



State of Rhode Island and Providence Plantations
DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION
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Commissioner

TO: District Superintendents
District ELL Directors

FROM: Mary Ann Snider, Director
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SUBJECT: LEA Obligations for the Education of ELLs Whose Parents Waive Program Placement.

The ELL Advisory Council raised a concern recently regarding a parent's right to waive placement of their student in an ELL program, as allowed by our rules and regulations governing the education of ELLs authorized by R.I.G.L.16-54-2, herein referred to as the RI ELL Regulations. They cite a recent Department of Justice inquiry into the Boston Public Schools for neglecting to provide necessary language instruction to its ELL population after employing a similar waiver provision.

This guidance is meant to clarify the various layers of legal obligations that schools have with respect to educating ELLs.

The Civil Rights Act of 1964, built on the Reconstruction Amendments and other civil rights acts put into place by that time, is the foundation of language minority students' rights in public schools. Of particular interest to educators are Titles IV and VI of the Act. Title IV ensures equal educational opportunities for all individuals regardless of race, color, religion, or national origin in public educational institutions at all levels in the United States. It also empowers the Attorney General to initiate a civil action against any agency not providing equal education opportunities. Title VI ensures that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance, which includes almost all schools. Under Title VI, federal funding may be withdrawn from schools that engage in practices which violate this section of the Civil Rights Act.

On May 25th, 1970, the Office for Civil Rights (OCR) released a policy memorandum entitled "Identification of Discrimination and Denial of Services on the Basis of National Origin" advising school districts of their responsibility under Title VI to provide equal education opportunity to national-origin minority students who are deficient in English-language skills. It stated, "Where inability to speak and understand the English-language excludes such students from effective participation in a district's educational program, a district must take affirmative steps to rectify the language deficiency in order to

open its instructional program to these students.” The policies delineated in the May 1970 memorandum were upheld in *Lau v. Nichols*, 414 U.S. 563 (1974) (*Lau*).

The Supreme Court decision in the *Lau v. Nichols* case is one of the most significant precedents for language minority students in the United States. The case was brought by a group of non-English speaking Chinese students against officials of the San Francisco School District. These students could not participate in the educational program offered in the district by virtue of the fact that they did not speak, read, write, or understand English to the necessary degree. The Supreme Court, on January 21st, 1974, overturned previous District Court judgments and decided the case in support of the students’ claim. Mr. Justice Douglas, delivering the opinion of the court, stated that “there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.” He went on to cite the requirements outlined in the 1970 OCR policy memorandum described earlier. The case is still relied on for authority in similar cases today.

Very shortly after the *Lau v. Nichols* case, Congress passed the *Equal Educational Opportunity Act* (EEOA), effectively extending the *Lau* decision to all schools. This act mandates that no state shall deny equal education opportunity to any individual, "by the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by students in an instructional program."

In 1981, the newly-formed Department of Education put into effect a set of criteria for ensuring compliance with Title VI, which are still in effect today. Under these criteria, districts have the option to employ any program or approach that ensures language minority students can effectively participate in the district’s educational program. OCR reviews the compliance of schools on a case-by-case basis under these provisions either as a result of a complaint allegation or as part of a compliance review.

Among the criteria used by OCR when making determinations of Title VI and EEOA compliance are three major requirements that were produced by the case of *Castañeda v. Pickard* in 1981 [648 F.2d 989 (5th Cir., 1981)]. This case has a special distinction because it was the first to result in criteria of this sort. The criteria are non-prescriptive enough to allow for local decision-making, but still rigorous enough to ensure effective programming which precludes violation of students’ rights.

The three criteria are:

- 1) Theory: The school must pursue a program based on an educational theory recognized as sound or, at least, as a legitimate experimental strategy.
- 2) Practice: The school must actually implement the program with instructional practices, resources, and personnel necessary to transfer theory into reality.
- 3) Results: The school must not persist in a program that fails to produce results.

These criteria are known as the “*Castañeda Test*” and are applied across all states to this day.

