



# When “Practicable” and “Feasible” May Mean “Mandatory”: The Rights of Limited English Proficient Parents

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North Carolina’s student population classified as limited English proficiency (LEP) has exploded in recent years. Between 2002 and 2007 the number of LEP students nearly doubled, from 60,149 in October 2002 to 112,534 in October 2007.<sup>1</sup> The latter figure represents almost one in twelve students in the state’s elementary and secondary schools.<sup>2</sup> Far less noticeable, however, has been the corresponding growth in the LEP *parent* population. While no definitive figure is available for the number of LEP parents whose children attend North Carolina schools, the figure for LEP students likely provides a rough extrapolation.<sup>3</sup> Given the growth, therefore, in the number of LEP students, North Carolina school officials should be attentive to what is likely a rapidly growing segment of their parent population as well.

State and local educational agencies (SEAs and LEAs) currently have a considerable body of practical guidance outlining the rights of LEP students.<sup>4</sup> So far, however, none of the available

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1. N.C. DEP’T OF PUB. INSTRUCTION (NCDPI), LEP HEADCOUNT DATA, 2002–2009 (updated July 7, 2010); downloadable document *available at* [esllearnnc.sharpschool.com/cms/One.aspx?portalId=4502459&pageId=7605316](http://esllearnnc.sharpschool.com/cms/One.aspx?portalId=4502459&pageId=7605316).

2. The average daily membership in North Carolina public and charter schools for fiscal year 2007–2008 was 1,461,740. Of these students, approximately 7.7 percent were classified as LEP. *See* LEP HEADCOUNT DATA, *supra* note 1; *see also* NCDPI, FACTS AND FIGURES 2007–2008, *available at* [www.ncpublicschools.org/docs/fbs/resources/data/factsfigures/2007-08figures.pdf](http://www.ncpublicschools.org/docs/fbs/resources/data/factsfigures/2007-08figures.pdf).

3. Admittedly data on LEP students in North Carolina cannot be extrapolated to provide an exact number of LEP parents. In some situations, one or both parents of an LEP child may actually be proficient in English. Conversely, LEP parents may have a child who is proficient in English and not classified as LEP. Probably the more common situation, however, is for both parent and child to be LEP, and therefore the number of LEP students in North Carolina is likely at least suggestive of the number of LEP parents in the state.

4. *See, e.g.*, Christopher A. Lott, *Legal Issues Facing Schools with Limited English Proficiency Students*, ch. B.16 *in* EDUCATION LAW IN NORTH CAROLINA (Janine M. Murphy ed., Aug. 23, 2006).

guidance has comprehensively addressed the corresponding rights of LEP parents.<sup>5</sup> This lack of guidance is curious given that various laws and regulations, both federal and state, specify an extensive range of responsibilities that LEAs and SEAs owe to *all* parents, whether English proficient or not. Some of these laws, directly attempting to address the language barriers that LEP parents face, require schools to arrange for interpreters at parent meetings and to send out notices “to the extent practicable” or “if feasible” in a parent’s native language. Still other laws require a parent to be involved in a decision, be notified of a decision, or consent to an activity, but they do not specify when a parent’s involvement must be facilitated through interpreters or when notice must be provided or consent obtained in the parent’s native language. Perhaps the most common question LEAs face is which documents they must translate. In sum, given the number of laws at issue and the paucity of guidance available, many LEAs are rightly confused about the contours of their responsibility to provide language services to LEP parents.

This bulletin surveys the key federal and state laws affecting the rights of LEP parents in North Carolina. While the complex interaction of civil rights laws and the statutory requirements of various programs can initially be befuddling, the clearest guidance actually allows an LEA a great deal of flexibility in seeking to provide LEP parents with meaningful access to programs and services.

## Title VI

Title VI of the Civil Rights Act of 1964 prohibits recipients of federal financial aid from discriminating against individuals “on the ground of race, color, or national origin.”<sup>6</sup> The implementing regulations for Title VI further clarify that a recipient “may not, directly or through contractual or other arrangements, on ground of race, color, or national origin,” exclude persons from participating in its programs, deny them any service or the benefits of its programs, or subject them to separate treatment.<sup>7</sup> In May 1970 what was then the Department of Health, Education, and Welfare (HEW) issued a key policy memorandum that clarifies a school’s responsibilities under Title VI to national origin–minority group children.<sup>8</sup> Entitled “Identification of Discrimination and Denial of Services on the Basis of National Origin,” the 1970 memo lists a number of “major areas of concern” relating to compliance with Title VI. Among them is the “responsibility of school districts to adequately notify national origin–minority group parents of school activities called to the attention of other parents.”<sup>9</sup> These notices, the 1970 memo adds, “*may* have to be provided in a language other than English” in order to be adequate (emphasis added).<sup>10</sup> Such gray language obviously allows for considerable flexibility: an LEA may determine for itself when adequate notice necessitates interpretation or translation and when it does not. It is important to note that the 1970 memo has never been withdrawn; the Supreme Court upheld its provisions

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5. A few advocacy organizations have prepared reports on the rights of LEP parents. *See, e.g.*, ADVOCATES FOR CHILDREN OF NEW YORK/NEW YORK IMMIGRATION COALITION, DENIED AT THE DOOR: LANGUAGE BARRIERS BLOCK IMMIGRANT PARENTS FROM SCHOOL INVOLVEMENT 12–23 (Feb. 19, 2004), at [www.advocatesforchildren.org/pubs/2005/langbarriers.pdf](http://www.advocatesforchildren.org/pubs/2005/langbarriers.pdf).

6. Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (July 2, 1964).

7. 34 C.F.R. §§ 100.3(a), (b)(1)(i) and (iii).

8. 35 Fed. Reg. 11,595 (July 18, 1970).

9. *Id.*

10. *Id.*

in a landmark 1974 decision,<sup>11</sup> and the Office for Civil Rights (OCR) at the Department of Education (DOE) still uses it when analyzing an LEA for compliance with Title VI.<sup>12</sup>

In 1985, 1991, and 2000, DOE issued three separate memoranda that affirm the principles first articulated in the 1970 memo and explain the legal standards OCR applies when investigating an LEA for compliance with Title VI.<sup>13</sup> The 1985 and 1991 memos primarily address how OCR analyzes the legal adequacy of English as a second language programs, but the 2000 memo, “The Provision of an Equal Education Opportunity to Limited-English Proficient Students,” again raises the issue of appropriate parental notification.<sup>14</sup> In the 2000 memo OCR lists “[w]hether a school district ensures that parents who are not proficient in English are provided with appropriate and sufficient information about all school activities” as one of the factors it considers when determining both whether a district needs to provide alternative language services and whether an alternative program is likely to be successful.<sup>15</sup> Crucially, the 2000 memo reiterates the gray language found in the 1970 memo: on the one hand, notifications “*must be* sufficient so that parents can make well-informed decisions,” but on the other hand, LEAs “*may be* required to provide notification in the parents’ home language” (emphasis added).<sup>16</sup> The 2000 memo therefore offers no specific guidance to LEAs seeking to establish legally sufficient procedures to address the needs of LEP parents.

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11. In *Lau v. Nichols*, 414 U.S. 563 (1974), a group of Chinese students successfully challenged the San Francisco Unified School District for failing to provide them with adequate language instruction. In siding with the students, the U.S. Supreme Court quoted the 1970 HEW memo, specifically its requirement that “where inability to speak and understand the English language excludes national origin–minority group children from effective participation in the educational program . . . the district must take affirmative steps to rectify the language deficiency.” 414 U.S. at 568. A more recent decision, *Alexander v. Sandoval*, 532 U.S. 275 (2001), rejected *Lau*’s interpretation of Title VI, leading some commentators to question the continuing validity of disparate impact federal regulations propagated under Title VI. DOJ has made clear, however, that it disagrees with this line of reasoning, suggesting instead that *Sandoval* “holds principally that there is no private right of action to enforce Title VI disparate-impact regulations. It did not address the validity of those regulations.” 67 Fed. Reg. 41,458, n.3 (June 18, 2002).

12. See, e.g., Springfield (MO) R-XII School District, 40 NDLR 49 (OCR 2009) (“The intent of the May 1970 Memorandum is to clarify [a] school district’s responsibility to communicate as effectively with LEP parents as it would with other parents, despite any language barrier.”).

