

Migrant Legal Action Program, Inc.

1001 Connecticut Avenue, N.W.
Suite 915
Washington, D.C. 20036

Telephone: (202) 775-7780
Fax: (202) 775-7784

THE RIGHTS OF IMMIGRANT STUDENTS AND ENGLISH LEARNERS IN THE U.S. PUBLIC SCHOOLS

Roger C. Rosenthal, Esq.
Executive Director, Migrant Legal Action Program

TESOL 2024 International Convention
Tampa Marriott Water Street, Florida Ballroom, Salon 5
Tampa, Florida
March 21, 2024

- I. Overview of the issue/Demographic changes
- II. Right to attend free public school: Plyler v. Doe
- III. Social Security Numbers: Privacy Act of 1974
- IV. Fears of Immigrant Parents and Parents Not Fluent in English
- V. Enrollment: Immigration Documents/Birth Certificates/Immunizations/Other Issues
- VI. School Lunch and Breakfast
- VII. Language rights issues
 - Title VI of the Civil Rights Act of 1964
 - The meaning and impact of Lau v. Nichols and Castaneda v. Pickard
 - How Do the Principles in these Cases Apply to Low Incidence Situations?
- VIII. The Practical Application of Title VI in the schools
 - Translations/interpretations for parents; Responsibility to provide
 - Children as interpreters
 - Placement/retention, etc.
- IX. ELs and Special Education

- X. Access to Post-Secondary Education: Admission Requirements; Tuition Issues
- XI. Deferred Action for Childhood Arrivals (DACA)
- XII. Immigration Enforcement in the Public Schools/ “Public Charge”
- XIII. Questions

rrosenthal@mlap.org

www.mlap.org

www.facebook.com/MigrantLegalActionProgram

SCHOOL OPENING ALERT

The U.S. Supreme Court has ruled in *Plyler v. Doe* [457 U.S. 202 (1982)] that undocumented children and young adults have the same right to attend public primary and secondary schools as do U.S. citizens and permanent residents. Like other children, undocumented students are obliged under state law to attend school until they reach a mandated age.

As a result of the *Plyler* ruling, public schools may not:

- ◆ Deny admission to a student during initial enrollment or at any other time on the basis of undocumented status.
- ◆ Treat a student disparately to determine residency.
- ◆ Engage in any practices to "chill" the right of access to school.
- ◆ Require students or parents to disclose or document their immigration status.
- ◆ Make inquiries of students or parents that may expose their undocumented status.
- ◆ Require social security numbers from all students, as this may expose undocumented status.

Students without social security numbers should be assigned a number generated by the school. Adults without social security numbers who are applying for a free lunch and/or breakfast program on behalf of a student need only indicate on the application that they do not have a social security number.

LLAMADA URGENTE

En 1982, El Tribunal Supremo de los Estados Unidos decidió en el caso titulado *Plyler v. Doe* [457 U.S. 202] que los niños y los jóvenes indocumentados tienen el mismo derecho a las escuelas públicas de primaria y secundaria que el que tienen sus contrapartes de nacionalidad estadounidense. Al igual que los demás niños, los estudiantes indocumentados están obligados a asistir a la escuela hasta que lleguen a la edad escolar requerida por la ley.

Bajo la decisión *Plyler*, las escuelas públicas no pueden:

- ♦ negarles admisión a la escuela a estudiantes indocumentados basado en su estado de ser indocumentados, ya sea al momento de la matrícula o en cualquier otro momento.
- ♦ tratar a un estudiante en forma desigual o discriminatoria para determinar su situación legal y/o de residencia.
- ♦ tomar medidas o reglamentos que pudieran atemorizar a la comunidad indocumentada, con el resultado de que ellos no acudan a su derecho de acceso a las escuelas públicas.
- ♦ requerir que un estudiante o sus padres revelen o documenten su situación legal y/o inmigratoria.
- ♦ investigar la situación legal y/o inmigratoria de un estudiante o de sus padres, aún cuando sólo sea por razones educativas, ya que esto puede poner en evidencia dicha situación.
- ♦ exigir que un estudiante obtenga un número de seguro social como pre-requisito de matrícula a un programa escolar.

La escuela debe de asignar un número de identificación a los estudiantes que no tienen tarjeta de seguro social. Los adultos sin tarjeta de seguro social aplicando para el programa de almuerzo y/o desayuno gratis para sus hijos sólo necesitan indicar en la solicitud que no tiene un número de seguro social.

2022-2023 RI Prototype Household Application for Free and Reduced Price School Meals

Complete one application per household. Please use a pen (not a pencil).

