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Reauthorization Watch

Between 2014 and a Hard Place, States Brace for Looming AYP Crisis

Two years ago, educational consultant Scott Marion warned educators assembled at the U.S. Department of Education that No Child Left Behind's (NCLB's) accountability system was pushing states to the brink. At the time, he predicted, "The Fannie Mae of NCLB is about to hit."

Then, the bad news about Fannie Mae's distressed mortgages was still fresh, and many educators found dis-

turbing parallels between NCLB's "adequate yearly progress" (AYP) benchmarks and the balloon payments coming due on Fannie Mae-backed loans; like over-optimistic homebuyers, states chose to defer payment until later, hoping that some miracle would bail them out before the bill came due.

Some educators hoped the miracle would come from the transfer of

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English Learners and Civil Rights: Agency Enforcement Gets Tough

By Ellen Forte and Molly Faulkner-Bond

An eventful year for policy and practice related to English learners (ELs), 2010 witnessed renewed vigilance by various government agencies on the enforcement of these students' civil rights. The heightened focus brought the issue to the center of the national education conversation and forced many local and state education agencies (LEAs and SEAs) to revise or reevaluate their practices.

Even if painful for some, the lessons learned from these missteps are invaluable. Lacking a national discourse

about EL educational rights as a comprehensive whole, the findings and rulings from the civil rights arms of the U.S. Departments of Justice (DOJ) and Education (ED) provide valuable insight into the government's expectations regarding the roles of different education agencies in preserving these students' rights — and what systemic challenges they face in attempting to do so.

Recent Events

On the 45th anniversary of a seminal civil rights march that took

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power in the presidential election. Most were confident that Congress would have addressed NCLB's long-delayed reauthorization by now and offered some relief from the escalating number of schools heading into improvement status because of missed AYP targets.

But the bailout hasn't come. NCLB is still the law of the land. And most prognosticators predict that the Republican gains in the recent midterm elections will lead to a deadlocked Congress that, once again, will push reauthorization down the road.

Marion's opinion certainly hasn't changed.

"The train is clearly heading into a brick wall," said Marion, vice president of the National Center for the Improvement of Educational Assessment and a member of the *Title I Monitor's* editorial board, in a recent interview. "I'm not convinced that this Congress will be able to move quickly on anything, so I think we'll see a big foreclosure crisis with the 2011 AYP results and a massive crash in 2012 if nothing is done."

Backloading

Under NCLB, state targets for the percentage of children who must reach proficiency each year — also called annual measurable objectives (AMOs) — ratchet up over time, with the goal of universal proficiency by 2014. The higher the targets, the more likely it is that schools and districts go into "needs improvement" status for falling short. They then face an escalating series of sanctions, from offering public school choice to restructuring programs and replacing staff.

Many states required only slight gains in the early years after the law passed, followed by rapid, perhaps unrealistic, progress as 2014 approached. A total of 23 states "backloaded" their AMOs, according to a 2008 study by the Center on Education Policy (CEP).

North Dakota was one state that set its proficiency requirements to go up in three-year increments, with relatively modest gains in the first couple of jumps. "Until this year, it has been hard, but not devastating," said Laurie Matzke, the state's Title I director and also a member of the *Monitor's* board. "We are making a big jump in our timeline this year and are expecting drastic results."

"The train is clearly heading into a brick wall. I'm not convinced that this Congress will be able to move quickly on anything, so I think we'll see a big foreclosure crisis with the 2011 AYP results and a massive crash in 2012 if nothing is done."

— Scott Marion, vice president of the National Center for the Improvement of Educational Assessment

The state currently has 67 out of approximately 450 schools in improvement. Matzke estimates that 300 to 350 will not make AYP this year.

"It is so disheartening," she said. "Many of our schools are doing great things for children. ... But unfortunately, none of these activities will be enough. Every single school will soon be identified for improvement."

It will even have effects in states that didn't engage in backloading, such as neighboring Montana. BJ Granbery, the state's Title I director, said there will be a "big jump" in proficiency targets for next year, but the state lacks the capacity to serve all the schools that will be thrust into improvement as a result.

"We can really only serve those schools in corrective action or restructuring, and expect to 'freeze' that group from here on out," Granbery said, referring to the last two stages of the improvement process. "We didn't add any new ones to the group receiving team visits or school improvement consultant services."

Reauthorization Blueprint

Education Department (ED) officials, for their part, continue to pin their hopes on reauthorization. In its "blueprint" for overhauling NCLB, the Obama administration advocated doing away with the 2014 deadline for universal proficiency in favor of a "soft" 2020 deadline for all students to meet "college and career-ready" standards.

