

EXPANDING THE IDEA TO MITIGATE DISPROPORTIONALITY OF ENGLISH LANGUAGE LEARNERS IN SPECIAL EDUCATION

*Hannah R. Kramer**

If I had my way, the field would get rid of the term “special education. . . .” There should be no dichotomy between general and special education. We are all just school teachers who don’t know as much as we should about educating young people who are very different from the average.¹

- Lloyd Dunn

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* Hannah Kramer is a third-year law student at the Benjamin N. Cardozo School of Law. She would like to thank Professor Rebekah Diller for her support.

¹ Peter V. Paul, *The Works of Lloyd Dunn, Madeleine Will, E. D. Hirsch, and a Few Select Others: A Nexus of Similar Provocative Ideas*, 164 NO. 3 AM. ANNALS DEAF 349 (2019).

I. INTRODUCTION

For decades, advocates have highlighted a public education system fraught with inequality and mistreatment of students of color.² This long-standing plight is chiefly apparent in special education classrooms today, where minority groups are frequently routed at a higher rate than their white peers.³

Scholar Lloyd Dunn was one of the first to address the correlation between special education and students of color.⁴ In a 1968 essay, Dunn determined that between sixty and eighty percent of students in the United States' "mild mental retardation classes"—Dunn used this phrase at the time to reference the intellectually disabled—were low-income or students of color.⁵ In another work published the same year, Dunn criticized the placement of students, many of whom came from culturally or socioeconomically disadvantaged backgrounds, into special education.⁶ His scholarship formally acknowledged disproportionality in special education,⁷ and his contributions have shaped the special education field by advancing litigation, legislative enactments, and current organizational structures and methods.⁸

Dunn's research is as relevant today as it was sixty years ago. In fact, disproportionality remains a large concern.⁹ Research signifies that the disproportionality of students of color in special education is a pervasive

² Research indicates that racial segregation "persists at fairly high levels," despite desegregation of schools after the Supreme Court's ruling in *Brown v. Board of Education*. John R. Logan, Elisabeta Minca, & Sinem Adar, *The Geography of Inequality: Why Separate Means Unequal in American Public Schools*, 85 SOC. EDUC. 287 (2012). "While documenting trends, researchers emphasize that segregation is important not only because it separates children but because it leaves minority children in inferior schools," Logan and his team explain. "There is no doubt about the extent of racial and ethnic disparities in educational outcomes for individual students."

³ See Emilie Richardson, *Breaking the Norm: Accurate Evaluation of English Language Learners With Special Education Needs*, 17 B.U. PUB. INT. L.J. 289 (2008); NAT'L CTR. FOR LEARNING DISABILITIES, SIGNIFICANT DISPROPORTIONALITY SPECIAL EDUCATION: CURRENT TRENDS AND ACTIONS FOR IMPACT (2020), https://www.nclld.org/wp-content/uploads/2020/10/2020-NCLD-Disproportionality_Trends-and-Actions-for-Impact_FINAL-1.pdf.

⁴ Emma Curran Donnelly Hulse, *Disabling Language: The Overrepresentation of Emerging Bilingual Students*, 48 FORDHAM URB. L.J. 381, 388 (2021); see also Alfredo J. Artiles & Stanley C. Trent, *Overrepresentation of Minority Students in Special Education: A Continuing Debate*, 27 J. SPECIAL EDUC. 410 (1994).

⁵ Lloyd M. Dunn, *Special Education for the Mildly Retarded-Is Much of It Justifiable?*, 35 EXCEPTIONAL CHILD 5, 6 (1968); see also Hulse, *supra* note 4, at 388.

⁶ Paul, *supra* note 1, at 350.

⁷ Ruby Lopez & Diana Linn, *Representation of English Language Learners in Special Education: A Campus-level Study*, 3 J. MULTICULTURAL AFF. 1 (2018); Hulse, *supra* note 4.

⁸ Artiles & Trent, *supra* note 4.

⁹ Lopez & Linn, *supra* note 7, at 2.

issue for America's schools despite federal enactments and local initiatives.¹⁰ At the end of the twentieth century, Black students were overrepresented in each disability category and in nearly every state.¹¹ A more recent study from 2016 signified that Black students are forty percent more likely than their peers to be diagnosed with a disability.¹² Researchers offer various reasons for these disparities, including the correlation between race and income, and, importantly, significant systematic racial biases in identifying students for special education.¹³

Although the disproportionality of minorities in special education has been a concern for decades, there has been minimal scholarship on the disproportionality of certain demographic groups.¹⁴ Patterns of disproportionality are well established for students of color, particularly for Black students.¹⁵ However, "somewhat less clear trends exist" for other demographics, notably English Language Learners.¹⁶ Because of the surge of English Language Learners in the United States and the group's distinct educational needs,¹⁷ the placement of English Language Learners into special education programs remains a foremost concern for advocates today.¹⁸

English Language Learner ("ELL") students constitute the fastest-growing student demographic in the country.¹⁹ A Department of Education report from 2011 determined that from 1999 to 2009, the ELL population increased by fifty-one percent, while the general student population grew by only seven percent.²⁰ It is expected that by 2025, one in four students will be

¹⁰ *Id.*; Amanda Sullivan, *Disproportionality in Special Education Identification and Placement of English Language Learners*, 77 COUNCIL FOR SPECIAL EDUC. CHILD. 317, 320 (2011); *see generally* Individuals with Disabilities Education Act, 20 U.S.C. § 1400.

¹¹ Hulse, *supra* note 4.

¹² NAT'L CTR. FOR LEARNING DISABILITIES, *supra* note 3, at 2.

¹³ *Id.*

¹⁴ *See also* Diana Linn & Lynn Hemmer, *English Language Learner Disproportionality in Special Education: Implications for the Scholar-Practitioner*, 1 WALDEN U. J. EDUC. RES. & PRAC. 70 (2011).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ A report originally commissioned by Washington state identified fourteen key principles that teachers of ELLs should know. For example, educators should be aware of conversational versus academic language, as everyday communication is distinct from classroom discourse. ELLs also require additional instructional support when learning to read and as they advance. This can be provided in English oral language development, literary instruction, and if feasible, teaching students to read in their primary language as well as English. THERESA DEUSSEN, ELIZABETH AUTIO, BRUCE MILLER, ANNE TURNBAUGH LOCKWOOD, & VICTORIA STEWART, EDUC. N.W., WHAT TEACHERS SHOULD KNOW ABOUT INSTRUCTION FOR ENGLISH LANGUAGE LEARNERS (2008).

¹⁸ *See* DEBBIE ZACARIAN, TRANSFORMING SCHOOLS FOR ENGLISH LEARNERS: A COMPREHENSIVE FRAMEWORK FOR SCHOOL LEADERS 129 (2011).

¹⁹ *How Educators Can Advocate for English Language Learners*, NAT'L EDUC. ASSOC., ALL IN! 4 (2015), <https://www.colorincolorado.org/guide/all-how-educators-can-advocate-english-language-learners> [hereinafter *How Educators Can Advocate*].

²⁰ Linn & Hemmer, *supra* note 14.

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an ELL.²¹ This group faces a myriad of social and educational challenges, including an increased likelihood of being routed into special education, compared to their English-proficient peers.²² In fact, ELLs are more than twelve percent likely than their other peers to be diagnosed with a specific learning disability.²³ Given the rise of ELLs and the high disproportionality rates in special education,²⁴ developing appropriate identification techniques is critical.²⁵

Evaluating and diagnosing ELL students present a uniquely complex problem.²⁶ Although a lack of English proficiency does not constitute a disability, many educators struggle to determine whether a student has a disability or merely a lingual deficiency.²⁷ Learning disabilities and secondary language acquisition manifest similarly.²⁸ Consequently, many students are “inappropriately routed into special education as a convenient way to ‘do something’ without adequately considering programmatic limitations” or when teachers “are at a loss” about instruction.²⁹ Misplacement yields significant consequences, including fewer positive educational outcomes, stigmas, increased rates of discipline, and diminished resources for students who actually require disability support.³⁰

²¹ *English Language Learners*, NAT’L EDUC. ASS’N (July 2020), <https://www.nea.org/resource-library/english-language-learners> [hereinafter *English Language Learners Toolkit*].

²² Romie Barriere, *The Over-and-Under-Identification of English Language Learners Into Special Education*, CONG. HISP. CAUCUS INST., CHCI WHITE PAPER 11 (Apr. 2011).

²³ Specific Learning Disability is the most common category for all students with an Individualized Education Program, also known as an IEP. An IEP lays out the special education services a student receives. JANE TANKARD CARNOCK, & ELENA SILVA, ENGLISH LEARNERS WITH DISABILITIES: SHINING A LIGHT ON DUAL-IDENTIFIED STUDENTS, NEW AMERICA (July 30, 2019), <https://www.newamerica.org/education-policy/reports/english-learners-disabilities-shining-light-dual-identified-students/>. The IDEA defines Specific Learning Disability as “a disorder in one or more of the basic psychological processes involved in understanding or in using language that is spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations.” Individuals with Disabilities Education Act, 20 U.S.C. § 1401; *see also* OFF. ENG. LANGUAGE ACQUISITION, U.S. DEP’T EDUC., ENGLISH LEARNERS WITH DISABILITIES (2021), https://ncela.ed.gov/files/fast_facts/20201216-Del4.4-ELsDisabilities-508-OELA.pdf.

²⁴ Disproportionality can manifest as overrepresentation or underrepresentation of a minority group. Linn & Hemmer, *supra* note 14. It is usually understood as there being more or less students from a certain group than what is expected from the group’s representation in the general population. *Id.* The term is more broadly defined later in this Note, *infra* Part II(A).

²⁵ *Id.*

²⁶ MID-ATL. EQUITY CONSORTIUM, ENGLISH LEARNERS & DISPROPORTIONALITY IN SPECIAL EDUCATION: ADDRESSING CRITICAL EQUITY ISSUES (2016).

²⁷ Sullivan, *supra* note 10.

²⁸ Krissa Baseggio, Thesis, *A Silent Crisis: The Misidentification of English Language Learners as Students with Learning Disabilities*, ALL REGIS UNIV. THESES 34-5 (May 2018).

