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The Gap Between Rights and Reality: The Intersection of Language, Disability, and Educational Opportunity

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**THE GAP BETWEEN RIGHTS AND REALITY:
THE INTERSECTION OF LANGUAGE, DISABILITY,
AND EDUCATIONAL OPPORTUNITY**

*Claire Raj**

English Language Learners (ELLs) are the fastest growing group in America's schools. The debate over how to best serve them is largely dominated by fights over English-only versus bilingual instruction. This controversy is once again taking center stage, as states like California and Massachusetts reassess their language programs after a decade of English-only laws on the books. But once again, lost in the battle over language pedagogy is the fact that ELLs face educational challenges beyond language. Like any other student population, the ELL cohort includes students with disabilities who need special education services. In theory, two different statutes protect the rights of ELLs with disabilities: the Individuals with Disabilities Education Act (IDEA), and the Equal Educational Opportunities Act (EEOA), which guarantees assistance in overcoming language barriers. In reality, however, neither law adequately safeguards ELLs' equal access to education. Rather, when students have both language and disability challenges, they fall through a gap that exists between the implementation of these two statutes.

To date, schools and courts have largely ignored the intersection of language and disability, operating as though the IDEA addresses one set of students and the EEOA an entirely different set. Many schools select and implement their English language acquisition programs without giving any thought to the unintended consequences on special education. This approach, sanctioned by courts, is both flawed and dangerous because a school's chosen language program can either impede or enhance the accurate identification of students with disabilities. Even more worrisome, some schools use language acquisition as a justification to delay identification of ELLs with disabilities. While this is inconsistent with the intent of the IDEA, provisions of the IDEA, as interpreted by courts, do not adequately prevent it. Even worse, EEOA precedent may actually encourage such delays. As a result, students with dual challenges of language and disability do not receive the necessary educational services these two statutes are designed to provide. The mixed messages from statutes and courts can be resolved, but such cohesion requires reading the IDEA and EEOA together, not separately. This Article provides the specific analysis by which to do so.

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INTRODUCTION

One of the most important and difficult tasks teachers face is deciding how to best address a student's learning difficulties. This challenge occurs every day in every school across the country. When a student struggles, an effective teacher alters his or her method in an attempt to reach that student and make the material more palatable. In the face of continued learning struggles that are unresponsive to changes in teaching technique or individualized assistance, a teacher may refer a child for a special education evaluation to determine whether an underlying disability is the root of the child's struggles. The decision to refer a student for a special education evaluation is often highly subjective, particularly when a student's struggles are not directly related to an externally measureable factor, such as a hearing or vision impairment.¹ Moreover, the subsequent evaluation by a specialist, while often based on standardized assessment tools, does not eradicate the element of subjectivity.²

These generally difficult decisions are further complicated when the student is limited in English proficiency. To get the decisions right for English Language Learners (ELLs),³ teachers and administrators must disentangle struggles based in language proficiency from struggles rooted in an underlying disability.⁴ Rather than directly confront this challenge, some schools or teachers ignore it by delaying special education referrals with the hope that development of language proficiency will either eliminate the problem or clarify the disability.⁵ In contrast, in attempts to avoid the inherent challenges and pressures of transitioning large numbers of ELLs to English proficiency, others take the easy way out and simply

1. COMM. ON MINORITY REPRESENTATION IN SPECIAL EDUC., MINORITY STUDENTS IN SPECIAL AND GIFTED EDUCATION 5 (M. Suzanne Donovan & Christopher T. Cross eds., 2002); Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.-C.L. L. REV. 407, 456 (2001).

2. See generally Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237, 1262 (1995); Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity Under the IDEA*, 58 HASTINGS L.J. 1147 (2007); Paul M. Secunda, "At Best an Inexact Science": *Delimiting the Legal Contours of Specific Learning Disability Under IDEA*, 36 J.L. & EDUC. 155 (2007) (reviewing PERRY A. ZIRKEL, *THE LEGAL MEANING OF SPECIFIC LEARNING DISABILITY FOR SPECIAL EDUCATION ELIGIBILITY* (2006)).

3. When used in this Article, the term "English Language Learner" (ELL) means a student who lacks the English-language ability needed to participate fully in school. In most cases, students are identified as ELLs after they complete a formal assessment of their English literacy, during which they are tested in reading, writing, speaking, and listening comprehension. A variety of terms are used to describe this group, including English learners (ELs), limited English proficient (LEP), nonnative English speakers, and language-minority (LM) students.

4. PAULA OLSON, *REFERRING LANGUAGE MINORITY STUDENTS TO SPECIAL EDUCATION*, ERIC DIG. 5 (1991).

5. See, e.g., Fair Lawn (NJ) Sch. Dist., 55 IDELR 176, 176-77 (2010) (addressing a New Jersey school district's policy "not to evaluate a student for a possible articulation deficit until he learned sufficient English").

refer ELLs for special education services.⁶ For these teachers and schools, any additional help for a struggling ELL—warranted or not—is welcome.

The failure to appropriately address disability within the ELL population has gone largely unnoticed in the past, but it increasingly demands a solution.⁷ ELLs now represent the fastest growing group of students in the United States.⁸ They have a significant presence in almost every state.⁹ By 2025, one in four students will be categorized as an ELL.¹⁰ Thus, avoidance and half measures are no longer viable options. Schools must confront the challenges presented by ELLs and find ways to ensure adequate and appropriate educational services are in place to meet their diverse needs.

Federal laws obligate teachers and administrators to make the difficult decisions surrounding the best way to address the dual challenges of disability and language proficiency.¹¹ However, these laws do little to create structures which help schools get those decisions right; and they also fail to provide a clear remedy when schools get them wrong. The result is that some schools routinely ignore or under-identify ELLs with disabilities, focusing first and solely on language acquisition, while others over-identify ELLs with disabilities in an attempt to provide more services, regardless of whether they are appropriate or warranted.¹² In either scenario, schools are failing ELLs and impeding equal access to education.

6. Amanda L. Sullivan, *Disproportionality in Special Education Identification and Placement of English Language Learners*, 77 *EXCEPTIONAL CHILDREN* 317, 320 (2011).

7. See *infra* Part II.C for a discussion of how the intersection of disability and language in education has resulted in a failure to meet the special education needs of ELLs.

8. PATTI RALABATE, NATIONAL EDUCATION ASSOCIATION, TRUTH IN LABELING: DISPROPORTIONALITY IN SPECIAL EDUCATION 7 (2007), available at <http://www.nea.org/assets/docs/HE/EW-TruthInLabeling.pdf>; *English-Language Learners*, EDUC. WEEK, <http://www.edweek.org/ew/issues/english-language-learners/> (last updated June 16, 2011).

9. U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2014, at 52 (May 2014), available at <http://nces.ed.gov/pubs2014/2014083.pdf> (providing state-by-state breakdown of the percentage of ELL students enrolled in public school); see also *English-Language Learners*, *supra* note 8.

10. U.S. DEP'T OF EDUC., BUILDING PARTNERSHIPS TO HELP ENGLISH LANGUAGE LEARNERS (July 27, 2006), available at <http://www2.ed.gov/nclb/methods/english/lepfactsheet.pdf>.

11. See Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–1482 (2012); Equal Educational Opportunities Act (EEOA), 20 U.S.C. § 1703(f) (2012).

12. Nationally, schools currently identify about nine percent of ELLs as requiring special education services. CHANDRA KELLER-ALLEN, ENGLISH LANGUAGE LEARNERS WITH DISABILITIES: IDENTIFICATION AND OTHER STATE POLICIES AND ISSUES 2 (2006), available at http://nasdse.org/DesktopModules/DNNspot-Store/ProductFiles/31_37349382-317f-47d9-aefc-7a2c0636eb11.pdf. Compared to native English-speaking students, this number represents an under-identification of ELLs' special education needs. *Id.* However, when delving into the data, ELLs are also overrepresented in certain categories of disabilities. *Id.* at 1; see also U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2013, at 54–59 (May 2013), available at <http://nces.ed.gov/pubs2013/2013037.pdf>. ELLs can also be overrepresented in certain geographic regions of the country. KELLER-ALLEN, *supra*, at 12. Some researchers have theorized that ELLs are overrepresented in districts with small ELL populations and underrepresented in districts that have ELL populations of 100 or more students. See *id.*

The primary law governing educational opportunities of ELLs, the Equal Educational Opportunities Act (EEOA), obligates schools to implement language services and programs which ensure that ELLs' language barriers do not unduly impede their education.¹³ Like other students, however, ELL students have a diverse set of educational needs. And, like their native English-speaking peers, some ELLs have disabilities that require accommodations or special education services. The EEOA and the case law interpreting it say nothing of ELLs with special education needs. Rather, the consideration of those needs falls within general statutes governing students with disabilities, most prominently the Individuals with Disabilities Education Act (IDEA).¹⁴

The IDEA grants students with disabilities an affirmative right to a free public education appropriate for their needs.¹⁵ States must identify, locate, and evaluate all children with disabilities residing in their jurisdiction and provide services to children who meet the statutory definition of a "child with a disability."¹⁶ While the IDEA mandates that schools evaluate students' potential disabilities in their native language, the IDEA says little else about how to disaggregate disability and language proficiency.¹⁷ Thus, while both the IDEA and the EEOA offer protections to ELLs, those protections are distinct and prove inadequate when the challenges of disability and language intersect.

This failure to appropriately serve ELL students with disabilities is often masked, if not sanctioned, by courts' interpretation of the EEOA. Courts have adopted a set of legal principles for applying the EEOA that affords schools and states substantial flexibility in providing language services.¹⁸ For the most part, schools are free to choose any language program they wish, so long as they implement it in a way intended to produce positive results over time.¹⁹ While this flexibility may be warranted in regard to the language services a school provides, the indirect result is to sanction language programs and practices that make accurate identification and assessment of ELLs with disabilities less likely. Were ELLs a monolithic group, defined solely by their language barriers, this

13. 20 U.S.C. § 1703(f).

14. *See id.* §§ 1400–1482; *see also* Memorandum from Michael L. Williams, Assistant Secretary for Civil Rights, U.S. Dep't of Educ., to OCR Senior Staff, Policy Update on Schools' Obligations Toward National Origin Minority Students with Limited-English Proficiency (LEP Students) (Sept. 27, 1991), <http://www2.ed.gov/about/offices/list/ocr/docs/lau1991.html>.

15. 20 U.S.C. § 1412.

16. *Id.* §§ 1401(3), 1412, 1414; *see also* Robert A. Garda, Jr., *Who is Eligible Under the Individuals with Disabilities Education Improvement Act?*, 35 J.L. & EDUC. 291, 292 (2006) (discussing the IDEA's definition of "child with a disability").

17. 20 U.S.C. § 1414(b)(3)(A)(ii). The IDEA's child find provisions mandate that schools seek out children with disabilities, but these provisions do not generally affect how schools choose to implement curriculum. *See infra* Part II.B.1 for an overview of the IDEA's child find mandate.

18. *See generally* Derek W. Black, *Civil Rights, Charter Schools, and Lessons to Be Learned*, 64 FLA. L. REV. 1723, 1739–42 (2012); Eric Haas, *The Equal Educational Opportunity Act 30 Years Later: Time to Revisit "Appropriate Action" for Assisting English Language Learners*, 34 J.L. & EDUC. 361, 362, 387 (2005).

19. *See, e.g.,* *Castaneda v. Pickard*, 648 F.2d 989, 1009 (5th Cir. 1981); *Teresa P. ex rel. T.P. v. Berkeley Unified Sch. Dist.*, 724 F. Supp. 698, 713–16 (N.D. Cal. 1989).

flexibility might not present problems. But because ELLs' learning challenges can stretch beyond language to include disabilities, a laissez-faire approach to language services has negative implications on the provision of special education services.

The IDEA rejects a laissez-faire approach to disabilities by requiring that students with suspected disabilities be identified, appropriately assessed, and, if found disabled and in need of services, timely provided with a plan to meet their special educational needs.²⁰ The IDEA's primary function, however, is to protect students' rights once they are suspected of or identified as having a disability.²¹ Prior to that point, the IDEA places no significant limitations on curriculum or how it is delivered. Thus, the IDEA says nothing directly about the manner in which a school runs its language acquisition program. But, of course, what occurs in school prior to the provision of special education services is crucial to a school's ability to correctly identify students with disabilities.²² A school's chosen language acquisition program and its implementation can either impede or enhance the accurate identification of disabilities. In fact, some schools use language acquisition as a justification to delay identification of ELLs with disabilities.²³ This is inconsistent with the intent of the IDEA and often inhibits full and effective compliance with the IDEA.²⁴ The IDEA mandates that schools locate and evaluate children with disabilities, and do so accurately. But in poorly designed and implemented ELL programs, the IDEA's mandates are difficult to meet and the cause of action for challenging breaches of the mandate less obvious. Thus, as a practical matter, students with dual challenges of language and disability can easily fall through a gap that exists between the very two statutes designed to protect their right to education.

To this point, solutions have eluded both courts and scholars. Scholars have yet to focus seriously on the problem,²⁵ and courts and litigants seem confused

20. 20 U.S.C. §§ 1400, 1414.

21. *See id.* § 1400(d).

22. *See* Glennon, *supra* note 2, at 1313–14. *See generally* Losen & Welner, *supra* note 1, at 420 (discussing the connection between general educational quality and the delivery of special education services); Michael Rebell, *Safeguarding the Right to a Sound Basic Education in Times of Fiscal Constraint*, 75 ALA. L. REV. 1855, 1931–33 (2012) (discussing how low quality education drove parents to seek special education placements in New York).

23. *See, e.g.*, K.A.B. *ex rel.* Susan B. v. Downingtown Area Sch. Dist., No. 11-1158, 2013 WL 3742413, at *6 (E.D. Pa. July 16, 2013); Fair Lawn (NJ) Sch. Dist., 55 IDELR 176, 176 (2010).

24. *See* 20 U.S.C. § 1400(d) (stating that the purpose of the IDEA is to ensure equal educational rights for children with disabilities).

25. The scholarship pertaining to ELL students has focused almost entirely on the more general issues of program selection, funding, educational quality, and the politics of bilingualism. *See, e.g.*, Haas, *supra* note 18, at 362 (criticizing the ways in which courts have misinterpreted scientific data regarding ELLs); Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CAL. L. REV. 1249, 2055–59 (1988) (explaining how the bilingual education debate, in reality, “reflects a battle over the allocation of discretion to make educational policy”); Rosemary C. Salomone, *Multilingualism and Multiculturalism: Transatlantic Discourses on Language, Identity, and Immigrant Schooling*, 87 NOTRE DAME L. REV. 2031 (2012) (exploring issues of language and identity in public education); Jessica R. Berenyi, Note, “Appropriate Action,” *Inappropriately Defined: Amending the Equal Educational Opportunities Act of 1974*, 65 WASH. & LEE L. REV. 639 (2008)

by it. For instance, in 2005, a group of high school students alleged that their school district's policy of delaying special education assessment of ELL students for three years while their language proficiency improved was both a violation of the EEOA and impermissible national origin discrimination under Title VI of the Civil Rights Act of 1964.²⁶ In 2010, the Eighth Circuit rejected the Title VI claim because the district had a legitimate, nondiscriminatory reason for treating the students differently—namely, lack of language proficiency.²⁷ The court dismissed the EEOA claim, reasoning that the plaintiffs, who were no longer students, did not have standing to seek relief.²⁸ The court never considered an IDEA analysis because the plaintiffs did not file a claim under the Act. From the plaintiffs' perspective, the district's language program was preventing access to IDEA protections, meaning that the IDEA had not yet been implicated.

A more recent case demonstrates the problem in reverse: courts not being receptive to litigants seeking to use the IDEA to remedy identification delays due to language. In 2013, adoptive parents of a Russian-born student sought to hold their Pennsylvania school district liable for delays in identifying their son's learning disability.²⁹ The court rejected the parents' IDEA claim, finding that the school's delay was justified due to the child's lack of English proficiency.³⁰ The court discarded the applicability of the EEOA altogether, reasoning that it spoke only to language needs, not special education.³¹ In short, these cases demonstrate that ELL students with disabilities, while theoretically protected by two statutes, sometimes have little to no protection under either.

Regardless of what legal structures are in place, disentangling language and disability needs will remain challenging, but until appropriate structures are in place, the process is sure to be unreliable and to deprive students with disabilities of the services to which they are entitled. This Article's major contributions are threefold. First, it identifies the gap between the implementation of the EEOA and the IDEA. Current precedent and scholarship assume that students' disability needs can be resolved solely by the IDEA while students' language barriers are addressed by the EEOA. They fail to appreciate the fact that when the problems intersect in a single student's life, so too must the law and precedent. Currently, neither the statutes nor the case law makes this

(proposing additional statutory language to the EEOA aimed to protect the rights of LEP students); Travis W. England, Note, *Bilingual Education: Lessons from Abroad for America's Pending Crisis*, 86 WASH. U. L. REV. 1211, 1219 (2009) (arguing that states need more bounded guidance to effectively meet the educational needs of ELLs). The only legal scholarship to previously address, in any respect, the intersection of disabilities and language barriers is Emilie Richardson, *Breaking the Norm: Accurate Evaluation of English Language Learners with Special Education Needs*, 17 B.U. PUB. INT. L.J. 289 (2008), and Erin Archerd, *An Idea for Improving English Language Learners' Access to Education*, 41 FORDHAM URB. L.J. 351, 356–62 (2013).

26. *Mumid v. Abraham Lincoln High Sch.*, 618 F.3d 789, 792–93 (8th Cir. 2010).

27. *Id.* at 794.

28. *Id.* at 797.

29. *K.A.B. ex rel. Susan B. v. Downingtown Area Sch. Dist.*, No. 11-1158, 2013 WL 3742413, at *1 (E.D. Pa. July 16, 2013).

30. *Id.* at *6–8.

31. *Id.* at *11–12.

connection. Second, this Article proposes the legal analysis by which courts and federal agencies could and should bridge the gap between the EEOA and the IDEA. Third, the Article proposes necessary alterations in data collection and monitoring of language programs that would assist policymakers and researchers in understanding the problem, regardless of what policies and judicial doctrines are in place.

This Article proceeds in four Sections. Section I describes the ELL population in U.S. schools, the language programs they receive, and the most important statute affecting their educational rights: the EEOA. Section II analyzes the intersection between ELLs and special education, with a focus on the IDEA and the failures of the IDEA to serve ELLs appropriately. Section III exposes the gaps that exist when implementation of language programs under the EEOA prevent proper compliance with the IDEA and demonstrates how neither statute is effectively protecting the educational rights of ELLs with disabilities. Section IV proposes three interrelated solutions to this gap that would encourage the accurate and appropriate identification of ELLs with special education needs.