13. Policy regarding the Treatment of National Origin Minority Students Who Are Limited English Proficient, memorandum from the Office for Civil Rights, Department of Education (Dec. 3, 1985), available at [www.ed.gov/about/offices/list/ocr/docs/lau1990\\_and\\_1985.html](http://www.ed.gov/about/offices/list/ocr/docs/lau1990_and_1985.html); Policy Update on Schools’ Obligations toward National Origin Minority Students with Limited-English Proficiency, memorandum from the Office for Civil Rights, Department of Education (Sept. 27, 1991), available at [www.ed.gov/about/offices/list/ocr/docs/lau1991.html](http://www.ed.gov/about/offices/list/ocr/docs/lau1991.html); The Provision of an Equal Education Opportunity to Limited-English Proficient Students, memorandum from the Office for Civil Rights, Department of Education (Aug. 2000), available at [www.ed.gov/print/about/offices/list/ocr/eeolep/index.html](http://www.ed.gov/print/about/offices/list/ocr/eeolep/index.html).

14. The Provision of an Equal Education Opportunity to Limited-English Proficient Students, *supra* note 13.

15. *Id.*

16. *Id.*

### Executive Order 13166 and Initial DOJ Guidance

Far more helpful is federal guidance that emerged following President Bill Clinton's issuance of Executive Order 13166 in August 2000.<sup>17</sup> Entitled "Improving Access to Services for Persons with Limited English Proficiency," the order applies to all federally conducted and federally assisted programs and activities, including, therefore, public schools. The order requires recipients of federal funds to take "reasonable steps to ensure meaningful access to their programs and activities by LEP persons."<sup>18</sup> The order also requires each federal agency to draft Title VI guidance "specifically tailored to its recipients" and consistent with LEP guidance issued by the Department of Justice (DOJ).<sup>19</sup> DOJ's initial guidance document, "Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination against Persons with Limited English Proficiency," was issued concurrently with Executive Order 13166.<sup>20</sup> This short document sets forth compliance standards to help recipients ensure that LEP persons are not the victims of discrimination and that they have the meaningful access to federal programs required under Title VI.<sup>21</sup>

Like the 1970 and 2000 memos, this initial DOJ guidance still allows for considerable flexibility and individual agency self-determination. "What constitutes reasonable steps to ensure meaningful access," DOJ recognizes, "will be contingent on a number of factors."<sup>22</sup> But the guidance goes on to identify at least four of the factors that recipients of federal funds should weigh in the balance: (1) the number or proportion of LEP persons the recipient serves, (2) the frequency of contacts between LEP persons and the recipient's program or activity, (3) the nature and importance of that program or activity, and (4) the resources available to the recipient.<sup>23</sup>

### DOJ Recipient Guidance

In June 2002, DOJ amplified the original four-factor test through subsequent guidance issued to recipients of its federal financial aid.<sup>24</sup> Given DOJ's unique role under Executive Order 13166, the importance of this guidance extends beyond those agencies and programs that receive federal funds directly from DOJ. Executive Order 13166 directs DOJ both to provide guidance to other federal agencies and to ensure that each individual agency's guidance is consistent with the guidance issued by DOJ.<sup>25</sup> Other federal agencies and departments, therefore, look to the DOJ Recipient Guidance when crafting their own LEP policies. But while the DOJ Recipient Guidance is central, it is not a formal regulation. Instead, it provides "an analytical framework that

17. 65 Fed. Reg. 50,121–22 (Aug. 16, 2000).

18. *Id.*

19. *Id.*

20. 65 Fed. Reg. 50,123–25 (Aug. 16, 2000).

21. *Id.*

22. *Id.* at 50,124.

23. *Id.* The test is described in more detail in the following section.

24. Department of Justice Guidance to Federal Financial Assistance Recipients regarding Title VI Prohibition against National Origin Discrimination Affecting Limited English Proficient Persons (referred to hereinafter as the DOJ Recipient Guidance), 67 Fed. Reg. 41,455–72 (June 18, 2002).

25. See the discussion of DOJ's role in *id.* at 41,457–58 ("The Department of Justice's role under Executive Order 13166 is unique. The Order charges DOJ with responsibility for providing LEP Guidance to other Federal agencies and for ensuring consistency among each agency-specific guidance.").

recipients may use to determine how best to comply with statutory and regulatory obligations to provide meaningful access . . . for individuals who are limited English proficient.”<sup>26</sup>

The DOJ Recipient Guidance does have important legal teeth, though. When an LEP parent files a complaint alleging that he or she has received inadequate notice or language assistance,<sup>27</sup> DOE’s Office for Civil Rights uses the DOJ Recipient Guidance to analyze whether or not the language services that an LEA has offered are in compliance with Title VI and other applicable laws.<sup>28</sup> School board attorneys and school administrators would therefore be well advised to consult the DOJ Recipient Guidance for themselves when they are crafting policies and procedures to address the needs of LEP parents.<sup>29</sup> The outline provided below summarizes the key provisions.

#### *Four-Factor Test*

A recipient seeking to determine the scope of its obligation to provide language assistance to LEP persons must weigh each of its various programs and services using the four-factor test mentioned above.

*Factor One: The number or proportion of LEP persons served or encountered in the eligible population.*<sup>30</sup> The larger the number of LEP parents a school serves, the greater the likelihood that language services will be needed. While the DOJ Recipient Guidance offers no definitive trigger number,<sup>31</sup> an LEA must at least have compiled data on its parent population to correctly appraise this factor. In North Carolina, LEAs are required to conduct a home language survey

26. *Id.* at 41,457 n.2.

27. OCR typically becomes involved only after a complaint alleging a civil rights violation has been filed, though the office may undertake compliance reviews on its own initiative. After evaluating a complaint and notifying the party against which the complaint has been filed, OCR may initiate an investigation. Frequently these investigations end prematurely, if the complainant and the LEA agree to participate in OCR’s Early Complaint Resolution (ECR) process. If, however, the investigation proceeds, OCR will make final determination as to an LEA’s compliance. LEAs found not to be in compliance will typically negotiate with OCR to craft a workable agreement that ensures the LEA’s future compliance. For a complete description of OCR’s complaint process, see U.S. DEP’T OF EDUC., OCR CASE PROCESSING MANUAL (May 2008), available at [www.ed.gov/about/offices/list/ocr/docs/ocrcpm.html](http://www.ed.gov/about/offices/list/ocr/docs/ocrcpm.html).

28. *See, e.g.*, Los Angeles (CA) Unified School District, 51 IDELR 229 (OCR 2008) (“OCR analyzes whether or not a school district has met its obligations under Title VI in a manner consistent with the U.S. Department of Justice (DOJ) ‘Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition against National Origin Discrimination Affecting Limited English Proficient Persons.’”(citation omitted)). *See also* Springfield (MO) R-XII School District, *supra* note 12; Los Angeles (CA) Unified School District, 51 IDELR 82 (OCR 2008); Parker Unified School District, No. 09-06-1403 (OCR Feb. 29, 2008); Los Angeles (CA) Unified School District, No. 09-07-1150 (OCR Aug. 20, 2007).

29. For LEAs evaluating their current policies and procedures, another valuable resource is U.S. DEP’T OF JUSTICE, LANGUAGE ASSISTANCE SELF-ASSESSMENT AND PLANNING TOOL FOR RECIPIENTS OF FEDERAL FINANCIAL ASSISTANCE, available at [www.lep.gov/selfassesstool.htm](http://www.lep.gov/selfassesstool.htm).

30. This first factor is discussed at 67 Fed. Reg. 41,459–60 (June 18, 2002).

31. Elsewhere, however, the DOJ Guidance suggests that providing *written* translation services for any LEP group that constitutes 5 percent of the eligible population will be considered strong evidence of compliance. But the document is clear that this safe harbor applies to written translations only and “do[es] not affect the requirement to provide meaningful access to LEP individuals through competent oral interpreters where oral language services are needed and are reasonable.” *Id.* at 41,464. *See also infra* pp. 9–10 as to whether this 5 percent figure is applicable beyond the context of a DOJ recipient.

for each child who enrolls, and this survey is then kept in the student's permanent record.<sup>32</sup> Theoretically, then, North Carolina LEAs should have available the raw data they need concerning their LEP parent population.

