The aim is to avoid scenarios where children in families with unauthorized-immigrant members do not receive an education because of fears related to immigration enforcement. Additionally, many school districts have issued “sanctuary” declarations, reaffirming families’ rights under these and other legal provisions.

## Rule No. 1. All Children Have the Right to Free, Public Education Regardless of Immigration Status

*What law or court case applies?*

In *Plyler v. Doe*, the U.S. Supreme Court ruled that school districts in Texas could not charge tuition only to unauthorized-immigrant students. The decision rests on the equal protection clause of the 14th Amendment to the U.S. Constitution, which says that states must apply their laws equally to all people within their jurisdiction.

*How would you see this rule in practice?*

The U.S. Department of Education has interpreted this court ruling to mean not only that children cannot be denied access to free, public education on the basis of their or a family member’s immigration status, but that schools must not engage in “practices that may chill or discourage the participation, or lead to the exclusion, of students based on their or their parents’ or guardians’ actual or perceived citizenship or immigration status.”<sup>5</sup> Department guidance<sup>6</sup> offers more details: school registration forms and procedures may not directly ask about immigration or citizenship status, require parents to provide documents that unauthorized immigrants might not have (such as a Social Security card or state driver’s license), or require a child’s birth certificate. Rather, districts must accept alternative documents as proof that a child lives within district or school boundaries and is a certain age; these may include a utility bill or entry in a family bible, respectively.

Beyond enrollment, many schools and districts have applied the *Plyler* ruling as a general prohibition on asking children or their families about their immigration or citizenship status at any time. California, for example, passed a law to that effect in 2017.<sup>7</sup>

*Who can enforce the rule?*

Disputes over school enrollment are often resolved by key personnel within a school district, such as the director of EL programs or of parent and family engagement. Some families seek help from community navigators at organizations such as refugee resettlement or social service agencies who then facilitate communication between families and district personnel. If the issue cannot be resolved in this way, families that feel they have been improperly denied access to education on the basis of immigration status can sue in federal court. Typically, such lawsuits are brought by a civil rights law firm on behalf of several families that have experienced similar discrimination.

Additionally, state departments of education are responsible for ensuring that schools and districts follow federal civil rights law, and that they implement the state's requirements for school registration policies and procedures. State attorneys general can intervene in cases where schools or districts are not following state law.

### *What are the limits of the rule?*

The *Plyler* ruling applies to the primary- and secondary-school grades that a state considers part of its free, public education system. Although *Plyler* affirms that unauthorized-immigrant children have the right to attend these U.S. schools, it does not protect schoolchildren from immigration enforcement actions that take place off of the school campus or that are conducted lawfully on campus. Nevertheless, U.S. Immigration and Customs Enforcement (ICE), the federal agency responsible for enforcing immigration laws within the country, has a policy that restricts enforcement activity at sensitive locations such as schools.<sup>8</sup>

While the *Plyler* case has been interpreted to mean that school personnel should not ask children or families about their immigration status, there is some information the federal government requires schools to track that could signify immigration status. Schools that receive Title III funding (for EL and newcomer students) must annually report to their state department of education the number of children they serve who are recent immigrants. This means that they must identify students ages 3 to 21 who were not born in any U.S. state, the District of Columbia, or Puerto Rico and who have been enrolled in U.S. schools for three years or fewer.<sup>9</sup> Schools also collect information about what languages students' families speak at home and whether parents have limited English proficiency in order to meet requirements to provide interpretation and translation (see Rule No. 6). Schools may also record students' native languages and countries of origin to track the academic progress of demographic subgroups.

Schools seeking to track the needs and progress of subgroups of ELs, such as unaccompanied minors or refugees, may find themselves conflicted between the educative value of having such information and the possibility that requesting it might cause some immigrant families distress. Many families are concerned about sharing personal information, even though their privacy is protected under FERPA (for more on FERPA, see Rule No. 2).

### *How has this rule strengthened broader policy or practice?*

Since President Donald Trump was elected in 2016, immigrant students have reported an increase in experiences of bullying and harassment, and fear of ICE enforcement activity has grown in many communities; these trends have been linked to widespread reports from schools of decreased attendance among immigrant-background children.<sup>10</sup> In response, some schools and districts have sought to reassure parents and families that they are safe and welcome by declaring themselves "sanctuaries," "safe havens," or "safe zones"—many referencing *Plyler* as a justification for their policies. In these declarations, schools generally pledge not to voluntarily cooperate if ICE requests information and to only respond to requests to comply with a judicial warrant or subpoena, which require a higher level of legal review than the administrative warrants ICE typically uses. Many declarations also lay out guidelines for limiting the collection of and protecting families' personal information.<sup>11</sup>

### *How have systems fallen short?*

In 2011, after numerous complaints and lawsuits alleging improper school registration practices, the U.S. Departments of Education and Justice issued guidance to schools on how to avoid viola-

tions of students' civil rights under *Plyler*. Yet even after the agencies revised and reissued the guidance in 2014, civil rights groups have documented practices that could discourage or delay immigrant families from enrolling children in school. For example, in 2017, attorneys identified 40 school districts in California whose enrollment forms asked the citizenship status of students or their parents, and five districts that required parents to bring a child's birth certificate and/or Social Security card to registration.<sup>12</sup> And in 2018, the American Civil Liberties Union (ACLU) of New Jersey filed a lawsuit against 11 school districts and a charter school, alleging they had similar inappropriate documentation requirements.<sup>13</sup>

## Rule No. 2. Schools Cannot Share Personal Information about Immigrant Students and Families without Their Permission

*What law or court case applies?*

FERPA provides parents and guardians (or students, if over age 18) the right to access and request corrections to their children's (or their own) educational records. The law also limits the circumstances in which educational records may be released to third parties. These rules apply to all educational programs that receive federal funds.

Under FERPA, schools and districts may not release student information without parental/guardian consent. Exceptions are made for information sought by organizations or agencies with a legitimate educational purpose (such as conducting a program evaluation under contract with the school) or to respond to a judicial warrant or subpoena. There is also an exception for so-called directory information, which will be discussed below in "What are the limits of the rule."<sup>14</sup>

*How would you see this rule in practice?*

Schools must notify students and parents or guardians of their rights under FERPA on an annual basis. They do not need to send notifications to each family personally; instead, schools may publish or post the information publicly, in a student handbook or school calendar, for example.<sup>15</sup>

*Who can enforce the rule?*

Families who believe their rights under FERPA have been violated may report this to the Family Policy Compliance Office of the U.S. Department of Education, which handles all such complaints. Families cannot file a private lawsuit against a school for FERPA-related concerns.<sup>16</sup>

*What are the limits of the rule?*

In contrast to all other types of information covered under FERPA, which can only be released with explicit consent, schools are not required to obtain parental consent to release "directory information."<sup>17</sup> Districts can decide what (if any) categories of student information to classify as directory information, but federal FERPA guidance suggests a list—adopted by many districts—that includes name, address, and date and place of birth, all of which could be used by immigration enforcement officers looking to verify the whereabouts of a family or a child's foreign nationality.

