LEGAL ISSUES WITH RESPECT TO
THE EDUCATION OF IMMIGRANT
STUDENTS AND ENGLISH
LANGUAGE LEARNERS

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Maree F. Sneed, Esq.
Hogan & Hartson LLP
555 Thirteenth Street, NW
Washington, DC 20004
202/637-6416
mfsneed@hhlaw.com

John W. Borkowski, Esq.
Hogan & Hartson LLP
105 E. Jefferson Boulevard, Suite 800
South Bend, IN 46601
574/239-7010
jwborkowski@hhlaw.com
Federal Legal Issues Affecting The Education Of Immigrant Students And English Language Learners (“ELL”)

I. The Demographics Underlying Major Educational Issues

II. Recent Controversies in the News

III. Immigrant and ELL Students and the Law
   A. Rights of Immigrant Students
   B. Rights of ELL Students

IV. The Impact of No Child Left Behind Act (“NCLB”)

V. Methods Enforcing the Rights of ELL Students
TRUE OR FALSE?
Question 1:

One in 10 students, kindergarten through 12th grade, is a child of immigrant parents.
Question 2:

Immigrants make up less than 15 percent of the American population.
Question 3:

Districts may ask for a birth certificate to confirm a child’s age and may deny admission if a child does not have such a document.

TRUE/FALSE?
Question 4:

ELL students must be included in regular math and reading assessments after they have attended school in the U.S. for at least one year.

TRUE FALSE
Question 5:

Over the past three years, in total, the United States Department of Education Office for Civil Rights has initiated more than 10 compliance reviews related to Limited English Proficient student issues.
Question 6:

If a school district fails to comply with federal laws benefitting ELL students, the Office for Civil Rights can terminate federal funding to the district.
I. THE DEMOGRAPHICS UNDERLYING THESE MAJOR EDUCATIONAL ISSUES
Demographic forces make the education of immigrant children and ELL students among the most important challenges facing public education in America.
► One in five students, kindergarten through 12th grade, is a child of immigrant parents

► At least 1.1 million children, ages 5 through 19, have parents who are undocumented
10.4 percent of the American population are immigrants (43% increase since 1990)

28.4 million immigrants live in the United States, the largest such number ever recorded

10.3 million school-age children of immigrants account for nearly 20% of the school age population
Over the next 20 years the projected size of the 5-18 year old population is projected to remain between 60 and 70 million.

But that population would likely decline were it not for growth in the Hispanic population, which is expected to grow from about 20 million now to 30 million by 2025.
ELLs overall are projected to make up 25% of student enrollment by 2010 … and, 40% by 2030

U.S. Department of Education projects that within a decade every public school classroom will have at least one ELL student
II. RECENT CONTROVERSIES IN THE NEWS
Latino parent sought to enroll her children in a District school. As proof of residency, she produced:

- copies of her gas and electric bill
- her *matricula* card, a form of photo identification issued in the U.S. by the Mexican Consulate

District policy: Bills were acceptable proof of residency

Nevertheless, officials told the parent that *matricula* cards were no longer accepted and they demanded a state-issued identification card

School officials also:

- gave the parent material from an anti-immigration website
- contacted the Department of Homeland Security
North Chicago School District Controversy (cont.)

- The children eventually were enrolled after:
  - the district’s director of bilingual education intervened.
  - The parents contacted:

- MALDEF subsequently sent a letter alleging that the school district’s actions were unlawful.
2. Manassas, Virginia Public Schools

- In September 2008, school officials admitted that they had disclosed, in 2005, personal information about a number of Hispanic students to city inspectors investigating anonymous complaints about overcrowded housing.

- Release of information may have violated FERPA.

- To settle a lawsuit brought by 11 Hispanic residents subjected to the searches, the city and school district will pay $775,000.
3. Controversies Over Assessments for NCLB

- **Virginia**
  - February 2007: USDOE threatened sanctions, including withholding of federal funds, for use of unapproved ELL assessments.
  - December 2007: USDOE approved Virginia’s standards and assessment system under Title I of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the No Child Left Behind Act of 2001 (NCLB).
... Controversies Over Assessments for NCLB (cont.)