Apply online: www.myschoolapps.com/Home/DistrictRedirect/LINCOLN-RI?langid=1

STEP 1

List ALL Household Members who are infants, children, and students up to and including grade 12 (if more spaces are required for additional names, attach another sheet of paper)

Child's First Name	MI	Child's Last Name	School	Grade	Student? Yes <input type="checkbox"/> No <input type="checkbox"/>	Foster Child <input type="checkbox"/>	Homeless Migrant <input type="checkbox"/> Runaway <input type="checkbox"/>

Check all that apply

STEP 2

Do any Household Members (including you) currently participate in one or more of the following assistance programs: SNAP, TANF, or EDCIPR?

If NO > Go to STEP 3. If YES > Write a case number here then go to STEP 4 (Do not complete STEP 3) **Case Number:** _____

Write only one case number in this space.

STEP 3

Report income for ALL Household Members (Skip this step if you answered "Yes" to STEP 2)

A. Child Income

Sometimes children in the household earn or receive income. Please include the TOTAL income received by all Household Members listed in STEP 1 here.

Child Income: \$ _____

How often?
 Weekly Bi-Weekly Monthly

B. All Adult Household Members (Including yourself)

List all Household Members not listed in STEP 1 (including yourself) even if they do not receive income. For each Household Member listed, if they do not receive income, report total gross income (before taxes) for each source in whole dollars (no cents) only. If they do not receive income from any source, write '0'. If you enter '0' or leave any fields blank, you are certifying (promising) that there is no income to report.

Name of Adult Household Members (First and Last)	Earnings from Work			Public Assistance/ Child Support/Alimony			Child Income			Pensions/Retirement/ All Other Income		
	Weekly	Bi-Weekly	2x Month	Monthly	Weekly	Bi-Weekly	2x Month	Monthly	Weekly	Bi-Weekly	2x Month	Monthly
\$	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
\$	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
\$	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
\$	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
\$	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Total Household Members (Children and Adults)

Last Four Digits of Social Security Number (SSN) of Primary Wage Earner or Other Adult Household Member

Check if no SSN

STEP 4

Contact information and adult signature. Mail Completed Form To: Lincoln Public Schools, Lunch Program, P.O. Box 367, Lincoln, RI 02865

I certify (promise) that all information on this application is true and that all income is reported. I understand that this information is given in connection with the receipt of Federal funds, and that school officials may verify (check) the information. I am aware that if I purposely give false information, my children may lose meal benefits, and I may be prosecuted under applicable State and Federal laws.

Street Address (if available) _____ Apt # _____ City _____ State _____ Zip _____

Daytime Phone and Email (optional) _____

Printed name of adult signing the form _____ Signature of adult _____ Today's date _____

INSTRUCTIONS Sources of Income

Sources of Income for Children

Sources of Child Income

- Earnings from work
- Social Security
 - Disability Payments
 - Survivor's Benefits
- Income from person outside the household
- Income from any other source

Example(s)

- A child has a regular full or part-time job where they earn a salary or wages
- A child is blind or disabled and receives Social Security benefits
- A Parent is disabled, retired, or deceased, and their child receives Social Security benefits
- A friend or extended family member regularly gives a child spending money
- A child receives regular income from a private pension fund, annuity, or trust

OPTIONAL Children's Racial and Ethnic Identities

We are required to ask for information about your children's race and ethnicity. This information is important and helps to make sure we are fully serving our community. Responding to this section is optional and does not affect your children's eligibility for free or reduced price meals.

Ethnicity (check one): Race Hispanic or Latino Not Hispanic or Latino Asian American Indian or Alaskan Native

The Richard B. Russell National School Lunch Act requires the information on this application. You do not have to give the information, but if you do not, we cannot approve your child for free or reduced price meals. You must include the last four digits of the social security number of the adult household member who signs the application. The last four digits of the social security number is not required when you apply on behalf of a foster child or you list a Supplemental Nutrition Assistance Program (SNAP), Temporary Assistance for Needy Families (TANF) Program or Food Distribution Program on Indian Reservations (FDPIR) case number or other FDPIR identifier for your child or when you indicate that the adult household member signing the application does not have a social security number. We will use your information to determine if your child is eligible for free or reduced price meals, and for administration and enforcement of the lunch and breakfast programs. We MAY share your eligibility information with education, health, and nutrition programs to help them evaluate, fund, or determine benefits for their programs, auditors for program reviews, and law enforcement officials to help them look into violations of program rules.

In accordance with federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, this institution is prohibited from discriminating on the basis of race, color, national origin, sex (including gender identity and sexual orientation), disability, age, or marital or relationship for prior civil rights activity.

