

Best Practices in the Special Education Evaluation of Students Who Are Culturally and Linguistically Diverse, Revised 2011

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This document is directed to evaluation professionals (i.e. educational diagnosticians, licensed specialists in school psychology, and speech & language pathologists) involved in the general education and special education evaluation of **culturally and linguistically diverse (CLD)** students with disabilities in the state of Texas. CLD students include:

- (a) Students who are identified as **Limited English Proficient/English Language Learners (LEP/ELLs)** by their school district or charter school; as well as,
- (b) Students who are not identified as LEP/ELLs by the district or charter school, but come from a home, community, or school environment where another language has had a real and significant impact on the student's development of English language proficiency.

The linguistic diversity of this second group of students may not be recognized and completely understood by educators, thus special education evaluation of these students may be imprecise leading to incorrect diagnosis. School records do not typically identify this group of students and they may be instructed, as well as evaluated as if they were English monolingual speakers. Additionally, little information or research can be found on this group of students who are known to be culturally and linguistically diverse, but are not identified as LEP/ELLs. Information from state statistics indicates that in addition to the 731,304 students identified as ELLs in public schools there are approximately another 700,000 students who are CLD, speaking a language other than English at home.

Students identified as ELLs: According to the 2006–07 Texas Public School Statistics, 731,304 students or 16 % of the total school population in Texas were identified as ELLs.

Students recognized as CLD, but not as ELLs: The 2000 U.S. Census Bureau reported that 1,380,888 children ages 5 to 17 spoke a non-English language at home in the state of Texas. Taking this number and subtracting the number of students identified by school districts and charter schools as ELLs (731,304); yields a rough estimate of another 700,000 students in Texas who also need to have linguistic difference issues addressed in their testing, programming, instruction, and intervention.

The term culturally and linguistically diverse (CLD) refers to culture, as well as language. Although language is an essential part of culture, culture is more than language and includes beliefs, customs, traditions, etc. Language, however, often overshadows other aspects of culture because it is so prominent. Educating a culturally and linguistically diverse student, nevertheless, requires attention to the whole child.

This document endeavors to provide a best practices model to help support and guide evaluation professionals in the bilingual special education evaluation of CLD students. Best practices are procedures and policies that may go above and beyond the minimal requirements of the law. Thus, in this document evaluation professionals are provided references to pertinent law, case study, and research, in order to recognize minimal requirements from procedures that go beyond those minimal requirements.

*Please note that in keeping with recent changes in terminology, this document refers to students of **Limited English Proficiency (LEP)** as **English Language Learners or ELLs**. Additionally, this document uses the term culturally and linguistically diverse or CLD to refer to all students who have cultural and linguistic requirements, although some students in this category may not be identified as ELLs. Even though the term, "culturally and linguistically diverse", is somewhat redundant, it is used in this document to ensure clear understanding and because it is a term used by professionals in the field.*

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Table of Contents

**Best Practices in the Special Education Evaluation
of Students Who Are Culturally and Linguistically Diverse,
Revised 2011**

Important Information to Know Before Testing	5
General Education Services for CLD Students Yield Different Academic Benefit	5
What Does Typical Second Language Learning Look Like?	6
Native Language Loss When a Second Language is Introduced	6
Impact of Socioeconomic Status on Language Learning	8
Best Practices Before Testing	9
Response to Intervention (RtI) for Students Experiencing Difficulty	9
Instructional Consultation Teams.....	9
Cultural Diversity	10
Special Concerns in Special Education	10
Disproportionality in Special Education	10
Equal and Meaningful Access to Special Education	12
Special Education	13
Referral	13
Home Language Survey and Language Proficiency Testing by Language Proficiency Assessment Committee	14
Exclusionary Clauses	14
Informed Consent	15
Evaluation Process	15
Procedural Rights and Parent Participation	15
Personnel Qualifications.....	17
Ancillary Examiners.....	18
Interpreter/Translators.....	18
Evaluation Procedures	20
Oral Language Proficiency and Dominance Testing	20
Cognitive Evaluation	23

Adaptive Behavior Testing.....	25
Academic Assessment.....	26
Response to Intervention and the Identification of a Specific Learning Disabled	27
Best Practice Regarding Rtl for CLD Students.....	29
Reevaluations	30
Interpretation of Test Results & Evaluation Data	30
Evaluation Report	31
ARD/IEP Meeting	32
Speech and Language Evaluation of CLD Students	33
Special Education Services for CLD Students.....	35
Research	36
Research on Special Language Programming	36
Brain Research	37
Research on Issues of Oral Language Proficiency.....	38
Dyslexia Research	39
Research Regarding English Literacy.....	39
Research Regarding Cross-Transfer between Languages	40
Research Regarding Assessments and Evaluations	40
Research on the Impact of Sociocultural and Socioeconomic Variables	41
Research on Bilingualism and Disabilities	42
Federal and State Definitions	42
Federal	42
State of Texas	43
Federal and State Legislation and Litigation.....	44
Federal	44
State of Texas	45
References	47
Appendix A: Language Minority Children's Long Term Academic Achievement	51
Appendix B: Report of the National Literacy Panel on Language-Minority Children and Youth	53
Appendix C: Guidance to Federal Financial Assistance Recipients	54

**Best Practices in the Special Education Evaluation
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Important Information to Know Before Testing

An evaluation professional must have some basic fundamental knowledge regarding students who are culturally and linguistically diverse in order to understand the referral, determine the appropriate language and form of the testing, select the actual tests, interpret the test results in light of other information, and participate effectively in the decision-making process for the student. This document will begin by addressing four major characteristics or traits of second language learning. (1) First, evaluation professionals will be provided some of the research on the academic and language benefits of different general education programs. This is critical information to have when considering the student's academic performance before referral to special education testing, as well as when interpreting the assessed academic functioning of the student after the testing has been conducted. (2) Next, the basics of the normal second language acquisition process will be addressed. The evaluation professional must have some knowledge of what constitutes normal second language acquisition to be able to recognize atypical learning. (3) Another aspect of the second language acquisition process that also needs to be understood and taken into account in bilingual special education evaluation is native language loss. When a second language is introduced and becomes a more prevalent part in the student's life, first language development suffers, even when the student is in a bilingual education program. (4) The last thing to know before testing is addressed is the impact of poverty on language learning. Although, not specifically an issue of linguistic diversity, low socioeconomic status is a major contributor in many students who are culturally and linguistically diverse and the extent of its impact must be taken into account.

General Education Services for CLD Students Yield Different Academic Benefit

General education services for students who are **culturally and linguistically diverse (CLD)** vary greatly; moreover, these services yield substantially different levels of benefit. Evaluation professionals should know the effects of these services in order to appropriately interpret student performance. Thomas and Collier (2002) studied the academic effects of special language programming for students who began school speaking a language other than English. Their study was one of the largest studies conducted to date, with over 210,000 data sets of ELL

students according to different special language programs. The results of the Thomas and Collier study indicate that the second language acquisition process is lengthier than many educators and policy-makers realize. The researchers also found that special language programs that develop first language fluency and literacy confer advantages to ELLs in learning English. Programs that used English to teach English fluency and literacy, as well as academic content were found to be the least effective. See Table 1. Artiles et al. (2004) and Lee (2002) also found similar results and documented large disparity in service outcomes and achievement gaps across multiple special language programs.

ELLs immersed in the English mainstream because their parents refused bilingual or **English as a Second Language (ESL)** services showed large decreases in reading and math achievement by Grade 5. The largest number of dropouts came from this group and those remaining finished 11th grade at the 12th percentile (Thomas & Collier, 2001). Curiel et al, 1986 and Theobald (2003) found in their studies that students who are ELLs and do not receive assistance from either ESL or bilingual programs have the highest dropout rates.

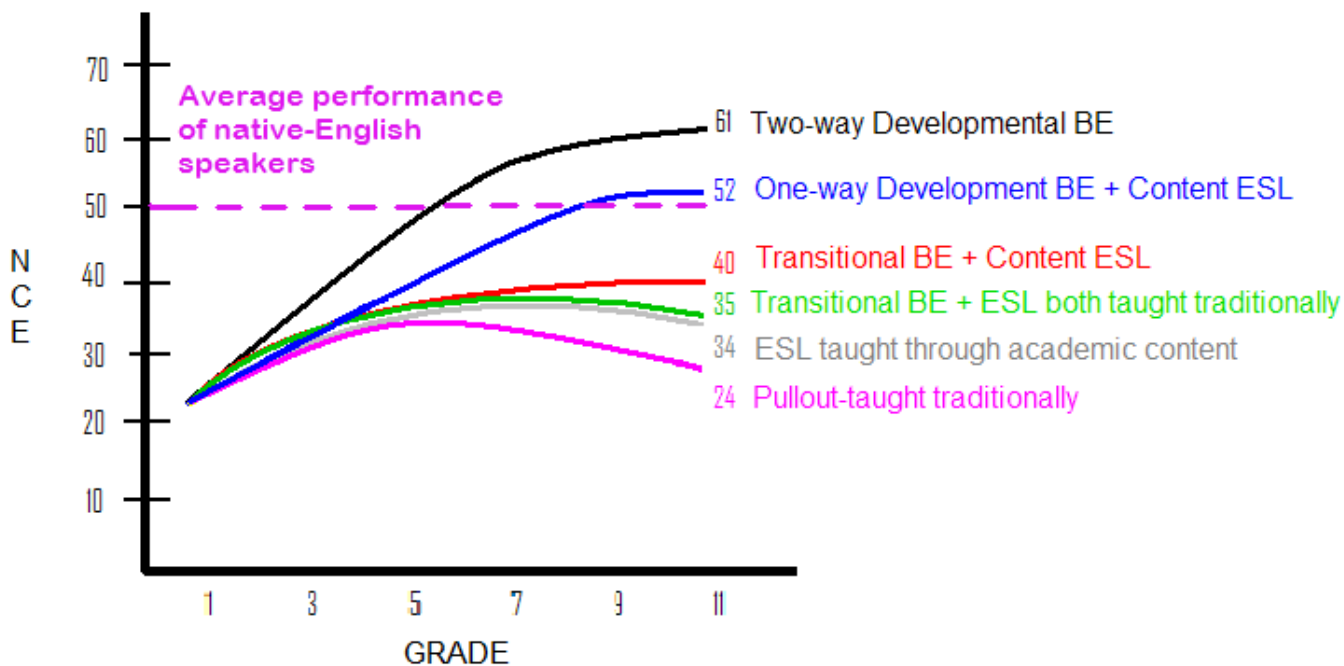


Table 1. Thomas and Collier, 2002

Artiles et al. (2002 & 2005) found that students identified as ELLs, who are in English-only academic settings, were three times more likely to be referred for special education testing. Their results suggest that ELLs without special language support have more academic difficulties and that educators are often responding by referring the students for special education testing.

What Does Typical Second Language Learning Look Like

In addition to knowing the academic benefits of different school programming, especially special language programming, evaluation professionals must be aware of the second language acquisition process in order to correctly understand whether an ELL student's difficulties in general education are typical challenges that many ELLs experience or if the difficulties reflect a learning or developmental disability. To distinguish between language difference vs. language disorder issues, evaluation professionals must have a fundamental understanding of how a second language is normally learned in order to identify delayed development.

Jim Cummins (1984) describes two broad levels of proficiency in a language: (1) conversational and (2) academic proficiency. Conversational proficiency, sometimes referred to as **basic interpersonal communication skills (BICS)**, takes ELLs 1 to 3 years, on average, to acquire. On the other hand, academic proficiency, known as **cognitive/academic language proficiency (CALP)**, takes ELLs 5 to 7 and even up to 10 years to acquire. Cummins uses an iceberg metaphor to illustrate BICS and CALP. BICS is the more visible part of language and is metaphorically represented as the "tip of the iceberg", while CALP is the less visible, "under the surface" part of the iceberg. For individuals with two languages, the iceberg metaphor is continued by illustrating the two languages as two overlapping icebergs intersecting in the cognitive/academic aspects of language. The common underlying proficiency of the two languages appears to be in the more complex aspects of language. Thus, a well-developed first language (L1) promotes the development of a second language (L2).

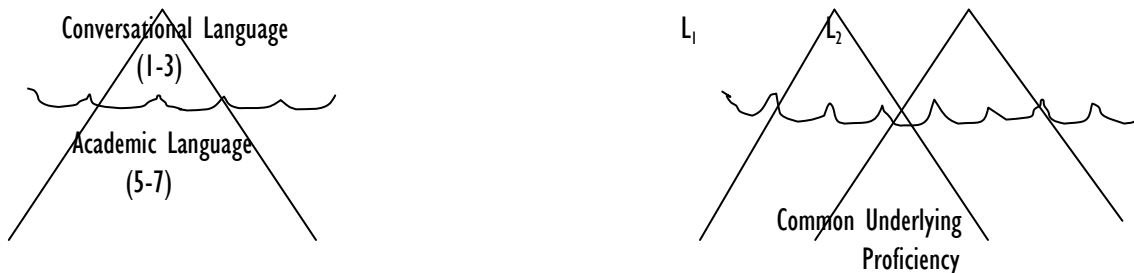


Figure 1. Jim Cummins' Iceberg Metaphor

Native Language Loss When a Second Language is Introduced

Another important characteristic of second language learning is the language loss phenomena, attrition of a first language as the second language begins to play a more significant role (Schmid and Köpke, 2007). Students in all-English programs (i.e. immersion, ESL, parent denial, etc.) experience the greatest native language loss, but students attending bilingual education programs also experience some language loss of their first language.

Evaluation professionals need to be aware that the majority of students who have been learning English for 2 to 4 years are not only still in the second language acquisition process of English, but also experiencing language loss of their first language. Thus, oral language fluency may reflect below average skills in both languages.

