



## **Equity by Design:**

Disability and English Learners:  
Intersections of Civil Rights and Best  
Practice

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# Disability and English Learners: Intersections of Civil Rights and Best Practice

Approximately 10% of US students are English learners (ELs) and more so in urban and suburban areas where upwards of 1 in 6

## KEY TERMS

**English Learner** - Under ESSA, an EL is an individual “(A) who is aged 3 through 21; (B) who is enrolled or preparing to enroll in an elementary school or secondary school; (C)(i) who was not born in the United States or whose native language is a language other than English; (ii) (I) who is a Native American or Alaska Native, or a native resident of the outlying areas; *and* (II) who comes from an environment where a language other than English has had a significant impact on the individual's level of English language proficiency; or (iii) who is migratory, whose native language is a language other than English, and who comes from an environment where a language other than English is dominant; and (D) whose difficulties in speaking, reading, writing, or understanding the English language may be sufficient to deny the individual — (i) the ability to meet the challenging State academic standards; (ii) the ability to successfully achieve in classrooms where the language of instruction is English; or (iii) the opportunity to participate fully in society” (ESSA Section §8101(20)).

**Civil Rights Laws** - Federal legislation, specifically Title VI of the Civil Rights Act of 1964, which prohibits recipients of federal funds from engaging in discrimination based on student race, color, national origin, sex, and religion. See also, the Equal Educational Opportunities Act requiring schools to remove language barriers to equal participation.

**Discrimination** - Subjecting students or groups to differential treatment based on race, color, or national origins than otherwise similar students; or implementing seemingly neutral policy in a manner that results in disparate negative impact of students from a particular group.

students are learning English (Office of English Language Acquisition [OELA], 2017). Although nationally, enrollment rates for ELs have not increased sharply in recent years, both southern and more rural states have more recently experienced significant growth in their EL populations (McFarlane, Hussar, de Brey, Snyder, Wang, Wilkonson-Flicker, & Bullock Mann, 2017). Every child residing in the United States has a legal right to public education regardless of national origin, language status, or immigration status under the 1982 Supreme Court case, *Plyer v. Doe* (for discussion, see Nguyen, 2017). As states and schools attempt to serve all children via legally- and ethically-appropriate policies and practices, school systems unaccustomed to effective or widespread service delivery for ELs face unique challenges and opportunities in facilitating academic success and wellbeing of culturally and linguistically diverse learners, creating positive and welcoming school communities, strengthening home-school-community connections, and developing equitable policies, procedures, and practices (Birman, Weisntein, Chan, & Beehler, 2007).

There is vast cultural and linguistic diversity among students who are ELs. Indeed, among ELs, every racial/ethnic group and approximately 400 languages are represented (OELA, 2017). With this being said, the majority of ELs in the US are Latinx (75%) , followed by Asian (11%), and White students (6%). Some EL students may come from homes where no English is spoken, while others come from multilingual families. Despite the valuable assets conferred by multilingualism, ELs face inequitable access to learning compared to their non-EL peers. Although most identified EL

students receive language supports through Title III funding (OELA, 2015), ELs continue to fall behind academically with significant disparities in mathematics and reading performance throughout elementary and secondary school (McFarland et. al., 2017), and elevated risk of high school dropout (National Center for Educational Statistics [NCES], 2014). There is also concern that ELs may be inappropriately identified for special education since national data indicate increasing risk of overrepresentation, particularly among students identified with specific learning disabilities or speech-language impairment (e.g., Sullivan, 2011).

A range of interrelated challenges, such as socioeconomic disadvantage (McFarland et. al., 2017); limited inclusion in advanced or college preparatory programs (Kanno & Kangas, 2014); isolation in restrictive special education placements (Sullivan, 2011); and insufficient professional preparation among teachers and related service providers to differentiate instruction or provide language supports for ELs are thought to contribute to these poor outcomes. Indeed, there is concern that even language programs themselves are especially susceptible to ill-equipped staff, leading to limited gains in English language proficiency (OELA, 2015). Across states, this situation is further complicated by varying EL definitions and processes for identifying students (Bailey & Carroll, 2015), hindering accountability efforts (Hopkins, Thompson, Linquanti, Hakuta, & August, 2013), a critical aspect of supporting equitable outcomes. Further, these factors may contribute to educational difficulties that may result in inappropriate identification for special education and exacerbate disproportionality. Given this context, the purpose of this brief is to review civil rights law, federal disability laws, and related best practices to help schools conceptualize nondiscriminatory, effective services to their growing EL populations, particularly for students with or at-risk for

disabilities.