Program information may be made available in languages other than English. Persons with disabilities who require alternative means of communication to obtain program information (e.g., Braille, large print, audiotope, American Sign Language), should contact the responsible state or

Do not fill out For School Use Only

Annual Income Conversion: Weekly x 52, Every 2 Weeks x 26, Twice a Month x 24 Monthly x 12

Total Income Weekly Biweekly 3 Month 6 Month 12 Month Household Size

Determining Official's Signature Date

Confirming Official's Signature Date

Categorical Eligibility

Eligibility: Free Reduced Denied

Verifying Official's Signature Date

Sources of Income for Adults

Earnings from Work

- Salary, wages, cash bonuses
- Net income from self-employment (farm or business)
- If you are in the U.S. Military:
 - Basic pay and cash bonuses (do NOT include combat pay, FSSA or privatized housing allowances)
 - Allowances for off-base housing, food and clothing

Public Assistance / Alimony / Child Support

- Unemployment benefits
- Worker's compensation
- Supplemental Security Income (SSI)
- Cash assistance from State or local government
- Alimony payments
- Child support payments
- Veteran's benefits
- Strike benefits

Pensions / Retirement / All Other Income

- Social Security (including railroad retirement and black lung benefits)
- Private pensions or disability benefits
- Regular income from trusts or estates
- Annuities
- Investment income
- Earned interest
- Rental income
- Regular cash payments from outside household

Black or African American Native Hawaiian or Other Pacific Islander White

local agency that administers the program or USDA's TARGET Center at (202) 720-2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877-8339.

To file a program discrimination complaint, a Complainant should complete a Form AD-3027, USDA Program Discrimination Complaint Form which can be obtained online at: <https://www.usda.gov/sites/default/files/documents/USDA-CASCR%20P-Complaint-Form-0508-0002-508-11-28-17-Final.pdf> from any USDA office, by calling (866) 632-6992, or by writing a letter addressed to USDA. The letter must contain the complainant's name, address, telephone number, and a written description of the alleged discriminatory action in sufficient detail to inform the Assistant Secretary for Civil Rights (ASCR) about the nature and date of an alleged civil rights violation. The completed AD-3027 form or letter must be submitted to USDA by:

mail: U.S. Department of Agriculture
Office of the Assistant Secretary for Civil Rights
1400 Independence Avenue, SW
Washington, D.C. 20250-9410

This institution is an equal opportunity provider.

Further, the Rhode Island Department of Education does not discriminate on the basis of age, sex, sexual orientation, gender identity/expression, race, color, religion, national origin or disability. To file a complaint of discrimination with the State of Rhode Island, write to the Rhode Island Department of Education, Office of Equality and Access, 255 Westminster Street, Providence RI 02903 or call (401) 722-8979.

Date

School Meals

Translated Applications

This page features foreign language translations of the Prototype Application for Free and Reduced Price School Meals for SY2016-2017. They are provided by USDA as a template to assist State and local agencies in serving households where English is not spoken as a primary language. Households may also download these resources directly to be filled out and submitted to their local school district.

In addition to the application form, each translated packet also includes application instructions, a parent letter/FAQ. We also provide a packet of communications documents to be used by State and local agencies for information sharing requests, income verification, and benefit issuance notices to households. State and local agencies responsible for administering the school meal programs may use these materials in their current form, or may adapt them as needed.

Additionally, an "I Speak" resource document is available to help identify the primary language of non-English speakers. It uses a short phrase in each of the 49 languages that an applicant can check to indicate the language they speak. "I Speak" can help Local Educational Agencies select the appropriate translation as well as ensure consistent and effective interaction with applicants who have limited English proficiency.

Albanian	Farsi	Italian	Nepali	Spanish
Amharic	French	Iu Mien	Polish	Tagalog
Arabic	French Creole	Jamaican Creole	Portuguese	Thai
Armenian	Greek	Japanese	Punjabi	Tigrinya
Bengali	Gujarati	Karen	Romanian	Ukrainian
Bosnian	Haitian Creole	Khmer	Russian	Urdu
Burmese	Hindi	Korean	Samoan	Vietnamese
Chinese (Simplified)	Hmong	Kru	Serbian	Yiddish
Chinese (Traditional)	Igbo	Kurdish	Somali	Yoruba
Croatian	Ilokano	Laotian	Sudanese	

Last Published: 08/19/2016

Migrant Legal Action Program, Inc.

1001 Connecticut Avenue, N.W.
Suite 915
Washington, D.C. 20036

Telephone: (202) 775-7780
Fax: (202) 775-7784

Language Rights Issues

Lau v. Nichols, 414 U.S. 563 (1974)

The U.S. Supreme Court held (1) that discrimination on the basis of language proficiency is discrimination on the basis of national origin under Title VI of the Civil Rights Act of 1964 and (2) that treating people with different needs in the same way is not equal treatment.

Title VI of the Civil Rights Act of 1964 states, "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."

In Lau, the U.S. Supreme Court stated, in part, "Basic English skills are at the very core of what these public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired these basic skills, is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful."

Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981)

The Court of Appeals articulated a three-part test for assessing a school system's treatment of limited English proficient students. The standard requires (1) a sound approach to the education of these students, (2) reasonable implementation of the approach, and (3) outcomes reflecting that the approach is working.

rosenthal@mlap.org

www.mlap.org

Migrant Legal Action Program, Inc.

1001 Connecticut Avenue, N.W.
Suite 915
Washington, D.C. 20036
Telephone: (202) 775-7780
Fax: (202) 775-7784

The Legal Requirement for School Districts to Translate/Interpret for Parents Who Do Not Speak English

All school districts to which Title VI of the Civil Rights Act of 1964 applies are required by federal law to translate or interpret all documents and communications with parents who are not fluent in English into a language they can understand.

On May 25, 1970, the U.S. Department of Health, Education, and Welfare—the predecessor to the U.S. Department of Education—Office for Civil Rights (OCR) issued formal guidance establishing the policy that “[s]chool districts have the responsibility to adequately notify national origin-minority group parents of school activities which are called to the attention of other parents. Such notice in order to be adequate may have to be provided in a language other than English.” In the 1974 U.S. Supreme Court case, *Lau v. Nichols*, 414 U.S. 563, the Court affirmed the validity of these guidelines. Then in 2000, OCR further reinforced these requirements by issuing a document which stated that “Title VI is violated if . . . parents whose English is limited do not receive school notices and other information in a language they can understand.”

Recent OCR Cases of School Districts Failing to Meet the Requirement

OCR has resolved three recent cases where school districts failed to provide adequate translation and interpretation services to parents who speak a language other than English. In Cleveland, Ohio, a complaint was filed directly to OCR and in Tulsa, Oklahoma and Dearborn, Michigan the school districts were found to violate the law as a result of OCR compliance reviews.

Cleveland Metropolitan School District

The complaint alleged that the school district failed to provide limited English proficient (LEP) parents with information concerning activities and other school-related matters in a language that they could understand. The complaint also alleged the district failed to provide information to LEP parents regarding the proposed expulsion of their son in a language that they could understand.

The resolution reached with OCR requires the district to implement a written plan to provide language assistance to LEP parents. The plan requires notifying parents, in a language they can understand, of the availability of language assistance; identifying which parents need language assistance; ensuring that a list is maintained in each building and on the district level of the parents needing assistance; advising staff of parents’ need for assistance; ensuring that staff obtain adequate translators in a timely manner; and ensuring

that vital documents are translated into each language spoken by parents likely to be affected by the district's programs and activities.

Tulsa Public Schools

The information obtained during OCR's investigation indicated that the school district did not have written policies or procedures for responding to parent requests for documents in languages other than English or for a foreign language interpreter. The district failed to consistently track or keep records relating to which parents in the district are LEP, the requests for translation or interpretation services, and the services provided to LEP parents. The investigation also found that the district did not have a set process in place for notifying LEP parents that it has interpreters and translators available for school-related communications. The district failed to ensure that the interpreters and translators it did have were adequately trained. OCR also noted that the district failed to provide translation and interpretation services for parents who speak languages other than Spanish.

The resolution reached with the district requires it to submit a detailed plan for providing meaningful access to information about its programs and activities for LEP parents. The district must provide language assistance services to all LEP parents and guardians of district students needing such assistance. Also, the district must provide training for administrators and staff regarding the provision of language assistance services as well as ensure that all its interpreters and translators are appropriately trained and proficient in the language for which they provide assistance.

Dearborn Public Schools

The OCR investigation found that the school district did not have an effective process for determining which students have LEP parents and for identifying the language needs of those parents. In addition, the district did not notify any of the LEP parents of the availability of translation and interpretation services, which were not available to all LEP parents, nor did it ensure that the interpreters and translators it was using were competent. While an interpreter for Arabic-speaking LEP parents was typically available, there was no system in place to facilitate communication with a parent who spoke neither English nor Arabic. Also, the district did not have a system in place for notifying district teachers and staff about the needs of LEP parents, and did not provide appropriate guidance to staff about communicating with LEP parents in a language other than English.

The resolution reached with the district requires it to implement a written plan to provide language assistance services to LEP parents that ensures that they have meaningful access to the district's programs and activities. The plan must include the use of various services, such as onsite translators/interpreters, telephonic translators/interpreters, and effective translation programs. Also, the district must revise its home language survey to ensure that it accurately identifies LEP parents in the district needing language assistance.



**Information for Limited English Proficient (LEP) Parents and Guardians and
for Schools and School Districts that Communicate with Them**

This fact sheet answers common questions about the rights of parents and guardians who do not speak, listen, read, or write English proficiently because it is not their primary language.

Must my child's school provide information to me in a language I can understand?

