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**ENGLISH LEARNERS IN K–12 SCHOOLS AT THE  
PERILOUS INTERSECTION WITH DISABILITY LAWS:  
THE NEED FOR GUARDIAS BILINGÜES**

PERRY A. ZIRKEL\*

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## INTRODUCTION

Reflecting the changing demographics of the nation, students from ethnic minorities who have notable difficulties with English due to their native or home language being other than English have become an increasingly important segment of the K–12 school population.<sup>1</sup> These students gained recognition—along with students with disabilities—as being among two of the four disaggregated subgroups in the 2001 No Child Left Behind Act (“NCLB”).<sup>2</sup> This recognition continued in NCLB’s 2015 successor in the Elementary and Secondary Education Act—the Every Student Succeeds Act (“ESSA”).<sup>3</sup> The priority subgroups are not at all mutually exclusive.

Although the terminology has varied considerably<sup>4</sup> and evolved without complete consistency,<sup>5</sup> this Article generically uses the legally current term, “English Learner” (“EL”) to refer to these students. Not only does the ESSA use this designation, but also the Individuals with Disabilities Education Act (“IDEA”) incorporates by reference its definition for its pre-existing use of “limited English proficient.”<sup>6</sup> Similarly, to avoid variations in both education and law, English as a Second Language (“ESL”) is used generically herein for language and literacy development programs specific to EL students.

Although the ESSA provides recognition of the importance of EL students in parallel to another priority subgroup, students with disabilities, the Act largely leaves the interconnection between these two subgroups unaddressed and also fails to provide a private right of action.<sup>7</sup> Students designated broadly as EL, who also qualify or are reasonably suspected of having a disability, are at a particularly difficult intersection between two very different legal frameworks.

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<sup>1</sup> E.g., *English Language Learners in Public Schools*, NAT’L CTR. FOR EDUC. STATISTICS, [https://nces.ed.gov/programs/coe/indicator\\_cgf.asp](https://nces.ed.gov/programs/coe/indicator_cgf.asp) (last updated May 2020) (reporting, with wide variance from state to state, a national average of 10.1% of the school population in 2017 as compared with 8.1% in 2000). Spanish-speaking students account for the largest proportion (74.8%), with the next most frequent language groups being Arabic (2.7%) and Chinese (2.1%). *Id.*

<sup>2</sup> No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

<sup>3</sup> 20 U.S.C. §§ 6301–7981 (2019). In addition to EL students and students with disabilities, the two other subgroups are “(A) economically disadvantaged students; (B) students from major racial and ethnic groups.” *Id.* § 6311(c)(2).

<sup>4</sup> E.g., Nina Lee Webster & Chunlei Lu, “*English Language Learners*”: *An Analysis of Perplexing ESL-Related Terminology*, 14 LANGUAGE & LITERACY 83, 86–87 (2012) (identifying fourteen alternative terms in the education literature).

<sup>5</sup> The legal decisions reflect this imprecise evolution. *Compare* Hazelwood (MO) Sch. Dist., 74 IDELR 298 (OCR 2018) (“English language learner”), *with* Tustin (CA) Unified Sch. Dist., 16 IDELR 1335 (OCR 1990) (“limited English proficient”), *with* Dysart (AZ) Unified Sch. Dist., 311 IDELR 32 (OCR 1983) (“non . . . English-proficient”).

<sup>6</sup> 20 U.S.C. § 1401(18) (2019); 34 C.F.R. § 300.27 (2020) (incorporating 20 U.S.C. § 7801(20) (2019)).

<sup>7</sup> See, e.g., *Renee v. Duncan*, 623 F.3d 787, 803 (9th Cir. 2010); *accord* *Blakely v. Wells*, 380 F. App’x 6, 8 (2d Cir. 2010).

One framework, largely derived from the Fourteenth Amendment's Equal Protection Clause, consists of a sequential pair of statutes aimed at discrimination based on ethnicity/language.<sup>8</sup> The other framework, derived from the Fourteenth Amendment's Equal Protection and Due Process clauses, consists of a similarly sequential pair of statutes focused on disability.<sup>9</sup>

The purpose of this Article is to canvass the case law and related administrative authority at this juncture, particularly in the area within the disability framework that is specific to EL students. Part I provides an overview of the two aforementioned pairs of statutes and, on a brief illustrative basis, the major court decisions under each of these statutes. Part II presents a similarly brief review of the directly pertinent legal literature specific to the EL-disability connection. Part III consists of a comprehensive and systematic synthesis of the case law and related administrative authority for the various steps at this intersection, including identification and appropriate instruction. Finally, concluding with recommendations for legal reform.

## I. OVERVIEW OF THE INTERSECTING LEGAL FRAMEWORKS

### A. *EL Statutory Framework*

The two principal statutes that specifically apply to EL students are Title VI of the Civil Rights Act of 1964<sup>10</sup> and the Equal Education Opportunities Act ("EEOA") of 1974.<sup>11</sup> Serving as a bridge between these two statutory frameworks before its subsequent narrowing gloss on Title VI<sup>12</sup> is the Supreme Court's decision in *Lau v. Nichols*.<sup>13</sup> In *Lau*, the Court ultimately relied on the Title VI clarifying guidance that required "affirmative steps to rectify the language deficiency" of EL students<sup>14</sup> to rule in favor of Chinese-speaking students who had not received any specialized assistance to access the

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<sup>8</sup> See *infra* Part I.

<sup>9</sup> See *infra* Part I.

<sup>10</sup> 42 U.S.C. § 2000d (2019) ("No person . . . 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" (emphasis added)). For the regulations, see 28 C.F.R. §§ 42.101–42.112 (2020) (U.S. Department of Justice); 34 C.F.R. §§ 100.1–100.13 (2020) (U.S. Department of Education).

<sup>11</sup> 20 U.S.C. § 1703 (2019) ("No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or *national origin*, by . . . (f) the failure by an educational agency to take *appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs*." (emphasis added)).

<sup>12</sup> This gloss refers to superseding disparate impact with the intent requirement. See *infra* note 21; see also *Alexander v. Sandoval*, 532 U.S. 275, 285–86 (2001).

<sup>13</sup> *Lau v. Nichols*, 414 U.S. 563 (1974).

<sup>14</sup> *Id.* at 568 (quoting *Identification of Discrimination and Denial of Services on the Basis of National Origin*, 35 Fed. Reg. 11,595 (July 18, 1970)).

defendant-district's instructional program.<sup>15</sup> However, the Court did not order a specific remedy.<sup>16</sup>

The EEOA codified the relevant standard under the similarly flexible language of "appropriate action" to rectify the language barrier that EL students face.<sup>17</sup> The major court decision subsequently applying this EEOA standard was the Fifth Circuit's 1981 decision in *Castaneda v. Pickard*.<sup>18</sup> Interpreting the EEOA as intending latitude for school districts to choose among a variety of approaches "for appropriate action," including but not limited to bilingual education,<sup>19</sup> the Fifth Circuit established a flowchart-like three-factor test when assessing the district's choice: (1) was the program "informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy"?; (2) did the district "follow through with practices, resources and personnel necessary" for effective implementation of the program?; and (3) "after being employed for a period of time sufficient to give [it] a legitimate trial," did the program "produce results indicating that the language barriers . . . are actually being overcome"?<sup>20</sup> The court ultimately ruled in favor of the district, concluding that its particular bilingual program passed not only the elevated standard of Title VI<sup>21</sup> but also its three-factor test under the EEOA.<sup>22</sup>

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<sup>15</sup> Of the approximately 2,850 EL students of Chinese ancestry in the San Francisco Unified School District, about 1,800 did not receive any specialized language instruction. *Id.* at 564.

<sup>16</sup> *Id.* at 564–65 ("No specific remedy is urged upon us. Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another. There may be others. Petitioners ask only that the Board of Education be directed to apply its expertise to the problem and rectify the situation.").

<sup>17</sup> *Supra* text accompanying note 14.

<sup>18</sup> *Castaneda v. Pickard* (*Castaneda I*), 648 F.2d 989 (5th Cir. 1981).

<sup>19</sup> *Id.* at 1008–09.

<sup>20</sup> *Id.* at 1009–10. The court's alternate formulation of the second factor is based on reasonable calculation. *Id.* at 1010 ("The court's second inquiry would be whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school.").

<sup>21</sup> *Id.* at 1007 ("Although the Supreme Court in *Bakke* did not expressly overrule *Lau* . . . we understand the clear import of *Bakke* to be that Title VI, like the Equal Protection Clause, is violated only by conduct animated by an intent to discriminate and not by conduct which, although benignly motivated, has a differential impact on persons of different races.").

<sup>22</sup> *Id.* at 1010–12. Within the wide latitude of the *Castaneda I* test, the subsequent court decisions generally favored the defendants. Compare *Flores v. Huppenthal*, 789 F.3d 994 (9th Cir. 2015), *United States v. Texas*, 601 F.3d 354 (5th Cir. 2010), *McFadden v. Bd. of Educ. for Ill. Sch. Dist. U-46*, 984 F. Supp. 2d 882 (N.D. Ill. 2013), *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007 (N.D. Cal. 1998), *aff'd on other grounds sub nom. Valeria v. Davis*, 307 F.3d 1036 (9th Cir. 2002), *Teresa P. ex rel. T.P. v. Berkeley Unified Sch. Dist.*, 724 F. Supp. 698 (N.D. Cal. 1989), *Alejo v. Torlakson*, 151 Cal. Rptr. 3d 420 (Ct. App. 2013) (ruling for

### B. Disability Statutory Framework

Containing a much more individualized focus, the corresponding two successive statutes applicable to K-12 students are Section 504 of the Rehabilitation Act of 1973 (“§ 504”)<sup>23</sup> and the IDEA.<sup>24</sup> The first of this pair is a civil rights act that provides a broader scope of both eligibility and, by regulation, “free appropriate education” (“FAPE”)<sup>25</sup> than its much more prescriptive and slightly younger brother. Said second sibling, the IDEA, is funding rather than civil rights legislation, which passed in its original form in 1975 and was most recently amended in IDEA 2004.<sup>26</sup> The basic difference in eligibility is the requirement for special education need under the IDEA as compared to § 504’s extension to other major life activities well beyond learning.<sup>27</sup> The corresponding difference in FAPE is that the child may be entitled only to related aids and services in general education.<sup>28</sup> Although § 504 offers broader coverage, the IDEA has much more detailed requirements arising from its periodic reauthorizations and the resulting regulations.<sup>29</sup> As a result of its deeper general and specific requirements, the IDEA is the primary applicable

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defendants), *cf.* *Horne v. Flores*, 557 U.S. 433 (2009) (remanding for refined inquiry while denying statewide injunction), *Castaneda ex rel. Castaneda v. Pickard (Castaneda II)*, 781 F.2d 456 (5th Cir. 1986) (focusing on teacher hiring and ability grouping), *and United States v. Texas*, 680 F.2d 356 (5th Cir. 1982) (remanding for local determinations), *with Keyes v. Sch. Dist. No. 1, Denver*, 576 F. Supp. 1503 (D. Colo. 1983) (ruling for plaintiffs), *cf.* *Issa v. Sch. Dist. of Lancaster*, 847 F.3d 121 (3d Cir. 2017) (upholding preliminary injunction), *Gomez v. Ill. State Bd. of Educ.*, 811 F.2d 1030 (7th Cir. 1987) (upholding denial of dismissal), *and Carbajal v. Albuquerque Pub. Sch. Dist.*, No. CIV 98-279 MV/DJS, 1999 WL 35809583 (D.N.M. May 14, 1999) (granting dismissal).