²⁹ Sullivan, *supra* note 10.

³⁰ Baseggio, *supra* note 28, at IV; Sullivan, *supra* note 10, at 318.

Researchers point to a breadth of linguistic, cultural, and socioeconomic influences that complicate the placement of ELLs, including evaluation biases and culturally inappropriate assessment models.³¹ Although ELLs remain overrepresented nationwide in many disability categories, data remains inconsistent and substantially varies based on learners' ages and states.³² Research signifies a "paradoxical pattern" of over and under representation for ELLs in the special education system; the group is underrepresented at the primary grade levels but is overrepresented in third grade and beyond.³³ ELLs are also overrepresented in some states, but underrepresented in others, reasons for which will be addressed later in this Note.³⁴

The lack of reliable and consistent data further complicates these discrepancies.³⁵ Today, under the No Child Left Behind Act of 2001 and the Every Student Succeeds Act of 2015, states are required by law to publish data on the academic performance of its students, including ELLs.³⁶ Furthermore, states must report the number of ELL students in its schools to receive Title III funding under the ESSA.³⁷ Previously, many districts lacked appropriate data collection procedures on the identification and placement of their ELLs, as statewide reporting on the group was previously not mandated.³⁸ Even as late as 2011, federal data on the identification and placement of students by language status was still considered "new."³⁹ To exacerbate these challenges, research on language acquisition and special education has only recently begun to emerge.⁴⁰

Because ELLs are not a uniform group, consisting of hundreds of cultures and languages, there is no single solution to rectify

³¹ MID-ATL. EQUITY CONSORTIUM, *supra* note 26; Richardson, *supra* note 3; Sullivan, *supra* note 10.

³² Lopez & Linn, *supra* note 7, at 2.

³³ Sullivan, *supra* note 10, at 319-20; MID-ATL. EQUITY CONSORTIUM, *supra* note 26.

³⁴ Sullivan, *supra* note 10, at 319-20; *WIDA Focus on Identifying ELLs with Specific Learning Disabilities: Facts, Advice, and Resources for School Teams*, WIS. CTR. FOR EDUC. RSCH. (May 2017), <https://wida.wisc.edu/sites/default/files/resource/FocusOn-Identifying-ELLs-with-Specific-Learning-Disabilities.pdf>; *see infra* notes 146-49.

³⁵ Maya Riser-Kositsky, *How Many English-Learners Do Districts Serve? Data Are Inconsistent*, EDUCATIONWEEK (Jan. 8, 2020), <https://www.edweek.org/education/how-many-english-learners-do-districts-serve-data-are-inconsistent/2020/01>.

³⁶ No Child Left Behind, 20 U.S.C. § 6311 (2001); Every Student Succeeds Act, 20 U.S.C. § 6301; Julie Sugarman, *A Guide to Finding and Understanding English Learner Data*, MIGRATION POL'Y INST. (2018), https://www.migrationpolicy.org/sites/default/files/publications/EL-Data-Guide_Final.pdf.

³⁷ 20 U.S.C. § 6301; Sugarman, *supra* note 36.

³⁸ Sullivan, *supra* note 10, at 319.

³⁹ *Id.*

⁴⁰ Linn & Hemmer, *supra* note 14, at 72.

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disproportionality in special education.⁴¹ Advocates have suggested various reforms to alleviate disproportional placement of ELLs in special education, including improved assessment practices, bias training, stronger enforcement of federal policies, and improved data reporting.⁴² Many of these recommendations will be discussed further in this Note.

This Note primarily focuses on proposed amendments to the Individuals with Disabilities Education Act, the federal law that governs educational services for students with disabilities.⁴³ As misrepresentation in special education is a national issue, this Note argues that the Act is the most effective place to begin to address these concerns.⁴⁴ ELLs have linguistic and cultural differences and therefore comprise a unique subclass, distinct from their English-proficient peers.⁴⁵ This Note argues that, despite the surge of ELL students, the Individuals with Disabilities Education Act is currently ill equipped to appropriately handle the identification, evaluation, placement, and support of ELLs. Specifically, the Act fails to address the cultural and linguistic needs of the group.

This Note proposes various changes to the Individuals with Disabilities Education Act (“IDEA”)⁴⁶ to ameliorate the recurring problems ELLs face throughout determination for special education services, including the pre-intervention and placement stages. Before a student is even referred for disability evaluation, the Act should require schools to consider external linguistic factors, including the child’s enrollment in Language Learning Programs.⁴⁷ The IDEA should also require certain ELL-specific testing procedures by mandating the recreation of an assessment unavailable in a student’s native language. Many assessments are not recreated, but translated directly to the students, which impedes or invalidates performance.⁴⁸ Further,

⁴¹ Sullivan, *supra* note 10, at 319; Elvira Sanatullova-Allison & Victoria Robison-Young, *Overrepresentation: An Overview of the Issues Surrounding the Identification of English Language Learners with Learning Disabilities*, 31 INT’L J. SPEC. EDUC. 145, 147 (2016).

⁴² See Richardson, *supra* note 3; Compliance with federal measures “is best achieved through consistent federal enforcement bolstered by support activities performed by states.” NAT’L COUNCIL ON DISABILITY, IDEA SERIES: FEDERAL MONITORING AND ENFORCEMENT OF IDEA COMPLIANCE (Feb. 7, 2018), https://www.ncd.gov/sites/default/files/NCD_Monitoring-Enforcement_Accessible.pdf (quoting U.S. COMM’N ON C.R., RECOMMENDATIONS FOR THE REAUTHORIZATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (2002), <http://www.usccr.gov/pubs/idea/recs.htm>).

⁴³ Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-82.

⁴⁴ See generally WIDA Focus on Identifying ELLs with Specific Learning Disabilities: Facts, Advice, and Resources for School Teams, *supra* note 34; Hulse, *supra* note 4.

⁴⁵ Sullivan, *supra* note 10; see Sanatullova-Allison & Robison-Young, *supra* note 41.

⁴⁶ 20 U.S.C. §§ 1400-82.

⁴⁷ Maria de Lourdes B. Serpa, *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*, SCHOLARWORKS U. MASS. BOS. 25 (2011).

⁴⁸ *Id.* at 23.

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the IDEA's placement requirements should include language from the language learning education laws⁴⁹ to allow for a more culturally and linguistically appropriate approach.⁵⁰ Stronger and more inclusive language would allow for greater compliance by the states.⁵¹

Part II of this Note discusses the surge of ELLs and the demographic shift in our nation's schools. This section includes research on the student group's diverse backgrounds and dispels common misconceptions about their abilities. Part II also introduces a comparison of disability laws and equal education laws. These laws are distinguishable and establish various procedural safeguards and evaluation and placement procedures for students, depending on each student's language or disability needs.

Part III of this Note focuses significantly on the problems that researchers encounter when evaluating ELLs for special education. The study of second language acquisition and special education is new.⁵² As a result, minimal data exists, which limits this legal analysis. The federal government's lack of uniform reporting procedures compounds these issues. This section also includes scholarship on the uniqueness of ELLs and how language acquisition challenges and disabilities manifest similarly. Although ELLs in special education are understudied compared to other student groups, evaluators share one significant challenge: most are unable to distinguish between second language acquisition and disabilities. The IDEA fails to account for these differences, frequently resulting in the misdiagnosis of disabilities. Both inappropriate referrals and lack of referrals yield to misrepresentation in special education classes, and result in social, academic, and disciplinary ramifications.

Part IV addresses various reform suggestions to the IDEA, including increasing screening practices under a response-to-intervention framework, stricter language in the evaluation procedures, and incorporating a more contemporary definition of "Least Restrictive Environment." Lastly, Part V

⁴⁹ Language learning education laws, a byproduct of the Civil Rights laws, protect the educational rights of students not yet proficient in English. *See id.* at 25. States can implement their own procedures but must abide by federal criteria. *Id.* Federal policy focused on English Language Learners is primarily encompassed in Title I and III of the Elementary and Secondary Education Act. *See* CARNOCK & SILVA, *supra* note 23, at 8.

⁵⁰ Serpa, *supra* note 47; CARNOCK & SILVA, *supra* note 23, at 8.

⁵¹

Since 1995, the National Council on Disability has reported significant concerns about monitoring and enforcement of the IDEA. Concerns have included the Office of Civil Rights' lack of enforcement complaint referrals to the Department of Justice, the failure to investigate and litigate IDEA cases, and the Department of Education's continued funding of noncompliant schools.

NAT'L COUNCIL ON DISABILITY, *supra* note 42.

⁵² Lopez & Linn, *supra* note 7, at 2.

concludes with expected pushbacks to these suggestions—such as English-only legislation, which has been enacted and repealed in some states— and brief hopes for President Biden’s administration.

II. BACKGROUND

A. *Surge of English Language Learners*

Over the past three decades, the racial and ethnic composition of schools in the United States has substantially diversified.⁵³ According to a National Center For Education Statistics report, the percentage of white students enrolled in public schools decreased from seventy percent in 1986 to fifty five percent in 2008.⁵⁴ Although the population of Black students enrolled in public schools increased only by one percent, Latinx enrollments nearly doubled across the country during the same years.⁵⁵ During the 2014 school year, for the first time since 1972, less than half the students enrolled in public schools were white.⁵⁶

This significant shift can largely be attributed to the surge of ELLs, who today constitute the fastest growing student population in the United States.⁵⁷ According to the Department of Education, over 4.8 million English Learners were enrolled in the country’s schools for the 2014-2015 school year,⁵⁸ representing an increase of one million students from the turn of the century.⁵⁹ In 2015, ELLs were enrolled in almost three out of every four public schools.⁶⁰ Western states have the highest concentration of ELLs,⁶¹ but federal data indicates the surge has impacted most states.⁶² According to the National Education Association, this demographic upswing will continue.

⁵³ Linn & Hemmer, *supra* note 14.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Baseggio, *supra* note 28, at 4.

⁵⁷ *Our Nation’s English Learners*, U.S. DEP’T EDUC., <https://www2.ed.gov/datastory/el-characteristics/index.html> (last visited Dec. 17, 2022).