Yes. Schools must communicate information to limited English proficient parents in a language they can understand about any program, service, or activity that is called to the attention of parents who are proficient in English. This includes, but is not limited to, information related to:

- registration and enrollment in school and school programs
- language assistance programs
- report cards
- student discipline policies and procedures
- special education and related services, and meetings to discuss special education
- parent-teacher conferences
- grievance procedures and notices of nondiscrimination
- parent handbooks
- gifted and talented programs
- magnet and charter schools
- requests for parent permission for student participation in school activities

Must a school provide language assistance if I request it even if my child is proficient in English and I am somewhat proficient in English?

Yes. Schools must respond to a parent's request for language assistance and remember that parents can be limited English proficient even if their child is proficient in English.

May my child's school ask my child, other students, or untrained school staff to translate or interpret for me?

No. Schools must provide translation or interpretation from appropriate and competent individuals and may not rely on or ask students, siblings, friends, or untrained school staff to translate or interpret for parents.

What information should I expect from the school if my child is an English learner?

When your child enrolls, you should receive a home language survey or similar form to fill out that helps the school identify potential English learners, who are eligible for language assistance services. If your child is identified as an English learner, the school must notify you in writing within 30 days of the school year starting with information about your child's English language proficiency level, programs and services available to meet your child's educational needs, and your right to opt your child out of a program or particular services for English learners. For more information about the rights of English learners, visit

<http://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-el-students-201501.pdf>.



What type of processes can school districts use to identify limited English proficient parents?

- School districts must develop and implement a process for determining whether parents are limited English proficient and identifying their language needs.
- The process should be designed to identify all limited English proficient parents, including parents and guardians whose primary language is not common in the district or whose children are proficient in English.
- A school district may, for example, use a home language survey, to inquire whether a parent requires oral and/or written communication in a language other than English.
- The school's initial inquiry should, of course, be translated into languages that are common in the school and surrounding community so that the inquiry is designed to reach parents in a language they are likely to understand.

What steps must school districts take to provide effective language assistance to LEP parents?

- School districts must provide effective language assistance to limited English proficient parents, such as by offering translated materials or a language interpreter. Language assistance must be free and provided by appropriate and competent staff, or through appropriate and competent outside resources.
- School districts should ensure that interpreters and translators have knowledge in both languages of any specialized terms or concepts to be used in the communication at issue, and are trained on the role of an interpreter and translator, the ethics of interpreting and translating, and the need to maintain confidentiality.
- It is not sufficient for the staff merely to be bilingual. For example, a staff member who is bilingual may be able to communicate directly with limited English proficient parents in a different language, but may not be competent to interpret in and out of that language, or to translate documents.

What can I do if I have questions, want additional information, or believe a school is not complying with these requirements?

- You may visit the website of the U.S. Department of Education's Office for Civil Rights (OCR) at www.ed.gov/ocr or contact OCR at (800) 421-3481 (TDD: 800-877-8339) or at ocr@ed.gov. For more information about filing a complaint, visit www.ed.gov/ocr/complaintintro.html.
- You may visit the website of the U.S. Department of Justice's Civil Rights Division at www.justice.gov/crt/about/edu/ or contact DOJ at (877) 292-3804 or at education@usdoj.gov. For more information about filing a complaint, visit www.justice.gov/crt/complaint/#three.
- For more information about school districts' obligations to English learner students and limited English proficient parents, additional OCR guidance is available at <http://www2.ed.gov/about/offices/list/ocr/ellresources.html>.

Migrant Legal Action Program, Inc.

1001 Connecticut Avenue, N.W.
Suite 915
Washington, D.C. 20036
Telephone: (202) 775-7780
Fax: (202) 775-7784

Special Education and English Learners

Providing a Special Education Program for English Learner (EL) students may present certain challenges to educators, but the mandates and protections concerning provision of these educational services, found in federal law, are clear.

There are two key fundamental principles which must be observed by a school district in this area.

Both Title VI / EEOA and IDEA Apply

An English Learner student who needs, or could potentially need, Special Education services must be accorded the right to receive both a language acquisition program (such as English as a Second Language or similar services) and Special Education services, not one or the other. Both must be made available to the student.

In joint guidance issued in the form of a Dear Colleague letter, the U. S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice stated:

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 [Individuals with Disabilities Education Act] and Federal civil rights laws, and the Departments expect SEAs to address these policies in monitoring districts' compliance with Federal law.¹

Language of SPED Testing and Evaluation

When evaluating an English Learner for possible Special Education services, it is important to conduct that evaluation in a manner and language that is comprehensible to the student. If the evaluation is conducted in English and the student does not easily understand English, the evaluation results are likely to be unreliable and lead to a misidentification of the student for Special Education services.

