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BREAKING THE NORM: ACCURATE EVALUATION OF ENGLISH LANGUAGE LEARNERS WITH SPECIAL EDUCATION NEEDS

I. INTRODUCTION

Disproportionate representation of English language learners (“ELLs”)¹ in high incidence special education programs has concerned education scholars, policy advocates, and legislators for the past three decades.² ELLs incorrectly placed in special education services because of language deficiencies suffer because they are “denied access to the general education curriculum and . . . may receive services that do not meet their needs.”³ Moreover, the special education label may “stigmatize students as inferior, result in lowered expectations, potentially separate students from peers, and lead to poor education and life outcomes”⁴ This problem continues to grow as the nation’s school-age population becomes increasingly ethnically diverse.⁵

Disproportionate representation most often occurs because educators and administrators incorrectly identify special education needs in ELLs through the use of culturally inappropriate assessment methods.⁶ Mainstream educators and administrators often find it difficult to distinguish students with learning disabilities from students who struggle because of language barriers.⁷ Tradi-

¹ Academic and legal literature use a variety of terms to refer to non-native English speakers who have not yet become fluent in English. Among the more common terms are limited English proficient (LEP), English language learners (ELLs), or linguistically diverse children. See Alfredo J. Artiles & Alba A. Ortiz, *English Language Learners with Special Education Needs: Contexts and Possibilities*, in ENGLISH LANGUAGE LEARNERS WITH SPECIAL EDUCATION NEEDS: IDENTIFICATION, ASSESSMENT, AND INSTRUCTION 3, 19-20 (Alfredo J. Artiles & Alba A. Ortiz eds., 2002). For the purposes of this Note, I will refer to these students as ELLs.

² ELLEN SCHILLER, FRAN O’REILLY & TOM FIORE, THE STUDY OF STATE & LOCAL IMPLEMENTATION & IMPACT OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, MARKING THE PROGRESS OF IDEA IMPLEMENTATION, 25 (2006), <http://www.abt.sliidea.org/Reports/FINAL%20Marking%20Progress%205.01.06.eps.fo.pdf>; Janette K. Klingner et al., *Addressing the Disproportionate Representation of Culturally and Linguistically Diverse Students in Special Education through Culturally Responsive Educational Systems*, 13 no. 38 EDUC. POL’Y ANALYSIS ARCHIVES 1, 4 (2005), <http://epaa.asu.edu/epaa/v13n38/v13n38.pdf>.

³ Klingner, *supra* note 2, at 4.

⁴ *Id.*

⁵ *Id.* at 2.

⁶ SCHILLER, O’REILLY & FIORE, *supra* note 2, at 25.

⁷ Alba Ortiz, *English Language Learners with Special Needs: Effective Instructional Strategies*, ERIC DIG., Dec. 2001, at 1, available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1a/71/21.pdf [hereinafter Ortiz, *English Language Learners with Special Needs*].

tional evaluation methods, which employ standardized norm-based tests, inappropriately exacerbate this difficulty.⁸ When assessing students, most educators interpret ELLs' performances through "white middle-class normative parameters of competence" which are inappropriate measures for many ELLs.⁹ These norms include "basic assumptions about race, worldview, beliefs, and epistemologies," as well as measures of adequate classroom progress.¹⁰

This Note will demonstrate that the use of traditional assessment methods is inappropriate and ineffective for assessing the special education needs of ELLs and thus denies ELLs the opportunity for equal education. Part II examines federal educational guarantees under both Title VI of the Civil Rights Act of 1964 ("Title VI") and the Equal Education Opportunities Act ("EEOA").¹¹ Title VI prohibits national origin discrimination in federally funded programs and affords all students the equal opportunity to have English language and academic needs met.¹² The EEOA prohibits states from denying equal educational opportunities on the basis of national origin and specifies that educational agencies must "take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."¹³ Part III focuses on assessment and evaluation procedures under the federal Individuals with Disabilities Education Improvement Act ("IDEA"), as well as corresponding state identification methods. Part IV identifies the problems with traditional assessment methods which result in disproportionate representation of ELLs in special education, specifically addressing unreliability and bias in objective testing methods.¹⁴ Finally, Part V introduces a culturally sensitive model for identifying ELLs with disabilities.

II. EDUCATIONAL GUARANTEES FOR ELLS

The educational rights of ELLs entered the national agenda in political and educational discourse in the late 1960s and early 1970s, during the Civil Rights

⁸ Artiles & Ortiz, *supra* note 1, at 21.

⁹ Klingner, *supra* note 2, at 6.

¹⁰ *Id.*

¹¹ William Ryan, Note, *The Unz Initiatives and the Abolition of Bilingual Education*, 43 B.C. L. REV. 487, 497 (2002).

¹² Artiles & Ortiz, *supra* note 1, at 10

¹³ 20 U.S.C. § 1703 (2000).

¹⁴ Many factors beyond traditional assessment methods contribute to disproportionate representation and implicate huge problems within the education system. See Klingner, *supra* note 2, at 5. For example, resource allocation in school financing schemes contributes to inequities as states unequally allocate funds. *Id.* School districts with the highest percentage of ELLs and other minority students may receive inadequate funds, despite greater needs for highly qualified professional staff. *Id.* This discrepancy contributes to the increasing educational gap between classes and races. *Id.* Although problems such as this deserve significant attention, they are beyond the scope of this Note.