<sup>23</sup> 29 U.S.C. §§ 705(20), 794 (2019). “§ 504” is used herein generically as a rubric for the statutory framework that includes the subsequent, sister legislation, the Americans with Disabilities Act (ADA). 42 U.S.C. §§ 12101–12103, 12131–12134 (2019). For the related regulations, see 34 C.F.R. §§ 104.1–104.10, 104.31–104.39 (2020) and 28 C.F.R. §§ 35.101–35.108, 35.130–35.139 (2020).

<sup>24</sup> 20 U.S.C. §§ 1400–1418 (2019). For the related regulations, see 34 C.F.R. §§ 300.1–300.199 (2020).

<sup>25</sup> 34 C.F.R. § 104.33(b)(1).

<sup>26</sup> For the history of the IDEA, including its passage in 1975 as the Education of All Handicapped Children’s Act, see RUTH COLKER, *DISABLED EDUCATION: A CRITICAL ANALYSIS OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT* 27–43 (2012).

<sup>27</sup> Compare 34 C.F.R. § 300.8(a), with 34 C.F.R. § 104.3(j), and 28 C.F.R. § 35.108.

<sup>28</sup> Compare 34 C.F.R. § 300.17, with 34 C.F.R. § 104.33(b)(1).

<sup>29</sup> For a comprehensive comparison between the § 504 and the IDEA that includes but extends well beyond eligibility and FAPE to other potential claims and overlapping enforcement mechanisms, see Perry A. Zirkel, *An Updated Comprehensive Comparison of the IDEA and Section 504/ADA*, 342 EDUC. L. REP. 886 (2017); see also Perry A. Zirkel & Brook L. McGuire, *A Roadmap to Legal Dispute Resolution for Students with Disabilities*, 23 J. SPECIAL EDUC. LEADERSHIP 100 (2010) (tracing the alternative adjudicative and investigative mechanisms under the IDEA and § 504).

framework for EL students.<sup>30</sup> However, as a secondary matter, § 504 provides EL and other students not only broader coverage, but also alternate claims and forums for enforcement.<sup>31</sup>

Finally, at the juncture of these two federal statutory frameworks, an occasional state law provides a limited addition. As a relatively unusual example, Texas regulations include: (1) a prohibition of discrimination against various protected categories, including disability, in its two-way bilingual education option;<sup>32</sup> and (2) a requirement for “assessment procedures that differentiate between language proficiency and disabling conditions” as well as coordination of the IDEA individualized education program (IEP) team with the language proficiency assessment committee.<sup>33</sup> Similarly distinctive, New York’s regulations require a “bilingual multidisciplinary assessment” for EL students suspected of meeting the eligibility requirements for special education.<sup>34</sup> Illinois is one of the few states with certification in bilingual special education.<sup>35</sup> Other scattered state law provisions provide more limited additions to the framework. For example, California law requires development of a guidance manual addressing the identification and services for EL students with “exceptional needs,”<sup>36</sup> and Louisiana specifies the following limitation on the identification process: “Evaluations for special education and related services may not be delayed because of a student’s language proficiency or the student’s participation in a specialized language program.”<sup>37</sup>

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<sup>30</sup> First, as a general matter, the IDEA provides more detailed requirements for identification, including evaluation, and FAPE, including adjudication and remedies. Second, as a specific matter, unlike the § 504 regulations, the IDEA regulations expressly and repeatedly reference EL students. *E.g.*, 34 C.F.R. § 300.27 (incorporating the definition of the ESSA); 34 C.F.R. § 300.29(a) (defining native language in the EL context); 34 C.F.R. § 300.306(b) (specifying EL as one of the narrow exclusions for eligibility, specifically if it is the determinant and exclusive basis for eligibility); 34 C.F.R. § 300.309 (specifying EL as one of the exclusions if it is the primary basis for meeting the criteria for the specific learning disability classification); 34 C.F.R. § 300.324(a)(2) (specifying EL as one of the special considerations in developing the IEP). Additionally, akin to § 504 and Title VI, the IDEA regulations also have nondiscrimination requirements. 34 C.F.R. § 300.304(c)(1)(i) (requiring the selection and administration of evaluation materials “not . . . be discriminatory on a racial or cultural basis”); 34 C.F.R. § 300.173 (prohibiting disproportionality “by race and ethnicity”).

<sup>31</sup> *See supra* note 29.

<sup>32</sup> 19 TEX. ADMIN. CODE § 89.1228(b) (2018).

<sup>33</sup> *Id.* § 89.1230; § 89.1100 (coordination for justified testing accommodations or exemptions); § 89.1050(c)(1)(J) (member of IEP team).

<sup>34</sup> N.Y. COMP. CODES R. & REGS. tit. 8, §§ 154–1.3(e) (2018).

<sup>35</sup> ILL. ADMIN. CODE tit. 23, § 28.330 (2020).

<sup>36</sup> CAL. EDUC. CODE § 56305 (West 2019).

<sup>37</sup> LA. ADMIN. CODE tit. 28, § 351(H) (2020).

## II. LEGAL LITERATURE AT THE EL-DISABILITY INTERSECTION

Legal literature specific to EL students' intersection with the disability-based laws in the K-12 context is scant. Such scholarship amounts to barely a handful of law review articles that recognized problems of accurate identification and appropriate instruction and propose limited solutions. These articles fail to yield a comprehensive synthesis of the applicable adjudicative and administrative authority, especially court decisions, at this problematic intersection.

In a brief article almost thirty years ago, I canvassed the then scant "[v]arious sources of federal [disability] law [that] converge on requirements for specialized notice, evaluation, and services for [EL] students" and recommended improved identification and bilingual special education.<sup>38</sup> Approximately fifteen years later, a law review article focused on the evaluation of EL students under the IDEA, concluding that traditional assessment methods are ineffective for this purpose and proposing instead a "more culturally and linguistically sensitive model" for determining their eligibility for special education services.<sup>39</sup> The identified basis for this model is a classroom that is "rich in language input, multiple forms of literacy, various types of organizational structures . . . and multiple forms of instructional strategies."<sup>40</sup>

A more recent cluster of law review articles provides more comprehensive and intensive legal analyses. First, Professor Erin Archerd<sup>41</sup> concluded that the ESEA (then in the form of the NCLB) and the EEOA had fallen short in addressing the educational needs of EL students.<sup>42</sup> She proposed the use of the various alternative dispute resolution mechanisms under the IDEA, such as mediation and facilitated IEPs, as a promising, although not exclusive, way<sup>43</sup> to

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<sup>38</sup> Perry A. Zirkel, "SPED/LEP": *Special Education for Limited English Proficient Students*, 69 EDUC. L. REP. 181, 187 (1991).

<sup>39</sup> Emilie Richardson, Note, *Breaking the Norm: Accurate Evaluation of English Language Learners with Special Education Needs*, 17 B.U. PUB. INT. L.J. 289, 303 (2008).

<sup>40</sup> *Id.* (quoting Richard A. Figueroa, *Toward a New Model of Assessment*, in ENGLISH LANGUAGE LEARNERS WITH SPECIAL EDUCATION NEEDS: IDENTIFICATION, ASSESSMENT, AND INSTRUCTION 58-59 (Alfredo J. Artiles & Alba A. Ortiz eds., 2002)).

<sup>41</sup> At the time of her article, Archerd was the Langdon Fellow in Dispute Resolution at Ohio State University's Moritz College of Law, but immediately thereafter she joined the faculty at the University of Detroit Mercy's law school. *Erin Archerd – Associate Professor of Law*, U. DET. MERCY, <https://www.udmercy.edu/about/people/university/law/erin-archerd.php> (last visited Oct. 9, 2020).

<sup>42</sup> Erin Archerd, *An IDEA for Improving English Language Learners' Access to Education*, 41 FORDHAM URB. L.J. 351, 365-71 (2013). However, reflecting the "murky" intersection between these general education laws and the IDEA, she did not specifically point out that the suggested solution only applies to EL students who meet the eligibility standards of the IDEA.

<sup>43</sup> *Id.* at 378-80. The other alternative that she identified is the use of private processes, including related data collection and reporting. *Id.* at 379-80.

resolve issues of misidentification and appropriate services.<sup>44</sup> Next, Professor Claire Raj identified the problem as the gap between the EEOA's flexibility and the IDEA's prescriptiveness.<sup>45</sup> She proposed a reversal of judicial interpretations that allow and accentuate that gap.<sup>46</sup> In light of cohesive jurisprudence, she also recommended more aggressive Office for Civil Rights (OCR) enforcement<sup>47</sup> and a congressional requirement for uniform data reporting.<sup>48</sup> The following year, attorneys Sarah Beebe and Christine Nishimura pointed to inappropriate identification and services for EL students who need special education.<sup>49</sup> However, their recommendations were largely limited to resorting to the complaint investigation under Title VI for failure to provide IDEA documents and IEP meetings in the parents' native language.<sup>50</sup> Most recently, attorney Kevin Golembiewski's article was limited to a remedies argument in the reverse direction of the statutory intersection, contending that the EEOA provides for compensatory education relief for EL students.<sup>51</sup>

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<sup>44</sup> Her problem diagnosis focused on misidentification, which includes both under- and over-identification, thus leaving the resulting issue of appropriate special education services as largely implicit. *Id.* at 360–62. Her survey of Internet sources specific to selected cities in three states and the Latinx and Somali populations in a city in another state revealed differences among states and among EL subgroups that serve as potentially significant intervening variables in the extent of the problems and the effectiveness of her proposed primary solution. *Id.* at 381–97.

<sup>45</sup> Claire Raj, *The Gap Between Rights and Reality: The Intersection of Language, Disability, and Educational Opportunity*, 87 TEMPLE L. REV. 283, 318–19 (2015) (“The flexibility allowed under the EEOA grants school districts the ability to set up language programs that make it unlikely they will appropriately identify and evaluate ELL students with special education needs. Although theoretically the IDEA protects these students by mandating timely and accurate identification and evaluation of disabilities, in practice these students are often overlooked, and because they have not been identified, they are unlikely to know of and assert their rights under the IDEA.”).

<sup>46</sup> *Id.* at 333 (“[J]udicial reconciliation of the EEOA and the IDEA would force courts to restrict EEOA deference in certain respects. Schools’ flexibility in selecting a language program would extend only so far as the district could demonstrate that the program allowed for accurate and timely identification of ELL students with special education needs.”).

<sup>47</sup> *Id.* at 334.

<sup>48</sup> *Id.* at 335–36.

<sup>49</sup> Sarah Beebe & Christine Florick Nishimura, *Right of Limited English Proficient Students with Disabilities and Their Parents to Be Served in Their Native Language*, 21 TEX. J. ON C.L. & C.R. 127 (2016).

<sup>50</sup> *Id.* at 154. As a seemingly secondary matter, they suggested use of the IDEA hearing and state complaint processes to seek “culturally responsive instruction.” *Id.* at 153.

<sup>51</sup> Kevin Golembiewski, *Compensatory Education is Available to English Language Learners Under the EEOA*, 9 ALA. C.R. & C.L. L. REV. 57, 61 (2018). Although acknowledging that the courts have not previously recognized this remedy as available under the EEOA, he premised his argument on the analogy to the IDEA and the desegregation roots of the EEOA. *Id.* at 59–60. Moreover, his proposal was not at all specific to EL students with disabilities.