Schools must notify parents and guardians about what their district considers directory information, and that families have the right to opt out of having such information released. However, as with other FERPA-related information, schools are only required to make this notification public, not to communicate it individually to each family. It is unclear what share of families are familiar with these rights and know how to act on them.

*How has this rule strengthened broader policy or practice?*

FERPA has been cited in “sanctuary” school declarations as the justification for districts’ unwillingness to voluntarily provide information to ICE or other agencies. Many declarations set procedures, such as requiring superintendent approval, for responding even to judicial warrants.<sup>18</sup>

*How have systems fallen short?*

Despite FERPA limiting what school and district employees can share with third parties, there are situations in which information is shared. The presence of school resource officers (SROs)—employees of local law enforcement agencies—on high school campuses has led to what civil rights advocates call the “school to deportation pipeline.”<sup>19</sup> In addition to what they personally witness, SROs may have access to student records and receive tips from staff that they can pass on to their respective agencies without violating FERPA. Even if a school district adjusts its own information-sharing practices by implementing “sanctuary” policies, these may not affect the policies that guide SROs’ law enforcement agencies regarding cooperation with ICE.

In recent years, media accounts have detailed cases in which ICE has detained students suspected of criminal activity on the basis of disciplinary reports collected by school administrators or SROs. In Huntington, New York, for example, a 19-year-old sophomore from Honduras with a pending asylum case was suspended from school in 2017 for drawing what an administrator incorrectly thought were gang signs. Following standard procedures, the SRO reported this to his agency, which resulted in the student’s detention by ICE and eventual deportation. Other similarly accused youth in the community had green-card applications denied based on accusations of gang affiliation, even after judges in detention hearings found the evidence behind the allegations not to be credible.<sup>20</sup>

## Legal Protections for English Learners

Federal law goes considerably beyond safeguarding EL and immigrant-background students’ right to enroll and feel safe in public schools. It also requires states, districts, and schools to take steps to ensure that ELs can participate meaningfully in the same educational experiences as all other students.

Title VI of the *Civil Rights Act of 1964* (hereafter, Title VI), which forbids discrimination based on race, color, or national origin, is arguably the cornerstone of this set of legal protections for ELs. Additional laws, federal court cases, and guidance issued by the federal government help school systems understand the details of their obligations to equitably serve and promote the educational success of ELs.

### Rule No. 3. English Learners Must Have Meaningful Access to Education

#### *What law or court case applies?*

In the 1974 case of *Lau v. Nichols*, the U.S. Supreme Court ruled that simply providing ELs the opportunity to attend grade-level classes in English was not enough; doing so did not necessarily allow them to meaningfully access the same content as students fluent in English. The court related discrimination on the basis of language to discrimination on the basis of national origin, which is prohibited under Title VI. The *Lau* finding was codified in the 1974 *Equal Educational Opportunities Act* (EEOA), which requires educational agencies to take appropriate action to overcome language barriers that prevent ELs from fully participating in instruction. In response to the case, the U.S. Department of Education’s Office for Civil Rights (OCR) published rules (known as the “Lau Remedies”) to promote bilingual education as a way to allow children to learn grade-appropriate content in their native language while acquiring English.<sup>21</sup>

To evaluate whether districts are meeting their obligation for appropriate action under the EEOA and Title VI, OCR uses standards that were established by a 1981 Fifth Circuit Court ruling in *Castañeda v. Pickard*. The “Castañeda Standards” require schools to use instructional approaches that are (1) based on sound theory, (2) implemented with sufficient resources and in such a way as to be effective, and (3) able to demonstrate that students are overcoming language barriers.<sup>22</sup>

Relatedly, the 1994 reauthorization of the *Elementary and Secondary Education Act of 1965* introduced into federal law the idea that all students—including traditionally underserved groups, such as ELs and students from low-income families—should achieve the same state academic standards. That law’s two successors, the 2001 *No Child Left Behind* (NCLB) and the 2015 *Every Student Succeeds Act* (ESSA), built on this idea by requiring states to develop English language proficiency standards linked to state academic standards in English language arts, math, and other subjects. In essence, this means that a state’s goals for its students’ English language development must be linked to the level of English that students need to succeed in grade-level content instruction. NCLB and ESSA also require states to track the degree to which each school’s ELs are meeting state achievement goals. (ESSA’s role in protecting EL education is discussed further in Rules No. 4 and 5.)

#### *How would you see this rule in practice?*

Many districts have a policy manual that outlines how they meet federal and state requirements for helping ELs successfully learn English and academic subjects. Some states and districts call this type of manual a “Lau plan” (after the court case), and others use terms such as “language assistance plan” or “EL master plan.” Districts that have been investigated by OCR or the U.S. Department of Justice (DOJ) and found to be violating Title VI or EEOA have a consent decree or agreement that spells out what the district will do to resolve the violation. In some places, this document is comprehensive enough to serve as the district’s policy manual on how they meet federal requirements.

Additionally, each local education agency that receives Title III funding must submit a plan to their state education agency describing the programs and activities they will undertake with their Title III grant. In many cases, this plan will include some or all of a district’s (or charter school’s) policies related to meeting federal requirements. The plan must describe how the district or charter school helps ELs meet English proficiency and academic standards; how it promotes family and community engagement; and assurance that it complies with state and federal laws, includes stakeholders in planning, and engages in appropriate data sharing.<sup>23</sup>

## Ten Obligations States and School Districts Have to Their EL Students

There is no one document that spells out all of the policies and practices of a school that is effectively providing ELs with access to education. However, a 2015 “dear colleague letter” issued by the U.S. Department of Justice and the U.S. Department of Education’s Office for Civil Rights highlights ten areas in which the agencies frequently find states and districts falling short, leaving them in violation of Title VI and the *Equal Educational Opportunities Act*. As the letter notes, they must:

1. identify and assess EL students in need of language assistance in a timely, valid, and reliable manner;
2. provide EL students with a language assistance program that is educationally sound and proven successful;
3. sufficiently staff and support the language assistance programs for EL students;
4. ensure EL students have equal opportunities to meaningfully participate in all curricular and extracurricular activities, including the core curriculum, graduation requirements, specialized and advanced courses and programs, sports, and clubs;
5. avoid unnecessary segregation of EL students;
6. ensure that EL students with disabilities under the *Individuals with Disabilities Education Act* (IDEA) or Section 504 are evaluated in a timely and appropriate manner for special education and disability-related services and that their language needs are considered in evaluations and delivery of services;
7. meet the needs of EL students who opt out of language assistance programs;
8. monitor and evaluate EL students in language assistance programs to ensure their progress with respect to acquiring English proficiency and grade level core content, exit EL students from language assistance programs when they are proficient in English, and monitor exited students to ensure they were not prematurely exited and that any academic deficits incurred in the language assistance program have been remedied;
9. evaluate the effectiveness of a school district’s language assistance program(s) to ensure that EL students in each program acquire English proficiency and that each program was reasonably calculated to allow EL students to attain parity of participation in the standard instructional program within a reasonable period of time; and
10. ensure meaningful communication with Limited English Proficient parents.