An LEA obviously should take care to ensure that the home language survey is itself administered in a language that an LEP parent can understand. An OCR investigation concluded in 2008 revealed that a Massachusetts school district had given an English version of its home language survey to a parent who spoke only Mandarin Chinese; further, the district provided no interpreter to help the parent understand the form.<sup>33</sup> Curiously, the district had available a version of the form in Mandarin, but either through inadvertence or the inadequate training of district staff, the Mandarin form was not provided. This oversight was among the evidence OCR cited in its determination that the district did not meet the requirements of Title VI.<sup>34</sup>

*Factor Two: The frequency with which LEP individuals come in contact with the program.*<sup>35</sup> In applying this factor to the situation of LEP parents, an LEA should be mindful of such laws and regulations as the Individuals with Disabilities Education Act (IDEA), which requires parental consent or participation,<sup>36</sup> and No Child Left Behind (NCLB), which encourages parental involvement in a particular educational program.<sup>37</sup> An LEA might also weigh in the balance those situations where language services have been needed in the past as well as which languages the LEA most commonly encounters in its parent population. For example, an LEA may be required to have a more elaborate array of language services to assist its Spanish-speaking parents than it has to assist members of a very small language group. But even the members of a small group must be provided with meaningful access, though the plan to safeguard that access "need not be intricate": "It may be as simple as being prepared to use one of the commercially-available telephonic interpretation services to obtain immediate interpreter services."<sup>38</sup> Important too is that the status quo in a district should not be the ultimate determiner, for recipients must "take care to consider whether appropriate outreach to LEP persons could increase the frequency of contact with LEP language groups."<sup>39</sup>

*Factor Three: The nature and importance of the program, activity, or service provided by the program.*<sup>40</sup> Generally speaking, the more important the program, or the greater the possible consequences to the LEP person, the more likely it is that language services will be necessary. While the U.S. Supreme Court has famously held that public education "is perhaps the most important function of state and local governments,"<sup>41</sup> whether this claim implicates the rights only of children to have an education or also the rights of parents to be involved in their children's education is unclear. The DOJ Recipient Guidance does note, however, that "decisions by a Federal, state, or local entity to make a certain activity compulsory . . . can serve as strong evidence of the program's importance."<sup>42</sup> An LEA might therefore look to the relevant

32. N.C. ADMIN. CODE (hereinafter N.C.A.C.) tit 16, ch. 06D, sec. 0106(c) (2009).

33. Amherst Regional School District, Complaint No. 01-06-1226 (OCR Feb 22, 2008).

34. *Id.*

35. 67 Fed. Reg. 41,460 (June 18, 2002).

36. See the discussion of IDEA requirements *infra* at pp. 14, 15.

37. See the discussion of NCLB *infra* at pp. 16–18.

38. 67 Fed. Reg. 41,460 (June 18, 2002).

39. *Id.*

40. *Id.*

41. *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483, 493 (1954).

42. 67 Fed. Reg. 41,460 (June 18, 2002).

statutory and regulatory language that establishes a particular educational program in order to help determine what level of language services are necessary for that program. Where laws and regulations require parental consent, participation, or notice, language services for LEP parents may be imperative. To take two extremes, properly notifying an LEP parent of supplemental educational services being provided under NCLB is potentially of far greater consequence and importance than providing that same parent with a translated copy of the student newspaper.

An LEA might assess this third factor by also considering the possible consequences to the LEA itself and not just the consequences to the parent or child. For example, although no state or federal law requires parents to give consent for their children to participate on an athletic team or to travel off campus on a school field trip, the policies and procedures of many LEAs require parents to sign consent forms, in part to help protect a school district from liability in the event that a child is injured while engaging in such an activity.<sup>43</sup> In any potential negligence action, the forms may help show that the child voluntarily participated in the activity and that both the child and the parents knew the potential risks involved.<sup>44</sup> But obviously the evidentiary value of the consent form would be substantially diminished if a parent could argue that he or she had not understood the document she or he was asked to sign.

*Factor Four: The resources available to the recipient and costs.*<sup>45</sup> Smaller LEAs with fewer resources need not provide the same level of language services as larger LEAs. The general requirement under Title VI is that all recipients take “reasonable steps to ensure meaningful access.” But as the DOJ Recipient Guidance observes, “‘reasonable steps’ may cease to be reasonable where the costs imposed substantially outweigh the benefits.”<sup>46</sup> A very real issue arises, however, as language services become more widely available through the Internet and other modern media. Language assistance that may have been unthinkable for a rural district ten years ago might now be available on a webpage or over the telephone. An LEA without the resources to find or hire bilingual staff might fulfill its obligations to LEP parents simply by subscribing to an online interpretation service. Moreover, a rural LEA might look to see whether some resources are available at the state level: the translated version of a standard document, for example, might be posted on an SEA website. The DOJ Recipient Guidance thus offers the following counsel:

Recipients should carefully explore the most cost-effective means of delivering competent and accurate language services before limiting services due to resource concerns. Large entities and those entities serving a significant number or proportion of LEP persons should ensure that their resource limitations are well-substantiated before using this factor as a reason to limit language assistance.<sup>47</sup>

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43. See Donald H. Henderson et al., *The Use of Exculpatory Clauses and Consent Forms by Educational Institutions*, 67 EDUC. L. REP. (West) 13, 32 (1991) (arguing that “[p]arents who have received prior notification about an off-campus trip or athletic competition and have freely given permission for their children to participate are less likely to succeed in a negligence action than uninformed parents who have not consented to such activity.”).

44. *Id.*

45. 67 Fed. Reg. 41,460 (June 18, 2002).

46. *Id.*

47. *Id.*

The usefulness of the four-factor test extends beyond the decision of whether or not to provide language services. The test has implications also for what “mix” of language services needs to be provided. The DOJ Recipient Guidance distinguishes between two types of services: oral language services (interpretation) and written language services (translation).

### *Oral Language Services*

When providing interpretation services, an LEA must take care to ensure the competency of its interpreters. An LEA may be inclined to rely on its bilingual staff or even on its foreign language faculty to provide interpretation services, but “[c]ompetency requires more than self-identification as bilingual.”<sup>48</sup> Interpreters must “[d]emonstrate proficiency” in both English and the required foreign language, and they must know what type of interpretation services are required in particular contexts. In some situations, for example, a mere summary of the proceedings may be sufficient; in others, an interpreter might need to translate every word. Important too is that the interpreter must “have knowledge in both languages of any specialized terms or concepts peculiar to the entity’s program or activity.”<sup>49</sup> But despite these strictures, the DOJ Recipient Guidance is clear that competency to interpret “does not necessarily mean formal certification as an interpreter.”<sup>50</sup>

Interpretation services must be provided in an accurate and timely manner, but schools are free to use a wide variety of resources to satisfy their Title VI obligations to LEP parents. Bilingual staff, contract interpreters, telephone interpreter lines, and even (in some limited circumstances) community volunteers are all endorsed as legitimate options. Perhaps most valuable for LEAs, however, are the guidelines provided on the use of family members, friends, and children as interpreters.

An LEA may allow LEP persons to use family members or friends as interpreters, but LEAs may not require that LEP persons do so.<sup>51</sup> Rather, an LEA should make clear that family members and friends can be used “in place of or as a supplement to the free language services expressly offered by the [LEA].”<sup>52</sup> And even when LEP parents bring their own interpreters, an LEA must still “take special care to ensure that family and . . . other informal interpreters are appropriate in light of the circumstances and subject matter of the program, service, or activity.”<sup>53</sup> Informal interpreters may have a personal stake in the issue at hand: they may have an undisclosed conflict of interest or a desire to protect themselves or another. This latter concern is heightened when children act as interpreters. The DOJ Recipient Guidance takes a generally dim view of children serving as interpreters, noting that in most circumstances children would not be competent.<sup>54</sup> In the educational setting, a child’s own interests, or those of his or her sibling, may very well be at stake in a meeting between an LEP parent and a school official.

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48. *Id.* at 41,461.

49. *Id.*

50. *Id.*

51. 67 Fed. Reg. 41,462 (June 18, 2002).

52. *Id.*

53. *Id.*

54. Several OCR actions take a similar position. *See, e.g.,* Guymon (OK) Public Schools, No. 07-05-5001 (OCR Feb. 20, 2008) (“[S]everal individuals indicated that students were allowed to translate during conferences with their parents and in some instances high school students, not related to the parents, were allowed to interpret for parent–teacher conferences. Generally, it is not appropriate for students to serve as interpreters at parent–teacher conferences because of confidentiality concerns and because the student interpreter’s language skills have not been assessed for competency.”).