I. ENGLISH LANGUAGE LEARNERS: DEMOGRAPHICS, EDUCATIONAL PROGRAMS, AND LEGAL PROTECTIONS

A. *The Nation's Most Rapidly Expanding Demographic Group*

ELLs represent the fastest growing school-age population in the United States.³² An estimated 4.7 million students in U.S. schools come from a non-English-speaking background, which amounts to ten percent of the kindergarten through twelfth grade enrollment in public schools.³³ In six states, the size of the ELL population has at least doubled in five years, with the most rapid growth occurring in states with historically low concentrations of ELL students.³⁴ Consequently, many states are still struggling to implement language programs which effectively address this emerging population's educational needs.

Although Spanish is by far the most prevalent native language within this group, accounting for over two-thirds of ELLs, more than one hundred languages are spoken by the ELL population.³⁵ The families of ELLs are consistently more socioeconomically disadvantaged than those of their peers. ELL youth are half as likely to have a parent with a college degree and much more likely to live in a low-income household.³⁶ The majority of ELLs attend schools that tend to be larger, more urbanized, and serve students from

32. KELLER-ALLEN, *supra* note 12, at 2.

33. COURTNEY TANENBAUM ET AL., NATIONAL EVALUATION OF TITLE III IMPLEMENTATION—REPORT ON STATE AND LOCAL IMPLEMENTATION 1 (2012), available at <https://www2.ed.gov/rschstat/eval/title-iii/state-local-implementation-report.pdf>.

34. CHRISTOPHER B. SWANSON, PERSPECTIVES ON A POPULATION: ENGLISH LANGUAGE LEARNERS IN AMERICAN SCHOOLS 3 (2009).

35. *Id.* at 12.

36. *Id.* at 10.

predominantly low-income and racial and ethnic minority backgrounds.³⁷ Thus, language is not the only challenge faced by ELL students.

ELLs also consistently score lower than other subgroups on standardized tests designed to measure academic achievement and progress, and have among the highest grade retention and dropout rates of all subgroups.³⁸ ELLs are twice as likely as their English-proficient peers to be reading below grade level.³⁹ In a national assessment of reading comprehension in 2005, only seven percent of fourth-grade ELL students scored at or above the proficient levels, compared with thirty-two percent of native English speakers.⁴⁰ Only four percent of eighth-grade ELL students scored at or above the proficient level compared with thirty percent of native English speakers.⁴¹

These academic challenges are not surprising, since by definition ELL students are not English proficient. However, as this Article demonstrates, these challenges take on another dimension for an ELL student who may also be struggling with disabilities. Low academic achievement and reading-related difficulties are primary reasons teachers refer students for special education evaluations.⁴² Teachers may be unable to accurately identify these difficulties in the ELL population when language struggles are intertwined with learning disabilities.⁴³ The combination of language and disability can lead teachers to both over- and under-identify ELL students for special education.⁴⁴ Before delving into the intersection of disabilities within the ELL population, it is important to first understand the ways in which schools are addressing language needs.

37. *Id.* at 7.

38. JINOK KIM, NAT'L CTR. FOR RES. ON EVALUATION, STANDARDS, & STUDENT TESTING, CRESST REPORT 810, RELATIONSHIPS AMONG AND BETWEEN ELL STATUS, DEMOGRAPHIC CHARACTERISTICS, ENROLLMENT HISTORY, AND SCHOOL PERSISTENCE 10–13 (2011), available at <http://www.cse.ucla.edu/products/reports/R810.pdf>. “Grade retention” is used here to mean that the student is forced to repeat the grade they are currently in rather than progress to the next grade level.

39. Alba A. Ortiz et al., *The Role of Bilingual Education Teachers in Preventing Inappropriate Referrals of ELLs to Special Education: Implications for Response to Intervention*, 34 BILINGUAL RES. J. 316, 317 (2011).

40. DAVID J. FRANCIS ET AL., CTR. ON INSTRUCTION, PRACTICAL GUIDELINES FOR THE EDUCATION OF ENGLISH LANGUAGE LEARNERS: RESEARCH-BASED RECOMMENDATIONS FOR INSTRUCTION AND ACADEMIC INTERVENTIONS 4 (2006), available at <http://www2.ed.gov/about/inits/ed/lep-partnership/interventions.pdf>.

41. *Id.*

42. Ortiz et al., *supra* note 39, at 317.

43. See Jennifer F. Samson & Nonie K. Lesaux, *Language-Minority Learners in Special Education: Rates and Predictors of Identification for Services*, 42 J. OF LEARNING DISABILITIES 148, 150 (2009) (discussing a study that found teachers are less likely to identify ELLs with reading disabilities than their native English-speaking counterparts).

44. *Id.* at 154–56. “Overrepresentation” and “under-identification” when used in this Article are meant to describe rates of ELL identification for special education relative to the overall student population. Disproportionality exists throughout different levels of the education system, from variances between states, within states, and even within school districts. *Id.* at 148. Disproportionality is also measured in rates of identification for particular disabilities. *Id.* at 149–50.

B. *Common English Language Acquisition Programs*

Schools cannot ignore the needs of ELLs.⁴⁵ In order to address their language needs, schools have opted for several types of English language acquisition programs, ranging from one-year English-immersion programs to bilingual programs. These programs can be grouped into three broad categories: (1) English as a Second Language (ESL), (2) content instruction designed for ELLs, and (3) instruction in students' native language or bilingual instruction.⁴⁶

ESL focuses on the development of proficiency in the English language, including grammar, vocabulary, and communication skills, with a majority of the instruction provided in English.⁴⁷ Students may have a full class period of ESL instruction in a classroom of all ELLs, or they may receive "push-in" instruction, where they receive extra help while in a classroom of native English speakers.⁴⁸ Extra help may take the form of a teacher's aide who assists the ELL student by explaining certain instructions in the student's native language, or it may be that the ELL student is given a different set of standards for completing an assignment.⁴⁹ For instance, instead of writing, an ELL student will be asked to draw a picture.

A second category of instruction, content instruction designed for ELLs, focuses on teaching English through academic content rather than English language alone.⁵⁰ While content instruction is delivered in English, adjustments are made to help make subject matter accessible for ELLs.⁵¹ These programs are sometimes referred to as "sheltered English" programs or "structured English immersion."⁵² Structured English immersion differs from ESL in that English is not taught as a language with a focus on learning the language. Rather, the focus is on content of subject matter. ELLs will generally receive instruction along with their native English-speaking peers, but they may receive additional instruction in order to help facilitate their understanding.⁵³ For example, teachers may use simplified language and visual aids to ensure that an ELL student can follow along.

The final category, instruction in native language, is commonly referred to as bilingual education. Program models vary widely with some programs aiming for proficiency in dual languages while others limit native language use for the

45. See generally EEOA, 20 U.S.C. § 1703(f) (2012).

46. TANENBAUM ET AL., *supra* note 33, at 38–39.

47. *Id.*; see also ROBERT LINQUANTI, FOSTERING ACADEMIC SUCCESS FOR ENGLISH LEARNERS: WHAT DO WE KNOW? 3 (1999), available at http://www.wested.org/online_pubs/Foster_Academic_Success_092309.pdf.

48. LINQUANTI, *supra* note 47, at 5–8; TANENBAUM ET AL., *supra* note 33, at xvi, 39.

49. LINQUANTI, *supra* note 47, at 5–8.

50. TANENBAUM ET AL., *supra* note 33, at 39; BRACKEN REED & JENNIFER RAILSBACK, NORTHWEST REG'L EDUC. LAB., STRATEGIES AND RESOURCES FOR MAINSTREAM TEACHERS OF ENGLISH LANGUAGE LEARNERS 10–13 (2003).

51. TANENBAUM ET AL., *supra* note 33, at 39.

52. *Id.*

53. *Id.*

sole purpose of improving English language proficiency.⁵⁴ An example is a dual-immersion program, which usually includes a mix of native English speakers and nonnative English speakers.⁵⁵ Instruction is in English for part of the day and in the dual language for the second part of the day, with the goal of proficiency in both languages.

Nationally, states have taken a variety of approaches when addressing the needs of ELL students, with the majority choosing to let individual districts determine how to best choose and implement language programs affecting this population.⁵⁶ States that do pass legislation regarding ELL programs generally do so to either mandate native language instruction or restrict it. For example, several states require native language instruction when a minimum number of students in a classroom speak the same native language.⁵⁷ On the other hand, four states—Arkansas, Arizona, California, and Massachusetts—have policies in place restricting the use of native language instruction for all ELLs.⁵⁸

Although some commonality exists, the educational experiences of ELL students can differ quite drastically depending on the state and even school district in which they are situated. In the last decade, there has been a substantial shift in language programs offered to ELLs with a movement away from bilingual or native language instruction and toward instruction solely in English.⁵⁹ This shift has largely occurred without giving much thought to the unintended consequences for ELL children with special education needs.

54. *Id.*

55. *Id.*; ELIZABETH HOWARD, JULIE SUGARMAN & DONNA CHRISTIAN, GUIDING PRINCIPLES FOR DUAL LANGUAGE EDUCATION 8–10 (2007).

56. According to a 2009 survey of schools which receive federal money for English language programs, known as “Title III” schools, seventeen states and the District of Columbia had formal statewide policies in place dictating the type of language instruction to be put in place by schools. *See generally* TANENBAUM ET AL., *supra* note 33, at 40; U.S. DEP’T OF EDUC., THE BIENNIAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF TITLE III STATE FORMULA GRANT PROGRAM (2008). Part A of Title III is officially known as the English Language Acquisition, Language Enhancement, and Academic Achievement Act. *See id.* Title III is a part of the federal No Child Left Behind Act of 2001 (NCLB) proposed and signed into law by the George W. Bush administration. Title III provides funding to state and local education agencies who are obligated by NCLB to increase the English proficiency and core academic content knowledge of ELLs (referred to in NCLB as Limited English Proficient students). TANENBAUM ET AL., *supra* note 33, at xviii.

57. Washington requires that districts provide all eligible ELLs with a transitional bilingual program that used native language in basic literacy and content instruction unless resources were unavailable or there were not enough students in one grade level to warrant purchasing native language instructional materials. TANENBAUM ET AL., *supra* note 33, at 40. Connecticut, Illinois, New Jersey, New York, and Texas all have policies requiring local districts to offer bilingual programs when there are at least twenty students with the same native language in a grade level, school, or district, depending on the state. *Id.*

58. *Id.* Arkansas requires basic language instruction to be delivered in English. *Id.* The other three states mandate English-only instruction, but allow for waivers in certain circumstances which would permit bilingual instruction. *Id.*

59. ANNETTE M. ZEHLER ET AL., DESCRIPTIVE STUDY OF SERVICES TO LEP STUDENTS AND LEP STUDENTS WITH DISABILITIES, POLICY REPORT: SUMMARY OF FINDINGS RELATED TO LEP AND SPED-LEP STUDENTS 9 (2003), available at http://www.nclae.us/files/rcd/BE021195/policy_report.pdf (finding that between 1992 and 2002 the percentage of ELL students who received ELL services in all

C. *Legal Protections for ELLs*

Recognizing this growing population and its need for educational support, Congress and the executive branch have taken three major steps to improve educational outcomes for ELLs: Title VI of the Civil Rights Act of 1964, the EEOA, and Title III of the Education and Secondary Education Act (Title III).⁶⁰ Each piece of legislation has a different goal. Title VI prohibits discrimination on the basis of race, color, or national origin in any program receiving federal financial assistance.⁶¹ The EEOA's focus, in contrast, is on ensuring assistance for ELLs in overcoming educational barriers related to language.⁶² Over time, the EEOA has superseded Title VI in importance for ELL rights. The final statute—Title III—neither prohibits discrimination nor ensures rights. Rather, it focuses on data collection and school accountability for the standardized test results of ELL students.⁶³ For this reason, Title III plays little direct role in student rights and litigation, and the discussion of Title III is reserved for the recommendations part of this Article, which addresses the need for additional and consistent data on ELL programs.⁶⁴

1. Title VI of the Civil Rights Act of 1964

The educational rights of ELLs date back to the civil rights movement of the 1960s and 1970s.⁶⁵ Though the Civil Rights Act of 1964 primarily focused on racial equality, it also had strong implications for ELLs.⁶⁶ Title VI of the Act states, “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”⁶⁷ Effectively, this meant that students who because of their national origin were receiving disparate or unequal treatment could seek redress

English increased substantially from 33.7% to 47.9% while the percentage of ELL students who received significant native language instruction decreased by more than half (from 37% to 15%); see also Moran, *supra* note 25, at 1331–32.

60. 42 U.S.C. §§ 2000d–2000d-7 (2012) (Title VI); 20 U.S.C. §§ 1701–1758 (2012) (EEOA); 20 U.S.C. §§ 6301–6983 (English Language Acquisition, Language Enhancement, and Academic Achievement Act).

61. 42 U.S.C. § 2000d.

62. See 20 U.S.C. §§ 1701, 1703(f).

63. See *id.* § 6812.

64. See *infra* Part IV.C for an analysis of flaws associated with Title III data collection and a discussion of ways to improve it.

65. See *Lau v. Nichols*, 414 U.S. 563 (1974); Kristi L. Bowman, *Pursuing Educational Opportunities for Latino/a Students*, 88 N.C. L. REV. 911, 924 (2010); William N. Myhill, *The State of Public Education and the Needs of English Language Learners in the Era of ‘No Child Left Behind,’* 8 J. GENDER RACE & JUST. 393, 400–01 (2004).

66. See *Lau*, 414 U.S. at 567–68 (observing that Chinese-speaking students received fewer educational benefits than their English-speaking counterparts, which in turn triggered the Civil Rights Act of 1964 and corresponding federal regulations).

67. 42 U.S.C. § 2000d (2012).

in federal court. They did so in *Lau v. Nichols*,⁶⁸ which reached the Supreme Court in 1974.⁶⁹

Lau was the first case to extend the protections of Title VI to ELLs.⁷⁰ *Lau* involved a class action by approximately eighteen hundred non-English-speaking students of Chinese ancestry against the San Francisco Unified School District (SFUD). The students claimed that SFUD's failure to provide them with any form of supplemental language instruction violated the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.⁷¹ The Court held that SFUD's lack of a language program violated Title VI because it effectively denied the students a "meaningful opportunity" to participate in their education.⁷² The Court reasoned that the school's failure to address language barriers had a discriminatory effect—that is, it prevented the plaintiff-students from equal participation in school.⁷³ "[T]here is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."⁷⁴ Essentially, the Supreme Court acknowledged the inherent hypocrisy in mandating proficiency in English while failing to provide the tools necessary to reach that goal. The central holding in *Lau*—that schools are not free to ignore the needs of limited-English-speaking students in public schools—remains in force through a separate statute, the EEOA.⁷⁵

2. The Equal Educational Opportunities Act of 1974

Congress passed the EEOA, in part, to codify the legal rights afforded ELLs under *Lau*.⁷⁶ The relevant section, § 1703(f), requires that states take "appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."⁷⁷ In essence, schools must take affirmative steps to ensure that ELLs are receiving instruction

68. 414 U.S. 563 (1974).

69. *Lau*, 414 U.S. at 563.

70. *Id.* 563–65.

71. *Id.* at 565.

72. *Id.* at 568.

73. *Id.* at 566–69.

74. *Id.* at 566.

75. See EEOA, 20 U.S.C. § 1703(f) (2012). *Lau* was never overturned, but subsequent Supreme Court rulings have cast doubt on the continuing validity of the holding in *Lau*. Those later rulings came in distinct non-ELL contexts that did not directly call *Lau* into question, but they did overrule the underlying general premise in *Lau* that litigants could bring a cause of action for disparate impact. See *Alexander v. Sandoval*, 532 U.S. 275, 285 (2001); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 281–84 (1978). Currently, to sustain a claim under Title VI, a plaintiff must show intentional discrimination. *Sandoval*, 535 U.S. at 286. Because it can be challenging to demonstrate intentional discrimination, Title VI has lost much of its power to rectify individual claims of discrimination. See generally Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 195–99 (2003); Sam Spital, *Restoring Brown's Promise of Equality After Alexander v. Sandoval: Why We Can't Wait*, 19 HARV. BLACKLETTER L.J. 93, 96 (2003).

76. Haas, *supra* note 18, at 361.

77. 20 U.S.C. § 1703(f).

appropriate to their language needs with the goal of making the regular educational curriculum accessible.⁷⁸ This can range from whole programs set up around English language proficiency with separate texts and class periods to individual tutoring, or help from a teacher's aide in a regular education classroom. Regardless of the manner in which schools assist their ELLs, the law is clear that schools are not free to simply ignore this population of students.⁷⁹

The most important case in interpreting the EEOA's "appropriate action" clause is the Fifth Circuit's decision in *Castaneda v. Pickard*.⁸⁰ *Castaneda* involved a class of Mexican-American children and their parents who brought suit against the Raymondville, Texas Independent School District alleging, inter alia, that the school district failed to implement adequate bilingual education programs. Plaintiffs alleged that the failure to address language needs impeded students' equal participation in school and, consequently, violated Title VI of the Civil Rights Act of 1964 as well as the EEOA.⁸¹ The court's analysis of the "appropriate action" standard has been adopted as the prevailing framework for cases involving the EEOA.⁸²

In *Castaneda*, the court's biggest challenge regarding the EEOA was the small legislative record and the paucity of the statutory language itself.⁸³ Because the "EEOA was a floor amendment to the 1974 legislation amending the Elementary and Secondary Education Act of 1965," there is limited legislative history to help determine congressional intent behind the Act.⁸⁴ Thus, the circuit court looked to the plain meaning of § 1703(f) as well as the historical context in which the Act originated. At the same time Congress enacted the EEOA, it passed the Bilingual Education Act of 1974, which established federal funding for the development of bilingual educational programs.⁸⁵ Given this context, the

78. *Id.*

79. *Lau*, 414 U.S. at 563.

80. 648 F.2d 989 (5th Cir. 1981). Although, the Supreme Court recently ruled on a case with EEOA implications, it has never explicitly interpreted what the EEOA actually requires. In *Horne v. Flores*, 557 U.S. 433 (2009), the Supreme Court considered a case with EEOA implications; however, the Court did not weigh in on how to interpret EEOA's "appropriate action" mandate. *See id.* at 440–55. The majority opinion limited its analysis by stating that EEOA compliance should not be determined by funding alone, but rather, the "ultimate focus is on the quality of educational programming and services provided to students, not the amount of money spent on them." *Id.* at 466–67. It did, however, cite to *Castaneda* favorably and reaffirm that the "EEOA's 'appropriate action' requirement grants States broad latitude to design, fund, and implement ELL programs that suit local needs and account for local conditions." *Id.* at 468. After *Horne*, lower courts continue to adopt *Castaneda*'s three-pronged analysis when adjudicating EEOA cases. *See United States v. Texas*, 601 F.3d 354, 365–66 (5th Cir. 2010).