Source: U.S. Department of Justice and U.S. Department of Education, *Dear Colleague Letter: English Learner Students and Limited English Proficient Parents* (Washington, DC: U.S. Department of Justice and U.S. Department of Education, 2015), 8–9, [www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf](http://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf).

### *Who can enforce the rule?*

In 2002, the U.S. Supreme Court ruled in *Alexander v. Sandoval* that private individuals—such as parents—do not have a right to sue schools or other institutions for Title VI violations. Rather, complaints must be handled by federal agencies; OCR and DOJ take the lead here. Many complaints are directed at OCR, which is responsible for addressing violations of Title VI and the regulations that guide how states and districts implement it, but a person can file a Title VI complaint with both OCR and DOJ, and each agency can refer cases to the other. Anyone can make a complaint to OCR, or an organization such as a civil rights advocacy group may do so on a student’s behalf. However, depending on an administration’s priorities, timely resolution of a particular student’s issue cannot be assured. OCR investigations may result in the school or district revising its policies related to assessment, instruction, or other aspects of EL education. The agreement that describes these changes is then subject to periodic monitoring by the federal government.

While EEOA violations may be similar in nature to Title VI violations, the DOJ is responsible for compliance with the EEOA. The main difference between how OCR handles Title VI complaints and how DOJ deals with Title VI and EEOA complaints is that, unlike OCR, the DOJ can sue a school or district in federal court. If the DOJ is successful in such a case, it would result in a consent decree or court order requiring the school or district to change its policies and practices. It is also important to note that unlike with Title VI, individuals do have a right to file a private federal lawsuit under the EEOA.<sup>24</sup>

### *What are the limits of the rule?*

The obligations that states and local education agencies have under Title VI only apply to primary and secondary education programs that receive federal funds; these obligations and protections do not apply, for example, to private preschool programs or to colleges and universities. The EEOA applies to all public primary and secondary schools, whether they receive federal funds or not.

Some analysts argue that the three-prong Castañeda Standards that OCR and courts use to judge whether a school is providing meaningful access to education are not strong enough. Its first prong simply requires a school’s EL program to be “recognized as sound by some experts in the field or... considered a legitimate experimental strategy.”<sup>25</sup> It does not require schools to use the approach with the best demonstrated outcomes in prior research. The second and third prongs require schools to demonstrate that the program is effective, but this can take years to determine, during which time students might be receiving an ineffective education.<sup>26</sup>

### *How has this rule strengthened broader policy or practice?*

Federal guidelines spelling out ELs’ civil rights have helped many districts develop local policies for identifying and serving these students. Additionally, localities that have received complaints and are working to resolve them develop policies under the direction of OCR or DOJ, working with education law specialists. The district that was sued in the *Lau* case, San Francisco Unified School District, has been subject to ongoing DOJ monitoring since the original consent decree was approved in 1976. Since then, the district has updated its *Lau* plan to reflect changes in best practices and state and federal law. Although managing federal oversight can be challenging, implementing the consent decree brought focus to EL data and spurred the district and its schools to invest resources in services such as translation and interpretation for parents. Even if the consent decree is settled in the future, the district will still be subject to the same monitoring of EL programs and services under state and federal law as all other California districts.<sup>27</sup>



## *How have systems fallen short?*

Ongoing disputes over educational models in Arizona are a good example of the limitations of the Castañeda Standards. In 2006, the Arizona Department of Education mandated that ELs be enrolled in a four-hour daily instructional block focused on English language development. The state hoped that this intensive language instruction would allow students to exit EL status in one year and join mainstream classes. This model was developed by a state taskforce after the passage of Proposition 203 in 2000—eliminating most forms of bilingual education—and a federal district court ruling just months earlier in *Flores v. Arizona* that the state was not adequately funding EL education (and therefore not meeting its obligations under the EEOA).<sup>28</sup>

The state faced fines after it failed to comply with *Flores* and was hit with a related OCR complaint about its methods for identifying ELs. This pressure led the state to appeal the *Flores* ruling, and in 2013, a court overturned it. Although the court did not specifically endorse the four-hour model, it found that the state was taking adequate steps to serve ELs and that outcomes had improved in the district that was the subject of the original lawsuit.

This case highlighted a weakness of EEOA enforcement, as the court found the work of the 2006 state taskforce to be sufficient evidence of the model's reasonableness—even though many EL researchers spoke out against the model at the time based on extensive studies that compared instructional approaches. This was the case because the court did not have a duty to evaluate competing claims.<sup>29</sup> The 2013 ruling was upheld in a 2015 appeal, though in 2018 the Arizona legislature passed a measure giving school districts more flexibility in how they serve ELs.

## **Rule No. 4. States Must Hold Schools Accountable for Ensuring ELs Achieve English Proficiency and Academic Standards**

### *What law or court case applies?*

Over the last 30 years, revisions of the *Elementary and Secondary Education Act* have built on the civil rights principle of equal access to education<sup>30</sup> by requiring states to ensure that schools are helping ELs develop the English skills to succeed in grade-level instruction within a reasonable amount of time. The federal legal framework for holding schools accountable for this—revised most recently in 2015 by ESSA—directs states to develop learning standards and corresponding annual assessments that measure student progress toward academic goals. After ESSA was enacted, each state submitted a plan to the U.S. Department of Education outlining how it will comply with the law, and those plans were reviewed and approved by the secretary of education.

### *How would you see this rule in practice?*

ESSA requires states to give all students annual standardized assessments for English language arts and math in grades 3 through 8 and once in high school, and in science once each in three grade spans (grades 3 to 5, 6 to 9, and 10 to 12). Additionally, all ELs (whether they receive language support services or not)<sup>31</sup> must be tested annually on their English language proficiency from the first year they are enrolled until they meet the state's criteria for exiting EL status. States also collect information on the rates at which all students and groups such as ELs graduate from high school and a school quality or student success indicator, such as attendance rates.

In their ESSA plans, states laid out goals for schools to increase the percent of students meeting benchmarks in English language proficiency, English language arts, math, and other areas. Each year, states identify schools not meeting benchmarks, with their lowest performing schools placed in comprehensive support and improvement and schools performing poorly with certain subgroups placed in targeted support and improvement.

### *Who can enforce the rule?*

ESSA gives states fairly wide latitude to define student achievement and school effectiveness. As they did under NCLB, states define what level of English proficiency students must reach to exit EL status and what minimum score on assessments counts as having met English language arts and math standards. In a major departure from NCLB, ESSA allows states to create their own goals for what share of students should meet benchmarks each year and their own timeline for improving performance and closing achievement gaps—important components of how states communicate school effectiveness to the public. States also have more flexibility under ESSA to decide how much each indicator (such as English or math achievement) counts toward a school’s annual rating and to set consequences for the lowest performing schools.