- **Virginia** (cont.)

  - To help USDOE develop its understanding of how to accurately and appropriately measure the content knowledge of LEP students, USDOE indicated it would like to work with Virginia to collect data on the use and impact of the VGLA for LEP students.
… Controversies Over Assessments for NCLB (cont.)

- **Virginia (cont.)**
  - To help USDOE develop its understanding of how to accurately and appropriately measure the content knowledge of LEP students, USDOE indicated it would like to work with Virginia to collect data on the use and impact of the VGLA for LEP students.
… Controversies Over Assessments for NCLB (cont.)

- **Virginia** (cont.)
  - In September 2007, the Virginia Board of Education approved the ACCESS for ELLs as the statewide ELP assessment for NCLB for the 2008-2009 school year.
... Controversies Over Assessments for NCLB (cont.)

- Illinois

  February 2008: Districts under protest administered native language content assessment to ELLs because USDOE had disapproved Illinois’ assessment for ELLs and the State had failed to replace it.

4. Struggles with ELL Compliance

Graduation rates:

• ESEA regulations released in October 2008 require schools and districts to be judged on their graduation rates overall and by subgroup, including ELLs, to determine whether they’ve made adequate yearly progress.

• As of September 2009, however, 13 states and many districts did not report that information to USDOE.

• Some of the states that did not submit ELL graduation rates for the 2006-07 school year did not have the capacity to do so – including Louisiana, Mississippi, Nebraska, Nevada and Tennessee.
Struggles with ELL Compliance (cont.)

Many school districts struggle to provide resources for ELL students:

- Garland Independent School District, in Texas, has had enough Vietnamese-speaking students to require bilingual classes for more than a decade.
- In 2008-2009, the district reported more than 1,085 Vietnamese speakers to the state.
- School leaders were not able to find bilingual Vietnamese teachers, so the district filed for exceptions to state requirements for ELL students for the last 13 years.
Struggles with ELL Compliance (cont.)

• The Tea Area School District, in South Dakota, had never enrolled an ELL student prior to the 2008-09 school year. A family from Eastern Europe moved to the district, and suddenly, it had 6 ELL students.

• A year later, in the fall of 2009, there was still no established ELL program.

• With so few students, and no extra funding from the state or federal government, the district could not afford to pay an ELL teacher. The district relies on other specialty staff (not trained in ELL education) to work with the ELL students.
III. IMMIGRANT AND ELL STUDENTS AND THE LAW
III. The History of Immigrant and ELL Students and the Law

A. The Rights of Immigrant Students

B. The Rights of ELL Students
A. Rights of Immigrant Students

- 14th Amendment of the U.S. Constitution:
  - Equal Protection Clause
  - Due Process Clause
- Title VI of the Civil Rights Act of 1964

Illegal aliens are “persons” protected by the 14th Amendment.

- Supreme Court held:
  - Texas violated the Constitution’s Equal Protection Clause by denying undocumented school-age children access to the free public education that the State provided to children who were citizens or legal residents.
  - Texas penalized children who had no control over the decision of their parents to bring them into the country illegally
  - Public education is not merely a “benefit,” “it has a fundamental role in maintaining the fabric of our society”
Plyler v. Doe (cont.)

- Texas law did not further a substantial state interest
  - Texas could not show that it needed to protect its resources against an influx of illegal immigrants because evidence suggested that they did not pose a significant burden on the state’s economy

Just one year after Plyler

Supreme Court held:

- Texas statute permitting school districts to deny tuition-free admission to public schools to a minor living apart from “a parent, guardian, or other person having lawful control over him” if the minor’s presence in the district was “for the primary purpose of attending the public free schools.”

- The Supreme Court held that this was a bona fide residence requirement that satisfied constitutional standards.
Limits on Anti-Immigrant State and Local Legislation

- *Meyer v. Nebraska* 262 U.S. 390 (1923): Struck down law that prohibited instruction in any language other than English

- State laws that attempt to regulate immigration in contravention of federal immigration policy have been struck down under the doctrine of preemption
Limits on Anti-Immigrant State and Local Legislation (cont.)