Movement.¹⁵ The Civil Rights Act of 1964, though primarily focused on equal rights for blacks, carried strong implications for equal rights of linguistic minorities as well.¹⁶ Title VI of the Act states that “[n]o 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.”¹⁷ In order to enforce Title VI, the Department of Health, Education, and Welfare (“HEW”) promulgated regulations that prohibit the use of race, color, or national origin as a basis for providing disparate services and benefits or restricting access to services and benefits.¹⁸ Although the Civil Rights Movement and corresponding Civil Rights Act initially focused primarily on racial equality for blacks, the Act directly impacts ELLs’ public education because language barriers to education services may constitute exclusion on the basis of national origin.¹⁹

Implications of the Civil Rights Act for language minorities began to emerge in the late 1960s and early 1970s.²⁰ Congress enacted the Bilingual Education Act in 1968, which funded research and experimentation with programs for ELLs.²¹ This was the first federal legislation that exclusively dealt with support for ELLs.²² Soon after, in 1970, the Office for Civil Rights (“OCR”) put forth a memorandum that addressed Title VI’s applicability to ELLs.²³ The memorandum states: “[w]here inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.”²⁴

In 1974, the landmark Supreme Court case of *Lau v. Nichols*²⁵ established guidelines for adequate ELL education.²⁶ In *Lau*, Chinese ELLs challenged the school district’s decision to provide the same content and manner of instruction for all students, regardless of whether they spoke English.²⁷ The Court found that the school district violated Title VI by not developing an appropriate pro-

¹⁵ Ryan, *supra* note 11, at 492.

¹⁶ Rachel F. Moran, *Bilingual Education, Immigration, and the Culture of Disinvestment*, 2 J. GENDER RACE & JUST. 163, 165 (1999).

¹⁷ 42 U.S.C. § 2000d (2000).

¹⁸ Ryan, *supra* note 11, at 493.

¹⁹ *See id.*

²⁰ Moran, *supra* note 16, at 165.

²¹ *Id.*

²² Ryan, *supra* note 11, at 492.

²³ Moran, *supra* note 16, at 166.

²⁴ *Id.*

²⁵ *Lau v. Nichols*, 414 U.S. 563 (1974).

²⁶ *See* Ryan, *supra* note 11, at 493-94.

²⁷ *Id.* at 494.

gram for its ELLs, since limitations created by the language barrier prevented the ELLs from participating and doing well in school.²⁸ Consequently, the Court found that the school district denied the ELLs a meaningful opportunity to participate in the educational program.²⁹ The Court stated that discrimination that has the effect of denying availability violates Title VI, regardless of the intent of the school district.³⁰ OCR later adopted the *Lau* guidelines, which strongly prefer programs that include some form of native language instruction.³¹

In 1974, Congress promulgated the EEOA, which codified *Lau* and the OCR guidelines.³² The EEOA prohibits states from “deny[ing] equal educational opportunity to an individual on account of his or her race, color, sex, or national origin.”³³ The statute expressly specifies that “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” violates the statute.³⁴

Neither Title VI nor the EEOA require school districts to adopt a given program, but instead leave school districts the discretion to develop programs to meet their ELLs’ particular needs.³⁵ The Fifth Circuit’s decision in *Castaneda v. Pickard* defined required elements of appropriate action to remedy language barriers.³⁶ The court restated *Lau*’s central holding, that “schools are not free to ignore the need of limited English speaking children.”³⁷ Additionally, the court established a three-prong test to determine whether school district programs constitute “appropriate action” to combat language barriers under the EEOA.³⁸ First, school districts must base the ELL program on sound educational theory.³⁹ This requirement leaves discretion with school districts to choose between sound but competing theories, provided that some experts in the field recognize the theory as sound or deem it a legitimate experimental strategy.⁴⁰ Second, the program actually used by the school district must be “reasonably calculated to implement effectively the educational theory.”⁴¹ Third, after a sufficient trial period, the program must actually overcome lan-

²⁸ *See id.*

²⁹ *Lau*, 414 U.S. at 568.

³⁰ *Id.*

³¹ Moran, *supra* note 16, at 166.

³² *Id.* at 167.

³³ 20 U.S.C. § 1703 (2000).

³⁴ 20 U.S.C. § 1703(f) (2000).

³⁵ Moran, *supra* note 16, at 168.

³⁶ *See Castaneda v. Pickard*, 648 F.2d 989, 1009-10 (5th Cir. 1981).

³⁷ *Id.* at 1008.

³⁸ Ryan, *supra* note 11, at 497.

³⁹ *Castaneda*, 648 F.2d at 1009.

⁴⁰ *Id.*

⁴¹ *Id.* at 1010.

guage barriers confronting ELLs.⁴² This test has become the predominant standard for ascertaining whether a given program complies with equal education guarantees under Title VI and EEOA.⁴³

III. TRADITIONAL EVALUATION METHODS UNDER IDEA

A. IDEA Requirements

IDEA governs special education assessment and referral.⁴⁴ This Act is a “comprehensive law articulating federal policy concerning the education of children with disabilities.”⁴⁵ Under IDEA, local school districts must ensure that all students within the district, who have disabilities and need special education and related services, are identified, located, and evaluated.⁴⁶ IDEA guarantees that all students with disabilities receive a free and appropriate public education, the bounds of which are determined by the development of an individualized plan.⁴⁷ IDEA breaks down placement in appropriate special education into specific stages: referral, evaluation, development of an Individualized Education Plan (“IEP”), and placement in the least restrictive environment.⁴⁸

Many states include pre-referral intervention under the umbrella of the referral stage, which is the state at which teachers or administrators flag a student for observation and evaluation.⁴⁹ Pre-referral intervention, or early intervention, refers to intense supplementary instruction intended “to bring at-risk students quickly to a level at which they can profit from high-quality classroom

⁴² *Id.*

⁴³ Ryan, *supra* note 11, at 497.

⁴⁴ Congress first addressed the education of students with disabilities in 1975 with the Education for all Handicapped Children Act. Alfredo J. Artiles, *Special Education's Changing Identity: Paradoxes and Dilemmas in Views of Culture and Space*, in SPECIAL EDUCATION FOR A NEW CENTURY 85, 85 (Lauren I. Katzman et. al. eds., 2005) [hereinafter, Artiles, *Special Education's Changing Identity*]. Congress amended and reauthorized the Act as the Individuals with Disabilities Education Act (“IDEA”) in 1990. *Id.* In 2004, Congress amended IDEA to correspond with federal requirements of the No Child Left Behind Act. DEPT. OF EDUC., OFFICE OF SPECIAL EDUC. PROGRAMS, DIALOGUE GUIDE TO OSEP REGULATION: DISPROPORTIONALITY AND OVERIDENTIFICATION (2007), <http://www.ideapartnership.org/oseppage.cfm?pageid=41>.