See 2014 Deadline, p. 5

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Title I in the Trenches

Eliminating a Top Monitoring Finding: Equitable Services, Private Schools and You

By Roberta Schlicher

At the recent summer meeting of the National Title I Association, I listened to federal Title I officials as they lamented once again the fact that equitable services to private schools annually tops the list of state monitoring findings. I was puzzled. The finding has consistently led the pack every year for the past few years. As educators, we pride ourselves on using data, not instincts, to remedy educational deficiencies. However, it appears as though we aren't following our own advice when it comes to private schools. We clearly have the data. We know exactly what the finding is, but we aren't using it to solve the problem.

Section 1120 of the No Child Left Behind Act of 2001 (NCLB), requires equitable participation of children enrolled in private schools for Title I, Part A programs. The private school requirements for the majority of other NCLB programs appear in the Uniform Provisions in Title IX of NCLB sections 9501-9504. The only three programs that contain their own provisions outside of Title IX are: Title I, Part A, Improving the Academic Achievement of the Disadvantaged; Title V, Part A, Innovative Programs (Congress eliminated funding for this program beginning in fiscal year 2009); and Title V, Part D, Subpart 6, Gifted and Talented Students.

Two offices at the U.S. Department of Education (ED) have responsibility for providing technical assistance for the private school requirements of Title I, Part A. The Student Achievement and School Accountability (SASA) office monitors Title I, Part A

programs for compliance under NCLB and provides technical assistance based in part on monitoring findings. SASA focuses primarily on state and local program compliance. A second office, the Office of Non-Public Education (ONPE), also provides technical assistance, but focuses primarily on providing accurate information to the non-public school community. ONPE's mission is to foster maximum participation of non-public school students and teachers in all federal education programs and initiatives.

So, we've got equitable services to private schools topping the list of monitoring findings for many years.

See *Title I in the Trenches*, p. 4



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And we've got two ED offices that have been working together to provide focused technical assistance through toolkits, guidance documents, webinars, and presentations. It raises the question: Why isn't the finding going away, or at least moving further down the list?

The answer is not clear-cut. Some public school officials believe that private schools shouldn't receive public funds and use stalling tactics to keep private school officials at bay. And some private school officials resent the fact that the LEA has the final say in how funds are used and therefore make little attempt to engage in two-way communication.

Meaningful Consultation

According to Michelle Doyle, an educational consultant specializing in private schools and former head of ONPE, the key to remedying the deficiency lies in ensuring that the districts and private schools participate in *meaningful* consultation. Many districts hold what they call "meaningful" consultation meetings in which they do little more than describe the Title I program. Not only is this approach out of compliance with federal requirements, it is also ineffective. It does not provide public school officials with the results of the private schools' own needs-analysis. Without this information, public schools can't allocate funds to address students' actual needs, which puts them out of compliance with the federal requirements. Doyle said it also is challenging for private school officials to obtain information about how much Title I money private school students have generated, adding another barrier to productive conversations between private and public school officials.

Section 1120(b) of NCLB outlines the process districts must use to conduct meaningful consultation. The process needs to be an ongoing, two-way discussion between the district and the private school. Section 1120(c) describes the method the district should use to calculate the number of children from low-income families who attend private schools.

States and districts also have access to a "Toolkit" developed by the SASA office. The 200-plus-page document provides a step-by-step tool for districts implementing the requirements, including recommended timelines, worksheets and templates for forms and letters. One of the worksheets specifically addresses how to determine the amount of Title I funds for equitable services; another template provides a suggested agenda and approach for the initial meaningful consultation meeting. The resource is available at: <http://www2.ed.gov/programs/titleiparta/ps/titleitoolkit.pdf>.

Turnover

Diane C. Elliott, a private school administrator in Northern Virginia with over 10 years of experience working with public school districts, has another perspective on why the finding continues to crop up. Ms. Elliott says that turnover in public school district personnel has a huge impact on whether the requirements are met. In districts where personnel have been in their positions for a number of years, communication between public and private school officials typically is ongoing, meets the private schools' needs, and complies with the law. However, according to Elliott, in districts where there is frequent turnover and members have multiple duties including Title I, there is often a lack of communication. In some places there is a total shutdown of communication with no responses at all to phone calls or e-mails.

In my former state office, we saw a decrease over the past couple of years in the number of school divisions receiving findings under the equitable services provision when we ramped up our technical assistance efforts. After we hosted a series of webinars and presentations at state conferences, and served as an intermediary between private and public school officials in a number of instances, local school divisions began paying greater attention to the requirement, which reduced findings. Sadly, prior to the state's concerted effort, there were many places where private school officials knew the requirements better than the public school officials.

Although ED has provided comprehensive guidance on the topic, states and localities continue to struggle with proper implementation. Helping states and localities understand the complex requirements is one way to address the issue. However, the more complex issue is how to address the reality of high turnover rates and the underlying reasons for the barriers to communication between public and private school officials. Toolkits, guidance documents, webinars and conference presentations are not sufficient to adequately train new personnel or address the underlying issues. Hopefully, the persistence of ED monitoring findings on equitable services will force ED to consider a more in-depth approach in the form of a training program for new Title I directors. I think such a program would be the best direction for ED to take in its technical assistance efforts. 📌

Roberta Schlicher is the former director of program administration and accountability at the Virginia Department of Education and currently a senior associate at edCount, LLC. She can be reached at rschlicher@edCount.com.