⁵⁸ *Id.*

⁵⁹ Corey Mitchell, *The Nation’s English-Learner Population Has Surged: 3 Things to Know*, EDUCATIONWEEK (Feb. 18, 2020), <https://www.edweek.org/leadership/the-nations-english-learner-population-has-surged-3-things-to-know/2020/02>.

⁶⁰ *Ensuring English Learner Students Can Participate Meaningfully and Equally in Educational Programs*, U.S. DEP’T JUST. & U.S. DEP’T EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-el-students-201501.pdf> (last visited Dec. 17, 2022).

⁶¹ *English Language Learners: A Growing—Yet Underserved—Student Population*, EDUC. COMM’N STATES (Dec. 2013), <https://www.ecs.org/clearinghouse/01/10/20/11020.pdf>.

⁶² *English Language Learners: Demographic Trends*, OFF. ENG. LANGUAGE ACQUISITION, (2020), https://ncela.ed.gov/files/fast_facts/19-0193_Del4.4_ELDemographicTrends_021220_508.pdf.

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⁶³ By 2025, it is expected that one in four public school students will be an ELL.⁶⁴

Like any other diverse group, ELLs enhance communities with their cultures.⁶⁵ Absorbing students' cultures into the classroom is a crucial component of helping the students better understand their personal and academic experiences.⁶⁶ Yet, some argue that ELLs' "culture and identity may be perceived as a deficit to be overcome rather than assets that enrich the classroom."⁶⁷ Although Spanish is the dominant home language of ELLs and is spoken by over 3.8 million ELL public school students,⁶⁸ twenty-five percent of ELLs speak a language other than Spanish.⁶⁹ In total, the United States' ELLs speak over 400 languages.⁷⁰ Notably, some communities have larger pockets of the same languages. For example, Dearborn, Michigan, is home to a growing Arabic-speaking population from the Southwest Asia and North Africa ("SWANA").⁷¹

Other cities in the United States also have growing ELL populations that bring many linguistic variations. Cities outside of Hawaii, including Portland, Oregon, and Kansas City, Missouri, have seen an increasing number of Micronesian students who speak many Oceanic languages.⁷² Furthermore, ELL populations are frequently concentrated.⁷³ One report from 2005 suggests that seventy percent of ELLs are enrolled in only ten percent of schools.⁷⁴ Furthermore, research shows that schools with the highest concentrations of ELLs are often staffed with the least qualified educators, thereby perpetuating disproportionate representation.⁷⁵ These statistics signify the many challenges of teaching such a highly-concentrated linguistically and culturally diverse group.

⁶³ Baseggio, *supra* note 28, at 4.

⁶⁴ *English Language Learners Toolkit*, *supra* note 21.

⁶⁵ *How Educators Can Advocate*, *supra* note 19.

⁶⁶ See Kristina Robertson, *How to Connect ELLs' Background Knowledge to Content*, COLORIN COLO., <https://www.colorincolorado.org/article/connect-students-background-knowledge-content-ell-classroom> (last visited Oct. 30, 2022).

⁶⁷ Ace Parsi, *ESSA and English Language Learners*, 23 POL'Y UPDATE (Nat'l Ass'n of State Boards of Educ.), Aug. 2016, at 1.

⁶⁸ *The Condition of Education: English Language Learners in Public Schools*, NAT'L CTR. FOR EDUC. STAT. (May 2021), <https://nces.ed.gov/fastfacts/display.asp?id=96>.

⁶⁹ EDUC. COMM'N STATES, *supra* note 61, at 3.

⁷⁰ U.S. DEP'T EDUC., *supra* note 57.

⁷¹ *How Educators Can Advocate*, *supra* note 19, at 9.

⁷² *Id.*

⁷³ Erin Archerd, *An Idea For Improving English Language Learners' Access to Education*, 41 FORDHAM URB. L. J. 351, 358 (2013).

⁷⁴ *Id.*

⁷⁵ Richardson, *supra* note 3, at 297.

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The implications of the surge are consequential in states that previously had small ELL populations and now must create more comprehensive language and learning programs. For example, for the first time in 2008, Washington state faced the “challenges of providing a solid education to students who are linguistically and culturally unlike most of their teachers, as well as unlike the students most teachers were trained to teach.”⁷⁶

Most people incorrectly believe ELLs to be “non-native speakers.”⁷⁷ Yet, eighty percent of ELLs are born in the United States.⁷⁸ Regardless of immigration status or national origin, ELLs are guaranteed the same access to public education as any other student in the United States.⁷⁹ The Supreme Court affirmed this right in its 1982 decision in *Plyler v. Doe*, which held that a state cannot deny a child access to a basic public education, irrespective of the child’s immigration status.⁸⁰ Writing for the Court, Justice Brennan reasoned: “Public education has a pivotal role in maintaining the fabric of our society and in sustaining our political and cultural heritage: the deprivation of education takes an inestimable toll on the social, economic, intellectual, and psychological well-being of the individual, and poses an obstacle to individual achievement.”⁸¹ The Department of Education has understood the Supreme Court’s ruling to mean that children cannot be denied access to free public education on the basis of immigration status.⁸²

B. The Special Education Evaluation Process

The rights of ELLs are largely governed by the Every Student Succeeds Act, (“ESSA”), a reauthorization of the longstanding Elementary and Secondary Education Act (“ESEA”).⁸³ ESSA’s authorization in 2015 was

⁷⁶ DEUSSEN, AUTIO, MILLER, LOCKWOOD, & STEWART, *supra* note 17, at 1.

⁷⁷ Archerd, *supra* note 73.

⁷⁸ PATRICIA GÁNDARA & MEGAN HOPKINS, CHALLENGES IN ENGLISH LEARNER EDUCATION, COLORÍN COLO. (2010), <https://www.colorincolorado.org/article/challenges-english-learner-education>.

⁷⁹ U.S. DEPT’ OF EDUC., EDUCATIONAL SERVICES FOR IMMIGRANT CHILDREN AND THOSE RECENTLY ARRIVED TO THE UNITED STATES, (2014), <https://www2.ed.gov/policy/rights/guid/unaccompanied-children.html>; NAT’L COUNCIL ON DISABILITY, *supra* note 42; GÁNDARA & HOPKINS, *supra* note 78.

⁸⁰ *Plyler v. Doe*, 457 U.S. 202 (1982); see *How Educators Can Advocate*, *supra* note 19, at 14.

⁸¹ *Plyler*, 457 U.S. at 203.

⁸² Sugarman, *supra* note 36.

⁸³ Every Student Succeeds Act, 20 U.S.C. § 6301; DEBBIE ZACARIAN, SERVING ENGLISH LEARNERS: LAWS, POLICIES, AND REGULATIONS, COLORÍN COLO. (2012), https://www.colorincolorado.org/sites/default/files/Policy_Guide_Final.pdf; U.S. DEP’T EDUC. ESSA: A NEW EDUCATION LAW, (2015), <https://www.ed.gov/essa?src=rn>.

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applauded as a significant stride for ELLs.⁸⁴ For the first time, schools were required by federal law to report the language progress of its ELLs.⁸⁵

ESEA defines an English learner as an individual who “was not born in the United States or whose native language is a language other than English” and:

[W]hose 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.⁸⁶

ELLs are educated in a primarily monolingual culture and frequently, are only taught in English.⁸⁷ Therefore, becoming fluent in English “is a process that occurs over a period of time and requires different types and levels of support.”⁸⁸ In turn, the Act requires states to develop identification procedures and support programs for its ELL students.⁸⁹ Many states utilize a home survey or administer their own assessments to determine a student’s language proficiency level.⁹⁰ After the student is identified as an ELL, the school district must provide the student with a language instruction educational program that is “scientifically proven to be sound, properly resourced, and proven to work.”⁹¹ Under Title VI of the Civil Rights Act of 1964 and the Equal Education Opportunities Act of 1974, states must ensure that the student “can participate meaningfully and equally in educational programs and services.”⁹²

When an ELL is diagnosed with a disability, the school must meet both the student’s language needs under the English language learning laws and disability-related educational needs under the IDEA.⁹³ The federal

⁸⁴ LESLIE VILLEGAS & DELIA POMPA, MIGRATION POL’Y INST., THE PATCHY LANDSCAPE OF STATE ENGLISH LEARNER POLICIES UNDER ESSA 1 (Feb. 2020), <https://www.migrationpolicy.org/research/state-english-learner-policies-essa>.

⁸⁵ *Id.*

⁸⁶ Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301. The Act also includes references to Native American, Alaskan Natives, and migratory individuals. U.S. DEP’T OF EDUC., *supra* note 86.

⁸⁷ Baseggio, *supra* note 28, at 5; Linn & Hemmer, *supra* note 14.

⁸⁸ GÁNDARA & HOPKINS, *supra* note 78.

⁸⁹ Every Student Succeeds Act, 20 U.S.C. § 6301.

⁹⁰ ZACARIAN, *supra* note 83.

⁹¹ *Id.*

⁹² U.S. DEP’T EDUC., 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) 6 (2016), <https://www2.ed.gov/policy/elsec/leg/essa/essatitleiiiiguidenglishlearners92016.pdf>.

⁹³ GÁNDARA & HOPKINS, *supra* note 78; Serpa, *supra* note 47; Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-82.