- In 1995, a federal court struck down provisions of a California ballot initiative measure that required verification of immigration status in order to exclude illegal aliens from public schools.

- Citing *Plyler*, the court concluded that the provision was preempted by federal law because it was prohibited under the Equal protection Clause.

Post-\textit{Plyler} Principles

1. Districts may lawfully establish residency requirements and restrict enrollment only to students who live within their boundaries, BUT they cannot limit access to undocumented immigrant children residing within the district.

2. Districts may not take actions that have the effect of deterring undocumented immigrants from accessing public education such as requiring parents or adult caretakers to provide proof of residency that would reveal their own or their child’s immigration status.
Enforcement of Immigration Laws

- School personnel, especially those involved in student intake, have no legal obligation to enforce immigration laws

- The Family Educational Rights and Privacy Act, which protects the privacy of student education records, limits a district’s ability to release information from student records without prior parental consent
Eligibility Requirements for District Programs

- Once undocumented immigrant students are enrolled, schools are required to provide them with the same benefits and services made available to other students.

- Districts should not reject applications for free or reduced meals or other programs simply because a parent or child fails to provide information that would reveal immigration or citizenship status.
Other Eligibility Criteria: Birth Certificates

- Districts **may** ask for a birth certificate to confirm a child’s age, **BUT** if a child does not have such a document, he or she should not be denied admission.

- Instead, the district should permit alternative means to prove a child’s age, such as:
  - Baptismal certificate, or
  - Parent’s signed sworn statement
Eligibility Requirements for District Programs

- Districts may not require a child’s or parent’s Social Security number as a condition of eligibility programs. Such a requirement also may have the effect of exposing immigration status.
Targeted Programs for Immigrants

- The Federal government funds several programs for immigrant students, such as:
  - Transitional Refugee Children Program
  - Emergency Immigrant Education Programs

- As conditions of eligibility, proof that a parent has refugee status or that a child was born outside the U.S. may be required.

- A parent’s refusal to provide such information should not affect a child’s right to attend school. It should only mean that the child will not be able to participate in the federal program.
McKinney-Vento Homeless Assistance Act

- The Act is intended to reduce the barriers to school enrollment for homeless children and youths.

- Act has a very broad definition of homeless: all those children and youths who lack a fixed, regular, and adequate nighttime residence.
The McKinney-Vento definition includes:

- Children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason;

- Children living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations;

- Children living in emergency or transitional shelters;

- Children abandoned in hospitals; and

- Children awaiting foster care placement
McKinney-Vento Homeless Assistance Act

- The Act **requires** school districts to provide homeless students with certain benefits related to enrollment, transportation, and other resources.

- In many circumstances immigrant students may qualify as “homeless” under the broad definition contained in McKinney-Vento.
B. Rights of ELL Students

- Federal law provides English language learners with a right to educational opportunities responsive to their language needs:
  - Equal Educational Opportunity Act of 1974
  - *Lau v. Nichols* (Supreme Court 1974)
Early Cases Involved Mixed Issues of Desegregation and Educational Opportunity

- In 1931 Mexican immigrant parents in Lemon Grove, California were successful in having the first court-ordered desegregation remediation order entered in a U.S. Court.

- Spanish-speaking immigrant students had been required to attend school in a barn-like building on the outskirts of town.

- Separation allegedly had pedagogical purpose.
Early Cases Involved Mixed Issues of Desegregation and Educational Opportunity (cont.)

- 1946 Mexican-American parents challenged the segregation of their children in the Westminster School District

- The District claimed that action was justified based on the need for English language instruction

- Almost a decade before Brown v. Board of Ed., a Federal District Court in California rejected the separate but equal defense, finding this segregation unconstitutional

In 1974, the Supreme Court held that Chinese students with limited or no English proficiency had a right for “meaningful education” under Title VI of the Civil Rights Act of 1964.
Lau v. Nichols (cont.)