With each state able to set its own definitions and policies in these crucial categories, there is a danger that state policymakers will “go easy” when designing their accountability systems in order to avoid controversies or embarrassment associated with the public revelation of poor school performance. The federal government had an opportunity to address low expectations in state plans in 2017 and 2018, when states submitted their ESSA plans for approval. During this approval process, the U.S. Department of Education could ask states to make changes to ensure compliance with the law. The department will have further opportunities to do so as states have begun to submit plan modification requests. Ultimately, the Department of Education can withhold related federal funds if states violate ESSA or other federal statutes, although conflicts rarely reach this stage.

### *What are the limits of the rule?*

In terms of federal accountability, students are not tested in all grade levels and for all content areas, meaning that schools as a whole are held accountable based only on a segment of instruction. Further, although there is a fairly clear definition of success for an individual EL—meeting a state’s criteria for English language proficiency—researchers and policymakers have yet to agree on the definition of an effective language instruction program. Indeed, state ESSA plans vary widely in how quickly they expect students to learn English and how many years they ought to take to exit EL status. For these reasons, ESSA accountability systems may overidentify or underidentify effective programs based on the assumptions made by policymakers.

More broadly, there has been considerable controversy—under both NCLB and ESSA—over whether accountability is the right policy mechanism to ensure schools improve instruction for historically disadvantaged subgroups. Research on the impact of NCLB is mixed. Studies show that student achievement on standardized tests has improved overall, but also that some populations have made only modest progress in closing achievement gaps, while others have made no progress or seen gaps widen.<sup>32</sup> Even though ESSA has given states more flexibility in identifying and improving low-performing schools, and has shifted the focus from punishment to improvement, the effectiveness of this accountability system depends on whether states are able to set high but realistic expectations and target sufficient resources to schools that need them.

## *How has this rule strengthened broader policy or practice?*

Although school accountability based on publicly reported student outcomes has not had the effect of fully closing achievement gaps, the development of English language proficiency standards and assessments (as required by NCLB) has had some indirect, positive impacts on instruction. As schools have trained teachers on the new standards and assessments, educators in many states and districts have received comprehensive professional development on how to support ELs in building academic language proficiency across content areas.

WIDA<sup>33</sup> has been a leader in this effort, having been established in 2003 by a consortium of states to develop English language proficiency standards and an assessment to measure student progress toward achieving those standards. As membership of the consortium has grown to 39 states and U.S. territories, WIDA has expanded its resources and professional development for educators. For example, WIDA helps teachers use its standards and assessments to understand what students at each stage of development can do with language and how to promote growth.<sup>34</sup> States using other English language proficiency standards and assessments—including the multistate ELPA21 consortium<sup>35</sup>—provide similar professional development opportunities.

## *How have systems fallen short?*

In 2018, civil rights organizations urged Congress to review the U.S. Department of Education's approval of state ESSA plans they felt did not comply with provisions of the law. Specifically, the organizations argued that several state plans failed to take the performance of all student subgroups into account and others fell short in the design of their systems for identifying schools that were not effectively serving each subgroup.<sup>36</sup> Another analysis of ESSA state plans, published in 2017, concluded that because the Trump administration had signaled that it would not closely scrutinize state plans, most of them were “uncreative, unambitious, unclear, or unfinished.”<sup>37</sup> States will need to develop additional processes and policies to put their ESSA plans into effect, but it remains to be seen whether this implementation process will bring clarity to how the accountability system will support instruction for ELs.

## **Rule No. 5. Schools Must Use Data and Evidence to Make Decisions**

### *What law or court case applies?*

Given the high stakes associated with making progress toward English proficiency and academic achievement—for both individual students and schools—it is critical for educators to use data and evidence when deciding which students are ELs and whether their instructional programs are effective.<sup>38</sup> ESSA emphasizes the importance of using objective criteria when making decisions; for example, it states that “a student shall not be admitted to, or excluded from, any federally assisted education program on the basis of a surname or language-minority status.”<sup>39</sup>

As part of provisions discussed in this brief, the federal government has issued data-related guidance on a number of topics, including:

- **Identification of ELs.** Schools have an obligation under Title VI and EEOA to identify students who need language support services. No federal laws or regulations require them to use a specific method for doing so, but 1985 OCR guidance interpreted this as meaning that schools must first identify students with a primary or home language other than English (which is considered a proxy for national origin, a protected class under Title VI) and, second, those who are not proficient in English.<sup>40</sup> The 2015 “dear colleague letter” (described in Rule No. 3) suggested approaches to this two-step process and asserted that the second step must be done with a valid and reliable assessment.<sup>41</sup>
- **English language proficiency.** ESSA requires all ELs to be tested annually with an assessment aligned with state English language proficiency standards (see Rule No. 4).<sup>42</sup> Schools must use the results of this assessment to identify students ready to exit EL status, but schools are allowed to use other criteria as well. In states that require supplementary criteria—such as additional literacy assessments—students who score proficient on the English language proficiency assessment but do not meet other criteria remain ELs until they also meet those requirements.
- **Program effectiveness.** Several legal provisions require states and localities to use valid and reliable assessments of English language proficiency, English language arts, math, and/or other measures to judge program effectiveness. These include the third prong of the Castañeda Standards, which requires schools to demonstrate that their language instruction educational program is effective (see Rule No. 3),<sup>43</sup> school accountability in Title I of ESSA (see Rule No. 4), and accountability for the use of federal EL funds under Title III of ESSA.

*How would you see this rule in practice?*

In terms of defining EL status, ESSA required states to establish consistent entrance and exit procedures (for identifying newly enrolled ELs and eventually reclassifying them as English proficient, respectively). Schools and districts in all states use a two-step process for identifying ELs that involves first asking parents or guardians who are enrolling a student to fill out a home language questionnaire,<sup>44</sup> and then to screen students who may require English language services using a valid and reliable measure of English language proficiency. Students who enroll in the middle of the school year and whose home language questionnaire indicates use of a language other than English may be temporarily placed in EL services until they can take the English language proficiency screening assessment. That assessment must be completed within 30 days of enrollment, but students should not have to wait for their results to receive potentially helpful services. Students who are identified as ELs are then tested annually until they meet state-determined criteria for exiting EL status.

Schools use many other assessments to collect data on student outcomes—information that is then used to identify students for additional support, group students for instruction, and evaluate program effectiveness. Results from federally required annual assessments must be disaggregated by student subgroup; that is, average achievement must be reported for students by race/ethnicity, gender, EL status, and other characteristics.

*Who can enforce the rule?*

Because the idea that decisions about EL education should be based on data and evidence appears in many laws and policies, the agencies responsible for enforcing different aspects of this rule vary.

The U.S. Department of Education often plays an oversight role even where states have flexibility to determine how to measure outcomes. For example, ESSA requires the Department of Education to review the technical quality of the assessments states use for accountability purposes.<sup>45</sup>

### *What are the limits of the rule?*

In general, references to evidence-based decision-making in civil rights provisions and ESSA focus on using student outcome data. Student outcomes are generally measured by annual standardized tests that make heavy use of multiple-choice and other closed-ended questions. Some critics argue that school systems should take a more expansive view of data and evidence, including student work portfolios and school-quality inspections.<sup>46</sup> Similarly, although outcomes are analyzed for a variety of student subgroups (including ELs), accountability systems rarely require schools to provide data on what instructional practices or resources were used to serve these students. The resulting lack of data on these key program characteristics is unfortunate, as they are the primary means by which school systems can influence student outcomes.