⁴⁵ Judith Osgood Smith & Robert J. Colon, *Legal Responsibilities Towards Students with Disabilities: What Every Administrator Should Know*, 82 NASSP BULLETIN, Jan. 1998, 40 at 40-41.

⁴⁶ *Id.* at 44.

⁴⁷ Alan Gartner & Dorothy Kerzner Lipsky, *Beyond Special Education: Toward a Quality System for All Students*, in SPECIAL EDUCATION FOR A NEW CENTURY, *supra* note 44, at 165, 168.

⁴⁸ Osgood Smith & Colon, *supra* note 45, at 44.

⁴⁹ MASS. DEPT. EDUC., IEP PROCESS GUIDE 6 (2001), www.doe.mass.edu/sped/iep/proguide.pdf.

instruction.”⁵⁰ Not all states require pre-referral intervention, but if a state does, the classroom teacher must modify the instructional environment to see how the student responds.⁵¹ The purpose of pre-referral intervention is two-fold: it may prevent unnecessary evaluation or labeling of children who do not have disabilities, and also provides immediate assistance to children who are not succeeding in school.⁵² In practice, however, this stage typically is ineffectual because teachers do not request pre-referral intervention until the student has fallen further behind than a remedial program could repair.⁵³ If the student does not respond well to pre-referral intervention, the school district will formally evaluate the student to see whether the student has a disability and requires special education services.⁵⁴ Referral procedures vary widely by state, but IDEA regulations require states to put in place policies and procedures to prevent inappropriate overidentification by race or ethnicity.⁵⁵

IDEA does not specify which evaluation methods a state may use in making its determination, but sets a number of procedural safeguards.⁵⁶ With respect to the evaluation methods, the statute requires that the school district may “not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability.”⁵⁷ The statute also requires that the evaluations materials are not racially or culturally discriminatory and are administered in the language most likely to produce accurate results, to the extent that this is a feasible option.⁵⁸ Moreover, limited English proficiency cannot be the determinant factor for placement in special education.⁵⁹

A multi-disciplinary team (“MDT”) typically carries out the evaluation and placement of the student.⁶⁰ The composition of the MDT depends on the needs of the student, but always includes a teacher or other specialist with knowledge of the suspected disability.⁶¹ IDEA also encourages parents to participate at this stage of the process.⁶² Ideally, an MDT includes a school administrator,

⁵⁰ Alba A. Ortiz, *Prevention of School Failure and Early Intervention for English Language Learners*, in ENGLISH LANGUAGE LEARNERS WITH SPECIAL EDUCATION NEEDS: IDENTIFICATION, ASSESSMENT, AND INSTRUCTION, *supra* note 1, at 31, 41 [hereinafter Ortiz, *Prevention*].

⁵¹ Osgood Smith & Colon, *supra* note 45, at 44.

⁵² *Id.*

⁵³ Ortiz, *Prevention*, *supra* note 50, at 42-43.

⁵⁴ Osgood Smith & Colon, *supra* note 45, at 44-45.

⁵⁵ DISPROPORTIONALITY & OVERIDENTIFICATION, *supra* note 44.

⁵⁶ 20 U.S.C. § 1414 (2000).

⁵⁷ 20 U.S.C. § 1414(2)(B).

⁵⁸ 20 U.S.C. § 1414(3)(A)(i)-(ii).

⁵⁹ 20 U.S.C. § 1414(5)(C).

⁶⁰ Phyllis Tempest, *Local Navajo Norms for the Wechsler Intelligence Scale for Children*, 37 JOURNAL OF AMERICAN INDIAN EDUCATION 18, 19 (1998).

⁶¹ Osgood Smith & Colon, *supra* note 45, at 45.

⁶² Tempest, *supra* note 60.

special and general education teachers, an educator familiar with language acquisition processes and ELL needs, the student's parents, and perhaps even the student.⁶³ It is particularly important that the team includes people who understand the complexities of language acquisition.⁶⁴ Mainstream teachers usually cannot accurately distinguish between language difficulties and learning disabilities.⁶⁵

After determining that a student is eligible for special education services, the MDT must develop an IEP.⁶⁶ The IEP should "address the unique needs of the students and . . . assist the student as much as possible to move towards independence."⁶⁷ Rather than a development schedule, the IEP sets goals that focus the student's education and the MDT places the student in a program that corresponds with those goals.⁶⁸ When placing the student in a specific special education service, the MDT must also abide by the statutory requirement to place the student in the least restrictive environment that complies with the student's needs.⁶⁹ The statute states that students with disabilities should remain in the classroom with the non-disabled whenever possible.⁷⁰ For ELLs, IEPs should determine whether a school district will provide services in English or in the student's native language in order to create the least restrictive environment.⁷¹

B. *Diagnostic Procedures by the States*

A national survey of IDEA's implementation throughout the states and districts conducted for the Office of Special Education Programs indicates that less than half of states have specifically addressed placement of ELLs in the least restrictive environment.⁷² Only forty-one percent of states provide schools with written guidelines regarding the placement of minority students with IEPs in the least restrictive environment.⁷³ Furthermore, while eighty-two percent of states provide resources to support the placement of students generally in the least restrictive environment, only fifty-seven percent do so for mi-

⁶³ Alba A. Ortiz & James R. Yates, *Considerations in the Assessment of English Language Learners Referred to Special Education*, in ENGLISH LANGUAGE LEARNERS WITH SPECIAL EDUCATION NEEDS: IDENTIFICATION, ASSESSMENT, AND INSTRUCTION, *supra* note 1, at 65, 79.

⁶⁴ *Id.*

⁶⁵ Maria Sacchetti & Tracy Jan, *Bilingual Law Fails First Test*, BOSTON GLOBE, May 21, 2006, at A1.