If an LEP parent insists nevertheless on using his or her minor child as an interpreter, the decision “should be respected,” but the LEA should ensure that that LEP person is making the choice voluntarily, aware of both the potential problems and the availability of alternative language services at no cost.<sup>55</sup> The LEA might also consider providing its own independent interpreter in addition to the interpreter selected by the LEP parent.<sup>56</sup>

These guidelines for interpreters take on an added significance when applied to a variety of situations within the educational setting. IDEA, for example, requires that parents of a child with special needs be involved in creating an Individualized Educational Plan (IEP) for their child.<sup>57</sup> This involvement ideally includes the active participation of parents in a “team meeting” with the child’s teachers as well as the parents’ consent to the final IEP.<sup>58</sup> In several OCR actions, LEAs were found in violation of Title VI because they failed to ensure the competency of the interpreters meant to facilitate the IEP process.<sup>59</sup> The interpreters had been unaware of technical vocabulary and in some cases had translated only summaries of the IEP team meeting rather than the entire proceeding.<sup>60</sup>

#### *Written Language Services*

An LEA need not translate every document into every language it encounters. Instead, LEAs should use the four-factor analysis to help determine which documents should be translated into which languages. An LEA should consider each of its documents on a case-by-case basis, “looking at the totality of the circumstances in light of the four-factor analysis.”<sup>61</sup> Important also, since translation is a one-time expense, an LEA weighing the fourth factor might consider amortizing the cost of the translation over the probable lifespan of the document.

After applying the test, an LEA might decide to translate “vital documents” into those languages it encounters most frequently. Whether or not a document is “vital” may depend on the importance of the particular program or activity it concerns. LEAs may want to pay particular attention, for example, to documents that have legal implications, such as complaint and consent forms and disciplinary notices. In addition, those documents that notify parents of their rights under applicable laws may need to be given a high priority because “[l]ack of awareness that a particular program, activity, or service exists may effectively deny LEP individuals [the] meaningful access [guaranteed in Title VI].”<sup>62</sup>

The DOJ Recipient Guidance also suggests two “safe harbor” provisions that constitute strong evidence of compliance:

- (a) The DOJ recipient provides written translations of vital documents for each eligible LEP language group that constitutes five percent or 1,000, whichever is less, of the population eligible to be served or likely to be affected or encountered. Translation of other documents, if needed, can be provided orally; or

55. 67 Fed. Reg. 41,463 (June 18, 2002).

56. *Id.* at 41,462–63.

57. 34 C.F.R. § 300.322 (2009).

58. *Id.*; 34 C.F.R. § 300.9 (2009) (defining “consent” for purposes of the act); 34 C.F.R. § 300.300 (2009).

59. *See* Los Angeles (CA) Unified School District, 51 IDELR 229 (OCR 2008); Los Angeles (CA) Unified School District, 51 IDELR 82 (OCR 2008).

60. *See* complaints cited *supra* note 59.

61. 67 Fed. Reg. 41,463 (June 18, 2002).

62. *Id.*

(b) If there are fewer than 50 persons in a language group that reaches the five percent trigger in (a), the recipient does not translate vital written materials but provides written notice in the primary language of the LEP language group of the right to receive competent oral interpretation of those materials at no cost.<sup>63</sup>

Whether these provisions are applicable beyond the specific context of a DOJ recipient is unclear. Certainly the 5 percent mark is a useful one. The original 1970 HEW memo, for example, was addressed to school districts in which 5 percent or more of the student population was LEP. Regardless, an LEA should be careful to consider the importance of the particular document being proposed for translation: in some cases specific statutory provisions may trump actual or theoretical safe harbors.

The DOJ Recipient Guidance also addresses the competence of translators, noting that many of the considerations that apply to interpreters apply also to translators. Certified translators, like certified interpreters, are not necessary, but “the permanent nature of written translations . . . imposes additional responsibility on the recipient to ensure that the quality and accuracy permit meaningful access by LEP persons.”<sup>64</sup> Translators should therefore take care to understand the expected audience for the document and review prior translations of similar documents in order to maintain consistency when translating terms of art or technical phrases. Community organizations might be especially helpful in ensuring that a document is translated at an appropriate reading level for the target audience.

#### *Elements of an Effective Language Assistance Plan*

The DOJ Recipient Guidance suggests that after applying the four-factor test, most recipients will find it useful to develop a periodically updated written Language Assistance Plan for providing language assistance services. Such a plan “will likely be the most appropriate and cost-effective means of documenting compliance and providing a framework for the provision of timely and reasonable language assistance.”<sup>65</sup> Some LEAs that serve very few LEP parents may choose not to develop a written plan, but even these LEAs “should consider alternative ways to articulate in some other reasonable manner a plan for providing meaningful access.”<sup>66</sup>

The DOJ Recipient Guidance identifies five elements that “are typically part of effective implementation plans.”<sup>67</sup>

*Identifying LEP Individuals Who Need Language Assistance.* As mentioned above, North Carolina law requires a home language survey upon each student’s enrollment.<sup>68</sup>

*Language Assistance Measures.* Most effective plans will say at a minimum what services are provided and in which languages these services are provided. Steps to ensure the competency of interpreters and translators likely would be included as would procedures for frontline staff to follow when taking a call or receiving some other form of communication from an LEP person.

*Training Staff.* Staff must be aware of the language services available and their own obligation to provide meaningful access. An effective implementation plan should therefore include methods for training staff, especially those who have contact with the public.

63. *Id.* at 41,464.

64. *Id.*

65. *Id.*

66. *Id.*

67. These are discussed at 67 Fed. Reg. 41,464–65 (June 18, 2002).

68. See *supra* note 32 and accompanying text.

*Providing Notice to LEP Persons.* Once an LEA decides to provide a particular language service, it must ensure that its LEP parent population knows that the service is available. Useful methods to inform LEP parents might include posting signs at entry points, publishing outreach documents, working with community organizations, and including notices in local media outlets. Some LEAs may find it also makes sense to include a description of available LEP services when the LEA sends home the “annual notices” required by other laws.

*Monitoring and Updating the LEP Plan.* Effective plans will include a process for making updates and revisions. Given the dynamic change and growth in the LEP community, language assistance plans must periodically consider “whether new documents, programs, services, and activities need to be made accessible for LEP individuals.”<sup>69</sup>

### OCR Investigations under Title VI

School districts that do not meet their obligations to provide meaningful access to LEP parents may find themselves being investigated by OCR.<sup>70</sup> The most common OCR investigations implicating the rights of LEP parents have concerned schools that allegedly failed to notify LEP parents of information and activities called to the attention of other parents.<sup>71</sup> A case from the Midwest is typical. An LEA collected information about LEP families upon a student’s enrollment but failed to compile that information. Further, the LEA had only an informal method of communicating with LEP parents, and the LEA never explained this method to either the LEP parents or its own staff. When interpretation and translation services were provided, the LEA failed to ensure the competency of its interpreters and translators and occasionally relied on bilingual students to provide these services. Finally, the LEA did not have a system in place to regularly monitor the effectiveness of the language assistance services it was offering.<sup>72</sup> Most of these problems stemmed from the lack of any official language assistance plan and could have been corrected with a minimal expenditure of resources.

But OCR has confronted a variety of other situations. One investigation of a district in which 60 percent of students were either LEP or living in an LEP family found a violation of Title VI because the school board had no policies or procedures in place for the interpretation or translation of board meetings. OCR’s resolution letter concluded in relevant part:

69. 67 Fed. Reg. 41,465 (June 18, 2002).

70. For a brief description of the OCR investigation process see *infra* p. 14 and note 92. At present, OCR investigations are the primary tool of enforcement and redress for LEP parents. The U.S. Supreme Court’s decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001), effectively precludes any private lawsuits to enforce the disparate-impact regulations of Title VI. Likewise, a recent private lawsuit brought under the Equal Education Opportunity Act, 20 U.S.C. § 1703, met a similar fate. See *Lopez v. Bay Shore Union Free School District*, 668 F. Supp. 2d 406, 415–16 (2009) (holding that even if an LEA’s failure to communicate with parents in Spanish resulted in their child’s suspension, these actions did not give rise to a claim under the EEOA). The EEOA is not discussed in this bulletin since the text of the relevant subsection, 20 U.S.C. § 1703(f), specifically addresses only those language barriers that affect the equal participation of *students*, not parents.

71. See, e.g., *Sylvania City School District*, Docket No. 15-04-1167 (OCR April 20, 2006) (“The complaint alleged that, with few exceptions, the District does not provide either oral or written translation services to LEP parents for school–parent communications, including newsletters, written student progress reports, written schedules and scheduling changes, Title I program information, information regarding other programs run through the District, and parent-teacher conferences.”).

72. *Lake Station (IN) Community Schools*, No. 05-06-1145 (OCR June 1, 2006).