### *How has this rule strengthened broader policy or practice?*

The reason that the use of data and evidence to assign EL status may be considered a protection is that it requires schools to make consistent, fact-based decisions. In contrast, practices such as identifying ELs based on their parents' English skills or their last name, race/ethnicity, or perceived immigration status could be a civil rights violation. Asking all adults enrolling a child in school to complete a home language survey, as is done in many states, avoids discrimination or making immigrant-background or ethnic-minority parents feel singled out. The sweeping nature of this first step in the identification process is also designed to avoid underidentifying students who need services. On the other hand, screening potential ELs with a valid and reliable English language proficiency test aims to prevent overidentification of ELs based on broad criteria (such as a student having parents who speak a language other than English).

The importance of evidence can also be seen in how forcefully civil rights advocates pressed for the disaggregation of student outcomes data (such as reporting graduation rates by race/ethnicity, EL status, and other categories) as a cornerstone of NCLB; the goal of this push was to bring to light widespread and previously ignored achievement gaps that disproportionately affected ethnic/racial minorities, students from low-income families, ELs, and other groups. Although some critics of NCLB argued that the law had little positive effect on closing these achievement gaps, civil rights groups continued to support core provisions that made them more visible—including annual testing—when ESSA was being negotiated.<sup>47</sup>

### *How have systems fallen short?*

Numerous districts have received complaints since the *Civil Rights Act* was passed in 1964, and very often the subsequent investigations have found inappropriate EL identification procedures. For example, in 2010, the DOJ found that Boston Public Schools violated EEOA and Title VI for this exact reason. One part of the resulting consent decree required the district to reassess the English language proficiency of about 7,000 students. The students—who entered the district between 2003 and 2009—had been tested only in listening and speaking (not in reading and writing, the other two required language domains), and the belated testing showed that 4,300 were improperly labeled as non-ELs.<sup>48</sup>

## Legal Protections for Limited English Proficient Parents and Parents of English Learners

Finally, federal laws and policies include provisions on how school systems communicate with parents and guardians and meaningfully involve them in their children's education. Schools have a legal obligation to comply with these rules but should also understand that investing in communication and collaboration with families is a critical factor in student success.

### Rule No. 6. Schools Must Communicate with Parents and Guardians in a Language They Understand

*What law or court case applies?*

There are a number of statutes behind the rule that schools must provide language access via interpretation and translation services. A 1970 memo on Title VI from the U.S. Department of Health, Education, and Welfare (as it was then known) stated that “school districts have the responsibility to adequately notify national-origin minority group parents of school activities which are called to the attention of other parents. Such notice in order to be adequate may have to be provided in a language other than English.”<sup>49</sup> The DOJ has also interpreted the EEOA's requirement that schools take appropriate action to overcome language barriers to mean that they must provide interpretation and translation for parents.<sup>50</sup>

Additionally, Executive Order 13166, signed by President Bill Clinton in 2000, concerns the Title VI requirement that all federally funded agencies—and the state and local agencies that they subsequently fund—provide language access services. This executive order requires agencies to identify translation and interpretation needs among the populations they serve and to develop a plan to provide those services. Regulations released by the DOJ in 2002 clarified that evaluations of whether agencies were in compliance with Executive Order 13166 would be based on a four-part “reasonableness” standard.<sup>51</sup> This standard attempts to balance the need to provide meaningful access to services for Limited English Proficient individuals against the potentially overwhelming burden on agency resources of translating thousands of documents into dozens of languages.

Finally, several paragraphs in Title I of ESSA state that school communications shall be “to the extent practicable, provided in a language the parents can understand.”<sup>52</sup> Specific key communications must be translated; these include annual notification of a child's EL status and placement in an EL program, the annual state report card, notice of parent engagement opportunities, and a school's comprehensive plan for a schoolwide Title I program. Additionally, the *Individuals with Disabilities Education Act* requires schools to provide interpretation and translation, as necessary, so that parents can participate in meetings to discuss a student's special education needs.<sup>53</sup>

*How would you see this rule in practice?*

Schools and districts vary enormously in how they implement language access provisions. Some make little effort to translate documents or provide interpretation, or only do so occasionally and for a single language. Districts with more robust implementation of this rule have full-time staff to translate and interpret in several languages commonly spoken within their communities and contract with private companies to provide telephone interpretation and written translations in other

languages. Districts may also have a written language access plan, conduct training with staff on how to work with an interpreter, and engage in frequent outreach to ensure parents and guardians know their language access rights.

### *Who can enforce the rule?*

OCR and the DOJ are responsible for investigating language access complaints (see Rule No. 3 for more details). In addition to federal statutes, some states and localities also have separate language access laws, and some school districts have regulations that are more specific and that can be enforced by state or local authorities.

### *What are the limits of the rule?*

Because federal language access regulations allow agencies to judge what level of language access is “reasonable” or “practicable,” there is little consistency in the level of effort expected of schools within and across states. As a result, some school boards might feel emboldened not to fully fund these services, knowing that they can claim that delivering them would be an “unreasonable” burden on resources.

### *How has this rule strengthened broader policy or practice?*

School systems that engage in robust language access planning may find it has numerous unintended benefits. For example, training staff on how to access and use interpreters may improve their understanding of culturally competent communication, including which nonverbal behaviors may be interpreted in some cultures as impolite. Additionally, creating a standardized vocabulary for use when translating common, school-specific words and expressions may help a district improve the clarity of its writing in English, as the exercise may identify overused jargon or terms that may be unfamiliar to many families.

### *How have systems fallen short?*

Although the language access regulations apply to all Limited English Proficient parents—regardless of whether their children are ELs—many school districts deliver their interpretation and translation services through the office that oversees EL services. This may be problematic if parents of non-ELs are not considered when planning and implementing language access measures.

Another potential problem arises if information on the language needs of parents and guardians is only gathered from home language questionnaires. Because the main purpose of these questionnaires is to identify students who may lack exposure to English at home, the questions may not adequately investigate the degree to which parents are Limited English Proficient (rather than English-proficient speakers of other languages). This may lead to either overidentification of parent needs (such as counting all multilingual parents as Limited English Proficient) or underidentification (such as counting all parents who name English as a language they speak to any degree as not needing language access services). Additionally, parents may not identify themselves as needing translation and interpretation services out of embarrassment, or they may have adequate English for some purposes (such as communicating with a child’s teacher) but not others (such as understanding an assessment score report). In those cases, schools might not have enough information to know when they should offer services, and to which parents.