81. *Castaneda*, 648 F.2d at 992.

82. *See, e.g., Gomez v. Illinois State Bd. of Educ.*, 811 F.2d 1030, 1040–41 (7th Cir. 1987); *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007, 1017–18 (N.D. Cal. 1998); *see also* Michael A. Rosenhouse, *Construction and Application of Equal Educational Opportunities Act (EEOA)*, 20 U.S.C.A. §§ 1701 *et seq.*, 38 A.L.R. FED. 2D 201 (2009).

83. *Castaneda*, 648 F.2d at 1001.

84. *Id.*

85. Education Amendments of 1974, Pub. L. No. 93–380, 83 Stat. 484 (codified as amended at 20 U.S.C. §§ 1701–58).

court reasoned Congress was well aware of bilingual education since it specifically legislated the encouragement of bilingual programs.⁸⁶ According to the court, Congress's decision to use the less specific term of "appropriate action," rather than "bilingual education," demonstrated its intent to leave schools with a "substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA."⁸⁷ Further, the court concluded that the very fact the EEOA gives students a private right of action forcing schools to address language barriers signified that Congress must have intended for schools to make a "genuine and good faith effort, consistent with local circumstances and resources, to remedy the language deficiencies of their students."⁸⁸

Based on this reasoning, the court adopted a three-part test prescribing substantive standards to flesh out what schools must do in order to demonstrate "appropriate action" which overcomes language barriers in instructional programs: (1) was the challenged language program based on sound educational theory supported by a qualified expert; (2) was the program adequately implemented; and (3) after a "legitimate trial" period, has the program "produce[d] results indicating that the language barriers confronting students are actually being overcome."⁸⁹

The court's biggest misgiving in announcing any standard was the fear that it was substituting its own educational values and theories for the educational values and theories reserved to state and local school authorities.⁹⁰ This discomfort may lie at the center of the application and enforcement problems that have plagued the statute.⁹¹ The court emphasized its desire to ensure that the substantive test not supersede decisions that are more appropriately left to the "expert knowledge of educators."⁹² Several scholars have questioned whether the court, in its reluctance to step on the toes of state and local education authorities, abdicated its role as evaluator, effectively rubber-stamping any language program with little regard for quality or effectiveness.⁹³ This reluctance can be seen through the application of each prong.

The first prong purports to ensure that a school has chosen a sound educational theory on which to base its language program.⁹⁴ However, the court goes on to state, "[its] responsibility, insofar as educational theory is concerned, is only to ascertain that a school system is pursuing a program informed by an educational theory recognized as sound by some experts in the field or, at least,

86. *Castaneda*, 648 F.2d at 1008.

87. *Id.* at 1009.

88. *Id.*

89. *Id.* at 1009–10.

90. *Id.* at 1009.

91. *Id.*; *Quiroz v. State Bd. of Educ.*, No. Civ.S-97-1600WBS/GGH, 1997 WL 661163, at *4 (E.D. Cal. Sept. 10, 1997); *Teresa P. ex rel. T.P. v. Berkeley Unified Sch. Dist.*, 724 F. Supp. 698, 713 (N.D. Cal. 1989); *Rosenhouse*, *supra* note 82.

92. *Castaneda*, 648 F.2d at 1009.

93. Haas, *supra* note 18, at 362.

94. *Castaneda*, 648 F.2d at 1009.

deemed a legitimate experimental strategy.”⁹⁵ Effectively, the court will not get into the business of weighing competing educational theories, or even weighing credibility of experts.⁹⁶ As long as the school advances an educational theory with the backing of at least one expert, the theory will be deemed sound.⁹⁷ Subsequent court decisions have placed the entire burden on plaintiffs to effectively disprove this first prong. That is, plaintiffs must prove there is virtually no expert in the field that would deem the theory legitimate.⁹⁸ Critics have suggested that subsequent interpretation of the “soundness” standard has watered down the prong, rendering it virtually meaningless.⁹⁹ The result grants incredible flexibility to school districts when choosing a language acquisition program.

The second prong looks at whether schools have used adequate “practices, resources, and personnel” to effectively implement the proposed language program.¹⁰⁰ This assessment is to be made while cognizant of the “local circumstances and resources” available to a school district.¹⁰¹ Historically, courts seemed more apt to grant relief under this prong than the first or third.¹⁰² Schools have been held accountable when they fail to provide teachers who are competent to teach in bilingual or ESL programs.¹⁰³ However, more recently, courts have held that failure to adequately staff or implement a program is excusable when it is due to a lack of resources.¹⁰⁴ The difference may turn on whether student achievement is affected by lack of certified teachers.¹⁰⁵

95. *Id.*

96. *Quiroz*, 1997 WL 661163, at *5 (noting the court would not pick between two educational theories, one ESL and one bilingual). “So long as the chosen theory is sound, we must defer to the judgment of the educational agencies in adopting that theory, even though other theories may also seem appropriate.” *Id.* (citing *Gomez v. Illinois State Bd. of Educ.*, 811 F.2d 1030, 1041 (1987)).

97. *Castaneda*, 648 F.2d at 1009.

98. In *Teresa P. ex rel. T.P. v. Berkeley Unified School District*, 724 F. Supp. 698 (N.D. Cal. 1989), the court relied on opinions of the school district’s expert witnesses to determine soundness of theory and did not probe into the substance or validity of theories presented by experts. In *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007 (N.D. Cal. 1998), the court held that the burden was on plaintiffs to establish that the proposed English-only language legislation, Proposition 227, could not, in any circumstance, constitute “appropriate action” as required by the EEOA. *See also* Haas, *supra* note 18, at 369 (discussing the *Teresa P.*, *Valeria G.*, and *Castaneda* decisions).

99. *See* Haas, *supra* note 18, at 367–70 (criticizing courts for failing to qualify experts or demonstrate reasoning for how they determined that educational theory was sound, and placing a virtually insurmountable burden of proof on plaintiffs).

100. *Castaneda*, 648 F.2d at 1010.

101. *Id.* at 1009.

102. *United States v. Texas*, 680 F.2d 356, 372 (5th Cir. 1982); *Castaneda*, 648 F.2d at 1012; *Keyes v. Sch. Dist. No. 1*, 576 F. Supp. 1503, 1521 (D. Colo. 1983).

103. *See Castaneda*, 648 F.2d at 1014–15; *Keyes*, 576 F. Supp. at 1520 (finding that school’s lack of standardized testing procedures to ensure competency in oral and written language skills of bilingual and ESL teachers, instructors, and classroom aides failed to ensure effective bilingual or ESL instruction).

104. *See* *McFadden v. Bd. of Educ.*, 984 F. Supp. 2d 882, 896–97 (N.D. Ill. 2013) (failing to find a violation of EEOA due to deficiencies in professional development and in hiring qualified ELL teachers, citing a national shortage of qualified ELL teachers and district’s efforts to recruit such teachers); Order at 23, *Flores v. Arizona*, No. 92-CV-596-TUC-RCC (D. Ariz. Mar. 29, 2013), ECF

When assessing implementation, courts grant schools wide discretion in the manner in which they implement an English language acquisition program. For instance, a school is permitted to implement a program that focuses primarily on intensive English language acquisition at the expense of content-based instruction in core curriculum (such as science, math, and social studies) so long as remedial action is taken to overcome any academic deficiencies that may result from this delay in content instruction.¹⁰⁶

The third and final prong requires courts to determine whether after a legitimate trial period the program in place “produce[s] results indicating that the language barriers confronting students are actually being overcome.”¹⁰⁷ *Castaneda* provides no guidance in determining what standards a court should use in evaluating an educational plan, and courts have been extremely reluctant to define what results would be deemed sufficient under this prong: “Measuring the success or failure of educational programs is one of the great challenges that faces our educators and is a challenge that this Court approaches with, at least, great trepidation.”¹⁰⁸ If any analysis is done regarding educational outcomes, courts tend to rely on standard measuring devices already in place by the school system or required by federal law.¹⁰⁹ Although there is no bright-line test for what amount of time suffices as a legitimate trial period, schools are generally afforded several years before any action is taken regarding effectiveness of

No. 1082. (ordering on remand that a lack of bilingual teacher’s aides did not violate the implementation prong); *Teresa P. ex rel. T.P. v. Berkeley Unified Sch. Dist.*, 724 F. Supp. 698, 714 (N.D. Cal. 1989) (holding that even though the school district failed to recruit and hire teachers qualified in ESL instruction, they were not in violation of the implementation prong since such applicants were not available to fill those positions).

105. In *Keyes*, the court held that the school’s program was flawed by failure to adopt adequate tests to measure results of a program among the ELL population and seemed troubled by the high number of Hispanic dropouts peaking in tenth grade. 576 F. Supp. at 1519. In *Teresa P.*, a class of ELL students sued the school district for a violation of the EEOA alleging, inter alia, that the district failed to allocate adequate resources to an ELL program, including a failure to ensure that teachers were properly certified to teach in respective language programs. 724 F. Supp. at 712. In holding that the district did not fail to appropriately implement the language programs, the court looked to evidence showing that the achievement of ELL students in classrooms with teachers who had appropriate credentials did not differ from the achievement of ELL students in classrooms with teachers who were not credentialed. *Id.* at 714–15. The court thus excused the district’s failure to properly implement the language program because the district was able to demonstrate that a lack of implementation did not affect student achievement. *Id.* at 717.

106. *Castaneda*, 648 F.2d at 1010–12; *Teresa P.*, 724 F. Supp. at 714–15.

107. *Castaneda*, 648 F.2d at 1010.

108. *Teresa P.*, 724 F. Supp. at 715; see also *Keyes*, 576 F. Supp. at 1518 (“It is beyond the competence of the courts to determine appropriate measurements of academic achievement and there is damage to the fabric of federalism when national courts dictate the use of any component of the educational process in schools governed by elected officers of local government.”).

109. “It is surely beyond the competence of this Court to fashion its own measure of academic achievement, and the Court will necessarily defer to the measuring devices already used by the school system.” *Teresa P.*, 724 F. Supp. at 715; see also *Horne v. Flores*, 557 U.S. 433, 459 (2009); *United States v. Texas*, 601 F.3d 354, 360–61, 374–75 (5th Cir. 2010) (upholding statewide LEP program which based assessment on statewide plan).

implementation.¹¹⁰ Moreover, the last prong seems to be in place as a check on the first two rather than something that has to be demonstrated at the outset.¹¹¹

Thus, the three-part *Castaneda* test affords school districts wide latitude in both selecting and implementing their respective English language acquisition programs. It also gives them a period of several years, at least, before needing to demonstrate any successful achievement under that program.¹¹² This highly deferential standard makes it extremely difficult for parents to successfully challenge an ELL program under the EEOA.¹¹³ Moreover, it gives school districts the ability to set up programs of their choosing with very little oversight from courts and a low level of accountability. As discussed in Sections II and III of this Article, the flexibility inherent in the EEOA creates challenges when dealing with the cross-section of children who are both ELLs and require special education. Specifically, this wide latitude gives school districts the ability to set up language programs that make it unlikely that they will timely and accurately identify ELL students with potential special education needs.

It is important to note that ELL children, like any others, may have diverse needs and challenges—language and non-language—that affect their ability to obtain an equal and appropriate education. ELL children, like others, may be poor, have disabilities, come from unstable home environments, or be homeless or migrant. Each of these characteristics has the potential to trigger legal doctrines which may intersect with the EEOA. The EEOA does not directly address these intersections, but rather focuses solely on language needs. However, as this Article attempts to demonstrate, it is essential that the law directly address the intersections because not doing so can result in ELL children with disabilities not being properly served under either of the statutes designed to protect them.

110. In *United States v. Texas*, 601 F.3d at 371, the court held that a period of two years was insufficient time to demonstrate EEOA compliance under the third prong, proven results after a legitimate time period. Few other courts have considered the time frame for a legitimate trial period. *Horne v. Flores* was first initiated in 1992, but ultimately decided after remand in 2013. Order at 22–23, *Flores v. Arizona*, No. 92-CV-596-TUC-RCC (D. Ariz. Mar. 29, 2013), ECF No. 1082. In that time, twenty-one years had passed in which the school could attempt to demonstrate their changes to the language program were producing results. A district court recently held that a school district's language program did not violate the EEOA after eight years of litigation. *McFadden v. Bd. of Educ.* U-46, 984 F. Supp. 2d 882, 897 (N.D. Ill. 2013).

111. In *Quiroz*, the plaintiffs argued that the absence of an evaluation plan violated *Castaneda*'s third prong where an English language program had not yet been fully implemented. *Quiroz v. State Bd. of Educ.*, No. Civ. S-97-1600WBS/GGH, 1997 WL 661163, at *6 (E.D. Cal. Sept. 10, 1997). The court held that defendant-school district's lack of evaluation plan did not violate the EEOA, stating, "The last prong appears to be aimed at prohibiting districts from persisting with programs that are abject failures, not as a hurdle to initial implementation." *Id.* at *6 n.6.

112. *Texas*, 601 F.3d at 371.

113. See *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007, 1021 (N.D. Cal. 1998); *Quiroz*, 1997 WL 661163, at *7; *Teresa P.*, 724 F. Supp. at 715–16.

II. THE INTERSECTION OF DISABILITY AND LANGUAGE IN EDUCATION

ELLs' special education rights are grounded in an entirely separate and disconnected law, the Individuals with Disabilities Education Act (IDEA).¹¹⁴ As is the case for any other student with disabilities, the IDEA provides the blueprint to address an ELL student's special education needs and serves as the vehicle through which an ELL can seek redress of a school's failure to adequately address his or her disability. The point of this Article is not to criticize special education, but simply to point out that the IDEA and EEOA were conceived independently. Yet, an individual student may have needs that require a coordinated and simultaneous response under both statutes. When the two statutes are applied independently, they can work at cross-purposes. Understanding that point, however, first requires an understanding of the major components of special education law.

A. *Individuals with Disabilities Education Act Overview*

In contrast to the wide discretion schools are offered under the EEOA, the laws governing obligations for special education students are detailed and rigid. The federal statutes most relevant to special education are the IDEA, the Americans with Disabilities Act, and section 504 of the Rehabilitation Act of 1973.¹¹⁵ This Article focuses on the IDEA since it contains the most procedural protections for students, plays a substantial role in the administration of every public school and, thus, has the greatest effect on ELLs with special education needs.

The IDEA authorizes federal funding to subsidize special education services provided by states.¹¹⁶ It is primarily a funding statute that creates substantive rights.¹¹⁷ The federal government will provide funding to those states that provide special education services which meet the criteria set forth in the IDEA.¹¹⁸ IDEA obligations boil down to five basic components: (1) identification and referral for a special education evaluation; (2) timely and accurate evaluation for qualifying disability; (3) a determination of whether the qualifying disability requires special education services, if so; (4) the development of an individualized education program (IEP) which calls for placement in the least restrictive environment; and (5) compliance with procedural safeguards.¹¹⁹

As a preliminary matter, schools have an ongoing duty to identify, locate, and evaluate children in need of special education services.¹²⁰ This duty is

114. IDEA, 20 U.S.C. §§ 1400–82 (2012).

115. *Id.*; Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2012); Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2012).

116. 20 U.S.C. §§ 1400–82.

117. *Id.*

118. *Id.* § 1411(i) (authorizing appropriation of funding).

119. *Id.* §§ 1412(a)(5), 1414, 1415.

120. *Id.* § 1412(a)(3)(A).

referred to as “child find” and is discussed in greater detail in Part B.1. Once a potential disability is identified, a child is referred for an evaluation to determine whether an underlying disability exists.¹²¹ Even if the evaluation indicates a disability exists, an eligibility determination must be made to assess whether the child is disabled within the meaning of the IDEA.¹²² Children who meet such a definition are entitled to a free and appropriate education, which is carried out through the creation of an IEP.¹²³ The IEP is developed by a team of people, including teachers, school psychologists, and parents.¹²⁴ It is the blueprint of services a child will receive in order to benefit from their educational experience. The IDEA does not require that each child’s potential be maximized; rather, a school’s obligation is satisfied so long as it provides “personalized instruction with sufficient support services to permit the child to benefit.”¹²⁵ The IDEA mandates that children with disabilities, to the extent appropriate, be placed with their nondisabled peers (often referred to as “mainstreaming” or “inclusion”).¹²⁶ Finally, the IDEA contains several procedural safeguards which help to create a system of very tight guidelines under which schools must operate.¹²⁷

Procedural protections are in place at all stages of the IDEA process, including identification, evaluation, IEP development, placement decision, and implementation.¹²⁸ Parents are afforded the right of notice about meetings and proposed actions, the right to participate as equal team members in all decision making, the right to consent to or withhold consent for proposed actions, and the right to have disagreements resolved through a due process hearing.¹²⁹ A parent, the school district, or any other aggrieved party can appeal the due process hearing decision to federal court.¹³⁰ Thus, there are significant procedural protections in place to serve as a check on the school district and provide parents with ample opportunity to challenge decisions made by school authorities. More importantly for this Article, the IDEA has several provisions in place that are in

121. *Id.*

122. The IDEA defines “child with a disability” as a child “(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services.” *Id.* § 1401(3)(A) (amended in 2010 to replace the term “mental retardation” with “intellectual disabilities”). In addition, contained within each enumerated disability is the requirement that the disability “adversely affects a child’s educational performance.” 34 C.F.R. § 300.7 (c)(1)–(13) (2014).

123. *See* 20 U.S.C. § 1414(d).

124. *Id.* § 1414(d)(1)(B); *see also* N.K. v. New York City Dep’t of Educ., 961 F. Supp. 2d 577, 582 (S.D.N.Y. 2013) (upholding the adequacy of an IEP team that included a school psychologist).

125. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 203 (1982).

126. 20 U.S.C. § 1412(a)(5); *see also* Disability Rights California, *Information on Least Restrictive Environment*, in SPECIAL EDUCATION RIGHTS AND RESPONSIBILITIES ch. 7, 1 (2011), available at <http://www.disabilityrightsca.org/pubs/504001Ch07.pdf>.

127. 20 U.S.C. § 1415.

128. *Id.* § 1415(b).

129. *Id.* § 1415(d)(2).

130. *Id.* § 1415(g)(1).

tension with the EEOA. The remainder of this Article discusses those provisions and the problems they create when the special education world collides with ELLs.

B. IDEA Provisions Most Relevant to Serving ELLs with Disabilities

When it comes to ELLs, the most troublesome provisions of the IDEA relate to identification, assessment, and eligibility of ELLs for special education services. The IDEA sections addressing these issues are those relating to child find¹³¹ and eligibility.¹³² Child find is implicated when schools are unable to timely identify and refer ELL children with potential special education needs for an evaluation. Eligibility becomes a problem when schools fail to appropriately evaluate ELLs for disabilities, which can lead to both under- and overrepresentation of ELLs within special education.