New SIG Guidance Updates School Eligibility Criteria

In new School Improvement Grant guidance, the U.S. Department of Education (ED) has clarified issues surrounding eligibility as the program heads into its second year under rules significantly revamped by the stimulus bill.

While acknowledging that the 2010 application is “in most respects, identical” to the 2009 version, ED Assistant Secretary Thelma Melendez told state superintendents in a Nov. 1 letter that they had flexibility in terms of generating lists of eligible schools.

For example, a state that has five or more Tier I schools identified for 2009, but not being served in the 2010-11 school year, need not generate new lists of Tier I, Tier II or Tier III schools, according to the guidance. However, it will need to request a waiver from the department to update its lists to, for example, reflect recent achievement and graduation rate data or to revise its definition of “persistently lowest-achieving schools.” A state that does not have at least five unserved Tier I schools remaining from 2009 must generate new lists of Tier I, Tier II and Tier III schools based on the state’s recent achievement and graduation rate data.

(On the School Improvement Grant (SIG) spectrum, Tier I schools are those that are the worst-performing, while Tier III schools have lesser problems.)

The deadline for the 2010 competition is Dec. 3. Most states will have funds available from two sources: \$545.6 million in SIG funds from the regular 2010 appropriation and a more significant amount of carryover from the program’s \$3.5 billion combined regular and stimulus appropriation for 2009.

Melendez invited states to apply for a waiver to extend the availability of fiscal year (FY) 2009 carryover funds and use them to make three-year awards to their school districts. At the same time, she added, the department encouraged states to use their FY 2010 funds to award only the first year of a three-year SIG grant, with continuation awards in years two and three coming from subsequent SIG appropriations. Melendez wrote that ED believes this approach would allow states to “maximize” the number of Tier I and Tier II schools its districts would have the opportunity to serve in the 2010 competition.

The guidance also contains instructions on how school districts may use a “reasonable portion” of their 2010 SIG funds during the first year for “pre-implementation” activities prior to full implementation in 2011-12 school year. Examples of such activities outlined in the guidance include:

See *SIG Criteria*, p. 6

2014 Deadline (continued from p. 2)

In a statement regarding the 2014 deadline, ED spokeswoman Sandra Abreveya said: “This is one of the reasons that it’s so important to move ahead quickly with reauthorization and have a new accountability system that focuses on meaningful intervention in the lowest-performing schools and those with the largest achievement gaps.” She declined to elaborate.

The CEP, which highlighted the backloading problem two years ago, was expected to release a report on AYP in late November showing that the number of schools in improvement “will climb substantially over the next few years,” said Jack Jennings, president of CEP and a former senior Democratic staffer on the House education committee.

Jennings said he doubted whether the department would intervene with regulations designed to reduce the number of schools in improvement because ED Secretary Arne Duncan hopes to forge ahead with the new Congress on reauthorization in early 2011. But Jennings is not sanguine about the chances of those efforts.

“I am skeptical that reauthorization will be concluded during the next Congress,” he said. “I see the strong possibility of deadlock for two years.”

Another possibility, suggested by education attorney Leigh Manasevit, is that ED will treat the AYP problem the same way it handled another thorny provision of NCLB — the requirement that all teachers be “highly qualified” by 2005-06. When it became apparent that many states would not meet that timetable, ED, rather than waiving the deadline, said that states engaging in good faith efforts would not be subject to sanctions.

“It is so disheartening. Many of our schools are doing great things for children. . . . But unfortunately, none of these activities will be enough. Every single school will soon be identified for improvement.”

— Laurie Matzke, Title I director, North Dakota

“I don’t think that the administration will formally waive the deadline as that implies a lack of interest in certain students,” Manasevit said. “Remember the mantra of ‘Who do you want to leave behind?’”

— Andrew Brownstein

ED Finalizes January 2010 Interim SIG Regulations

The U.S. Department of Education officially finalized eight-month-old amendments to the rules governing the School Improvement Grant (SIG) program. Originally introduced in mid-January as “interim final requirements” for the SIG program, the changes expanded school eligibility and raised the total grant amount that a district may request for each school assisted.

The January 2010 interim alterations officially implemented the expanded participation criteria for schools instituted by Congress under the Consolidated Appropriations Act of 2010. The legislation did not require states to alter their definition of “persistently low-achieving schools” — the target of SIG’s reform efforts — but rather augmented the pool of schools potentially eligible for SIG funding.

Specifically, the Oct. 28 *Federal Register* notice codified the fact that low-performing Title I schools not identified for improvement, corrective action or restructuring can be deemed eligible for SIG awards. It also authorized aid for certain low-achieving schools that are *eligible* for Title I, even if they are not actually receiving Title I funds.