- School district, which had offered no program to teach students English had an obligation to take “affirmative steps to overcome language barriers”

- Court, however, also noted broad school district discretion over what method to use
Post-*Lau* Principles: EEOA

- Equal Educational Opportunities Act requires districts to “take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs”
Post-\textit{Lau} Principles: EEOA (cont.)

Again, what is “appropriate action”?

- The Fifth Circuit in \textit{Castaneda v. Pickard}, 648 F.2d 989 (1981) says that it is “a genuine and good faith effort consistent with local circumstances and resources to remedy language deficiencies”
Post-\textit{Lau} Principles: EEOA (cont.)

- Castaneda’s 3-point test
  - Program based on a sound educational theory;
  - Supported by adequate resources and trained personnel; and
  - Evaluated for effectiveness and restructured, if necessary.
What are Adequate Resources?

**Horne v. Flores**

- The case was filed in 1992 on behalf of a class of English Language Learner (“ELL”) students and parents in Nogales, Arizona, a small city along the Mexican border in southern Arizona.

- The plaintiffs’ primary allegation was that Arizona had failed to provide financial and other resources necessary for public schools to adequately implement State-mandated ELL programs.
**Horne v. Flores**

- The Ninth Circuit concluded that, after more than 15 years of litigation, the State of Arizona still had not complied with a judgment requiring the State to provide funding for ELL students that is reasonably calculated to effectively implement Arizona’s educational theory for ELL students.

- The Ninth Circuit rejected the argument that compliance with NCLB’s ELL provisions satisfied the EEOA’s mandate that states take “appropriate” action.
Horne v. Flores

- The Ninth Circuit stated that the NCLB’s overall accountability requirements could not substitute for the equality-based, individual civil rights guaranteed by the EEOA.

- “An individual student whose needs are not being met under the EEOA need not wait for help just because, year after year, his school as a whole makes ‘adequate yearly progress’ towards improving academic achievement overall, including for ELL students.”
Horne v. Flores

• The Supreme Court granted certiorari on January 9, 2009, on two questions:
  – Whether a federal-court injunction seeking to compel institutional reform should be modified in the public interest when the original judgment could not have been issued on the state of facts and law that now exist, even if the named defendants support the injunction?
  – Whether compliance with NCLB’s extensive requirements for English language instruction is sufficient to satisfy EEOA’s mandate that States take “appropriate action” to overcome language barriers impeding students’ access to equal educational opportunities?
Horne v. Flores

• Hogan & Hartson prepared an amicus brief on behalf of AASA, NSBA, NEA, and others. The brief supported the respondents (the original plaintiffs),

• The brief argued:
  – That Arizona’s ELL funding is inadequate,
  – That meaningful local control requires appropriate resources.
  – That federal courts have a role in protecting civil rights,
  – That NCLB does not repeal EEOA.
Horne v. Flores

- The Supreme Court reversed and remanded.
- Court directed the lower courts to re-evaluate their conclusions that there had not been changed circumstances justifying relief from judgment under Rule 60(b)(5).
Horne v. Flores

- Writing for the majority, Justice Alito paid particular attention to the important role of Rule 60(b)(5) in so-called “institutional reform litigation.”

- The majority urged a “flexible approach” to Rule 60(b)(5) in such cases, so that courts can ensure that the “responsibility for discharging the State’s obligations is returned promptly to the State and its officials.”
Horne v. Flores

• The Court ordered that the case be remanded to the District Court for reconsideration of four factual and legal changes:

  (1) Arizona’s adoption of a new ELL instructional methodology;

  (2) Congress’ enactment of the NCLB;

  (3) Structural and managerial reforms in Nogales; and

  (4) Increased overall education funding.
Horne v. Flores

• In August 2009, the Ninth Circuit remanded the case to the District Court to comply with the Supreme Court’s decision.

• The District Court has scheduled a Rule 60(b)(5) evidentiary hearing on the State’s compliance with EEOA for August 2010.

