

Excerpt from United State Department of Education/ United States Department of Justice - Dear Colleague Letter, January 2015, Pages 24-27

F. Evaluating EL Students for Special Education Services and Providing Special Education and English Language Services The Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973 (Section 504) address the rights of students with disabilities in the education context. The Department of Education's Office of Special Education Programs, a component of ED's Office of Special Education and Rehabilitative Services, administers the IDEA. OCR and DOJ share authority for enforcing Section 504 in the educational context, and DOJ coordinates enforcement of Section 504 across Federal agencies. SEAs and school districts must ensure that all EL students who may have a disability, like all other students who may have a disability and need services under IDEA or Section 504, are located, identified, and evaluated for special education and disability-related services in a timely manner. When conducting such evaluations, school districts must consider the English language proficiency of EL students in determining the appropriate assessments and other evaluation materials to be used. School districts must not identify or determine that EL students are students with disabilities because of their limited English language proficiency. School districts must provide EL students with disabilities with both the language assistance and disability-related services to which they are entitled under Federal law. Districts must also inform a parent of an EL student with an individualized education program (IEP) how the language instruction education program meets the objectives of the child's IEP. The Departments are aware that some school districts have a formal or informal policy of "no dual services," i.e., a policy of allowing students to receive either EL services or special education services, but not both. Other districts have a policy of delaying disability evaluations of EL students for special education and related services for a specified period of time based on their EL status. These policies are impermissible under the IDEA and Federal civil rights laws, and the Departments expect SEAs to address these policies in monitoring districts' compliance with Federal law. Further, even if a parent of an EL student with a disability declines disability related services under the IDEA or Section 504, that student with a disability remains entitled to all EL rights and services as described in this guidance.

1. Individuals with Disabilities Education Act (IDEA) The IDEA requires SEAs and school districts to, among other things, make available a free appropriate public education (FAPE) to all eligible children with disabilities. Under the IDEA, FAPE means, among other things, special education and related services at no cost to parents

provided in conformity with the student's IEP. Under the IDEA, school districts must also identify, locate, and evaluate all children who may have disabilities and who need special education and related services, regardless of the severity of their disabilities. A parent or a school district may initiate a request for an initial evaluation to determine if a child is a child with a disability under the IDEA. A school district must ensure that assessments and other evaluation materials used to evaluate a child with a disability are "provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer." This is true even for those EL students whose parents have opted their children out of EL programs. A student cannot be determined to be a child with a disability if the "determinant factor" is limited English proficiency and if the student does not otherwise meet the definition of a "child with a disability" under the IDEA.

Example 13: A teacher thinks that a Spanish-speaking EL student with beginner level English has a learning disability. She would like to have the student evaluated for a disability but believes that the student must complete one year in the EL program or achieve intermediate proficiency in English before being evaluated for a disability or receiving special education and related services. She is incorrect. The principal explains to her that if she believes the student has a disability, the school district must seek parental consent for an initial evaluation and once consent is granted must evaluate the student in a timely manner. After the parents consent, the district arranges for a bilingual psychologist to conduct the evaluation in Spanish, given the EL student's ELP level and language background.

Once a school district determines that an EL student is a child with a disability under the IDEA and needs special education and related services, the school district is responsible for determining, through the development of an IEP at a meeting of the IEP Team (which includes the child's parents and school officials), the special education and related services necessary to make FAPE available to the child. As part of this process, the IDEA requires that the IEP team consider, among other special factors, the language needs of a child with limited English education and related services. 20 U.S.C. § 1401(3); 34 C.F.R. § 300.8. See infra note for the definition of an individual with a disability under Section 504. 69 34 C.F.R. § 300.301(b). Once parental consent, as defined in 34 C.F.R. § 300.9, is obtained, the evaluation must be conducted within 60 days from the date that parental consent is received, or if the SEA has established a

timeframe within which the evaluation must be conducted, within the State-established timeframe. For more information about IEPs, see 20 U.S.C. § 1414(d) and 34 C.F.R. §§ 300.320-300.324.

To implement this requirement, it is essential that the IEP team include participants who have the requisite knowledge of the child's language needs. To ensure that EL children with disabilities receive services that meet their language and special education needs, it is important for members of the IEP team to include professionals with training, and preferably expertise, in second language acquisition and an understanding of how to differentiate between the student's limited English proficiency and the student's disability. Additionally, the IDEA requires that the school district "take whatever action is necessary to ensure that the parent understands the proceedings of the IEP team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English."