



# Advocating for ELL Students: Legal Do's and Don'ts

David Nash, Esq.

LEGAL ONE Director

Dr. JoAnne M. Negrin

Supervisor of ESL, World Languages, Bilingual Education, and Performing Arts

Vineland Public Schools

May 31, 2019

# Disclaimer

*This presentation is intended as a summary of law only, and is not meant as legal advice. Please consult your attorney to obtain legal advice.*



# Key Topics

- Constitutional Protections for English Language Learners
- Legal Issues Related to Student Enrollment
- US Dept. of Education Guidance on ELL Students and Civil Rights
- NJDOE Guidance on Supporting Gifted ELL Students
- NJDOE Guidance Related to Newcomers
- Comprehensive Equity Plan – A Framework for Action
- Emerging Issues in Social Media

# Using the Law to Leverage Change

- While we want to change hearts and minds, sometimes we have to rely on the law to leverage necessary change
- NJDOE and U.S. Department of Education Guidance documents represent current official interpretations of state and federal law and are heavily relied upon when litigation occurs
- Don't simply "go through the motions" of compliance checklists. Instead, have meaningful discussions on how to engage ELL students and their parents, celebrate our diversity, build on the strengths that all students bring, and acknowledge and address any discriminatory, illegal and/or ineffective practices
- Implementing best practices and focusing on the best interests of the child is also the best legal strategy!

# Using the Law to Leverage From Below

Most of the people with extensive knowledge of best practices for ELLs are not in positions of power

Tactfully sharing your knowledge will help those in power make the best decisions

Although you may not be in a position to create policy, it is your job to assist those who do by informing and advising as to correct practices

# ***LAU V. NICHOLS***

414 U.S. 563 (1974)



- “. . . there is no equality of treatment merely by providing [EL] students with the same facilities, textbooks, teachers and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.”



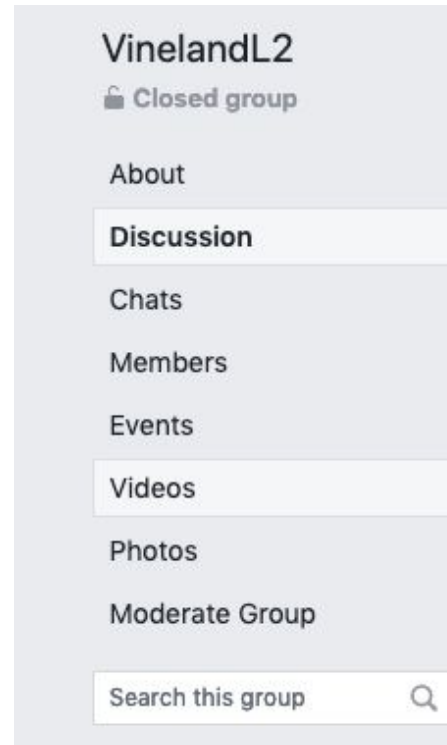
## The Equal Educational Opportunities Act OF 1974

- Congress effectively codified the Supreme Court's holding in *Lau* with respect to states and public schools in Section 1703(f) of the EEOA, but did not make their duty to serve ELs contingent upon federal funding.
- Section 1703(f) requires state and local education agencies to take appropriate action to overcome language barriers that impede equal participation by students in the agencies' instructional programs.
- For a more detailed summary and list of recent cases click [here](#).