• The hearing will address at least the four important factual and legal changes that the Supreme Court identified, as well as any other factors that may warrant Rule 60(b)(5) relief.
United States v. Texas

- July 2008: The U.S. District Court, Eastern District of Texas, ruled that the Texas Education Agency’s (“TEA”) chosen program for education limited English proficiency students violated the Equal Education Opportunity Act (“EEOA”).

- The TEA failed to adequately monitor the components of the Limited English Proficiency (“LEP”) program – particularly at the secondary school level – as required by the EEOA, thereby depriving LEP students of equal educational opportunities.
United States v. Texas

- The Court ordered that the TEA had until January 31, 2009 to find ways to repair the monitoring and secondary school programs, for the 2009-2010 academic year and thereafter, to comply with the EEOA.

- The Court of Appeals for the Fifth Circuit issued an order staying implementation of the order until completion of the defendants’ appeal. The appeal is still pending.
IV. THE IMPACT OF NO CHILD LEFT BEHIND ACT ("NCLB")
NCLB Raises the Stakes for School Districts

- All students of all racial, ethnic, socio-economic and language groups now must achieve proficiency as defined by each state by the 2013-2014 school year.

- In the interim, all districts, schools, and subgroups within them must make Adequate Yearly Progress (“AYP”) toward 100% proficiency.
ELL students must be included in regular math and reading assessments after they have attended school in the U.S. for at least one year.

ELL students must be tested in English after their third consecutive year attending a school in the U.S.

Failure of any subgroup, including ELL, to achieve AYP results in serious sanctions.
NCLB: ESEA Title III

- Formula grants to support English acquisition
- States must have English language proficiency standards linked to their academic content and student achievement standards
- States must annually assess English proficiency of all ELL students
NCLB: Parental Notification

School districts required—within 30 days of start of school or two weeks if child enrolls late—to inform parents of ELL student:

- The reason a child has been identified for ELL services;
- The student’s “level of English proficiency, how such level was assessed, and the status of the child’s academic achievement”;
- The method of instruction being used with the student as well as other available methods;
- How the program … will meet the educational strengths and needs of the child;
NCLB: Parental Notification (cont.)

- “How the program will specifically help their child learn English, and meet age appropriate academic achievement standards for grade promotion and graduation”;

- “Specific exit requirements for the program,” the “expected rate of transition from such program into classrooms that are not tailored for limited English proficient children, and the expected rate of graduation from secondary school for such program if funds under [Title III] are used for children in secondary school”;
NCLB: Parental Notification (cont.)

- With respect to students with disabilities, “how [the] program meets the objectives of the individualized education program of the child”; and

- The parent’s right to remove a child from the program, decline a proposed program, or select “another program or method of instruction, if available.”
NCLB: Assessments

- Identifying appropriate, effective assessment tools is essential to compliance with NCLB.
- The standard assessments do not accurately reflect the abilities of ELL students. Most testing accommodations are also ineffective, except providing a dictionary for translation.
- States have struggled to find good tests. We do not yet have fully valid and reliable assessments in every state.
V. METHODS OF ENFORCING THE RIGHTS OF ELL STUDENTS
Methods of Enforcement at the Federal Level

- NCLB Sanctions
- Agency Reviews
- Withholding of Funds
- Litigation
NCLB Sanctions

• Under No Child Left Behind, each state is required to define “adequate yearly progress” (AYP) for its districts.

• If districts fail to meet AYP, they first receive technical assistance and are required to allow students to transfer schools.

• As the time period of failure to meet AYP lengthens, the sanctions become progressively more severe, and can result ultimately in the state taking over the school.

• Accountability and sanctions are applicable to all districts with LEP students, whether Title III funding is received or not.
Office for Civil Rights ("OCR")

The United States Department of Education, Office for Civil Rights ("OCR") is responsible for ensuring that the recipients of federal funds comply with Title VI.

- Proactive compliance reviews
- Complaint investigations
Office for Civil Rights ("OCR") (cont.)