In summary, language minority students have a constitutionally-grounded right to an education equal to that which all students receive in public schools. In order to accomplish this, public education institutions must take appropriate steps to overcome the language barriers that prevent ELLs from gaining equal access to their educational programs. In order to determine which students are protected under these various rules, states must employ a non-discriminatory system for identifying them. The system of identification in Rhode Island is prescribed by the Rhode Island ELL Regulations sections L-4-3 and L-4-4.

At the time of enrollment in public schools in Rhode Island, the parents or guardians of all students must complete a state-developed home language survey. The home language survey contains six questions that are meant to identify students who may potentially have limited English proficiency as a result of speaking or being exposed to another language. For students whose parent/guardian indicates that English is not their native language, section L-4-3(d) of the RI ELL Regulations requires that a background interview be conducted with the parent/guardian and student to determine if formal English proficiency screening is appropriate and, if so, that it be conducted in a timely manner. It further requires that the district make a tentative educational assignment while screening results are pending and that it use all other appropriate information available from the student's previous school to make this assignment and inform the student's teachers of his/her status in this interim period.

Section L-4-4 of the RI ELL Regulations requires that the district use the WIDA-ACCESS Placement Test (W-APT) for English language proficiency screening and that an additional English reading assessment be given to students who score 3.0 or higher on the 1.0 – 6.0 W-APT scale. It does not prescribe which additional reading assessment districts shall use. It also requires, when possible, that districts administer a reading assessment in the first language of the student regardless of his/her English proficiency level.

The RI ELL Regulations go on to describe ELL program standards in section L-4-6. These standards all support the foundational rights of language minority students as described above. Of particular interest in this section, though, are criteria (b) 6 and (b) 9.

L-4-6. Student Placement Standards.

(b) A students' instructional placement must address his or her academic needs. To meet these needs:

6. Placement of English Language Learners in a specialized instructional program for English Language Learners shall be made within twenty (20) school days of the completion of the Home Language Survey. See also: Section L-4-3 (d) [English Language Learners entitled to immediate tentative placement.]

A specialized instructional program for English Language Learners may consist of a separate program (i.e. ESL class) or it may be instructional modifications to the general education program or some combination of the two. Section L-4-7 describes time requirements for ESL classes where that model is employed.

Of particular concern here is criterion 9 of section L-4-6(b).

L-4-6. Student Placement Standards.

(b) A student's instructional placement must address his or her academic needs. To meet these needs:

9. Parents shall be informed of the date of their child's placement and of their right to approve or waive the proposed placement. If the parents choose to waive the child's ELL program placement, the district is responsible for assessing the English Language Proficiency of the student on the annual ELP assessment as well as for conducting a six month monitoring of the student's academic progress without benefit of ELL services. Parents must be notified of the results of both the ELP assessment and monitoring so that the placement decision might be reviewed.