The District is responsible for implementing appropriate methods for ensuring that all LEP parents are provided with meaningful access to important information concerning their child. This access is especially important at Board meetings, where matters concerning important District educational programs are regularly discussed and decided.<sup>73</sup>

Such atypical scenarios aside, an LEA can likely steer clear of any problems or investigations by being attentive to the needs of LEP parents in its district. An LEA should assess its own particular circumstances and develop a plan that affords LEP parents meaningful access to important information. How an LEA goes about this process is largely within its own discretion. To repeat, the DOJ Recipient Guidance is *merely* guidance, not itself a new regulation. How different LEAs ensure meaningful access will vary as much as LEP parent populations vary from state to state and district to district. Written translations of key documents may be a key component of one LEA's plan but be useless in a district in which the LEP parent population is largely illiterate. In that case a more elaborate plan for oral interpretation and notice may need to be put in place. Likewise, steps that may be practicable and cost-efficient in an urban district may severely strain the resources of a rural district.

The key requirement is that LEAs plan ahead and take steps toward the goal of ensuring full access for LEP parents. If a complaint is filed despite an LEA's efforts to build a comprehensive system of language services, OCR will likely "look favorably on intermediate steps recipients take that are consistent with [the DOJ] Guidance."<sup>74</sup>

### Family Educational Rights and Privacy Act

The provisions of the Family Educational Rights and Privacy Act (FERPA) help to safeguard the confidentiality of student records and to ensure that parents have access to these records.<sup>75</sup> Although FERPA's statutory language and enabling regulations mention LEP parents specifically only once, the act must be viewed through the lens of Title VI, in particular, two of the interpretive documents discussed above: the 1970 HEW memo, which requires that schools adequately notify LEP parents of activities and school information called to the attention of English-proficient parents,<sup>76</sup> and Executive Order 13166, which requires that schools take reasonable steps to provide LEP parents with meaningful access to school programs and services.<sup>77</sup>

Four key parts of FERPA implicate the rights of LEP parents. First, FERPA requires that in most instances<sup>78</sup> a parent must sign and date a written consent form before an LEA may

73. Parker Unified School District, No. 09-06-1403 (OCR Feb. 29, 2008).

74. 67 Fed. Reg. 41,466 (June 18, 2002).

75. 20 U.S.C. § 1232g.

76. *See supra* pp. 2–3.

77. *See supra* p. 4. A recent OCR decision also supports this interpretive framework: among the evidence OCR cited in its conclusion that a school was not in compliance with Title VI was the school's failure to give an LEP parent a translated copy of the school's "Authorization for Release of/Request for Information." Amherst Regional School District, No. 01-06-1226 (OCR Feb. 22, 2008); *see also infra* note 85 and accompanying text.

78. FERPA does allow an LEA to release information without parental consent to nine categories of recipients. These include appropriate officials in cases of health and safety emergencies, school officials

release any personally identifiable information not designated as directory data in a student’s file.<sup>79</sup> While FERPA does not define “consent” so as to require that an LEA obtain consent in a parent’s native language, an LEA should seriously consider whether the consent would be valid if neither a translated consent form nor an interpreter for a form in English was provided.<sup>80</sup> Second, FERPA requires that parents be allowed to review their children’s educational records, and LEAs must “respond to reasonable requests for explanations and interpretations of the records.”<sup>81</sup> Third, parents who question the accuracy of the information contained in their children’s records must be given “a full and fair opportunity to present evidence relevant to the issues raised.”<sup>82</sup> A “full and fair opportunity” for an LEP parent would presumably necessitate the presence of a translator to articulate the parent’s concerns and the LEA’s response. Fourth, an LEA must provide parents with notice of their rights under FERPA.<sup>83</sup> The act’s enabling regulations specify further that LEAs shall “effectively notify . . . those who have a primary or home language other than English,”<sup>84</sup> and DOE has said that this regulatory provision gives an LEA “flexibility to determine how to effectively notify” LEP parents, provided the notice “is consistent with applicable civil rights laws.”<sup>85</sup>

Reading FERPA holistically through the lens of Title VI suggests that an LEA may need to provide language services when obtaining an LEP parent’s consent to the release of a child’s education records, when helping an LEP parent understand the content of those records, when allowing the LEP parent to question the accuracy of the records, and when informing LEP parents of their rights under FERPA.

### The Education of Students with Disabilities: IDEA and Section 504

Two significant federal acts, IDEA<sup>86</sup> and Section 504 of the Rehabilitation Act of 1973 (“Section 504”),<sup>87</sup> help protect students with disabilities and provide them with access to a free and appropriate public education (FAPE). IDEA provides federal money to the states provided they abide by the act’s procedural requirements; in contrast, Section 504 protects students with disabilities from discrimination. Despite the different approaches of IDEA and Section 504, those students who qualify for supplemental educational services under either one or both acts often are treated the same for many practical purposes.<sup>88</sup> For example, although Section 504 does

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with a legitimate educational interest, and authorities within the juvenile justice system, among others. See 20 U.S.C. §§ 1232g(b)(1)(A)–(J).

79. *Id.* § 1232g(b)(1). See also 34 C.F.R. § 99.30 (2009).

80. See Amherst Regional School District, *supra* note 77 (suggesting that failure to provide either a translated copy of a FERPA release or an interpreter to explain the English version of the release constituted a violation of Title VI).

81. 34 C.F.R. §§ 99.10(a)–(c) (2009).

82. *Id.* § 99.22(d).

83. 20 U.S.C. § 1232g(e).

84. 34 C.F.R. § 99.7(b)(2) (2009).

85. 61 Fed. Reg. 59,293 (Nov. 21, 1996).

86. 20 U.S.C. §§ 1400–1482.

87. 29 U.S.C. § 794.

88. One key difference between the two acts, however, is that DOE’s Office of Special Education Programs enforces IDEA, whereas the OCR enforces Section 504.

not require the IEP required by IDEA, it does require its “functional equivalent,”<sup>89</sup> and Section 504 regulations make clear “that one way to meet the special education requirements of § 504 is through the IEP process of IDEA.”<sup>90</sup> Consequently, schools often provide an “IEP” for the relatively small number of students who qualify for special services only under Section 504 and not under IDEA.

While many LEAs administer the programs required by IDEA and Section 504 similarly, complaints alleging a violation of these laws are handled very differently at the federal level. The Office of Special Education Programs (OSEP) is tasked with ensuring state compliance with IDEA. If a parent or guardian files a complaint with OSEP, that complaint is immediately referred back to the SEA, which is then required to investigate the LEA and report its findings and any resolution back to OSEP within sixty days. Complaints against the SEA itself may lead to an OSEP investigation, with OSEP ordering corrective action if it determines that a SEA is not in compliance with IDEA.<sup>91</sup>

In contrast, OCR monitors compliance with Section 504 and other applicable civil rights laws, including Title VI. OCR has discretion whether to investigate individual complaints against an SEA or LEA, and when OCR determines that a complaint is both complete and meritorious, it may conduct an investigation. If the investigation results in a finding of noncompliance, OCR first seeks voluntary compliance from the SEA or LEA. Other remedies, such as the withdrawal of federal funds or referral of the case to DOJ, are available if voluntary compliance proves ineffective.<sup>92</sup>

While compliance and enforcement vary between IDEA and Section 504, the requirements of both laws—as well as their implications for LEP parents—are considered here together. As a practical matter, the antidiscrimination provisions of Title VI and Section 504 apply in the IDEA context anyway, and OCR has invoked its statutory authority under Title VI to investigate complaints alleging discrimination during the IEP process of IDEA despite the fact that OSEP, not OCR, is the office primarily tasked with enforcement of IDEA.<sup>93</sup>

## IDEA

IDEA is unique among major pieces of federal legislation for the specific recognition it gives to LEP parents. First, unlike FERPA, IDEA defines the critical term “consent” as meaning “that [t]he parent has been fully informed of all information relevant to the activity for which consent

89. THOMAS F. GUERNSEY AND KATHE KLARE, *SPECIAL EDUCATION LAW* 109 (2008), *citing* 34 C.F.R. §§ 104.33(b)(1) and (2).

90. *Id.*, *citing* 34 C.F.R. § 104.33(b)(2) and Letter to Morse, 41 IDELR 65 (OSEP 2003) (504 plan may not be substituted for an IDEA IEP, but an IDEA IEP will satisfy 504 requirements).

91. For a full description of this process, together with citations to relevant statutes, regulations, and published investigations, *see* GUERNSEY AND KLARE, *supra* note 89, at 285–86.