Schools fall in the latter group if they have not made adequate yearly progress for two years or are in the state’s lowest quintile based on the proficiency rates of the “all students” subgroup. These “newly eligible schools” — their official designation — cannot be any higher achieving than the highest-achieving schools identified under the original requirements. Importantly, states *can* add the newly eligible schools to their list of potential SIG participants, but are not required to do so.

And Waivers...


The newly finalized changes eliminated the need for a waiver for “newly eligible” school participation. As the authorizing statute — section 1003(g) of the Title I law — was originally written, schools eligible for but not actually participating in the regular Title I program could not receive SIG funds. The paradoxical result was that the Obama administration was encouraging participation of schools that could only participate if the sponsoring school district simultaneously requested a waiver. The language in the fiscal 2010 appropriations measure, as now reflected in the final regulations, eliminated the need for a waiver.

The January 2010 changes to the SIG regulations continue to allow states to seek a waiver of the school improvement timeline for any Tier I or Tier II school, provided the participating school is implementing a “turn-around” or “restart” model — two of the four models allowed under the regulations. States also may seek waivers of the 40-percent poverty threshold for participating Tier

I and Tier II schools so that those schools can implement a SIG model as part of a schoolwide program.

Finally, the revisions officially raise the maximum grant per school from \$500,000 to \$2 million. The boost in the maximum grant is intended to allow an intense focus of resources on the worst-performing schools; when proposing a budget for a school, districts must consider the need to build their own capacity as well as provide the necessary supports to spur reform over multiple years.

Regardless of the grant size, however, the *Federal Register* notice makes clear that the states’ ability to seek a waiver to extend the availability of SIG funds beyond the Sept. 11, 2011, deadline extends only to school year 2009-10 funding. The reason: School year 2010-11 funds already are available through Sept. 30, 2012, which is the same date as the extension for the previous year’s funding.


Congress appropriated \$545.6 million in fiscal 2010. Fiscal 2010 state applications for SIG funding are due Dec. 3. 

— Travis Hicks

For More Information

Access a copy of the *Federal Register* notice at <http://edocket.access.gpo.gov/2010/2010-27313.htm>.

School Improvement (continued from p. 5)

1. holding parent and community meetings to review school performance, discuss intervention models and develop school improvement plans;
2. recruiting and hiring a new principal and new teachers;
3. conducting a “rigorous review process” to select and then contract with a charter management organization, an education management organization or an external provider;
4. providing remediation and enrichment activities during the summer of 2011 in schools that will adopt a SIG intervention model at the start of the 2011-12 school year;
5. providing professional development to help staff implement new or revised instructional programs aligned with a school’s plan and SIG intervention model. 

— Andrew Brownstein

For More Information

- The 2010 SIG guidance can be viewed at <http://www2.ed.gov/programs/sif/sigguidance11012010.pdf>
- The 2010 SIG application can be found at <http://www2.ed.gov/programs/sif/2010-377a.doc>.

Title I Q&A

Seniority Pay Differentials and Title I Allocations

Q: Our local educational agency (LEA) has two Title I schools with similar allocations. Due to the cost of staff seniority differentials, however, one school only can offer a program about half the size of the other. This seems unfair. Is there anything we can do about this?

A: Yes. U.S. Department of Education guidance offers an option to remedy this inequity. If you choose to adopt it, however, you must use it consistently.

Specifically, the Title I guidance says:

[A]n LEA may consider variations in personnel costs, such as seniority pay differentials or fringe benefit differentials, as LEA-wide administrative costs, rather than as part of the funds allocated to school attendance areas or schools. The LEA would pay the differential salary and fringe benefit costs from its administrative funds taken off the top of the LEA's allocation. This policy would have to be applied consistently to staff serving both public and private school children throughout the LEA.

This option is explained in Q&A #8 of the Title I guidance governing “within-district allocations,” formally titled “Local Educational Agency Identification and Selection of School Attendance Areas and Schools and Allocation of Title I Funds to Those Areas and Schools,” dated Aug. 21, 2003.

The guidance may be downloaded from <http://www2.ed.gov/programs/titleiparta/legislation.html>.

‘Equitable Share’ of Parental Involvement Funds

Q: Our local educational agency (LEA) reserved additional parental involvement funds at the district level in order to translate Title I documents for parents. Initially, we reserved the normal “equitable share” of these funds for the private school program. But then, in consultation with the private schools, we determined that they simply did not need any Title I documents translated. So, we returned the funds to the LEA’s regular Title I allocation and used them for additional public school services. Was this OK?

A: No. The funds still should have been used for private school parental involvement, even if it did not entail translation services similar to those done for public school parents.

