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Legal Guidelines For Educating English Learners In Charter Schools

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Legal Guidelines for Educating English Learners in Charter Schools

Introduction

English Learners (ELs) constitute one of the fastest growing demographic groups among school children in the United States, with the number of ELs in K-12 public schools increasing by about 14% over the seven-year period from 2002-03 to 2010-11.¹ This rapid growth in ELs has coincided with the growth in charter schools.² The greater flexibility afforded to charter schools positions them well to develop innovative approaches to providing ELs with a quality education.³ However, although charter schools enjoy greater autonomy, they are still required to follow federal and state laws and statutes. Against this backdrop, the National Charter School Resource Center developed this white paper to examine the legal parameters that charter schools need to be aware of as they attempt to serve the needs of ELs.

In Section I of this paper, we outline the broad legal framework governing equal educational access for ELs in charter schools as established by federal law. Section II highlights state laws that have been enacted to clarify, extend or implement federal requirements. Recognizing the role of data in ensuring that individual schools as well as the charter sector as a whole are held accountable to their legal obligations towards ELs, we discuss issues related to the availability and quality of available data on ELs in charter schools in Section III. Finally, informed by our analyses and discussion, we outline policy implications at the federal and state levels in Section IV.

I. Federal Laws

The Civil Rights Act of 1964, the Equal Educational Opportunities Act of 1974, and the Elementary and Secondary Education Act (ESEA) together establish the broad framework governing the education of EL students in public schools, including charter schools.⁴

Civil Rights Laws

Civil Rights Act of 1964 and Equal Educational Opportunities Act of 1974: Title VI of the Civil Rights Act of 1964 provides that no person in the United States shall be excluded from participation in, denied benefits of, or discriminated against by any program receiving federal funding (including public charter schools) on the basis of race, color, or national origin. These civil rights protections extend to ELs on the basis of national origin. A 1970 policy memo released by the Office for Civil Rights (OCR) of the U.S. Department of Education (ED) established that under the Civil Rights Act, school districts must take affirmative steps to address language deficiencies that prevent English limited children from effectively participating in school programs. The 1974 Supreme Court *Lau v. Nichols*⁵ decision upheld the 1970 OCR policy memo for school districts as a valid interpretation of Title VI.⁶ The Equal Educational Opportunities Act of 1974 (EEOA)⁷ codified the *Lau* ruling and requires state and local educational agencies to take affirmative action to overcome any language barriers that prevent

ELs from equal participation in any instructional program. Both Title VI and the EEOA are enforceable through the filing of a complaint to the Department of Justice under Title VI or private lawsuits under either Title VI or the EEOA. Title VI is also enforceable by filing a complaint with OCR. Court cases arising under these laws provide additional guidance to schools regarding their obligations under Title VI or the EEOA. Provisions relevant to ELs include:

- Taking steps to identify students who are not proficient in English;
- Not excluding ELs from active participation in school because of their inability to speak and understand the language of instruction or from gifted and talented programs based on their limited English proficiency;
- Providing resources, including a language acquisition program and adequate language services;
- Exiting ELs from a language acquisition program when they have acquired English proficiency;
- Obtaining written parental or guardian permission to exit ELs who have not yet acquired English proficiency from a language acquisition program;
- Communicating meaningfully with non-English-speaking or limited English-speaking parents and guardians of ELs by providing written or oral translations of important school information in a language they can understand;
- Providing language acquisition assistance to ELs even if they receive special education services, providing special education services to qualified ELs, and ensuring that ELs are not inappropriately placed in special education because of their lack of English skills.⁸

For both the EEOA and Title VI under the Civil Rights Act, some complaints result in settlement agreements with the Local Educational Agency (LEA) or the state itself. Charter schools are held to the terms of these agreements if they lie within the jurisdiction covered by the agreement. For example, a charter school within a school district that has reached a settlement agreement with the federal government must comply with the actions required by the agreement.⁹

Case Law and Federal Policy Memoranda: Case law and federal policy memoranda have additionally provided guidance regarding evaluation of school compliance with Title VI and EEOA. Under *Castañeda v. Pickard*'s¹⁰ three-prong test based on the EEOA, programs for ELs must be:

1. Based on scientifically sound educational theory or principles;
2. Implemented effectively with sufficient resources and personnel; and
3. Determined to show, after a period sufficient to give the program a legitimate trial, effectiveness in producing results (i.e. students are able to overcome language barriers).

Policy documents issued by the OCR in 1985 and 1991 updated the relevant legal standards for investigating compliance with Title VI and affirmed the use of the *Castañeda* test.¹¹ While acknowledging that the *Castañeda* decision had recognized the need for some degree of segregation to overcome language barriers to learning, the memo also noted specific practices that may violate Title VI, including: (1) segregating [ELs] for both academic and nonacademic subjects, such as recess, physical education, art and music; and (2) maintaining students in an

alternative language program longer than necessary to achieve the district's goals for the program.