Of particular interest, these relatively recent articles provided only negligible, if any, coverage of the available hearing officer and court decisions specific to EL students with disabilities. Moreover, their citations to the pertinent published interpretations of administrative agencies—specifically, the U.S. Department of Education’s OCR for Title VI and § 504<sup>52</sup> and its Office for Special Education Programs (“OSEP”) for the IDEA—in addition to the state education agencies’ complaint procedures decisions under the IDEA<sup>53</sup>—were far from comprehensively representative. Finally, the articles neglected § 504 except to the limited extent of occasional reference to OCR or, via its shared authority, Department of Justice (“DOJ”) enforcement for “double-covered” students.<sup>54</sup>

### III. LEGAL DECISIONS<sup>55</sup> AND RELATED AUTHORITY<sup>56</sup> AT THE EL-DISABILITY INTERSECTION

The central part of this Article comprehensively and systematically canvasses the legal decisions at the focal juncture in accordance with the general sequence of the issues under the IDEA and § 504. Thus, the synthesis starts with the

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<sup>52</sup> These policy interpretations include not only OCR and OSEP guidance documents, but also OCR letters of findings (LOFs). *See, e.g.,* Margaret M. McMenamin & Perry A. Zirkel, *OCR Rulings Under Section 504 and the Americans with Disabilities Act: Higher Education Student Cases*, 16 J. ON POSTSECONDARY EDUC. & DISABILITY 55 (2003) (analyzing a sample of OCR LOFs in the postsecondary education context); Perry A. Zirkel, *The Courts’ Use of OCR Policy Interpretations in Section 504/ADA K-12 Student Education Cases*, 349 EDUC. L. REP. 7 (2017) (examining the extent to which courts have found OCR policy letters to be persuasive); Perry A. Zirkel, *The Courts’ Use of OSEP Policy Interpretations in IDEA Cases*, 344 EDUC. L. REP. 671 (2017) (examining the extent to which courts have found OSEP policy letters to be persuasive).

<sup>53</sup> *See, e.g.,* Perry A. Zirkel, *State Laws and Guidance for Complaint Procedures Under the Individuals with Disabilities Education Act*, 368 EDUC. L. REP. 24 (2019) (canvassing the state legislation, regulations, and guidance for this alternate decisional dispute resolution avenue under the IDEA).

<sup>54</sup> “Double-covered” in this context refers to students who meet the eligibility criteria of both the IDEA and § 504, as contrasted with “504-only” students. *See* Perry A. Zirkel, *Identification of Students Under Section 504: An Alternate Eligibility Form*, 357 EDUC. L. REP. 39 (2018); Perry A. Zirkel, *Public School Rates of 504-Only Students*, 356 EDUC. L. REP. 1 (2018).

<sup>55</sup> “Legal decisions” here refers generically to both adjudicative and administrative rulings available in Westlaw and the more specialized legal database, the SpecialEdConnection®. The citations in the second, more specialized database are to either “IDELR” or, equivalent to “WL” citations in Westlaw, “LRP.” “SEA” in the parenthetical part of a citation designates a hearing officer or, in the relatively few states that have opted for a second administrative tier under the IDEA, review officer decision. Finally, the coverage here is limited to the rulings in each decision that are within the scope of the EL-disability interconnection.

<sup>56</sup> This accompanying source refers generically to specific provisions of the IDEA and § 504 legislation and regulations and the administering agency policy interpretations particular to each of the identified subtopics.

identification stage, proceeds to the overriding obligation for FAPE, and ends with miscellaneous other pertinent issues, such as discipline protections.

#### A. Identification

Identification under both the IDEA and § 504 consists of three successive, overlapping district obligations: child find, evaluation, and eligibility.<sup>57</sup> First, child find, which is largely a matter of case law, is the ongoing obligation to evaluate the child within a reasonable time after reasonably suspecting eligibility.<sup>58</sup> Second, evaluation consists of various procedural and substantive requirements to determine initial and continuing eligibility and, for eligible students, the foundation for FAPE.<sup>59</sup> Third, eligibility consists of specified criteria, which for the IDEA includes the need for special education and for § 504 includes the broader scope of a substantial limitation with a major life activity.<sup>60</sup>

##### 1. Child Find

For child find, the EL-specific framework is limited to a joint OCR-DOJ policy letter that provides relevant interpretations and illustrations under Title VI, the IDEA, and § 504.<sup>61</sup> Additionally, the only directly pertinent example at the judicial level is an unpublished decision by a federal court in Pennsylvania.<sup>62</sup> In this case, the parents in Pennsylvania adopted a child from an orphanage in Russia just before his fifth birthday.<sup>63</sup> Approximately one month later, they arranged for his evaluation at a local public education agency, but the results

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<sup>57</sup> See, e.g., Perry A. Zirkel, *Special Education Law: Illustrative Basics and Nuances of Key IDEA Components*, 38 TCHR. EDUC. & SPECIAL EDUC. 263, 264–69 (2015) (providing overview of the overlapping school district identification obligations under the IDEA). The corresponding obligations are the same under § 504 excepting a wider scope of eligibility. 34 C.F.R. §§ 104.3(j), 104.35(a)–(b) (2020). See *Culley v. Cumberland Valley Sch. Dist.*, 758 F. App'x 301, 306–07 (3d Cir. 2018).

<sup>58</sup> E.g., Perry A. Zirkel, *An Adjudicative Checklist for Child Find and Eligibility under the IDEA*, 357 EDUC. L. REP. 30, 30–31 (2018) (identifying the components of child find with the applicable regulations and illustrative case law). For the corresponding, less specific regulation under § 504, see 34 C.F.R. § 104.35(b).

<sup>59</sup> See §§ 300.301, 300.304–300.306 (IDEA); § 104.35(a)–(b) (§ 504).

<sup>60</sup> E.g., Zirkel, *supra* note 29, at 890.

<sup>61</sup> U.S. Dep't of Educ. & U.S. Dep't of Justice, Dear Colleague Letter (Jan. 7, 2015), 115 LRP 524, at \*25, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf> (identifying as impermissible a district policy or practice of “delaying disability evaluations of EL students for special education and related services for a specified period of time based on their EL status.”).

<sup>62</sup> *K.A.B. ex rel. Susan B. v. Downingtown Area Sch. Dist.*, 61 IDELR 159 (E.D. Pa. 2013).

<sup>63</sup> *Id.* at \*2.

were inconclusive due to the language barrier.<sup>64</sup> At the parents' request, at the beginning and at the end of kindergarten the school district provided speech and language evaluations, again yielding inconclusive results due to his limited exposure to English.<sup>65</sup> When the child was in first grade, he received English as a Second Language ("ESL") and reading support services.<sup>66</sup> These services continued in the second grade until late November, when the district conducted a full special education evaluation with parental consent, and concluded that he was eligible under the classification of specific learning disability ("SLD").<sup>67</sup> The parents subsequently filed for a due process hearing, with the relevant claim being an alleged child find violation, specifically that the district had reason to conduct the evaluation before second grade.<sup>68</sup> Both the hearing officer and the court rejected this claim, citing: (1) the difficulty determining whether the child's academic delays were due to language acquisition or learning disability, as evidenced in the inconclusive speech and language evaluations; (2) the compounding factors of the varying developmental progress in the primary grades and the acclimatization from an adoptive environment and foreign culture; and (3) the above-noted<sup>69</sup> express exclusion for limited English proficiency in the IDEA's SLD eligibility criteria.<sup>70</sup>

The remaining decisional authority for child find under the IDEA or § 504 for EL students is sparse and marginal.<sup>71</sup> Thus, to date, outcomes of decisional law have not been responsive to the nuances of early detection and evaluation of EL students' possible eligibility under federal disability law.

## 2. Evaluation

The framework of EL-specific authority for evaluations, beyond the general and less direct ethnic discrimination prohibition,<sup>72</sup> includes the IDEA requirements for: (1) the evaluation materials to be provided and administered

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<sup>64</sup> *Id.* at \*2-3.

<sup>65</sup> *Id.* at \*3.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> The other claim challenged the appropriateness of the resulting IEPs but did not include any argument specific to the child's EL status. *Id.*

<sup>69</sup> *See supra* note 30.

<sup>70</sup> *K.A.B.*, 61 IDELR at \*6.

<sup>71</sup> *E.g.*, *M.H. ex rel. K.H. v. Mt. Vernon City Sch. Dist.*, No. 3-CV-3596(VB), 2014 WL 901578 (S.D.N.Y. Mar. 3, 2014) (denying dismissal of class action suit that includes child find of EL students as one of the alleged systemic violations of the defendant district); *Chaffey Joint Union High Sch. Dist.*, 120 LRP 19658 (Cal. SEA 2020) (ruling by hearing officer that district did not violate child find upon placing child dominant in Mayan dialect in EL program); *In re Student with a Disability*, 120 LRP 14946 (N.M. SEA 2020) (ruling by hearing officer that misidentification as EL student contributed to child find violation).

<sup>72</sup> 34 C.F.R. § 300.304(c)(1)(i) (2020) (requiring evaluation materials "[a]re selected and administered so as not to be discriminatory on a racial or cultural basis").

in the child's native language and in the "form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer"<sup>73</sup> and (2) express exclusions or limitations for the role of limited English proficiency in eligibility determinations.<sup>74</sup> For the overlapping, but broader coverage of § 504, the addition is limited to a joint OCR and DOJ interpretive guidance stating that evaluations must consider the language needs of EL students.<sup>75</sup>

Here, too, the pertinent case law is limited. A published federal appeals court decision provides a major example.<sup>76</sup> In this case, the focus was the reevaluation of a seventh grader in Chicago who since second grade had an IEP for the IDEA classification of SLD, but in the interim had developed various serious medical conditions and experienced the recent compounding emotional effect of his father's death.<sup>77</sup> He lived with his mother, who was exclusively Spanish-speaking.<sup>78</sup> The school psychologist, who was bilingual and also certified in special education, tested the child in English with minimal Spanish translation; she did so based on her conclusion that he had become proficient in and, indeed preferred, English.<sup>79</sup> A second school psychologist, who was also bilingual, completed the evaluation report when the first school psychologist went on maternity leave.<sup>80</sup> The parent challenged the reevaluation and resulting classification of the child as having emotional disabilities, but not intellectual disabilities or other health impairment, in addition to SLD.<sup>81</sup> The court upheld the hearing officer's rejection of the parent's challenges to the qualifications and conclusions of the evaluators, including their judgment that the student was no

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<sup>73</sup> *Id.* § 300.304(c)(1)(ii). The corresponding statutory language is similar but not identical; for example, it does not include the "clearly" qualifier in the feasibility exception. 20 U.S.C. § 1414(b)(3)(A)(ii) (2019).

<sup>74</sup> *Id.* § 1414(b)(5)(C); 34 C.F.R. § 300.306(b)(1)(iii) (2020) (prohibiting limited English proficiency to be the determinant eligibility factor); 34 C.F.R. § 300.309 (specifying EL as one of the exclusions if the primary basis for meeting the criteria for the SLD classification).

<sup>75</sup> Dear Colleague Letter, *supra* note 61, at \*8. More specifically, this EL-focused policy letter not only provides interpretations and illustrations for evaluations under the IDEA, but also § 504, pointing out that the commentary accompanying the § 504 regulations explains that the requirement for administration in the native language of the child applies under the applicable coverage of the Title VI regulations. *Id.* at \*28 n.80 (citing 34 C.F.R. pt. 104, App. A at number 25).

<sup>76</sup> *B.G. ex rel. J.A.G. v. Bd. of Educ. of Chi.*, 901 F.3d 903 (7th Cir. 2018).

<sup>77</sup> *Id.* at 907.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 912.

<sup>80</sup> *Id.* at 910.

<sup>81</sup> *Id.* at 911.

longer EL.<sup>82</sup> In doing so, the court deferred not only to the hearing officer<sup>83</sup> but also to the school psychologist who tested the child.<sup>84</sup>

The remaining decisional law specific to IDEA or § 504 evaluation of EL students is notably limited in its relevance<sup>85</sup> or precedential authority.<sup>86</sup>

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<sup>82</sup> *Id.* at 912–13.