# Getting Staff and Family Support for ELL Programming

- Parent Night Activities
- Engagement with community partners
- Social media presence





# Citizenship Status Issues

- US Citizenship is not required for a domiciled child to attend public school for free.
  - *Plyler v. Doe*, 457 U.S. 202 (1982); NJAC 6A: 22-3.3b
  - School Districts may not inquire about immigration status when enrolling a child
  - School Districts may not require as a condition of enrollment:
    - Proof of lawful admission to the U.S.
    - Social Security Number
    - Exception: Students seeking F-1 Visa

# NJDOE August 22, 2018 Memo

- Enrollment Considerations for Immigrant Students
  - School districts are prohibited from implementing discriminatory enrollment practices, intentionally or unintentionally, that may exclude children from enrolling in public school based upon their immigration status pursuant to state regulations (*N.J.A.C. 6A:22-3.3*).
  - *Additionally, N.J.A.C. 6A:22-3.4 prohibits school districts from making enrollment contingent upon the receipt of information or documents either protected from disclosure by law or pertaining to criteria that are not a legitimate basis for determining eligibility to attend school.*

# 2018 Lawsuits Re: Immigration Status

- July 2018 – ACLU sues SD's for asking about Immigration Status
  - The 12 districts facing lawsuits were the following:
    - Northern Valley Regional High School District (Bergen County)
    - Bellmawr School District (Camden County)
    - Sterling Regional High School District (Camden County)
    - Winslow Township School District (Camden County)
    - East Orange Community Charter School (Essex County)
    - West New York School District (Hudson County)
    - Sea Girt School District (Monmouth County)
    - Harding Township School District (Morris County)
    - Watchung Hills Regional High School District (Somerset County)
    - Montague School District (Sussex County)
    - Cranford School District (Union County)
    - Allamuchy School District (Warren County)

# Enrollment of Newcomers

- May 2018 – NJDOE – Enrollment for Newcomers
  - <https://www.nj.gov/education/bilingual/resources/EnrollmentNewcomers.pdf>
- Key Issues Addressed:
  - What Must LEA's Consider When Registering ELLs?
    - Unaccompanied minors, homeless, trauma, undocumented
  - How are English Language Learners Registered for School?
    - Make accessible for all students/parents
    - Home language survey
    - Make ELL identification and notice within 30 days of start of year, or 14 days if midyear
  - How Do I Review Foreign Transcripts and Transfer Credits?
    - Need standard protocol (See p.5 of guidance), may place according to age in short term
    - See Appendix F (Shows equivalencies for courses from Brazil, Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, India, Mexico)
  - What Are the Current High School Graduation Requirements?
    - NJ Supreme Court consent order allows status quo for 2019, 2020 regarding PARCC
    - Option Two

# Good District Registration Practices

- Provide training for registration and guidance staff yearly
- Use DOE-provided webinars and official guidance documents
- Age-appropriate placement pending further evaluation
- Development of programming for newcomer/SIFE students where needed

# Immigration Issue Fears in Schools

## Consider

- ICE in the schools
  - “Safe Havens”
  - Schools not allowed to inquire re: Immigration Status
- If a parent keeps their child home from school re: Immigration Issue Fears
  - SD’s obligation re: student absenteeism

# What you can do:

- Letter from Superintendent to community
- Training for Principals, building personnel including security
- “Know Your Rights” training for parents
- Assistance with creating Power of Attorney documents for custody, etc.
- Agreements with local law enforcement/coordinated outreach



# Vineland Public Schools

625 Plum Street ♦ Vineland, NJ 08360-3708 ♦ (856)794-6700 ♦ Fax (856) 794-9464

December 2017

Dear Parents and Guardians:

We have been approached by families who are concerned about actions taken by United States government against undocumented immigrants. The Vineland Board of Education has passed a resolution supporting the rights of immigrants and refugee students that protects the constitutional rights of all students. We want our children and families to know that our schools are safe for children and that the district will continue to provide positive learning environment for all children regardless of their status. The United States Supreme Court has recognized the importance of public education for all students including those who are undocumented.

United States Immigration and Customs Enforcement (ICE) realizes schools, pre-schools and even school bus stops are very sensitive areas, and have strict guidelines and must seek permission before entering any of these locations. Also included in their policies are medical treatment and health care facilities, such as hospitals, doctor's offices, clinics, and urgent care facilities. Most importantly places of worship, such as churches, synagogues, mosques, and temples cannot be entered without permission.

Please know the Vineland School District does not keep records of families' immigration status. This information is not required to register to attend school.