## Civil Rights Protections for English Learners

Title VI of the Civil Rights Act (1964) prohibits discrimination based on race, color, or national origin in the school receiving federal funds. These protected classes include students who are ELs. The landmark Supreme Court case, *Lau v. Nichols* (1974) affirmed that schools must engage in proactive efforts to ensure EL students' meaningful participation in schools (Lhamon & Gupta, 2015). At the same time, the Equal Educational Opportunities Act (1974) required schools to remove language barriers to increase equal participation in instruction and all curricular and extracurricular programming. Thus, these civil rights laws set broad parameters for schools' responsibilities to ELs, however, specific actions or strategies were not delineated. Schools may facilitate meaningful, equitable participation and eliminate language barriers in a variety of ways depending on the



needs of the unique contexts and communities served. According to the landmark case *Castañeda v. Pickard* (1981), from which the standards for evaluating compliance with civil rights laws were derived, language supports must be based on recognized educational theory and proven successful; formulated to be implemented effectively; and, following

implementation, producing results demonstrating that language barriers have been reduced in a reasonable time frame (Lhamon & Gupta, 2015). In monitoring results, schools must assess and ensure progress in both English proficiency and grade level skills in the core curriculum.

With this being said, the potential disproportionality of ELs in special education becomes a civil rights concern when EL students are not provided appropriate educational opportunities before or after they are identified for special education. This is also where the intersections of civil rights law with special education law emerge. Under the Individuals with Disabilities Education Act (2004; IDEA), limited English proficiency and inadequate academic instruction are explicitly identified as insufficient bases for disability identification. Schools have an affirmative responsibility to rule out these factors as

determinants of students' need for special education. Under civil rights law, they should also ensure that these factors are not *causing* students' educational difficulties. Further, although IDEA's disproportionality monitoring requirements focus on race-based disparities, the Office of Civil Rights (OCR) has repeatedly emphasized the importance of preventing inappropriate over- or under-identification of EL students who are eligible for special education services, as well as unlawful delay of evaluation for special education calling attention to the need to consider language acquisition and involve staff with applicable expertise throughout general and special education processes (Lhamon, 2016).

Discrimination in any stage of the process—pre-referral instruction and intervention, assessment, identification, or placement—violates students' rights under Title VI, IDEA, Section 504, and the Americans with Disabilities Act (1990; ADA). When discrimination is suspected, OCR considers not only patterns of identification, but also the appropriateness of school policies, procedures, and practice relative to civil rights laws, professional standards, research, and best practice guidelines, as well as the consistency with which they are applied with individuals and groups and the fidelity with which specific practices are implemented. Where discrimination is found, OCR's requirements for corrective action commonly featured development of equitable practices through implementation of intensive and ongoing professional learning to support educators and service providers' understanding and implementation of effective, nondiscriminatory instruction, intervention, and assessment practices paired with systematic, continual data monitoring of both implementation fidelity and effectiveness for individuals and groups (for discussion, see Lhamon, 2016).

## KEY TERMS CONT.

**Individuals with Disabilities Education Improvement Act** - federal special education legislation requiring states and local education agencies to provide free, appropriate public education (FAPE) to all students with disabilities.

**Multi-Tiered Systems of Support** - A framework for providing effective instruction and intervention tailored to the diverse needs of students wherein problem-solving models, data-based decision making, and research-based practices and procedures are leveraged for continuous improvement and differentiated instruction to address the full spectrum of student needs. Common examples include Response to Intervention (RTI) and Positive Behavioral Interventions and Supports (PBIS)

**Data-Based Decision Making** - a process of continuously collecting, analyzing, and using multiple forms of data to guide educational decisions; set goals for systems, settings/groups, and individuals; and evaluate effects of efforts.

## ***Avoiding Inappropriate or Discriminatory Practices: What NOT To Do***

Although schools may meet the requirements of civil rights laws through a variety of specific practices depending on their particular contexts, there are several practices to be avoided because they hinder meaningful access and participation of ELs students and their families. Such inappropriate actions include:

- seeking information on citizenship status from students or families;
- delaying enrollment or making educational decisions based on actual or perceived immigrant status, citizenship, or religion;
- failure to systematically identify students' home languages, screen and or monitor students' language proficiency, provide appropriately credentialed service providers, or provide appropriately translated materials and access to trained interpreters;
- delaying enrollment, assessment, or participation in program because of insufficient language supports;
- using outdated, unreliable, or un-validated assessment procedures, instruments, or intervention materials;
- denying concurrent participation in or inappropriately exiting students from EL services, special education, and/or any other program (e.g., advanced classes, magnet programs, distance learning, counseling services, student clubs or activities);
- segregating EL students from their peers;
- limiting some students' access to language service (e.g., students with certain disabilities or native languages);
- failing to protect students from harassment by staff or students due to actual or perceived race, national origin, disability, or religion; and
- using special education to compensate for lack of appropriate language supports or ineffectiveness of past curriculum or

instruction.