1. Child Find

a. Requirements

In order to be eligible for federal funding, the IDEA obligates states to submit plans demonstrating “policies and procedures” intended to identify, locate, and evaluate children in need of special education services.¹³³ This duty, referred to as child find, is expansive. It applies from birth, whether or not the school ultimately provides any educational services, and includes children who are homeless, children attending private schools, and “[h]ighly mobile children, including migrant children.”¹³⁴ Further, it includes children suspected of having disabilities and in need of special education, even though they may be advancing from grade to grade.¹³⁵

Child find obligations are both systemic and individual. Systemically, states are required to implement procedures which make it likely that school districts will be able to identify children who may have disabilities.¹³⁶ In other words, the IDEA forces states to acknowledge that children with special needs exist within their school districts and places the burden on the districts to seek them out, even when the district has no current knowledge of a particular student with special needs. As it relates to an individual child, the child find obligation is “triggered when the school has reason to suspect a child has a disability, and has reason to suspect that special education services may be needed to address the

131. *Id.* § 1412(a)(3) (defining “child find” as a process by which “[a]ll children with disabilities residing in the State . . . who are in need of special education and related service, are identified, located, and evaluated”).

132. *Id.* § 1414.

133. *Id.* § 1412(a)(3); 34 C.F.R. § 300.111(a) (2014).

134. 34 C.F.R. § 300.111.

135. *Id.*; *id.* § 300.101(c)(1).

136. *Id.* § 300.111(a).

disability.”¹³⁷ Though child find “does not impose a specific deadline by which time children suspected of having a qualifying disability” must be evaluated, a referral for an evaluation “should take place within a ‘reasonable time’ after school officials are put on notice that behavior is likely to indicate a disability.”¹³⁸

Further, school districts cannot duck their obligations to provide services under the IDEA by failing to identify disabilities. The Supreme Court weighed in on this issue in *Forest Grove School District v. T.A.*¹³⁹ There, the school district failed to find the plaintiff-student eligible for special education services despite clear struggles with learning observed by teachers.¹⁴⁰ The defendant-school district claimed it was not on notice of the child’s disability, and therefore, was not obligated to provide services under IDEA.¹⁴¹ The Court disagreed wholeheartedly, stating, “[a] reading of the [IDEA] that left parents without an adequate remedy when a school district unreasonably failed to identify a child with disabilities would not comport with Congress’ acknowledgement of the paramount importance of properly identifying each child eligible for services.”¹⁴²

b. Unresolved Issues with Child Find Obligations

There are two troublesome issues that arise with the implementation of child find as it relates to ELL students. First, what amounts to a “reasonable time” in which to identify and refer a student? Second, how does a plaintiff establish a violation of child find?

Courts look to specific facts and circumstances of each case to determine the parameters of reasonable time under child find. For instance, the Third Circuit Court of Appeals declined to establish a deadline for when children who are suspected of having a disability must be identified, but opined that the failure to imply a reasonable time obligation on school districts would “eviscerate that duty and thwart the undisputed legislative intent that disabled children be identified, evaluated, and offered appropriate services.”¹⁴³ Thus, the court

137. *Reid v. District of Columbia*, 310 F. Supp. 2d 137, 146 (D.D.C. 2004); *see also* *Compton Unified Sch. Dist. v. Addison*, 47 IDELR 300 (C.D. Cal. 2007).

138. *Sch. Bd. v. Brown*, 769 F. Supp. 2d 928, 942 (E.D. Va. 2010). Once a school district obtains consent from a child’s parent for an evaluation, the IDEA obligates schools to conduct an evaluation within sixty days, unless a timeline has been set by the state. 20 U.S.C. § 1414(a)(1)(C) (2012).

139. 557 U.S. 230 (2009). The main issue before the Court was reimbursement for private school tuition when parents elected to enroll their child in private school due to the school’s refusal to provide special education services.

140. *See Forest Grove Sch. Dist.*, 557 U.S. at 233–34.

141. *See id.* at 240.

142. *Id.* at 245 (“Indeed, by immunizing a school district’s refusal to find a child eligible for special-education services no matter how compelling the child’s need, the School District’s interpretation . . . would produce a rule bordering on the irrational.”); *see also* *Compton Unified Sch. Dist. v. Addison*, 598 F.3d 1181, 1184 (9th Cir. 2010) (rejecting district’s argument that, because it chose to ignore child’s disability and take no action, it had not affirmatively refused to act, thus it was not on notice of the disability). The court in *Addison* looked to *Forest Grove* to support its holding that schools cannot duck child find requirements by refusing to act. *Id.*

143. *W.B. v. Matula*, 67 F.3d 484, 501 (3d Cir. 1995).

acknowledged the clear intent to place the onus on school districts to proactively seek out students with disabilities. More recently, an appellate court cautioned against holding school districts liable for failure to diagnose a disability at the earliest possible moment, stating that “schools need not rush to judgment or immediately evaluate every student exhibiting below-average capabilities, especially at a time when young children are developing at different speeds and acclimating to the school environment.”¹⁴⁴ Ultimately, it appears that courts recognize the clear obligation to find disabled students rests with schools, but accept the practical reality that disability evaluations are an imperfect science.

The affirmative duty to identify children with disabilities is clear. The question of when school officials are at fault for failure to identify an individual student with disabilities, however, is less clear. First, because violations of child find are procedural rather than substantive, claimants must demonstrate that the violation caused substantive harm in order to win relief.¹⁴⁵ Second, even if the plaintiff can demonstrate substantive harm, then she must also demonstrate that school officials “overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate.”¹⁴⁶ Schools that make attempts to address educational shortcomings by putting in place additional services to assist the child are generally shielded from any liability that could arise from a delay in identifying a child with a disability.¹⁴⁷ Courts will also evaluate whether or not a child was progressing academically in determining the reasonableness of delay.¹⁴⁸

c. The Intersection of Child Find and ELLs

The child find issue comes to a head when dealing with the unique cross-section of ELL students who also have special education needs. Child find obligates schools to have systems in place which make it likely they will identify students with disabilities. However, this general obligation is unlikely to result in the accurate identification of ELLs with disabilities, as their identification requires a more nuanced assessment. General education teachers are often the first to spot struggling students and ferret out whether difficulties may be related to an underlying disability. However, research demonstrates it is particularly challenging to disentangle language acquisition challenges from underlying

144. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 252 (3d Cir. 2012).

145. *Metro. Bd. of Pub. Educ. v. Guest*, 193 F.3d 457, 464 (6th Cir. 1999).

146. *Bd. of Educ. v. L.M.*, 478 F.3d 307, 313 (6th Cir. 2007) (quoting *Clay T. v. Walton Cnty. Sch. Dist.*, 952 F. Supp. 817, 823 (M.D. Ga. 1997)).

147. *See, e.g., Jackson v. Nw. Local Sch. Dist.*, No. 1:09-cv-300, 2010 WL 3452333, at *7–8 (S.D. Ohio Aug. 3, 2010) (noting that additional services provided to a student with ADD “provided a basic floor of educational opportunity . . . and were sufficient under the IDEA”); *L.M.*, 478 F.3d at 313–14 (observing the school district’s provision of “additional services designed to aid [the student] in catching up with his peers” was sufficient to satisfy the IDEA, “even though at that point he was not identified as being disabled”).

148. *L.M.*, 478 F.3d at 314.

disabilities, particularly learning disabilities.¹⁴⁹ In practice, a teacher may be less likely to notice an underlying disability in an ELL student and more likely to assume that the student's struggles relate solely to the challenges of learning a new language.¹⁵⁰ Thus, the teacher chooses not to make a referral for an evaluation and hopes that as the child's language proficiency improves, his or her educational progress will likewise improve. But, what if the student has an underlying disability? Are schools accountable under child find for failure to identify disabilities within the ELL population if clear signs of disability are overshadowed by language acquisition challenges? Further, if there is no accountability, doesn't this "eviscerate" the protections of child find and in essence give teachers a pass when it comes to identifying ELLs with special education issues in a timely manner?¹⁵¹ Unfortunately, neither the EEOA nor the IDEA provides much clarity when addressing the intersection of the EEOA and IDEA, as this Article further explores in Section III.

2. Eligibility

In order to be qualified as a "child with a disability" within the meaning of the IDEA: (1) a child must have one or more of the ten specified conditions listed in the statute; (2) the condition must have an adverse effect on educational performance; and (3) the child, by reason of that condition, must need special education and related services.¹⁵² In practice, eligibility determinations generally occur after the child has been evaluated by qualified professionals. The IEP team then meets to review evaluation data, classroom-based observations and assessments, and observations by teachers as well as parents.¹⁵³

One major problem is that eligibility determinations are far from clear-cut.¹⁵⁴ Courts have reached conflicting conclusions about how much adverse educational impact the disabling condition must have, as well as how to determine a "need" for special education and related services.¹⁵⁵

149. KELLER-ALLEN, *supra* note 12, at 2; *see also* Richard A. Figueroa & Patricia Newsome, *The Diagnosis of LD in English Learners: Is It Nondiscriminatory?*, 39 J. LEARNING DISABILITIES 206, 207 (2006); Yi-Juin Liu et al., *From Early Childhood Special Education to Special Education Resource Rooms: Identification, Assessment, and Eligibility Determinations for English Language Learners with Reading-Related Disabilities*, 33 ASSESSMENT FOR EFFECTIVE INTERVENTION 177, 178 (2008).

150. Andrea Zetlin et al., *Building a Pathway of Optimal Support for English Language Learners in Special Education*, 34 TCHR. EDUC. & SPECIAL EDUC. 59, 60–61 (2011).

151. *See supra* note 143 and accompanying text.

152. *See supra* note 122 for the IDEA's definition of "child with a disability." Children must also be within the ages of three through twenty-one; however, there are some exceptions. IDEA, 20 U.S.C. § 1401(3)(b) (2012). *See also* Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83, 123–42 (2009).

153. 20 U.S.C. § 1414(a)–(c); 34 C.F.R. § 104.35, 300.301–311 (2014).

154. *See generally* MARK C. WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE 102 (3d ed. 2008); Robert A. Garda, Jr., *Untangling Eligibility Requirements Under the Individuals with Disabilities Education Act*, 69 MO. L. REV. 441 (2004).

155. *See* Mary P. v. Illinois State Bd. of Educ., 919 F. Supp. 1173, 1175, 1181 (N.D. Ill. 1996) (finding educational performance adversely affected when child's speech impairment inhibited his ability or desire to communicate with his teachers and peers despite his performance at age-

As previously alluded to, appropriately identifying and evaluating ELLs with special education needs can be difficult, but part of the problem stems from the fact that eligibility determinations are hard as a general principle.¹⁵⁶ This is, by far, not an exact science. Certain categories of disabilities are termed “high incidence” because they account for more than eighty-two percent of students in special education.¹⁵⁷ These categories include mental retardation, specific learning disabilities, emotional disabilities, and speech-language impairments.¹⁵⁸ Educators and social scientists have long had concerns about these categories because diagnoses of these types of disabilities are highly subjective in nature, relying on observations and assessments of the evaluator rather than objective medical tests.¹⁵⁹ Moreover, diagnostic practices vary considerably among states and sometimes even within a state.¹⁶⁰ The subjective nature of diagnosis has resulted in a much higher rate of high-incidence disabilities within minority populations, referred to as minority overrepresentation.¹⁶¹

In 2004, Congress reauthorized and amended the IDEA, in part, to address concerns over minority overrepresentation.¹⁶² Included in the amendments were new requirements surrounding the assessments of ELLs, which this Article refers to as the “2004 ELL Assessment Requirements.” Specifically, assessments must be (1) “selected and administered so as not to be discriminatory on a racial or cultural basis,” (2) provided and administered in the child’s native language unless clearly not feasible to administer, and (3) valid for the purposes in which they are used.¹⁶³ The added language is an acknowledgement of the difficulties

appropriate level), *amended by* 934 F. Supp. 989 (N.D. Ill. 1996); *Doe ex rel. Doe v. Bd. of Educ.*, 753 F. Supp. 65, 70 (D. Conn. 1990) (finding plaintiff’s emotional and behavioral issues did not adversely affect his educational performance when both his grades and achievement test results before, during, and after his hospitalization were satisfactory or above). The IDEA defines “special education” as the adaptation of the content, methodology, or delivery of instruction to address a child’s unique needs and ensure access to the general curriculum. *See* 20 U.S.C. § 1401(29); 34 C.F.R. § 300.39. “Related services” are defined as “transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education.” 20 U.S.C. § 1401(26). If a child only requires “related services” and not “special education,” then the child is not eligible under the IDEA. *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 894 (1984); 34 C.F.R. § 300.7(a)(2)(i).

156. *See* Russell J. Skiba et al., *Achieving Equity in Special Education: History, Status and Current Challenges*, 74 *EXCEPTIONAL CHILD*. 264, 275–76 (2008); *see also* Glennon, *supra* note 2, at 1246–48 (highlighting the detailed procedures agencies go through to determine IDEA eligibility). *See generally* Hensel, *supra* note 2; Secunda, *supra* note 2.

157. Sullivan, *supra* note 6, at 318.

158. *Id.*; *see also* Samson & Lesaux, *supra* note 43, at 149.

159. Samson & Lesaux, *supra* note 43, at 149; Skiba et al., *supra* note 156, at 264; Sullivan, *supra* note 6, at 318. *See generally* Weber, *supra* note 152, at 123–42.

160. Sullivan, *supra* note 6, at 318.

161. Weber, *supra* note 152, at 143.

162. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (codified as amended at 20 U.S.C. §§ 1400–82). The 2004 Reauthorization required states to enact “policies and procedures designed to prevent the inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities.” 20 U.S.C. § 1412(a)(24) (2012).

163. 34 C.F.R. § 300.304(c)(1) (2014); *see also id.* §§ 300.27, 300.306(b)(1)(iii).

surrounding assessment of ELLs as well as an attempt to ensure nondiscrimination within eligibility determinations.

The 2004 Reauthorization also addressed the category of specific learning disabilities (SLD), one of the high-incidence disabilities that are susceptible to subjectivity.¹⁶⁴ The 2004 Reauthorization addressed this category by eliminating the requirement that school districts use the severe discrepancy test to determine eligibility under SLD and allowing for a new model, “Response-to-Intervention” (RTI).¹⁶⁵ The reasons for the change are twofold: the first is to attempt to keep more children out of special education by providing increased levels of instruction in the general education classroom in hopes of addressing their difficulty in that setting;¹⁶⁶ the second is to receive a more accurate assessment of children who do actually need special education services.¹⁶⁷

164. See James E. Ryan, *Poverty as Disability and the Future of Special Education Law*, 101 GEO. L.J. 1455, 1467–74 (2013) (discussing the unreliability of the discrepancy model in assessing specific learning disabilities).

165. *Id.* at 1474–75; Torin D. Togut & Jennifer E. Nix, *The Helter Skelter World of IDEA Eligibility for Specific Learning Disability: The Clash of Response-to-Intervention and Child Find Requirements*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 568, 574 (2012). The severe discrepancy test measured whether there was a severe discrepancy between the student's achievement and intellectual ability, usually measured with IQ testing. It was roundly criticized as being inaccurate as well as incentivizing a “wait to fail” approach to identification. *Id.* at 608. It also produced inconsistencies across states and sometimes even among districts within the same state because individual states and districts could determine their own cutoff scores as to when a severe discrepancy existed such that a child would be diagnosed as having a SLD. *Id.* at 576. RTI offers an alternative to severe discrepancy through the implementation of “scientifically based research interventions earlier in the process for students failing to respond to traditional classroom instruction.” *Id.* at 577. The focus under RTI is student achievement and progress based on grade-level content. *See id.* at 579. Effective use of RTI involves properly implementing scientifically validated measures while carefully observing student response to those measures. That is, students who are struggling receive more individualized instruction based on validated instruction techniques. Students who continue to struggle when compared to their classmates are progressively given more intense instruction until at some point, if no improvement is demonstrated, the child is labeled as having a learning disability. *Id.* at 580–83. The specialized instruction includes tiers of intervention. The first tier involves high quality instruction and careful assessment of the learning progress of all students. *Id.* at 581–82. The second tier involves more intense instruction; for example, individual or small-group instruction provided by the classroom teacher or reading specialist for those students who are not making progress. This can last about six weeks. Weber, *supra* note 152, at 128–29. Students who do not demonstrate adequate progress enter the third tier, which consists of specially designed sets of educational interventions for a period of eight or more weeks. *Id.* at 129; *see also* Ortiz et al., *supra* note 39, at 318 (discussing RTI).

166. Weber, *supra* note 152, at 123–42.

167. *Id.* Although RTI holds promise for addressing minority overrepresentation, many scholars have cautioned against viewing it as a panacea. *See* Togut & Nix, *supra* note 165, at 585–86 (discussing minority overrepresentation as a result of RTI); Weber, *supra* note 152, at 122. Because Congress did not mandate the use of RTI, nationally there exists “a hodgepodge of different SLD eligibility standards” with some school systems sticking with severe discrepancy model while others use RTI. *See* Togut & Nix, *supra* note 165, at 576. Moreover, scholars have criticized RTI as difficult to implement appropriately across disabilities and age ranges, as well as creating potential problems with procedural protections in the IDEA. Weber, *supra* note 152, at 133–38. For instance, RTI may create a parental notice problem. Under the IDEA parents have the right to notice and consent prior to their child being evaluated for purposes of special education. 20 U.S.C. § 1415. RTI blurs the line of official assessment for special education purposes, since the hope is that many children will actually be kept

What is difficult to do accurately with native English speakers becomes even more challenging when working with ELL students.¹⁶⁸ Not only are a majority of assessments written in English, but many are not valid for use with ELLs.¹⁶⁹ Inaccurate assessments are a violation of the IDEA, but in practice, they occur all too often.¹⁷⁰ Moreover, assessments are only part of the eligibility determination process. Other important factors such as teacher observations, classroom performance, and standardized exams all combine as data points to consider when determining whether an ELL student is eligible for special education services.

Unfortunately, schools often select a language development program with little consideration of the impact on accurate and timely assessment of ELLs with disabilities who may need special education services. For instance, many ELL students struggle with reading comprehension, but unlike their native English-speaking peers, their difficulty is masked as a lack of language proficiency.¹⁷¹ Moreover, the new RTI approach could delay identification of struggling ELL students even more by incentivizing a wait-to-fail approach. The following Part dissects the many problems surrounding accurate eligibility determinations for ELLs and the resulting inability to fulfill the IDEA's promise of timely and appropriate special education services.