Our only concern is the education of children and providing a safe and nurturing place for learning. In many of our schools we have character education programs that helps children understand and respect one another.

If you need additional assistance or support with immigration concerns, please find the attached resources that may be of help.

Sincerely,

Dr. Mary L. Gruccio  
Superintendent of Schools



deciembre 2017

Estimados padres y/o encargados:

Se nos han acercado familias preocupadas por las medidas tomadas por el gobierno de los Estados Unidos contra inmigrantes indocumentados. El Consejo de Educación de Vineland ha aprobado una resolución que respalda los derechos de los inmigrantes y estudiantes refugiados que protege los derechos constitucionales de todos los estudiantes. Queremos que nuestros niños y sus familias sepan que nuestras escuelas son seguras para los niños y que el distrito seguirá proporcionando un ambiente de aprendizaje positivo para todos los niños, independientemente de su estatus migratorio. La Corte Suprema de los Estados Unidos ha reconocido la importancia de la educación pública para todos los estudiantes, incluyendo los estudiantes indocumentados.

El Servicio de Inmigración y Aduanas de los Estados Unidos (ICE, por sus siglas en inglés) sabe que las escuelas, las escuelas preescolares e incluso las paradas de autobús escolar son áreas sensibles y tienen pautas estrictas y deben solicitar permiso antes de entrar en cualquiera de estas ubicaciones. También se incluyen en sus políticas incluyen los lugares de tratamiento médico y las instalaciones de atención médica, como hospitales, consultorios médicos, clínicas y centros de atención de urgencia. Sobre todo, que los lugares de adoración, como las iglesias, sinagogas, mezquitas y templos, no pueden ser ingresadas sin permiso.

Por favor, sepa que el Distrito Escolar de Vineland no mantiene archivos con información acerca del estatus migratorio de las familias. Esta información no es requerida para poder ser registrado para asistir a la escuela. Nuestra única preocupación es la educación de los niños, el proporcionar un lugar seguro y cultivar un ambiente adecuado para el aprendizaje. En muchas de nuestras escuelas tenemos programas de educación del carácter que ayudan a los niños a entender y respetarse unos a otros.

Si necesita ayuda o apoyo adicional con asuntos de inmigración, por favor, vea la lista de recursos que incluimos con esta carta que pueden ser de ayuda.

Sinceramente,

Dra. Mary L. Gruccio  
Superintendente de Escuelas




# Parents must acknowledge receipt of ICE letter in order to access Parent Portal

**\* There are Documents that need to be Acknowledged/Signed in order to have full access to**

*Required Documents must be acknowledged for EVERY student associated with your account.*

*Once acknowledged , this message will be removed and full access will be granted.*

FOLDER NAME / TITLE	FOR	
Immigration & Customs Enforcement		
 ICE	Morgan	Acknowledge that you have read this document

# Immunizations

- A student coming to New Jersey from another state or country has 30 days to provide documentation of required immunizations and must be allowed to enroll in school and attend school during that time period
- Homeless child cannot be barred from enrolling and attending school while getting immunizations
- There is a religious exemption for immunization
- See N.J.A.C. 8:57-4.5
- [NJDOH Website](#)
  - [http://www.nj.gov/health/cd/imm\\_requirements/](http://www.nj.gov/health/cd/imm_requirements/)
- [http://www.nj.gov/health/cd/documents/imm\\_requirements/vaccine\\_qa.pdf](http://www.nj.gov/health/cd/documents/imm_requirements/vaccine_qa.pdf)

*Note: The SD Homeless Liaison can help obtain these records*

<http://www.state.nj.us/education/students/homeless/liaison.htm>



## January 2015 Guidance

- Joint Dear Colleague Letter  
<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf>
- The [Civil Rights Fact Sheet](#) is a summary of the longer “Dear Colleague” letter.