<sup>83</sup> *Id.* at 917 (“This case involves a voluminous administrative record dealing with subject matter beyond the expertise of federal judges. That is why we defer to the hearing officer’s factual findings and decline to substitute our own views on educational policy for the hearing officer’s.”).

<sup>84</sup> *Id.* at 911 (“After all, [the school psychologist] knew [the child], while [the private psychologist who was the parent’s expert] had never met or evaluated him.”).

<sup>85</sup> See *A.D. v. Bd. of Educ. of N.Y.C.*, 690 F. Supp. 2d 193, 208 (S.D.N.Y. 2010) (upholding appropriateness of unilateral placement of child with autism who spoke Spanish at home and English at school based in part on its caveat that “a bilingual evaluation may be more appropriate for assessing her language and verbal development”); *cf.* *Jose P. v. Ambach*, No. 79 C 270, 1987 WL 9684 (S.D.N.Y. Apr. 13, 1987) (enforcing the judgment seven years earlier in two consolidated class actions, with *Dyrcia S.* being on behalf of “handicapped Hispanic children with limited English proficiency” and with the relevant focus here being on the need for bilingual evaluators); *Haowen Z. v. Poway Unified Sch. Dist.*, 61 IDELR 250 (S.D. Cal. 2013) (denying preliminary injunction against IQ testing of EL student with autism, which referred by analogy to the IQ testing controversy specific to African American students in *Larry P. v. Riles*, 495 F. Supp. 926 (N.D. Cal. 1979), *aff’d in part, rev’d in part*, 793 F.2d 969 (9th Cir. 1986), *further ruling sub nom.* *Crawford v. Honig*, 37 F.3d 485 (9th Cir. 1994)).

<sup>86</sup> *E.g.*, *Chaffey Joint Union High Sch. Dist.*, 120 LRP 19658 (Cal. SEA 2020) (ruling by hearing officer upholding the appropriateness of evaluation by bilingual evaluator that carefully took into account linguistic and cultural differences of a child who spoke Mayan dialect under IDEA); *L.A. Unified Sch. Dist.*, 120 LRP 30207 (Cal. SEA 2020) (ruling by hearing officer upholding the appropriateness of reevaluation by bilingual school psychologist); *Colton Unified Sch. Dist.*, 76 IDELR 170 (Cal. SEA 2020) (ruling by hearing officer upholding the appropriateness of reevaluation by bilingual school psychologist); *Charleston (SC) Cnty. Sch.*, 120 LRP 3085 (OCR 2019) (confirming that district agreed to resolve the parent’s complaint before completion of the OCR investigation by providing an IDEA eligibility evaluation via a bilingual assessor or interpreter); *Hazelwood (MO) Sch. Dist.*, 74 IDELR 298 (OCR 2018) (finding the preponderance of the evidence insufficient to establish the district failed to involve EL personnel in the testing (and FAPE) for EL students eligible under the IDEA or § 504); *Louisa Cnty. (VA) Pub. Sch.*, 115 LRP 4506, at \*5 (OCR 2014) (confirming district’s voluntary resolution agreement to provide comprehensive self-assessment and evaluation of EL students “to ensure that they are measured for the extent that they need special education rather than English language skills”); *Bensalem Twp. Sch. Dist.*, 114 LRP 24883 (Pa. SEA 2014) (ruling by hearing officer that district’s IDEA evaluation of recent adoptee of an eastern European country, which included social worker’s interpreter services, found that the learning deficiencies were due to English acquisition not disability, was appropriate, thus denying IEE at public expense); *Northshore (WA) Sch. Dist. No. 417*, 55 IDELR 23 (OCR 2009) (finding violations of the § 504 in the special education evaluation process for EL students, including the use of students as interpreters); *Georgetown (TX) Indep. Sch. Dist.*, 39 IDELR 198 (OCR 2003) (finding that the initial evaluation of Romanian

### 3. Eligibility

For the resulting determination of eligibility, the EL-specific framework consists primarily of the exclusions for IDEA eligibility generally<sup>87</sup> and its SLD classification specifically.<sup>88</sup> The judicial case law to date amounts to a federal case in California in which the child's EL status was rather unclear and of limited significance.<sup>89</sup> In this case, which was subject to successive Ninth Circuit decisions, the language status of the child limited his characterization as "bilingual."<sup>90</sup> In successive evaluations at the beginning and end of fifth grade, the district determined that the child was not eligible under the IDEA.<sup>91</sup> For the IDEA classification relevant to the child's bilingual status, which was SLD, the relevant issue was the school psychologist's choice among his various IQ scores, for which the parents' accused the psychologist of "cherry picking."<sup>92</sup> After remand to reexamine the issue in light of additional evidence, the Ninth Circuit ultimately upheld the lower court's intervening decision that the district's choice was reasonable.<sup>93</sup> Although, the court noted in passing that some of the testing was in both Spanish and English,<sup>94</sup> its cursory and not necessarily consistent EL-related analysis appeared to be limited to citing the school psychologist's explanation that "[I] didn't use the full scale score [of the WISC] because of [the

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child, which concluded that she was not eligible under the IDEA even though the district determined with § 504 and Title VI); L.A. Unified Sch. Dist., 103 LRP 35505 (Cal. SEA 2003) (ruling by hearing officer authorizing reevaluation of Spanish-speaking special education student via specified protocol, including bilingual school psychologist); Bd. of Educ. of N.Y.C., 31 IDELR 202 (N.Y. SEA 1999) (ruling by review officer ordering reevaluation of EL student's IDEA's evaluation based on inconsistent and confusing educational record even though a bilingual school psychologist conducted the original evaluation); Bd. of Educ. of Whitesboro Cent. Sch. Dist., 25 IDELR 547 (N.Y. SEA 1996) (ruling by review officer authorizing evaluation of EL student, in lieu of parent's refusal, conditional upon first determining his proficiency in English).

<sup>87</sup> 34 C.F.R. § 300.306(b) (2020) (providing the determinant and exclusive basis for eligibility).

<sup>88</sup> *Id.* § 300.309 (if it is the primary basis for meeting the eligibility criteria for this classification).

<sup>89</sup> *E.M. ex rel. E.M. v. Pajaro Valley Unified Sch. Dist. (Pajaro I)*, 652 F.3d 999, 1003 (9th Cir. 2011), *aff'd*, *E.M. ex rel. E.M. v. Pajaro Valley Unified Sch. Dist. (Pajaro II)*, 758 F.3d 1162 (9th Cir. 2014).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 1002.

<sup>92</sup> *Id.* at 1003. More generally, the court acknowledged the "fundamental tension" in eligibility determinations between under- and over-identification, which "is particularly salient for minority students, who historically have been over-identified as disabled and disproportionately placed in segregated educational settings, due in part to biased IQ tests." *Id.* at 1004 (citing *Larry P. ex rel. Lucille P. v. Riles*, 793 F.2d 969 (9th Cir. 1984)).

<sup>93</sup> *Pajaro II*, 758 F.3d at 1170–72.

<sup>94</sup> *Id.* at 1167, 1176–77.

child’s] bilingual background, so it seemed more valid to use the performance score.”<sup>95</sup>

The only other pertinent case law consists of relatively rare administrative decisions. For example, in one case, a hearing officer upheld the school district’s eligibility determination that the child, whose native language was Spanish but dominant language was English, did not qualify for special education.<sup>96</sup> The hearing officer acknowledged the difficulties of special education evaluations of EL students,<sup>97</sup> but attributed the student’s declining delays to his bilingual background.<sup>98</sup> The other hearing officer decision did not directly address the EL status of a Cantonese-speaking student in upholding the decision to exit him from special education status.<sup>99</sup>

#### 4. Mis-Identification

Stemming ultimately from all three overlapping obligations, but most directly from eligibility, is the problem of mis-identification. Mis-identification is in part attributable to language and the interconnected issues of culture and ethnicity.<sup>100</sup> The IDEA regulations have requirements to address significant disproportionality based on ethnicity and race in identification as well as placement.<sup>101</sup> Both the research<sup>102</sup> and the litigation<sup>103</sup> have focused, with mixed results, on the disproportionality of African American students under the

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<sup>95</sup> *Id.* at 1166 n.3.

<sup>96</sup> Grapevine-Colleyville Indep. Sch. Dist., 115 LRP 15682 (Tex. SEA 2015).

<sup>97</sup> *Id.* at \*3.

<sup>98</sup> *Id.* at \*6, \*10–11, \*14–15.

<sup>99</sup> Garvey Sch. Dist., 120 LRP 8402 (Cal. SEA 2020). The school psychologist in this case inferably was, like the student, bilingual in Cantonese and English. *Id.* at \*3–4.

<sup>100</sup> *E.g.*, Alfredo J. Artiles et al., *Justifying and Explaining Disproportionality, 1968–2008: A Critique of Underlying Views of Culture*, 76 EXCEPTIONAL CHILD. 279 (2010) (identifying the complexity of overlapping variables, including race, ethnicity, English proficiency, socioeconomic status, and culture).

<sup>101</sup> 34 C.F.R. §§ 300.173, 300.600(d)(3), 300.646 (2020).

<sup>102</sup> *E.g.*, Paul L. Morgan et al., *Are Black Children Disproportionately Overrepresented in Special Education?: A Best-Evidence Synthesis*, 83 EXCEPTIONAL CHILD. 181 (2017); Russell J. Skiba et al., *Risks and Consequences of Oversimplifying Educational Inequities: A Response to Morgan et al. (2015)*, 45 EDUC. RESEARCHER 221 (2016).

<sup>103</sup> *E.g.*, *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247 (3d Cir. 2014); *Larry P. ex rel. Lucille P. v. Riles*, 495 F. Supp. 926 (N.D. Cal. 1979), *aff’d in part, rev’d in part*, 793 F.2d 969 (9th Cir. 1986), *further ruling sub nom.* *Crawford v. Honig*, 37 F.3d 485 (9th Cir. 1994); *Parents in Action on Special Educ. v. Hannon*, 506 F. Supp. 831 (N.D. Ill. 1980).

IDEA.<sup>104</sup> In comparison, the case law, like the empirical exploration,<sup>105</sup> has been less frequent for EL students. Yet, these decisions too reflect both under- and over-identification based on various differentiating factors that here include English proficiency.

For under-identification, the lead judicial example is a federal appellate case in which the plaintiffs were thirteen former students at an alternative public high school serving Somali and Ethiopian refugees receiving EL services.<sup>106</sup> In the wake of a successful state complaint decision that found the school in violation of the IDEA for systematically under-identifying these students for special education,<sup>107</sup> the plaintiffs filed suit under Title VI and the EEOA seeking additional relief, including money damages. However, the Eighth Circuit upheld the judgment in favor of the defendants, concluding that the plaintiffs' delayed

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<sup>104</sup> Although such analyses focus on race, the overlap with other variables that may include EL status is complex. *E.g.*, Rebecca A. Cruz & Janelle E. Rodl, *An Integrative Synthesis of Literature on Disproportionality in Special Education*, 52 J. SPECIAL EDUC. 50 (2018) (categorizing under "race" African American and Latinx students, finding that the proportion of twenty-six studies that analyzed disproportionality data for these principal groups to be 100% and 80%, respectively); Aleksis P. Kincaid & Amanda L. Sullivan, *Parsing the Relations of Race and Socioeconomic Status in Special Education Disproportionality*, 38 REMEDIAL & SPECIAL EDUC. 159 (2017) (finding, consistent with the limited previous research, that the three components of socioeconomic status—income, prestige, and education—were differentially related to racial disproportionality in special education). Moreover, the corresponding examination of racial and ethnic disproportionality for students under § 504 alone, i.e., beyond IDEA coverage, was relatively rare. *E.g.*, Perry A. Zirkel & John M. Weathers, *K-12 Students Eligible Solely Under Section 504: Updated National Incidence Data*, 27 J. DISABILITY POL'Y STUD. 67, 70 (2016) (finding that the proportions of black and Hispanic students with 504 plans were respectively lower than for white students).