C. *The Failure to Meet the Special Education Needs of ELLs*

Special education funding and legal requirements play a central role in the operation and mission of the average public school. Both the state and federal governments appropriate significant funding for the education of students with disabilities, and those schools with substantial numbers of students with disabilities must devise programs to identify and serve those students. In many districts, the costs of doing so far exceed the resources that the district receives from the state and federal government.¹⁷² But schools with large numbers of ELLs can often operate with a different focus and mission, which may diminish or interfere with the attention and sophistication devoted to special education.¹⁷³

out of special education by use of RTI. Weber, *supra* note 152, at 133–38. Further, RTI may create a problem with the strict timing requirements of the IDEA. Generally, schools have sixty days to complete an evaluation, 20 U.S.C. § 1414, but RTI by its very nature is a longer and ongoing process. *See id.* at 139–40.

168. Ortiz et al., *supra* note 39, at 319–29 (discussing inappropriate referrals to special education).

169. Education researchers and stakeholders have repeatedly called attention to the lack of appropriate assessment measures of ELLs with disabilities including a shortage of test translations as well as tests that are validated across cultures. Zetlin et al., *supra* note 150, at 61.

170. *See* TANENBAUM ET AL., *supra* note 33, at 18.

171. FRANCIS ET. AL., *supra* note 40, at 26.

172. *See* NATHAN LEVENSON, BOOSTING THE EQUALITY AND EFFICIENCY OF SPECIAL EDUCATION 5–6 (2012) (arguing that the high cost of special education can dominate school policy and finance); Ashley Oliver, Note, *Should Special Education Have a Price Tag? A New Reasonableness Standard for Cost*, 83 DENV. U. L. REV. 763, 763 (2006) (discussing the high cost of special education).

173. *See, e.g.*, Fair Lawn (NJ) Sch. Dist., 55 IDELR 176, 176–77 (2010) (requiring a New Jersey school district change its existing policy delaying evaluations until a student learned sufficient English

Often, schools think of these statutes as serving two discrete populations; however, the statutes can and do intersect when an ELL student has special education needs.¹⁷⁴ Unfortunately, not enough attention has been paid to this cross-section of students.

As mentioned, scholars, policymakers, and education stakeholders have heavily focused on the problem of overrepresentation with respect to African American children in special education, with the consensus indicating a problem of racial bias.¹⁷⁵ With the 2004 ELL Assessment Requirements, the IDEA acknowledged the difficulty surrounding accurate assessment of ELLs and attempted to solve it.¹⁷⁶ However, in practice, the promise of accurate assessments has been difficult to fulfill.¹⁷⁷

Complexities surrounding accurate eligibility determinations for special education needs within the ELL population are centered in two categorical problems: bias and resources. The first problem, bias, begins with the initial identification of potential disabilities that often takes place in the general education classroom. General education teachers may hold certain biases about ELLs, including low educational expectations for ELL students because of the challenge of acquiring a new language. This translates to a wait-to-fail approach where teachers delay seeking out additional services for ELLs, hoping to give them more time to acquire English language skills.¹⁷⁸ Alternatively, teachers

instead of evaluating the student to determine if learning difficulties were due to learning a second language); *Mumid v. Abraham Lincoln High Sch.*, 618 F.3d 789, 793–94 (8th Cir. 2010) (involving a school with large ELL population and policy of delaying referrals for special education evaluations until students received at least three years of English language instruction). *See generally*, RALABATE, *supra* note 8, at 7–8 (stating that schools with large ELL populations tend to under-identify ELL students for special education services, indicating that a focus on language acquisition can overshadow and delay accurate identification of disabilities).

174. *See* TANENBAUM ET AL., *supra* note 33, at 33–35 (highlighting the “challenges associated with accurately identifying EL students who also had disabilities”).

175. *See* Robert A. Garda, Jr., *The New IDEA: Shifting Educational Paradigms to Achieve Racial Equality in Special Education*, 56 ALA. L. REV. 1071, 1072–74 (2005); Sarah E. Redfield & Theresa Kraft, *What Color Is Special Education?*, 41 J.L. & EDUC. 129, 141–45 (2012); Skiba et al., *supra* note 156, at 281.

176. As mentioned, the reauthorization of the IDEA in 2004 reflected a concern about the misidentification of ethnically diverse students and included new provisions governing the selection and administration of evaluations for ELLs. Tests and other materials used for assessment must be administered 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 do so. 34 C.F.R. § 300.304(c)(1)(ii) (2014). There is also specific language which prohibits finding an ELL child to be disabled if the determinant factor is limited English proficiency and “[i]f the child does not otherwise meet the eligibility criteria” set forth under the statute. *Id.* § 300.306(b).

177. Marjolaine M. Limbos & Esther Geva, *Accuracy of Teacher Assessments of Second-Language Students at Risk for Reading Disability*, 34 J. LEARNING DISABILITIES 136, 137 (2001).

178. *See, e.g.*, K.A.B. *ex rel.* Susan B. v. Downingtown Area Sch. Dist., No. 11-1158, 2013 WL 3742413, at *2–3 (E.D. Pa. July 16, 2013); Fair Lawn (NJ) Sch. Dist., 55 IDELR 176, 176–77 (2010); *see also* Julie Esparza Brown & Jennifer Doolittle, *A Cultural, Linguistic, and Ecological Framework for Response to Intervention with English Language Learners*, 40 TEACHING EXCEPTIONAL CHILD. 66, 66 (2008).

could have exceedingly high expectations of ELLs holding them to unreasonable rates of progression. When an ELL fails to meet the teacher's expectation of progress, the teacher assumes a disability may be at fault.¹⁷⁹ In either situation, general education teachers are making decisions about when to refer an ELL student for a special education evaluation on faulty assumptions and biases.¹⁸⁰ The second problem centers on a basic lack of resources, which can frustrate a school's ability to ensure timely and accurate assessment of ELLs.

1. Inappropriate Disability Referrals and Evaluations

Bias infiltrates the identification and evaluation of ELLs for special education at several stages. First, general education teachers often lack the requisite skills to appropriately instruct the ELL population, resulting in incorrect delivery of curriculum. Second, general education teachers also lack the training to disentangle a potential disability from language acquisition struggles. Without objective skills at hand, teachers rely on harmful assumptions and biases about ELL students' ability to progress. Finally, assessment tools are often inadequate and inherently biased, producing flawed results.

a. *Insufficient Teacher Training in ELL Education*

Over the last several decades there has been a shift in the way ELL students are instructed, moving away from bilingual instruction and toward an English-immersion approach.¹⁸¹ This change in instruction has resulted in more ELL students in regular education classrooms, resulting in a much more diverse classroom with a larger range of learning needs.¹⁸² Unfortunately, general education teachers have not been offered the training to ensure they have the necessary skills to adequately instruct this diverse set of students.¹⁸³ The instructional capacities of general education teachers, however, are increasingly crucial to proper identification of students with disabilities, particularly ELLs, because teachers tend to be a first step in this process. In fact, many schools now

179. See Zetlin et al., *supra* note 150, at 60–61 (discussing how the cumulative pattern of identification reported for ELL students is shaped by the expectations teachers hold for ELLs).

180. Teacher referral is a strong predictor for special education services. Some research indicates that between seventy-three and ninety percent of students referred for evaluations by regular education teachers are found eligible for special education services. Alfredo J. Artiles, Beth Harry, Daniel J. Reschly & Philip C. Chinn, *Over-Identification of Students of Color in Special Education: A Critical Overview*, MULTICULTURAL PERSPECTIVES, Sept. 2001, at 3–10.

181. ZEHLER ET AL., *supra* note 59, at 35.

182. *Id.* at 36 (“The number of teachers who instruct at least one LEP student has more than tripled; teachers of LEP students now represent more than 40 percent of all teachers in public schools in grades K-12.”).

183. *Id.* (“Many teachers and instructional aides who work with LEP students have not received training related specifically to instruction of LEP students.”); Zetlin et al., *supra* note 150, at 60–61 (“[M]any teachers lack training in how to distinguish between language delay and language disability.”).

mandate that teachers engage in a prereferral process before referring a student for a special education evaluation.¹⁸⁴

The prereferral process involves interventions and informal screenings in the regular education classroom in an attempt to improve learning prior to a referral for special education evaluation.¹⁸⁵ Prereferral is meant to limit special education referrals to only those students for whom other in-class accommodations and modifications are not working. The idea is to exhaust all other avenues and reach a conclusion that the child's needs cannot be met by a regular education program before requesting a special education evaluation.¹⁸⁶

In the case of ELLs, however, prereferrals may actually exacerbate the problem. Research demonstrates that most general education teachers lack the training necessary to accurately identify a potential disability in an ELL student.¹⁸⁷ Often teachers assume that a child's lack of progress is related to his or her limited English proficiency rather than an underlying disability.¹⁸⁸ Thus, they are unlikely or unable to successfully engage in a prereferral process with ELL students.

Another way in which teacher bias affects ELLs relates to ignorance surrounding cultural differences and customs. General education teachers often ignore or have faulty assumptions about the culture and customs of ELL students.¹⁸⁹ A misunderstanding or ignorance of culture can lead to inappropriate lesson planning. Lessons are, in effect, lost in translation.¹⁹⁰ Ineffective teaching methods can lead to poor performance. The academic failure is then assumed to be a product of inability to learn or acquire new information.¹⁹¹ Poor academic performance is one of the main reasons children are referred for special education.¹⁹²

Teachers' incorrect assumptions and biases about ELL students' capabilities for learning may either incentivize delay in rooting out a disability or trigger an unwarranted referral for a special education evaluation. This is not to say that

184. OLSON, *supra* note 4, at 2.

185. *Id.*

186. *Id.*

187. A longitudinal study of teacher candidates in California determined that once candidates engage in practice they feel less capable of instructing ELLs and students with special needs. Beth Anderson Smith et al., Presentation at the American Educational Research Association Annual Meeting: From Ryan to 2042: Phase I of the Longitudinal Study Comparing Teacher Preparation Program Models through Teacher Candidate Perceptions Regarding the Instruction of Students, Including Typically Performing Students, Students with Special Needs, and English Learners 10 (Apr. 10–14, 2004).

188. Samson & Lesaux, *supra* note 43, at 159; *see also* Ortiz et al., *supra* note 39, at 317.

189. Zetlin et al., *supra* note 150, at 60; Ann C. Willig, Florida Atlantic University, Proceedings of the Second National Research Symposium on Limited English Proficient Student Issues: Focus on Evaluation and Measurement (1992) (discussing Alba A. Ortiz, Assessing Appropriate and Inappropriate Referral Systems for LEP Special Education Students).

190. Zetlin et al., *supra* note 150, at 60–61.

191. *See id.* at 61 (“ELL students who are more likely to be experiencing a language development delay than a language disability may be mistakenly referred for special education.”).

192. Liu et al., *supra* note 149, at 178; Samson & Lesaux, *supra* note 43, at 158.

teachers do not have their students' best interests at heart, but rather that they are not fully prepared to notice the potential signs of underlying disability in ELLs.¹⁹³ Perhaps it is asking too much of our general education teachers to be trained in such ways, which speaks to an issue of resources or lack of resources that will be discussed shortly.¹⁹⁴

The net result of lack of teacher training is the likelihood of making referrals for special education evaluations based on faulty or inaccurate assumptions about an ELL's ability to learn. Evaluations and, ultimately, eligibility determinations are then tainted by this incomplete or inaccurate data. Although the IDEA mandates that evaluations of language-minority students be accurate and unbiased, in practice, evaluations and eligibility determinations do not occur in a vacuum. Rather, data is drawn from a variety of sources, including teacher observations, performance on standardized tests, psychoeducational assessments, and parental and familial input. When eligibility determinations are based, in part, on flawed data in the form of biased teacher observations, it puts more pressure on the disability assessment tool to be perfect. But as the following Part demonstrates, the assessment tools themselves are often biased and incapable of guaranteeing accurate results.

b. Invalid and Biased Assessment Tools

Another factor complicating assessments of ELLs relates to the assessment tools themselves as well as the inconsistent way in which these tools are employed. As mentioned, the 2004 ELL Assessment Requirements mandate assessments be administered 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.¹⁹⁵ There is also specific language which prohibits finding an ELL child to be disabled if the determinant factor is limited English proficiency without "otherwise meet[ing] the eligibility criteria" set forth under the statute.¹⁹⁶

Despite the specific language, the guidelines have not proved effective in rooting out bias. The first of several problems appears to be the disruptive impact bilingualism has on test properties. That is, the very fact that a student has knowledge of two languages may compromise the validity of assessments.¹⁹⁷

193. Zetlin et al., *supra* note 150, at 60–61. "[I]n 2006, a national survey found that only 37% of special education service providers had any formal training in issues in second-language learning." Samson & Lesaux, *supra* note 43, at 160.

194. See *infra* Part II.C.2 for a discussion of how inadequate resources for general education exacerbates the failure to meet the special education needs of ELLs.

195. 34 C.F.R. § 300.304(c)(1)(ii) (2014). See *supra* notes 162–63 and accompanying text for a discussion of the 2004 ELL Assessment Requirements.

196. 34 C.F.R. § 300.306(b)(1)(iii), (b)(2).

197. JEFFREY E. GRIFFIN, ENGLISH LANGUAGE LEARNERS WITH SPECIAL EDUCATION NEEDS 66 (Alfredo Artiles & Alba Ortiz, eds., 2002); Figueroa & Newsome, *supra* note 149, at 208–13 (examining nineteen psychological reports of diagnosis of SLD and finding that provisions in law for assessment of ELLs are not being followed). A great majority (between 90 and 100%) of diagnosticians did not consider the possible impact of prior schooling, present schooling, or curriculum

Second, although experts agree that students should be tested in their native language as well as in English, this often necessitates the use of interpreters. An unskilled interpreter may invalidate test results.¹⁹⁸ Rather than following strict rules of interpretation, the interpreter often adds additional meaning to instructions. Further, even when the test is translated as written into a student's native language, there may be issues with cultural references that invalidate results.¹⁹⁹ Third, students are often only assessed in their native language, but in order for test results to be accurate, the student should also be assessed in English if they have been receiving instruction in English.²⁰⁰ Fourth, too often family history and social history are overlooked, particularly when it is difficult to communicate with parents who are nonnative English speakers.²⁰¹ The net result is an incomplete picture of an ELL child, often leading to misdiagnosis or incomplete diagnosis. What this boils down to is good intentions in the form of statutory guidance that carry little weight in the messy reality of ELL assessments.

2. Inadequate Resources

The inability of general education teachers to recognize signs of potential underlying disabilities in ELLs stems from a lack of resources to adequately train teachers or put in place other trained school professionals who could appropriately identify and assess ELLs with disabilities.²⁰² A shortage of trained ESL and bilingual teachers has left many school districts filling teaching positions with teachers who lack qualifications to instruct ELL students.²⁰³ Ineffective teaching may lead to poor educational progress, which can lead to inappropriate referrals for special education evaluations. Schools' intentions to train these teachers or help them achieve required certifications can often take years, or in the worst-case scenario, never materialize.²⁰⁴ Moreover, there is a

of the home as contextual factors to be taken into account. *Id.* at 210–12. Psychologists did not assess or investigate the possible confounding effects of bilingualism on tests, testing, and diagnosis. *Id.*

198. Zetlin et al., *supra* note 150, at 61.

199. *Id.* (discussing insufficient test translations).

200. Liu et al., *supra* note 149, at 184–85; Zetlin et al., *supra* note 150, at 61 (discussing problems with assessment of ELLs, including ELLs who may not have had formal reading and writing instruction in their home language and, thus, lack academic language proficiency in their native language).

201. See Liu et al., *supra* note 149, at 185.

202. When asked if their state had appropriate resources to implement Title III, officials in fifteen states specifically mentioned staff limitations as a challenge with regard to the number of staff devoted to Title III issues or lack of expertise in issues related to ELLs. TANENBAUM ET AL., *supra* note 33, at xxii; see also Huong Tran Nguyen, *General Education and Special Education Teachers Collaborate to Support English Language Learners with Learning Disabilities*, 21 ISSUES IN TCHR. EDUC. 127, 130 (2012).

203. See, e.g., Kenneth M. Zeichner, *The Adequacies and Inadequacies of Three Current Strategies to Recruit, Prepare, and Retain the Best Teachers for All Students*, 105 TCHRS. COLLEGE RECORD 490, 494 (2003).

204. Only 29.5% of U.S. teachers with ELL students in their general education classrooms are prepared to work with ELLs. Nguyen, *supra* note 202, at 131. Only twenty states require that all

lack of other qualified professionals to assist with accurate identification and assessment.²⁰⁵ The result is either that ELLs are passed over for assessment or that the measures used to assess them are so flawed that inaccurate results are all but guaranteed.

The U.S. Department of Education's 2012 *National Evaluation of Title III Implementation*—a report on state and local implementation of ELL programs—states that several districts screened for special education needs among their ELL population by using the same procedures designed for native English-speaking students.²⁰⁶ In other words, there was no modification of testing. Many school officials reported difficulties in obtaining appropriate translators and a lack of bilingual school staff as preventing validated results.²⁰⁷ Several of those interviewed recognized significant delays in assessing ELLs and acknowledged delays to be particularly worrisome.²⁰⁸ Four districts admitted that they flat-out discouraged immediate placement of ELLs in special education in order to prevent overrepresentation of ELLs.²⁰⁹

This lack of resources results in both an inability to appropriately identify ELLs with potential disabilities as well as an inability to ensure accuracy in the assessment process once an ELL is flagged as having a potential special education problem. Thus, even though protections for both timely identification and accurate assessment of ELLs with disabilities exist in the IDEA, in practice, language program selection, ineffective teaching methods, and a general lack of resources combine to eviscerate the promise of such guarantees. Ineffective identification and assessment cut right through the heart of the IDEA. Timely and accurate identification and assessments for disabilities form the foundation upon which services are built to adequately address educational needs. Without a solid foundation, the educational program simply falls apart.

3. The End Product: Undiagnosed and Misdiagnosed Disabilities

The complexities involved in accurately assessing ELLs with potential disabilities has led to a peculiar result, the both over- and under-identification of these children as having qualified disabilities. In either case, there is a disproportionate representation of ELLs with disabilities. “A somewhat paradoxical pattern of overrepresentation and underrepresentation seems to exist in the United States, presumably because both underreferral and overdiagnosis occur because of misunderstanding of the educational needs of

teachers have training to work with ELLs. *Id.* Only twenty-six percent of teachers have had ELL-related professional development programs and fifty-seven percent believe they need additional training to teach ELLs effectively. *Id.*

205. Samson & Lesaux, *supra* note 43, at 160; Sullivan, *supra* note 6, at 320. A 2006 national survey found that only thirty-seven percent of special education service providers had formal training in the area of language proficiency. Samson & Lesaux, *supra* note 43, at 160.

