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## Educational Rights of English-Language Learners and Costs of Failing Them

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### Case Digest Summary

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Each year, millions of children whose native language is not English begin a new school year without the language skills they need to learn. These children are commonly referred to as English-language learners, or ELLs. More than 4.85 million of our K-12 children, or approximately 8.5 percent, have been identified as ELLs. For many of these young learners, the ELL label will stick with them for much of, if not all, their K-12 education. In fact, it is estimated that between one-third and one-half of all ELLs who enter primary grades become so-called "long-term English language learners," which the National Education Association defines as students "who have been enrolled in U.S. schools for six years or more, are stalled in progressing towards English proficiency ... and are struggling academically."

Despite an estimated 60 percent growth in the ELL population in our nation's schools over the last 10 years, school systems across the country continue to shortchange this critical student population. The lack of adequate resources, training and support provided to these students and their teachers has resulted in high dropout rates and low graduation successes. This not only contributes to the maintenance and growth of an academic underclass within the school system but also creates lasting challenges for these students. Studies show that an inadequate education combined with ongoing English deficiencies lead to lower wages. This, in turn, means that many ELLs will not escape the poverty of their childhood. Twenty-six percent of ELLs live in households with an annual income below the poverty line, nearly twice as many as their English-proficient peers. Moreover, those who struggle with the English language earn 17 to 135 percent less than those proficient in English.

The failure to appropriately educate ELLs also has grave societal consequences. An array of studies have shown that low educational attainment and dropout rates are correlated with a number of social costs. Some studies show that \$18.5 billion in national yearly crime costs could be saved if the overall graduation rates improved by 5 percent and that the U.S. economy would reap at least an additional \$1.2 billion in wages. In Pennsylvania, one study shows that \$750 million would be saved in prison expenses and \$48 million would be added to our state economy if we could increase graduation rates by 5 percent. In addition to these more objective costs, when a broad swath of students are denied the opportunity to realize their educational potential, society loses out on valuable human capital.

Given the stakes involved, is there anything that socially-minded attorneys can do through our existing set of civil rights laws to counteract these outcomes? The answer is yes.

The legal right of ELLs to educational equity has been recognized for decades. Title VI of the 1964 Civil Rights Act prohibits discrimination by recipients of federal funding (i.e., all school districts) based on race and national origin. Title VI confers power upon federal agencies to adopt rules and guidelines that are consistent with its broad remedial purposes. On May 25, 1970, the then-existing Department of Health, Education and Welfare issued a memorandum based on Title VI that required school districts to take "affirmative steps" to address the needs of ELLs: "Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program ... the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."

In 1974, in *Lau v. Nichols*, 414 U.S. 563 (1974), the U.S. Supreme Court endorsed these guidelines as a valid interpretation of Title VI and held that "the failure of [a] school system to provide meaningful English language instruction to [its] non-English-speaking students or to provide them with other adequate instructional procedures, violates Title VI of the 1964 Civil Rights Act."

Shortly after *Lau*, Congress passed the Equal Educational Opportunities Act (EEOA), which provides in part that an educational agency must "take 'appropriate action' to overcome language barriers that impede equal participation by its students in its instructional programs." This act, along with amendments to the 1968 Bilingual Education Act (BEA), were part of the 1974 amendments to the Elementary and Secondary Education Act passed to address the needs of ELL students.

After *Lau*, in 1981, the U.S. Court of Appeals for the Fifth Circuit in *Castañeda v. Pickard*, 648 F.2d 989 (5th Cir. 1981), established three criteria that have generally become the standard for evaluating whether a school district's ELL program complies with Title VI and the EEOA: The program must be (1) based on "a sound

educational theory”; (2) “implemented effectively,” with adequate resources and personnel; and (3) effective in overcoming language handicaps.

Despite such legal mandates, many school districts across the country have struggled to educate our ELL students. As a result, on Jan. 7, the U.S. Department of Education and the U.S. Department of Justice jointly issued guidelines, identifying 10 critical issue-areas that state educational agencies and local school districts must effectively address to ensure compliance with federal civil rights laws: (1) identify and assess ELLs in a prompt and reliable manner; (2) provide ELLs with an educationally-sound language assistance program; (3) appropriately staff and support the language assistance program; (4) ensure equal opportunities for ELLs to participate in curricular and extracurricular activities; (5) avoid unnecessary segregation; (6) ensure that ELLs with disabilities receive appropriate services under the Individuals with Disabilities Education Act and/or Section 504 of the 1973 Rehabilitation Act; (7) continue to meet the needs of ELLs who opt out of language assistance programs; (8) monitor ELLs to ensure adequate annual progress in acquiring English and grade-level proficiency; (9) evaluate the effectiveness of the district’s language assistance program; and (10) ensure meaningful communication with limited English-proficiency parents. The Pennsylvania Human Relations Commission also interprets the Pennsylvania Human Relations Act to require compliance with these guidelines.

Very much like our civil rights forebears, we can use these laws to ensure educational equity for ELL students. When we recognize that ELLs more often than not find themselves in environments where they are faced with the pressure to become fluent in another language, where materials and resources are provided in a language they do not fully understand, where educators do not resemble them or speak their language, and where classroom instruction and activities lack cultural relevance, we are faced with the imperative to act to reduce their burdens so that they may obtain the same quality of education their peers receive. Anything less is illegal and unjust.

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