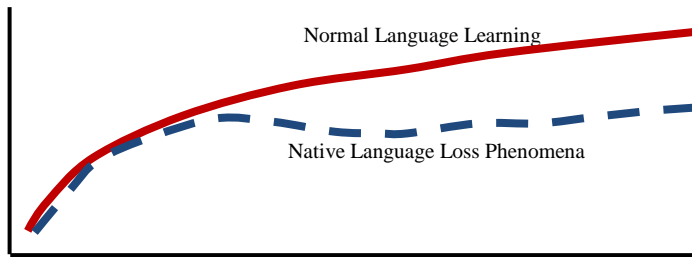
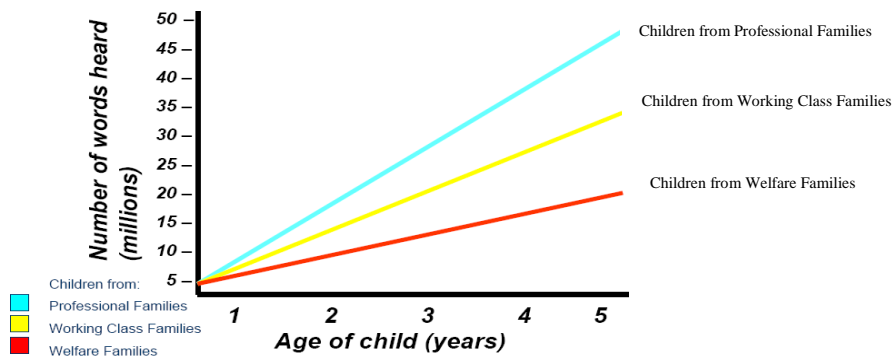


Figure 2. Native Language Loss Phenomena

Impact of Socioeconomic Status on Language Learning

There is ample evidence that vocabulary is associated with socioeconomic status (Beck et al., 2002; Biemiller, 2001). Families with low socioeconomic status often lack the financial, social, and educational supports and may have limited access to community resources to promote and support their children’s development and school readiness. The listening vocabulary of children of professional families versus children of welfare families can differ by as much as a 30 million word difference by age five (Biemiller, 2001). Evaluation professionals often have to consider and factor in both linguistic diversity and socioeconomic status to their students’ test results.



Biemiller, 2001

Table 2. Cumulative Language Experiences in Children 1 to 5 Years of Age.

Best Practices Before Testing

Response to Intervention (Rtl) for Students Experiencing Academic Difficulty

As part of the general education classroom environment, the use of a systematic process for determining whether a student responds to evidence-based interventions is encouraged and considered best practice before special education referral is considered for students having academic learning difficulty. This systematic process, which is referred to as **Response to Intervention or Rtl**, is often characterized as a multi-tiered approach. If a student is not performing in the general education classroom, Tier 1, then the student is offered a differentiated, evidence-based, and regularly monitored intervention, referred to as Tier 2. For students who do not respond to the Tier 2 intervention, some school districts are interpreting Tier 3 as special education, while other districts are offering another, more intense general education Tier 3 intervention. A Tier 3 general education intervention is considered best practice because it gives the student more opportunity outside of special education.

At present, evidence-based Rtl for CLD students beyond general education (Tier 1) is somewhat problematic because of a lack of a research base. Only a few studies of Tier 2 & Tier 3 Rtl include or focus on CLD students and those typically have been conducted with English-only interventions, few have been conducted with the students' native language. Thus, because of this paucity of a research base, Tier 2 (and Tier 3) in general education for CLD students should be implemented and interpreted with caution.

Rtl of CLD students should be conducted by educators who understand bilingualism, cultural diversity, and second language learning. Utilization of the Rtl process in the identification of a Specific Learning Disability (SLD) is considered best practice, but it is also considered insufficient by itself for the accurate identification of SLD due to the paucity of research and the full implementation of evidence-based Rtl for students who are culturally and linguistically diverse. More information on the Rtl process in the identification of SLD can be found on pages 27 to 30.

Instructional Consultation Teams

Instructional Consultation (IC) Teams are composed of teachers, counselors, and instructional coaches who support their fellow teachers' professional capacity by providing school-based problem solving of academic and behavior difficulties for students K-12. IC Teams problem-solve student's difficulties prior to consideration for special education referral. These teams provide a systematic, data-based support to classroom teachers and are considered best practice prior to special education referral. IC Teams can assist in distinguishing if the difficulty that the student

is exhibiting is primarily related to linguistic diversity, cultural factors, socioeconomic issues, and/or other environmental differences. The IC Teams should include members who are knowledgeable about linguistic and cultural differences, so that recommendations specific to the needs of CLD students can be made. Gravois and Rosenfield (2006) found that schools implementing IC Teams documented significant decreases in the risk of minority student being referred to and placed in special education.

Cultural Diversity

Educators typically address issues of linguistic diversity, but forget the cultural diversity of the student and its impact on student learning. Cultural diversity, however, can influence all aspects of parenting, social interactions, and learning. Additionally, culture is fluid and multifaceted, thus adding a level of complexity many educators are not trained to address.

Klinger and Edwards (2006) propose that instruction for all students should be culturally-responsive because culture is involved in all learning. In 1996, Wiley developed a framework for conceptualization of culturally-responsive instruction that includes accommodation, incorporation, and adaptation. Accommodation refers to understanding the communicative styles and literacy practices of the student and to integrate these styles and practices into instructional delivery. Incorporation involves studying community practices and incorporating them into the curriculum. Additionally, incorporation means acknowledging that much can be learned from other cultures. In adaptation, children and adults either acculturate to the school culture or become skilled at living and learning within the norms of those who control the schools. The adaptation process is the most controversial of the processes and it can produce conflict.

Special Concerns

Disproportionality in Special Education

Individuals with Disabilities Education Act (IDEA) 2004 pronounces disproportionality in special education based on “race” and ethnicity as a critical concern in the United States. IDEA 2004 requires that states have policies and procedures in place designed to prevent disproportionate representation by “race” and ethnicity. IDEA 2004 further requires that states collect and monitor the data of local educational agencies to determine if disproportionality is a problem.

IDEA 2004, Sec. 300.646 on Disproportionality.

(a) General. Each State that receives assistance under Part B of the Act, and the Secretary of the Interior, must provide for the collection and examination of data to determine if significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State with respect to--

- (1) The identification of children as children with disabilities, including the identification of children as children with disabilities in accordance with a particular impairment described in section 602(3) of the Act;*
- (2) The placement in particular educational settings of these children; and*
- (3) The incidence, duration, and type of disciplinary actions, including suspensions and expulsions.*

(b) Review and revision of policies, practices, and procedures. In the case of a determination of significant disproportionality with respect to the identification of children as children with disabilities, or the placement in particular educational settings of these children, in accordance with paragraph (a) of this section, the State or the Secretary of the Interior must—

- (1) Provide for the review and, if appropriate revision of the policies, procedures, and practices used in the identification or placement to ensure that the policies, procedures, and practices comply with the requirements of the Act.*
- (2) Require any LEA identified under paragraph (a) of this section to reserve the maximum amount of funds under section 613(f) of the Act to provide comprehensive coordinated early intervening services to serve children in the LEA, particularly, but not exclusively, children in those groups that were significantly overidentified under paragraph (a) of this section; and*
- (3) Require the LEA to publicly report on the revision of policies, practices, and procedures described under paragraph (b)(1) of this section.*

IDEA 2004, Sec. 300.173

Overidentification and disproportionality—The State has in effect, consistent with the purposes of this title and with section 618(d), policies and procedures designed to prevent the inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities, including children with disabilities with a particular impairment described in section 602.

Schools are encouraged to be knowledgeable of the issues facing students who come from culturally and linguistically diverse backgrounds and to exercise prudence and caution during special education identification, in order to reduce disproportionality in special education. For example, an RtI program that does not take into consideration the special needs of CLD students could trigger more disproportionality. Another example that could lead to disproportionate representation is the use of the **standard error of measurement (SEM)** in the determination of **mental retardation/intellectual disability (MR/ID)** without the essential understanding & knowledge of CLD factors and collaboration of other information & data sources.

Equal and Meaningful Access to Special Education

CLD students cannot be prohibited access to any service, program, activity, or opportunity that other students enjoy. This is a basic civil right of every individual in the United States, whether they speak another language or have a disability. Both Title VI of the Civil Rights Act and the Equal Education Opportunity Act of 1974 prohibit this denial of equal access to services of federally assisted programs. Thus, school districts and charter schools must take the appropriate action necessary to overcome any language challenges that impede equal participation by its CLD students in Rtl and special education.

Title VI - Civil Rights Act of 1964

Sec. 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin.

"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." *(highlighting added)*

Equal Education Opportunity Act of 1974

Title 20, Chapter 39, Subchapter I, Part 2, Section 1703

Denial of equal educational opportunity prohibited

No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by -

- (a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;
 - (b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps, consistent with part 4 of this subchapter, to remove the vestiges of a dual school system;
 - (c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;
 - (d) discrimination by an educational agency on the basis of race, color, or national origin in the employment, employment conditions, or assignment to schools of its faculty or staff, except to fulfill the purposes of subsection (f) below;
 - (e) the transfer by an educational agency, whether voluntary or otherwise, of a student from one school to another if the purpose and effect of such transfer is to increase segregation of students on the basis of race, color, or national origin among the schools of such agency;
- or
- (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs. *(highlighting added)*

Special Education

Referral

For students who are ELLs, it is best practice that the **Language Proficiency Assessment Committee (LPAC)** be notified and consulted before a referral for special education is initiated. The LPAC committee may find it appropriate to re-convene and re-examine the student's programming before a referral is considered. The results of the LPAC committee can then be forwarded to the referral committee. The LPAC committee should also be notified of referred students who have exited within the last two years from a special language program (ESL, bilingual education, etc.) since former ELLs are required to be monitored by LPAC for two years after exit.

Texas Education Code 29.063

(c) The language proficiency assessment committee shall:

(4) monitor the progress of students formerly classified as limited English proficiency who have transferred out of the bilingual education or special language program and, based on the information, designate the most appropriate placement for such students;

Office of Civil Rights vs. Denver Public Schools, 1995

The September 1991 memorandum states that, once exited from the alternative language program, former LEP students should be able to participate meaningfully in the mainstream educational environment. That is, they should be able to keep up with their non-LEP peers academically and participate meaningfully in essentially all aspects of the curriculum without the use of simplified English materials. In order to implement this requirement, districts should monitor the academic progress of former LEP students on an individual basis.

The referral committee should include an LPAC representative who will speak to the linguistic diversity and special language programming of students identified as ELLs and of former students who have exited ELL category within the last two years. The LPAC representative should gather, share, and help interpret the following information to the other members of the referral committee:

- Student's native language,
- Number of years exposed to and quality of the native language,
- Age English was introduced,
- Number of years exposed to and quality of English language, and
- Special language programming, amount of time in these programs, and performance outcome of the student.

In the referral committee meeting, the student's cumulative folder should be reviewed. Additional data that will need to be collected includes:

- (1) Previous school information, including schooling outside of the United States;
- (2) Attendance records;
- (3) Participation and performance in education programs, including any intervention programs;
- (4) Previous test results (historical test results, such as benchmarks, criterion-referenced assessments, and qualitative data are especially useful);
- (5) **Home Language Survey (HLS)** and the LPAC's language proficiency testing and recommendations;
- (6) History of language exposure and use; and
- (7) Cultural/lifestyle information.

For referrals that are approved for special education evaluation, the above-mentioned information and data should be included in the **Full and Individual Evaluation (FIE)** report.

Home Language Survey and Language Proficiency Testing by LPAC. There are federal and state laws that require that the parent(s) of all students who first enter school, or the student if 16 years old or older, complete a HLS. If the HLS indicates a language other than English, then the LPAC must conduct language proficiency testing in English in listening, speaking, reading, and writing (listening and speaking only required for students below the 2nd grade). If the school district is required to have bilingual education programs because the number of language minority students enrolled in the district exceeds 19, then state law requires that language proficiency testing in Spanish in listening, speaking, reading and writing be conducted, if Spanish is the native language of the student. If Spanish is not the native language, the school district does informal language testing of the student's native language proficiency.

It is important for school districts and charter schools to understand that these federal and state laws can not be disregarded for students with severe disabilities. Students with severe disabilities may require a different kind of language proficiency evaluation and the testing may need to be conducted by special education evaluation professionals, but the requirement must be met.

Exclusionary Clauses. For a special education referral, observed educational difficulties cannot primarily be the result of an environmental, cultural, or economic factor. It is for this reason that it is important to know and take into account the cultural and socioeconomic background of the student.

Informed Consent. If the referral committee determines that referral for special education evaluation is appropriate, parents/adult students must be informed in their native language or other form of communication of their procedural safeguards and any evaluation procedures the school district proposes to conduct. For some parents, informed consent may mean a verbal explanation in the parent's native language using parent-friendly language. There should be written evidence that informed consent has been met.

IDEA 2004

Consent means that—(a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication; *(highlighting added)*

IDEA, Sec. 300.503

(c) Notice in understandable language.(1) The notice required under paragraph (a) of this section must be--(i) Written in language understandable to the general public; and(ii) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.(2) If the native language or other mode of communication of the parent is not a written language, the public agency must take steps to ensure--That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication; (ii) That the parent understands the content of the notice; and (iii) That there is written evidence that the requirements in paragraphs (c)(2)(i) and (ii) of this section have been met.

Evaluation Process

Procedural Rights and Parent Participation. All forms, including procedural safeguards and prior written notice of evaluation must be in the native language of the parent or in a language the parent fully understands. A parent must be encouraged and given the opportunity to be a full participant in their child's special education process.