206. TANENBAUM ET AL., *supra* note 33, at 33–34.

207. *Id.* at 116–20.

208. *Id.* at 34.

209. *Id.*

students identified as ELLs, poorly designed language assessments, and weak psychoeducational assessment practices.”²¹⁰

Under-identification of ELLs often occurs in earlier grades. Research demonstrates that ELLs can achieve at levels equivalent to their native English-speaking peers in primary grades and that both groups experience difficulties with phonological awareness and word reading at similar rates.²¹¹ Yet, teachers are less likely to identify ELLs than native English speakers for remedial reading assistance in early years because teachers assume ELLs’ difficulties relate to a lack of proficiency in English.²¹² Thus, teachers have a higher tolerance for failure within ELL populations than within the native English-speaking population. This bias can stymie early detection of certain types of learning disabilities.

Many teachers wrongly assume that children need to develop sufficient English proficiency before they can be identified for a potential disability.²¹³ Thus, teachers are more inclined to let children spend time acquiring language skills and overlook a potential disability. There is also evidence to suggest that even when special education needs are suspected, districts wait to refer ELL students to special education because of a lack of effective programs for students with dual language and special education needs.²¹⁴ In fact, some researchers suggest “it may be only in the face of . . . persistent underachievement that [ELLs with disabilities] are eventually referred and evaluated for special education services.”²¹⁵ When teachers assume that potential disabilities are solely due to language acquisition, students may miss out on needed supports and services. Moreover, in many cases, the earlier a disability is recognized and supports put in place, the better chance a student has to overcome that disability and achieve academic progress.²¹⁶ In fact, some research demonstrates that when ELLs with reading difficulties are not identified in early grades and provided reading assistance, they are at a severe disadvantage when trying to overcome these challenges through remedial services in later years.²¹⁷

As ELL students advance in school, their chances of being referred for special education increase, sometimes exponentially. In one study that followed a national sample of students from kindergarten through third grade, researchers found that by third grade the chances of an ELL student being identified for special education services increased by 305%, as compared to 132% for native English speakers.²¹⁸ The dramatic increase in identification may be a reflection

210. Sullivan, *supra* note 6, at 320 (footnote omitted). The over- and underrepresentation of ELLs with special education can vary by state, or even vary between school districts within a state. It can also vary by type of disability. *Id.* at 318–20.

211. Samson & Lesaux, *supra* note 43 at 150.

212. *Id.*

213. *Id.*

214. *Id.* at 159; Nguyen, *supra* note 202, at 130–31.

215. Samson & Lesaux, *supra* note 43, at 159.

216. *Id.*

217. *Id.*

218. *Id.* at 156.

of a dramatic under-identification of ELLs in the early grades. It demonstrates a pattern in which teachers wait to refer ELL students for special education evaluations.

On the other hand, over-identification of ELLs is also prevalent and often occurs when students continue to lag behind their peers. Often an ELL student who continues to struggle is referred for a special education evaluation with the hope that he or she will receive more individualized instruction in a special education setting.²¹⁹ Unfortunately, ELLs in special education settings generally do not receive more individualized instruction due to a lack of special education teachers trained to use techniques designed specifically for ELL student learning.²²⁰ Thus, the overrepresentation of ELLs in special education is equally troubling because students without disabilities who are labeled as such can suffer negative consequences such as lowered expectation for performance and reduced potential for academic advancement.²²¹

The pattern of both over- and under-identification of ELLs with special education needs varies by geographic location. One nationwide study focused on Latino students identified for special education found that states with more recent expansions in their ELL population, such as South Carolina, Tennessee, and Georgia, tend to under-identify ELLs for special education services.²²² In other studies, states such as California and Texas, which have been working with large ELL populations for decades, reflect over-identification of ELLs with special education needs.²²³ In either scenario, ELLs are failing to be accurately identified as needing special education services.

As previously discussed, the 2004 Reauthorization of the IDEA introduced RTI as a way to remedy identification problems by introducing more accurate assessment of children with potential learning disabilities.²²⁴ One of RTI's goals is to combat the IDEA's problem with overrepresentation in certain populations, namely minorities.²²⁵ Neither the IDEA nor the EEOA contains any mechanism

219. See *id.* at 150 (observing a trend of identification of ELLs for special education that are in their upper elementary years); Zetlin et al., *supra* note 150, at 60–62 (discussing the process of identification, referral, and evaluation of ELLs for special education services).

220. Zetlin et al., *supra* note 150, at 60.

221. GRIFFIN, *supra* note 197, at 32; Sullivan, *supra* note 6, at 318–20.

222. Becky Pérez, Russell J. Skiba & Choong-Geun Chung, *Latino Students and Disproportion in Special Education*, EDUC. POL'Y BRIEF (Ctr. for Evaluation & Educ. Pol'y) 2008, at 2 fig.1. Although the study only analyzed special education in the Latino population, Spanish-speaking students make up over seventy percent of the ELL population and thus the conclusions have some bearing on the larger ELL demographic. Sullivan, *supra* note 6, at 322.

223. See Sullivan, *supra* note 6, at 319. *But see* Pérez et al., *supra* note 222 at 2–3 (observing that, despite assumptions to the contrary, California and Texas “did not display evidence of meaningful disparity in terms of either over- or under-representation”).

224. See Angela A. Ciolfi & James E. Ryan, *Race and Response-to-Intervention in Special Education*, 54 *How. L.J.* 303, 309–10 (2011). See *supra* note 165–71 and accompanying text for a discussion of RTI.

225. The relevant regulations provide that the lack of achievement and progress or the patterns of strengths and weaknesses cannot be primarily the result of a “[l]imited English proficiency” or “lack

to guard against under-identification of disabilities within certain populations.²²⁶ The IDEA's disregard may be that it focuses on over-identification as the most pressing problem for minorities. But, as noted earlier, ELLs often face a unique set of biases, including the tendency to delay disabilities identification until English proficiency is reached. The IDEA's focus on overrepresentation has the potential to exacerbate the problem for ELLs by suggesting we need to identify fewer students when in some places we are already identifying too few. This is not to suggest that the concern about over-identification is unnecessary. In fact, if we are not careful, a response to under-identification could greatly expand the ELL-special education population. However, the ultimate goal is to identify correctly, and doing so requires attention to both issues.

In both scenarios, under- and overrepresentation, neither the IDEA nor the EEOA offers effective solutions for the cross-section of ELL children who may also require special education services. As it relates to overrepresentation, the IDEA speaks to unbiased and accurate assessments, but as discussed earlier, the practical application of these guidelines does not fulfill the spirit of the provision. In other words, assessments as completed in practice fail to ferret out ELL students who are struggling only with language acquisition and not an underlying disability, in part, because of a lack of resources and/or a failure to adequately train general education teachers who are at the front lines of spotting disability. Turning to the underrepresentation of ELLs in special education, arguably the IDEA does not yet come into play with these students, as they have not been identified. Moreover, they are unlikely to be identified since their disabilities are masked by lack of language proficiency. The EEOA remains silent on the issue of special education and sets up a broader framework for language programs with much deference given to schools. Thus, ELL students with disabilities are left without any real protections under either statute and seem to fall into a gap that exists between the implementation of the two statutes.

III. THE GAP BETWEEN THE EEOA AND IDEA

Resolving these issues is extremely difficult because the EEOA sanctions language programs that have the effect of creating significant IDEA compliance problems. Moreover, the two statutes operate with incentives that run contrary to one another. In one corner is the EEOA, which affords school districts immense flexibility surrounding (1) program selection, (2) program implementation, and (3) timing and achievement of ELLs.²²⁷ In essence, the EEOA lets the school district choose whatever language program it wants, run

of appropriate instruction in reading or math." 34 C.F.R. § 300.309(a)(3)(vi), (b) (2014). This concern, however, is again focused solely on overrepresentation problems.

226. Although the IDEA's child find provision mandates that schools seek out students with disabilities, in practice ELL students with disabilities can easily be overlooked due to their lack of language proficiency. Moreover, as will be discussed in more detail, parents face an uphill battle when trying to establish violations of child find. Schools may be able to successfully use lack of language proficiency as a shield protecting them against liability under child find. See *infra* Part III.A.1.

227. See *supra* notes 89-113 and accompanying text for a discussion of the three-pronged *Castaneda* test.

the program in whatever way it sees fit, and gives the district several years to demonstrate results if it makes a results inquiry at all.

In the other corner is the IDEA, which proscribes numerous mandates on school districts to ensure that “all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs . . . [and] to ensure that the rights of children with disabilities and parents of such children are protected.”²²⁸ The IDEA forces a school district to ensure that a highly specific set of standards are met and that due process is provided at each turn.²²⁹ Moreover, the IDEA compels schools to work with parents, not only requiring notice, but also mandating parental involvement in the process.²³⁰

The tension between the two statutes becomes evident when examining the cross-section of children who are affected by both the EEOA and the IDEA. 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.²³¹ What becomes apparent is that neither the EEOA nor the IDEA is being implemented in a way that protects ELL children’s right to educational opportunity. The following Part demonstrates why the flexibility inherent in the EEOA makes it unlikely that school districts are abiding by the IDEA’s mandate to ensure that all children with disabilities are provided an appropriate education.

A. *EEOA Flexibility Versus Affirmative Disability Rights*

The EEOA’s guiding principle is a requirement that school districts take “appropriate action” to overcome language barriers that impede equal participation in school.²³² As demonstrated, courts have taken an expansive view of the word “appropriate,” letting school districts define and implement programs of their choosing.²³³ The EEOA “leave[s] state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA.”²³⁴ Courts

228. IDEA, 20 U.S.C. § 1400(d)(1)(A)–(B) (2012).

229. *Id.* § 1415.

230. *Id.* § 1414(a)(1)(B), (a)(1)(D), (b)(2)(A)(ii), (c)(3)–(4), (d)(1)(B), (d)(1)(C)(ii).

231. The IDEA mandates identification of children through its child find obligations. *Id.* § 1412(a)(3)(A); 34 C.F.R. § 300.111 (2014). It also requires schools to adhere to strict timelines with regard to disability eligibility determination. *Id.* § 300.301(c). However, in practice these provisions will not come into effect for a child who cannot access the IDEA because that student or that student’s parent are unaware of his or her disability. *See* Togut & Nix, *supra* note 165, at 587.

232. 20 U.S.C. § 1703(f).

233. *See supra* Part I.C.2 for a discussion of the EEOA and judicial interpretations of the “appropriate action” requirement.

234. *Castaneda v. Pickard*, 648 F.2d 989, 1009 (5th Cir. 1981).

use the three-pronged *Castaneda* test to analyze challenges to language programs under the EEOA.²³⁵ When reviewing applications of that test, it becomes evident that courts put little weight behind any of the prongs. As demonstrated below, the flexibility and resulting deference granted to school districts at each turn make it more likely that schools will fail to adequately protect ELL students with special education needs as required by the IDEA.

1. Language Program Selection

The EEOA affords a school district immense discretion as it relates to the type of language instruction program it chooses to set up.²³⁶ That discretion is problematic in its own right as to the quality of the language program, but it is also troublesome because half-hearted or misguided implementation of language instruction can undermine the appropriate and accurate identification of disabilities.²³⁷ It seems that neither schools nor courts are paying attention to the potential special education implications which may result from certain types of language selection programs or poor implementation of such programs.

Many school districts have chosen to implement English-immersion programs, which focus on English-language acquisition above all else, including educational content.²³⁸ An example of an English-immersion school district is Nogales Unified School District in Arizona.²³⁹ In 1992, a group of ELL students and their parents filed a class action suit alleging that Arizona's State Board of Education was providing inadequate education for ELLs in violation of the EEOA.²⁴⁰ The suit was originally brought when the school district had in place bilingual programs. However, in November 2003, Arizona voters passed Proposition 203, which mandated statewide implementation of "structured English immersion."²⁴¹ Part of this approach included a minimum of four hours of daily instruction in English language development.²⁴² This instruction was in

235. *Id.* at 1009–10.

236. See *supra* Part I.C.2 for a discussion of broad judicial interpretations of the EEOA.

237. Samson & Lesaux, *supra* note 43, at 150; Zetlin et al., *supra* note 150, at 60–61; Willig, *supra* note 189, at 5.

238. Approximately thirty percent of ELLs live in states with English-only legislation which sets parameters around the type of language instruction and generally restricts access to native language instruction. Sullivan, *supra* note 6, at 318.

239. ARIZ. REV. STAT. ANN. § 15-752 (2014) (“[A]ll children in Arizona public schools shall be taught English by being taught in English and all children shall be placed in English language classrooms. Children who are English learners shall be educated through sheltered English immersion during a temporary transition period not normally intended to exceed one year.”).

240. *Horne v. Flores*, 557 U.S. 433, 438 (2009).

241. “‘Sheltered English immersion’ or ‘structured English immersion’ means an English language acquisition process for young children in which nearly all classroom instruction is in English but with the curriculum and presentation designed for children who are learning the language. . . . Although teachers may use a minimal amount of the child’s native language when necessary, no subject matter shall be taught in any language other than English, and children in this program learn to read and write solely in English.” ARIZ. REV. STAT. ANN. § 15-751(5); see also *Horne*, 557 U.S. at 459–60 (discussing Proposition 203).

242. ARIZ. REV. STAT. ANN. § 15-756.01.

English with little, if any, native language support.²⁴³ Academic content in other subjects was not the focus of English language development.²⁴⁴ Although Arizona's law did not require that content be withheld from ELL learning, the law clearly gave preference to intense acquisition of English language above other academic content.²⁴⁵

Engaging in such a singular focus on English acquisition in an English-only environment can make it extremely difficult to accurately identify a student with certain types of disabilities, for example, specific learning disabilities.²⁴⁶ English-only instruction can lead to situations in which ELLs are both over- and under-identified for special education services. In either scenario, the crux of the problem is a failure to accurately disentangle language development from disability.

English-only language programs result in an over-identification of ELLs for special education when teachers assume that poor performance is indicative of disability.²⁴⁷ One problem can occur when an ELL student is conversant in English, but does not have academic knowledge of the language. The teacher assumes because the student speaks English she or he should understand lessons. However, being conversant in English does not necessarily mean that a student has a deep enough understanding of vocabulary to understand curriculum. Thus, in this scenario the student may exhibit poor performance due to lack of language proficiency but the teacher assumes an underlying disability is to blame.

The Boston public school system provides an example of overrepresentation in a district operating an English-only language program. In 2002, Massachusetts passed a ballot measure which restricted the use of bilingual instruction in favor of English-immersion programs.²⁴⁸ In the decade since, Boston city schools have seen a rise in ELLs identified as needing special education.²⁴⁹ About 21% of Boston ELLs are also identified as special education

243. English language development means "the teaching of English language skills to students who are in the process of learning English. It is distinguished from other types of instruction, e.g., math, science, or social science, in that the content of ELD emphasizes the English language itself." Order at 6–7, *Flores v. Arizona*, No. 92-CV-596-TUC-RCC (D. Ariz. Mar. 29, 2013), ECF No. 1082.

244. *Id.* at 7.

245. *Id.*

246. See Peggy McCardle, Joan Mele-McCarthy & Kathleen Leos, *English Language Learners and Learning Disabilities: Research Agenda and Implications for Practice*, 20 LEARNING DISABILITIES RES. & PRAC. 68, 70 (2005); Myhill, *supra* note 65, at 446–47.

247. RALABATE, *supra* note 8, at 7–8.

248. The default English language program in Massachusetts is sheltered English instruction, which teaches both language and content in English. Parents can request a waiver of ESL and opt for bilingual instruction if they can show that their child could not benefit from English-only instruction. *English Language Learners*, BOSTON PUB. SCHS., www.bostonpublicschools.org/ELL (last visited Mar. 6, 2015).

249. CAROLINE E. PARKER ET AL., ENGLISH LANGUAGE LEARNERS WITH DISABILITIES IN MASSACHUSETTS: CURRENT STATUS AND NEXT STEPS FOR IDENTIFICATION AND INSTRUCTION 1 (2012) (observing that in Massachusetts "the percentage of ELLs with identified disabilities has increased from 9.8 percent of ELLs in 2001–2002 to 14.8 percent of ELLs in 2010–2011").

compared to a statewide average of 16.5%. Thus, approximately more than one in five ELLs in Boston city schools are identified as having a disability and are in need of special education services.²⁵⁰

Teachers with ELL students can often feel a great deal of pressure to find a way to ensure progress among this student population. A student's consistent lack of progress can force a teacher to find a solution for this problem. A teacher may incorrectly assume that the student's education will benefit from more individualized instruction in a special education setting. In reality, however, ELLs often do not get more individualized language assistance with special education services. Further, inaccurate identification of students with disabilities can lead to long-term, negative academic and social consequences.

English-only language programs may also result in the under-identification of ELLs with disabilities who are in need of special education services. English-immersion programs, such as the one in Arizona, elevate English proficiency at the expense of subject matter. In other words, ELLs are expected to fall back on substantive content in other core areas, such as math, science, social studies, and literature, while they focus on language development.²⁵¹ This expectation of poor performance makes it unlikely that certain disabilities, such as a learning disability, will be noticed by teachers in the general education curriculum. Any signs of failure will likely be attributed to the acquisition of a new language and the resulting inability to keep up in core subject areas. Consequently, ELLs with potential disabilities can spend years in school struggling with an unidentified disability because teachers may too often assume that the student's problems are related to their language proficiency.²⁵²

These types of language programs are wholly permissible under the EEOA. In fact, the court in *Castaneda* contemplated this very structure and approved it.

We also believe, however, that § 1703(f) leaves schools free to determine whether they wish to discharge these obligations simultaneously, by implementing a program designed to keep limited English speaking students at grade level in other areas of the curriculum by providing instruction in their native language at the same time that an English language development effort is pursued, or

250. Erin Smith, *Barrier Grief: English Issues Mistaken for Learning Disabilities in Boston Schools*, BOS. HERALD (July 21, 2014), http://www.bostonherald.com/news_opinion/local_coverage/2014/07/barrier_grief_english_issues_mistaken_for_learning_disabilities; see MARIA DE LOURDES B. SERPA, GASTÓN INSTITUTE PUBLICATION, PAPER 152, AN IMPERATIVE FOR CHANGE: BRIDGING SPECIAL AND LANGUAGE LEARNING EDUCATION TO ENSURE A FREE AND APPROPRIATE EDUCATION IN THE LEAST RESTRICTIVE ENVIRONMENT FOR ELLS WITH DISABILITIES IN MASSACHUSETTS (2011), available at http://scholarworks.umb.edu/gaston_pubs/152.

251. ELL students in mainstream English-only settings fare worse academically than students in bilingual settings. Nguyen, *supra* note 202, at 135.