<sup>105</sup> *E.g.*, Ilana M. Umansky, Karen D. Thompson, & Guadalupe Díaz, *Using an Ever-English Learner Framework to Examine Disproportionality in Special Education*, 84 EXCEPTIONAL CHILD. 76 (2017) (identifying relevant interrelated contributing variables to EL disproportionality under the IDEA, including classification, location, and grade level).

<sup>106</sup> *Mumid v. Abraham Lincoln High Sch.*, 618 F.3d 789 (8th Cir. 2010). *But cf.* *Methelus v. Sch. Bd. of Collier Cnty.*, 243 F. Supp. 3d 1266 (M.D. Fla. 2017) (finding *Mumid* unpersuasive in light of the common-sense interrelationship between EL and national origin and denying dismissal of EL students' Title VI and EEOA claims, but these claims did not intersect with IDEA or § 504 issues); *N.Y. ex rel. Schneiderman v. Utica Sch. Dist.*, 177 F. Supp. 3d 739 (N.D.N.Y. 2016) (resembling *Methelus*, the court denied dismissal of EL students' Title VI and EEOA claims, but these claims did not intersect with IDEA or § 504 issues).

<sup>107</sup> *Minneapolis Special Sch. Dist. #001*, 106 LRP 11691 (Minn. SEA 2005). The under-identification started with the child find violation of not allowing for special education evaluations until they had been in the school for three years. *Id.* at \*8. The corrective actions included training and progress reports until the identification rate reaches the state average. *Id.* at \*10–11.

evaluation claim under Title VI fatally conflated EL with national origin<sup>108</sup> and that their corresponding claim under the EEOA failed based on the unavailability of the requested relief.<sup>109</sup> The other EL decisions related to under-identification are of limited relevant import.<sup>110</sup>

For over-identification, the sole court decision is only partially pertinent.<sup>111</sup> In this case, the plaintiffs were black and Hispanic students in special education classes for the classification of emotional disturbance, thus only implicitly indicating over-identification and, to an even more limited extent, the EL connection.<sup>112</sup> The Second Circuit vacated and remanded the trial court decision, which had been in the plaintiffs' favor, because it did not address the requisite discriminatory intent under the Fourteenth Amendment's Equal Protection Clause and Title VI.<sup>113</sup> On remand, the case ended with a

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<sup>108</sup> *Mumid*, 618 F.3d at 795 (“While Title VI prohibits discrimination on the basis of national origin, language and national origin are not interchangeable . . . . A policy that treats students with limited English proficiency differently than other students in the district does not facially discriminate based on national origin.”).

<sup>109</sup> *Id.* at 795–96 (assuming arguendo that the plaintiffs proved a violation of the EEOA, as former students they lacked standing for injunctive relief, and the EEOA does not provide for their alternative remedy of money damages).

<sup>110</sup> *E.g.*, *Ray M. ex rel. Juana D. v. Bd. of Educ. of City Sch. Dist. of N.Y.*, 25 IDELR 697 (E.D.N.Y. 1996) (stipulating settlement with defendant state education agency that included various provisions for EL subclass), *further proceedings*, 30 IDELR 247 (E.D.N.Y. 1999) (stipulating settlement with defendant school district providing largely only reporting and notice provisions for EL subclass); *Horry Cnty. Sch.*, 119 LRP 4181, at \*4 (DOJ 2017) (creating district-wide settlement agreement that includes provision that “No EL with a disability will be denied [ESL] services solely due to the nature or severity of the student’s disability; nor will that student be denied special education services due to his/her EL status”); *L.A. (CA) Unified Sch. Dist.*, 117 LRP 17102, at \*6 (OCR 2016) (creating individual voluntary resolution agreement including training provision that “No student is denied EL services because they are disabled and that no student is denied services for disabled students because they are designated an EL”); *Fair Lawn (NJ) Sch. Dist.*, 55 IDELR 176 (OCR 2010) (creating voluntary resolution agreement to evaluate Russian EL student for speech/language impairment); *Haw. State Dep’t of Educ.*, 53 IDELR 101 (OCR 2009) (creating voluntary resolution agreement that included revision of procedures for identification, referral, and evaluation of LEP students for special education eligibility); *cf. S.L.S. v. Clark Cnty. Sch. Dist.*, 70 IDELR 232 (D. Nev. 2017) (dismissing without prejudice pro se parent’s vague and broad-based complaint that included claim of failure to identify EL middle school student as SLD, although granting *in forma pauperis* petition for court costs).

<sup>111</sup> *Lora v. Bd. of Educ. of N.Y.C.*, 623 F.2d 248 (2d Cir. 1980).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 250–51.

settlement.<sup>114</sup> The other EL over-identification decisions under the IDEA or § 504 are of limited legal weight.<sup>115</sup>

B. *Free Appropriate Education (“FAPE”)*

The central obligation under the IDEA, which has more depth but generally less breadth than § 504,<sup>116</sup> is FAPE. The two primary dimensions of FAPE are procedural and substantive.<sup>117</sup>

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<sup>114</sup> *Lora v. Bd. of Educ. of N.Y.C.*, 587 F. Supp. 1572 (S.D.N.Y. 1984).

<sup>115</sup> *E.g.*, Salt Lake City (UT) Sch. Dist., 69 IDELR 82 (OCR 2016) (creating voluntary resolution agreement to revise district’s identification procedures to ensure EL students are not overrepresented in special education, including evaluation by staff persons who are qualified to administer special education tests in the child’s native language); Schenectady (NY) Sch. Dist., 62 IDELR 93 (OCR 2014) (creating voluntary resolution agreement that includes revision of identification procedures to correct over-identification of EL students); Manatee Cnty. (FL) Sch. Dist., 62 IDELR 214 (OCR 2013) (finding insufficient evidence of over-identification of EL students in the intellectual disabilities classification); Long Beach (CA) Unified Sch. Dist., 37 IDELR 14 (OCR 2001) (finding insufficient evidence of overrepresentation of EL students in a particular special education class); *cf.* *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247 (3d Cir. 2014) (ruling against class action challenge that included Title VI and 14<sup>th</sup> Amendment equal protection claims of African American overrepresentation, or mis-identification, in SLD classification); *A.G. v. Lower Merion Sch. Dist.*, 542 F. App’x 194 (3d Cir. 2013) (rejecting, for lack of deliberate indifference, § 504 “regarded as” mis-identification of African American student as SLD); *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248 (3d Cir. 2013) (rejecting on same basis IDEA claim of mis-identification of African American student as SLD). For the separable issue of overrepresentation for suspensions and expulsions, see *infra* notes 148–152 and accompanying text.

<sup>116</sup> For breadth, see *supra* notes 27–28 and accompanying text. For depth, see Perry A. Zirkel, *The Substantive Standard for FAPE: Does Section 504 Require Less Than the IDEA?*, 106 EDUC. L. REP. 471 (1996) (concluding that most courts use the “reasonable accommodation” standard under § 504). Although the majority of courts continue to use the reasonable accommodation standard, which is much more cost conscious than the corresponding FAPE standard, the limited jurisdictions that use a “meaningful access” criterion under § 504 are potentially more fruitful, but yet untested, for EL students with disabilities. Compare *Mark H. v. Hamamoto*, 620 F.3d 1090, 1101–02 (9th Cir. 2010) (meaningful access), with *Campbell v. Bd. of Educ. of Centerline Sch. Dist.*, 58 F. App’x 162, 166–68 (6th Cir. 2003) (reasonable accommodation). However, the added hurdle is the courts’ increasing use of a heightened standard for § 504 cases that is not necessarily limited to money damages claims. See Perry A. Zirkel, *Do Courts Require a Heightened, Intent Standard for Students’ Section 504 and ADA Claims Against School Districts?*, 47 J.L. & EDUC. 109 (2018).

<sup>117</sup> See, *e.g.*, Perry A. Zirkel, *An Adjudicative Checklist of Criteria for the Four Dimensions of FAPE under the IDEA*, 346 EDUC. L. REP. 18, 19–21 (2018) (delineating the standards for procedural and substantive FAPE).

### 1. Procedural FAPE

In the 2004 amendments of the IDEA, Congress codified the two-part test for procedural FAPE, requiring not only a violation of one or more of the various procedural requirements of the IDEA, but also a resulting loss in terms of either the substantive standard for the student or the participation rights of the parents.<sup>118</sup> The EL-related provisions of the IDEA mainly focus on translation and interpreter services for parents. Specifically, the IDEA requires school districts to provide the requisite prior written notice and procedural safeguards notice “in the native language of the parent, unless it is clearly not feasible to do so”<sup>119</sup> and to arrange for “an interpreter for parents . . . whose native language is other than English.”<sup>120</sup> The comprehensive OCR-DOJ EL-related Dear Colleague Letter (DCL) adds this carefully hedged interpretation: “Under Title VI and the EEOA, for a [limited English proficient] parent to have meaningful access to an IEP or Section 504 plan meeting, it also may be necessary to have the IEPs, Section 504 plans, or related documents translated into the parent’s primary language.”<sup>121</sup> However, under the IDEA, OSEP has issued an interpretation that the IDEA requires the district to assure that parents are fully informed for the requisite consent for both evaluation and the initial IEP services, with the translation of IEP documents being neither automatically necessary or sufficient for this purpose.<sup>122</sup> As a related matter, OSEP has also issued policy guidance stating that, subject to reasonable notice requirements, parents have the right to audio-tape the IEP meeting if their primary language is other than English.<sup>123</sup>

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<sup>118</sup> 20 U.S.C. § 1415(f)(3)(E)(ii) (2019). The second step of this analysis is expressly binding only upon the adjudication process. *Id.* Thus, the state complaint investigation process and OCR retain latitude for a single-step approach for their compliance-oriented avenues under the IDEA and § 504, respectively. *E.g.*, Perry A. Zirkel, *The Two Dispute Decisional Processes Under the Individuals with Disabilities Education Act: An Empirical Comparison*, 16 CONN. PUB. INT. L.J. 169, 189 (2017) (finding that this alternate decisional avenue under the IDEA often used a single-step analysis for remedying procedural violations).

<sup>119</sup> 20 U.S.C. §§ 1415(b)(4), 1415(d)(2) (2019); 34 C.F.R. §§ 300.503(c)(1)(ii), 300.504(d) (2020); *see also* 34 C.F.R. § 300.300(a)(iii) (information for parental consent without any corresponding feasibility limitation); 34 C.F.R. § 300.612(a)(1) (notice about confidentiality of personally identifiable student information).

<sup>120</sup> This example is part of the broader requirement to “take whatever action is necessary to ensure that the parent understands the proceedings of the IEP Team meeting.” 34 C.F.R. § 300.322(e).

<sup>121</sup> Dear Colleague Letter, *supra* note 61, at \*27 n.76.

<sup>122</sup> U.S. Dep’t of Educ., Office of Special Educ. & Rehab. Servs., Letter to Boswell (Sept. 4, 2007), 49 IDELR 196.