92. For a description of the OCR investigative process, *see id.* at 286–91.

93. *See, e.g.*, Springfield (MO) R-XII School District, *supra* note 12. In this case a school’s special and compensatory programs (SCP) director was advised by legal counsel to consult IDEA’s definition of “native language” before responding to an LEP parent’s request for documents in Spanish. The district was found to be in noncompliance with Title VI, and OCR criticized the SCP director for not also investigating the district’s legal obligations under Title VI before concluding (probably erroneously) that services were not required under IDEA’s definition of “native language.” *Id.* at 18–19.

is sought, in his or her native language, or through another mode of communication.”<sup>94</sup> This definition applies to the whole of the act, so wherever “consent” is required, that consent must be in the parent’s native language. Under IDEA, a parent must give consent to the child’s initial evaluation, which seeks to determine whether the child indeed qualifies as a child with a disability.<sup>95</sup> If the child does qualify and is entitled to special education, the parent must give consent before these services are provided.<sup>96</sup> A parent must also consent before a child is reevaluated.<sup>97</sup>

Second, IDEA also specifies that whenever notice to parents is required, “the notice . . . must be . . . provided in the native language of the parent . . . unless it is clearly not feasible to do so.”<sup>98</sup> Among other places, the act requires that notice be provided whenever an LEA plans to evaluate a child, reevaluate a child, change the child’s educational placement, initiate special educational services, or change the special educational services already provided.<sup>99</sup>

Third, the arguable centerpiece of IDEA, the IEP, makes explicit provision for the involvement of LEP parents. Reviewed at least annually, the IEP has several key components: a statement of the child’s current achievement, a description of how the child’s disability affects his or her academic and social involvement, and a plan outlining the special educational services to be provided.<sup>100</sup> The child’s parents, teachers, and appropriate school support staff cooperate to develop the IEP in a series of team meetings.<sup>101</sup> At these meetings an LEA “must take whatever action is necessary to ensure that the parent understands the proceedings of the IEP meeting, including arranging for an interpreter for parents . . . whose native language is other than English.”<sup>102</sup> Parents must also receive, at no cost, a final copy of the IEP.<sup>103</sup>

### Section 504

Unlike the provisions of IDEA outlined above, those of Section 504 do not specifically address the needs of LEP parents. Indeed, in comparison with IDEA, Section 504 is a much more flexible act, with far fewer requirements placed on school boards, administrators, and teachers.<sup>104</sup> To take just one example, Section 504 does not require that a parent consent to his or her child’s educational plan but only that the parent be notified of the plan.<sup>105</sup> Despite Section 504’s greater flexibility, many schools use IDEA procedures for notice and parental involvement even when a child qualifies for special education only under Section 504.<sup>106</sup>

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94. 34 C.F.R. § 300.9(a) (2009). The regulations also define “native language” as “[t]he language normally used by the individual.” *Id.* § 300.29(a)(1).

95. 34 C.F.R. § 300.300(a) (2009).

96. *Id.* § 300.300(b).

97. *Id.* § 300.300(c).

98. 34 C.F.R. § 300.503(c)(ii) (2009).

99. *Id.* § 300.503(a).

100. *Id.* § 300.320.

101. *Id.* § 300.321.

102. *Id.* § 300.322(e).

103. *Id.* § 300.322(f).

104. For a useful comparison of the two acts, see COUNCIL FOR EXCEPTIONAL CHILDREN, UNDERSTANDING THE DIFFERENCES BETWEEN IDEA AND SECTION 504 (2002), available at [www.idonline.org/article/6086](http://www.idonline.org/article/6086).

105. 34 C.F.R. § 104.36 (2009).

106. *See id.* (stating that compliance with IDEA regulations is one method of satisfying § 504 regulations).

### The IEP Process

A number of OCR actions in recent years have stemmed from complaints that LEAs discriminated against LEP parents during the IEP process. LEP parents were asked to bring their own interpreters for IEP meetings;<sup>107</sup> notices of team meetings and other special education documents were not translated into a parent's native language;<sup>108</sup> an interpreter translated the proceedings of a team meeting only partially and left before the meeting was over;<sup>109</sup> interpreters were not always trained to translate the technical vocabulary used in IEP meetings and sometimes paraphrased what was said at the meetings;<sup>110</sup> parents were required to sign and agree to the final IEP plan before it was translated;<sup>111</sup> and translations of IEP plans were not provided to parents in a timely manner.<sup>112</sup>

LEAs and SEAs should not be tempted to see the requirements of the IEP process—or of Section 504 plans, for that matter—in isolation from other laws.<sup>113</sup> The cases described above were investigated pursuant to OCR's statutory authority under Title VI and Section 504/Title II,<sup>114</sup> and all the LEAs were found to be in noncompliance with one or more of these antidiscrimination laws. The key point for LEAs and SEAs to realize is that the requirements of Title VI, especially as propagated in Executive Order 13166 and outlined in the DOJ Recipient Guidance, should be factored into the calculus as the LEA determines what mix of language services it needs to provide to LEP parents during the IEP process.

### NCLB

NCLB,<sup>115</sup> the federal government's 2002 reauthorization and revision of the Elementary and Secondary Education Act of 1965 (ESEA), addresses the rights of LEP parents in two respects. First, the act requires that *parents* of LEP *children* be involved in the educational process; second, it requires that various notices be provided orally or written in a language that LEP parents can understand.

107. Victor Valley (CA) Union High School District, 50 IDELR 141 (OCR 2007).

108. Amherst Regional School District, *supra* note 77.

109. Victor Valley (CA) Union High School District, *supra* note 107.

110. Finer–Olivet (CA) Union School District, No. 09-08-1393 (OCR Feb. 11, 2009).

111. Los Angeles (CA) Unified School District, No. 09-07-1150 (OCR Aug. 20, 2007). This practice raised concerns because the district provided copies of the unsigned IEP in English to English-speaking parents who had not yet signed the IEP.

112. *Id.*; see also Amherst Regional School District, *supra* note 77. *But also see* Letter to Boswell, 49 IDELR 196 (Office of Special Educ. Programs, 2007) (concluding that providing written translations of IEP documents is not required under IDEA but that translating the IEP “may help to show that a parent has been fully informed of the services his or her child will be receiving.”). This divergence of opinion may reflect a division between OSEP and OCR. For a discussion of coordination between OSEP and OCR, see GUERNSEY AND KLARE, *supra* note 89, at 291 (*citing* Revised Memorandum of Understanding, August 20, 1987, 202 EHLR 395 (1987)).

113. See note 93.

114. OCR often cites Title II of the Americans with Disabilities Act (42 U.S.C. §§ 12101–12213) among its statutory authorizations to investigate, though it interprets the provisions of Title II similarly to those of Section 504. See Letter to Rahall, 211 IDELR 575 (OCR 1994).

115. Pub. L. No. 107-110, 115 Stat. 1425 (2002).

One of the key goals of NCLB is to encourage all parents to participate in the education of their children and be an active partner in school improvement. The text of NCLB addresses the particular challenge of involving the parents of LEP children, with Section 1112 requiring that any LEA receiving federal funds

implement an effective means of outreach to parents of limited English proficient students to inform the parents regarding how the parents can be involved in the education of their children, and be active participants in assisting their children to attain English proficiency, achieve at high levels in core academic subjects, and meet challenging State academic achievement standards and State academic content standards expected of all students, including holding, and sending notice of opportunities for, regular meetings for the purpose of formulating and responding to recommendations from parents of students assisted under this part.<sup>116</sup>

While the statute by its terms addresses the “*parents of LEP children*” rather than “*LEP parents*,” the overlap between the two groups is too great to support any overly narrow interpretation. Certainly NCLB does not specify that these outreach efforts should be directed only at parents who speak English. Any effective outreach to parents of LEP students would have to take account of the fact that many of these parents do not themselves speak English.

Beyond the requirement of outreach, NCLB contains numerous provisions that mandate a wide variety of notices be provided to parents.<sup>117</sup> Notices containing information about the parents’ child as well as notices containing information about the child’s school are required. To take just two examples, schools must notify parents of their child’s performance on academic achievement tests,<sup>118</sup> and schools identified for corrective action under NCLB must notify parents of this identification, what the identification means, and what parents can do to become involved in the school improvement process.<sup>119</sup>

The same language is used throughout NCLB to outline the particulars of the various parental notices required, all of which must be provided “in an understandable and uniform format and, to the extent practicable, in a language the parents can understand.”<sup>120</sup> In several nonregulatory guidance documents, DOE has attempted to flesh out the meaning of the statutory phrase “to the extent practicable.” “This [phrase],” DOE has said, “means that, whenever practicable, written translations of printed information must be provided to parents with limited English proficiency.”<sup>121</sup> When written translations are not practicable, however, LEAs and SEAs may provide information orally to LEP parents, and LEAs and SEAs “have flexibility in determining

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116. *Id.* § 1112(g)(4).