⁶⁶ 20 U.S.C. § 1436(a)(3) (2000).

⁶⁷ IEP PROCESS GUIDE, *supra* note 49, at 12.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ 20 U.S.C. § 1412(5)(A) (2000).

⁷¹ Artiles & Ortiz, *supra* note 1, at 14.

⁷² SCHILLER, O'REILLY, & FIORE, *supra* note 2, at 25.

⁷³ *Id.*

nority students.⁷⁴

Even among states that provide specific instructions regarding ELLs' placement in special education, the instructions are vague and leave the MDT a significant amount of discretion.⁷⁵ For example, in Massachusetts, when school districts consider ELLs for special education, the only composition requirement the Massachusetts Department of Education ("MADOE") has implemented is that the MDT include at least one staff member knowledgeable about second language acquisition.⁷⁶ MADOE further specifies that MDTs may not rely on a single test for all students in determining eligibility of special education services, but may use some or all of the following tests: information provided by parents, observation, work samples, interviews, or cumulative record review.⁷⁷ MADOE requires MDTs to consider information about the ELL's language when determining how to conduct the evaluation to prevent a student from being misclassified.⁷⁸ Although MADOE states that English proficiency must not form the basis of MDTs' determinations, the evaluation requirements are sufficiently broad that MDTs are left with large amounts of discretion in making their assessments.⁷⁹

C. *Traditional evaluation methods*

The traditional method of evaluating students with disabilities uses standardized diagnostic procedures, many of which are based on white middle-class norms.⁸⁰ Traditional testing has two major categories of components: objective standards and educator interpretation of student performance.⁸¹ Objective standardized tests are generally based on English language norms, and studies show that validity and reliability of these test results are seriously compromised when given to an ELL either in English or in the ELL's native language.⁸² Beyond testing for specific disabilities, MDTs consider classroom-based, local, and

⁷⁴ *Id.* at 26.

⁷⁵ *See, e.g.*, MASS. DEPT. OF EDUC., COORDINATED PROGRAM REVIEW PROCEDURES 25 (School Year 2006-07).

⁷⁶ *Id.*

⁷⁷ IEP PROCESS GUIDE, *supra* note 49, at 7.

⁷⁸ *Id.*

⁷⁹ *Id.* at 11.

⁸⁰ Spencer J. Salend, Laurel M. Garrick Duhaney & Winifred Montgomery, *A Comprehensive Approach to Identifying and Addressing Issues of Disproportionate Representation*, 23 REMEDIAL & SPECIAL EDUC. 289, 290 (2002).

⁸¹ MASS. DEPT. OF EDUC., SECTION 614: EVALUATIONS, ELIGIBILITY DETERMINATIONS, INDIVIDUALIZED EDUCATION PLANS, AND EDUCATIONAL PLACEMENTS 1 (May 2005), http://www.doe.mass.edu/sped/IDEA2004/spr_meetings/eval_law.pdf.

⁸² Richard A. Figueroa, *Toward a New Model of Assessment, in ENGLISH LANGUAGE LEARNERS WITH SPECIAL EDUCATION NEEDS: IDENTIFICATION, ASSESSMENT, AND INSTRUCTION*, *supra* note 1, at 51, 53.

State assessments.⁸³ The observation component also has reliability problems, as most mainstream educators do not fully understand the significance of cultural differences or the process of second language acquisition.⁸⁴

Objective standardized tests can take a variety of forms. Some measure discrete skills, such as recalling numbers.⁸⁵ This type of test, called digit span, documents processing disorders, which may be a symptom of a learning disability.⁸⁶ In the context of ELLs, educational agencies have attempted to adjust objective standards to accommodate language differences.⁸⁷ Common accommodations include the use of interpreters by school psychologists and translated tests.⁸⁸ Studies have proven both of these methods to be unreliable.⁸⁹

Although IDEA and corresponding state standards express a commitment to accurate identification of ELLs with disabilities, they give school districts little guidance as to what testing methods will achieve accurate results.⁹⁰ Evaluation requirements often require several assessments, as though these will serve as a check on the accuracy of the evaluation as a whole.⁹¹ MDTs and teachers are left with large amounts of discretion in making their determinations.⁹² Because MDTs then combine a number of unreliable and invalid testing methods when evaluating ELLs, factors contributing to disproportionality may be present at several stages of the referral and evaluation process.⁹³

IV. TITLE VI AND EEOA VIOLATIONS

The use of traditional diagnostic methods inherently violates Title VI and the EEOA. Both Title VI and the EEOA prohibit discrimination on the basis of national origin in public schools.⁹⁴ The EEOA specifically provides that educational agencies "take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."⁹⁵ IDEA procedures and corresponding state and district policies that employ traditional diagnostic methods do not constitute appropriate action under the EEOA requirements. Even with safeguards, the use of traditional identification procedures denies ELLs equal education opportunities.

Although IDEA and state policies assert that there be no discrimination in

⁸³ SECTION 614, *supra* note 81, at 1.

⁸⁴ *See* Klingner, *supra* note 2, at 6.

⁸⁵ Figueroa, *supra* note 82, at 53.

⁸⁶ *Id.*

⁸⁷ *Id.* at 54.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *See* IEP PROCESS GUIDE, *supra* note 49, at 7.

⁹¹ *Id.*

⁹² *See id.*

⁹³ Klingner, *supra* note 2, at 5.

⁹⁴ Artiles & Ortiz, *supra* note 1, at 10.