To understand the problem, let’s begin by reviewing the basic rules regarding parental involvement funds. Any school district that receives more than \$500,000 in

Title I funds must reserve 1 percent of the total award for parental involvement activities. As with most set-asides, an “equitable share” of these funds must be reserved for services to eligible private school children and their parents and teachers. After deducting the equitable share, 95 percent of the remainder must be allocated to participating public schools for their parental involvement activities (although the schools may choose to return their funds to the district for district-conducted activities like parent centers).

Under ED guidance, LEAs may reserve more than 1 percent for parental involvement. In this case, the additional funds may be retained entirely at the district level rather than being doled out to individual schools. However, the Title I private school program still must receive an equitable share of any additional reserved funds.

What often is forgotten in this whole process is that the private school set-aside for parental involvement may be used for entirely different activities than those funded under the public school share. When determining what activities to fund with the private school share, your LEA must consult with private school representatives to determine the needs of the parents of participating private school children and how best to meet those needs.

In your case, you got partway there. In consultation with private school representatives, you determined that their parents did not need translation services. But you needed to take the *next step* and explore whether the private school funds might be usefully employed for other types of parental involvement activities. Only in the unlikely event that the private school representatives agreed that there was no need for additional parental involvement activities could these monies be returned to the LEA for use by the public schools.

An Equitable Share of ‘Improvement’ Funds?

Q: It was our understanding that if we reserved Title I funds at the district level for improving our public schools, we did not need to allocate an “equitable share” for eligible children attending private schools. Yet now we are told we should do so. What did we do wrong?

A: You have mixed up different kinds of “improvement.”

In a general sense, all Title I funds are intended to “improve” schools. In your case, it appears that you reserved funds off the top of your allocation for a district-wide summer school. This indeed might improve your students’ achievement (and your schools’ scores), but this is not the type of “improvement” exempted from the Title I equitable-sharing requirement.

See Title I Q&A, p. 8

ED Releases Revamped MEP ‘Child Eligibility’ Guidance

The U.S. Department of Education (ED) recently unveiled new guidance intended to clarify lingering questions related to “child eligibility” under the Migrant Education Program.

The confusion surrounding what constitutes a child eligible for services under the Migrant Education Program (MEP) arose after ED made sweeping changes to the program’s regulations in 2008. The new rules altered the definition of numerous terms used in determining migrant child eligibility, including what constitutes “temporary” and “seasonal” employment, as well as the steps a family must take “in order to obtain” work in an eligible area. The guidance seeks to fill gaps left in the final rules.

Typically, the changes made in the final regulations toughened enforcement of MEP eligibility, especially those provisions regarding whether a job was “temporary.” Other changes made in the rules were intended to ease the burden imposed on recruiters.

Determining eligibility is a complex task for recruiters — and one ED hopes to make easier through the guidance. With regard to the definition of “temporary” or “seasonal” employment, for instance, the old guidance offered only a half page of information, while the revised document offers four full pages of specifics.

In terms of examples, the new guidance specifies three ways in which a recruiter can verify whether a job fits the “temporary” bill, including: 1) an employer statement;

2) a worker statement; and 3) a state determination. The document delves further into the verification methods, offering examples of how each might look.

For instance, the guidance said that an employer statement might be: “employer _____ (name) stated that she will hire the worker only for the months of February through May to accommodate the increase in floral gifting around Valentine’s Day, Easter, and Mother’s Day.” In this example, the guidance highlights the fact that the employer stated that she is hiring the worker for a short period of time that will not exceed 12 months, therefore qualifying the employment as “temporary.”

ED makes clear the guidance provides only an “interpretation” of statutory provisions and does not impose any requirements beyond those included in No Child Left Behind. The updated guidance replaces the Chapter II child eligibility section of the full program guidance originally issued on October 23, 2003. 🏠

— Travis Hicks

For More Information

ED currently has not posted the guidance on the web, but it is available on the Virginia Department of Education’s website at http://www.doe.virginia.gov/federal_programs/esea/title1/part_c/mep_child_eligibility.pdf. For comparison, the October, 23, 2003, guidance is available at <http://www2.ed.gov/programs/mep/mepguidance2003.doc>.

Title I Q&A (continued from p. 7)

The law and regulations mandate certain expenditures of funds to assist schools and local educational agencies (LEAs) deemed “in need of improvement” under Section 1116 of the Title I law. Schools identified for this type of “improvement” must spend at least 10 percent of their Title I allocations on professional development. Likewise, LEAs designated as in need of improvement must spend at least 10 percent of their total allocations (which may include amounts spent by schools in need of improvement) on professional development for teachers in the LEA.

In addition, LEAs must provide technical assistance to their schools in need of improvement. Finally, LEAs may reserve additional funds to conduct school improvement activities in these schools.

All these activities relate to *public* schools that are formally designated as in need of improvement due to repeated failures to achieve annual yearly progress, or AYP. Private schools are not subject to the state’s AYP measures or the “improvement” process, and no federal funds may be spent to improve the general program in such schools. Hence, they have no claim on funds designated by Congress to improve

public schools labeled under Section 1116. If your funds fell in this category, you would be in the clear.