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government mandates that ELLs, like any other student, receive a free and appropriate public education.⁹⁴ The IDEA outlines specific procedures states must employ to meet students who fall into one of the thirteen disability categories.⁹⁵ Before a student is referred for special education evaluation, the IDEA dictates pre-evaluation processes that encourage the use of response-to-intervention models that are meant to support students in special education.⁹⁶

Once a student is suspected of having a disability, a teacher, counselor, or other professional can refer the student for a disability evaluation.⁹⁷ The IDEA’s Child Find requirement requires the states to ensure that each student suspected of having a disability is “identified, located, and evaluated.”⁹⁸ These requirements extend specifically to students experiencing homelessness, and those who are migrants, wards of the state, and enrolled in private schools—although ELLs are not specifically listed.⁹⁹ The school must request parental consent to the evaluation in the parent’s native language, which the parent must provide in writing.¹⁰⁰ After receiving consent, the school must arrange for a multidisciplinary team to evaluate the child.¹⁰¹

As required by the IDEA, an evaluation meeting is then held with the student’s parents, a special education teacher, a general education teacher, a representative from the local educational agency, and other individuals who can speak to the student’s needs.¹⁰² Under the Act’s Least Restrictive Environment provision, students must be placed into a general education classroom to the maximum extent possible.¹⁰³ Research has highlighted the many benefits of inclusive classrooms, including better educational outcomes, higher test scores, and higher graduation rates.¹⁰⁴ If the evaluation team determines the student has a disability, it must create an Individualized Education Program (“IEP”), which lists services tailored to the student’s needs.¹⁰⁵ The parent may refuse special education services, but the school

⁹⁴ Barriere, *supra* note 22.

⁹⁵ *Id.* at 11; 20 U.S.C. § 1401; Serpa, *supra* note 47.

⁹⁶ Barriere, *supra* note 22; *see also* OFF. ENG. LANGUAGE ACQUISITION, *supra* note 62, at 2.

⁹⁷ Serpa, *supra* note 47.

⁹⁸ 20 U.S.C. § 1412; Serpa, *supra* note 47.

⁹⁹ 20 U.S.C. § 1412.

¹⁰⁰ Serpa, *supra* note 47.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ NAT’L. CTR. FOR LEARNING DISABILITIES, *supra* note 3, at 4.

¹⁰⁵ Individuals with Disabilities Education Act, 20 U.S.C. § 1412; U.S. DEP’T EDUC., ENGLISH LEARNER TOOLKIT FOR STATE AND LOCAL AGENCIES (SEAS AND LEAS) 82 (2017), https://ncela.ed.gov/files/english_learner_toolkit/OELA_2017_ElLsToolkit_508C.pdf.

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must continue to provide language-related services unless the parent also declines ELL instruction.¹⁰⁶

In Section 1400 of the IDEA, Congress formally addresses the significant impact spurred by the surge of students of color.¹⁰⁷ The Act confirms that ELLs are the fastest-growing student population¹⁰⁸ and recognizes a “special challenge for special education in the referral of, assessment of, and provision of services for, our Nation’s students from non-English language backgrounds.”¹⁰⁹ It also calls for increased efforts to “prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities.”¹¹⁰

The IDEA prohibits disability determinations based on cultural, economic, and environmental circumstances.¹¹¹ It stipulates that limited English proficiency should not be the “determinant factor” in a child’s disability determination.¹¹² For the evaluation to be appropriately non-discriminatory, the evaluation should be “culturally and linguistically sensitive and relevant and free from any other bias.”¹¹³

Evaluators can “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child.”¹¹⁴ This provision affords assessors the discretion to determine the most effective way to evaluate a student’s abilities.¹¹⁵ Since “valid and reliable tests in multiple languages are almost non-existent,” evaluators can use alternate strategies they deem appropriate.¹¹⁶ Furthermore, assessments must be “selected and administered so as not to be discriminatory on a racial or cultural basis.”¹¹⁷ The IDEA requires the assessments to be “provided and administered in the child’s native language or other mode of communication.”¹¹⁸

In addition to the IDEA, students with disabilities are also governed by Section 504 of the Rehabilitation Act of 1973 and the Americans with

¹⁰⁶ 20 U.S.C. §§ 1400-82; U.S. DEP’T EDUC., *supra* note 105.

¹⁰⁷ 20 U.S.C. §§ 1400-82.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at § 1414; Baseggio, *supra* note 28, at 12.

¹¹² 20 U.S.C. § 1414.

¹¹³ Baseggio, *supra* note 28, at 12.

¹¹⁴ 20 U.S.C. § 1414; Serpa, *supra* note 47.

¹¹⁵ Serpa, *supra* note 47.

¹¹⁶ *Id.*

¹¹⁷ 20 U.S.C. § 1414.

¹¹⁸ *Id.*

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Disabilities Act of 1990.¹¹⁹ However, the IDEA is unique as it is the only federal law amongst the three that distributes federal funds to states to assist with special education and its related services.¹²⁰ Consequently, the IDEA can be understood as a grants act as well as a civil rights statute.¹²¹ Given the uniqueness of the Act, this Note primarily focuses on the rights of ELLs under the IDEA instead of other disability-related statutes.

III. THE PROBLEMS UNDER THE IDEA

A. Lack of Research and Uniform Data

Scholarship on ELLs and special education is minimal.¹²² Studies on the junction between language acquisition and disability determination have only recently emerged.¹²³ Furthermore, statewide data on ELLs and their placement is limited and varies considerably.¹²⁴ As of 2011, federal databases only “recently” began collecting data on placement by language status, despite federal mandates to report on students by racial category.¹²⁵ Historically, schools lacked established collection and reporting procedures for their ELL populations.¹²⁶ As recently as 2020, one in five districts across twenty-eight states had no information reported for the past few years on its ELLs.¹²⁷

This lack of research is further complicated by the fact that “no state currently collects data that identifies ELLs in special education as a subgroup, which makes examining issues associated with ELL-special education disproportionality challenges, complex, and time-consuming for state administrators.”¹²⁸ The IDEA also does not impose a specific monitoring framework on the states, making enforcement of the Act’s provisions challenging.¹²⁹

Although scholarship on the connection between ELLs and special education is relatively new,¹³⁰ data signifies a worrisome trend.¹³¹ Despite

¹¹⁹ Rehabilitation Act of 1973, 29 U.S.C. § 794; American with Disabilities Act of 1990, 42 U.S.C. § 12101; NAT’L COUNCIL ON DISABILITY, *supra* note 42, at 17.

¹²⁰ NAT’L COUNCIL ON DISABILITY, *supra* note 42, at 17.

¹²¹ *Id.*

¹²² *See generally* Lopez & Linn, *supra* note 7, at 2.

¹²³ Linn & Hemmer, *supra* note 14, at 72.

¹²⁴ Sullivan, *supra* note 10, at 319.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Riser-Kositsky, *supra* note 35.

¹²⁸ Lopez & Linn, *supra* note 7, at 2-3.

¹²⁹ NAT’L COUNCIL ON DISABILITY, *supra* note 42, at 9.

¹³⁰ Linn & Hemmer, *supra* note 14.

¹³¹ *See* OFF. ENG. LANGUAGE ACQUISITION, *supra* note 23.

federal protections outlined by both the IDEA and the ESSA, ELLs are more likely than their non-ELL peers to be determined to require special education services.¹³² Such trends are evidenced nationwide.¹³³ A Department of Education report from the 2017-2018 school year determined that New Mexico, Montana, and Illinois had the most significant disparity rates in the identification of students with disabilities between ELLs and English-proficient students, with a 12.9%, 9.2%, and 8.2% point difference, respectively.¹³⁴ One study of a San Diego school district found that the identification rates were most jarring for its Latinx ELL students, who were eighty percent more likely than their Latinx peers who were not ELLs to be referred.¹³⁵ Disparate identification rates continue to grow.¹³⁶

The trend is starkly apparent in specific learning disabilities and speech or language impairment categories.¹³⁷ For the 2018-2019 academic year, forty-eight percent of ELLs were diagnosed with a specific learning disability compared to almost thirty-six percent of their non-English language learning peers.¹³⁸ Similarly, over eighteen percent were determined to have a speech or language impairment, compared to sixteen percent of their non-ELL peers.¹³⁹ These disproportionate distributions suggest that students “whose limited English skills make it hard to keep up with classroom work are being labeled as having disabilities and are being inappropriately assigned to Special Education programs, when the school itself is failing to meet the student’s educational needs.”¹⁴⁰

One would expect the number of ELLs who require special education services under the IDEA to be proportional to their representation in the general student body. However, the percentage of ELLs in special education is disproportionate.¹⁴¹ Disproportionality can be explained as the existence of more or less students than what is expected from the group’s representation in the general population.¹⁴² It can manifest as either overrepresentation or underrepresentation, both of which “indicate that students may not be

¹³² Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 (2015); *id.*

¹³³ Lopez & Linn, *supra* note 7, at, 2.

¹³⁴ OFF. ENG. LANGUAGE ACQUISITION, *supra* note 23.

¹³⁵ Lesli A. Maxwell & Nirvi Shah, *Evaluating ELLs for Special Needs a Challenge*, EDUCATIONWEEK (Aug. 28, 2012), <https://www.edweek.org/policy-politics/evaluating-ells-for-special-needs-a-challenge/2012/08>.

¹³⁶ Richardson, *supra* note 3, at 289.

¹³⁷ OFF. ENG. LANGUAGE ACQUISITION, *supra* note 23.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Serpa, *supra* note 47.

¹⁴¹ MID-ATL. EQUITY CONSORTIUM, *supra* note 26.

¹⁴² Linn & Hemmer, *supra* note 14.

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receiving an appropriate education that meets their unique needs as required by federal law.”¹⁴³

Both manifestations of disproportionality apply to ELLs,¹⁴⁴ who are at risk of being both misidentified as needing special education services, or failing to be identified and thus receiving delayed intervention.¹⁴⁵ There is a “paradoxical pattern” of representation: the group is unrepresented at the primary grade levels, frequently until first or second grade, but is overrepresented in third grade and beyond.¹⁴⁶ As the students enter secondary school, overrepresentation becomes “increasingly pronounced.”¹⁴⁷ Many researchers attribute this to decreased language support services.¹⁴⁸ One study suggests that ELLs who attend schools without native-language support programs are overrepresented in categories like learning disabilities and speech and language impairments.¹⁴⁹

Researchers contend there is no single cause for disproportionality.¹⁵⁰ Because the junctions between English learners and special education are not well understood,¹⁵¹ it is hard to pinpoint a single solution to rectify ELL disproportionality. Instead, disproportionality can be attributed to various factors, including the lack of uniform testing standards, poor evaluation practices and biases, gaps in development and referral protocols, and failure to enforce protocols.¹⁵²

Many of these challenges are exacerbated by inconsistent and ambiguous language in the IDEA.¹⁵³ Although the Act affords various protections to ELLs, its lack of standard definitions has “led to inconsistencies in identifying and supporting” the group.¹⁵⁴ Diagnostic practices “differ considerably” across states, school districts and individual evaluators.¹⁵⁵ ELLs are overrepresented in some states—most notably in

¹⁴³ Lopez & Linn, *supra* note 7, at 2; Hulse, *supra* note 4, at 388.