Regarding this issue, the Education and Justice Departments stated in the joint guidance:

When conducting [Special Education] evaluations, school districts must consider the English language proficiency of EL students in determining the appropriate assessments and other

¹ U.S. Department of Education, Office of Civil Rights/U.S. Department of Justice, Civil Rights Division, *School's Civil Rights Obligations to English Learner Students and Limited English Proficient Parents*, 25 (Jan 7, 2015), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf>

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.²

* * *

Recent DOJ Enforcement Agreement

The Department of Justice (DOJ) has entered into a number of consent agreements with school districts under the Equal Educational Opportunities Act of 1974 (EEOA)³ regarding these issues. The most instructive is an agreement entered into in 2014 with the Crestwood School District in Michigan. A 2011 complaint filed with DOJ included a wide range of allegations that, among other things, the Crestwood School District was not providing sufficient language acquisition services or sufficient translation and interpretation services to special education students. The ensuing investigation led to a consent agreement, the elements of which demonstrate what the Government has determined must be provided in situations relating to Special Education and English Learner students:

Crestwood School District Consent Agreement⁴

- Pursuant to the consent agreement, all special education assessments must be conducted in the student's native language or "in the form most likely to yield accurate information" pertaining to an assessment of the student's potential disabilities. Furthermore, the interpretation of these assessments must include consultation with an ESL instructor to ensure that the student's language barrier does not result in a misdiagnosis of special education needs.
- The parents of students with both English language acquisition and special education needs must be informed in writing, in a language they can understand, that their child is entitled to both language acquisition and special education services.
- All "Individualized Education Program (IEP) Teams" that assess the educational needs of special education students and propose appropriate courses of action must include an ESL instructor whenever a plan for a student who is entitled to both special education and language acquisition services is being considered. These teams must document, on at least an annual basis: (1) the student's progress in acquiring English language skills; (2) the extent to which the student's disability is affecting such progress; (3) any decisions regarding the impact of the student's disability on the language acquisition delivery plan, and the rationale for those decisions; and (4) the language acquisition program models and the instructors assigned to the student.

rrosenthal@mlap.org

www.mlap.org

www.facebook.com/MigrantLegalActionProgram

² Id., at 24

³ The EEOA "requires states and school districts to provide English Language Learner (ELL) students with appropriate services to overcome language barriers...." U.S. Department of Justice, Civil Rights Division, <https://www.justice.gov/crt/educational-opportunities-section>

⁴ U.S. Department of Justice, Civil Rights Division, *Settlement Agreement Between The United States of America and The Crestwood School District*, (October 13, 2014), <https://www.justice.gov/sites/default/files/crt/legacy/2014/08/27/crestwoodagree.pdf>

ACCESS TO POST-SECONDARY EDUCATION FOR IMMIGRANT STUDENTS

There is often confusion between the issue of (1) gaining admission or access to post-secondary education and (2) paying for that education.

Access: Of all the states and the District of Columbia, only three states currently restrict access to publicly funded colleges by undocumented students: South Carolina, Alabama, and Georgia. (Georgia denies admission to undocumented students to any schools that do not admit all academically qualified students.) All other states allow undocumented students to be admitted to public two year and four year colleges with the same admissions criteria that other students must have to matriculate. Private institutions can do what the institution chooses to do.

In-state/Out-of-state tuition:

The following states allow in-state tuition for undocumented students who graduate from high schools in the state:

Arizona	Minnesota
California	Nebraska
Colorado	New Jersey
Connecticut	New Mexico
District of Columbia	New York
Florida	Oklahoma
Hawaii (University of Hawaii campuses)	Oregon
Illinois	Rhode Island
Kansas	Texas
Kentucky	Utah
Maryland	Virginia
Michigan (University of Michigan campuses)	Washington

Access to federal assistance: Undocumented students, including those who have been granted DACA protection, do not have a right to federal loans or grants.



Homeland Security

October 27, 2021

MEMORANDUM TO: Tae D. Johnson
Acting Director
U.S. Immigration and Customs Enforcement

Troy A. Miller
Acting Commissioner
U.S. Customs and Border Protection

Ur M. Jaddou
Director
U.S. Citizenship and Immigration Services

Robert Silvers
Under Secretary
Office of Strategy, Policy, and Plans

Katherine Culliton-González
Officer for Civil Rights and Civil Liberties
Office of Civil Rights and Civil Liberties

Lynn Parker Dupree
Chief Privacy Officer
Privacy Office

FROM: Alejandro N. Mayorkas
Secretary

A handwritten signature in black ink, appearing to read "Alejandro N. Mayorkas".

SUBJECT: **Guidelines for Enforcement Actions in or Near Protected Areas**

This memorandum provides guidance for ICE and CBP enforcement actions in or near areas that require special protection. It is effective immediately.