Conversely, appropriate services are summarized in Figure 1.

## ***Cultivating Practices to Support EL Students' Civil Rights***

Across general and special education, key features of nondiscriminatory procedures include systemic use of research-based assessment, instruction, and intervention practices; provision of effective language supports for students and families; and collaboration with language specialists. Taken together, these practices are consistent with the IDEA requirements for nondiscriminatory evaluations and rule out limited English proficiency and inadequate instruction as determinants of special education needs.



These practices are also consistent with the increasingly common framework for multi-tiered systems of support (MTSS; e.g., Response to Intervention). Although research suggests MTSS may help prevent disproportionate representation of ELs receiving special education services, it is important to recognize that ELs are a heterogeneous population of students who must receive linguistically-appropriate supports at all tiers to benefit from opportunities to learn within the general

education curriculum for RTI to function optimally (Thorius & Sullivan, 2013). Mere enrollment or attendance is not sufficient; instead, schools must ensure the effectiveness of core instruction and related instructional and assessment procedures for ELs (see Socie & Vanderwood, 2016 for discussion of MTSS to support literacy among ELs). Importantly, all MTSS and early intervening frameworks are predicated on the assumption of the effectiveness of general education supports and use of data-based decision making. For ELs, satisfying this assumption requires explicit attention to the nature and effectiveness of language supports and differentiated instruction within the general curriculum. Data-based decision making generally features research-based procedures for universal screening and progress monitoring, as well as a well-defined process for moving children between instructional contexts, evidence-based supplementary intervention tiers, and valid procedures for determining special education eligibility.



Consistent use of research-based assessment and intervention, appropriate for EL students specifically, is especially important given educators' longstanding difficulties in differentiating developing English proficiency from disabilities, particularly learning disabilities and language impairments. When appropriate instructional and intervention efforts are paired with data-based decision making, the data obtained throughout educational processes can be used to confirm or disconfirm hypotheses about students' learning needs. This safeguards against discriminatory educational

decisions based on students' lack of progress when language barriers and inadequate access to curriculum or instruction hindered their learning and wellbeing. Further, research and data-based decision making can mitigate the potential effects of biases and stereotypes on educators' treatment of students from historically marginalized backgrounds, including ELs (Cheatham, Jimenez-Silva, Wodrich, & Kasai, 2014). Protocols for collection, analysis, and interpretation of data should include explicit consideration of language status and proficiency (e.g., using subgroup norms for progress monitoring and benchmarking).

### *Appropriate Practices for EL Students Who May have Disabilities*

Scholars have long emphasized that both EL students and students who may have disabilities share similar presentations—low achievement, poor reading acquisition, internalizing and externalizing behavior problems, difficulty following directions—and for EL students' these challenges can be misinterpreted as disability (e.g., Ochoa, Robles-Piña, Garcia, & Breunig, 1999). The risk for misinterpretation of students' behaviors is especially high where consistent, appropriate language supports and general education practices have not been ensured. Before placing an EL student in intervention services, it is critical to gather information about the student's previous educational background, including previous intervention services, and language proficiency (Lhamon, 2015), and to use this information to tailor programming and services.

In order to appropriately select and provide interventions and potential special education services, schools should provide professional learning and resources to assist educators in distinguishing between disability and non-disability related factors that may affect learning

(Lhamon, 2016). Continuation of language assistance services while intervening is crucial to facilitating students' meaningful and equal participation in interventions (Lhamon, 2015). Thus, it is not sufficient to provide intervention in general or special education; interventions must be paired with appropriate language supports to ensure students can benefit from the intervention, be it academic, behavioral, or social-emotional.