1991 OCR Policy Update on Schools’ Obligations Toward National Origin Minority Students with Limited English Proficiency

- Title VI “does not mandate any particular programs of instruction” for ELL students

- Some types of programs recognized by OCR
  - Transitional Bilingual Education
  - Bilingual/Bicultural Education
  - Structured Immersion
  - Developmental Bilingual Education
  - English as a Second Language ("ESL")
OCR Policy Update: Characteristics of Appropriate ELL Programs

- Assess language needs
- Provide appropriate programs
- Staff program appropriately
- Assess students annually
- Employ clear exit criteria
- Follow-up on student progress after exit
- Evaluate effectiveness of program
OCR Policy Update: Segregation and Equal Access Concerns

- No unnecessary segregation, including segregation for non-academic subjects
- Equal access to gifted and advanced programs
- Concern that special education placements are not based on language need
OCR: Investigations

OCR investigations have covered a number of issues, including:

- Whether the district is appropriately assessing students for ELL eligibility;
- Whether the program of instruction offered ELL students is reasonably designed to provide access to the district’s regular curriculum;
- Whether the district applies appropriate criteria to ensure that students exit ELL programs on a timely basis;
- Whether districts effectively monitor the progress of language minority students after they exit ELL programs;
OCR: Investigations (cont.)

- Whether ELL students have access to facilities, staff and instructional materials of comparable quality to those available to other students;

- Whether ELL students are integrated with other students as much as possible, not only for Art, Music, and PE, but also for as much of the regular school day as their needs and abilities allow; and

- Whether ELL students have access to the full spectrum of the district’s education program, including:
  - special education
  - gifted
  - honors
  - AP
  - extracurricular activities
OCR: Investigations (cont.)

Fiscal Year 2007: OCR initiated and resolved 6 compliance reviews regarding ELL and Special Education Services for ELL Students.

Fiscal Year 2008: OCR initiated 8 compliance reviews on the same topics, and resolved 7.

Fiscal Year 2009: OCR initiated 4 compliance reviews on the same topics, and resolved 8, including some carried over from prior years.
Withholding of Funds

- OCR is authorized to enforce compliance by:
  - suspension of Federal financial assistance
  - termination of Federal financial assistance
  - refusal to grant Federal financial assistance
  - refusal to continue Federal financial assistance
**Litigation**

OCR may also use other means of enforcement authorized by law, including referral to the United States Department of Justice with a recommendation that appropriate proceedings be brought.

The Department of Justice may file suit on its own to enforce the EEOA on behalf of the United States.

Private plaintiffs may file claims in federal courts under the EEOA.
TRUE OR FALSE?
Question 1:

One in 10 students, kindergarten through 12\textsuperscript{th} grade, is a child of immigrant parents.
ANSWER: False

One in 5 students, kindergarten through 12th grade, is a child of immigrant parents.
Question 2:

Immigrants make up less than 15 percent of the American population.
ANSWER: True

10.4 percent of the American population are immigrants (43% increase since 1990)
Question 3:

Districts may ask for a birth certificate to confirm a child’s age and may deny admission if a child does not have such a document.

TRUE/FALSE?
ANSWER: False

Districts may ask for a birth certificate to confirm a child’s age, but may not deny admission if a child does not have such a document.
Question 4:

ELL students must be included in regular math and reading assessments after they have attended school in the U.S. for at least one year.

TRUE  FALSE
ANSWER: True
Question 5:

Over the past three years, in total, the United States Department of Education Office for Civil Rights has initiated more than 10 compliance reviews related to Limited English Proficient student issues.
ANSWER: True

OCR has initiated 18 compliance reviews related to Limited English Proficient student issues.
Question 6:

If a school district fails to comply with federal laws benefitting ELL students, the Office for Civil Rights can terminate federal funding to the district.
ANSWER: True

This is one of OCR’s enforcement mechanisms.
QUESTIONS
For more information on Hogan & Hartson, please visit us at www.hhlaw.com

Maree F. Sneed, Esq.
Hogan & Hartson LLP
555 Thirteenth Street, NW
Washington, DC 20004
202/637-6416
mfsneed@hhlaw.com

John W. Borkowski, Esq.
Hogan & Hartson LLP
105 E. Jefferson Boulevard
Suite 800
South Bend, IN 46601
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