IDEA 2004

Procedural Safeguards Notice

Contents.—The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents (unless it clearly is not feasible to do so) and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to (A) independent educational evaluation; (B) prior written notice; (C) parental consent; (D) access to educational records; (E) the opportunity to present and resolve complaints, including—(i) the time period in which to make a complaint; (ii) the opportunity for the agency to resolve the complaint; and (iii) the availability of mediation; (F) the child's placement during pendency of due process proceedings; (G) procedures for students who are subject to placement in an interim alternative educational setting; (H) requirements for unilateral placement by parents of children in private schools at public expense; (I) due process hearing, including requirements for disclosure of evaluation results and recommendations; (J) State-level appeals (if applicable in that State); (K) civil actions, including the time period in which to file such actions; and (L) attorneys' fees. *(highlighting added)*

IDEA 2004

Procedural Safeguards.

(4) Procedures designed to ensure that the notice required by paragraph (3) is in the native language of the parents, unless it clearly is not feasible to do so. (highlighting added)

IDEA 2004

Consent for Initial Evaluation.—The agency proposing to conduct an initial evaluation to determine if the child qualifies as a child with a disability as defined in section 602 shall obtain informed consent from the parent of such child before conducting the evaluation. Parental consent for evaluation shall not be construed as consent for placement for receipt of special education and related services.

Student P. v. Edgewood ISD,

185-SE-195

Mrs. P. (petitioner's parent) speaks some English, but requires proficient translation into Spanish of all matters related to the education of Student P. in order to satisfy the requirements of IDEA. (parenthetical information added)

...Mrs. P. could not meaningfully participate in creating this very important component of Student's P. IEP if she was only aware of a part of the document.

The **Admit, Review, & Dismissal/Individual Education Plan (ARD/IEP)** committee must ensure that the parent understands the proceedings including arranging an interpreter at meetings and translation of forms or audio recording of the proceedings. More in-depth information on the nature and type of interpreting and translation services needed for parents can be found in a guidance document provided by the Office of Civil Rights and found in Appendix C.

IDEA 2004

34 CFR 300.345 (e) Use of interpreters or other action, as appropriate. The public agency must take whatever action is necessary to ensure that the parent understands the proceedings of the IEP Team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English. (highlighting added)

IDEA 2004

34 CFR 300.501(c) (5) The public agency shall make reasonable efforts to ensure that the parents understand, and are able to participate in, any group discussions relating to the educational placement of their child, including arranging for an interpreter for parents with deafness, or whose native language is other than English.

Texas Administrative Code 89.1050

e) The written report of the ARD committee shall document the decisions of the committee with respect to issues discussed at the meeting. The report shall include the date, names, positions, and signatures of the members participating in each meeting in accordance with 34 CFR, §§300.321, 300.322, 300.324, and 300.325. The report shall also indicate each member's agreement or disagreement with the committee's decisions. In the event TEC, §29.005(d)(1), applies, the district shall provide a written or audio-taped copy of the student's IEP, as defined in 34 CFR, §300.324 and §300.320. In the event TEC, §29.005(d)(2), applies, the district shall make a good faith effort to provide a written or audio-taped copy of the student's IEP, as defined in 34 CFR, §300.324 and §300.320.

Personnel Qualifications. Evaluation professionals must have the skills, as well as be adequately prepared and trained to provide services to CLD students. Best practice dictates that for conducting an evaluation for a bilingual or multilingual student or for a student monolingual in a language other than English, an evaluation professional must be:

- a) Fluent and literate in the languages spoken by the student;
- b) Knowledgeable of the student's culture; and
- c) Trained on evaluation materials and practices appropriate for the CLD student.

School districts should actively strive to achieve "best practice". In testing situations, when best practice cannot be achieved, school districts must continue to ensure that evaluation professionals involved in the testing are knowledgeable of cultural and linguistic issues and have the necessary training on evaluation materials and practices appropriate for CLD students.

IDEA 2004

Personnel Qualifications.—

(A) In general.—The State educational agency has established and maintains qualifications to ensure that personnel necessary to carry out this part are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities.

IDEA 2004

(3) Additional Requirements.—Each local educational agency shall ensure that—(A) assessments and other evaluation materials used to assess a child under this section—(i) are selected and administered so as not to be discriminatory on a racial or cultural basis; (ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer; (iii) are used for purposes for which the assessment or measures are valid and reliable; (iv) are administered by trained and knowledgeable personnel; and (v) are administered in accordance with any instructions provided by the producer of such assessments; . . . (highlighting added)

Ancillary Examiners. As mentioned earlier, best practice in the personnel qualifications of a bilingual evaluation of a CLD student is a bilingual, biliterate, and bicultural evaluation professional. Unfortunately, qualified examiners may be unavailable in some localities and, as a result, other viable and practical approaches may become necessary to ensure that services are delivered, albeit not in the best possible fashion. One such approach is the primary/ancillary examiner team approach to testing.

In the primary/ancillary examiner team approach, the primary examiner is the fully certified, endorsed, or licensed evaluation professional assigned the case, but who does not speak the language spoken by the student. The primary examiner has basic training in second language acquisition, socioeconomic and cultural implications, special language programming, and in bilingual special education evaluation. The primary examiner also is knowledgeable of the available tests and forms (nonverbal, low-verbal, and bilingual) in the language of the student.

The ancillary examiner is a trained individual, usually employed by the school district, who is fluent and literate in English and the target language and has received training on the administration of tests in the target language. Before administering any test, the ancillary examiner receives documented training in the administration of the test and in the issues of confidentiality of student information and test security. Because the ancillary examiner administers tests that are already in the target language; no interpretation or translation of test materials is needed, thus the test administration should follow standardized procedures.

The primary examiner administers all tests in English, as well all non-verbal tests; while the ancillary examiner administers tests in the “other” language of the student. In the primary/ancillary examiner team approach to special education testing, the ancillary examiner administers tests only in the presence of the primary examiner. The primary examiner is responsible for scoring and interpretation of all test results, including the test results in the “other” language.

Health and Human Services, HHS

Selecting Language Assistance Services

Recipients have two main ways to provide language services: oral and written language services (interpretation and translation, respectively). Regardless of the type of language service provided, quality and accuracy of those services is critical to avoid serious consequences to the LEP person and to the recipient.

Interpreters/Translators. When tests are unavailable in the native language of the student and native language testing is necessary for a complete understanding of the student’s academic, emotional, or behavioral situation, evaluation professionals may be forced to use interpreters in the assessment process. The interpretation of a test by an interpreter should be carried out with caution. Interpretation of tests often invalidates the test scores, but the evaluation professional may still consider the procedure worth the time if the effort yields some valuable

diagnostic information. The quality and accuracy of the oral interpretation must be monitored carefully. For example, an “on the spot” oral translation of a test can yield more misinformation than information about the student. A somewhat better approach is to translate the test in writing into the target language prior to administering the test. This approach, however, may require the consent of the test publisher.

According to Lopez (2002), when working with an interpreter, evaluation professionals should:

- Select interpreters who have high proficiency in both languages.
- Provide the interpreter with an overview of the purpose of the session. This should include a description of the activities that should take place, the purpose of the translation session, and the context of the student's situation.
- Address issues related to confidentiality and describe boundaries of confidentiality.
- Provide the interpreter with the opportunity to review all assessment materials prior to the evaluation.
- Discuss technical terms that will be used during the session.
- Speak in short sentences and allow time for the interpreter to translate.
- Take notes relevant to any issues that need to be addressed during debriefing.
- After assessment sessions, discuss cross-cultural issues relevant to the student's responses and behavior and any problems that may have surfaced during the sessions.
- Encourage the interpreter to ask questions regarding the session.

American Psychological Association, Standard 9.11

When an interpreter is used in testing, the interpreter should be fluent in both the language of the test and the examinee's native language, should have expertise in translating, and should have a basic understanding of the assessment process.

Comment: *Although individuals with limited proficiency in the language of the test should ideally be tested by professionally trained bilingual examiners, the use of an interpreter may be necessary in some situations. If an interpreter is required, the professional examiner is responsible for ensuring that the interpreter has the appropriate qualifications, experience, and preparation to assist appropriately in the administration of the test. It is necessary for the interpreter to understand the importance of following standardized procedures, how testing is conducted typically, the importance of accurately conveying to the examiner an examinee's actual responses, and the role and responsibilities of the interpreter in testing.*

p. 100

The use of the primary/ancillary examiner team approach and/or the use of interpreter or translator in the testing process must be carefully documented on the (1) test record forms, (2) evaluation report, and (3) ARD/IEP committee reports.

Evaluation Procedures. IDEA 2004 requires that procedures be in place to ensure that testing and evaluation procedures be both selected and administered so as not to be racially or culturally discriminatory. Assessment and evaluation materials used in the evaluation and placement of children with disabilities:

- Must be selected and administered so as not to be discriminatory;
- Administered by trained personnel;
- Administered in accordance with any instructions provided by the producer of the assessment; and,
- Be administered in the language and form most likely to yield accurate information.

IDEA 2004

Procedural Safeguards.—

(B) Additional Procedural Safeguards.—Procedures to ensure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of children with disabilities for services under this title will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

IDEA 2004

(c) *Other evaluation procedures.* Each public agency must ensure that—

(1) Assessments and other evaluation materials used to assess a child under this part—

- (i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;
- (ii) Are provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;
- (iii) Are used for the purposes for which the assessments or measures are valid and reliable;
- (iv) Are administered by trained and knowledgeable personnel; and
- (v) Are administered in accordance with any instructions provided by the producer of the assessments.

Oral Language Proficiency and Dominance Testing. Assessment of oral language proficiency in English and the student's other language(s) should be the initial step of the evaluation process for students who are CLD. Comparison of the student's test performance in the two languages, along with qualitative and quantitative information, will help determine the student's language dominance or stronger language. The results of the oral language proficiency and dominance testing provide a backdrop for the remainder of the testing and the interpretation of the results. Oral language proficiency and dominance testing serves many purposes.

- Results from the oral language proficiency and dominance testing helps determine if the student has had meaningful access to general education instructional programs.

- Test results aid in understanding the student's success or lack of success in general education and the Rtl process.
- These test results will aid in determining the language(s) of the other tests to be administered.
- Testing provides important information on the student's listening comprehension and oral expression, two of the eight SLD areas.
- Oral language proficiency testing and the additional qualitative and quantitative information gathered provide diagnostic information regarding the student's learning progress.
- Oral language proficiency testing and the additional qualitative and quantitative information gathered guide the school staff in providing the necessary, qualified personnel to conduct the evaluation and services.
- The student's performance in the two languages gives the members of the ARD/IEP committee information which can help determine the language of instruction for special education services.

Determining dominance is best accomplished by using parallel and statistically equated oral language tests. Parallel measures of oral language assess the same tasks, but in two different languages. For example, if the English oral language instrument has a vocabulary and a verbal analogies test, so does the parallel Spanish oral language instrument. Determining dominance by comparing tests that are not parallel can result in comparing tests that measure different aspects of oral language. "Unparallel" oral language tests may be acceptable for assessing proficiency levels in each of the languages, but can be a significant obstacle in comparing the two languages to determine language dominance. For students with a very definite stronger language, parallelism may not be a critical issue and the evaluation professional may deem it appropriate to use different oral language tests or to do informal oral language testing in the non-dominant language.

In statistically equated tests, parallel tests in two different languages have undergone an additional statistical step in their development. The evaluation professional has more confidence in comparing the oral language scores in two languages that have been statistically equated. Consequently, there is less possibility of error in determining the student's oral language dominance.

If tests are unavailable in the student's native language, informal assessment measures (i.e. language sample, oral story retelling, storytelling, evaluation of receptive vocabulary, etc.) will be necessary to aid in oral language proficiency and dominance testing. It is important to note that informal testing is not, in and of itself, inferior testing. Informal testing can yield critical diagnostic information, but it does require more training and preparation than formal testing.

The results of the oral language testing must be interpreted in light of the student's years of exposure to that language, as well as to the type, quality, and appropriateness of the educational programming, especially

special language programming. Additionally, socio-economic and cultural issues and their impact need to be factored into the interpretation of the test results. Formal oral language testing should never be the only information used to determine oral language proficiency and dominance.

OCR v. Denver Public Schools

LEP Students With Disabilities

In order to account for the effect of language on test results, staff persons at some school districts consider students' "dominant language" or "primary language," often using the terms interchangeably. However, determining that a student is dominant in English is not equivalent to determining that the student is proficient in the language skills required to produce valid, reliable results on a special education evaluation instrument.

OCR v. Denver Public Schools

LEP Students With Disabilities: Evaluation

OCR received several forms used in the pre-referral, referral, and placement process, some of which are specifically for use with language-minority students. One example, the Pre-Referral Background Information and Language Survey for Limited English Proficient Children form, is used to determine "language dominance." Like the other forms furnished to OCR, the instructions on this form limit its use to students who have already been identified as LEP, and includes no space to record objective assessment of proficiency in English or any other language. The determination of "language dominance" is not based on a comparison of objective assessment of proficiency in two or more languages. Rather, staff persons are invited to draw a judgment of language dominance based on subjective information regarding the student's language use and background. The person completing the form, who is not necessarily qualified to administer special education testing instruments, may suggest the language to be used for testing.