**When inappropriate tools and assessments are administered, schools risk identifying students as students with disabilities based on limited English proficiency.**

When disability is suspected, schools are required to timely identify and evaluate all children with a suspected disability to determine eligibility and need for special education (20 U.S.C. 1401(3); 1412(a)(3)). This process, known as child find, helps ensure that children with disabilities do not languish in schools without access to Free Appropriate Public Education (FAPE). For ELs, the right to timely identification means consideration of eligibility cannot be delayed due to students' limited English proficiency or delayed access to language supports, including bilingual providers; to do so would be discrimination. During evaluation of special education needs and eligibility, schools must consider English proficiency of the student and select appropriate tools and assessments for accurate evaluation, with preference given to assessment in the students' native language. When inappropriate tools and assessments are administered, schools risk identifying students as students with disabilities based on limited English proficiency (Lhamon & Gupta, 2015). When language impairment is suspected, it is especially critical

to actively differentiate difficulties based on environmental factors or language acquisition from a primary language impairment wherein students experience difficulties across languages. This will often require a comprehensive bilingual or multilingual evaluation (for description of the rationale and process, see Pieretti & Roseberry-McKibbin, 2016). After determination of special education eligibility, individualized education programs should be developed with full participation of family members and multilingual service providers, with language supports integrated with special education services.

### ***Linking These Efforts to the Systemic Change Framework***

Efforts to prevent and eliminate disproportionality in special education often employ the Systemic Change Framework (SCF) to ameliorate disproportionality (for discussion, see Jackson, Thorius, & Kyser, 2016). The aforementioned efforts to support ELs' civil rights can be embedded in systemic change efforts. Within the SCF, resources are developed and distributed equitably. For ELs, this includes ensuring materials (e.g., assessment, instructional, and intervention materials) and human resources (e.g., ESL specialists, interpreters, translation services, cultural liaisons, bilingual related service providers) are cultivated and consistently employed to remove language barriers and facilitate students' and families' meaningful participation in educational processes. One strategy to efficiently distribute educational resources is MTSS which emphasizes high-quality, scientifically-based general curriculum and instruction, data-based decision making throughout general and special education, and monitoring instructional and intervention fidelity. Where access to bilingual service providers is unavoidably limited, Harris and Sullivan (2017) offer a model for leveraging their capacity and reach within MTSS to bolster students' academic, behavioral, or social-emotional outcomes. This model describes how bilingual



providers' core competencies can be applied in general education and intervention tiers, including special education, particularly in helping staff understand implications of language acquisition and acculturation for learning and instruction, identifying and adapting research-based interventions, and ensuring appropriate consideration of language proficiency throughout processes for data-based decision making.