# Dear Colleague Letter

*Translations*

- LEP parents must be given access to information brought to the attention of non-LEP parents, including:
  - ELL programs
  - Special education information
  - IEP meetings
  - Grievance procedures
  - Notices of nondiscrimination
  - Student discipline policies and procedures
  - Registration/enrollment
  - Report cards
  - Requests for parent permission for activities
  - Parent-teacher conferences
  - Parent handbooks
  - Gifted and talented
  - Magnet and charter schools
  - Etc.

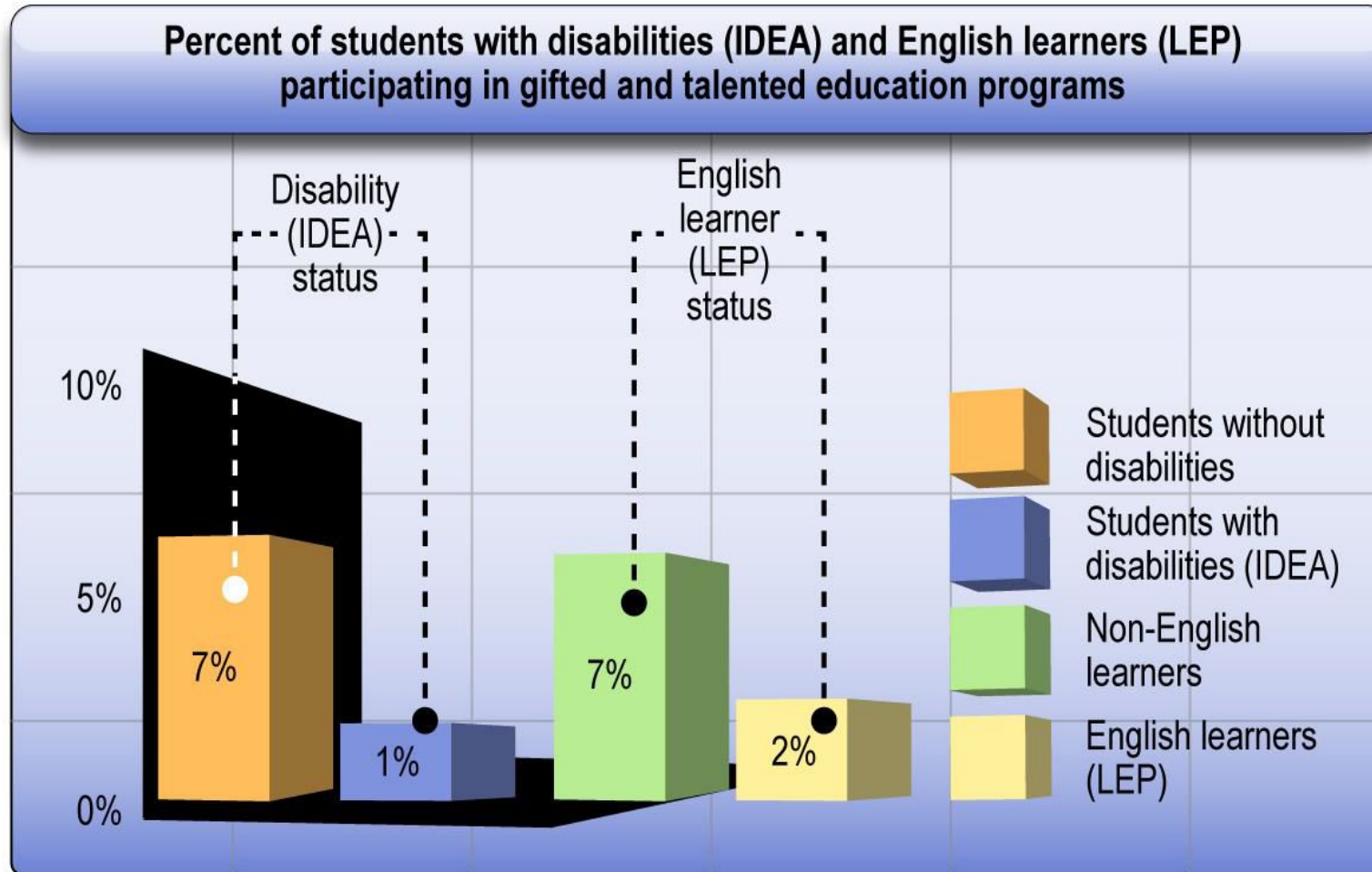
# Supporting Gifted ELL Students

- P.L. 2017, c. 171 Statute mandated NJDOE Guidance
- NJDOE Guidance issued on November 7, 2018
- January 7, 2015 US Department of Education Dear Colleague Letter (p. 21)

# Who are “gifted and talented” students?

- Students who possess or demonstrate high levels of ability in one or more content areas when compared to their chronological peers in the local school district and who require modifications of their educational program if they are to achieve in accordance with their capabilities. N.J.A.C. 6A:8-1.1

# Gifted and Talented Programs



Source: Civil Rights Data Collection



# Advanced Placement Participation

- English learners represent 5% of high school students, but only 2% of the students enrolled in an AP course and only 1% of the students taking and receiving a qualifying score of 3 or above on an AP exam.

5% of high school students

2% of students enrolled in an AP course

1% of students receiving a qualifying score on an AP exam

*Source: Civil Rights Data Collection*





# Identifying ELLs for Gifted and Talented Programs

- Qualitative and Quantitative Measures
- Multiple Criteria
  - Ethnographic assessment procedures
  - Dynamic assessments (opportunity to transfer newly acquired skills to novel situations)
  - Portfolios
  - Test scores in native language and English
  - English language proficiency tests
  - Teacher observation
  - Behavioral checklists
  - Parent interviews
  - Writing Samples
  - Rating Scales
  - Samples of creativity
  - Input from the Cultural Group of Which the Student Identifies

# Identifying ELLs for Gifted and Talented Programs

- All assessments and checklists consider cultural and linguistic competencies