As mentioned on pages 7 and 8, when interpreting the results of an oral language proficiency evaluation, several factors must be thoughtfully taken into account. Low language skills have been found to be directly related with low socio-economic status (Oller & Eilers, 2002). This is especially true of vocabulary knowledge in the early childhood years. Another issue to consider is native language loss when a second language is introduced, known as the Native Language Loss Phenomenon. (Wilén, 2005). Thus, students learning English as a second language will score low in the new language which they are learning, but often also score below average in their native language which they are losing or are no longer developing. As a result, bilingual students can look delayed in both of their languages for a period of time during the second language acquisition process.

Seven-year-old Maria is a second language learner of English. Her native and home language is Spanish. She has been exposed to English in school for the last three years. Maria's Spanish language skills have not been developed or maintained in the school setting. Oral language proficiency testing indicated below average Spanish language skills and low English language skills. The evaluation professional concluded that Maria's Spanish oral language skills were below average because of the native language loss phenomenon, as well as the lack of academic maintenance and development of her Spanish language abilities in school. The evaluation professional also determined that Maria's low English language skills were the direct result of the second language learning process and were generally commensurate for an ELL student of her age who had only three years of English language exposure.

Two models that help in test selections based on the results of the oral language proficiency and dominance testing have been developed. One of these is the Ochoa and Ortiz **Multidimensional Assessment Model for Bilingual Individuals (MAMBI)** (Rhodes et al., 2005) and the other is the Bilingual Cross-Battery Psycho-Educational Testing Table developed by Criselda Alvarado (www.educationeval.com). Regardless of the model utilized, test selection is based on the following important variables:

- Language profile of the student,
- Instructional programming/history (English, native language, bilingual),
- Current age or grade level,
- Assessment modality/form judged most appropriate for the student (i.e. non-verbal assessment, low-verbal assessment, bilingual testing, etc.), and
- Availability of tests in the target language.

Lee is an 8 year old girl diagnosed with Down's syndrome. Her home language is Vietnamese. Since Lee was 3 years old, she has received special education services in a self-contained classroom taught by an English speaking teacher with the help of a bilingual (English/Vietnamese) paraprofessional. Lee's mother reports that her daughter says about 5 words in Vietnamese, but understands simple 4 to 6 word sentences in Vietnamese like "Do you want to eat?" and "Bring me your shoes." Lee's teacher reports that she has not heard Lee speak in English, although Lee does appear to understand some simple English directives. The parent, teacher, and evaluation professional agree from the information that Lee's receptive and expressive language skills are stronger in Vietnamese. The evaluation professional determines that a non-verbal test of cognitive abilities will be administered. Receptive and expressive language testing in English and Vietnamese will be part of the evaluation. Criterion-referenced testing of academic skills in English and Vietnamese will also be conducted.

Cognitive Evaluation. IDEA 2004 requires that students be tested in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide and administer. Thus, unless it is clearly not feasible, evaluation professionals must not only take into account the student's dominant language, but also take into consideration the

form of the test that is most appropriate in view of the student's situation. Assessment modality or form of cognitive assessments may fall into one of the following categories (Rhodes et al., 2005, Alvarado, 2004):

- Both languages tested separately (L1 and L2)
- Bilingual assessment (combination of both languages; with one language serving as the foundation language of the test)
- Native language assessment (L1)
- Second language assessment (L2)
- Low-verbal (L1 or L2)
- Non-verbal

Twelve year old Ramón was referred to special education testing. He has demonstrated difficulty in reading and language arts. Ramón's parents speak primarily Spanish in the home, but Ramón's siblings speak English to each other. Oral language proficiency and dominance testing, as well as additional qualitative & quantitative information, indicated that Ramón was bilingual in English and Spanish, English dominant. The evaluation professional administered the bilingual scale of an English cognitive test.

IDEA 2004

(c) Other evaluation procedures. Each public agency must ensure that--

(1) Assessments and other evaluation materials used to assess a child under this part--

(i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) Are provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;

(iii) Are used for the purposes for which the assessments or measures are valid and reliable;

(iv) Are administered by trained and knowledgeable personnel; and

(v) Are administered in accordance with any instructions provided by the producer of the assessments.

(highlighting added)

. . . for a non-native speaker and for a speaker of some dialects of English, every test given in English becomes, in part, a language or literacy test. Test results may not reflect accurately the abilities and competencies being measured if test performance depends on these test takers' knowledge of English.

Standards for Educational and Psychological Testing

American Psychological Association

American Educational Research Association

National Council on Measurement in Education, 1985

It is important that evaluation professional understand and take into account the degree of the linguistic demand and cultural loading of the tests used. The **Culture-Language Classification Matrix (C-LIM)** can be used to assist in this process (Rhodes et al., 2005; Flanagan, Ortiz, & Alfonso, 2007). The C-LIM gives evaluation professionals a frame of reference to consider the level of language and culture embedded in standardized tests.

The C-LIM compares the student's score profile to a score pattern typical of linguistically diverse students. The evaluation professional can then look at the student's C-LIM profile and make a more knowledgeable assessment of the results.

Alma was administered the English form of a cognitive test and demonstrated an overall score of "Below Average". Close examination of her test scores, however, revealed that on the most culturally and linguistically-loaded subtests, Alma scored low, whereas on the less culturally and linguistically loaded subtests, she scored average. The evaluation professional concluded that the Alma's true general cognitive ability was underestimated due to cultural and linguistic factors.

For students who speak a language in which a cognitive test is not available, the evaluation professional may be limited to using a non-verbal format for cognitive testing. Additionally, students with severe oral language delays or impairments may necessitate non-verbal testing. It is important to note, however, the limitations of non-verbal testing of cognitive abilities. By their very nature, non-verbal cognitive tests restrict the testing. These tests often only encompass three or four cognitive areas, such as fluid reasoning, visual processing, short-term memory, and processing speed, but do not take into account other cognitive areas such as comprehension-knowledge, auditory processing, and long-term storage and retrieval. Limiting evaluation to non-verbal or performance measures can fail to identify genuine learning problems in verbal areas that require special education intervention and can fail to give an accurate representation of the student's overall general cognitive ability. The evaluation professional should use additional methods and information gathering to achieve as accurate a picture as possible of the student's cognitive abilities. The reason for omitting verbal measures should be documented in the report.

Adaptive Behavior Testing. Adaptive behavior scales administered to students must also be administered in the dominant language. Adaptive behavior scales requiring a parent interview must be administered in the preferred language of the parent. Adaptive behavior scales requiring a significant amount of teacher input should be completed by a teacher or teachers who can address both languages and is/are knowledgeable of the student's cultural background, as well as, is/are familiar with the student's adaptive behavior.

The evaluation professional should be cognizant that adaptive behavioral scales are sensitive to cultural influences. Parent rearing practices, as well as discipline, vary across cultures and thus can effect test scores. For example, some cultures emphasize toilet training by two years of age, while other cultures have a more lenient view of toilet training. In some cultures, children are given household responsibilities at a very young age; while in other cultures, children are generally only asked to be responsible for picking up after themselves.

In addition to cultural influences, socioeconomic issues can also affect the adaptive behavior test scores. For example, a 14-year-old student living in a high crime neighborhood may not be allowed to go out on his/her own.

Academic Evaluation. “The complexity of the (academic evaluation & interpretation) process is multiplied when culture, language, and unique life experiences are considered” (Rhodes et al., 2005, p.202) (parenthetical information added). Generally, the student’s educational exposure dictates the areas and language of the academic testing. However, an academic evaluation in English for all students should generally be attempted except in situations where it would be illogical. An academic screening may serve for students who have received limited or no formal instruction in the English language. This screening can serve as documentation and base-line data.

Vicente went to the kindergarten, first and second grade school in Mexico. His parents reported that he had serious academic difficulties in school in Mexico and that he was retained twice (once in the first and once in the second grade). His family moved to the U.S. and Vicente was placed in a bilingual education fourth grade classroom because of his age. At the end of the fourth grade, his classroom teacher initiated a referral for special education testing. The evaluation professional determined that because of his educational history, Vicente should be administered a full Spanish academic assessment and a brief English academic screener.

IDEA 2004

SPECIFIC LEARNING DISABILITY.—

(A) IN GENERAL.—The term ‘specific learning disability’ means a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.

(B) DISORDERS INCLUDED.—Such term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

(C) DISORDERS NOT INCLUDED.—Such term does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

As a general rule of thumb, if English language instruction has been received for one year or more, a comprehensive English academic evaluation should be conducted for baseline information and documentation. If the student has received instruction in a language other than English for one year or more, a comprehensive academic evaluation in that language (if tests are available) should be considered, unless there is sufficient evidence that such an evaluation is not appropriate (i.e. a high school student who received one year of bilingual education in first grade). An academic screening or informal evaluation of academic skills may serve for students who have received limited or no formal instruction in the native language.

If evaluation instruments are not available in the student’s native language, informal assessment (i.e. student relates an event or tells a story; student reads a passage in a grade level book in his/her native language; or student writes sentences, a paragraph, or a story in his/her native language, etc.) can provide an estimate of the student’s academic ability.

When students have gaps in their schooling, have received instruction in two or more languages, or began their English academic instruction not speaking English, the evaluation professional will want to interpret any standardized norm-referenced testing based on the years and quality of academic exposure in that language. For example, a 5th grade student from Honduras who has received English reading instruction for only the last two years scores a grade equivalent of beginning 3rd grade level. The educators find that this level of performance is quite good when considering the years of exposure and expect that with time and appropriate instruction, the student will achieve grade-level performance. Without factoring into the test results the number of years of exposure to English, educators might only notice that the student is performing below grade level. Another example of interpreting academic test results in light of the student's language exposure is the student who has received bilingual education during his/her elementary years, but RtI was delivered in English only. The evaluation professional will want to investigate the student's level of performance in the first language based on the amount and quality of native language instruction received and RtI performance based on that the student received intervention in a language he/she did not speak fluently.

The student's educational history, sociological/cultural/economic factors, and language background must be considered in the interpretation of test results and in the determination of eligibility. These factors should be documented in sufficient detail in the FIE report in order to judge the appropriateness of the eligibility decision.

Response to Intervention and Specific Learning Disability. IDEA 2004 mandates that underachievement in a child suspected of having a **Specific Learning Disability (SLD)** not be due to lack of *appropriate* instruction in reading or math. Before eligibility is determined, data must demonstrate that the student was provided appropriate instruction in general education settings, delivered by qualified personnel. Title VI of the Civil Rights Act of 1964, Lau vs. Nichols Supreme Court Case, and Executive Order 13166 define appropriate instruction for CLD students as "meaningfully accessible". Thus, RtI should also be meaningfully accessible to the at-risk CLD student for it to be considered appropriate and this could necessitate that the language of instruction in RtI be the native language of the student. Another piece that may need to be considered regarding the appropriateness of RtI is the consistency between the language of instruction in general education and the language of instruction in RtI.

IDEA 2004, § 300.307 Specific learning disabilities.

- (a) *General.* A State must adopt, consistent with § 300.309, criteria for determining whether a child has a specific learning disability as defined in § 300.8(c)(10). In addition, the criteria adopted by the State—
- (1) Must not require the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability, as defined in § 300.8(c)(10);
 - (2) Must permit the use of a process based on the child's response to scientific, research-based intervention; and (3) May permit the use of other alternative research-based procedures for determining whether a child has a specific learning disability, as defined in § 300.8(c)(10).

States are required to permit a process based on the child's response to scientific, research-based intervention, often referred to as RtI. The Department of Education developed the preceding table based on IDEA 2004's testing criteria. Highlighted information in Table 1 below has particular significance for ELLs.

Yes to:	Yes to ONE of THESE: Either (a)(2)(i) OR (a)(2)(ii)		Yes to:
(a)(1)	(a)(2)(i)	(a)(2)(ii)	(a)(3)
<p>(1)The child does not achieve adequately for the child's age or to meet State-approved grade-level standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child's age or State-approved grade-level standards:</p> <ul style="list-style-type: none"> (i) Oral expression. (ii) Listening comprehension. (iii) Written expression. (iv) Basic reading skill. (v) Reading fluency skills. (vi) Reading comprehension. (vii) Mathematics calculation. (viii) Mathematics problem solving. 	<p>(2)(i)The child does not make sufficient progress to meet age or State approved grade-level standards in one or more of the areas identified in paragraph (a)(1) of this section when using a process based on the child's response to scientific, research-based intervention.</p>	<p>(ii)The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with §§ 300.304 and 300.305</p>	<p>(3)The group determines that its findings under paragraphs (a)(1) and (2) of this section are not primarily the result of--</p> <ul style="list-style-type: none"> (i)A visual, hearing, or motor disability; (ii)Mental retardation; (iii) Emotional disturbance; (iv)Cultural factors; (v)Environmental or economic disadvantage; or (vi)Limited English proficiency.

Table 3: Department of Education Table

The **National Association of School Psychologists (NASP)** position statement on the identification of students with specific learning disabilities advocates the use of a multi-tiered model in the identification process. The position statement describes the three tiers and issues related to CLD students are addressed. The three text boxes below present the CLD-related information in that document according to the tier. Tier 1 emphasizes the critical nature of utilizing research-supported methods and approaches with CLD students in general education before beginning RtI.

Tier 2 draws attention to the appropriateness of the language of instruction in the intervention phase, while Tier 3 stresses the issues related to cultural-sensitivity and second language learning.

NASP Position Statement on Identification of Students with Specific Learning Disabilities

Tier 1

Teachers of culturally and linguistically diverse students should use teaching methods and approaches that are research-supported for these populations, and should receive the training they need to be qualified teachers of diverse students.

NASP Position Statement on Identification of Students with Specific Learning Disabilities

Tier 2

For students with cultural and/or linguistic diversity, lack of satisfactory progress may not constitute a learning disability if the language of the Tier 2 services was not accessible for the student or if the services were inappropriate for the student's culture.