117. The act specifies more than fifteen different situations in which parents must be given notice of particular information. For a list of some of these, see National School Boards Association, *Parental Notification under NCLBA*, in NO CHILD LEFT BEHIND ACT: NOTIFICATION AND REPORTING REQUIREMENTS FOR LOCAL SCHOOL BOARDS (Resource Doc. No. 3) 4–6 (August 2002).

118. Pub. L. No. 107-110, § 1111(b)(3)(C)(xii) (115 Stat.).

119. *Id.* § 1116(b)(6).

120. *Id.*

121. U.S. DEP’T OF EDUC., PARENTAL INVOLVEMENT: TITLE I, PART A NON-REGULATORY GUIDANCE 5 (Question A-9) (2004), available at [www.ristatepirc.org/pdfs/federalparentinvolvementguide.pdf](http://www.ristatepirc.org/pdfs/federalparentinvolvementguide.pdf).

what mix of oral and written translation services may be necessary and reasonable for communicating the required information.”<sup>122</sup>

This guidance makes clear that the statutory language “whenever practicable” is not an invitation for LEAs to fail to inform LEP parents of information called to the attention of other parents.<sup>123</sup> Rather, NCLB’s language allows for *flexibility* in determining whether information will be conveyed orally or in written form. DOE has also specifically referenced the DOJ Recipient Guidance as offering “clarification on how to determine an appropriate mix of language services.”<sup>124</sup> LEAs attempting to apply the DOJ Recipient Guidance to the requirements of NCLB may need to weigh the four-factor test for each occasion in which NCLB requires notice. An LEA may ultimately determine that those notices having the most critical consequences for LEP students and their parents—perhaps notices of supplemental educational services or the availability of a public school choice program—will need to be translated, whereas less important notices can be provided orally.

### Protection of Pupil Rights Amendment

One final piece of federal legislation, the Protection of Pupil Rights Amendment (PPRA),<sup>125</sup> deserves attention for its implications on the rights of LEP parents. The PPRA, or Hatch Amendment, regulates the collection of personal information from students through surveys or analysis.<sup>126</sup> In general, when a survey that seeks personal information is funded at least in part by DOE, the LEA may not require a student to participate without first obtaining written consent from the student’s parent.<sup>127</sup> When an LEA administers a study not funded by DOE, the LEA need not obtain the parent’s written consent but must give the parent the opportunity to opt his or her child out of participating.<sup>128</sup> Other provisions of the PPRA require, among other things, that notices be provided of rights under the amendment,<sup>129</sup> that some surveys be made available

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122. *Id.*

123. See also U.S. DEP’T OF EDUC., LEA AND SCHOOL IMPROVEMENT NON-REGULATORY GUIDANCE 7–8 (Question B-8) (revised July 21, 2006), available at [www.ed.gov/policy/elsec/guid/schoolimprovementguid.pdf](http://www.ed.gov/policy/elsec/guid/schoolimprovementguid.pdf) (“To the extent practicable, written communication must be in language that parents can understand, with special attention to the needs of migratory and limited English proficient students. If that is not practicable, the information *must* be provided in oral translations for parents with limited English proficiency.” (emphasis added)); 67 Fed. Reg. 71,750 (Dec. 2, 2002) (publishing DOE’s comments and responses to proposed rulemaking for NCLB at 34 C.F.R. § 200.36).

124. PARENTAL INVOLVEMENT: TITLE I, PART A, *supra* note 121.

125. 20 U.S.C. § 1232(h).

126. For a thorough discussion of the PPRA, see Robyn Rone, *Students as Research Subjects: The Privacy Rights of Students and Their Families*, 36 SCH. L. BULL. 8 (Winter 2005).

127. 20 U.S.C. § 1232h(b). Personal information includes information concerning (1) political affiliations or beliefs of the student or the student’s family; (2) mental or psychological problems of the student or the student’s family; (3) sex behavior or attitudes; (4) illegal, antisocial, self-incriminating or demeaning behavior; (5) critical behaviors of other individuals with whom the student has close family relationships; (6) legally recognized privileged or analogous relationships, such as those with lawyers, doctors, and ministers; (7) religious practices, affiliations, or beliefs of the student or the student’s family; and (8) family income.

128. *Id.* § 1232h(c)(2)(A)(ii). See also Rone, *supra* note 126, at 11.

129. 20 U.S.C. § 1232h(d).

for parents to review,<sup>130</sup> and that notice be provided at least annually of the specific or approximate dates when surveys seeking personal information will be administered.<sup>131</sup>

Although the various provisions of the PPRA are largely beyond the scope of this bulletin, the bottom line is that parents must provide consent in writing before students can participate in certain DOE-funded research. For LEP parents, this consent would likely need to be obtained in the parent’s native language. Furthermore, LEAs may need to provide written translations of PPRA notices as well as survey materials that fall under the amendment’s ambit.

## North Carolina Statutes and Regulations

A number of North Carolina laws and regulations touch on the rights of LEP parents, but like the federal acts and regulations discussed above, many of these state requirements do not specifically mention the provision of language services. In three key areas, however—LEP programs for students, school discipline, and the education of students with disabilities—the relevant statutory and regulatory language addresses LEP parents.

### LEP Programs for Students

Regulations governing LEP programs for students in North Carolina are found at title 16, chapter 06D, section .0106 of the North Carolina Administrative Code. The code charges the superintendent or the superintendent’s delegate with the responsibility of coordinating programs and services for LEP students “and their parents,” and the LEA itself must conduct a home language survey upon each student’s enrollment and maintain the results of that survey in the student’s permanent record. Subsection (h) speaks directly to the issue of parental notice:

LEAs shall promote the involvement of parents of students of limited English proficiency in the educational program of their children. LEAs shall notify national origin minority group parents of school activities which are called to the attention of other parents and these notices shall be provided in the home language if feasible.

While “if feasible” is nowhere defined in the code, this phrase clearly must be interpreted through the lens of Title VI and other applicable civil rights laws discussed above.<sup>132</sup> Arguably, too, the phrase “shall notify” in this subsection implies that an LEA must provide at least *some* language services—whether oral or written—for LEP parents. In other words, the regulation seems to say that an LEA should provide a *written* translation of the notice “if feasible,” but the LEA “shall notify” the LEP parent whether or not the written translation is feasible. And effective notice to an LEP parent would likely require at least oral interpretation services or the offer of such services.

130. *Id.* § 1232h(c)(1)(A)(i).

131. *Id.* § 1232h(c)(2)(B).

132. Further supporting this point, the state LEP regulations incorporate IDEA directly by reference, requiring that notice to parents of students with special needs “be conducted in accordance with the Individuals with Disabilities Education Act . . . and its implementing regulations.” 16 N.C.A.C. 06D .0106(i) (2009).

## School Discipline

Disciplinary procedures that involve corporal punishment, suspension, and expulsion are outlined in Section 115C-391 of the North Carolina General Statutes (hereinafter G.S.).

*Expulsion and suspension for more than ten days.* G.S. 115C-391(d5) outlines the rules governing expulsion and suspensions for more than ten days. Before 2009, the law required merely that “the local board . . . give notice” to parents but did not specify how this notice should be provided or what information the notice should include. As amended in 2009, the law makes clear that notice of expulsion or suspension for more than ten days must be *written* and provided, “when reasonably possible,” by the end of the workday when the recommendation for suspension or expulsion is made. “[I]n no event,” though, should the written notice be provided “later than the end of the following workday.” If the parents of a suspended or expelled child are LEP, the statute now requires that the notice “be written in the parent or guardian’s first language when the appropriate foreign language resources are readily available and in English.” And both the notice in English and the translated notice must be “easily understandable” and “in plain language.”

The statute now also specifies the contents of the notice, which must include at least the following information: (1) a description of the incident, (2) the provision of the conduct policy that the student violated, (3) a description of the process for a parent to request a hearing and the number of days a parent has to request the hearing, (4) a description of the procedures governing the hearing, (5) the parent’s right to have an attorney represent the student at the hearing, (6) the extent to which local policy allows a nonattorney to serve as an advocate for the student, and (7) a description of the parent’s right to review his child’s educational records before the hearing. Given the new law’s tight time frame for providing written notice, an LEA would be well advised to go ahead and translate many of the contents of this required notice into the main languages it encounters. Only parts (1) and (2) would actually vary from notice to notice, and if an LEA chooses to translate its entire conduct policy ahead of time, then only the description of the incident would need to be translated within the tight time frame that the new law establishes. Certainly LEAs with large LEP populations or with high rates of expulsion and suspensions for longer than ten days may find such proactive steps to be cost-effective.