- Use multiple sources of data
  - Authentic assessment
  - Observing students
  - Intelligence tests

# Identifying ELLs for Gifted and Talented Programs

- Tests to consider:
  - DISCOVER
  - Naglieri Nonverbal Ability Test (NNAT)-3
  - Cognitive Abilities Test (CoGAT)
  - Iowa
  - Raven's Progressive Matrices
  - Otis-Lennon School Ability Test
  - Measures of Academic Program (MAP)
  - Renzulli Scale
  - Torrence Test
  - Teacher rating scales
  - Parent rating scales

# Potential Challenges

- There may be a lack of clarity on how to address the needs of gifted ELL students
  - Rapid rate of English language acquisition may be indicator of giftedness, but gaps may still exist
- Parents may not understand the information provided to them about such programs
  - Legal obligation for meaningful communication with parents
- Tests selected may not be appropriate for ELLs, may include over-reliance on facially objective versus subjective measures
  - Tests may be heavily vocabulary-laden, or English only, not normed for English learners
  - May want to consider assessing in English first, then in native language for any missed questions
- Staff with certain language and cultural biases
- Trauma related to relocation, immigration, economic status

# ELL Access to All Services

- N.J.A.C. 6A:15-1.7 Supportive services

(a) Students enrolled in bilingual, ESL, and English language services programs shall have full access to educational services available to other students in the school district.

(b) To the extent that is administratively feasible, supportive services to ELLs, such as counseling, tutoring, and career guidance, should be provided by bilingual personnel who are familiar with and knowledgeable of the unique needs and background of the ELLs and their parents.

# References cited in NJDOE Guidance

- Castellano, J., Identifying and Assessing Gifted and Talented Bilingual Hispanic Students (1998)
- Lohman, David F., Korb, Katrina, Lakin, Joni. (2008). Identifying Academically Gifted English Language Learners Using Nonverbal Tests.
- Missouri Department of Education. (2016). Identifying and Serving Traditionally Underrepresented Gifted Students.
- U.S. Department of Education. (2015) Dear Colleague Letter on January 7, 2015.