## Rule No. 7. Schools Must Meaningfully Engage Parents and Guardians of ELs

*What law or court case applies?*

Title I of ESSA requires schools to:

- **Notify parents if their children are identified as ELs.** Within 30 days of the start of each school year, schools must notify parents of their children’s placement in EL services. Parents of students enrolling midyear must be notified within two weeks of such a placement. This notification must include information on how the child was assessed, the program and services offered (including the differences between programs, if more than one is available), the requirements for a student to exit EL status, and the parent’s right to refuse some or all EL services.
- **Conduct outreach to the parents of ELs.** Schools must reach out to parents of ELs to inform them about ways they can support their children’s education. Schools must also conduct regular meetings with parents of ELs to gather and respond to their feedback.<sup>54</sup>

Additionally, schools and districts that get ESSA Title III funds must use some of their grant for parent, family, and community engagement to enhance programs for ELs.<sup>55</sup> Numerous other ESSA provisions provide funding for parent engagement in other contexts and outline rules for consulting with parents during planning and evaluation efforts.<sup>56</sup>

*How would you see this rule in practice?*

Schools should be sending parents the notification and outreach communications outlined above and implementing other measures to engage families in the education of their children and in broader school and district decision-making processes.<sup>57</sup>

*Who can enforce the rule?*

States are responsible for ensuring that districts and schools comply with ESSA. Most larger school districts and state departments of education have parent and family engagement administrators to oversee such activities.

*What are the limits of the rule?*

Although ESSA requires districts to gather and respond to parent feedback, there are numerous cultural, linguistic, and logistical barriers to parent and family participation.<sup>58</sup> Schools and districts vary enormously in the degree to which they work to eliminate these barriers.

*How has this rule strengthened broader policy or practice?*

Some states require schools with significant populations of ELs to establish standing EL parent committees to facilitate feedback from parents on EL policies and practices. For example, the Illinois State Board of Education requires schools that have a transitional bilingual education program to create a Bilingual Parent Advisory Committee. Each committee operates independently of the school, with its own elected officers and meetings four times a year.<sup>59</sup> In California, schools with at least 21 ELs must create an English Learner Advisory Committee, and districts with at least 51 ELs



must create a District English Learner Advisory Committee. California Department of Education regulations set out specific annual tasks for these committees, including involvement in the development of district goals for state-mandated local control and accountability plans.<sup>60</sup>

### *How have systems fallen short?*

In 2016, the U.S. Census Bureau conducted a survey of parents and guardians who had children enrolled in kindergarten through grade 12. Parents who did not speak English at home were less likely to report receiving written school communications than those who did, but they were more likely to get a phone call about their student. The survey's results also showed that parents who did not speak English at home were less likely to participate in a variety of forms of engagement, including schoolwide meetings, conferences with teachers, and volunteer opportunities.<sup>61</sup> Because a great deal of research has demonstrated a link between parent engagement and better student outcomes, this remains an important area for improvement.<sup>62</sup>

## Other Legal Protections

Aside from the seven major rules described above, a range of other legal protections also affect immigrant-background students, ELs, and their families. The 2015 dear colleague letter (discussed in-depth in Rule No. 3) outlines several additional protections with direct relevance to ELs who are supported by Title VI and other federal provisions:

- Schools may not prohibit students from speaking in their primary language at school “without an educational justification.”
- Schools may not retaliate against any individual for raising a civil rights complaint.
- Schools have a responsibility to protect students from discriminatory harassment on the basis of national origin (and all other protected categories) under Title VI.<sup>63</sup>

ESSA includes numerous provisions regarding Native American, Alaska Native, and Native Hawaiian students, some of whom are ELs. These provisions include consultation between state or local education agencies and tribal authorities, and support for native language immersion and revitalization efforts.<sup>64</sup> The U.S. Department of Education also offers grants to educational institutions to provide teacher training, curriculum development, and program evaluation to improve instruction for Native American students who are ELs.<sup>65</sup>

Finally, Title VI requires that EL students be given equitable access to all programs and services offered to other students, including the following federal programs:

- ***The Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act of 1973.*** These laws set out the federal requirements for serving students with disabilities, and include several provisions specific to ELs:
  - Students must be assessed to identify disabilities in their primary language or in a way that yields information about their abilities, independent of their English proficiency.
  - Schools cannot delay the delivery of special education evaluation or services until students have reached some predetermined level of English proficiency.

- o Both EL and special education services must be provided to dually identified students; one does not substitute for the other.
- o Parents must be informed of how the language instruction educational program meets their children’s needs, as described in their IEP (individualized education program).<sup>66</sup>
- ***The McKinney-Vento Homeless Education Assistance Improvements Act of 2001.*** Subtitle VII-B of this law sets out the rights of students and families experiencing homelessness. Unaccompanied immigrant minors, in particular, might benefit from some of the law’s protections, such as the right to enroll in school immediately even if they lack otherwise required documents, including proof of legal guardianship.<sup>67</sup>
- ***Title I of ESSA.*** In addition to setting out the framework for state accountability systems, Title I provides funding to schools with high numbers or shares of low-income students. Funds are used to help students most at risk of failing to meet academic standards through targeted or whole-school interventions. Title I funds may be used to supplement a district’s EL services, but literacy or math interventions designed for struggling students more generally may not take the place of instruction targeted at English acquisition.<sup>68</sup>

It is common for ELs to qualify for other programs and services offered to the whole student body, including gifted and talented programs, special education, literacy or math support, and other enrichment opportunities. ELs must not be admitted to or restricted from participating in these activities solely because of their English language proficiency.<sup>69</sup> Researchers often consider whether ELs participate in such activities at the same rate as non-ELs as one important indicator of whether a school provides ELs equitable access to education.

## Conclusion

While the federal government is the source of most of the laws and guidelines highlighted in this brief, states and localities play a big role in making them meaningful for ELs and immigrant-background students. This is done through regulations and definitions (such as what English language proficiency score signals a student’s readiness to exit EL services), by communicating expectations and training staff to solve problems effectively (such as helping immigrant families identify alternative documents to meet school registration requirements), and with vigorous but context-sensitive oversight.

Some policies—such as identifying ELs using the two-step home language questionnaire and English assessment—have been well established over time, to the point that these procedures look fairly similar across the country. On the other hand, some policies that are strongly tied to school quality are left mostly to state and local education agencies. One example is teacher qualifications. The 2015 dear colleague letter issued by the U.S. Departments of Education and Justice asserts that language instruction educational programs must be adequately staffed and supported, but leaves it to states and localities to fill in the specifics; as a result, the certifications teachers must have, the instructional roles teachers and support staff play, and limits on maximum class size vary enormously.

The federal government does not require schools to use specific pedagogical methods or administrative procedures when serving EL and immigrant-background students. Rather, schools are considered in compliance with the law as long as they can demonstrate that their approach is non-discriminatory and effective relative to program, district, and state goals. In short, the protections discussed here are a floor, on which schools and districts can build additional supports.