<sup>123</sup> *E.g.*, U.S. Dep’t of Educ., Office of Special Educ. & Rehab. Servs., Letter to Savit (Jan. 19, 2016), 67 IDELR 216; U.S. Dep’t of Educ., Office of Special Educ. & Rehab. Servs., Letter to Doerr (Apr. 15, 1988), 213 IDELR 127; U.S. Dep’t of Educ., Office of Special Educ. & Rehab. Servs., Letter to Baugh (Aug. 11, 1987), 211 EHLR 479.

In related case law, a federal district court in Illinois denied dismissal of not only the IDEA but also Title VI class action claims of parents who alleged a systemic failure of Chicago Public Schools to provide the parents with translation and interpreter services for meaningful participation in the IEP process.<sup>124</sup> However, the court also established various limitations, including the application of the IDEA's exhaustion provision<sup>125</sup> and the need to prove upon further proceedings the second step for procedural FAPE under the IDEA<sup>126</sup> and intentional discrimination under Title VI.<sup>127</sup> In a similar putative class action against the Philadelphia Public Schools, the court first denied class certification and subsequently granted dismissal for failure to exhaust the impartial hearing process.<sup>128</sup>

In a more unusual twist, a federal district court in Pennsylvania ruled that the parent met the two exceptions for the two-year statute of limitations under the IDEA based on the district's repeated failure to translate notices and provide interpreter services for a monolingual Spanish-speaking parent.<sup>129</sup>

For recordings of IEP meetings, a federal district court in Connecticut ruled that a parent whose primary language was not English was entitled to audio record IEP meetings.<sup>130</sup> The court found the foregoing OSEP policy interpretations persuasive and further concluded that any other member's objection was not controlling.<sup>131</sup>

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<sup>124</sup> *H.P. v. Bd. of Educ. of Chi.*, 385 F. Supp. 3d 623, 627 (N.D. Ill. 2019). The putative class also raised, but the court did not separately address, claims under the EEOA and § 504. *Id.*

<sup>125</sup> For the exhausted cases, see *City of Chi. Sch. Dist. #299*, 72 IDELR 83 (Ill. SEA 2017) (finding that the district violated the IDEA's translation and interpreter requirements but the violation did not result in the requisite loss to the parents' meaningful participation); *City of Chi. Sch. Dist.*, 118 LRP 13297 (Ill. SEA 2017) (finding the district's failure to provide the child's parents with qualified Spanish/English interpretation and translation services resulted in denial of their right to meaningful participation).

<sup>126</sup> *H.P. v. Bd. of Educ. of Chi.*, 385 F. Supp. 3d at 633–37.

<sup>127</sup> *Id.* at 638.

<sup>128</sup> *T.R. v. Sch. Dist. of Phila.*, 223 F. Supp. 3d 321 (E.D. Pa. 2016), *denial of class certification*, No. 15-4782, 2019 WL 1745737 (E.D. Pa. Apr. 18, 2019), *dismissed for exhaustion*, 458 F. Supp. 3d 274 (E.D. Pa. 2020). This case is presently on appeal at the Third Circuit.

<sup>129</sup> *Marple Newtown Sch. Dist. v. Rafael N.*, 48 IDELR 184, at \*5 (E.D. Pa. 2007).

<sup>130</sup> *E.H. v. Tirozzi*, 735 F. Supp. 53, 59 (D. Conn. 1990).

<sup>131</sup> *Id.* at 56–58.

Additional judicial rulings are of only partial or indirect relevance.<sup>132</sup> The remaining pertinent decisional authority is limited to the administrative level.<sup>133</sup>

## 2. Substantive FAPE

In light of its procedural prescriptiveness, the IDEA has a relatively non-rigorous substantive standard.<sup>134</sup> The only EL-specific addition in the regulatory

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<sup>132</sup> *D.Z. v. Bethlehem Area Sch. Dist.*, 2 A.3d 712 (Pa. Commw. Ct. 2010) (rejecting parent's challenges to use of interpreter services at her due process hearing); *Bethlehem Area Sch. Dist. v. Zhou*, 976 A.2d 1284 (Pa. Commw. Ct. 2009) (ruling that the parent was not entitled to translated transcript for her due process hearing).

<sup>133</sup> *E.g.*, *E. Ramapo Cent. Sch. Dist.*, 120 LRP 3865 (N.Y. SEA 2019) (ruling by review officer that lack of Italian interpreter did not impede the parent's participation in light of parent's sufficient proficiency in English); *Lewiston Pub. Sch.*, 120 LRP 3817 (Me. SEA 2019) (complaint investigator's ruling that district did not provide sufficient translation/interpreter services but it did result in loss to the child); *In re Student with a Disability*, 119 LRP 26353 (Del. SEA 2019) (complaint investigator decision that district provided insufficient interpreter services, requiring corrective action); *Hazelwood (MO) Sch. Dist.*, 74 IDELR 298 (OCR 2018) (finding the preponderance of the evidence insufficient to establish that the district failed to involve the appropriate individuals, including ESL personnel, in the testing, staffing, meetings, and services for EL students with disabilities); *Irvine Unified Sch. Dist.*, 117 LRP 32125 (Cal. SEA 2017) (ruling by hearing officer that failure to provide the evaluation plan in the parents' native language was not a prejudicial violation in this case); *L.A. (CA) Unified Sch. Dist.*, 117 LRP 17102 (OCR 2016) (voluntary resolution agreement including providing parent with translation of the child's IEPs); *Clark Cnty. Sch. Dist.*, 116 LRP 53316 (Nev. SEA 2016) (complaint investigator ruling that absence of interpreter was not a violation because parent had previously declared English as her native language); *In re Student with a Disability*, 114 LRP 32831 (N.Y. SEA 2014) (ruling by review officer that district sufficiently made the IEP meeting understandable including bilingual special education teacher serving as interpreter); *In re Student with a Disability*, 115 LRP 20763 (N.Y. SEA 2014) (ruling by review officer that district's failure to provide translations of required notices, conduct a bilingual assessment of the EL student, and to address his language needs in the IEP cumulative amounted, with other procedural violations, that resulted in the requisite loss to the parents' right to meaningful participation); *Springfield (MA) Pub. Sch.*, 56 IDELR 82 (OCR 2020) (finding insufficient evidence to prove that the district denied FAPE to students whose IEPs were not translated promptly into English prior to their assignment to the complainant teacher's class); *Victor Valley (CA) Union High Sch. Dist.*, 50 IDELR 141 (OCR 2007) (finding that the district provided insufficient interpreter services at IEP meetings).

<sup>134</sup> *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist.* RE-1, 137 S. Ct. 988, 999, 1002 (2017) (refining the substantive standard from *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206–07 (1982) from “reasonably calculated to enable the child to receive educational benefits” to “reasonably calculated to enable a child to make *progress appropriate in light of the child's circumstances*” (emphasis added)). For the continuing pro-district outcomes trend before and after *Endrew F.*, see William Moran, Note, *The IDEA Demands More: A Review of FAPE Litigation After Endrew F.*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 495, 510–11 (2020); Perry A. Zirkel, *The Aftermath of Endrew F.: An Outcomes Analysis Two Years Later*, 364 EDUC. L. REP. 1, 3 (2019).

framework is the IDEA's requirement for the IEP team to "consider the language needs of the child as those needs relate to the child's IEP."<sup>135</sup> Additionally, the aforementioned OCR-DOJ policy interpretation repeated this special consideration to extend to the delivery of FAPE to students under the broader coverage of § 504.<sup>136</sup> This joint agency DCL also specified as impermissible any district's "formal or informal policy of 'no dual services,' i.e., a policy of allowing students to receive either EL services or special education services, but not both."<sup>137</sup> Finally, the DCL added this guidance:

To ensure that EL children with disabilities receive services that meet their language and special education needs, it is important for members of the IEP team to include professionals with training, and preferably expertise, in second language acquisition and an understanding of how to differentiate between the student's limited English proficiency and the student's disability.<sup>138</sup>

For EL students, the FAPE case law has been relatively limited although generally consistent. The only judicial ruling in which the child's EL status was a major factor in the determination of substantive FAPE is an unpublished federal court decision in Pennsylvania.<sup>139</sup> The plaintiff was a seventeen-year-old Spanish-speaking student with intellectual disabilities and epilepsy.<sup>140</sup> Although the student was impaired in both Spanish and English, his dominant language was Spanish.<sup>141</sup> The district provided his IEP services almost exclusively in English and replaced his ESL instruction with speech and language therapy in a group setting for a half hour each week.<sup>142</sup> Citing the aforementioned<sup>143</sup> IDEA regulation and applicable substantive standard for FAPE in *Rowley*, the court upheld the review panel's ruling that the IEPs at issue were not appropriate and affirmed the panel's remedial orders, which included bilingual special education instruction.<sup>144</sup> Other than decisions in which the

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<sup>135</sup> 20 U.S.C. § 1414(d)(3)(B)(ii) (2019); 34 C.F.R. § 300.324(a)(2)(ii) (2020). IEP Teams also must consider this special factor in the review and revision of IEPs. 34 C.F.R. § 300.324(b)(2).

<sup>136</sup> Dear Colleague Letter, *supra* note 61, at \*24, \*28.

<sup>137</sup> *Id.* at \*25.

<sup>138</sup> *Id.* at \*27; see NAT'L CTR. FOR ENGLISH LANGUAGE ACQUISITION, ENGLISH LEARNER TOOLKIT FOR STATE AND LOCAL EDUC. AGENCIES 2 (2017), <https://www2.ed.gov/about/offices/list/oela/english-learner-toolkit/index.html> (including self-assessment item concerning adequate EL training for special education teachers of EL students).

<sup>139</sup> *Marple Newtown Sch. Dist. v. Rafael N.*, 48 IDELR 184 (E.D. Pa. 2007).

<sup>140</sup> *Id.* at \*2.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> See *supra* note 135 and accompanying text.

<sup>144</sup> *Marple Newtown Sch. Dist. v. Rafael N.*, 48 IDELR at \*4–5.

student's EL status was only in the background,<sup>145</sup> the other substantive FAPE decisions for EL students were administrative adjudications that largely supported the provision of bilingual special education.<sup>146</sup>

### C. *Additional Issues*

Distinct from decisions for a variety of other issues in public education programs, ranging from admissions to accessibility but specific to EL or disability separately,<sup>147</sup> the additional decisions within the EL-disability

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<sup>145</sup> *E.g.*, Smith v. D.C., 63 IDELR 77 (D.D.C. 2014); Kathryn F. v. W. Chester Area Sch. Dist., 62 IDELR 177 (E.D. Pa. 2013).

<sup>146</sup> *E.g.*, Bonim Lamokom, 119 LRP 36756 (N.Y. SEA 2019) (ruling by review officer that proposed IEP for Yiddish-dominant student with intellectual disabilities that provided special education and speech/language therapy in Yiddish in specialized school, after bilingual reevaluation, met substantive standard for FAPE, although not the proper placement on other grounds unrelated to EL); *In re Student with a Disability*, 118 LRP 50580 (N.Y. SEA 2018) (ruling by review officer that upheld substantive appropriateness of IEP that provided bilingual special education for EL student with autism); L.A. Unified Sch. Dist., 114 LRP 53431 (Cal. SEA 2014) (ruling by hearing officer that parent failed to prove that bilingual special education teacher did not provide appropriate EL services to English-dominant Latinx child with intellectual disabilities); *In re Student with a Disability*, 114 LRP 47163 (N.Y. SEA 2014) (ruling by review officer upholding substantive appropriateness of district's proposed placement, at least on interim basis, of Yiddish-speaking EL child with intellectual disabilities in a monolingual class with a bilingual professional); *In re Student with a Disability*, 114 LRP 46689 (N.Y. SEA 2014) (ruling by review officer that district's change from bilingual to English-only IEP services for EL student with multiple disabilities lacked justification); Vista Unified Sch. Dist., 114 LRP 130 (Cal. SEA 2013) (ruling by hearing officer that IEP for fully bilingual student was appropriate without EL services per bilingual personnel's reevaluation); N.Y.C. Dep't of Educ., 46 IDELR 88 (N.Y. SEA 2006) (ruling by review officer that failure to provide student with bilingual special education in the absence of reevaluation of English proficiency was denial of FAPE); *cf.* Gilroy (CA) Unified Sch. Dist., 120 LRP 4597 (OCR 2019) (voluntary resolution agreement that included EL training for special education teachers of EL students); L.A. (CA) Unified Sch. Dist., 117 LRP 17102 (OCR 2016) (voluntary resolution agreement that contained provision that all IEP and § 504 teams for EL students include "individuals who are knowledgeable about EL student instruction"); *In re Student with a Disability*, 115 LRP 38464 (N.Y. SEA 2014) (ruling by hearing officer that in the wake of district conceding denial of FAPE, the unilateral placement in a Hebrew-English private school was appropriate but reducing the reimbursement to 50% based on the parents unreasonable conduct specific to EL-related issues).