# NJDOE Resources

- May 2018 – NJDOE – Enrollment for Newcomers
  - <https://www.nj.gov/education/bilingual/resources/EnrollmentNewcomers.pdf>
- NJDOE Website – Enrollment of Immigrant Students and/or Undocumented Students
  - <https://nj.gov/education/bilingual/policy/immenrol.htm>
- Immigrant Students – How Schools Can Help
  - <https://www.schoolhouseconnection.org/immigrant-students-how-schools-can-help-updated-and-translated-brief/>

# NJDOE Broadcast Memos

[Enrollment Considerations for Homeless and Immigrant Students](#)  
(8/25/15)

[Providing ELL Program Services During State Assessments](#) (3/15/16)

[ELL Guidance for the Every Student Succeeds Act](#) (3/28/19)



# EL Toolkit

- <http://www2.ed.gov/about/offices/list/oela/english-learner-toolkit/index.html>
- Toolkit to help teachers and schools fulfill civil rights obligations.
- To request the tool kit in an alternate format as a reasonable accommodation, i.e. Braille, large print, CD Rom or audio, please contact Melissa Escalante by phone, 202-401-1407 or via email at: [Melissa.Escalante@ed.gov](mailto:Melissa.Escalante@ed.gov).
- Phone # 1-800-872-5327
- TTY: 1-800-877-8339
- Email: [ed.language.assistance@ed.gov](mailto:ed.language.assistance@ed.gov)

Published September 2015

**CHAPTER 6**


**TOOLS AND RESOURCES FOR ADDRESSING ENGLISH LEARNERS WITH DISABILITIES**

*This is the sixth chapter of the English Learner Tool Kit, which is intended to help state and local education agencies (SEAs and LEAs) meet their obligations to English Learners (ELs). This tool kit should be read in conjunction with the U.S. Department of Education Office for Civil Rights' (OCR) and the U.S. Department of Justice's (DOJ) Dear Colleague Letter on "English Learner Students and Limited English Proficient Parents," published in January 2015, which outlines SEAs' and LEAs' legal obligations to ELs under civil rights laws and other federal requirements. The Dear Colleague Letter can be found at <http://www2.ed.gov/about/offices/list/ocr/ellresources.html>.*

**TOOLS AND RESOURCES FOR ADDRESSING ENGLISH LEARNERS WITH DISABILITIES**

**KEY POINTS**

- LEAs must identify, locate, and evaluate ELs with disabilities in a timely manner.
- LEAs must consider the English language proficiency of ELs with disabilities in determining appropriate assessments and other evaluation materials.
- LEAs must provide and administer special education evaluations in the child's native language, unless it is clearly not feasible to do so, to ensure that a student's language needs can be distinguished from a student's disability related needs.
- LEAs must not identify or determine that EL students are students with disabilities because of their limited English language proficiency.
- LEAs must provide EL students with disabilities with both the language assistance and disability related services they are entitled to under federal law.



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 school and other educational settings. If an EL is suspected of having one or more disabilities, the LEA must evaluate the EL promptly to determine if the EL has a disability or disabilities and whether the EL needs disability-related services (which are special education and related services under IDEA or regular or special education and related aids and services under Section 504). Disability evaluations may not be delayed because of a student's limited English language proficiency (ELP) or the student's participation in a language instruction educational program (LIEP). Also, a student's ELP cannot be the basis for determining that a student has a disability.

It is important for educators to accurately determine whether ELs are eligible for disability-related services. Research shows that there is variability in how LEAs

"IDEA refers to a 'child' with a disability. In this document 'student' is used to mean 'child' under IDEA.  
NOTE: Neither this tool kit nor the above-cited OCR/DOJ Dear Colleague Letter is intended to be a replacement for the careful study of Part B of the Individuals with Disabilities Act (IDEA) and Section 504 of the Rehabilitation Act of 1973 (Section 504), which govern the education of students with disabilities. More information about IDEA and Section 504 can be found at: <http://idea.ed.gov> and <http://www.ed.gov/ocr/publications/html/Section504>, respectively.