¹⁴⁴ Hulse, *supra* note 4, at 387.

¹⁴⁵ Sullivan, *supra* note 10.

¹⁴⁶ *Id.*; MID-ATL. EQUITY CONSORTIUM, *supra* note 26; Yujeong Park & Rachel Thomas, *Educating English-Language Learners with Special Needs: Beyond Cultural and Linguistic Considerations*, 3 J. EDUC. & PRAC. 52, 55 (2012).

¹⁴⁷ Sullivan, *supra* note 10, at 319.

¹⁴⁸ *Id.*

¹⁴⁹ Archerd, *supra* note 73, at 1; Sullivan, *supra* note 10, at 319.

¹⁵⁰ Sanatullova-Allison & Robison-Young, *supra* note 41, at 9.

¹⁵¹ Linn & Hemmer, *supra* note 14, at 71.

¹⁵² Richardson, *supra* note 3; Lopez & Linn, *supra* note 7; NAT’L COUNCIL ON DISABILITY, *supra* note 42, (quoting U.S. COMM’N ON C.R., RECOMMENDATIONS FOR THE REAUTHORIZATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (2002), <http://www.usccr.gov/pubs/idea/recs.htm>).

¹⁵³ See generally Individuals with Disabilities Education Act, 20 U.S.C. § 1400; see Sullivan, *supra* note 10, at 317; *How Educators Can Advocate*, *supra* note 19; Serpa, *supra* note 47.

¹⁵⁴ *How Educators Can Advocate*, *supra* note 19.

¹⁵⁵ Sullivan, *supra* note 10, at 318.

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districts with high numbers of ELLs—¹⁵⁶ but are underrepresented in others.¹⁵⁷ “Great variation in definitions and criteria” result in contradictory patterns of student identification.¹⁵⁸

Some districts previously faced allegations of discriminatory disability determinations.¹⁵⁹ For example, *Diana v. State Board of Education* was a high-profile case out of California, in which Mexican-American students were routed to special education classes because of low performance on IQ tests.¹⁶⁰ The plaintiffs argued that the students’ performances were instead attributable to their language barriers, not intellectual disabilities.¹⁶¹ The Northern District of California agreed, holding IDEA evaluations must include nonverbal evaluations or evaluations in a student’s primary language.¹⁶²

Many school districts delayed referral to special education services out of fear of similar litigation.¹⁶³ Scholarship suggests that, as a result, ELLs in some schools began receiving special education services two to three years later than students who were English proficient.¹⁶⁴ Because of these delays and the complexities in assessment, ELL students are vulnerable to inappropriate placement and services.¹⁶⁵

B. Uniqueness of English Language Learners

ELLs have greater challenges than their English-speaking peers when it comes to succeeding academically.¹⁶⁶ For an ELL to “excel or even survive academically,” he or she must be able to understand specialized vocabulary, write cohesively, comprehend complex texts, and pass examinations that are “written in a form of English that is often meant to challenge the language skills of native speakers.”¹⁶⁷

¹⁵⁶ Lopez & Linn, *supra* note 7, at 2.

¹⁵⁷ WIDA Focus on Identifying ELLs with Specific Learning Disabilities: Facts, Advice, and Resources for School Teams, *supra* note 34.

¹⁵⁸ Park & Thomas, *supra* note 146, at 53.

¹⁵⁹ Sullivan, *supra* note 10.

¹⁶⁰ Tomoe Kanaya, *Intelligence and the Individuals with Disabilities Education Act*, 7 J. INTELLIGENCE 1 (2019).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Sullivan, *supra* note 10.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ GÁNDARA & HOPKINS, *supra* note 78.

¹⁶⁷ *Id.*

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Not only must ELLs adapt to a new language and culture,¹⁶⁸ but they must do so in an environment that is mostly monolingual.¹⁶⁹ Historically, schools have implemented a transitional approach to language instruction, aimed to assist ELLs' transition into an English-speaking society.¹⁷⁰ However, many schools place ELLs directly into English-dominant classrooms with teachers who are ill-equipped to meet their linguistic needs.¹⁷¹ A misunderstanding or lack of training in second language acquisition and linguistic influences can implicate disability determinations, as educators may struggle to differentiate between lack of language proficiency and disabilities.¹⁷²

Lack of English proficiency does not constitute a disability.¹⁷³ Both federal and state law make this clear.¹⁷⁴ The IDEA's provisions distinguish between cultural and linguistic factors, and factors that may suggest the student requires disability services.¹⁷⁵ The Act requires evaluators to consider the child's linguistic and cultural needs in making a disability determination.¹⁷⁶ Additionally, evaluators are prohibited from using evaluations that are racially or culturally discriminatory.¹⁷⁷ In a 2015 Dear Colleague Letter, the Department of Education advised that student evaluations should come from a variety of sources, including aptitude and achievement tests and the student's cultural and social background.¹⁷⁸ For

¹⁶⁸ Serpa, *supra* note 47, at 36.

¹⁶⁹ GÁNDARA & HOPKINS, *supra* note 78; Linn & Hemmer, *supra* note 14; Baseggio, *supra* note 28.

¹⁷⁰ Some scholars believe that language instruction in the United States "never realized its original meaning and purpose in the historical and political context." For more on the transitional approach, see Jung Han & Kyongson Park, *Monolingual or Bilingual Approach: The Effectiveness of Teaching Methods in Second Language Classroom*, 2 PURDUE LANGUAGES AND CULTURES CONF. 1 (Mar. 4, 2017).

¹⁷¹ *Id.*

¹⁷² Serpa, *supra* note 47, at 46.

¹⁷³ GÁNDARA & HOPKINS, *supra* note 78; Serpa, *supra* note 47.

¹⁷⁴ Individuals with Disabilities Education Act, 20 U.S.C. § 1412; Serpa, *supra* note 47; At the state level, states have enacted procedures to help schools rule out exclusionary factors in making a disability determination. Meghan Whittaker & Samuel O. Ortiz, *What a Specific Learning Disability Is Not: Examining Exclusionary Factors*, NAT'L CTR. FOR LEARNING DISABILITIES, 9, <https://www.nclد.org/wp-content/uploads/2019/11/What-a-Specific-Learning-Disability-Is-Not-Examining-Exclusionary-Factors.12192019.pdf>; For example, Tennessee specifies that evaluators should consider factors like visual, motor, or hearing disabilities, cultural factors, and limited English proficiency, when evaluating a child. It specifies that "limited English proficiency must be ruled out as the primary reason that the team suspects a disability." TENN. DEP'T EDUC., INTELLECTUAL DISABILITY EVALUATION GUIDE 8 (Nov. 2018), https://www.tn.gov/content/dam/tn/education/special-education/eligibility/se_intellectual_disability_evaluation_guidance_document.pdf.

¹⁷⁵ 20 U.S.C. § 1412.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*; Richardson, *supra* note 3, at 293.

¹⁷⁸ U.S. DEP'T JUST. & U.S. DEP'T EDUC., DEAR COLLEAGUE LETTER: ENGLISH LEARNER STUDENTS AND LIMITED ENGLISH PROFICIENT PARENTS, 28 (Jan. 7, 2015); Dear Colleague Letters are often sent to

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example, prior to evaluating an ELL, the school district should gather information about the student's educational background and any language-based intervention programs.¹⁷⁹ Districts should review the student's school records *and* ask the student and parents about the student's experience in those schools.¹⁸⁰

The Act also prohibits evaluators from using the student's language proficiency as the determinant factor in their disability diagnosis.¹⁸¹ Distinguishing between language and disability challenges is imperative because it determines the appropriate disability services, if needed. Inappropriate referrals are stigmatizing, exacerbate academic and social challenges, and divert resources from students who require disability services.¹⁸² Furthermore, research indicates that the stigma associated with a learning disability affects not just the student: teachers and parents are more likely to have lower expectations for students labeled with a learning disability, which may inhibit their educational outcomes.¹⁸³

Evaluators struggle to distinguish between language acquisition and disability,¹⁸⁴ largely because both challenges can manifest similarly, frequently as underachievement in the classroom.¹⁸⁵ ELLs and students with a learning disability both perform poorly on "academic tasks with high language demands, which may make ELLs even more vulnerable to misclassification as having a disability."¹⁸⁶ Additionally, both groups also display poor comprehension, syntax and grammar errors, and have difficulty following instructions and completing tasks.¹⁸⁷ For example, a student may have difficulty in reading comprehension, despite being able to read fluently and accurately.¹⁸⁸ Initially, this may manifest as a memory or processing deficit, but it could also be indicative of language acquisition difficulties.¹⁸⁹ If the cause is actually language acquisition, the student's understanding will improve along with their English proficiency, and disability referral is not

congressional members to support or oppose legislation. EVERYCRSREPORT.COM, "DEAR COLLEAGUE" LETTERS IN THE HOUSE OF REPRESENTATIVES: PAST PRACTICES AND ISSUES FOR CONGRESS (Feb. 22, 2017), <https://www.everycrsreport.com/reports/R44768.html>.

¹⁷⁹ EVERYCRSREPORT.COM, *supra* note 178, at 28.

¹⁸⁰ U.S. DEP'T JUST. & U.S. DEP'T EDUC., *supra* note 178.

¹⁸¹ Individuals with Disabilities Education Act, 20 U.S.C. § 1414.

¹⁸² Barriere, *supra* note 22, at 1; OFF. ENG. LANGUAGE ACQUISITION, *supra* note 23, at 1; Baseggio, *supra* note 28, at 4.

¹⁸³ Dara Shifrer, *Stigma of a Label: Educational Expectations for High School Students Labeled with Learning Disabilities*, 54 J. OF HEALTH AND SOC. BEHAV. 462, 463 (2013).