⁹⁵ 20 U.S.C. § 1703 (2000).

evaluation policies,⁹⁶ this declaration hardly constitutes an effective procedural safeguard. The IDEA safeguard protects against explicit or intentional racism in the decision-making process, but largely overlooks institutional racism.⁹⁷ Research shows that the following factors play an important role in disproportionate representation: bias in decision-making processes that determine special education eligibility, placement in special education programs with uneven levels of restrictiveness, school district hiring practices, resource allocation, availability of alternative programs, presence of bias at various stages of the referral process, uneven instruction and management in general education classrooms, and discipline policies.⁹⁸

The EEOA requires school districts to take appropriate action to mitigate ELLs' language barrier.⁹⁹ The Fifth Circuit's three-prong test in *Castaneda* provides a guide to determine whether action is appropriate and effective at combating this problem.¹⁰⁰ Application of the test to traditional diagnostic methods demonstrates that these methods constitute an inappropriate means to evaluate the existence of disabilities in ELLs. Although the Fifth Circuit originally employed the *Castaneda* test to implicate specific implementation of a program by a given school district, the test analogously applies to evaluation methods generally employed by states and districts nationwide.

A. *Soundness of Educational Theory*

The first prong of the *Castaneda* test examines whether the educational theory on which the program was based is sound.¹⁰¹ Although traditional diagnostic methods may constitute sound educational theory for native English speakers, this theory is not sound in the context of evaluating disabilities in ELLs. The procedures used to diagnose native English speakers with disabilities are culturally and linguistically biased toward a white middle-class norm.¹⁰²

The literature and educational pedagogy that specifically address ELLs in special education clearly indicate that traditional diagnostic procedures do not constitute a sound theory on which to base a diagnosis of disability.¹⁰³ Recent research and theoretical analysis demonstrate fundamental flaws with these diagnostic procedures.¹⁰⁴ This research and emerging train of educational thought reflects a new educational theory based on the more specific target

⁹⁶ DISPROPORTIONALITY & OVERIDENTIFICATION, *supra* note 44.

⁹⁷ Salend et al., *supra* note 80, at 290.

⁹⁸ Klingner, *supra* note 2, at 5.

⁹⁹ 20 U.S.C. § 1703.

¹⁰⁰ *Castaneda v. Pickard*, 648 F.2d 989, 1010 (5th Cir. 1981).

¹⁰¹ *Id.* at 1009-10.

¹⁰² Salend et al., *supra* note 80, at 290.

¹⁰³ See Klingner, *supra* note 2, at 5.

¹⁰⁴ See generally Artiles & Ortiz, *supra* note 1

group of ELLs.¹⁰⁵ This new theory demonstrates that traditional diagnostic procedures violate prongs one and three of the *Castaneda* test.¹⁰⁶ Traditional educational theory is no longer sound because of new research, data, and educational theories that focus specifically on ELLs with disabilities, rather than children with disabilities generally.¹⁰⁷ Data regarding disproportionate representation and specific problems raised by traditional diagnostic methods has only emerged in the past couple of decades.¹⁰⁸

Standardized diagnostic tests are culturally, socially, and linguistically biased.¹⁰⁹ Even when teachers recognize that standardized tests are not appropriate measures of educational achievement for children that do not belong to the dominant ethnicity,¹¹⁰ their school district or state IEP procedures may require them to consider these results in the MDT calculus.¹¹¹ Some states require consideration of statewide assessment tests, which may be socially and culturally biased, and thus do not accurately measure many ELLs' potential ability.¹¹²

In many states, diagnostic tests are only available in English, or only in English and Spanish.¹¹³ Such tests have monolingual norms for each language, but these norms may not correspond to the requirements of a student becoming bilingual.¹¹⁴ Digital span tests, for example, scan for processing disorders by asking participants to recall numbers in reverse order.¹¹⁵ With ELLs, however, low digital span scores can be attributed to the fact that processing information in a second language is a slower, less automatic process.¹¹⁶ Even if school districts attempted to provide native language testing, they are often faced with ELLs with a wide range of native languages. In the greater Boston area, for example, ELLs speak more than seventy languages other than English, ranging from Spanish and Portuguese to Khmer and Dzongkha, a language native to

¹⁰⁵ *Id.*

¹⁰⁶

¹⁰⁷ See generally Artiles & Ortiz, *supra* note 1

¹⁰⁸ Alfredo J. Artiles et al., *Within-Group Diversity in Minority Disproportionate Representation: English Language Learners in Urban School Districts*, 71 *EXCEPTIONAL CHILDREN* 283, 285 (2005) [hereinafter Artiles, *Within-Group Diversity*].

¹⁰⁹ Salend et al., *supra* note 80, at 290.

¹¹⁰ MIREN URIARTE & LISA CHAVEZ, *LATINO STUDENTS AND THE MASSACHUSETTS PUBLIC SCHOOLS 7* (Leslie Bowen ed., Mauricio Gaston Inst. for Latino Cmty. Dev. & Pub. Policy 2000), available at <http://www.gaston.umb.edu/articles/uriarte%20chavez%20edreport%202000.pdf>.

¹¹¹ See, e.g., IEP PROCESS GUIDE, *supra* note 49, at 3.

¹¹² Salend et al., *supra* note 80, at 290.

¹¹³ Ortiz & Yates, *supra* note 63, at 66.

¹¹⁴ Figueroa, *supra* note 82, at 55.

¹¹⁵ *Id.* at 53.

¹¹⁶ *Id.* at 53-54.

Bhutan.¹¹⁷ The option of a native language test or personnel who speak the ELL's language may be non-existent for an ELL who speaks a less common language.

Empirical studies show that even native language tests are unreliable at assessing disabilities in ELLs.¹¹⁸ These tests are often both poorly designed and used by personnel with little or no training in assessing ELLs.¹¹⁹ Even when the tests are well researched and written, however, they produce unreliable results.¹²⁰ Native language tests have monolingual norms, and an ELL in the process of learning a second language may not respond well to a monolingual test.¹²¹ Another reason may be that the student is illiterate in his or her native language.¹²² Even a more advanced attempt at adjusting objective standardized testing to ELLs contains norm-based problems. The Woodcock-Johnson Psychoeducational Battery-Revised test used sampling norms which were "a composite of Spanish speakers from seven countries," but this test still made assumptions about school experiences and language semantics which compromised the validity for Spanish-speaking ELLs.¹²³

Using interpreters and school psychologists is not a sufficient way to cope with the language barrier, as this method also produces unreliable results.¹²⁴ Without proper training in linguistic differences and language acquisition, school psychologists' findings are largely guesses rather than accurate diagnoses.¹²⁵ Further, most special education assessment personnel do not have language acquisition training and do not understand the interaction between disabilities and linguistic, cultural, and other student characteristics.¹²⁶

Since IDEA's passage, many states encourage school districts to use multiple factors when determining whether a student has a disability. The MADOE recognizes that "[e]ffective progress . . . is not easily translated to test scores, academic achievement, social skills or other individual or specific variables, but rather is an interrelated measure."¹²⁷ The states, however, give MDTs little guidance, leaving determinations to the team's discretion. Several inaccurate assessments are no more likely to identify an ELL with a disability than one inaccurate assessment.