However, your funds were used for district-wide *instructional* services. Section 200.64(a)(2) of the Title I regulations specifically requires you to allocate an equitable share of this district set-aside for eligible children attending private schools. As with other funds allocated for private school services, the equitable share of these monies will be based on the number of private school students residing in Title I attendance areas.

This case was relatively clear-cut. In more ambiguous situations, it might be a good idea to identify specifically any funds reserved for “school improvement” by stating that they are intended to assist schools “pursuant to the school and LEA improvement provisions of Section 1116.”

Finally, it should be noted that the law *does* mandate equitable sharing for funds reserved at the LEA level for general professional development under Section 1119. This involves professional development *not* linked to school improvement. The share of these funds reserved for private schools would be used to train private school teachers how to better serve those private school children who are enrolled in a Title I program. 🏠

EL Policy (continued from p. 1)

place in Selma, Ala., ED Secretary Arne Duncan announced that “the Department of Education’s Office for Civil Rights will reinvigorate equity and enforcement activities across the country.” Within two days of the March 2010 announcement, ED revealed that this reinvigoration would begin with a visit to “examine the academic opportunities and access of [EL] students in the Los Angeles Unified School District (LAUSD) to assess whether they are being denied equal educational opportunities.”

The decision to begin with a visit focused on the civil rights of ELs signaled, in the eyes of many, ED’s intent to attend more closely to this particular group of students. ED also indicated that 38 other districts would receive visits over the coming months, although none was announced with similar fanfare.

Within a week of the announcement, ED’s Office for Civil Rights (OCR) launched an expanded Civil Rights Data Collection (CRDC) effort to “begin collecting new data to measure whether all students have equal educational opportunity and to inform [the office’s] enforcement of federal civil rights laws.” The new CRDC survey went to 7,000 districts across the country (a 16 percent increase over previous administrations’ efforts) and collected data about student enrollment and placement, as well as cumulative end-of-year statistics for the 2009-10 school year. Districts must disaggregate nearly all of the data on these forms into reporting categories, including students who are limited English proficient. Although ED has not announced formal plans for how it will analyze or respond to findings from this survey, the data likely will reveal which LEAs show persistent gaps in EL achievement, graduation, participation in challenging classes and other areas.

In addition, OCR received approximately 7,000 civil rights complaints in fiscal 2010 — a 10 percent increase from the previous year and the largest one-year increase in the past decade. As of October 2010, OCR had begun 54 compliance reviews in LEAs and institutions around the country.

Concurrent to ED’s activities, the DOJ’s Civil Rights Division also has opened 15 investigations of EL programs around the country, and stated in July that the enforcement of the Equal Educational Opportunities Act of 1974 (EEOA) — a foundation stone of EL rights — at both the state and district levels “is a top priority of the Justice Department’s Civil Rights Division.” For some investigations, such as a leading case in Arizona, ED and the DOJ are acting jointly to evaluate problems and dictate remedial actions.



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LEAs facing investigations and program reviews

Although the outcomes of the LAUSD visit have not been publicized, the results of various other district reviews — both by government agencies and private evaluators — have made headlines. Other LEAs for which evaluation outcomes surfaced in 2010 include Boston; Buffalo, N.Y.; Portland, Ore.; Seattle; and the Adams 12 Five Star School District in Colorado. Although the reasons for these evaluations varied, as did the agencies conducting the investigations, the most common finding was that not all eligible students were receiving language support services.

For example, the Seattle report, which was authored by the Council of the Great City Schools, found that 43 percent of the district’s ELs did not receive language services of any kind in the 2006-07 school year; although this figure was reduced to 14 percent by the time of publication (presumably for the 2009-10 school year), the fact that 14 percent of students in need of service still had not received them remains problematic and may yet warrant a government ruling of noncompliance.

The exact reasons for these service gaps varied from district to district. In Boston, the DOJ concluded that inadequate identification processes caused the district to miss some eligible students. In Colorado’s Adams 12 Five Star, the DOJ found that the district had not taken adequate steps more generally to serve all identified ELs. In all districts, however, the outcomes generally were the same: the LEAs were either advised or commanded to

See EL Policy, p. 10

EL Policy (continued from p. 9)

take steps to implement changes to their practices and show that no eligible students missed out on services entitled to them by law.

SEAs facing sanctions and investigations

As the bodies directly responsible for educating children, LEAs hold primary responsibility for ensuring that ELs receive the services and supports that civil rights laws guarantee. Nonetheless, SEAs occasionally come under scrutiny for *statewide* practices or policies that affect the education of ELs. Two such examples from 2010 occurred in Illinois and Arizona, both of which faced DOJ investigations for EL-related policies. The DOJ found the Illinois State Board of Education (ISBE) to be in violation of the EEOA, because of a policy allowing non-proficient ELs to exit out of transitional-bilingual programs after three years of instruction — with no clear mandate that LEAs continue to support these students' language needs after exiting. Though it denied the allegations, the ISBE amended its policies to ensure that LEAs understood their responsibility to continue providing support to all ELs until the students achieve a proficient score on the state's English language proficiency assessment.