<sup>147</sup> Oddly close at the other side of the scope of the intersection, OCR has addressed a broad range of issues, including admissions, for selective public school programs, such as charter schools, for both EL students and students with disabilities under the separate respective standards of Title VI and § 504, but without extending the analysis to their intersection at the focal subset of EL students with disabilities. *E.g.*, Appleton (WI) Area Sch. Dist., 115 LRP 24527 (OCR 2015); Newpoint (OH) Educ. Partners, 115 LRP 24440 (OCR 2015); Harmony (TX) Pub. Sch., 114 LRP 50981 (OCR 2014) (charter schools); Orange (CA) Unified Sch. Dist., 111 LRP 65098 (OCR 2011) (magnet school).

intersecting coverage are limited to one narrow issue on the merits and a variety of adjudicative dispositions.

### 1. Disciplinary Protections

The IDEA provisions for disciplinary actions, such as expulsions,<sup>148</sup> have occasionally arisen in decisions for EL students with disabilities, but the analysis has been limited. For example, in an administrative adjudication in Florida under the IDEA, the hearing officer upheld the district's disciplinary change in placement for a middle school EL student with SLD and persistent behavioral problems, concluding that his assault on one or more other students was not a manifestation of his disability.<sup>149</sup> The hearing officer's analysis was extremely cursory, entirely lacking any reasoned analysis of her factual findings that (1) the district's initial eligibility evaluation had concluded that cultural misunderstandings contributed to his conflicts with other students; (2) the district failed to implement the resulting IEP provision for counseling; and (3) a private psychologist suspected the additional classification of emotional disturbance but was not able to render a definitive diagnosis due to the language barrier.<sup>150</sup> The connection to and impact on EL students with disabilities was also limited in a recent federal court ruling.<sup>151</sup> The ruling effectively reinstated the July 1, 2018 compliance date of the 2016 IDEA regulations that required states to use a standard methodology for making determinations of significant disproportionality in the implementation of discipline based on race or ethnicity.<sup>152</sup>

### 2. Adjudicative Dispositions

The remaining decisions are a variety of EL-disability claims that were subject to rulings on technical issues of adjudication distinct from the merits. Most of these issues are at the threshold of adjudication, such as the overlapping requirements of exhaustion and jurisdiction. For example, various court decisions specific to EL students with disabilities have been limited to application of the exhaustion provision of the IDEA,<sup>153</sup> which the Supreme

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<sup>148</sup> See 34 C.F.R. § 300.530(c)–(h) (2020) (procedural protections for disciplinary changes in placement); *id.* § 300.646 (addressing significant ethnic disproportionality in disciplinary actions).

<sup>149</sup> Miami-Dade Cnty. Sch. Bd., 55 IDELR 59, at \*7 (Fla. SEA 2010).

<sup>150</sup> *Id.* at \*4–5.

<sup>151</sup> Council of Parent Att'ys & Advocates, Inc. v. DeVos, 365 F. Supp. 3d 28 (D.D.C. 2019).

<sup>152</sup> *Id.* at 34.

<sup>153</sup> See 20 U.S.C. § 1415(l) (2019) (allowing alternative claims in court on behalf of students that are IDEA-eligible but only after obtaining a final decision from an IDEA hearing officer or, in states with two-tiers of administrative adjudication under the IDEA, review officer).

Court recently clarified in *Fry v. Napoleon Community Schools*.<sup>154</sup> More specifically, courts have disposed of § 504 and Title VI claims of EL students with disabilities both before and after *Fry* on the basis of exhaustion.<sup>155</sup> Conversely, a hearing officer in Massachusetts relied on *Fry* to grant a district's motion to dismiss, on jurisdictional grounds, the Title VI and EEOA claims of a high school senior who recently moved from Puerto Rico with an IEP, but not his EL claims that were IDEA-based.<sup>156</sup> The hearing officer agreed at this threshold stage with his claims of intertwined disability and language issues, observing that "this case involves complex issues that arise when a student requires both special education and ELL instruction. Teasing out whether any particular service is required for [the plaintiff student] to receive a FAPE . . . will require careful consideration of expert testimony."<sup>157</sup> Similarly limited to a threshold issue, court decisions for some systemic EL-disability claims were based on class certification.<sup>158</sup>

At the opposite end of the litigation process, another court decision specific to an EL student with disabilities was limited to the issue of attorneys' fees.<sup>159</sup> In this case, although the parent prevailed at the hearing officer level, the court awarded only \$8,000 of the requested \$50,000 because the hearing officer's decision was not more favorable than the prior timely offer of settlement.<sup>160</sup>

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<sup>154</sup> *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017) (ruling that IDEA exhaustion applies to claims for which the gravamen is FAPE).

<sup>155</sup> See *Reyes v. Bedford Cent. Sch. Dist.*, 70 IDELR 223 (S.D.N.Y. 2017) (dismissing parents' § 504 child find and Title VI ESL-misplacement claims for failure to exhaust per *Fry*); see also *Kielbus ex rel. Kielbus v. N.Y.C. Bd. of Educ.*, 140 F. Supp. 2d 284 (S.D.N.Y. 2001) (dismissing parents' § 504 and challenges to district's alleged refusal to provide ESL services to his daughter with hearing impairment).

<sup>156</sup> *Worcester Pub. Sch.*, 71 IDELR 98 (Mass. SEA 2017).

<sup>157</sup> *Id.* at \*5.

<sup>158</sup> See *J.R. v. Oxnard Sch. Dist.*, 75 IDELR 78 (C.D. Cal. 2019) (certifying class of district students subject to identification for identification under IDEA and § 504, including various representatives who were EL students); *McFadden ex rel. McFadden v. Bd. of Educ. for Ill. Sch. Dist. U-46*, No. 05 C 0760, 2008 WL 4877150 (N.D. Ill. Aug. 8, 2008) (certifying two classes in desegregation context, including EL students subject to deficiencies in special education, although ultimate rulings at 984 F. Supp. 2d 882 (N.D. Ill. 2013) did not specifically address this issue beyond gifted program); *Ray M. ex rel. Juana D. v. Bd. of Educ. of City Sch. Dist. of N.Y.*, 884 F. Supp. 696 (E.D.N.Y. 1980) (accepting expansion of class of preschool students to include EL students who have not been evaluated for special education "in their dominant language by appropriate clinicians"); cf. *Holyoke Pub. Sch.*, 118 LRP 7647 (Mass. SEA 2018) (ruling by hearing officer of lack of jurisdiction for class actions, though denial of dismissal of individual claims of parent of EL child with disabilities).

<sup>159</sup> *C.R. ex rel. C.R. v. Bd. of Educ. of Chi.*, 56 IDELR 133 (N.D. Ill. 2011).

<sup>160</sup> *Id.* at \*6–7 (citing 20 U.S.C. §§ 1415(i)(3)(D)–(E) (2019)) (limiting attorneys' fees to the pre-settlement services unless the parent was substantially justified in rejecting the settlement offer).

## CONCLUSIONS AND RECOMMENDATIONS

The problems resulting from the intersection between EL and disability are complex and multi-layered, starting with the inevitably imprecise determination of EL and disability status and ultimately extending to the interaction with culture, poverty, and national origin discrimination. For the limited role of law in resolving the immediate issues, which focus on identification and FAPE in the K–12 school context, the sparse, scattered, and shallow decisions to date represent not only a problem, but also an opportunity. Although only part of a larger systemic issue in society that includes overlapping dramatic disparities, as recognized in the ESSA, based on the intersection of poverty, race, and ethnicity,<sup>161</sup> the EL-disability connection leaves ample room for creative solutions.

The prior suggestions include (1) developing culturally and linguistically sensitive classrooms;<sup>162</sup> (2) expanding alternative dispute resolution mechanisms, such as facilitated IEPs;<sup>163</sup> and (3) providing for more aggressive OCR enforcement and a congressional requirement for uniform data reporting.<sup>164</sup> Such solutions are not at all exclusive, instead inviting a coordinated and cumulative approach. Nevertheless, within the limits of law and its resources, prioritization is necessary.

Recognizing that the problem and its solution involve the inevitable interrelationship and interaction between the students on one end and the policymakers and professionals on the other, my cost-benefit priority targets two subgroups of professional personnel. The first prong of the proposed solution is more effective training and recruitment of bilingual parent-side attorneys, preferably from the same culture and experience as the dominant EL group in the immediate region. The supply of specialized parent attorneys in IDEA and § 504 cases is notably insufficient in many parts of the country, particularly for low-income clients.<sup>165</sup> The shortage of bilingual attorneys with legally effective fluency in Spanish or, less frequently, Arabic or Chinese,<sup>166</sup> particularly with the

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<sup>161</sup> See *supra* notes 2–3 and accompanying text.

<sup>162</sup> See *supra* notes 39–40 and accompanying text.

<sup>163</sup> See *supra* notes 42–44 and accompanying text.

<sup>164</sup> See *supra* notes 45–48 and accompanying text.

<sup>165</sup> See, e.g., Kay Hennessy Seven & Perry A. Zirkel, *In the Matter of Arons: Construction of the IDEA's Lay Advocate Provision*, 9 GEO. J. ON POVERTY L. & POL'Y 193, 218–19 (2002) (reporting national survey findings of notable perceived insufficiency of parent attorneys in special education cases, particularly for low-income parents); cf. Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 CORNELL J.L. & PUB. POL'Y 171, 178–179 (2005) (discussing significant differences in resources and information between wealthy and poor families); Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 423, 449–60 (2012) (identifying resource disparities between districts and parents in terms of access to attorneys and insurance).

<sup>166</sup> See *supra* note 1.

same cultural experience of EL parents and on the parent side of the table, is *a fortiori* evident. For example, in several of the foregoing EL decisions the plaintiff was in the generally disadvantageous position<sup>167</sup> of being *pro se*.<sup>168</sup> Law schools have done little to address the need for bilingual attorneys with training in special education.<sup>169</sup> Recruitment and retention of Latinx students has been insufficient,<sup>170</sup> and the availability of special education clinics<sup>171</sup> and courses,<sup>172</sup> has been limited. Yet, bilingual attorneys have the potential for attracting EL clients and prevailing on their behalf by overcoming the language and cultural barriers for parents. Further, their effectiveness in developing a more nuanced and responsive body of case law represents the opportunity for blending individual employment success with collective educational reform.<sup>173</sup>

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<sup>167</sup> E.g., Perry A. Zirkel, *Are the Outcomes of Hearing (and Review) Officer Decisions Different for Pro Se and Represented Parents?*, 34 J. NAT'L ASS'N ADMIN. L. JUDICIARY 263, 268–79 (2015) (finding, consistent with a long line of previous research with varying designs, that the hearing officer outcomes for *pro se* parents were significantly less favorable than for those with attorney representation). The research concerning the review officer level and the complaint investigation avenues is too limited to yield generalizable conclusions.