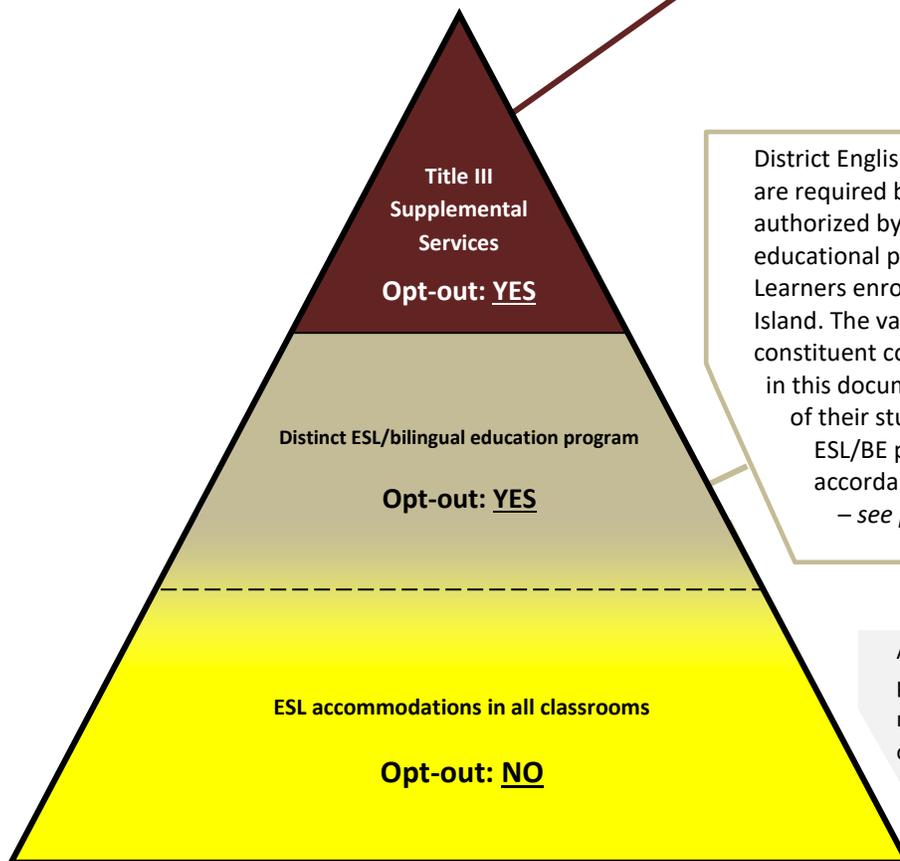
This provision allows a parent to waive an ELL instructional placement for their student. However, it does not, and cannot, release a district from its obligations under federal law to provide an equal education to language minority students.

Those students whose parents have waived ELL program placement are still considered ELLs and must be reported as such to the SEA. In other words, in cases in which parents waive the proposed ELL program placement, a district must make those modifications to its general education program necessary to overcome language barriers and be able to show that it does so. This can be accomplished by ensuring that the general education curriculum incorporates the English Language Proficiency Standards (ELPS) and that the general education staff working with ELLs is trained in the use of the ELPS for planning and delivering instruction and assessment. ELLs waived from a program placement must also participate in the annual English language proficiency assessment until such time that they meet the criteria for exit outlined in section L-4-16 of the RI ELL Regulations.

A third layer of obligations that a district may be required to observe derive from Title III of NCLB. Title III provides funding to institute *supplemental* services for ELLs, should a district choose to apply for a Title III subgrant from the SEA. These funds cannot be used to supplant any activity or program required by federal or state law or policy. Title III has its own provisions for the acceptance and use of funds, including providing a parent with the opportunity to opt-out of the supplemental services – Title III Part C, sec. 3302(a)(8)(A)(i). This only applies to Title III supplemental services, though, and not to any requirement set forth in either the RI ELL Regulations or federal law outlined above.

A simple model describing the relationship between these layers of legal and statutory obligations is provided on the next page:

Title III supplemental programs and/or services are provided using Title III funding, should the LEA choose to apply for a Title III subgrant from the state. These programs and services may only supplement, not supplant, programs and services required by federal or state policy/law. Parents have the right to have their children removed from Title III programs in accordance with Title III Part C, sec. 3302(a)(8)(A)(i)



District English language instructional programs are required by the rules and regulations authorized by R.I.G.L.16-54-2 governing educational programs for English Language Learners enrolled in the public schools of Rhode Island. The various program models and their constituent components are identified and defined in this document. Parents may waive placement of their student into the district's specific ESL/BE program(s) in accordance with section L-4-6(b)(9).
– see page 1 of this document.

An effective ESL/BE program is presumed to provide ELLs with the necessary instruction and support to overcome language barriers and ensure equal access to education fulfilling the requirements below

Employing instructional strategies to overcome language barriers in order to ensure equal access for ELLs in all classrooms is required by various federal laws and regulations. Parents may not release the district from this obligation, for there is essentially nothing for parents to opt their students out of other than an education equal to that which other students receive.

If you have questions regarding this information, please contact Bob Measel (robert.measel@ride.ri.gov) at (401) 222-8480 in the Office of Instruction, Assessment, and Accountability or Susan Rotblat-Walker (susan.walker@ride.ri.gov) at (401) 222-8413 or Emily Klein (emily.klein@ride.ri.gov) at (401) 222-8985 in the Office for Diverse Learners.

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