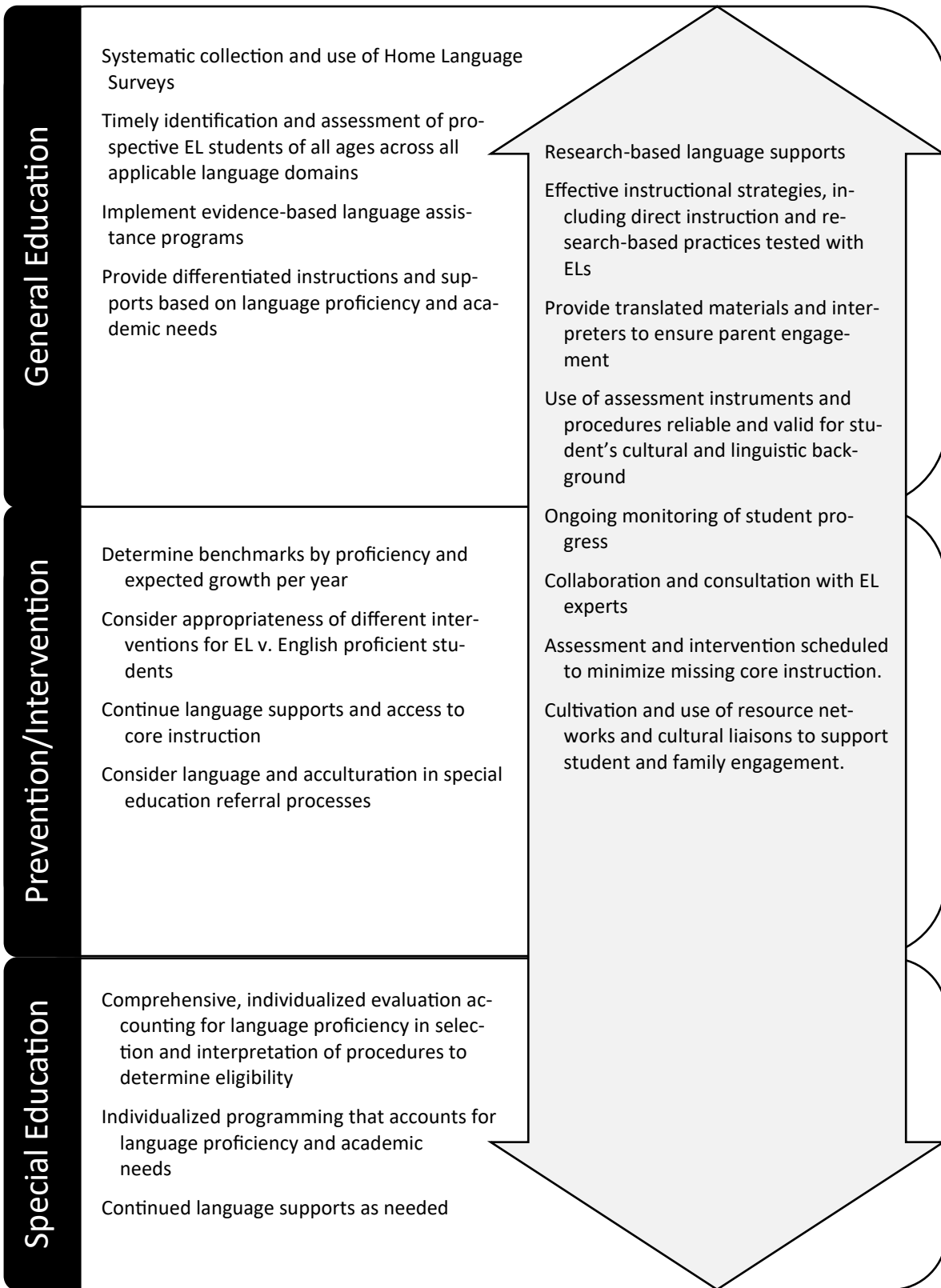
Another core dimension of the SCF is equitable leadership in which educators, families, and community members engage in collaborative decision making. Meaningful school-family engagement and partnerships first require that all families have access to basic educational information and can participate equally in educational processes, consistent with expectations under civil rights laws. For family members or community members with developing English proficiency, this access and participation must be predicated on consistent, pervasive use of translation and interpretation services in the diversity of languages present in the school community. Thus translation and interpretation should include not only student-specific information (e.g., notices, consent forms, progress reports, special education documents), but school-wide materials (e.g., parent handbooks, newsletters, public notices, committee or board meeting agendas and materials). The SCF also emphasizes the centrality of a culture of improvement wherein school and student data are systematically and continually used to assess potential disparities and effectiveness of efforts. Attention to the experiences and outcomes of students who are ELs can be included in district and school efforts related to IDEA's disproportionality monitoring requirements. This means disaggregating data not just by race, but language status and other key dimensions of difference (e.g., gender, homelessness). Focal variables should be tailored a school's unique context and composition in order to allow consideration of potential disparities and

differences in subgroups' needs and experiences.

## Related Resources

- Non-Regulatory Guidance: English Learners and Title III of the Elementary and Secondary Education Act (ESEA), as amended by the Every Student Succeeds Act (ESSA), <https://www2.ed.gov/policy/elsec/leg/essa/essatitleiiienglishlearners92016.pdf>
- National Clearinghouse of English Language Acquisition, <https://ncela.ed.gov/>
- The English Learner Toolkit, <https://ncela.ed.gov/english-learner-tool-kit>
- U.S. Equity Assistance Centers, <https://www2.ed.gov/programs/equitycenters/contacts.html>
- Office of Special Education Programs Resources for English Learners with Disabilities, <https://osepideasthatwork.org/federal-resources-stakeholders/english-language-learners>
- NCEE Evaluation Brief: Building Teacher Capacity to Support English Language Learners in Schools Receiving School Improvement Grants <https://ies.ed.gov/ncee/pubs/20154004/pdf/20154004.pdf>





**Figure 1**



## **About the Midwest & Plains Equity Assistance Center**

The mission of the Midwest & Plains Equity Assistance Center is to ensure equity in student access to and participation in high quality, research-based education by expanding states' and school systems' capacity to provide robust, effective opportunities to learn for all students, regardless of and responsive to race, sex, and national origin, and to reduce disparities in educational outcomes among and between groups. The Equity by Design briefs series is intended to provide vital background information and action steps to support educators and other equity advocates as they work to create positive educational environments for all children. For more information, visit <http://www.greatlakesequity.org>.

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## **Disclaimer**

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