More prominently, the Arizona lawsuit *Horne v. Flores* — playing out in federal courts as of publication — focuses on the structure and content of the state's language instruction program. The plaintiffs in the case (a continuation of one originally filed in 1992) allege that Arizona's statewide program, in which all ELs spend four hours each school day receiving isolated instruction in English as a second language (in other words, without any relation to academic content) is unfair and harmful because it denies ELs access to content instruction and limits their ability to graduate from high school prepared for college and the workforce.

Concurrent with the court case, DOJ's and ED's respective civil rights offices opened a joint investigation into Arizona's identification instruments. The agencies ruled in August that the state is in violation of Title VI of the Civil Rights Act of 1964. A psychometrician hired for the investigation concluded that the state's placement test was an invalid measure of student language skills, and the two agencies ruled that the state's one-question home language survey, introduced in the 2009-10 school year, was insufficient to identify all students who are eligible for and may need English language services.

Some advocates believe that Arizona's programming and identification practices were motivated more by cost-saving than by interest in their ELs' success.

However, because agencies elsewhere often provide *less* language support than their ELs actually need or deserve (as in the LEA-level examples discussed above), Arizona's half-day program arguably could be an unsuccessful attempt to err on the side of providing *more* language support (unsuccessful because the program provides instruction in a format that is inappropriately decontextualized and requires undue physical and social separation between ELs and their English-only peers). This precarious balancing act — providing ELs with exactly the right measure of language and content instruction and devising effective identification processes that neither over- nor under-identify students as ELs — is a common tripping point for many states and districts.

Given that practitioners must cobble together their own understanding of EL education requirements from disparate sources and departments, it should come as no surprise that most instances of noncompliance stem more from a lack of information or understanding on administrators' part than a conscious decision to shirk the rules.

Recurrent Themes

Considered together, the events of the past year have highlighted a number of structural problems that have been simmering below the surface for years, unnoticed or unaddressed. The sudden renewal of civil rights enforcement has exposed these dysfunctions and made clear the misalignment of the enforcement system with LEAs' responsibilities to provide adequate educational services for all students. Broadly speaking, the observable themes in these events include the following:

1. *EL service requirements are complicated to implement, in part because they stem from multiple legal mandates and are governed by multiple entities.* As this past year's incidents demonstrate, responsibilities and service requirements for ELs extend far beyond just NCLB. Indeed, the terms of EL education are dictated by Title I, Title III, Title VI of the Civil Rights Act of 1964, EEOA, and an assortment of court holdings.

As the subjects of the recent investigations are learning, this multiplicity of governing statutes has far-reaching implications for compliance and implementation. Meeting the program require-

See *EL Policy*, p. 11

EL Policy (continued from p. 10)

ments for one of these laws does not guarantee satisfactory compliance with all statutes; indeed, each is enforced and monitored by a different agency or combination of agencies, each with its own priorities. This fact means that services for ELs must be designed to satisfy the criteria not just for *any* of these potential judges, but for *all* of them. This means there may be more than one office or body that is watching for implementation errors or failures, and more than one recourse for dissatisfied teachers, parents or community members.

Hence, the job of successfully serving English learners in a given district or state is a complex task with very high stakes. Practitioners who design, implement and evaluate services must have a strong understanding of all applicable laws and ensure that they are meeting the requirements for each.

2. *Multiple laws and enforcers mean a lack of comprehensive guidance or understanding.* This should come as no surprise in light of the first theme above: Because there is no one law or governing body dictating the full extent of EL service requirements, there is no one authoritative source of guidance. Hence, efforts to understand the requirements at hand are fragmented piecemeal at