¹¹⁷ Kay Lazar, *Portuguese, Vietnamese, Serbo-Croatian, Chinese, Haitian (Creole), Spanish, Somali, Russian . . . Spoken Here Students*, BOSTON GLOBE, Oct. 2, 2005 at 1.

¹¹⁸ Figueroa, *supra* note 82, at 55.

¹¹⁹ Ortiz & Yates, *supra* note 63, at 66.

¹²⁰ Figueroa, *supra* note 82, at 55.

¹²¹ *Id.*

¹²² Ortiz & Yates, *supra* note 63, at 71.

¹²³ Figueroa, *supra* note 82, at 55.

¹²⁴ *Id.* at 54.

¹²⁵ *Id.*

¹²⁶ Ortiz & Yates, *supra* note 63, at 66.

¹²⁷ IEP PROCESS GUIDE, *supra* note 49, at 9.

B. *Effective Implementation of Educational Theory*

The second prong of the *Castaneda* test examines whether school districts “reasonably calculated to implement effectively the educational theory . . .”¹²⁸ Inquiry in this second prong focuses on whether the school district “follow[s] through with practices, resources and personnel necessary” to implement the theory as it is meant to work.¹²⁹ Traditional diagnostic methods are not sound educational theory.¹³⁰ Even language in IDEA stating that diagnostic practices must not result in disproportionality is not effectively implemented unless and until states or school districts put in place sufficiently concrete practices to enforce this goal.

Teachers refer ELLs for evaluation for disabilities when they observe struggles during the normal classroom experience.¹³¹ ELL progress, however, may vary significantly depending on the teacher’s effectiveness and the level of classroom support.¹³² Studies identify two trends which negatively affect the classroom experience of many ELLs.¹³³ First, although the credential level of teachers in affluent communities is increasingly improving, teachers in high poverty areas are often under-prepared, particularly when it comes to teaching ELLs.¹³⁴ Second, although the student population is increasingly diverse, the teaching force is becoming less diverse.¹³⁵

Mainstream educators create a barrier to effective implementation of IDEA and EEOA principles by interpreting culturally diverse students’ performance through white middle-class norms.¹³⁶ “[T]eachers’ and administrators’ beliefs about diversity, curriculum, assessment, instruction, school culture, governance, and professional development” directly impact disproportionate representation.¹³⁷ Lack of training on cultural issues or linguistic development may lead to inappropriate referrals and recommendations.¹³⁸ Most general and special education teachers do not have the background or training sufficient to understand the specific needs of ELLs.¹³⁹

IDEA requires school districts to include parents in the evaluation and identification of students with disabilities—which could help effective implementa-

¹²⁸ *Castaneda v. Pickard*, 648 F.2d 989, 1010 (5th Cir. 1981).

¹²⁹ *Id.*

¹³⁰ See discussion *infra* Part IV.A.

¹³¹ Klingner, *supra* note 2, at 7.

¹³² *Id.* at 5.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 6.

¹³⁷ Artiles, *Within-Group Diversity*, *supra* note 108, at 299.

¹³⁸ Salend et al., *supra* note 80, at 290.

¹³⁹ Ortiz, *Prevention of School Failure and Early Intervention for English Language Learners*, *supra* note 50, at 35.

tion of IDEA goals of eradicating disproportionate representation.¹⁴⁰ Most parental involvement, in practice, consists of consent and notifications of meetings, procedures, and the status of the ELL in the identification process.¹⁴¹ Families with values that do not correspond to American cultural ideals, however, may “experience cultural discomfort” when participating in the ELL’s education.¹⁴² The practical ability of parents to participate effectively in their children’s education often turns on the availability of language support services in the community.¹⁴³ Non-profit and community organizations may provide these support services to parents who are not fluent in English.¹⁴⁴

C. *Persistent Disproportionate Representation*

The third prong of the test examines whether the program achieves results in overcoming language barriers confronting ELLs.¹⁴⁵ Even if a school’s program is based on sound and effectively implemented educational theory, it may not constitute appropriate action if it “fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome”¹⁴⁶ Traditional diagnostic practices fail under this prong as well. These procedures have been in place for several decades, but disproportionate representation persists.¹⁴⁷

The proportion of ELLs in special education programs varies by area and circumstance, indicating the arbitrariness of the evaluation mechanism. Rural school districts tend to have particularly disproportionate numbers of ELLs not receiving native language support and with the lowest levels of English proficiency.¹⁴⁸ This overrepresentation continues to raise issues about ELLs’ equal education opportunities and their ability to adequately access the curriculum.¹⁴⁹ This practice has “a negative effect on [ELLs’] academic performance, self-esteem, classroom behavior and interactions, educational and career goals, and motivation.”¹⁵⁰

¹⁴⁰ Shernaz B. García, *Parent-Professional Collaboration in Culturally Sensitive Assessment*, in ENGLISH LANGUAGE LEARNERS WITH SPECIAL EDUCATION NEEDS: IDENTIFICATION, ASSESSMENT, AND INSTRUCTION, *supra* note 1, at 87, 89-90.

¹⁴¹ *Id.* at 90.

¹⁴² *Id.* at 91.

¹⁴³ BOSTON YOUTH TRANSITIONS TASK FORCE, TOO BIG TO BE SEEN: THE INVISIBLE DROPOUT CRISIS IN BOSTON AND AMERICA, 12 (May 2006), available at http://www.bostonpic.org/youth/Too_Big_To_Be_Seen.pdf.