¹⁸⁴ Serpa, *supra* note 47.

¹⁸⁵ Park & Thomas, *supra* note 146, at 52; Baseggio, *supra* note 28, at 48.

¹⁸⁶ Sullivan, *supra* note 10.

¹⁸⁷ Sanatullova-Allison & Robison-Young, *supra* note 41, at 4.

¹⁸⁸ U.S. DEP'T EDUC., *supra* note 105, at 7.

¹⁸⁹ *Id.*

needed.¹⁹⁰ Disabilities in language and learning are “generally due to factors intrinsic to the learner, such as a neurological impairment or a problem with symbolic processing . . . whereas second language learning difficulties are typically due to factors extrinsic to the learner, such as the language learning process itself or cross-cultural differences.”¹⁹¹ Evaluators then misidentify students as having a learning disability and incorrectly refer the student for disability services when, in reality, the issue is language acquisition.¹⁹²

Part of the difficulty in assessing the differences can be attributed to the lack of culturally appropriate assessment techniques for linguistically diverse students.¹⁹³ At the evaluation level, the IDEA allows evaluators to use numerous assessment tools to garner information about the child’s developmental and academic performance.¹⁹⁴ It also requires that the assessments be administered in the child’s native language¹⁹⁵ and that schools provide an interpreter at the evaluation meeting if necessary.¹⁹⁶ Frequently, however, interpreters are not provided, and parents are asked to sign permission forms that are not in their native language.¹⁹⁷

C. *Difficulties in Evaluating English Language Learners*

Despite these procedural safeguards, most evaluations are linguistically and culturally inappropriate.¹⁹⁸ Some evaluators believe they cannot meet the IDEA requirements because of the lack of assessments available in native languages.¹⁹⁹ There is seemingly no test that is reliable across every language,²⁰⁰ and many American English norm-referenced tests cannot be directly translated to other languages.²⁰¹ Many exams are administered “on the spot” by an interpreter, but scores are invalidated because of linguistic differences.²⁰² Results may still be biased due to measures “that are based

¹⁹⁰ *Id.*

¹⁹¹ Else Hamayan, Barbara Marler, Cristina Sánchez-López, & Jack Damico, *Reasons for the Misidentification of Special Needs Among ELLs*, COLORIN COLORO., <https://www.colorincolorado.org/article/reasons-misidentification-special-needs-among-ells> (last visited Oct. 30, 2022).

¹⁹² Park & Thomas, *supra* note 146, at 53; Baseggio, *supra* note 28, at 4.

¹⁹³ Serpa, *supra* note 47.

¹⁹⁴ Individuals with Disabilities Education Act, 20 U.S.C. § 1414; Serpa, *supra* note 47.

¹⁹⁵ 20 U.S.C. § 1414.

¹⁹⁶ Serpa, *supra* note 47.

¹⁹⁷ Janette Klingner & Beth Harry, *The Special Education Referral and Decision-Making Process for English Language Learners: Child Study Team Meetings and Placement Conferences*, 108 TCHR. C. REC. 2247, 2272 (2006).

¹⁹⁸ Serpa, *supra* note 47.

¹⁹⁹ Sullivan, *supra* note 10, at 319.

²⁰⁰ Serpa, *supra* note 47.

²⁰¹ *Id.*

²⁰² *Id.*

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upon the values, beliefs, and cultural heritage of the dominant American culture.”²⁰³ Scores are misinterpreted and lead to over-referral for disability services.²⁰⁴ Other assessments are given in English despite a lack of proficiency.²⁰⁵ Many students do not have enough time to “input the language, translate, and output the language.”²⁰⁶ To accurately measure the child’s ability, the exam would need to be entirely recreated and validated, instead of being directly translated to the student.²⁰⁷ Considering that there are over 400 languages spoken by the United States’ ELLs, this is not workable.²⁰⁸

In addition to the cultural limitations of the assessments, researchers remain wary about how accurate the tests are in determining an ELL’s abilities.²⁰⁹ Professors Janette Klingner and Beth Harry note that many factors can influence a child’s performance on standardized intelligence procedures.²¹⁰ For example, removal from a bilingual classroom to an English-only environment may adversely affect a child’s achievement and “depress” IQ test scores.²¹¹ Even students who show full English proficiency may “still typically demonstrate a low verbal IQ and high performance IQ profile when their intelligence is tested.”²¹² This discrepancy suggests that standardized intelligence testing may be inaccurate.²¹³ Overreliance on these IQ scores also leads to incorrect eligibility determinations.²¹⁴

Furthermore, there are lingering procedural questions about the most appropriate time to test ELLs.²¹⁵ Klingner and Harry note that “the field has not yet developed test of language proficiency that can adequately determine when a child with a primary language other than English is ready to be tested in only English.”²¹⁶ A student may appear proficient in English “long before they have fully developed cognitive academic language proficiency

²⁰³ Park & Thomas, *supra* note 146, at 53 (quoting JAMES MCLOUGHLIN, RENA LEWIS, & EFFIE PAPOUTSIS KRITIKOS, *ASSESSING STUDENTS WITH SPECIAL NEEDS* (7th ed. 2008)).

²⁰⁴ *Id.*

²⁰⁵ Serpa, *supra* note 47.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ U.S. DEP’T EDUC., *supra* note 57; ELIZABETH BURR, ERIC HAAS, & KAREN FERRIERE, *IDENTIFYING AND SUPPORTING ENGLISH LEARNER STUDENTS WITH LEARNING DISABILITIES: KEY ISSUES IN THE LITERATURE AND STATE PRACTICE 7* (2015).

²⁰⁹ Klingner & Harry, *supra* note 197.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

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masking the need for a native language assessment and lulling educators into thinking they are justified in focusing on English test results.”²¹⁷

The IDEA encourages the use of pre-referral strategies to assist students in general education before the student is evaluated for services.²¹⁸ For example, Section 1413 of the Act explains that schools should use a portion of its funds for Early Intervening Services to support students “who have not been identified as needing special education or related services but who need additional academic and behavioral support to succeed in a general education environment.”²¹⁹ These strategies will lower the number of students inaccurately referred to and placed in special education.²²⁰ The response-to-intervention approach (“RTI”) typically includes continuous progress monitoring of the student in the general education classroom along with the implementation of specific strategies to improve the students’ problem areas.²²¹

However, these strategies are implemented “sporadically or with little effect.”²²² In one study of 312 students, researchers noted these procedures to be deficient in many ways.²²³ Not all states require pre-intervention strategies, and many educators do not request pre-referral intervention until the student has fallen so far behind that assistance would be unhelpful.²²⁴ Moreover, research indicates that evaluators are often confused about their district’s referral policy.²²⁵ In one study, some educators incorrectly believed they were not allowed to refer students at the early levels of English proficiency.²²⁶ In turn, some students received delayed services.²²⁷

The lack of clear federal requirements has also led to inconsistent enforcement of the IDEA’s Least Restrictive Environment (“LRE”) requirement, which mandates that children who receive special education services should be instructed in the general education classroom as much as possible.²²⁸ The Act stipulates that the placement of children with disabilities outside the general education classroom should only occur “when the nature

²¹⁷ *Id.*

²¹⁸ Individuals with Disabilities Education Act, 20 U.S.C. § 1413; *id.* at 2249.

²¹⁹ 20 U.S.C. § 1413.

²²⁰ Klingner & Harry, *supra* note 197, at 2249.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ Richardson, *supra* note 3, at 293.

²²⁵ Klingner & Harry, *supra* note 197, at 2263.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Individuals with Disabilities Education Act, 20 U.S.C. § 1412.

or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”²²⁹

Research has highlighted the many benefits of inclusive classrooms, including better educational outcomes, higher test scores, and higher graduation rates.²³⁰ However, the states’ failure to adhere to the IDEA’s LRE requirements directly implicates students of color, who are more likely to be placed in more restrictive environments than their white peers.²³¹ Studies indicate that students from certain racial and ethnic backgrounds are incorrectly excluded from general education classrooms at a higher rate than other students.²³² One study showed that over half of white students with disabilities spend more than eighty percent of their day in general education settings compared to one third of their Black peers.²³³ Consequently, these students are deprived of “experiences with their general education peers and are denied rigorous learning opportunities.”²³⁴

Exclusion from general education is detrimental to students’ educational outcomes and graduation rates.²³⁵ Other ramifications of inappropriate classroom settings include bullying, increased stigmas, and negative educational and post-secondary opportunities.²³⁶ Separation from the general education classroom has also led to greater racial separation.²³⁷ Culturally and linguistically diverse students may be subjected to increased rates of discipline, including suspensions, expulsions, and more severe punishments for the same behavior as their white peers.²³⁸

Consequences of misplacement are shared across all student groups, regardless of language proficiency.²³⁹ For ELLs, these ramifications are starkly apparent in their decreased educational outcomes.²⁴⁰ ELLs’ collective academic achievement is “disastrously low.”²⁴¹ They struggle more academically than any other group and “fall far behind other children on virtually all academic measures.”²⁴² ELLs also have some of the highest grade retention—when a student repeats a grade due to low academic

²²⁹ *Id.*

²³⁰ NAT’L CTR. FOR LEARNING DISABILITIES, *supra* note 3, at 4.

²³¹ *Id.*

²³² *Id.* at 5.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ NAT’L COUNCIL ON DISABILITY, *supra* note 42, at 28.

²³⁷ *See Hulse, supra* note 4.; *see id.*

²³⁸ NAT’L CTR. FOR LEARNING DISABILITIES, *supra* note 3, at 5.

²³⁹ Sullivan, *supra* note 10, at 318.

²⁴⁰ GÁNDARA & HOPKINS, *supra* note 78.