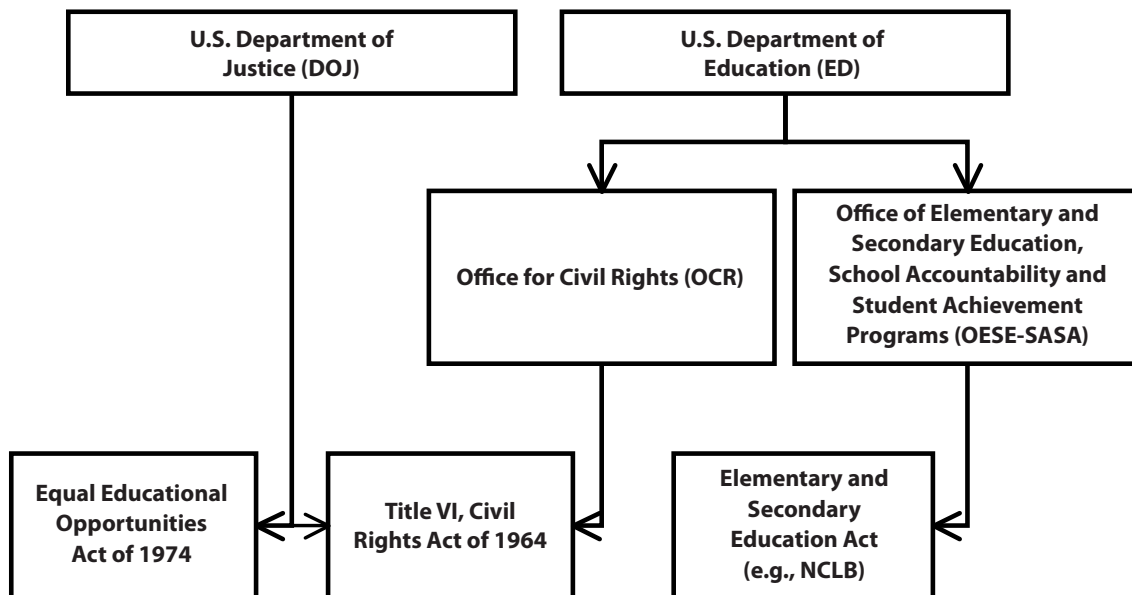
best, and often the product of practitioners' own initiative. ED and OCR both offer some resources on how to interpret and implement NCLB and Title VI, respectively. The guidance is, however, almost entirely segregated, and must be retrieved separately from different locations. The DOJ, meanwhile, acts primarily as an enforcer, leaving implementation guidance about the EEOA largely to OCR.

3. *Noncompliance usually results from confusion or misinformation, rather than negligence or malice.* Given that practitioners must cobble together their own understanding of EL education requirements from disparate sources and departments, it should come as no surprise that most instances of noncompliance stem more from a lack of information or understanding on administrators' part than a conscious decision to shirk the rules. One common finding in districts and states (e.g., Boston, Seattle, Portland, Ore., Illinois) was a failure on the agency's part to provide language support to ELs who had opted out of language programs, either because their parents had requested that their child not participate or because the children attended schools in the district that did not have formal language instruction programs. The agencies in question believed that the families' deci-

See *EL Policy*, p. 12

Exhibit 1. Laws and governing bodies

Governing Bodies



EL Policy (continued from p. 11)

sions to keep their children out of such programs waived the district or state's responsibility to help the child learn English.

4. *EL services require 'Goldilocks'-style balancing.* As previously suggested, the contrast between Arizona's segregated, decontextualized EL programming and other states' and districts' allegedly inadequate delivery systems illustrates that agencies may be at risk of noncompliance if they stray too far in any direction. The events of the past year have included sanctions for policies that have trended in both directions on some critical issues.


Identification is another area in which veering too far in any direction may be dangerous; a February article in *Education Week* highlighted incidents from around the country in which ELs and their families protested identification processes they felt unfairly identified them as needing services. Arizona's and Boston's compliance reviews, meanwhile, turned up violations in the form of *under-identification* of students. Overall, the message seems to be that too much *or* too little of any one thing may put LEAs or SEAs at risk of noncompliance. In order to avoid violations, they must strike a balance that is "just right."

Conclusion

The events of 2010 have brought national attention to the educational rights of English learners, primar-

ily based on heightened enforcement activity by various government offices. These efforts have revealed previously unexposed (or un-discussed) dysfunction in education agencies' systems for identifying and serving ELs — systems that demonstrated no benefit or even proved harmful to these students' education.

In the face of these developments, the incentive for practitioners to increase their knowledge and confidence as it relates to EL services is paramount, yet comprehensive resources or guidance on the ED website are not readily available. It is particularly vital that government agencies do a better job of educating education agencies in exactly what their obligations are and how best to meet them.

Despite being complex and potentially confusing, the imperative to serve English learners is not going to disappear. If recent events are any indication, the focus on educational practices related to ELs may, in the future, draw greater attention. LEAs and SEAs wishing to avoid public exposure and ensure program compliance will benefit from studying the lessons and trends of the past year. 

For More Information

Resources like Thompson's *Administrator's Guide to Federal Programs for English Learners* offer practitioners guidance, explication and best practice recommendations in a number of different service areas for ELs, to support the adoption and implementation of practices that are compliant and in students' and agencies' best interests.

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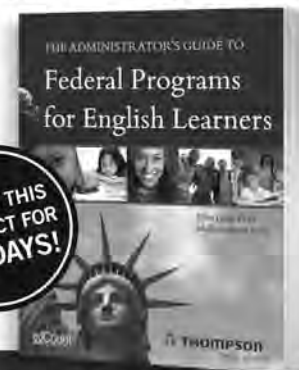
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