252. See ZEHLER ET AL., *supra* note 59, at 21–24. A national study based on data collected in the 2001–2002 school year from districts and schools that served at least one LEP student found that ELL students are underrepresented in all special education categories as compared to the general student population. The largest proportional differences were in the categories of “emotional disturbance” and “other health impairment” which includes attention-deficit/hyperactivity disorder (ADHD). *Id.* at 22–23. The largest percentage difference was in the “specific learning disability” category. *Id.* at 22.

to address these problems in sequence, by focusing first on the development of English language skills and then later providing students with compensatory and supplemental education to remedy deficiencies in other areas which they may develop during this period.²⁵³

Thus, school officials looking only at their ELL population are well within the bounds of the EEOA when electing to implement a program that emphasizes acquisition of language above academic content. However, schools also have an obligation to meet the needs of their students with disabilities, and implementation of English-only programs seems to contradict the very essence of the IDEA—namely, to ensure children with disabilities have access to a free and appropriate education.²⁵⁴ Permitting ELL children with special education needs to fall back on substantive content seems to violate that basic tenet as well as the spirit of the IDEA.²⁵⁵ Moreover, to the extent these types of programs make accurate and timely identification of special education–ELL students less likely, they fail to comply with the IDEA directives of child find and eligibility.²⁵⁶ Demonstrating those violations is difficult because the problem is systemic rather than individual. The system-wide process of timely identifying ELL children for special education, rather than any single child’s evaluation, is flawed, and flawed in a way that the EEOA allows.

Recall that the IDEA’s child find provision mandates school districts locate, identify, and refer students with potential qualifying disabilities so that appropriate supports and services can be put in place to assist them.²⁵⁷ Once those children are identified, the IDEA obligates schools to conduct an evaluation which is “administered 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”²⁵⁸ Thus, the IDEA, by proscribing standards for assessments of ELLs, clearly obligates school districts to identify and assess ELL children for disabilities as it would any other child.

Nothing in the IDEA creates an exception for the identification of ELL students. Rather, the statute specifically requires that ELL students be assessed in their native language in an attempt to ensure validity of assessments.²⁵⁹ Thus, there is an obligation to identify this cohort of students for potential disabilities and to do so under the same standards used for any other student. Language programs which make it less likely teachers will accurately identify disabilities and actively encourage a delay in assessment of special education in order to give preference to language acquisition are in direct contradiction with the child find provision of the IDEA.

253. *Castaneda v. Pickard*, 648 F.2d 989, 1011 (5th Cir. 1981).

254. IDEA, 20 U.S.C. § 1400(d)(1)(A)–(B) (2012).

255. *See generally id.* § 1400(d) (listing the purposes of the IDEA).

256. *See supra* Parts II.B.1 and II.B.2 for a discussion of eligibility and child find provisions of the IDEA.

257. 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111 (2014).

258. 34 C.F.R. § 300.304(c)(1)(ii).

259. *Id.*

Ultimately, the EEOA permits language programs to operate that make IDEA compliance unlikely. Moreover, the IDEA rarely serves as a check on these language programs. In fact, a school district has not yet been forced to change its language program because of the IDEA.²⁶⁰ In other words, although the child find provision mandates that schools seek out, identify, and evaluate children for disabilities, this provision has not yet been used to strike down a school's language program. Therefore, while in theory the IDEA protects ELLs with disabilities, in reality the IDEA protections are futile.

The inadequate nature of child find becomes apparent when analyzing liability under the statute. In order to prove that a school district violated child find, a plaintiff must demonstrate substantive harm that resulted when school officials overlooked clear signs of disability and were negligent in failing to order testing, or there was no rational justification for deciding not to evaluate.²⁶¹ Courts have also held that school districts cannot duck their child find requirements by failing to evaluate children.²⁶²

Assuming a plaintiff can demonstrate substantive harm, a court will first analyze whether the school district overlooked clear signs of disability. Courts have found that schools overlooked clear disability when they were on notice of the student's educational struggles, either through a parent or teacher, and they elected not to evaluate the student.²⁶³ If the school district overlooked a student's disability, courts will also evaluate additional factors to determine whether the school had a rational justification for its actions, such as whether the student was meeting academic goals and whether the school had put in place any additional services to assist the child with his or her educational issue.

In the ELL context, a school faced with such a child find challenge would likely argue that it was not on notice of a student's disability because the disability was masked by language proficiency. When educational struggles are expected due to an emphasis on English-language acquisition above content, they no longer serve as a harbinger of potential underlying disabilities. In other words, a school could argue there were no "clear signs of disability."²⁶⁴ Moreover, schools would likely assert the language program as a rational justification for deciding not to evaluate. Courts should find both defenses lacking. The IDEA clearly mandates that schools evaluate this population of students and instructs them on how to ensure accuracy in the process.²⁶⁵ It

260. Schools have been held liable for failure to provide adequate language services as part of an individual student's IEP. See *Marple Newton Sch. Dist. v. Rafael N.*, No. 07-0558, 2007 WL 2458076, at *11 (E.D. Pa. Aug. 23, 2007). However, a school district has not been forced to alter its general language program in order to comply with the IDEA.

261. *Bd. of Educ. v. L.M.*, 478 F.3d 307, 313 (6th Cir. 2007) (quoting *Clay T. v. Walton Cnty. Sch. Dist.*, 952 F. Supp. 817, 823 (M.D. GA. 1997)).

262. *Compton Unified Sch. Dist. v. Addison*, 598 F.3d 1181, 1184-85 (9th Cir. 2010).

263. See, e.g., *id.*

264. *L.M.*, 478 F.3d at 313 (quoting *Clay T.*, 952 F. Supp. at 823) (holding that an IDEA claimant "must show that school officials overlooked clear signs of disability").

265. See IDEA, 20 U.S.C. § 1414 (2012) (prescribing procedures for evaluations, eligibility determinations, individualized education programs, and educational placements).

should be inferred that the IDEA would not consider addressing lack of proficiency in English to be a rational justification for delaying evaluation. This affirmative duty to evaluate does not create an exception for ELLs; rather, it explicitly includes them in the group of students schools must seek out. Thus, courts should continue to put the onus on school districts to evaluate ELLs in a timely manner.

To date, no court has held that an ELL program violates the IDEA. Perhaps this is because IDEA claims generally focus on an individual child, whereas EEOA claims focus on a group of children being affected by a language program. Thus, courts have not been confronted with the issue of whether a school's language program violates the IDEA by failing to identify and refer a group of children for potential disabilities. Although a facial conflict between the statutes may not be present, in practice, the deference provided by the EEOA prevents adequate compliance with the IDEA. This inability to ensure compliance with the IDEA has real consequences for ELL children with special education needs. Courts analyzing such a case should not allow the EEOA to act as a shield which protects a school district from a violation of child find under the IDEA. Doing so would mean that the ELL student would have no recourse for delays in special education evaluations.

2. Language Program Implementation

The EEOA also affords a certain amount of flexibility when school districts determine how to implement a language program. Although historically courts have found language programs to violate the EEOA when not appropriately funded or implemented,²⁶⁶ the recent trend has been to give great weight to local resources when analyzing whether or not a school district has met its obligations under the EEOA.²⁶⁷ School districts are permitted to operate their ELL programs in the cheapest way possible, which can mean forgoing appropriate teacher certifications²⁶⁸ or bilingual teacher's aides.²⁶⁹ Teachers who are not qualified to serve ELL students may have a more difficult time identifying potential special education needs in these students.²⁷⁰

266. See, e.g., *Castaneda v. Pickard*, 648 F.2d 989, 1015 (5th Cir. 1981) (directing district court to establish a timetable for the school district to implement a program to resolve deficiencies of its language program); *Keyes v. Sch. Dist. No.1*, 576 F. Supp. 1503, 1518 (D. Colo. 1983) (finding EEOA violation where school district did not adequately implement language programs for LEP students); *United States v. Texas*, 523 F. Supp. 703, 735–36 (E.D. Tex. 1981) (finding Texas's limited ESL program was inadequate and violated the EEOA); *Rios v. Read*, 480 F. Supp. 14, 24 (E.D.N.Y. 1978) (finding the school district's bilingual program inadequate and in violation of the EEOA).

267. See, e.g., *Horne v. Flores*, 557 U.S. 433, 435 (2009); *C.G. v. Pennsylvania Dep't of Educ.*, 888 F. Supp. 2d 534, 575–76 (M.D. Pa. 2012); *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007, 1019 (N.D. Cal. 1998); *Quiroz v. State Bd. of Educ.*, 1997 WL 661163, at *4–6 (E.D. Cal. Sept. 10, 1997); *Teresa P. ex rel. T.P. v. Berkeley Unified Sch. Dist.*, 724 F. Supp. 698, 714 (N.D. Cal. 1989).

268. See *Teresa P.*, 724 F. Supp. at 714–15.

269. See *Horne*, 557 U.S. at 504 (Breyer, J., dissenting) (arguing that the majority did not appropriately consider certain evidence, such as the school district's lack of funding for bilingual teacher's aides).

270. *Sullivan*, *supra* note 6, at 320, 330.

Teachers play a vital role in spotting potential disabilities.²⁷¹ They interact on a daily basis with their students and are continually monitoring progress or lack of progress. However, a teacher who is not certified in ELL instruction is less likely to accurately identify potential disabilities for several reasons. First, the teacher may not be adequately structuring lesson plans to meet the needs of an ELL student. Thus, lack of achievement may be due to inappropriate lessons rather than a sign of disability.²⁷² Second, an untrained teacher may have unrealistic expectations for progress or even be unsure about the rate of progress. This could lead to either waiting too long in order to give language acquisition more time, or not waiting long enough.²⁷³ Two recent EEOA cases highlight the deference paid to local school districts in implementing their respective ELL programs.

In *Teresa P. ex rel T.P. v. Berkeley Unified School District*,²⁷⁴ a class of limited English proficient students and their parents sued the Berkeley Unified School District (BUSD) for a violation of the EEOA claiming, inter alia, that the district's failure to provide qualified teachers, sufficient supporting resources, and necessary monitoring systems amounted to a failure to properly implement the language acquisition program.²⁷⁵ Due to funding shortages, BUSD was unable to recruit and hire teachers with required ESL certification and in some cases used noncredentialed teachers, as well as tutors, to supplement instruction. The court ruled in favor of the BUSD, finding that the school district was not in violation of the EEOA when it failed to hire credentialed teachers.²⁷⁶ The court noted that BUSD funds were limited and that program delivery in all areas was conditioned upon that fact.²⁷⁷

More recently, the Supreme Court in *Horne v. Flores*²⁷⁸ weighed in on a decades-long battle between the State of Arizona and parents of ELL students surrounding adequate funding levels of a district's ELL program.²⁷⁹ Arizona appealed the district court's order which held that Arizona was violating the EEOA by failing to adequately fund its ELL program.²⁸⁰ The Supreme Court, in overturning this ruling, deflated any weight left in the implementation prong.²⁸¹ The Court stated that funding was merely one tool that may be employed to achieve the objective of the EEOA, and that "[t]he EEOA's 'appropriate action' requirement grants States broad latitude to design, fund, and implement ELL

271. Samson & Lesaux, *supra* note 43, at 151–60 (demonstrating, through a study, that low teacher ratings of language, literacy skills, and reading proficiency were significant predictors of placement in special education).

272. Zetlin et al., *supra* note 150, at 61–63.

273. *Id.* at 61.

274. 724 F. Supp. 698 (N.D. Cal. 1989).

275. *Teresa P.*, 724 F. Supp. at 700.

276. *Id.* at 714–15.

277. *Id.* at 715.

278. 557 U.S. 433 (2009).

279. *See Horne*, 557 U.S. at 438–39.

280. *Id.* at 439.

281. *See id.* at 467–56.

programs that suit local needs and account for local conditions.”²⁸² The Court remanded the case, ordering the district court to use a broader inquiry to determine whether changed circumstances have obviated the need for increased funding and otherwise satisfied the requirements of the EEOA.²⁸³ One result of this broader inquiry was that the district court found removal of bilingual teacher’s aides in ELL classrooms did not violate the implementation prong of *Castaneda*.²⁸⁴

The result again is an English acquisition program structured in a way that makes it highly unlikely teachers will be prepared to appropriately identify and refer ELL students with special education issues. A consistent theme among researchers who study assessments of ELLs is the ability of ELL teachers to have training in place that will allow them to spot an underlying disability in the ELL population.²⁸⁵ Schools that do not have to ensure that their ELL teachers have basic credentials are much less likely to hire people with the skills necessary to appropriately identify ELLs who have special education needs. When a court sanctions the use of untrained ELL teachers, as it did in *Teresa P. and Horne*, it is sanctioning the use of teachers who lack the skills to appropriately identify potential disabilities in this population.

Although the IDEA requires accurate evaluations of ELLs, the relevant provision does not protect the students who are passed over for evaluations. What’s more, the IDEA’s 2004 ELL Assessment Requirements are not expansive enough to combat the inaccuracy of biased data in the form of teacher observations, which affect special education eligibility determinations.²⁸⁶ In other words, the IDEA does not require certified ELL teachers, nor does it speak to appropriate language proficiency programs or implementation of such programs; thus, there exists a gap in ensuring appropriate services for ELLs with special education needs. As applied, neither the IDEA nor the EEOA requires staff with basic competencies necessary to appropriately identify and refer ELL students for special education.

3. Trial Period to Demonstrate Positive Results

Finally, the EEOA gives school districts flexibility as it relates to monitoring student achievement. Prong three of the *Castaneda* analysis requires courts to consider whether the program in question “produce[s] results indicating that the language barriers confronting students are actually being overcome.”²⁸⁷ The application of this standard as it relates to the IDEA is problematic in two ways. First, the legitimate trial period can last for several

282. *Id.* at 468.

283. *Id.* at 459.

284. Order at 12, 21–22, *Flores v. Arizona*, No. 92-CV-596-TUC-RCC (D. Ariz. Mar. 29, 2013), ECF No. 1082.

285. See Willig, *supra* note 189, at 2–3; Zetlin et al., *supra* note 150, at 62.

286. See *supra* Part II.C.1.b for a discussion of how biased assessment tools can result in the failure to meet the special education needs of ELLs.

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

years, if not decades, and second, courts are reluctant to weigh in on student achievement even after a legitimate trial period.²⁸⁸

Recent developments under No Child Left Behind (NCLB) have ostensibly sought to address the accountability of ELL programs by mandating that states demonstrate “adequate yearly progress” (AYP) in their ELL populations.²⁸⁹ However, states may defer this assessment in reading and language arts in ELL populations for one year.²⁹⁰ Further, states may include in their ELL subgroup students who have exited language programs for up to two years.²⁹¹ In addition, only roughly six out of ten school districts report that instructional programs for their ELL populations are well aligned with state content and performance standards.²⁹² If curriculum is not aligned to the content of the test, then it must follow that the assessments used to gauge whether students in fact learned this curriculum cannot be valid. In other words, if you are not properly teaching content, how can you expect tests to be an accurate reflection of how well children can learn? The lack of accountability for ELL programs incentivizes a wait-to-fail approach where schools are unlikely to notice special education issues and where underperformance in ELL populations is not only accepted, but expected.

Again, the tension between the EEOA and the IDEA is visible in this dichotomy. The EEOA allows ELL students to fail for some time, and may actually expect failure for some time. If failure is the baseline, a student who is struggling with special education needs as well as language proficiency may not stand out from his or her peers. Thus, to identify this student, teachers would need to be more vigilant and possess a higher level of skill to disentangle the

288. See *supra* Part I.C.2 for a discussion of the EEOA.

289. 34 C.F.R. § 200.21(a)(2) (2014). It should be noted that complying with NCLB does not necessarily ensure that a district has fulfilled its obligations under the EEOA. *Horne v. Flores*, 557 U.S. 433, 462 (2009). Courts can and should look to evidence of NCLB compliance as being probative of whether an EEOA violation exists; however, satisfaction of adequate yearly progress under NCLB does not necessarily mean that all obligations of the EEOA have been met. For further discussion, see Jeffrey Mongiello, *The Future of the Equal Educational Opportunities Act § 1703(f) after Horne v. Flores: Using No Child Left Behind Proficiency Levels to Define Appropriate Action Towards Meaningful Educational Opportunity*, 14 HARV. LATINO L. REV. 211 (2011).

290. 34 C.F.R. § 200.6(b)(2)(i) (“[The] State must assess, using assessments written in English, the achievement of any limited English proficient student in meeting the State’s reading/language arts academic standards if the student has attended schools in the United States . . . for three or more consecutive years.”).

291. See U.S. DEP’T OF EDUC., NEW NO CHILD LEFT BEHIND REGULATIONS: FLEXIBILITY AND ACCOUNTABILITY FOR LIMITED ENGLISH PROFICIENT STUDENTS 2 (2006), available at <http://www2.ed.gov/admins/lead/account/lepfactsheet.pdf>. “Since LEP students exit the LEP subgroup once they attain English language proficiency, states may have difficulty demonstrating improvements on state assessments for these students. Accordingly, the . . . new flexibility . . . for AYP calculations, allow[s] states for up to two years to include in the LEP subgroup students who have attained English proficiency.” Press Release, U.S. Dep’t of Educ., Secretary Paige Announces New Policies to Help English Language Learners (Feb. 19, 2004) (on file with author).

292. ZEHLER ET AL., *supra* note 59, at 15. Findings are part of a national survey in which school districts and ELL service coordinators were asked to rate on a five-point scale the extent to which instructional programs were aligned with state content/performance standards. *Id.*

underlying disability from language proficiency. The IDEA, of course, requires this level of attention as it mandates that schools affirmatively seek out students with special needs. The EEOA, however, invites a more relaxed approach to assessment, which can often mask the struggles of an ELL student with special education needs.

B. Limited Recourse for ELLs with Disabilities

1. Courts' Willingness to Allow Schools to Exploit the Statutory Tension

Courts and litigants have struggled to reconcile these statutory inconsistencies. In some instances, litigants have focused only on the IDEA or the EEOA, failing to raise claims under both. In other cases, litigants have raised both IDEA and EEOA claims, but courts have looked for a specific, narrow violation of one or the other statute, overlooking the fact that the problem is one of the intersection of these statutes. The most poignant example comes from *K.A.B. ex. rel. Susan B. v. Downingtown Area School District*,²⁹³ where parents of an adopted Russian-born son brought both EEOA and IDEA claims in connection with their school district's failure to timely identify their son's disability.²⁹⁴

Prior to starting kindergarten, the district evaluated K.A.B. for speech and language problems at his parents' request.²⁹⁵ The evaluation was inconclusive as to whether K.A.B. had a speech or language disorder or needed more exposure to English.²⁹⁶ His parents requested and received several additional evaluations, but all came back inconclusive due to a lack of language proficiency.²⁹⁷ Two years later, the district identified him as having a learning disability and also subsequently confirmed that K.A.B. had underlying speech and language issues, which were originally suspected by his parents.²⁹⁸ At that point, K.A.B.'s parents sued the district, alleging a failure to timely identify their son's disability.²⁹⁹ The parents argued that the district's policy of delaying learning disability evaluations for ELL students violated the EEOA.