<sup>168</sup> E.g., *S.L.S. v. Clark Cnty. Sch. Dist.*, 70 IDELR 232 (D. Nev. 2017); *K.A.B. ex rel. Susan B. v. Downingtown Area Sch.*, 61 IDELR 159 (E.D. Pa. 2013); *Bethlehem Area Sch. Dist. v. Zhou*, 976 A.2d 1284 (Pa. Commw. Ct. 2009); *In re Student with a Disability*, 118 LRP 50580 (N.Y. SEA 2018); *Grapevine-Colleyville Indep. Sch. Dist.*, 115 LRP 15682 (Tex. SEA 2015); *Bensalem Twp. Sch. Dist.*, 114 LRP 24883 (Pa. SEA 2014); *L.A. Unified Sch. Dist.*, 103 LRP 35505 (Cal. SEA 2003); *Bd. of Educ. of Whitesboro Cent. Sch. Dist.*, 25 IDELR 547 (N.Y. SEA 1996).

<sup>169</sup> See Lauryn P. Ragone & Perry A. Zirkel, *Education Law Offerings in Law Schools: An Update*, 49 J.L. & EDUC. 339, 344–45, 347 (2020) (finding the proportion to be approximately 20% of the law schools, although the frequency of this course offering varied).

<sup>170</sup> E.g., William Malpica & Mauricio A. España, *Expanding Latino Participation in the Legal Professions: Strategies for Increasing Latino Law School Enrollments*, 30 FORDHAM URB. L.J. 1393, 1394 (2003) (reporting that Latinx representation in the law profession is disproportionately low and decreasing); see also Juan Carlos Linares, *Si Se Puede?: Chicago Latinos Speak on Law, the Law School Experience, and the Need for an Increased Latino Bar*, 2 DEPAUL J. SOC. JUST. 321 (2009); Brent G. McCune et al., *The Disappearing Mexican-American Law Student*, 19 TEX. HISP. J.L. & POL'Y 1 (2013). The additional option of providing specialized training at and recruitment from the two law schools in Puerto Rico and those in Spanish-speaking countries remains unexplored.

<sup>171</sup> E.g., Ragone & Zirkel, *supra* note 169, at 347 n.48 (finding only two law school clinics focusing on special education law in a national survey of AALS law schools, including one at the University of Puerto Rico).

<sup>172</sup> *Id.* at 347 (finding special education course offerings in 20% of the law schools, which may not coincide with those with a significant number of bilingual law students).

<sup>173</sup> The major EL-related public interest law organizations, MALDEF and the Puerto Rican Legal Defense and Education Fund have too broad a brief to fill this role, especially for individual cases. MALDEF, <https://www.maldef.org/about/> (last updated Oct. 23, 2010); PRLDEF, <https://www.latinojjustice.org/en> (last updated Apr. 12, 2020). This proposal is for

The second and parallel prong of the proposed solution is to take appropriate, formerly called “affirmative,” action in the recruitment and retention of bilingual-bicultural special education personnel,<sup>174</sup> including school psychologists, teachers, and administrators,<sup>175</sup> with a focus on improving identification and interventions for EL students.<sup>176</sup> Again, the shortage and need are obvious.<sup>177</sup> Regarding employment and education, the potential for both preventing and improving litigation through a more nuanced approach to

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the recruitment and preparation of private attorneys, including those with a possible regional or even national scope. At least two parent-side law firms in special education illustrate the feasibility of having a regional or national reach. MCANDREWS, MEHALICK, CONNOLLY, HULSE AND RYAN P.C., <https://mcandrewslaw.com/firm-overview/> (last visited Nov. 10, 2020) (law firm with regional reach); CUDDY LAW FIRM, P.L.L.C., <https://cuddylawfirm.com/about-us/> (last visited Nov. 10, 2020) (law firm with national reach).

<sup>174</sup> This action may be at the state level. *E.g.*, Higher Education Student Assistance Act, 110 ILL. COMP. STAT. 947/65.25(g) (2020) (authorizing scholarships to address school personnel shortages, including bilingual special education and bilingual school service personnel). However, following the models of public and private programs, this specialized focus should be within a national framework. *See, e.g.*, Sarah Ann Eckert, *The National Teacher Corps: A Study of Shifting Goals and Changing Assumptions*, 46 URB. EDUC. 932 (2011) (tracing the National Teacher Corps program under the Higher Education Act of 1965 through the lens of the present Teacher for America program); Anne E. Campbell & David A. Zera, *The BEST Education Project (Bilingual Education, Special and TESOL Education Project)* (May 9, 2011), <https://ncela.ed.gov/files/uploads/47/T365Z120059.pdf> (proposal funded by U.S. Department of Education’s Office of English Language Acquisition, National Professional Development Program).

<sup>175</sup> In the decisions to date, bilingual school personnel have contributed to the pro-district outcomes. *See, e.g., supra* notes 85–86, 146 and text accompanying notes 79–84.

<sup>176</sup> One example, which was apparent from the start was the need for bilingual special education. *See supra* note 38 and accompanying text. Since then, the field has made foundational advances, as reflected in specialized journals. *See, e.g.*, Patricia Martínez-Álvarez & Hsu-Min Chiang, *A Bilingual Special Education Teacher Preparation Program in New York City: Case Studies of Teacher Candidates’ Student Teaching Experiences*, 53 EQUITY & EXCELLENCE EDUC. 196 (2020) (reporting case studies of two bilingual special education candidates student teaching experiences); Steve Daniel Przymus & Manual Alvarado, *Advancing Bilingual Special Education: Translanguaging in Content-Based Story Retells for Distinguishing Language Difference from Disability*, 19 MULTIPLE VOICES FOR ETHNICALLY DIVERSE EXCEPTIONAL LEARNERS 23 (2019) (reporting a study using bilingual language sample analysis of content-based story retells as a step toward differentiating EL and disability); Peishi Wang & Sara B. Woolf, *Trends and Issues in Bilingual Special Education Teacher Preparation: A Literature Review*, 6 J. MULTILINGUAL EDUC. RES. 4 (2015) (finding support for integrated model for preparing special education personnel specializing in EL students).

<sup>177</sup> *See, e.g.*, U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-19-348, SPECIAL EDUCATION: VARIED STATE CRITERIA MAY CONTRIBUTE TO DIFFERENCES IN PERCENTAGES OF CHILDREN SERVED (2019) (noting that the identification of EL students is a particular child find challenge due to insufficiency of staff “who are conversant in a child’s first language and skilled in distinguishing language proficiency from disabilities”).

unraveling the EL-disability knot for both the classroom and the courtroom is a win-win.<sup>178</sup>

These two prongs have a potentially compounding effect. Despite the lesser need for litigation resulting from the second-prong personnel, the first-prong attorney will have the advantage of picking the low-hanging fruit, particularly in rural districts that woefully lack the proposed personnel and in big-city districts that have glaring gaps in their bureaucratic “beadledom”<sup>179</sup> for effective identification and services for EL students with disabilities.

For this low-hanging fruit, the proposed cadre of bilingual attorneys have multiple options for meeting the needs of their client. One option is resorting to the investigative complaint processes under the IDEA and § 504.<sup>180</sup> The previous pertinent decisions reveal that these decisional avenues are often more successful than the adjudicative route,<sup>181</sup> although their precedential value is negligible.<sup>182</sup> The prospects for more aggressive and resourced public enforcement of the IDEA and § 504<sup>183</sup> are slim due to the direction of the Trump administration<sup>184</sup> and the likely longer-term economic constraints of the

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<sup>178</sup> The prevention part of this recommendation is based on more accurate professional practice, which may well exceed legal minima. The improvement part is predicated on the availability of such personnel, including on a private basis, as expert witnesses.

<sup>179</sup> Cf. *J.L. ex rel. J.P. v. N.Y.C. Dep’t of Educ.*, 324 F. Supp. 3d 455, 461 (S.D.N.Y. 2018) (observing the organizational dysfunctions in failing to provide the necessary services for students with severe medical disabilities who require substantial assistance to attend school).

<sup>180</sup> These alternatives are the state complaint process under the IDEA and OCR under § 504. See Zirkel & McGuire, *supra* note 29; Zirkel, *supra* note 118.

<sup>181</sup> Most of the reported investigative decisions thus far have been via OCR. See *supra* notes 110, 115, 133, 146. Yet, wider utilization of state complaint alternative would appear to be promising, particularly but not exclusively for procedural issues. See *supra* notes 107, 118, 133.

<sup>182</sup> Although such decisions and the voluntary resolution agreements that are frequent via the OCR complaint resolution process have no binding effect on other school districts, they may have a practical precedential effect depending on the perceived risks and costs.

<sup>183</sup> See, e.g., Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1465–88 (2011) (proposing expanded public enforcement of the IDEA via informational regulation, compliance monitoring and investigation, and financial incentives to reduce the disparities between poor and wealthy parents).

<sup>184</sup> See, e.g., U.S. Dep’t of Educ. & U.S. Dep’t of Justice, Dear Colleague Letter (Dec. 21, 2018), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf> (withdrawing Title VI guidance on school discipline); U.S. Dep’t of Educ. & U.S. Dep’t of Justice, Dear Colleague Letter (July 3, 2018), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-vi-201807.pdf> (withdrawing Title VI guidance on racial diversity); U.S. Dep’t of Educ. & U.S. Dep’t of Justice, Dear Colleague Letter (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf> (withdrawing Title IX guidance on transgender students); see also Christina A. Samuels, *Education Department Sued over New Approach to Civil Rights Complaints*, EDUC. WK., June 6, 2018, at 10; Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

COVID-19 pandemic.<sup>185</sup> The options of both individual and class action suits, with special care in terms of selection of the cases, availability of expert witnesses, and consideration of the exhaustion issue may yield the precedents currently lacking in the jurisprudence. One example, which Professor Raj insightfully identified, is the development of case law that merges the programmatic considerations of appropriate action into the individualized focus for appropriate specially designed instruction.<sup>186</sup> This development, with the assistance of the new cadre of bilingual attorneys and their counterpart specialists in education, would not only mitigate the courts' open-ended deference to school district practices<sup>187</sup> but also elevate the standards against under- and over-identification and improve both ESL and bilingual special education.

Thus, the increasing traffic of EL students at the complex intersection with disability laws warrants special steps to avoid the perils of improper identification and inappropriate interventions. Whether the intersection is akin to a confluence of roads or rivers, the necessary and appropriate steps should include the development of complementary cadres of specialized bilingual attorneys and educators, who are respectively analogous to crossing guards or lifeguards, for the benefits of both individual and societal success.

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<sup>185</sup> E.g., Òscar Jordà, Sanjay R. Singh, & Alan M. Taylor, *The Long-Term Economic Hangover of Pandemics*, 57 FIN. & DEV. 12 (June 2020), <https://www.imf.org/external/pubs/ft/fandd/2020/06/pdf/long-term-economic-impact-of-pandemics-jorda.pdf>.

<sup>186</sup> Raj, *supra* note 45, at 331–35.

<sup>187</sup> E.g., A.D. v. Bd. of Educ. of N.Y.C., 690 F. Supp. 2d 193, 208 (S.D.N.Y. 2010) (upholding the school district's placement decision despite the district ignoring in its subsequent testing the warning in the first testing that "a bilingual evaluation may be more appropriate for [this student's] language and verbal development").