²⁴¹ *Id.*

²⁴² *Id.*

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performance—and dropout rates.²⁴³ In 2014, the Department of Education reported that the high school graduation rate for ELLs was just under sixty-three percent, while the rate was about eighty-two percent for the general student population.²⁴⁴ The ELL graduation rate slightly improved for the 2017-2018 school year, although the median high school graduation rate was under sixty-nine percent.²⁴⁵ New York and Louisiana had two of the lowest rates, with only thirty-one percent and thirty-seven percent of its respective ELLs graduating.²⁴⁶ These numbers are further complicated by lack of uniformity in ELL determination and progress reports across the states, resulting in “serious repercussions.”²⁴⁷

Despite the growth of ELLs, many educators may be underprepared to adequately support the needs of the group.²⁴⁸ Misplacement by an evaluator or educator is not an intentional decision, but is “commonly a result of lack of knowledge, training, and information available to the educators who interact with these English language learners.”²⁴⁹ Many educators lack the appropriate training required to accurately identify students with disabilities.²⁵⁰ Consequently, educators are “underprepared to meet the linguistic and academic needs of ELLs, and many lack the cultural competence to deal with this diverse group of students.”²⁵¹ One survey from 2003 determined that only five percent of ELL teachers had bilingual certification.²⁵² Most educators working with ELLs are “primarily a monolingual English speaking group.”²⁵³ Some educators are required to teach only in English.²⁵⁴ Other instructors may not be licensed to work with ELL students or are not bilingual.²⁵⁵ Monolingual education can be troublesome, as teachers likely are unable to distinguish between second language acquisition and disabilities, and thus may be more likely to make incorrect disability determinations.²⁵⁶

²⁴³ Sullivan, *supra* note 10, at 318.

²⁴⁴ U.S. DEP’T EDUC., *supra*, note 92, at 3.

²⁴⁵ OFF. ENG. LANGUAGE ACQUISITION, U.S. DEP’T EDUC., HIGH SCHOOL GRADUATION RATES FOR ENGLISH LEARNERS (Sept. 2020), https://www.ncela.ed.gov/files/fast_facts/20200916-ELGraduationRatesFactSheet-508.pdf.

²⁴⁶ *Id.*

²⁴⁷ GÁNDARA & HOPKINS, *supra* note 78.

²⁴⁸ Baseggio, *supra* note 28.

²⁴⁹ *Id.*

²⁵⁰ GÁNDARA & HOPKINS, *supra* note 78.

²⁵¹ *How Educators Can Advocate*, *supra* note 19, at 5.

²⁵² GÁNDARA & HOPKINS, *supra* note 78.

²⁵³ *How Educators Can Advocate*, *supra* note 19, at 18.

²⁵⁴ Serpa, *supra* note 47, at 36.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

These problems are exacerbated by the lack of federal funding for better placement and evaluation practices, and diversity training for teachers.²⁵⁷ Although in 1975, Congress promised to cover forty percent of the average costs to educate a student eligible for services under the IDEA, the government currently pays less than half of what was initially promised.²⁵⁸ ELLs are “so disproportionately underserved by the public school system, the number of programs and dollars spent per ELL student are in decline, even as the number of ELL students has skyrocketed.”²⁵⁹ States and districts must then find the fiscal resources to meet their requirements under the IDEA.²⁶⁰ As a result of these budgetary restrictions, states have limited hiring and training programs for educators, eliminated educational programs, and in one state, restricted the number of students that could be identified as having a disability.²⁶¹

In addition to these aggravators, some may suggest that continuous disproportionality can be evidence of deep-rooted systematic problems in the education system, outside of poor funding and lack of language support.²⁶² One researcher reasoned that “for a field built on the principle of fairness, formed in the wake of *Brown v. Board of Education*, and grounded in the rhetoric of the civil rights movements, ongoing disproportionality strongly indicates systemic problems of inequity, prejudice, and marginalization within the education system.”²⁶³

IV. PROPOSAL: FIXING IDEA TO ADHERE TO ELLS’ LINGUISTIC AND CULTURAL NEEDS

The disproportionality of ELLs in special education can be attributed to many factors, including culturally inappropriate evaluations, biases, lack of funding, and lack of enforcement of the IDEA.²⁶⁴ There is no single solution to rectify the disproportionality of ELLs,²⁶⁵ but reforms to the IDEA will yield to improved assessment and placement practices. Unlike language learning and civil rights laws, which are less tailored to the specific needs of

²⁵⁷ GÁNDARA & HOPKINS, *supra* note 78.

²⁵⁸ Some argue that the initial budgetary formula incentivized states to over-identify students as requiring disability services. NAT’L COUNCIL ON DISABILITY, *BROKEN PROMISES: THE UNDERFUNDING OF IDEA* (Feb. 7, 2018), at 18.

²⁵⁹ *How Educators Can Advocate*, *supra* note 19, at 5.

²⁶⁰ NAT’L COUNCIL ON DISABILITY, *supra* note 258, at 9.

²⁶¹ *Id.*

²⁶² Sullivan, *supra* note 10, at 318.

²⁶³ *Id.*

²⁶⁴ Richardson, *supra* note 3; Lopez & Linn, *supra* note 7; NAT’L COUNCIL ON DISABILITY, *supra* note 42 (quoting U.S. COMM’N ON C.R., *RECOMMENDATIONS FOR THE REAUTHORIZATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (2002)*, <http://www.usccr.gov/pubs/idea/recs.htm>).

²⁶⁵ Sanatullova-Allison & Robison-Young, *supra* note 41, at 9.

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ELLs and have resulted in minimal changes to the group’s educational rights, the IDEA uniquely “holds out the promise of more direct and immediate improvements” for ELLs.²⁶⁶

Although ELLs are guaranteed an equal education by the Equal Protection Clause of the Fourteenth Amendment,²⁶⁷ the current iteration of the IDEA is too broad to appropriately meet their diverse needs.²⁶⁸ Many states lack guidance and transparent procedures for practitioners and educators, which leads to variability in states’ implementation of the regulations.²⁶⁹ Expanding the IDEA’s pre-referral, evaluation, and placement procedures with research-grounded policies will result in more accurate disability determinations.²⁷⁰

This Note proposes expansions and refinements to the IDEA to meet the varied needs of ELLs.²⁷¹ The Act should be amended to require evaluators to employ RTI models at the pre-referral stage, and strongly consider language-related factors before resorting to evaluations.²⁷² Consideration of these factors should continue throughout the evaluation phase as well. Additionally, this Note suggests that the language of the LRE provision should be expanded to better align with language learning laws.

A. Pre-Evaluation: Re-Working Screening of ELLs

More developed screening procedures—initiated before students are even referred for disability evaluations—will help ameliorate the overrepresentation of ELLs in special education. The IDEA promotes pre-referral strategies that are meant to help students within the general education environment *before* the student is evaluated for special education.²⁷³ Research also indicates that ELLs are more likely to be determined to require special education when there is a lack of language support programs.²⁷⁴ Before a student is referred for special education eligibility, evaluators must consider language-related factors, such as enrollment in a language learning program, to “make informed decisions about interventions or referrals.”²⁷⁵

²⁶⁶ Archer, *supra* note 73.

²⁶⁷ In his concurrence in *Plyler*, Justice Marshall affirmed that “class-based denial of public education is utterly incompatible with the Equal Protection Clause of the Fourteenth Amendment.” *Plyler*, 457 U.S. at 203.

²⁶⁸ CARNOCK & SILVA, *supra* note 23, at 15.

²⁶⁹ *Id.*

²⁷⁰ NAT’L COUNCIL ON DISABILITY, *supra* note 258.

²⁷¹ *Id.*; *How Educators Can Advocate*, *supra* note 19.

²⁷² Barriere, *supra* note 22; Klingner & Harry, *supra* note 197, at 2249.

²⁷³ Individuals with Disabilities Education Act, 20 U.S.C. § 1413; Klingner & Harry, *supra* note 197, at 2249.

²⁷⁴ Sullivan, *supra* note 10, at 319.

²⁷⁵ Serpa, *supra* note 47, at 25.

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The Department of Education suggested this in a 2015 Dear Colleague Letter, but it is not mandatory.²⁷⁶

Some advocates propose that a stricter step-by-step model should precede assessments.²⁷⁷ Specifically, pre-referral teams should employ an RTI framework to decrease the number of ELLs who are incorrectly referred for special education services.²⁷⁸ The model has many benefits, including reducing the “wait to fail” situations by encouraging prompt intervention.²⁷⁹ However, the IDEA leaves RTI largely undefined.²⁸⁰ The federal government does not provide guidelines or provisions dictating the RTI procedures.²⁸¹

In turn, the Act should require, not merely suggest, that evaluators employ RTI models at the pre-referral stage. It should outline more specific RTI guidelines in guidance documents, which will improve disability screening for ELLs. In guidance documents, the Department of Education should encourage that the RTI teams be primarily staffed with general education teachers, because the involvement of psychologists and special education teachers may skew observations.²⁸² These evaluative observations should focus on cognition, classroom behavior, and other environmental factors to determine if the student should be referred.²⁸³

Professors Klingner and Harry note that evaluators must consider, as one environmental factor, if the students received an “adequate opportunity to learn.”²⁸⁴ If not, “the determination cannot be made that she has a learning disability.”²⁸⁵ Special education should not be a “fall-back option” when language support and other curriculum is not provided.”²⁸⁶

As follows, the availability of language support and such supportive curriculum must also be considered as an environmental factor in the evaluation phase of disability determinations.²⁸⁷ Instead of beginning each assessment by looking for a deficiency, Klingner and Harry suggest that evaluators begin with the understanding that environmental factors are to blame if the child presents a challenge.²⁸⁸ In making their disability

²⁷⁶ U.S. DEP’T JUST. & U.S. DEP’T EDUC., *supra* note 178.

²⁷⁷ Baseggio, *supra* note 28, at 48.

²⁷⁸ Klingner & Harry, *supra* note 197, at 2249.

²⁷⁹ Park & Thomas, *supra* note 146.

²⁸⁰ Barriere, *supra* note 22, at 2.

²⁸¹ Archerd, *supra* note 73, at 247.

²⁸² Klingner & Harry, *supra* note 197, at 2275.

²⁸³ Sanatullova-Allison & Robison-Young, *supra* note 41, at 8.

²⁸⁴ Klingner & Harry, *supra* note 197, at 2275.

²⁸⁵ *Id.* at 2249.

²⁸⁶ Sullivan, *supra* note 10, at 330.