NASP Position Statement on Identification of Students with Specific Learning Disabilities

Tier 3

In making a determination of eligibility, the evaluation team also considers whether the determining factor is the lack of appropriate instruction in reading, math, limited English proficiency, or cultural differences. Evaluation teams should consider whether the multi-tiered interventions and assessment techniques utilized are culturally sensitive and adequately address the issues related to English Language Learners.

Best Practice Regarding the RtI Process and CLD Students. Although, federal regulations permit the use of the RtI model for the identification of a SLD, best practice dictates that for students experiencing academic difficulties, especially students identified as CLD, a comprehensive evaluation of cognitive strengths and weaknesses and academic achievement testing be conducted. An RtI model alone provides only for the appropriate teaching of CLD students and the identification of those students who do not respond to this teaching, but this process normally does not explain why the student did not respond, nor if the student has a SLD.

Best practice dictates, that when a student is experiencing difficulties in one or more of the eight academic areas outlined, (a) an RtI process should be implemented; (b) oral language proficiency and dominance testing should be conducted; (c) cognitive testing of psychological processes should be completed to determine strengths and weaknesses; and (d) if appropriate, academic testing in the student's native language and possibly also English

should be administered. Additionally, a SLD cannot be determined if the findings are primarily the result of a visual, hearing, or motor disability; mental retardation; emotional disturbance; cultural factors; environmental or economic disadvantage; or limited English proficiency.

IDEA 2004

30) Specific learning disability.--

(A) In general.--The term 'specific learning disability' means a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. (highlighting added)

(B) Disorders included.--Such term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

(C) Disorders not included.--Such term does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

NASP Position Statement on Identification of Students With Specific Learning Disabilities

- Specific learning disabilities are endogenous in nature, and are characterized by neurologically-based deficits in cognitive processes;
- These deficits are specific, that is, they impact particular cognitive processes that interfere with the acquisition of formal learning skills;
- Specific learning disabilities are heterogeneous—there are various types of learning disabilities, and there is no single defining characteristic common to all learning disabilities; . . .

Reevaluations. Some additional issues that need to be addressed when determining if conditions warrant comprehensive testing for reevaluation of CLD students are:

- Students who are in the second language process can experience dramatic changes between initial evaluation and reevaluation.
- Testing practices may have significantly changed from the initial evaluation.
- More appropriate and equitable standardized tests may now be available that were previously not available.

Interpretation of Test Results and Evaluation Data

Test results should never be interpreted in isolation and this is especially true with students with CLD backgrounds. Results must be interpreted in light of the quality and amount of exposure in the language of the test. Other factors that need to be considered are relevant cognitive, affective, environmental, cultural, and socio-economic characteristics. The evaluation report should have sufficient information documented regarding all these characteristics to enable the reader of the report to understand how the test results were interpreted.

For an evaluation of a specific learning disability, it is important to determine and document that the student has received appropriate reading and writing instruction in general education.

Office of Civil Rights v. Denver Public School

LEP Students With Disabilities

In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with § 104.34. [34 C.F.R. § 104.35(c)]

Office of Civil Rights v. Denver Public Schools

LEP Students With Disabilities: Evaluation

OCR also observed in language-minority student files several examples of staff persons disregarding the advice of evaluators that unknown effects of language-related criteria affect the reliability of the results, and should be considered when looking at test scores.

IDEA 2004

Special Rule for Eligibility Determination.—In making a determination of eligibility under paragraph (4) (A), a child shall not be determined to be a child with a disability if the determinant factor for such determination is—(A) lack of appropriate instruction in reading, including in the essential components of reading instruction (as defined in section 1208(3) of the Elementary and Secondary Education Act of 1965); (B) lack of instruction in math; or (C) limited English proficiency.

Evaluation Report

The evaluation report should include:

- The qualifications of the evaluation personnel (bilingual evaluation professional, primary/ancillary examiner team, etc.).
- Evaluation practices utilized (standardized vs. unstandardized) (norm-reference or criterion-referenced).
- Evaluation accommodations and/or modifications (acceptance of responses in a language other than the language of the test, oral translation, etc.).
- Language(s) of the test.
- Report oral language proficiency and dominance testing, including
 - Results of the Home Language Survey

- Teacher checklists on student's receptive and expressive language skills in English and in the native language of the student
- Previous and current language proficiency testing conducted by LPAC
- Parent information on student's language skills
- Parent information on language spoken at home by family members and the student
- LPAC recommendations
- If age and ability appropriate, student self-report on their language skills
- Relevant sociological/cultural information
- Educational opportunity information
 - Previous schooling
 - Previous schooling in another country
 - Any interruptions in schooling
 - Previous and current alternative language programming (ESL, native language education, etc.)

The evaluation team must consider and document environmental, cultural, and economic factors that may be contributing to the student's behavior and learning patterns. If the team determines that the difficulties the student is experiencing are primarily due to environmental, cultural, or economic factors, then eligibility must not be established.

If the parent(s) or guardian(s) of the student is/are unable to read the evaluation report because of language difference, literacy, or visual issues; an evaluation professional should provide the information orally to the parent(s)/guardian(s) in their native language prior to the IEP meeting. If the evaluation professional is unable to fully communicate with the parent(s), an interpreter should be used. The interpreter must have the skills necessary to accurately, fully, and impersonally interpret the proceedings of this meeting.

ARD/IEP Meeting

For students who are classified as ELL or students who have been exited from the ELL classification within the last two years, an LPAC representative should attend the IEP meeting to help address linguistic diversity issues. Additionally, if the parent or guardian of the student speaks a language other than English or cannot fully participate as a meaningful member of the IEP committee because of language difference issues, an interpreter must be present at the meeting. The IEP committee must consider and document environmental, cultural, and economic factors that may be contributing to the student's behavior and learning patterns and determine their impact on the

evaluation results and student's academic progress. Additionally the IEP committee must deliberate appropriate instructional placement and programming for the student, including the language of instruction in special education.

IDEA 2004

(B) Consideration of Special Factors.—The IEP Team shall—

(ii) in the case of a child with limited English proficiency, consider the language needs of the child as such needs relate to the child's IEP.

The IEP committee cannot refuse special education services solely because the student is identified as an ELL. An LPAC cannot reclassify a student as non-LEP solely because the student is identified as qualifying for special education services. A student who qualifies for both special education and alternative language programs is best served in both programs.

For parents requiring an interpreter at the IEP meeting, the school district should provide the parents a written or audio-taped copy of the IEP proceedings.

Texas Administrative Code 89.1050

e) The written report of the ARD committee shall document the decisions of the committee with respect to issues discussed at the meeting. The report shall include the date, names, positions, and signatures of the members participating in each meeting in accordance with 34 CFR, §§300.321, 300.322, 300.324, and 300.325. The report shall also indicate each member's agreement or disagreement with the committee's decisions. In the event TEC, §29.005(d)(1), applies, the district shall provide a written or audio-taped copy of the student's IEP, as defined in 34 CFR, §300.324 and §300.320. In the event TEC, §29.005(d)(2), applies, the district shall make a good faith effort to provide a written or audio-taped copy of the student's IEP, as defined in 34 CFR, §300.324 and §300.320. (highlighting added)

Speech and Language Evaluation of CLD Students

Evaluation professionals conducting language and/or speech testing of bilingual students should be able to demonstrate understanding of the process of normal speech and language acquisition of bilingual individuals. Monolingual English evaluation professionals conducting language and/or speech testing of bilingual students should seek out qualified support to help in the assessment and interpretation process. Appropriate evaluation diagnostic procedures may include standardized tests as well as descriptive linguistic analysis and other informal procedures. Informal assessment, in and of itself, is not substandard assessment; often requiring more skill and time for accurate results.

The student's background and language experience must be taken into account when selecting evaluation diagnostic procedures, as well as when interpreting results. To achieve this aim, the evaluation professional must learn about the student's history, both educational and family, and language environment, past and present.

Additionally, the evaluation professional must know and be sensitive to the student's cultural environment and/or lifestyle and its impact on test results and educational programming.

Language difference factors must be considered before a language disorder is determined. Accuracy in determining whether language problems originate from a language difference or a language disorder will depend heavily on the speech and language pathologists' knowledge of second language learning issues, ability to consult and collaborate with informed sources, and skill in integrating the data collected. The evaluation professional should be aware and consider the impact of the native language loss phenomena on the test results. See pages 6 and 7 for more information on the native language loss phenomena.

The student's cultural and experiential background must be considered before a language disorder is determined. A language disorder cannot primarily be due to a different cultural background, lack of opportunity, or limited English proficiency.

Although evaluation of articulation may be conducted only in the student's dominant language, interpretation of results must consider the dialectical influence of the student's other language upon the language tested, thus, the SLP should be familiar with dialectal differences.

Speech therapy services should be reasonably calculated to enable the CLD student to receive an educational benefit. To determine the language of therapy for an individual student, all data and information must be carefully considered including the student's first language, dominant language, proficiency levels in each of the languages, years of exposure to each of the languages, type of exposure to each of the languages, academic skills in each of the languages, and age of the student. Generally, although exceptions may be possible, language of therapy for students from CLD backgrounds should be in the dominant language of the student.

The full and individual evaluation speech report should have sufficient information documented regarding the student's cultural, experiential, and linguistic background to enable the reader of the report to understand how the test results were interpreted in light of this information.

IDEA 2004

(B) Consideration of Special Factors.—The IEP Team shall—

(ii) in the case of a child with limited English proficiency, consider the language needs of the child as such needs relate to the child's IEP.

Student P. v. Pasadena Independent School District, 1991

. . . Fernando has continued to exhibit a severe and profound impairment in expressive language with a level of proficiency that is significantly below average for his chronological age. This impairment is evident in both Spanish and English. . . Fernando requires special education services above and beyond standard speech therapy. Specifically, he needs direct language-based therapy provided in Spanish. Furthermore, Fernando needs to achieve communicative competence in his native language before learning English as his second language.

Student P. v. Pasadena Independent School District, 2003

. . . The Hearing Officer believes that appropriate speech therapy is provided in the student's primary language. In the present case, however, PISD presented expert testimony that the 'bilingual communication helper model' is an appropriate means of delivering speech therapy. Petitioner offered no expert testimony, and its remaining evidence fails to outweigh PISD's evidence.

Special Education Services for CLD Students

To determine the language of instruction in special education for an individual student, all data and information must be carefully considered including the:

- a) Student's first language,
- b) Dominant language,
- c) Proficiency levels in each of the languages,
- d) Years of exposure to each of the languages,
- e) Type of exposure to each of the languages,
- f) Academic skills in each of the languages,
- g) Age of the student, and
- h) Current language of instruction.

In determining the language of instruction in special education for students with disabilities, the strength of the student's native language skills must be considered, as well as the extent to which the knowledge base and skill level can be further developed in the native language.

Avoid reactive decisions. For example, the language of instruction in special education should not necessarily always be the student's first language. Consider all data and information carefully. For ELL, the maintenance and development of the individual's native language should be supported, whether or not special education services are provided in the native language. Research on the English academic achievement of ELLs in different alternative language programs overwhelming supports native language instruction.

Special education teachers and staff providing content area instruction must be qualified to deliver recognized alternative language services to students identified as ELLs.

Office of Civil Rights v. Denver Public Schools

LEP Students With Disabilities: Dual Services

OCR was told in interviews that District schools lack special education staff persons who are qualified to deliver recognized alternative language services. The District does not pay special education teachers to receive training in alternative language service delivery, as they do alternative language program teachers in the regular education setting. To meet their English-language needs, LEP students with disabilities receive "bilingual support," which is described as tutoring by bilingual paraprofessionals. Tutoring and instruction by staff persons who are not certified to teach are not recognized models for the instruction of LEP students.

Research

Within the last two to three decades, more research has become available on the education of ELLs and this research has yielded some important instructional insights to the education of ELLs. Language policy, however, is highly politicized in the United States, sometimes contradicting the research. Thus, speech/language pathologists, licensed specialists in school psychology, and educational diagnosticians can become involved in conflict between evidence-based pedagogy of ELLs and school and state policy. Appendix A and B are major studies on the teaching of ELLs. Appendix A is the executive summary from Thomas and Collier's (2001) national study of language minority student's long term academic achievement in different special language programs. Appendix B is the executive summary of the 2006 report by the National Literacy Panel on developing literacy in second language learners. In addition, below is a summary of some major research findings of students who were ELLs.

Research on Special Language Programming

The special language programming of CLD students varies from district to district and state to state and the benefits of these various special language programs differ greatly. Special education evaluation professionals need to be aware of the impact of these programs, in order to properly interpret the academic performance of CLD students in these programs.

- ELLs immersed in the English mainstream because their parents refused bilingual/ESL services showed large decreases in reading and math achievement by Grade 5. The largest number of dropouts come from this group and those remaining finished 11th grade at the 12th percentile (Thomas & Collier, 2001)
- Students who are ELLs and do not receive assistance from either ESL or bilingual programs have higher dropout rates (Theobald, 2003).

- Artiles et al. (2002 & 2005) report that English language learners in English immersion classrooms were almost three times more likely to be placed in special education as LD than ELLs in bilingual education.
- When ELLs initially exit into the English mainstream, those schooled all in English outperform those schooled bilingually when tested in English. But the bilingually schooled students reach the same levels of achievement as those schooled all in English by the middle school years, and during the high school years the bilingually schooled student outperform the monolingually schooled students (Thomas & Collier, 2001; National Literacy Panel, 2006).
- Bilingually schooled students outperform comparable monolingually schooled students in all academic achievement areas after 4 to 7 years of dual language schooling (Thomas & Collier, 2001).
- Students with no proficiency in English must not be placed in short-term native-language programs of only 1 to 3 years. The minimum length of time it takes to reach grade-level performance in the second language is 4 years (Thomas & Collier, 2001).