¹⁴⁴ *Id.* at 13.

¹⁴⁵ *Castaneda v. Pickard*, 648 F.2d 989, 1010 (5th Cir. 1981).

¹⁴⁶ *Id.*

¹⁴⁷ Klingner, *supra* note 2, at 2.

¹⁴⁸ Artiles & Ortiz, *supra* note 1, at 8.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

V. SOLUTION: A CULTURALLY SENSITIVE MODEL

Treating ELLs the same as native English speakers when diagnosing disabilities is inappropriate and ineffective. In order to diagnose ELLs in a way that does not violate Title VI and EEOA, the MDT must evaluate students using a more culturally and linguistically sensitive model. Beyond changes in the method of diagnosing ELLs with disabilities, the National Academy of Sciences recommends a general assessment of instructional programs to explain why students are not learning English prior to referral.¹⁵¹ An effective enriched classroom is the best place to assess whether an ELL has a disability.¹⁵² The most effective classrooms for ELLs utilize activities that build on native language and culture and create "an educational context that is rich in language input, multiple forms of literacy, various types of organizational structures, . . . and multiple forms of instructional strategies . . ."¹⁵³ Assessment of ELLs in this setting is also more accurate than in a traditional context because of "the multiple linguistic, developmental, and contextual interactions that can take place at any one time."¹⁵⁴

IDEA already requires that MDTs conduct evaluations in the student's native language to the maximum extent possible.¹⁵⁵ Native language evaluation, however, is not sufficient for accurate identification.¹⁵⁶ IDEA also requires that the MDT conduct tests that are not racially or culturally biased.¹⁵⁷ Therefore, in assessing the proficiency and existence of disabilities, the examiner should keep in mind the external factors that affect a student's language, particularly his or her social class and cultural surroundings.¹⁵⁸

Basic assumptions about "race, worldviews, [cultural] beliefs, and epistemologies . . . perpetuate disproportionate representation."¹⁵⁹ Because these substantive biases are ingrained and in large part create invisible and unconscious barriers for ELLs and other minorities, the corresponding framework must restrict the discretion that MDTs have to act on these biases. A system does not become culturally sensitive simply by declaring itself so. The structural framework of the IEP process and special education evaluation must reflect cultural sensitivity, rather than just allow cultural sensitivity to occur or not.

Much emerging educational scholarship promotes the creation of "culturally responsive educational systems."¹⁶⁰ Supporters of these systems theorize that

¹⁵¹ Figueroa, *supra* note 82, at 57.

¹⁵² *Id.*

¹⁵³ *Id.* at 58-59.

¹⁵⁴ *Id.* at 60.

¹⁵⁵ Ortiz & Yates, *supra* note 63, at 71.

¹⁵⁶ See discussion *infra* notes 113-118 and accompanying text.

¹⁵⁷ Ortiz & Yates, *supra* note 63, at 73.

¹⁵⁸ *Id.* at 75-76.

¹⁵⁹ Klingner, *supra* note 2, at 6.

¹⁶⁰ *Id.* at 8.

“all culturally and linguistically diverse students can excel in academic endeavors when their culture, language, heritage, and experiences are valued and used to facilitate their learning and development”¹⁶¹ “Culturally responsive educational systems benefit all students by broadening perspectives and validating each person’s uniqueness and sense of belonging to a larger whole.”¹⁶²

Proponents of culturally responsive educational systems encourage cultural responsiveness throughout the entire educational system.¹⁶³ States and districts can specifically incorporate the culturally responsive model into their policies in order to significantly decrease the ELLs’ disproportionate representation in special education¹⁶⁴ and thus provide ELLs with the education that IDEA, Title VI, and the EEOA guarantee. This reform should encompass: (1) a review of current professional development and licensure requirements for teachers and administrators, and (2) amendments to legal requirements for determining eligibility for special education.¹⁶⁵

A. Professional Development

In order to ensure that teachers and administrators are better prepared for teaching ELLs and accurately identifying disabilities, states should specifically require that teacher certifications requirements include specific standards addressed towards teaching ELLs, as well as continuing education requirements that focus on cultural diversity.¹⁶⁶ Although such requirements are often aspects of higher degrees, schools with high concentrations of ELLs often have the least qualified teachers and administrators, which perpetuates the disproportionate representation problem.¹⁶⁷ If states include cultural education requirements within general education licensing guidelines, then higher education may respond by implementing corresponding teacher training programs.¹⁶⁸

While true teacher development requires much more than amendments to licensure requirements, these amendments mark the start along a path towards a more consistently educated workforce. Adequate teacher training “requires attention to the context in which this preparation occurs, the nature of the skills and dispositions that characterize culturally responsive teachers, and the elements of multicultural education.”¹⁶⁹ If teachers learn how to implement spe-

¹⁶¹ *Id.*

¹⁶² *Id.* at 9 (citing W. D. Nichols, et al., *Teachers’ Role in Providing Culturally Responsive Literacy Instruction*, 41 *READING HORIZONS* 1 (2000)) (noting also that “everyone gains” when educators work to develop the individual self-worth of each child).

¹⁶³ *Id.* at 8.

¹⁶⁴ *Id.* at 10-13.

¹⁶⁵ *Id.* at 11-12.

¹⁶⁶ *Id.* at 12.

¹⁶⁷ *Id.* at 12 (citing S.E. Ansell et al., *Off Target*, 22 *EDUC. WK.* 57 (2003)).

¹⁶⁸ *See id.* at 13 (citing M. Cochran-Smith, *RELATIONSHIPS OF KNOWLEDGE AND PRACTICE: TEACHER LEARNING IN COMMUNITIES* (2004)) .