This memorandum supersedes and rescinds John Morton's memorandum entitled, "Enforcement Actions at or Focused on Sensitive Locations" (number 10029.2, dated October 24, 2011), and David Aguilar's memorandum entitled, "U.S. Customs and Border Protection Enforcement Actions at or Near Certain Community Locations" (dated January 18, 2013).

I. Foundational Principle

In our pursuit of justice, including in the execution of our enforcement responsibilities, we impact people's lives and advance our country's well-being in the most fundamental ways. It is because of the profound impact of our work that we must consider so many different factors before we decide to act. This can make our work very difficult. It is also one of the reasons why our work is noble.

When we conduct an enforcement action – whether it is an arrest, search, service of a subpoena, or other action – we need to consider many factors, including the location in which we are conducting the action and its impact on other people and broader societal interests. For example, if we take an action at an emergency shelter, it is possible that noncitizens, including children, will be hesitant to visit the shelter and receive needed food and water, urgent medical attention, or other humanitarian care.

To the fullest extent possible, we should not take an enforcement action in or near a location that would restrain people's access to essential services or engagement in essential activities. Such a location is referred to as a "protected area."

This principle is fundamental. We can accomplish our enforcement mission without denying or limiting individuals' access to needed medical care, children access to their schools, the displaced access to food and shelter, people of faith access to their places of worship, and more. Adherence to this principle is one bedrock of our stature as public servants.

II. Protected Areas

Whether an area is a "protected area" requires us to understand the activities that take place there, the importance of those activities to the well-being of people and the communities of which they are a part, and the impact an enforcement action would have on people's willingness to be in the protected area and receive or engage in the essential services or activities that occur there. It is a determination that requires the exercise of judgment.

The following are some examples of a protected area. The list is not complete. It includes only examples:

- A school, such as a pre-school, primary or secondary school, vocational or trade school, or college or university.
- A medical or mental healthcare facility, such as a hospital, doctor's office, health clinic, vaccination or testing site, urgent care center, site that serves pregnant individuals, or community health center.
- A place of worship or religious study, whether in a structure dedicated to activities of faith (such as a church or religious school) or a temporary facility or location where such activities are taking place.

- A place where children gather, such as a playground, recreation center, childcare center, before- or after-school care center, foster care facility, group home for children, or school bus stop.
- A social services establishment, such as a crisis center, domestic violence shelter, victims services center, child advocacy center, supervised visitation center, family justice center, community-based organization, facility that serves disabled persons, homeless shelter, drug or alcohol counseling and treatment facility, or food bank or pantry or other establishment distributing food or other essentials of life to people in need.
- A place where disaster or emergency response and relief is being provided, such as along evacuation routes, where shelter or emergency supplies, food, or water are being distributed, or registration for disaster-related assistance or family reunification is underway.
- A place where a funeral, graveside ceremony, rosary, wedding, or other religious or civil ceremonies or observances occur.
- A place where there is an ongoing parade, demonstration, or rally.

We need to consider the fact that an enforcement action taken near – and not necessarily in – the protected area can have the same restraining impact on an individual’s access to the protected area itself. If indeed that would be the case, then, to the fullest extent possible, we should not take the enforcement action near the protected area. There is no bright-line definition of what constitutes “near.” A variety of factors can be informative, such as proximity to the protected area, visibility from the protected area, and people’s behavioral patterns in and around the protected area. The determination requires an analysis of the facts and the exercise of judgment.

The fundamental question is whether our enforcement action would restrain people from accessing the protected area to receive essential services or engage in essential activities. Our obligation to refrain, to the fullest extent possible, from conducting a law enforcement action in or near a protected area thus applies at all times and is not limited by hours or days of operation.

Whether an enforcement action can be taken in or near a courthouse is addressed separately in the April 27, 2021 Memorandum from Tae Johnson, ICE Acting Director, and Troy Miller, CBP Acting Commissioner, entitled “Civil Immigration Enforcement Actions in or Near Courthouses,” which remains in effect.

III. Exceptions and Limitation on Scope

The foundational principle of this guidance is that, to the fullest extent possible, we should not take an enforcement action in or near a protected area. The phrase “to the fullest extent possible” recognizes that there might be limited circumstances under which an enforcement action needs to be taken in or near a protected area. The following are some examples of such limited circumstances:

- The enforcement action involves a national security threat.
- There is an imminent risk of death, violence, or physical harm to a person.
- The enforcement action involves the hot pursuit of an individual who poses a public safety threat.
- The enforcement action involves the hot pursuit of a personally observed border-crosser.
- There is an imminent risk that evidence material to a criminal case will be destroyed.
- A safe alternative location does not exist.

This list is not complete. It includes only examples. Here again, the exercise of judgment is required.