Brain and Cognitive Research

Recently, brain imaging studies of students who are CLD has provided much needed information on brain functioning, brain plasticity, and characteristics unique, as well as common among the different languages.

- Sounds penetrate the tissue and fluid surrounding the head of a fetus in the last trimester of pregnancy.
- Fetuses appear to be able to hear vowel sounds (vowels are more intense and have a lower frequency than consonants) and rhythmic patterns indicating a capacity for learning.
- Neonates or newborns show a right ear advantage for speech and a left ear advantage for music. They also show a preference for the voice of their mother and for the music the mother was listening during the late part of pregnancy (Bertoncini et al., 1989; Best, Hoffman, & Blaville, 1992; Pena et al., 2003).
- Babies have been found to be attuned to the native language by 10 to 12 months of age (Werker & Lalonde, 1988).
- A second language can completely replace the first language of a child who loses all contact with the native language before the age of 8 (Pallier et al., 2003); however even a small amount of exposure to the native language after the age of 6 years allows the maintainance of native-like phonetic sensitivities (Werker & Tees, 2005; Oh, Knightly, & Au, 2003).
- Learning a second language increases the density of grey matter in the left inferior parietal cortex, and the degree of structural reorganization is modulated by the proficiency attained and the age of acquisition (Mechelli et al., 2004).

- The process of language acquisition during childhood differs for certain languages. Valaki et al. (2004) investigated the cortical organization of Chinese, English, and Spanish speakers. English and Spanish speakers showed a strong lateralization to the left hemisphere, while Chinese speakers presented bilateral symmetry.
- Phonological awareness in the native language facilitates understanding of the relationship between sounds and symbols in the second language (Snow et al., 1998; August et al., 2002; Dickinson et al., 2004).
- Research of Korean (Kim & Davis, 2004), Arabic (Abu-Rabia, Share, & Mansour, 2003), Latvian (Sprugevica & Hoiem, 2003), and Chinese (McBride-Chang & Kail, 2002) students revealed a strong relation between phonological processing and reading performance.
- The research conducted by Tan et al. (2003) suggested that Chinese-English bilingual subjects were applying the system of their native language (Chinese) to reading in English, that is, that second language reading was shaped by the first language of the bilingual. The lack of letter-to-sound conversion rules in Chinese, however, appears to lead Chinese readers to be less capable of processing English by the analytic reading system on which English monolinguals rely.

Research on Issues of Oral Language Proficiency

Research on bilingualism consistently shows that second language learning takes longer than most educators expect, first language proficiency promotes second language proficiency, and bilingualism is not detrimental to students' learning of English.

- Students whose first language has many cognates with English, such as Spanish & Italian, have an advantage in English vocabulary recognition, but often do not fully use this advantage without targeted instruction (Nagy et al., 1993; Cunningham & Graham, 2000; August et al., 2002). For example, a bilingual Spanish/English or Italian/English speaker, using cognate knowledge, can easily understand the English term, "campanology" as the study of bells ("campanas") and capricious as meaning a disposition of arbitrary, fanciful notions and apt to change suddenly and unpredictably ("caprichoso").
- Basic interpersonal communication skills or conversational language acquired in one language do not appear to transfer to a second language, whereas skills that are academically mediated such as academic oral language or reading, do appear to transfer (Royer & Carlo, 1991). In studies of Spanish readers, the level of reading skills in their first language predicted the level of English reading skills.
- Bilingualism does not appear to be detrimental to children with disabilities. A study was conducted of bilingual children with Down's syndrome matched developmentally with monolingual children with Down's

syndrome. The bilingual children did at least as well in English as their English monolingual counterparts (Raining-Bird et al., 2005). In another study, language impaired bilingual students in bilingual programs did as well in English, their second language, as language impaired English monolingual students in English programs (Bruck, 1982). In another study, Crutcheley et al. (1997) tested bilingual and monolingual children with Specific Language Impairment (SLI) on various English oral language tests. They found that bilingual children score the same or better on the English language tests as the monolingual children.

Dyslexia Research

Reading problems are found in all languages, but the incidence or severity of the disability is often linked to the orthography of the language.

- Paulesu et al. (2001) found in their research that there is a universal neurobiological basis for dyslexia. Deficits in phonological processing appear to fundamentally characterize dyslexia, regardless of language.
- Differences in reading performance among dyslexics of different countries with alphabetic orthographies are due to the level of adherence of the written system to the alphabet principal.
- More reading problems are seen in students in opaque orthographies, that is orthographies that are highly irregular such as English, French, Danish, and Portuguese.
- Reading difficulties in transparent orthographies, that is, orthographies that adhere to the alphabet-principle, (i.e. Spanish, Italian, Turkish, Greek, and Finnish) are more often noticed in the student's reading speed and reading comprehension and less noticed in the student's reading decoding.

Research Regarding English Literacy

The five building blocks of reading are important to CLD student learning to read English, however they are not sufficient. Oral language development is an often-ignored, critical component of reading for CLD students.

- Instruction that provides substantial coverage in the key components of reading—identified by the National Reading Panel (NICHD, 2000) as phonemic awareness, phonics, fluency, vocabulary, and text comprehension — has clear benefits for language-minority students (National Literacy Panel, 2006).
- Instruction in the key components of reading is necessary — but not sufficient — for teaching language-minority students to read and write proficiently in English. Oral proficiency in English is critical as well — but student performance suggests that it is often overlooked in instruction (National Literacy Panel, 2006).
- Individual differences contribute significantly to English literacy development (National Literacy Panel, 2006).

Research Regarding Cross-Transfer between Languages

Students with good reading skills in their native language have been found to become good readers in English.

- Oral proficiency and literacy in the first language can be used to facilitate literacy development in English. (National Literacy Panel, 2006).
- Native-language (if alphabetic-based) phonological awareness training can facilitate student's ability to read in English. (Durgunoglu et al., 1993).
- Spanish word recognition significantly predicts performance on English word and pseudoword reading tasks (Durgunoglu et al., 1993, August et al., 2002).
- Students who have developed good meaning-making strategies in their first language use those strategies in their second language, even when they are not as fluent in that second language (Langer et al., 1990).
- A significant positive relationship is found between Spanish passage comprehension at the end of second grade and English passage comprehension at the end of fourth grade (August et al., 2002).

Research Regarding Assessments and Evaluation

- Most assessments do a poor job of gauging individual strengths and weaknesses (National Literacy Panel, 2006).
- Figueroa & Newsome (2006) studied 19 psychological reports of English Language Learners in a small urban elementary school district in California. Results indicated that the reports seldom adhered to existing legal and professional guidelines.
- The examiner's unfamiliarity with a minority group could also lead to bias in testing. Fuchs and Fuchs (1986) found that examiner unfamiliarity with the student's culture had a significant impact on standardized test performance. This effect was even greater when the students were of low socioeconomic status.
- Klingner et al. (2003) conducted an ethnographic study of the special education identification processes of ELLs in 12 schools. They found that the child study teams and the ARD/IEP committees paid little attention to information related to language acquisition.
- Ochoa, Rivera, & Powell (1997) conducted a survey of 859 psychologists who had conducted psychoeducational evaluations of bilingual students. Only 1% attempted to determine whether a learning disability also occurred in the student's native language.

Research Regarding Impact of Sociocultural and Socioeconomic Variables

- There is surprisingly little research on the impact of sociocultural variables on literacy achievement or development. However, home language experiences can have a positive impact on literacy achievement (National Literacy Panel, 2006).
- Poverty has significant effects on children's cognitive and verbal skills (Koreman et al., 1995; Liaw & Brooks-Gunn, 1993; & J. Smith et al., 1997).
- Brooks-Gunn et al, 1994, found that five year olds living in chronic poverty had adjusted mean IQs about $\frac{3}{4}$ of a standard deviation lower than children who were considered "nonpoor".
- Studies have shown that the negative life events and adverse conditions faced by poor and low-SES children can place demands on them that exceed their coping resources resulting in conduct problems (Carothers, et al., 2006; Pryor-Brown et al., 1986; & Wadsworth et al., 2005).
- Effects of poverty on cognitive development and academic achievement appear to be particularly strong in the earlier years (birth through 5), but continue to be strong for the first two decades of life (Axinn et al, 1993 & Brooks-Gunn et al, 1999).
- Studies have found that children in poverty have a higher prevalence of emotional and behavioral problems than children who are considered "middle-class" (Koreman et al, 1995 and Liaw & Brooks-Gunn, 1993).
- Sherman (1994) and Zill et al. (1995) found that the chance of being retained in a grade level or placed in special education classes increases by 2-3% for each year a child lives in poverty.
- Research has shown that teachers' expectations of poor children are lower than that of affluent children (McLoyd, 1998). These lowered expectations appear to be caused mostly by noncognitive considerations, such as speech patterns and dress.
- Skiba et al. (2005) found that in 259 school districts, disproportionality was greater in the judgment disability categories (LD, MR, & ED) than in the biologically based "hard" disability categories (such as visual impairment, etc.). They also found that students living in a high poverty school district were:
 1. More than twice as likely to be identified as Mildly Mentally Retarded;
 2. Nearly twice as likely to be identified as Moderately Mentally Retarded; and
 3. Twice as likely to be identified as Emotionally Disturbedas students who reside in wealthier school districts.

Research Regarding Bilingualism and Disabilities

- Brain research suggests that the second language develops, for the most part, in the same area of the brain as the first language, but that there are language-specific areas (Lucas et al., 2004; Roux et al., 2004).
- Brain lesions can selectively disrupt languages (Lucas, McKhann, & Ojemann, 2004; Ojemann & Whitaker 1978), that is to say that one language may be disrupted, but not the other.
- Selective impairment of reading and writing in only one language may also occur (Paradis, 1995).

Federal and State Definitions

Federal

Several federal definitions present the foundation for state definitions.

IDEA 2004

Native Language—The term “native language”, when used with respect to an individual who is limited English proficient, means the language normally used by the individual or, in the case of a child, the language normally used by the parents of the child.

IDEA 2004

Limited English Proficient—The term “limited English proficient” has the meaning given the term in section 9101 of the Elementary And Secondary Education Act of 1965.

ESEA 1965

Limited English proficiency and limited English proficient. --The terms ‘limited English proficiency’ and ‘limited English proficient’, when used with reference to an individual, mean an individual--

(A) who—

(i) was not born in the United States or whose native language is a language other than English and comes from an environment where a language other than English is dominant; or

(ii) is a Native American or Alaska Native or who is a native resident of the outlying areas and comes from an environment where a language other than English has had a significant impact on such individual’s level of English language proficiency; or

(iii) is migratory and whose native language is other than English and comes from an environment where a

language other than English is dominant; and

(B) who has sufficient difficulty speaking, reading, writing, or understanding the English language and whose difficulties may deny such individual the opportunity to learn successfully in classrooms where the language of instruction is English or to participate fully in our society.

IDEA 2004

Consent means that—*(a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;*

State of Texas

The Texas Education Code (TEC) 29.052 provides a general definition of a student of limited English proficiency.

DEFINITIONS. *In this subchapter:*

(1) "Student of limited English proficiency" means a student whose primary language is other than English and whose English language skills are such that the student has difficulty performing ordinary classwork in English.

Title 19 of the Texas Administrative Code (TAC) 89.1225 (f) provides a detailed definition of a student of limited English proficiency.

(f) For entry into a bilingual education or English as a second language program, a student shall be identified as limited English proficient using the following criteria.

(1) At prekindergarten through Grade 1, the score on the English oral language proficiency test is below the level designated for indicating limited English proficiency under subsection (d) of this section.

(2) At Grades 2-12:

(A) the student's score on the English oral language proficiency test is below the level designated for indicating limited English proficiency under subsection (d) of this section;

(B) the student's score on the reading and language arts sections of the TEA-approved norm-referenced measure at his or her grade level is below the 40th percentile; or

(C) the student's ability in English is so limited that the administration, at his or her grade level, of the reading and language arts sections of a TEA-approved norm-referenced assessment instrument or other test approved by TEA is not valid.

(3) In the absence of data required in paragraph (2)(B) of this subsection, evidence that the student is not academically successful as defined in subsection (j) of this section is required.

(4) The admission review and dismissal (ARD) committee in conjunction with the language proficiency assessment committee shall determine an appropriate assessment instrument and designated level of performance for indicating limited English proficiency as required under subsection (d) of this section for

*students for whom those tests would be inappropriate as part of the individualized education program (IEP).
The decision for entry into a bilingual education or English as a second language program shall be
determined by the ARD committee in conjunction with the language proficiency assessment committee in
accordance with
§89.1220(g) of this title (relating to Language Proficiency Assessment Committee).*

Federal and State Legislation and Litigation

Federal

Texas's educators, support personnel, and policy makers must be aware of federal laws, court decisions, and guidelines that protect the rights of ELLs to access public schooling. Some of these federal level regulations include Title VI of the Civil Rights Act of 1964 which prohibits the exclusion of individuals on the basis of race, color, or national origin from participation in any program or activity receiving federal financial assistance. *Lau v. Nichols* (1968) is another important ruling for educators, including evaluation professionals. The Supreme Court of the United States ruled that "equal access" to education for some students meant different instructional treatment. Taking students and treating them differently is an obvious form of discrimination, but the Supreme Court justices ruled that taking students who are different and treating them the same is a subtler form of discrimination. Executive Order 13166 signed in 2000 clarified that the term "national origin" referred to in Title VI of the Civil Rights Act includes individuals with limited English proficiency. Subsequently, a guidance document, issued in 2004 by the Office of Civil Rights, provided more detailed information on (a) who is considered limited English proficient, (b) the extent of obligation of agencies, and (c) how to select language assistance services. This guidance document can be particularly helpful to evaluation professionals because it explains the considerations relating to the competency of interpreters and translators. It is for this reason that it is included as an appendix. See Appendix C.