*Suspensions for ten or fewer days.* G.S. 115C-391(b) governs suspensions for ten or fewer days. The principal or the principal’s delegate must provide “notice to the student’s parent or guardian of the student’s suspension and the student’s rights.” This notice may be given “by telephone, telefax, e-mail, or any other method reasonably designed to achieve actual notice,” but the law does not specifically address whether language services must be provided to LEP parents. The goal of “actual notice,” however, may necessitate that some type of language services be provided an LEP parent whose child has been suspended for ten or fewer days.

*Use of seclusion and restraint.* The permissible use of seclusion and restraint is governed by G.S. 115C-391.1. At the beginning of the school year, boards of education must provide copies of both the relevant laws governing seclusion and restraint as well as any local policies. If any of the following are used—aversive procedures, a prohibited mechanical restraint, a physical restraint that results in an observable physical injury, a prohibited use of seclusion or seclusion that exceeds ten minutes or the amount of time specified in a student’s behavioral intervention plan—school personnel must inform the principal, who in turn must inform the student’s parents. Within a reasonable period of time, and in no event later than thirty days after the incident, the parent must receive a written incident report, the contents of which are specified in G.S. 391.1(j)(4)(a)–(d). Like the law governing suspensions of ten or fewer days, this statutory language also does not specifically require that language services be provided to LEP parents.

*Management and placement of continually disruptive students.* Under G.S. 115C-397.1, a teacher may request a committee meeting in order to consider options for a continually disruptive student. The committee must notify the student’s parent and encourage the parent’s participation in the proceeding.

### **Students with Disabilities**

North Carolina laws governing the education of students with disabilities complement the federal laws in IDEA and Section 504, and in several situations the North Carolina laws and their implementing regulations directly address the language needs of LEP parents.

First, under G.S. 115C-109.1, the State Board of Education must make available to the parents of students with disabilities a handbook of all procedural safeguards under North Carolina law and IDEA, and this handbook “must be written in the native language of the parent unless it clearly is not feasible to do so.” Second, G.S. 115C-109.5 requires that an LEA itself provide prompt written notice to a child’s parents whenever the LEA “proposes to initiate or change, or refuses to initiate or change (i) the identification, evaluation, or educational placement of a child, or (ii) the provision of a free appropriate public education to a child with a disability.” Moreover, this written notice must be “in the native language of the parents, unless it is clearly not feasible to translate it.”<sup>133</sup> Finally, the implementing regulations require that, “unless it is clearly not feasible to do so,” an LEA must provide all of the following in a parent’s native language: (1) a copy of the IEP (if requested), (2) a description of parental rights, (3) information concerning the right to an independent evaluation, and (4) information concerning the right to appeal and the appeals procedure.<sup>134</sup>

It is important to note that while North Carolina laws do not address, for example, the provision of language services for IEP meetings, the absence of such services might be grounds for a parent to claim a procedural violation and request a due process hearing. G.S. 115C-109.8 provides that if a procedural inadequacy has “significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents’ child,” then a hearing officer may find that a procedural violation has occurred.

### **Other Laws Requiring Parental Notice, Consent, or Involvement**

While most of the laws discussed above directly address the language needs of LEP parents, an LEA’s responsibility to provide language services and adequate notice likely extends beyond the context of LEP programs, disciplinary matters, and the education of students with disabilities. Arguably this responsibility also embraces at least the following areas.

*Parental involvement.* G.S. 115C-47, as amended in 2009, encourages a more robust effort on the part of local boards “to adopt policies to promote and support parental involvement.” “These policies,” the amendment continues, “may include strategies to increase communication with parents.”

*Notice of criminal incident.* G.S. 115C-47(56), added in 2009, requires that an LEA notify the parents of a child alleged to be the victim of an act reported to law enforcement officials.

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133. The contents of the notice are specified as well at Section 115C-109.5(b)(1)–(7) of the North Carolina General Statutes (hereinafter G.S.).

134. 16 N.C.A.C. 06H .0107.

*Health education.* G.S. 115C-81(e1) is the portion of the Basic Education Program that establishes standards for instruction on reproductive health and safety. It contains significant requirements of parental notice and consent. The State Board of Education is required to provide LEAs with copies of state objectives and curricular materials for parental review at least sixty days before the materials are used.<sup>135</sup> LEAs must adopt policies allowing parents to consent or withhold consent to their children's participation in all or part of the health education curriculum.<sup>136</sup> 2009 amendments did repeal, however, the old procedures at G.S. 115C-81(e1)(6) for establishing a "comprehensive health education curriculum," some of which required that public hearings on the proposed curriculum be held and that parents be offered the opportunity to review curricular materials before and after the hearing.

During the sixty-day screening period before a health education course begins, an LEA will likely want to ensure that curricular materials are available in all those languages in which the course will be presented, and LEAs may need to make clear that those materials provided for review only in English can be translated upon request. An LEA should also take care that its chosen method of parental consent or withdrawal of consent be provided in a parent's native language.

*Compulsory attendance.* G.S. 115C-378(e) requires that LEAs notify parents of compulsory attendance laws and possible violations of these laws.

*School Improvement Plans (SIPs).* G.S. 115C-105.27(a) requires that parents have a substantial role in developing a SIP. Further, the statute specifies that the parents serving on a school's SIP committee "shall reflect the racial and socioeconomic composition of the students enrolled in that school." LEAs with substantial LEP student populations may therefore need to involve LEP parents in the SIP process and provide the language services necessary to facilitate this involvement.

*Alternative learning programs.* G.S. 115C-47(32a) requires that school boards have guidelines to ensure parents are involved in the decision to send their child to an alternative learning program. G.S. 115C-105.48(b) additionally requires that after a student is placed in an alternative program, the staff of the program must meet to determine the appropriate intervention strategies and support services for the child, whose parents "shall be encouraged to provide input regarding the student's needs."

*Pesticides.* G.S. 115C-47(47) mandates that LEAs adopt policies to annually notify parents of the schedule of pesticide use and of the parent's right to request notification. If a parent requests notification, this must be made "to the extent practicable" at least seventy-two hours before a nonscheduled pesticide use. Given this relatively tight time frame, LEAs may want to translate pesticide notices in advance or put in place an oral notification plan for the parents of students with severe allergies to pesticides.

*Diseases and vaccines.* Under G.S. 115C-47(51), local boards must ensure that schools notify parents of certain diseases<sup>137</sup> that may be prevented by appropriate vaccines. These notices must be provided at the beginning of the school year to parents of students in grades five to twelve.

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135. G.S. 115C-81(e1)(5).

136. G.S. 115C-81(e1)(7).

137. A parent must be informed about cervical cancer, cervical dysplasia, and human papillomavirus. The statute requires that "[t]his information shall include the causes and symptoms of these diseases, how they are transmitted, how they may be prevented by vaccination, including the benefits and possible side effects of vaccination, and places parents and guardians may obtain additional information and vaccinations for their children." G.S. 115C-47(51).

*Low-performing schools.* Schools designated as low-performing are required by G.S. 115C-105.37 to notify parents of this designation. Parents in turn have the right to give input on any improvement plan before its adoption by a school board.

*School budget.* G.S. 115C-428 requires that the superintendent make the school budget available for public inspection. The superintendent may also choose to publish the budget in the local newspaper, and a school board may hold a public meeting before the budget’s submission to the county commissioners, but neither of these actions is required.

*Academic performance.* One final requirement applies at the SEA, not the LEA, level. G.S. 115C-105.4 requires the State Board of Education to develop a plan to create “rigorous academic performance standards” for each grade level. The plan must also include “clear and understandable methods of reporting individual student academic performance to parents.”

## Conclusion

LEAs seeking to address the language needs of an LEP parent population need not feel overwhelmed. Considerable resources are available at both the federal and state levels, and “reasonable steps to ensure meaningful access” will not necessarily be either time- or cost-intensive. What these steps will require is planning, and school officials charged with taking the reasonable steps to provide meaningful access should initially direct their energies toward the creation of a language assistance plan, paying particular attention to the key components of such a plan as laid out in the DOJ Recipient Guidance.<sup>138</sup>

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138. See also LANGUAGE ASSISTANCE SELF-ASSESSMENT AND PLANNING TOOL FOR RECIPIENTS OF FEDERAL FINANCIAL ASSISTANCE, *supra* note 29.

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