## Endnotes

- 1 States differ on the age range for mandatory school attendance (generally age 5 to 16, 17, or 18) and the maximum age at which youth without a high school degree may attend public schools (generally 20 or 21). See Emily Parker, *50-State Review: Constitutional Obligations for Public Education* (Denver: Education Commission of the States, 2016), [www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf](http://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf).
- 2 Douglas N. Harris, Helen F. Ladd, Marshall S. Smith, and Martin R. West, *A Principled Federal Role in PreK-12 Education* (Washington, DC: Brookings Institution, Brown Center on Education Policy, 2016), [www.brookings.edu/wp-content/uploads/2016/12/gs\\_20161206\\_principled\\_federal\\_role\\_browncenter1.pdf](http://www.brookings.edu/wp-content/uploads/2016/12/gs_20161206_principled_federal_role_browncenter1.pdf).
- 3 Local education agencies include public school districts and other state-authorized agencies (such as a county board of education). A public charter school may be considered an independent local education agency or be designated part of the local education agency run by a traditional school district, depending on state policy.
- 4 Jie Zong, Jeanne Batalova, and Micayla Burrows, “Frequently Requested Statistics on Immigrants and Immigration in the United States,” *Migration Information Source*, March 14, 2019, [www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states](http://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states).
- 5 Catherine E. Lhamon, Philip H. Rosenfelt, and Jocelyn Samuels, “Dear Colleague Letter: School Enrollment Procedures” (letter, U.S. Department of Justice and U.S. Department of Education, Washington, DC, May 8, 2014), 1, [www2.ed.gov/about/offices/list/ocr/letters/colleague-201405.pdf](http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405.pdf).
- 6 As opposed to laws and regulations, federally issued guidance documents, memos, frequently asked questions, and similar resources do not carry the force of law and may be rescinded anytime by the executive-branch agency that issued them.
- 7 EdTrust West, “Safe Schools for Immigrant Students: AB 699 (O’Donnell)—Implementation Fact Sheet,” accessed February 4, 2019, <https://west.edtrust.org/wp-content/uploads/sites/3/2015/11/AB-699-Fact-Sheet-Implementation-pdf>.
- 8 The sensitive locations policy states that Department of Homeland Security agencies will avoid conducting immigration enforcement activities at schools (including preschools, daycares, universities, educational events, and bus stops when children are present); hospitals and other medical facilities; places of worship; and public gatherings such as ceremonies or demonstrations. See U.S. Immigration and Customs Enforcement, “FAQ on Sensitive Locations and Courthouse Arrests,” updated September 25, 2018, [www.ice.gov/ero/enforcement/sensitive-loc](http://www.ice.gov/ero/enforcement/sensitive-loc).
- 9 Federal guidance suggests this information may be obtained by asking about a student’s date of birth, place of birth, and prior school enrollment. See U.S. Department of Education, “Fact Sheet II: Additional Questions and Answers on Enrolling New Immigrant Students,” accessed May 9, 2019, [www2.ed.gov/policy/rights/guid/unaccompanied-children-2.pdf](http://www2.ed.gov/policy/rights/guid/unaccompanied-children-2.pdf).
- 10 Patricia Gándara and Jongyeon Ee, “U.S. Immigration Enforcement Policy and Its Impact on Teaching and Learning in the Nation’s Schools” (working paper, Civil Rights Project, University of California, Los Angeles, February 28, 2018), [www.civilrightsproject.ucla.edu/research/k-12-education/immigration-immigrant-students/u.s.-immigration-enforcement-policy-and-its-impact-on-teaching-and-learning-in-the-nations-schools/Immigration-enforcement-on-schools-093018.pdf](http://www.civilrightsproject.ucla.edu/research/k-12-education/immigration-immigrant-students/u.s.-immigration-enforcement-policy-and-its-impact-on-teaching-and-learning-in-the-nations-schools/Immigration-enforcement-on-schools-093018.pdf).
- 11 Carolyn Jones, “What it Means When a School District Declares Itself a ‘Safe Haven’ or ‘Sanctuary’: A Quick Guide,” EdSource, August 10, 2017, <https://edsources.org/2017/what-it-means-when-a-school-district-declares-itself-a-safe-haven-or-sanctuary-a-quick-guide/584273>.
- 12 Letter from the Lawyers’ Committee for Civil Rights of the San Francisco Bay Area and California Rural Legal Assistance to Xavier Becerra, California Attorney General, *Complaint Concerning Discriminatory Enrollment Practices Denying Immigrant Youth their Right to Enroll in School*, March 27, 2017, [www.crla.org/sites/all/files/u6/2017/pr/BecerraResCmplnt.pdf](http://www.crla.org/sites/all/files/u6/2017/pr/BecerraResCmplnt.pdf).

- 13 John Mooney and Colleen O’Dea, “ACLU-NJ Sues School Districts for Asking about Immigration Status,” NJ Spotlight, July 27, 2018, [www.njspotlight.com/stories/18/07/26/aclu-nj-sues-school-districts-for-asking-about-student-immigration-status](http://www.njspotlight.com/stories/18/07/26/aclu-nj-sues-school-districts-for-asking-about-student-immigration-status).
- 14 U.S. Department of Education, “FERPA General Guidance for Students,” updated June 26, 2015, [www2.ed.gov/policy/gen/guid/fpco/ferpa/students.html](http://www2.ed.gov/policy/gen/guid/fpco/ferpa/students.html).
- 15 U.S. Department of Education, “FERPA General Guidance for Students.”
- 16 Electronic Privacy Information Center, “Federal Educational Rights and Privacy Act (FERPA),” accessed February 6, 2019, <https://epic.org/privacy/student/ferpa>.
- 17 Jessica Hanson, with Shiu-Ming Cheer and Tanya Broder, *Practice Advisory: The Legal Authority for ‘Sanctuary’ School Policies* (Los Angeles: National Immigration Law Center, 2018), [www.nilc.org/wp-content/uploads/2018/08/sanctuary-schools-practice-advisory-2018.pdf](http://www.nilc.org/wp-content/uploads/2018/08/sanctuary-schools-practice-advisory-2018.pdf).
- 18 The 4th Amendment has also been cited in support of “sanctuary” policies regarding on-campus immigration enforcement, in that law enforcement agents must have a judicial warrant to act inside a location where a person has an expectation of privacy. See Hanson, with Cheer and Broder, *Practice Advisory*.
- 19 Coshandra Dillard, “The School-to-Deportation Pipeline,” *Teaching Tolerance* 60 (Fall 2018), [www.tolerance.org/magazine/fall-2018/the-school-to-deportation-pipeline](http://www.tolerance.org/magazine/fall-2018/the-school-to-deportation-pipeline).
- 20 Hannah Dreier, “How a Crackdown on MS-13 Caught Up Innocent High School Students,” *The New York Times Magazine*, December 27, 2018, [www.nytimes.com/2018/12/27/magazine/ms13-deportation-ice.html](http://www.nytimes.com/2018/12/27/magazine/ms13-deportation-ice.html); Hanson, with Cheer and Broder, *Practice Advisory*.
- 21 In 1980, the U.S. Department of Education’s Office for Civil Rights (OCR) attempted to encode the Lau Remedies in the *Federal Register*. When policymakers and members of the public pushed back against mandatory bilingual education, OCR stopped using the Lau Remedies and developed new guidance that emphasized local choice of program model. See Roger J. Gonzalez, *An Equal Educational Opportunity for Language Minority Students: A Legal Analysis of Language Education after Lau* (doctoral dissertation, University of Nevada, Las Vegas, 2002), 124–25, <https://digitalscholarship.unlv.edu/rtds/2501>.
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- 24 U.S. Department of Justice and U.S. Department of Education, *Dear Colleague Letter: English Learner Students and Limited English Proficient Parents* (Washington, DC: U.S. Department of Justice and U.S. Department of Education, 2015), [www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf](http://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf).
- 25 U.S. Department of Justice and U.S. Department of Education, *Dear Colleague Letter*, 6.
- 26 Angela Cruze, Meg Cota, and Francesca López, “A Decade after Institutionalization: Educators’ Perspectives of Structured English Immersion,” *Language Policy* (2019), <https://doi.org/10.1007/s10993-018-9495-1>.
- 27 Author interview with Christina Wong, Special Assistant to the Superintendent, San Francisco Unified School District, February 12, 2019.
- 28 Cruze, Cota, and López, “A Decade after Institutionalization.”
- 29 Wayne Wright, “Recent Flores Decision Is Not an Endorsement of Arizona’s ELL Policies and Programs,” Equity Alliance Blog, July 15, 2013, [www.niusileadscape.org/bl/recent-flores-decision-is-not-an-endorsement-of-arizona%E2%80%99s-ell-policies-and-programs-by-wayne-wright/](http://www.niusileadscape.org/bl/recent-flores-decision-is-not-an-endorsement-of-arizona%E2%80%99s-ell-policies-and-programs-by-wayne-wright/).
- 30 School accountability was first introduced in the 1994 reauthorization of the *Elementary and Secondary Education Act* and was expanded in the *No Child Left Behind Act of 2001* (NCLB) and revised again in ESSA.