Title VI - Civil Rights Act of 1964

Sec. 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin.

"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."

Lau v. Nichols, 1968

"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 those 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."... "Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."

Executive Order 13166, August 11, 2000

"The Federal Government provides and funds an array of services that can be made accessible to otherwise eligible persons who are not proficient in the English language." ... "recipients must take reasonable steps to ensure meaningful access to their programs and activities by LEP persons."

Office of Civil Rights

Guidance to Federal Financial Assistance Recipients Regarding Title VI

Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons

"Recipients (of Federal financial assistance) are required to take reasonable steps to ensure meaningful access to their programs and activities by LEP persons." [Parenthetical information added]

State of Texas

Evaluation professionals must also keep abreast of state laws, court decisions, and guidelines that affect their clients. For example, the ARD/IEP committee, in conjunction with the LPAC make LEP entry and exit decisions for students who have been identified with a disability and served in special education.

TAC §89.1225. Testing and Classification of Students.

(f) For entry into a bilingual education or English as a second language program, a student shall be identified as limited English proficient using the following criteria.

(4) The admission review and dismissal (ARD) committee in conjunction with the language proficiency assessment committee shall determine an appropriate assessment instrument and designated level of performance for indicating limited English proficiency as required under subsection (d) of this section for students for whom those tests would be inappropriate as part of the individualized education program (IEP). The decision for entry into a bilingual education or English as a second language program shall be determined by the ARD committee in conjunction with the language proficiency assessment committee in accordance with §89.1220(g) of this title (relating to Language Proficiency Assessment Committee).

TAC §89.1225. Testing and Classification of Students.

(k) The ARD committee in conjunction with the language proficiency assessment committee shall determine an appropriate assessment instrument and performance standard requirement for exit under subsection (h) of this section for students for whom those tests would be inappropriate as part of the IEP. The decision to exit a student who receives both special education and special language services from the bilingual education or English as a second language program is determined by the ARD committee in conjunction with the language proficiency assessment committee in accordance with applicable provisions of subsection (h) of this section.

Chapter 101 provides guidelines regarding participation of LEP students in state assessments.

Texas Education Code, Chapter 101. Assessment. Subchapter AA. Commissioner's Rules

§101.1009. Limited English Proficient Students Who Receive Special Education Services.

- (a) The provisions of this subchapter apply to limited English proficient (LEP) students who receive special education services except as otherwise specified in this section.*
- (b) Decisions regarding the selection of assessments for LEP students who receive special education services shall be made by the admission, review, and dismissal (ARD) committee, which includes a language proficiency assessment committee (LPAC) member to ensure that issues related to the student's language proficiency are duly considered.*
- (c) A LEP student who receives special education services may be exempted from the English language proficiency assessments required by §101.1001 of this title (relating to English Language Proficiency Assessments) only if the ARD committee determines that these assessments cannot provide a meaningful measure of the student's annual growth in English language proficiency for reasons associated with the student's disability.*
- (d) The provisions of §101.1007(b) and (c) of this title (relating to Limited English Proficient Students at Grades Other Than the Exit Level) apply to the assessment of academic skills and the state-developed alternative assessment of academic skills.*
- (e) A LEP student who receives special education services and whose parent or guardian has declined the services required by the Texas Education Code, Chapter 29, Subchapter B, is not eligible for an exemption on the basis of limited English proficiency.*

§ 29.005. INDIVIDUALIZED EDUCATION PROGRAM.

- (a) Before a child is enrolled in a special education program of a school district, the district shall establish a committee composed of the persons required under 20 U.S.C. Section 1401(11) to develop the child's individualized education program.*
- (b) The committee shall develop the individualized education program by agreement of the committee members or, if those persons cannot agree, by an alternate method provided by the agency. Majority vote may not be used to determine the individualized education program.*
- (c) If the individualized education program is not developed by agreement, the written statement of the program required under 20 U.S.C. Section 1401(11) must include the basis of the disagreement.*
- (d) If the child's parent is unable to speak English, the district shall:*
- (1) provide the parent with a written or audiotaped copy of the child's individualized education program translated into Spanish if Spanish is the parent's native language; or*
 - (2) if the parent's native language is a language other than Spanish, make a good faith effort to provide the parent with a written or audiotaped copy of the child's individualized education program translated into the parent's native language.*

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Appendix A
A National Study of School Effectiveness for Language Minority Students. Long-Term Academic Achievement

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EXECUTIVE SUMMARY

Purpose. Our research from 1985 to 2001 has focused on analyzing the great variety of education services provided for language minority (LM) students in U.S. public schools and the resulting long-term academic achievement of these students. This five-year research study (1996-2001) is our most recent overview of the types of U.S. school programs provided for these linguistically and culturally diverse students, focusing on English language learners. (ELLs/LEPs) long-term academic achievement in Grades K-12. This study includes qualitative and quantitative research findings from five urban and rural research sites in the northeast, northwest, south-central, and southeast U.S. It is designed to answer urgent policy questions of interest to the federal and state governments of the United States, since this demographic group is projected to be 40 percent of the school-age population by the 2030s and most U.S. schools are currently under-educating this student group. Overall, this research provides whole school district views of policy decisionmaking that is data-driven regarding designing, implementing, evaluating, and reforming the education of LM students.

Analyses. As principal investigators, we established a collaborative research agreement with each school district that chose to participate, to follow every LM student who entered the school district for every year of his/her attendance in that school district, by each program type attended including the mainstream, and by cohorts of similar student background (e.g. socioeconomic status, primary language [L1] and second language [L2] proficiency upon entry, prior schooling). Measures of student achievement were those administered by the school district, including standardized test scores. We reported generalizations across school districts based on group performance on standardized measures, in normal curve equivalents (NCEs, equal-interval percentiles). Quantitative analyses proceeded through five research stages (presented in detail in report), each stage followed by collaborative interpretation of the results with school district staff. Qualitative analyses from interviews, school visits, surveys, and source documents, included historical demographic patterns of linguistically diverse groups of each U.S. region, the sociolinguistic and social context for the school programs, and specific implementation characteristics of each program type, including a case study of one school innovation.

Research sites, student samples, and program types analyzed. By written agreement, the school districts participating in each of our studies are promised anonymity until they choose to self-identify. For this study, four sites decided to self-identify. Madawaska School Department and School Administrative District #24, both located in northern Maine; Houston Independent School District in Texas; and Grant Community School in Salem, Oregon. The total number of student records collected in the five school districts featured in this report was 210,054. (One student record includes all the school district records for one student collected during one school year, such as student background characteristics, the grade level and school program(s) that student attended, and academic achievement measures administered to that student during the school year.) Over 80 primary languages were represented in the student samples, but the data analyses in three of the five research sites focused on Spanish speakers, the largest language group in the U.S. (75 percent of the U.S. LM school-age population). The student samples included newly arriving immigrants as well as ethnolinguistic groups of French cultural and linguistic roots in the northeast and students of Spanish-speaking heritage in the south-central U.S. The analyses focused on student outcomes from eight major different program types for LM students: 90-10 two-way bilingual immersion (or dual language), 50-50 two-way bilingual immersion, 90-10 one-way developmental bilingual education, 50-50 one-way developmental bilingual education, 90-10 transitional bilingual education, 50-50 transitional bilingual education, English as a Second Language (ESL) taught through academic content, and the English mainstream.

FINDINGS: Qualitative findings are presented in the full report. Major findings from the quantitative analyses that are statistically and practically significant for decision-making are presented below. For decision-making purposes, a 4 NCE difference between groups is considered a small but significant difference (equivalent to 0.2 of a national standard deviation [s.d.]), 5 NCEs an actionable significant difference (0.25 of a national s.d.), 6 NCEs a moderate significant difference (0.3 of a national s.d.), and 10 NCEs a very large significant difference (0.5 of a national s.d.).

ENGLISH ACHIEVEMENT FINDINGS: Focusing first on **program comparisons**, we summarize **English language learners. long-term achievement** on nationally standardized tests (ITBS, CTBS, Stanford 9, Terra Nova) **in English Total Reading** (the subtest measuring academic problem-solving across the curriculum: math, science, social studies, literature), for students who entered the U.S. school district with little or no proficiency in English in Grades K-1, and following them to the highest grade level reached by the program to date:

- English language learners immersed in the English mainstream because their parents refused bilingual/ESL services showed large decreases in reading and math achievement by Grade 5, equivalent to almost 3/4 of a standard deviation (15 NCEs), when compared to students who received bilingual/ESL services. The largest number of dropouts came from this group, and those remaining finished 11th grade at the 25th NCE (12th percentile) on the standardized reading test. (pp. 113-114, 122-124, Figures C-1, C-2, Tables C-1, C-2, C-10, C-11)
- When ESL content classes were provided for 2-3 years and followed by immersion in the English mainstream, ELL graduates ranged from the 31st to the 40th NCE with a median of the 34th NCE (23rd percentile) by the end of their high school years. (pp. 112-114, 126-127, 241-256, Figures C-1, C-2, E-1, E-6, E-7, E-8, E-9, E-14, Tables C-1, C-2, E-1, E-6, E-7, E-8, E-9, E-14)
- 50-50 Transitional bilingual education students who were former ELLs, provided with 50 percent instruction in English and 50 percent instruction in Spanish for 3-4 years, followed by immersion in the English mainstream, reached the 47th NCE (45th percentile) by the end of 11th grade. (pp. 112-114, 126-127, Figures C-1, C-2, Tables C-1, C-2)

- 90-10 Transitional bilingual education students who were former ELLs reached the 40th NCE (32nd percentile) by the end of 5th grade. (In 90-10 TBE, for Grades PK-2, 90 percent of instruction is in the minority language, gradually increasing English instruction until by Grade 5, all instruction is in the English mainstream for the remainder of schooling.) (pp. 119-122, Figure C-8, Table C-7)
- 50-50 One-way developmental bilingual education students who were former ELLs reached the 62nd NCE (72nd percentile) after 4 years of bilingual schooling in two highachieving school districts, outperforming their comparison ELL group schooled all in English by 15 NCEs (almost 3/4 of a national standard deviation, a very large significant difference). By 7th grade, these bilingually schooled former ELLs were still above grade level at the 56th NCE (61st percentile). (A one-way program is one language group being schooled through two languages.) (pp. 48-52, 58, Figures A-1, A-3, Tables A-5, A-6)
- 90-10 One-way developmental bilingual education students who were former ELLs reached the 41st NCE (34th percentile) by the end of 5th grade. (90-10 means that for Grades PK-2, 90 percent of instruction is in the minority language, gradually increasing English instruction to 50 percent by Grade 5, and a DBE program continues both languages in secondary school.) (pp. 119-122, Figure C-8, Table C-7)
- 50-50 Two-way bilingual immersion students who were former ELLs attending a highpoverty, high-mobility school: 58 percent met or exceeded Oregon state standards in English reading by the end of 3rd and 5th grades. (Two-way is two language groups receiving integrated schooling through their two languages; 50-50 is 50 percent instruction in English and 50 percent in the minority language.) (pp. 201-204, Figures D-4, D-6, Table D-18)
- 90-10 Two-way bilingual immersion students who were former ELLs performed above grade level in English in Grades 1-5, completing 5th grade at the 51st NCE (51st percentile), significantly outperforming their comparison groups in 90-10 transitional bilingual education and 90-10 developmental bilingual education. (pp. 119-121, Figure C-8, Table C-7)

Appendix B
Developing Literacy in Second-Language Learners
Report of the National Literacy Panel on Language-Minority Children and Youth
Executive Summary
Diane August

Major Findings of the Panel

Instruction that provides substantial coverage in the key components of reading —identified by the National Reading Panel (NICHD, 2000) as phonemic awareness, phonics, fluency, vocabulary, and text comprehension — has clear benefits for language-minority students.

Focusing on these key components of reading has a positive influence on the literacy development of language-minority students, just as it does for native English speakers. Likewise, writing instruction has clear benefits for language-minority students, as it does for native English speakers. p.4

Enhanced teaching of the key components of English literacy provides a clear advantage to English-language learners. More complex, innovative programs typically taught several of these components simultaneously — and these efforts were usually successful in improving literacy for language-minority students.

Instruction in the key components of reading is necessary — but not sufficient — for teaching language-minority students to read and write proficiently in English. Oral proficiency in English is critical as well — but student performance suggests that it is often overlooked in instruction.

An important finding that emerges from the research is that **word-level skills** in literacy — such as decoding, word recognition and spelling — are often taught well enough to allow language-minority students to attain levels of performance equal to those of native English speakers. However, this is not the case for **text-level skills** — reading comprehension and writing. Language-minority students rarely approach the same levels of proficiency in text-level skills achieved by native English speakers.

The research suggests that the reason for the disparity between word- and text-level skills among language-minority students is oral English proficiency. p 4-5.

Oral proficiency in English is not a strong predictor of English word-level skills ... By contrast, well-developed oral proficiency in English *is* associated with English reading comprehension skills for these students. These findings help explain why many language-minority students can keep pace with their native English-speaking peers when the instructional focus is on word-level skills, but lag behind when the instructional focus turns to reading comprehension and writing.

Oral proficiency and literacy in the first language can be used to facilitate literacy development in English. However, language-minority students can acquire English literacy skills in English-only classrooms as well.

Language-minority students are not blank slates. They enter classrooms with varying degrees of oral proficiency and literacy in their first language. There is clear evidence that tapping into first-language literacy can confer advantages to English-language learners. p. 5-6.