¹⁶⁹ *Id.* at 15 (citing B. A. Ford, *Multicultural Education Training for Special Educators*

cific instructional practices in culturally responsive ways, ELLs will have better opportunities to learn, are likely to make better progress, and are less likely to be referred to special education.¹⁷⁰

On-going professional development programs may help teachers change beliefs and attitudes that keep them from being culturally responsive teachers and bring them up-to-date with the modern diverse classroom.¹⁷¹ Such programs should be collaborative and include a mentoring program, so that teachers of varying levels and experiences can support each other.¹⁷² Cultural awareness programs lead to more effective classrooms and also improve teacher retention.¹⁷³

B. *Culturally Responsive MDTs*

MDTs can become more culturally responsive if team members include both professionals and community members.¹⁷⁴ Identifying students for referral and evaluation involves a determination of difference from 'normal' students.¹⁷⁵ Including people with different cultural understandings on the MDT provides a more appropriate frame reference to make determinations of difference.¹⁷⁶ The MDT should be required to consider culturally sensitive criteria in making its disability determination. In doing so, it would look at social, community, historical, familial, racial, and gender context of the individual so that the individual's educational process is considered.¹⁷⁷

IDEA emphasizes the "rights of parents to be informed about, to provide consent for, and to attend school meetings related to their children's education."¹⁷⁸ Despite the active role that IDEA envisions for parents and families, cultural and language barriers continue to strain the relationship between parents and their children's education.¹⁷⁹ Differing cultural viewpoints on the appropriate role of parents in education is a central example of the problems

Working with African-American Youth, 59 EXCEPTIONAL CHILD. 107 (1992); C. D. Kea et al., *To Teach Me Is to Know Me*, 32 J. SPECIAL EDUC. 44 (1998); F. Obiakor, *Multicultural Education: Powerful Tool for Preparing Future General and Special Educators*, 24 TCHR. EDUC. & SPECIAL EDUC. 241).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 15-16.

¹⁷² *Id.* at 16.

¹⁷³ *Id.* (citing K. H. Quartz, *Too Angry to Leave: Supporting New Teachers' Commitment to Transform Urban Schools*, 54 J. TCHR. EDUC. 99).

¹⁷⁴ *Id.* at 18.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 18-19 (discussing G. Sugai et al., *Applying Positive Behavior Support and Functional Behavioral Assessment in Schools*, 2 J. POSITIVE BEHAV. INTERVENTIONS 131 (2000)).

¹⁷⁸ García, *supra* note 141, at 87.

¹⁷⁹ *Id.* at 87-88.

plaguing the creation of a relatively uniform system of parental involvement.¹⁸⁰

Parents of ELLs should be “viewed as capable advocates for their children and as valuable resources in school improvement efforts” in making accurate assessments of disability.¹⁸¹ Information “regarding the student’s sociological background, developmental and medical history, language use and development, and social and emotional functioning” helps assessors place the student’s particular educational progress in context.¹⁸² Because IDEA encourages a more active parental role, parents should do more than merely provide this information. Parents may disagree with evaluation data, depending on their views of developmental norms, but be uncomfortable voicing their opinions in the environment provided.¹⁸³ If professionals are aware of the cultural differences, they may be able to provide a more culturally sensitive environment for productive parental involvement.¹⁸⁴

IDEA now allows states to have discretion in determining eligibility requirements.¹⁸⁵ The newly reauthorized statute allows states to use multiple factors and more culturally-based criteria in making ELL special education evaluations instead of purely IQ-based or standardized testing criteria.¹⁸⁶ IDEA should be amended so that it not only allows culturally-based criteria in the evaluation of ELLs, but requires it as the primary basis for assessment decisions.

VI. CONCLUSION

Disproportionate representation of ELLs in special education classes has been an ongoing problem for several decades.¹⁸⁷ This phenomenon causes significant harm to both ELLs misidentified with disabilities and ELLs with disabilities who remain untreated in general education classrooms.¹⁸⁸ Accurate identification of ELLs with disabilities is of critical importance in our increas-

¹⁸⁰ *Id.* at 88.

¹⁸¹ Ortiz, *English Language Learners with Special Needs*, *supra* note 7, at 3 (citing Jim Cummins, *Knowledge, Power, and Identity in Teaching English as a Second Language*, in *EDUCATING SECOND LANGUAGE CHILDREN: THE WHOLE CHILD, THE WHOLE CURRICULUM, THE WHOLE COMMUNITY* 33).

¹⁸² García, *supra* note 141, at 98.

¹⁸³ *Id.* at 101.

¹⁸⁴ *Id.*

¹⁸⁵ Klingner, *supra* note 2, at 11.

¹⁸⁶ *Id.* at 20.

¹⁸⁷ *Id.* at 2 (citing A. J. Artiles et al., *Culturally Diverse Students in Special Education: Legacies and Prospects*, in *HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION* 716 (J. A. Banks & C. M. Banks, eds., 2d ed. 2004; S. Donovan & C. Cross, *Minority Students in Special and Gifted Education*, Washington, DC: National Academy Press; L. Dunn, *Special Education for the Mildly Retarded: Is Much of it Justifiable?*, 35 *EXCEPTIONAL CHILD*. 5 (1968)).

¹⁸⁸ *Id.* at 4.

ingly diverse nation.¹⁸⁹

Traditional norm-based diagnostic methods of evaluating students with disabilities are likely inappropriate when used to evaluate ELLs.¹⁹⁰ These methods result in disproportionate representation and thus deny ELLs equal education opportunities and violate Title VI and the EEOA.¹⁹¹ In order to afford ELLs the educational opportunities that federal law, state law, school districts, and schools guarantee, states and school districts must take appropriate action to break down this language barrier. States cannot properly diagnose disability in ELLs unless they adopt a culturally sensitive diagnosis model which takes into account language, culture, and experience in determining individual student progress. This model would likely be healthy for the proper diagnosis of any student, but it is crucial for the proper diagnosis of linguistically and culturally diverse students.

Emilie Richardson

¹⁸⁹ *Id.* at 2.

¹⁹⁰ Artiles & Ortiz, *supra* note 1, at 21.

¹⁹¹ *See generally supra* Part IV.