The district court rejected their claim, finding that the timing of the district's evaluation was appropriate given the difficulty of disentangling language from the underlying disability. In forming this conclusion, the court credited testimony from K.A.B.'s ESL teacher and speech and language pathologist stating foreign-adopted students should be in the country for at least two years before special-needs testing.³⁰⁰ The court also cited the IDEA's guidance on the validity of assessments of learning disabilities for the proposition that cultural factors,

293. No. 11-1158, 2013 WL 3742413 (E.D. Pa. July 16, 2013).

294. *K.A.B.*, 2013 WL 3742413, at *1-4.

295. *Id.* at *2.

296. *Id.*

297. *Id.*

298. *Id.* at *3.

299. *Id.* at *4.

300. *Id.* at *6.

economic disadvantage, and limited English proficiency must be ruled out prior to assessing a student for disabilities.³⁰¹ However, what the court failed to consider, and perhaps what the plaintiffs failed to introduce into evidence, is ample social science research indicating that assessments of ELL students for disabilities can be performed accurately as long as the correct battery of assessments are given under the appropriate conditions.

By agreeing that the school could delay in assessing K.A.B., the court effectively held that ELL students with disabilities can be treated with less seriousness and urgency than other students. Such an interpretation, of course, is inconsistent with the IDEA's child find obligations, which place the affirmative duty on schools to seek out and identify children with special education needs in a timely manner. A violation of child find occurs when a student is reasonably suspected of having a disability, but *K.A.B.*'s holding implicitly indicates that although an ELL student might be suspected of a disability, a district is excused from child find obligations while the student's English develops.

K.A.B.'s parents also alleged an EEOA violation, but the court was even less receptive to that claim. The court simply found the EEOA inapplicable because it does not address special education.³⁰² While the court is correct that neither the text of the EEOA, nor subsequent case law, specifically addresses special education, the EEOA does mandate the provision of appropriate access to educational opportunities—access which is broad enough to encompass all students with language needs, including ELL students with special education needs.³⁰³ It follows that the court in *K.A.B.* should have considered whether a language program consisting of thirty minutes of daily pull-out prevented the school from accurately and timely identifying his disabilities.³⁰⁴ Insofar as some ELL students inevitably have disabilities, the EEOA must necessarily account for how language programs impede or enhance opportunities for ELLs with disabilities. For students with disabilities, equal access to education often includes accommodations and certainly includes the right to be treated equally with other similarly situated students. Thus, if other native English-speaking students are being assessed for special education issues, language-minority students should not be prevented from engaging in similar assessments. Failing to understand the intersection of language status and disability, however, the court summarily dismissed K.A.B.'s EEOA claim. Moreover, no clearly established precedent would indicate the court was wrong. Rather, current precedent conceptualizes IDEA and EEOA claims as entirely disconnected and offers no solution when this conceptualization is flawed.

301. *Id.*

302. *Id.* at *11–12.

303. *See* EEOA, 20 U.S.C. § 1703(f) (2012) (prohibiting the denial of equal educational opportunity through “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”).

304. *See K.A.B.*, 2013 WL 3742413, at *6. “Pull-out” service is when a child is removed from the general education classroom to work on specific skills. *Id.* at n.2.

2. Parents of ELLs: A Compromised First and Last Line of IDEA Defense

In any number of respects, from disability referrals to assessments to the appropriate delivery of educational services, the IDEA creates procedures whereby parents serve as essential checks on school districts.³⁰⁵ Parent participation is written into the IDEA as a way to ensure that schools are providing appropriate services to disabled students. Unfortunately, for ELLs this fail-safe is not as effective.

Parents of ELL children, who generally have limited English proficiency themselves, are much less likely to engage in the IDEA's advocacy model.³⁰⁶ These parents face cultural and linguistic barriers that may inhibit effective communication with school officials. Moreover, they bring a diverse set of cultural beliefs about disabilities, as well as the role of parents in education. Thus, although the IDEA mandates parental involvement, meaningful participation is often not achieved with parents of ELL students. Furthermore, studies show that schools which operate English-immersion language programs have the least parental involvement.³⁰⁷ When ELL parents are unable to serve as a check against school systems, it only increases the likelihood that their child's special education needs will go unnoticed and unserved. Consequently, resolving the tensions between the IDEA and the EEOA is even more important for this group of students who may be less able to advocate for themselves.

IV. SOLUTIONS

A. *Judicial Action: Reconcile EEOA Obligations with IDEA Rights*

Courts seem unwilling to impose any serious constraint on school districts' broad discretion in adopting and implementing their language programs. For this reason, many educational advocates have called for amendments to the EEOA that flesh out the "appropriate action" standard and give more guidance to schools and courts.³⁰⁸ As an initial matter, the likelihood of any such amendment is slim. Amending the EEOA would require political will and consensus, both of which are missing in the currently polarized political environment. Second, a fix for the general problem of poorly conceived and implemented language programs would not necessarily fix the more particularized problem of identifying student disabilities within that program. Fixing the special education problem requires a limitation on language program flexibility with specific

305. See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205 (1982) (observing that the IDEA procedures "giv[e] parents and guardians a large measure of participation at every stage of the administrative process").

306. See Shernaz B. Garcia, *Parent-Professional Collaboration in Culturally Sensitive Assessment*, in GRIFFIN, *supra* note 197, at 88.

307. Willig, *supra* note 189, at 3-4.

308. See, e.g., Berenyi, *supra* note 25, at 667-73; Maria-Daniel Asturias, Note, *Burden Shifting and Faulty Assumptions: The Impact of Horne v. Flores on State Obligations to Adolescent ELLs Under the EEOA*, 55 *How. L.J.* 607, 638-41 (2012).

attention paid to disability identification. This problem, however, could be mitigated without amending the EEOA if courts would engage in earnest attempts to reconcile the EEOA with the IDEA.

An ELL student with special education needs has rights under both the EEOA and the IDEA.³⁰⁹ When a student raises claims under both, the two statutes must be applied harmoniously to prevent either from superseding the other. An ELL student with the dual challenges of language and disability should have the right to a language program that affords him or her equal participation in school as well as the right to services or accommodations necessary to assist his or her disability. Thus, while a language program might not be generally objectionable under the EEOA, to the extent that the language program impedes a student's access to education by preventing the student from securing appropriate services for a disability, its application violates the spirit of "appropriate action" under the EEOA and is inconsistent with the IDEA's mandate of free appropriate public education, child find, and disability identification.

Anytime advocates raise EEOA challenges they should ask courts to dig beneath the surface of the adopted language program to assess the program's effect on accurate and appropriate services to the ELL-special education population. Such focus would have the largest impact on analysis of the second prong of the *Castaneda* standard: implementation.³¹⁰ Although courts have been willing to excuse implementation failures in regard to the general ELL population,³¹¹ courts' rationale for this leniency does not extend to ELL students with disabilities. Moreover, to extend the rationale to ELL students with disabilities would be to allow EEOA deference to impede and supersede the specific IDEA rights to be identified and evaluated for special education services.

For instance, courts have been willing to excuse the failure of schools to ensure properly certified and credentialed ESL teachers, reasoning that uncertified but good teachers may still be capable of effectively implementing language programs.³¹² While this may be true, uncertified and noncredentialed ESL teachers increase the risk that a school will not appropriately identify special education needs within the ELL population. The disaggregation of disability and language barriers is not simply an intuitive task that good teachers and administrators can muddle their way through. Rather, appropriate identification is complex even for those who are properly certified, and may be nearly impossible for those who are not. Relying on uncertified teachers as the first line of identification runs the serious risk of misidentification, delays, or

309. See IDEA, 20 U.S.C. §§ 1400-82 (2012); EEOA, 20 U.S.C. § 1703(f).

310. See *supra* notes 100-06 for a discussion of the second prong of the *Castaneda* test.

311. See, e.g., *Horne v. Flores*, 557 U.S. 433, 461-65 (2009); Order at 18-22, *Flores v. Arizona*, No. 92-CV-596-TUC-RCC (D. Ariz. Mar. 29, 2013), ECF No. 1082; *Teresa P. ex rel. T.P. v. Berkeley Unified Sch. Dist.*, 724 F. Supp. 698, 714-15 (N.D. Cal. 1989).

312. See *Teresa P.*, 724 F. Supp. at 714-15.

failures to provide appropriate services to ELL children with special education needs.

For this reason, notwithstanding the general deference afforded districts under the EEOA, courts must require that school districts have teachers with the certifications necessary to ensure that they are competent to teach ELL students. While legitimate obstacles, such as a national shortage of appropriately qualified teachers, make this requirement challenging for districts, a shortage of teachers does not excuse a district from maintaining a teaching force that is almost bereft of any teachers certified in the school's chosen language instruction program. At the very least, courts must demand substantial compliance with implementation of a chosen language program. Requiring less, effectively sanctions language programs that increase the risk that schools will overlook or inappropriately identify ELL students with disabilities. Insisting on qualified teachers is not only consistent with the original interpretation of the EEOA in *Castaneda*, but it will also make it more likely that the curriculum is being conveyed in ways designed to reach ELL students, which, in turn, will increase the accuracy of subsequent conclusions drawn from a student's lack of academic progress. Appropriately certified teachers will also be more familiar with the normal progression of language acquisition for an English learner and, consequently, more likely to identify or appreciate a lack of progression that is tied to an underlying disability.

In addition, schools must retain professionals—on staff or on a contract basis—who are able to adequately assess ELL students for potential disabilities after teachers or parents refer them. As national data demonstrates, many schools are currently failing to adhere to IDEA guidelines of assessment for nonnative English speakers.³¹³ ELLs are often assessed in English, or assessments are delayed because of a lack of translators.³¹⁴ Both are violations of the IDEA and render any results or conclusions from the assessments invalid. Rather than wait for these violations or invalid results to occur, courts should, as part of the EEOA language implementation analysis, insist that schools and districts have the staff which can both appropriately assess ELL students in a timely manner and reach assessment conclusions that are valid. Like any other demographic group, ELL populations necessarily include students with disabilities. Thus, any language program that a district adopts must account for the need and difficulty of accurately identifying ELLs with disabilities. Courts should interpret the failure to do so as a failure to appropriately implement the chosen language program.

In sum, judicial 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. Theoretically, any language program might be geared toward that end, but the program would require specific

313. Figueroa & Newsome, *supra* note 149, at 211–13.

314. TANENBAUM ET AL., *supra* note 33, at 18.

attention to the issue and appropriately trained and certified personnel. In essence, districts would have to consider the effect an English language program would have on the ELL–special education population, as well as the general ELL population, and ensure the effect was consistent with affording appropriate IDEA services.

B. Executive Action: Issue Policy Guidance That Clarifies the Obligation to Timely Assess ELLs for Special Education Services

It is evident that courts and schools continue to be misinformed about the circumstances under which a child with limited English proficiency can be appropriately assessed for a disability.³¹⁵ This confusion has led to unnecessary delays in assessments and encourages wait-to-fail policies when addressing ELLs' special education needs.³¹⁶ The U.S. Department of Education should address this problem by issuing guidance that clarifies the relevant sections regarding evaluations of ELLs. The 2004 Reauthorization of the IDEA added new requirements regarding the assessment of ELLs, essentially requiring that assessments be nondiscriminatory on a racial or cultural basis, administered in the child's native language, and valid for the purposes in which they are used.³¹⁷ Further, if the student has been receiving instruction in English, it may be important for the assessment to be given in both English and the native language in order to ensure a complete picture of the child's abilities.³¹⁸

Because the statute and corresponding regulations require assessment in native language where appropriate, they necessarily contemplate assessing children before they have reached proficiency in English. More to the point, the IDEA does not create an exception for assessment of ELLs, but rather provides instruction and guidelines concerning accurate assessments. However, as national data demonstrates, many schools are currently failing to adhere to these rules.³¹⁹ Both schools and courts incorrectly use and accept lack of language proficiency as a legitimate reason to delay assessments for special education. In short, the statutory message has not reached its intended audience. Therefore, the Department of Education should issue more definitive guidance underlining schools' obligations to assess ELLs for special education in a timely manner and clearly prohibiting delays in assessments due to language proficiency. Further, the Department of Education should stress the importance of maintaining the staff necessary to appropriately assess ELL students.

Separately, the Office for Civil Rights, which has the authority to enforce the EEOA, should aggressively investigate district practices of assessing ELLs for special education and take administrative action against those who continue to delay special education assessment based on language proficiency. So few of

315. K.A.B. *ex rel.* Susan B. v. Downingtown Area Sch. Dist., No. 11-1158, 2013 WL 3742413, *2–4, *11–12 (E.D. Pa. July 16, 2013).

316. Samson & Lesaux, *supra* note 43, at 159.

317. 34 C.F.R. § 300.304(c)(1) (2014); *see also id.* § 300.27; *id.* § 300.306(b)(1)(iii).

318. *See id.* § 100.3(b)(vi).

319. *See, e.g.,* Figueroa & Newsome, *supra* note 149, at 211–13.

these cases are litigated that courts have little precedent and understanding as to how to resolve the complex questions they raise. Moreover, the decisions are so infrequent and idiosyncratic that even if a court reached the correct decision, it might have little effect on other districts' practices. Affirmative and clear steps by the Department of Education, however, would prompt districts to come into compliance and provide courts with instructive guidance in adjudicating these cases.

C. Congressional Action: Require Uniform Data Reporting

An underlying issue complicating the intersection between ELLs and special education is the lack of accurate and complete data surrounding the ELL population.³²⁰ Without accurate and complete data, establishing a baseline of what works to address the needs of ELLs—as well as trusting the accuracy of results related to over- and under-identification of children who are both special needs and ELL—is nearly impossible. To move beyond the current state of ambiguity and conflicting pedagogical claims, social scientists and policymakers must have adequate information about ELLs with suspected and verified disabilities that tracks their progression across several years.

The currently available data falls far short of this goal.³²¹ Federal databases only recently began collecting data on identification and placement by language status.³²² Title III of the Elementary and Secondary Education Act, as amended in 2001 by the No Child Left Behind Act, has significantly improved data gathering surrounding ELLs' achievements; however, significant flaws remain.³²³ First, the ELL student population consistently changes as students become proficient and test out of the subgroup, while newer and much less proficient students enter. School districts are only required to track students for two years after they are deemed proficient.³²⁴ When data is only kept for two years subsequent to proficiency, tracking students longitudinally is challenging at best.

320. See ZEHLER ET AL., *supra* note 59, at 18 (finding that many district LEP service coordinators were unable to provide data on the achievement of former LEP students on statewide and district tests, and on dropout rates and diplomas received by LEP and former LEP students). In addition to record-keeping issues, the report cites several other reasons for difficulty in tracking this group: (1) high mobility rate of LEP students; (2) lack of standardized definition of LEP status; and (3) former LEP status is not always maintained in record-keeping systems. *Id.*

321. *Id.* at 37 (finding that the study's request for information about the subgroup of SpEd-LEP students (limited English-proficiency students with disabilities) challenged many district and school administrators. "Given that there have been very few research or evaluation efforts or data-reporting systems that have focused on SpEd-LEP students as a distinct population, these findings with regard to the data systems are not surprising.").

322. Sullivan, *supra* note 6, at 319.

323. 20 U.S.C. § 6841 (2012). Title III links funding to the development of English language proficiency standards. *Id.* In order for states to access federal dollars to assist with the cost of ELL programs, they must adopt valid English language proficiency assessments and measure ELLs' progress toward and attainment of English proficiency as well as academic content. *Id.* § 6841(a)(1)–(4).

324. *Id.* § 6841(a)(4); see also ZEHLER ET AL., *supra* note 59, at 33 (highlighting the lack of "data reporting systems that have focused on SpEd-LEP students as a distinct population").

As a result, a student formerly classified as ELL, who more than two years later is identified as having a disability, would not be captured by the current data collection systems as being an ELL with a disability, or an ELL whose disability was previously overlooked.

Second, Title III does not mandate a standard definition of ELL that states must adopt.³²⁵ Consequently, states across the country vary tremendously in their classification of ELLs. A student classified as an ELL in one state or district may not be considered an ELL in another.³²⁶ For that matter, ELL classifications may differ among districts within the same state.³²⁷ Finally, assessments of language proficiency also vary across districts and states, which again means that an ELL in one school may not be deemed an ELL in another, which make reliably longitudinal data, even if kept, useless.

In order to get a better understanding of the special education population within the larger population of ELLs, the data collection on ELLs must be unified. Simply mandating a standardized definition of an ELL in data reporting would go a long way toward fixing the problem. If, like disabilities, there was a national set of criteria which defined students with English language needs, tracking this group of students would become not only easier, but results would also prove more meaningful. Further, school districts should be required to maintain a student's ELL status, former or current, in the student's records. This would permit schools and others to track ELL students across time and draw reliable conclusions about the academic progress of this subgroup, including the extent to which their special education needs are being met or overlooked.

CONCLUSION

The educational needs of ELLs too often get tangled up in debates over immigration, nationalism, and cultural hegemony. Though language proficiency defines this group, ELLs have a diverse set of educational needs that are not limited to language alone. When the politics of language take center stage, ELLs with dual challenges of language and disability are relegated to the sidelines.

Schools, however, are legally obligated to address these dual challenges, under the EEOA and the IDEA, respectively. Although these statutes are separate and distinct, the students affected by them are not. Thus, decisions made through the lens of language will necessarily have secondary effects on students who also have disabilities. Moreover, ELLs with disabilities have rights under both statutes. Schools must acknowledge the intersection of language and disability and operate language programs that protect students' rights to accurate and timely identification of disabilities.

325. 20 U.S.C. §§ 6811, 7011.

326. In 2009–10, eight states and the District of Columbia had established consistent statewide criteria for identifying ELLs, while the remaining forty-two states provided districts with discretion in making identification decisions. *Id.* Eighteen states and the District of Columbia had established consistent criteria within their states for existing students from the ELL subgroup, while the remaining thirty-two states allowed for district discretion. TANENBAUM ET AL., *supra* note 33, at 15.

327. *Id.*

Courts, too, must acknowledge the conflict presented when a school's language program fails to timely identify and evaluate an ELL with special education needs and must reconcile the rights contained in the two equally controlling statutes. Ensuring compliance with the IDEA requires curtailing the flexibility previously afforded to districts under the EEOA. To do anything less is to undermine the bedrock principle of equal participation in education enshrined in both the EEOA and IDEA.