Individual differences contribute significantly to English literacy development.

English literacy development is a dynamic process and is influenced by individual differences in general language proficiency, age, English oral proficiency, cognitive abilities, previous learning, and the similarities and differences between the first language and English. p. 7.

Reading difficulties among language-minority students may be more a function of individual differences than of language-minority status. Similar proportions of language-minority students and monolingual English speakers are classified as poor readers. In fact, with the exception of English oral-language skills, the profiles of poor readers in the two groups are very similar. Both groups demonstrate difficulties with phonological awareness and working memory. These findings suggest that underlying processing deficits, as opposed to language-minority status, are the primary issue for students experiencing word-level difficulties. p. 7.

Most assessments do a poor job of gauging individual strengths and weaknesses.

... most measures do not predict how well language-minority students will perform over time on reading or content-area assessments in English.

There is surprisingly little evidence for the impact of sociocultural variables on literacy achievement or development. However, home language experiences can have a positive impact on literacy achievement.

...this finding reflects a shortcoming in the research, with studies tending to be descriptive rather than documenting empirical links between sociocultural factors and student outcomes.

Appendix C
Guidance to Federal Financial Assistance Recipients
Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons
By Health and Human Services, HHS.

VI. Selecting Language Assistance Services

Recipients have two main ways to provide language services: oral and written language services (interpretation and translation, respectively). Regardless of the type of language service provided, quality and accuracy of those services is critical to avoid serious consequences to the LEP person and to the recipient. Recipients have substantial flexibility in determining the appropriate mix.

A. Considerations Relating to Competency of Interpreters and Translators

Competence of Interpreters. Recipients should be aware that competency requires more than self-identification as bilingual. Some bilingual staff and community volunteers, for instance, may be able to communicate effectively in a different language when communicating information directly in that language, but not be competent to interpret in and out of English. Likewise, they may not be able to perform written translations.

Competency to interpret, however, does not necessarily mean formal certification as an interpreter, although certification is helpful. When using interpreters, recipients should take reasonable steps, given the circumstances, to assess whether the interpreters:

Demonstrate proficiency in and ability to communicate information accurately in both English and in the other language and identify and employ the appropriate mode of interpreting (e.g., consecutive, simultaneous, summarization, or sight translation);

To the extent necessary for communication between the recipient or its staff and the LEP person, have knowledge in both languages of any specialized terms or concepts peculiar to the recipient's program or activity and of any particularized vocabulary and phraseology used by the LEP person;

Many languages have "regionalisms," or differences in usage. For instance, a word that may be understood to mean something in Spanish for someone from Cuba may not be so understood by someone from Mexico. In addition, the interpreter should be aware when languages do not have an appropriate direct interpretation of certain terms and be able to provide the most appropriate interpretation. The interpreter should likely make the recipient aware of the issue, so that the interpreter and recipient can work to develop a consistent and appropriate set of descriptions of these terms in that language that can be used again, when appropriate.

Understand and follow confidentiality and impartiality rules to the same extent as the recipient employee for whom they are interpreting and/or to the extent their position requires;

Understand and adhere to their role as interpreters without deviating into other roles--such as counselor or legal advisor--where such deviation would be inappropriate (particularly in administrative hearings contexts).

Some recipients, such as some state agencies, may have additional self-imposed requirements for interpreters. Where individual rights depend on precise, complete, and accurate interpretation or translations, particularly in the context of administrative proceedings, the use of certified interpreters is strongly encouraged.

For those languages in which no formal accreditation or certification currently exists, certain recipients may want to consider a formal process for establishing the credentials of the interpreter, or assess whether a particular level of membership in a professional translation association can provide some indicator of professionalism.

While quality and accuracy of language services is critical, the quality and accuracy of language services is nonetheless part of the appropriate mix of LEP services required. The quality and accuracy of language services in a hospital emergency room, for example, should be as high as possible, given the circumstances, while the quality and accuracy of language services in other circumstances need not meet the same exacting standards.

Finally, when interpretation is needed and is reasonable, it should be provided in a timely manner. To be meaningfully effective, language assistance should be timely. While there is no single definition for "timely" applicable to all types of interactions at all times by all types of

recipients, one clear guide is that the language assistance should be provided at a time and place that avoids the effective denial of the service, benefit, or right at issue or the imposition of an undue burden on or delay in important rights, benefits, or services to the LEP person. When the timeliness of services is important, and delay would result in the effective denial of a benefit, service, or right, language assistance likely cannot be unduly delayed. Conversely, where access to or exercise of a service, benefit, or right is not effectively precluded by a reasonable delay, language assistance can likely be delayed for a reasonable period.

For example, language assistance could likely not be delayed in a medical emergency, or when the time period in which an individual has to exercise certain rights is shortly to expire. On the other hand, when an LEP person is seeking a routine medical examination or seeks to apply for certain benefits and has an ample period of time to apply for those benefits, a recipient could likely delay the provision of language services by requesting the LEP person to schedule an appointment at a time during which the recipient would be able to have an appropriate interpreter available.

Competence of Translators. As with oral interpreters, translators of written documents should be competent. Many of the same considerations apply. However, the skill of translating is very different from the skill of interpreting; a person who is a competent interpreter may or may not be competent to translate.

Particularly where legal or other vital documents are being translated, competence can often be achieved by use of certified translators. As noted above, certification or accreditation may not always be possible or necessary. Competence can often be ensured by having a second, independent translator "check" the work of the primary translator. Alternatively, one translator can translate the document, and a second, independent translator could translate it back into English to check that the appropriate meaning has been conveyed. This is called "back translation."

Translators should understand the expected reading level of the audience and, where appropriate, have fundamental knowledge about the target language group's vocabulary and phraseology. Sometimes direct translation of materials results in a translation that is written at a much more difficult level than the English language version or has no relevant equivalent meaning.

Community organizations may be able to help consider whether a document is written at a good level for the audience. Likewise, consistency in the words and phrases used to translate terms of art, legal, or other technical concepts helps avoid confusion by LEP individuals and may reduce costs.

For instance, there may be languages which do not have an appropriate direct translation of some specialized medical terms and the translator should be able to provide an appropriate translation. The translator should likely also make the recipient aware of this. Recipients can then work with translators to develop a consistent and appropriate set of descriptions of these terms in that language that can be used again, when appropriate. Recipients may find it more effective and less costly if they try to maintain consistency in the words and phrases used to translate terms of art and other technical concepts. Creating or using already-created glossaries of commonly used terms may be useful for LEP persons and translators and cost effective for the recipient. Providing translators with examples of previous translations of similar material by the recipient, other recipients, or federal agencies may be helpful.

While quality and accuracy of translation services is critical, the quality and accuracy of translation services is nonetheless part of the appropriate mix of LEP services required. For instance, to translate nonvital documents that have no legal or other consequence for LEP persons who rely on them, a recipient may use translators that are less skilled than the translators it uses to translate vital documents with legal or other information upon which reliance has important consequences. The permanent nature of written translations, however, imposes additional responsibility on the recipient to take reasonable steps to determine that the quality and accuracy of the translations permit meaningful access by LEP persons.

B. Oral Language Services (Interpretation)

Interpretation is the act of listening to something in one language (source language) and orally translating it into another language (target language). Where interpretation is needed and is reasonable, recipients should consider some or all of the following options for providing competent interpreters in a timely manner:

Hiring Bilingual Staff. When particular languages are encountered often, hiring bilingual staff offers one of the best, and often most economical, options. Recipients can, for example, fill public contact positions, such as social service eligibility workers or hospital emergency room receptionists/workers, with staff who are bilingual and competent to communicate directly with LEP persons in their language. If bilingual staff are also used to interpret between English speakers and LEP persons, or to orally interpret written documents from English into another language, they should be competent in the skill of interpreting. In addition, there may be times when the role of the bilingual employee may conflict with the role of an interpreter (for instance, a bilingual law clerk would probably not be able to perform effectively the role of a child support administrative hearing interpreter and law clerk at the same time, even if the law clerk were a qualified interpreter). Effective management strategies, including any appropriate adjustments in assignments and protocols for using bilingual staff, can ensure that bilingual staff are fully and appropriately utilized. When bilingual staff cannot meet all of the language service obligations of the recipient, the recipient should turn to other options.

Hiring Staff Interpreters. Hiring interpreters may be most helpful where there is a frequent need for interpreting services in one or more languages. Depending on the facts, sometimes it may be necessary and reasonable to provide on-site interpreters to provide accurate and meaningful communication with an LEP person.

Contracting for Interpreters. Contract interpreters may be a cost-effective option when there is no regular need for a particular language skill. In addition to commercial and other private providers, many community-based organizations and mutual assistance associations provide interpretation services for particular languages. Contracting with and providing training regarding the recipient's programs and processes to these organizations can be a cost-effective option for providing language services to LEP persons from those language groups.

Using Telephone Interpreter Lines. Telephone interpreter service lines often offer speedy interpreting assistance in many different languages. While telephone interpreters can be used in numerous situations, they may be particularly appropriate where the mode of communicating with an English proficient person would also be over the phone. Although telephonic interpretation services are useful in many situations, it is important to ensure that, when using such services, the interpreters used are competent to interpret any technical or legal terms specific to a particular program that may be important parts of the conversation. Nuances in language and non-verbal communication can often assist an interpreter and cannot be recognized over the phone. Video teleconferencing, if available, may sometimes help to resolve this issue where necessary. In addition, where documents are being discussed, it may be important to give telephonic interpreters adequate opportunity to review the document prior to the discussion and any logistical problems should be addressed.

Using Community Volunteers. In addition to consideration of bilingual staff, staff interpreters, or contract interpreters (either in-person or by telephone) as options to ensure meaningful access by LEP persons, use of recipient-coordinated community volunteers, working with, for instance, community-based organizations may provide a cost-effective supplemental language assistance strategy under appropriate circumstances. Because such volunteers may have other demands on their time, they may be more useful in providing language access for a recipient's less critical programs and activities where the provision of language services can reasonably be delayed. To the extent the recipient relies on community volunteers, it is often best to use volunteers who are trained in the information or services of the program and can communicate directly with LEP persons in their language. Just as with all interpreters, community volunteers used to interpret between English speakers and LEP persons, or to orally translate documents, should be competent in the skill of interpreting and knowledgeable about applicable confidentiality and impartiality rules. Recipients should consider formal arrangements with community-based organizations that provide volunteers to address these concerns and to help ensure that services are available more regularly.

Use of Family Members or Friends as Interpreters. Some LEP persons may feel more comfortable when a trusted family member or friend acts as an interpreter. However, when a recipient encounters an LEP person attempting to access its services, the recipient should make the LEP person aware that he or she has the option of having the recipient provide an interpreter for him/her without charge, or of

using his/her own interpreter. Although recipients should not plan to rely on an LEP person's family members, friends, or other informal interpreters to provide meaningful access to important programs and activities, the recipient should, except as noted below, respect an LEP person's desire to use an interpreter of his or her own choosing (whether a professional interpreter, family member, or friend) in place of the free language services expressly offered by the recipient. However, a recipient may not require an LEP person to use a family member or friend as an interpreter.

In addition, in emergency circumstances that are not reasonably foreseeable, a recipient may not be able to offer free language services, and temporary use of family members or friends as interpreters may be necessary. However, with proper planning and implementation, recipients should be able to avoid most such situations. If the LEP person voluntarily chooses to provide his or her own interpreter, a recipient should consider whether making a record of that choice, and of the recipient's offer of assistance, is appropriate.

As with the use of other non-professional interpreters, the recipient may need to consider issues of competence, appropriateness, conflicts of interest, and confidentiality in determining whether it should respect the desire of the LEP person to use an interpreter of his or her own choosing.

Recipients should take reasonable steps to ascertain that family, legal guardians, caretakers, and other informal interpreters are not only competent in the circumstances, but are also appropriate in light of the circumstances and subject matter of the program, service or activity, including protection of the recipient's own administrative or enforcement interest in accurate interpretation.

In some circumstances, family members (especially children) or friends may not be competent to provide quality and accurate interpretations. Issues of confidentiality, privacy, or conflict of interest may also arise. LEP individuals may feel uncomfortable revealing or describing sensitive, confidential, or potentially embarrassing medical, law enforcement (e.g., sexual or violent assaults), family, or financial information to a family member, friend, or member of the local community. In addition, such informal interpreters may have a personal connection to the LEP person or an undisclosed conflict of interest, such as the desire to protect themselves or another perpetrator in a domestic violence matter. For these reasons, where the LEP individual has declined the express offer of free language assistance and has chosen to use a family member, friend or other informal interpreter, if a recipient later determines that a family member or friend is not competent or appropriate, the recipient should provide competent interpreter services to the LEP person in place of or, if appropriate, as a supplement to the LEP individual's interpreter. For HHS recipient programs and activities, this is particularly true, for example, in administrative hearings, child or adult protective service investigations, situations in which life, health, safety, or access to important benefits and services are at stake, or when credibility and accuracy are important to protect an individual's rights and access to important services. Where precise, complete, and accurate interpretations or translations of information and/or testimony are critical, or where the competency of the LEP person's interpreter is not established, a recipient may want to consider providing its own, independent interpreter, even if an LEP person wants to use his or her own interpreter as well.

Extra caution should be exercised when the LEP person chooses to use a minor as the interpreter. While the LEP person's decision should be respected, there may be additional issues of competency, confidentiality, or conflict of interest when the choice involves using minor children as interpreters. The recipient should take reasonable steps to ascertain whether the LEP person's choice is voluntary, whether the LEP person is aware of the possible problems if the preferred interpreter is a minor child, and whether the LEP person knows that a competent interpreter could be provided by the recipient at no cost.