- 31 Parents may opt their children out of some or all EL services, but schools are still responsible for meeting their civil rights obligation to these students.
- 32 See, for example, Michael Hansen, Elizabeth Mann Levesque, Diana Quintero, and Jon Valant, “Have We Made Progress on Achievement Gaps? Looking at Evidence from the New NAEP Results,” Brookings Institution, Brown Center Chalkboard, April 17, 2018, [www.brookings.edu/blog/brown-center-chalkboard/2018/04/17/have-we-made-progress-on-achievement-gaps-looking-at-evidence-from-the-new-naep-results/](http://www.brookings.edu/blog/brown-center-chalkboard/2018/04/17/have-we-made-progress-on-achievement-gaps-looking-at-evidence-from-the-new-naep-results/).
- 33 WIDA previously stood for World-class Instructional Design and Assessment; the consortium no longer uses that name.
- 34 WIDA, “Mission and History,” accessed February 19, 2019, <https://wida.wisc.edu/about/mission-history>.
- 35 ELPA21 stands for English Language Proficiency Assessment for the 21st Century.
- 36 Letter from the Leadership Conference on Civil and Human Rights to Lamar Alexander and Patty Murray, Chair and Ranking Member of the U.S. Senate Committee on Health, Education, Labor, and Pensions, and Virginia Foxx and Robert C. Scott, Chair and Ranking Member of the U.S. House of Representatives Committee on Education and the Workforce, April 10, 2018, <http://civilrightsdocs.info/pdf/policy/letters/2018/Big4ESSAOversightletter041018SIGNED.pdf>.
- 37 Anne Hyslop, “Betsy DeVos and the Soft Bigotry of Low ESSA Expectations,” RealClearEducation, December 14, 2017, [www.realcleareducation.com/articles/2017/12/14/betsy\\_devos\\_and\\_the\\_soft\\_bigotry\\_of\\_low\\_essa\\_expectations\\_110237.html](http://www.realcleareducation.com/articles/2017/12/14/betsy_devos_and_the_soft_bigotry_of_low_essa_expectations_110237.html).
- 38 Numerous education experts have emphasized the importance of using multiple measures in designing appropriate assessment and accountability systems. See, for example, ASCD, “Multiple Measures of Accountability” (ASCD Policy Points, Alexandria, VA, June 2013), [www.ascd.org/ASCD/pdf/siteASCD/publications/policypoints/Multiple-Measures-of-Accountability.pdf](http://www.ascd.org/ASCD/pdf/siteASCD/publications/policypoints/Multiple-Measures-of-Accountability.pdf).
- 39 “Local Agency Plans,” Title 20 *U.S. Code*, Section 6312(e)(3)(D), accessed March 19, 2019, <http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title20-section6312&num=0&edition=prelim>.
- 40 Letter from William L. Smith, Acting Assistant Secretary for Civil Rights, to OCR senior staff, *Policy Regarding the Treatment of National Origin Minority Students Who Are Limited English Proficient*, April 6, 1990, [www2.ed.gov/about/offices/list/ocr/docs/lau1990\\_and\\_1985.html](http://www2.ed.gov/about/offices/list/ocr/docs/lau1990_and_1985.html).
- 41 To justify this requirement, the 2015 dear colleague letter cites three federal district court cases and a 1991 OCR memo, which noted that schools must identify students in need of language assistance programs using objective criteria. Such criteria include standardized tests of whether a student’s reading, writing, and oral language skills are sufficient to participate in general education. See U.S. Department of Justice and U.S. Department of Education, *Dear Colleague Letter*, 10–11.
- 42 The 2015 dear colleague letter stated that this assessment must be valid and reliable, citing section 3121(a)(3) of NCLB, which requires states to report the number of students achieving English proficiency “as determined by a valid and reliable assessment.” Section 3121(a)(3) of ESSA largely retains the same language as NCLB, but instead of a valid and reliable assessment, it refers to an annual English language proficiency assessment aligned to the state’s English language proficiency standards, as established in section 1111(b)(2)(G). See U.S. Department of Justice and U.S. Department of Education, *Dear Colleague Letter*, 33.
- 43 Such evaluation must include longitudinal comparisons of EL, former EL, and never-EL students. See U.S. Department of Justice and U.S. Department of Education, *Dear Colleague Letter*, 36.

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## About the Author



**Julie Sugarman** is a Senior Policy Analyst for PreK-12 Education at the Migration Policy Institute (MPI) National Center on Immigrant Integration Policy, where she focuses on issues related to immigrant and English Learner (EL) students in elementary and secondary schools. Among her areas of focus: policies, funding mechanisms, and district- and school-level practices that support high-quality instructional services for these youth, as well as the particular needs of immigrant and refugee students who first enter U.S. schools at the middle and high school levels.

Dr. Sugarman came to MPI from the Center for Applied Linguistics (CAL), where she specialized in the evaluation of educational programs for language learners and in dual language/two-way immersion programs. At CAL, she directed comprehensive program evaluations of instruction for ELs in K-12 and contributed to numerous research and evaluation projects, including studies of biliteracy development in two-way immersion programs and the evaluation of the STARTALK program that funds teacher training programs and language instruction for students in grades K-16 in critical languages.

Dr. Sugarman earned a BA in anthropology and French from Bryn Mawr College, an MA in anthropology from the University of Virginia, and a PhD in second language education and culture from the University of Maryland, College Park.



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