²⁸⁷ Sanatullova-Allison & Robison-Young, *supra* note 41, at 9.

²⁸⁸ *Id.*

determinations, practitioners should consider other environmental factors in their evaluations, including educational history, socioeconomic status, and cultural variables.²⁸⁹ They should also consider alternate deficiencies, such as weak auditory processing skills, rather than cognitive disorders or disabilities.²⁹⁰

B. Evaluation of ELLs

The IDEA's evaluation procedures are also too expansive to accommodate the needs of ELLs.²⁹¹ For example, the Act's evaluation procedures allow practitioners to utilize a "variety of assessment tools and strategies" when evaluating a student.²⁹² Although tests must be administered in the student's native language, and may be translated by an interpreter if needed,²⁹³ no test is fully reliable across every language. Furthermore, many evaluations are administered on the spot by an interpreter, and results are invalidated because of the language barrier.²⁹⁴

It is nearly impossible to provide assessments in all 400 of the ELLs' native languages. Therefore, Congress should amend the IDEA to require the assessments to be recreated into the child's native language, not directly translated.²⁹⁵ If recreating the test is not possible, then the evaluator should use an alternate assessment that will provide relevant information about the child's abilities.²⁹⁶

C. Expanding the Definition of Least Restrictive Environment

Congress should also rework the definition of the LRE requirement to include "a more contemporary context" with support from other education acts.²⁹⁷ The current definition of an LRE in the IDEA is "inadequate" because it fails to include the rights of ELLs guaranteed by other language learning laws.²⁹⁸ Altering the definition to include the language from language learning laws will ensure that students' language and disability-related educational needs are met in both a "culturally and linguistically responsive environment."²⁹⁹ Studies have demonstrated the significant

²⁸⁹ *Id.*

²⁹⁰ MID-ATL. EQUITY CONSORTIUM, *supra* note 26.

²⁹¹ Individuals with Disabilities Education Act, 20 U.S.C. § 1414.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ Serpa, *supra* note 47, at 3.

²⁹⁵ *Id.* at 36.

²⁹⁶ 20 U.S.C. § 1414.

²⁹⁷ Serpa, *supra* note 47.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

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benefits of general education placement when appropriate, including better educational outcomes.³⁰⁰ However, many states fail to adhere to the IDEA's LRE requirement.³⁰¹ Furthermore, students of color are more likely to be denied LRE placement compared to their white peers.³⁰² One study suggested that less than half the states give schools written guidelines about the placement of students in an LRE.³⁰³

Dr. Maria de Lourdes B. Serpa, a professor of Bilingual Special Education at Lesley University, proposes that an LRE for ELLs should be defined as “the educational setting where a child who has disabilities *and* who is learning English is provided with a free and appropriate public education [] specially designed to meet [their] educational and language learning needs while being educated with his ELL peers without disabilities to the maximum extent possible.”³⁰⁴ Expanding these definitions would be especially beneficial for high-growth states,³⁰⁵ which “may have many teachers inexperienced in working with ELLs and a lack of resources to support ELLs’ language growth.”³⁰⁶

Lastly, a 2019 report by the Institute of Education determined that only nine states have publicly available manuals on best practices for identifying ELLs.³⁰⁷ The federal government should require every state to provide similar manuals that align with the IDEA’s new ELL-specific pre-intervention, assessment, and LRE provisions. This Note’s proposals help ensure that the United States adequately supports the largest growing student population—both academically and socially—by fostering their skills and abilities and celebrating their distinct cultures.

V. CONCLUSION

Disproportionality in special education affects all minorities, not just ELLs.³⁰⁸ Research suggests consistent patterns of disproportionality in special education for certain groups.³⁰⁹ For example, it is well established that Black students are frequently overrepresented in the categories of

³⁰⁰ *Id.*

³⁰¹ 20 U.S.C. §§ 1400-82. For more information on state compliance under the IDEA, see NAT’L COUNCIL ON DISABILITY, *supra* note 42.

³⁰² NAT’L CTR. FOR LEARNING DISABILITIES, *supra* note 3.

³⁰³ Richardson, *supra* note 3, at 296.

³⁰⁴ Serpa, *supra* note 47.

³⁰⁵ High-growth states are considered states where “the shift in ELL numbers between 1999-2000 and 2009-2010 was greater than 200 percent.” *How Educators Can Advocate*, *supra* note 19, at 8.

³⁰⁶ *How Educators Can Advocate*, *supra* note 19, at 7.

³⁰⁷ CARNOCK & SILVA, *supra* note 23, at 15.

³⁰⁸ Sullivan, *supra* note 10, at 318-19.

³⁰⁹ *Id.*

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emotional disability and intellectual disability.³¹⁰ Meanwhile, Native Americans are frequently overrepresented in learning disabilities.³¹¹ Scholarship on language acquisition and special education placement is noticeably lacking, but as proposed above, targeted research is imperative to best prepare for the surge of ELLs in our country's schools.

Like any other student, ELLs are guaranteed a free and appropriate public education by federal law. However, the United States is failing to support these students. Low graduation rates, poor academic achievement, and significant levels of disproportionality within the special education system evidence the need for reform. One suggestion to improve educational outcomes for the group is to reform the eligibility processes of ELLs for special education. Specifically, we must implement more culturally and linguistically appropriate pre-referral and evaluation techniques to account for their diverse needs. Such reforms are needed at the federal level to specifically target ELLs and ensure they receive an appropriate education.³¹² These expansions to the IDEA will provide more guidance to the states, particularly high-density states with fast-growing ELL populations, and allow for better enforcement measures.

ELLs add much value to our school system with their various cultures and languages.³¹³ Studies show that culturally responsive educational systems benefit all students “by broadening perspectives and validating each person’s uniqueness and sense of belonging to a larger whole.”³¹⁴ Part of this enrichment requires preserving their native language and “validating students’ linguistic assets.”³¹⁵

Some states, including California, Massachusetts, and Arizona, have implemented English-only initiatives that restrict the amount of language support ELLs receive.³¹⁶ It is estimated that thirty percent of ELLs live in these states.³¹⁷ Legislative attempts to restrict students’ native languages yield to many ramifications, including grade retention, dropout, behavioral

³¹⁰ *Id.*

³¹¹ Lopez & Linn, *supra* note 7, at 1.

³¹² Hulse, *supra* note 4, at 384.

³¹³ U.S. DEP’T EDUC., RESOURCE GUIDE: ACCOUNTABILITY FOR ENGLISH LEARNERS UNDER THE ESEA 4 (2017).

³¹⁴ Richardson, *supra* note 3 (quoting JANETTE K. KLINGNER, ALFREDO ARTILES, ELIZABETH KOZLESKI, BETH HARRY, SHELLEY ZION, WILLIAM TATE, GRACE ZAMORA DURÁN, & DAVID RILEY, *Addressing the Disproportionate Representation of Culturally and Linguistically Diverse Students in Special Education through Culturally Responsive Educational Systems*, 13 EDUC. POL’Y ANALYSIS ARCHIVES 1 (2005)).

³¹⁵ *How Educators Can Advocate*, *supra* note 19, at 16.

³¹⁶ Sullivan, *supra* note 10, at 323.

³¹⁷ *Id.*

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issues, and inappropriate referral for special education services.³¹⁸ California and Massachusetts have since repealed their bilingual education laws,³¹⁹ but Arizona has not.³²⁰

Research indicates the many benefits of bilingual education, including helping students achieve second language learning.³²¹ Bilingual speakers are shown to be more advanced than their monolingual peers at enhanced executive functioning, or the “brain’s ability to plan, monitor understanding, apply strategies, ignore distractions, and solve problems.”³²² One study published by the Frank Porter Graham Child Development Institute at the University of North Carolina at Chapel Hill indicated that preschoolers who learned English while also maintaining their native language had greater problem-solving skills, a more advanced vocabulary, and helpful behaviors related to creative thinking and reasoning.³²³

Because ELLs constitute the nation’s fastest growing student population,³²⁴ it is in the country’s best interest to meet their educational and linguistic needs. Without proper placement procedures, ELLs face increased psychological harm, bullying, and greater negative educational outcomes.³²⁵ Since there is no “one size fits all model,” educators and legislatures must be cognizant of the group’s diverse needs and should be utilizing the IDEA to do so.³²⁶

President Biden has made education reform a priority for his administration, including increased funding for the IDEA.³²⁷ According to U.S. Secretary of Education Miguel Cardona, professional development is incorporated into that promise, by adding jobs for special education and bilingual teachers from diverse backgrounds.³²⁸ It should not end at

³¹⁸ *Id.*

³¹⁹ Corey Mitchell, *English-Only Laws in Education on Verge of Extinction*, EDUCATIONWEEK (Oct. 23, 2019), <https://www.edweek.org/teaching-learning/english-only-laws-in-education-on-verge-of-extinction/2019/10>.

³²⁰ Laura Gómez, *Push to Repeal English-Only Education Appears Abandoned in 2022*, AZ MIRROR (Jan 28, 2022), <https://www.azmirror.com/blog/push-to-repeal-english-only-education-appears-abandoned-in-2022/>.

³²¹ Han & Park, *supra* note 170, at 4.

³²² JANETTE KLINGNER & AMY EPPOLITO, *ENGLISH LANGUAGE LEARNERS: DIFFERENTIATING BETWEEN LANGUAGE ACQUISITION AND LEARNING DISABILITIES I* (COUNCIL FOR EXCEPTIONAL CHILD. 2014).

³²³ EDUC. COMM’N STATES, *supra* note 61, at 3.

³²⁴ *How Educators Can Advocate*, *supra* note 19.

³²⁵ Baseggio, *supra* note 28.

³²⁶ GÁNDARA & HOPKINS, *supra* note 78.

³²⁷ Press Release, U.S. DEP’T EDUC., Secretary Cardona Lays Out Vision for Education in America (Jan 27, 2022), <https://www.ed.gov/news/press-releases/secretary-cardona-lays-out-vision-education-america>.

³²⁸ *Id.*

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diversifying the workforce. To best support ELLs, research and funds are necessary to develop more comprehensive screening and evaluation procedures.