You can access Tools and Resources for Addressing English Learners with Disabilities at <http://www2.ed.gov/about/offices/list/oela/english-learner-toolkit/index.html>

**TOOLS AND RESOURCES FOR ADDRESSING ENGLISH LEARNERS WITH DISABILITIES** 1

# EL Toolkit

- Chapters
- [Identifying All English Learner Students](#) (PDF, 1.5MB)
- [Providing English Learners with a Language Assistance Program](#) (PDF, 800KB)
- [Staffing and Supporting an EL Program](#) (PDF, 921KB)
- [Meaningful Access to Core Curricular, Extra Curricular Programs](#) (PDF, 1.75MB)
- [Creating an Inclusive Environment and Avoiding Unnecessary Segregation](#) (PDF, 910KB)
- [Addressing English Learners with Disabilities](#) (PDF, 1.27MB)
- [Serving English Learners who Opt-Out of EL Programs](#) (PDF, 386KB)
- [Monitoring and Exiting English Learners from EL Programs and Services](#) (PDF, 1.23MB)
- [Evaluating the Effectiveness of a Districts EL Program](#) (PDF, 907KB)
- [Ensuring Meaningful Communication with Limited English Proficient Parents](#) (PDF, 1.26MB)

# Staff Speech Issues

## “Pickering Balancing Test”

- Did the statement concern a matter of general public concern?
- Was the employee speaking as a private citizen or during the course of his duties?
- Was the statement likely to disrupt a close working relationship?

# Protection from Discrimination / HIB

- Southern Poverty Law Center report notes increase in discriminatory activities targeting English Language Learners, immigrant students
  - See <https://www.splcenter.org/fighting-hate/extremist-files/ideology/anti-immigrant>
- Examples of students chanting “Build that Wall”
- Parental fears that may lead to under-reporting of issues
- Need to be proactive, ensure that students and parents know their rights, and available protections

# Halloween Costume – 10/31/18

- Idaho Teachers investigated for dressing up as “border wall” for Halloween
- Posted on SD’s Facebook page
- No First Amendment Right to engage in such political speech at a school function
- <https://www.foxnews.com/us/idaho-school-investigating-after-teachers-wore-border-wall-costumes-for-halloween>



# Comprehensive Equity Plan Requirements

- Plan must identify and correct all **discriminatory** and **inequitable** educational and hiring **policies, patterns, programs** and practices affecting **facilities, programs, students** and **staff**
- Must develop plan every three years
- Need to review data on student performance
- Plan is due on or before June 14, 2019
- See <https://www.nj.gov/education/equity/cep/2019-2022CEPPacket.pdf>

# Key Student Performance Data

- Consider discrepancies based on key demographic factors
- NAEP and PARCC data
- Promotion/retention/completion/drop outs
- Classification rates for Special Education
- Staffing practices and assignments
- Student discipline data
- Participation in rigorous programs
- Stakeholder satisfaction data

# US Department of Education Office for Civil Rights Case Settlements

- Includes summaries of cases from NJ and across the nation
- Common themes include:
  - Failure to provide information to parents in native language
  - Improper enrollment procedures
  - Underrepresentation in high level courses
  - Lack of access to services provided to other students
  - Lack of information sharing
  - See <https://www.justice.gov/crt/discrimination-against-english-language-learner-students>



# For More Information

- [www.njpsa.org/LEGALONENJ/](http://www.njpsa.org/LEGALONENJ/)
- David Nash, Esq., LEGAL ONE Director
- [dnash@njpsa.org](mailto:dnash@njpsa.org)
- (609) 860-1200
- NJDOE Bureau of Bilingual/ESL Education -  
<https://www.state.nj.us/education/bilingual/>