Absent exigent circumstances, an Agent or Officer must seek prior approval from their Agency's headquarters, or as you otherwise delegate, before taking an enforcement action in or near a protected area. If the enforcement action is taken due to exigent circumstances and prior approval was therefore not obtained, Agency headquarters (or your delegate) should be consulted post-action. To the fullest extent possible, any enforcement action in or near a protected area should be taken in a non-public area, outside of public view, and be otherwise conducted to eliminate or at least minimize the chance that the enforcement action will restrain people from accessing the protected area.

Enforcement actions that are within the scope of this guidance include, but are not limited to, such actions as arrests, civil apprehensions, searches, inspections, seizures, service of charging documents or subpoenas, interviews, and immigration enforcement surveillance. This guidance does not apply to matters in which enforcement activity is not contemplated. As just one example, it does not apply to an Agent's or Officer's participation in an official function or community meeting.

This guidance does not limit an agency's or employee's statutory authority, and we do not tolerate violations of law in or near a protected area.

IV. Training and Reporting

Please ensure that all employees for whom this guidance is relevant receive the needed training. Each of your respective agencies and offices should participate in the preparation of the training materials.

Any enforcement action taken in or near a protected area must be fully documented in your Agency's Privacy Act-compliant electronic system of record in a manner that can be searched and validated. The documentation should include, for example, identification of the protected area; the reason(s) why the enforcement action was taken there; whether or not prior approval was obtained and, if not, why not; the notification to headquarters (or headquarters' delegate) that occurred after an action was taken without prior approval; a situational report of what

occurred during and immediately after the enforcement action; and, any additional information that would assist in evaluating the effectiveness of this guidance in achieving our law enforcement and humanitarian objectives.

V. Statement of No Private Right Conferred

This guidance is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

Public Charge

Many immigrants choose not to participate in a wide variety of public benefit programs for which they are eligible, because they think this participation will impede their ability to get a green card/permanent residency in the U.S. They fear by taking these benefits they will be deemed a “public charge” by immigration authorities considering an application for a green card.

Adoption of new public charge regulations during the Trump Administration, regulations which took effect on February 24, 2020, heightened the fears in the immigrant community about participation in benefit programs.

After the Biden Administration took office in January 2021, these Trump rules were withdrawn and the Public Charge policy reverted to that adopted by the Clinton Administration in 1999. There are now federal regulations (issued by the Biden Administration) consistent with the Clinton policies.

Regardless of which policy applied, many of the individuals who have avoided using certain benefits are mistaken in their understanding that this policy applies to them. Here are key facts:

What is Public Charge? Public charge is a concept in immigration law that has been around for more than 100 years. The policy, as applied to those who wish to live in the U.S. on a permanent basis, is intended to exclude those who would be a burden on society, who could not really live on their own, who are primarily dependent on the government for subsistence.

Immigration authorities look at the “totality of circumstances” to make this determination. The decision is not based solely on use of public benefits

Who Does Public Charge apply to? The policy applies to those who wish to get a green card for permanent residency in the U.S. either by changing their status from within the U.S. or by entering the U.S. from abroad. It does not apply to refugees or asylees. *It does not apply if you already have a green card or are a naturalized citizen.*

Why Does Public Charge Not Apply to Many Immigrants?

There are two basic reasons why Public Charge is not a current problem for many immigrants. (1) Undocumented individuals are not eligible to apply for and cannot participate in any of the programs which could be considered as a potential problem if you are being considered for a green card. (2) If you are undocumented and entered the country without permission, there is currently almost no possibility that you can change your status to legal resident and get a green card, even if you are married to a U.S. citizen or have citizen children. There is no legalization program that applies to you. Therefore, public charge will not be relevant for you.

What benefit programs might be relevant to a Public Charge determination?

In 1999, the Clinton Administration stated the following could create a possible Public Charge problem (and they are essentially cash assistance programs):

- Temporary Assistance for Needy Families (TANF) cash assistance programs;
- State and local cash assistance programs that provide income maintenance (often called “General Assistance”);
- Supplemental Security Income (SSI);
- Medicaid or other programs providing long-term care*

Please note that this list does not include any federally funded program found in a public school.

Note: The government will not consider relevant non-cash programs funded *entirely* by states, localities or tribes in the determination of public charge.

Materials that might be helpful in explaining these issues to the community can be found at <https://protectingimmigrantfamilies.org/know-your-rights/>

Roger C. Rosenthal
rrosenthal@mlap.org

* The Trump Administration policy change added the following programs which could have created a possible Public Charge problem, but these are no longer applicable:

- Supplemental Nutrition Assistance Program (also known as SNAP, food stamps, or sometimes EBT)
 - Public Housing or Section 8 housing assistance
 - Federally funded Medicaid (except for emergency services, children under 21, pregnant women, and new mothers (for 60 days))