The Supreme Court has further defined the parameters of Title VI protections, ruling in *Keyes v. Denver School District*¹² that Hispanics have the right to attend racially desegregated schools and in *Plyler v. Doe*¹³ that a state may not deny access to a free public education to any child residing in the United States whether present in the country legally or otherwise. In *Plyler*, the Supreme Court also held that school systems are not immigration enforcement agents and are prohibited from making public any information about the legal status of their students. In 2009, the Court ruled in *Horne v. Flores*¹⁴ that states have the right to determine the requirements of its English Language Learner programs.

Elementary and Secondary Education Act

The Elementary and Secondary Education Act (ESEA) of 1965 authorized distribution of federal funds to school districts with high concentrations of low-income children in order to help ensure equal access to education. The 1968 reauthorization included the Bilingual Education Act that set aside funds for school districts with high concentrations of poor students with “limited-English speaking ability” (LESA)¹⁵ to develop and implement programs, including bilingual education, that would assist their students in acquiring English proficiency quickly. Subsequent reauthorizations of the Bilingual Education Act expanded eligibility for services initially to include LESA students of any income level and then later to include any students with “limited English proficiency” meaning students unable to speak, read, write or understand English sufficiently to be successful in classes taught in English.¹⁶

2001 Reauthorization: The 2001 reauthorization of the ESEA was the first law to specifically hold schools and districts accountable for the achievement of their ELs. Although Title III of ESEA continues to support dual language approaches, the 2001 reauthorization marked a shift in emphasis away from bilingual education and towards an “English only” philosophy.¹⁷ The law requires that states establish English language proficiency standards, test students in grades three through eight annually in reading and math, and achieve adequate yearly progress (AYP) goals as set by the states. It also underscores schools’ responsibility for the academic progress of ELs by designating English Learners as a special subgroup for AYP goals.

Title I of ESEA¹⁸ requires *schools* to:

- Create content curricula and materials that are appropriate for the age and proficiency of ELs;
- Measure and report disaggregated data on EL progress in content areas through annual assessments; and
- Ensure staff capacity to effectively deliver content instruction for ELs, and take action if ELs do not make sufficient academic progress.

Title III requires *states* to:

- Ensure that ELs develop English proficiency (in listening, speaking, reading, writing, and comprehending English) and meet the same academic content standards in reading, math, and science as non-ELs;

- Establish English language proficiency standards for ELs that are used to create research-based, scientifically sound and proven language instruction curricula linked to a state’s academic content and achievement standards; and
- Assess EL English proficiency and academic progress annually.¹⁹

Title III requires *schools and districts* to:

- Report disaggregated data on EL performance to the state; and
- Certify that all teachers in a language instruction education program for ELs are fluent in English and any other language used by the program.

ESEA Waivers: In 2011, the U.S. Department of Education invited states to request flexibility in meeting their legal obligations under the ESEA. To receive flexibility, states are required to implement several principles designed to improve student academic achievement and increase instructional quality. Three principles that directly impact ELs require states to:

- Adopt College- and Career-Ready standards and high-quality assessments in at least reading/language arts and math and support ELs in reaching these standards by “committing to adopt” English language proficiency standards and assessments that correspond to the College- and Career-Ready standards.²⁰
- Develop and implement for all Local Educational Agencies a system of “differentiated recognition, accountability and support” that includes interventions that improve student achievement, graduation rates, and school performance for all students and student subgroups, including ELs.²¹
- Commit to develop, adopt, pilot and implement teacher and principal evaluation and support systems that use data on student growth for all students (including English Learners) as one of multiple valid measures in determining performance levels.²²

Additionally, state waiver requests are required to include a description of how the state engaged and solicited input on its waiver request from diverse communities including organizations that represent ELs.²³

II. State Laws

Many states have enacted laws to address the educational needs of ELs in public schools. These state laws provide dedicated funding for the education of ELs, establish accountability guidelines specific to the performance of ELs, require schools and districts to address the needs of ELs in their school improvement plans, and mandate certain practices related to the education of ELs. In general, charter schools are subject to the same accountability requirements as all public schools for all categories of students, including ELs. However, some states exempt charter schools from some of these requirements or allow charters to apply for waivers from them.²⁴

Additionally, forty-two states and the District of Columbia have enacted state laws authorizing charter schools.²⁵ Some state charter laws outline responsibilities for charter schools regarding ELs.²⁶ These laws guide charter school policies related to the recruitment, enrollment, and provision of services to ELs. The following section highlights a few key components of state

charter school laws affecting ELs. Its primary purpose is to illustrate how states have clarified and extended federal guidelines, and it should not be considered a comprehensive overview of all state provisions governing ELs.

General Provisions With Implications For EL Populations

- Charter laws in thirty states²⁷ and the District of Columbia ensure charters are open to anyone wishing to attend.²⁸ Other states either do not require charter schools to provide open enrollment or lack specific provisions regarding student recruitment and enrollment.²⁹
- Laws requiring random selection when charter schools are oversubscribed are established in thirty-six states and the District of Columbia.³⁰ According to the National Alliance for Public Charter Schools model law rankings data base, a few states,³¹ permit enrollment of students on a first-come-first-served basis as an alternative to lottery-based enrollment — an approach that may negatively affect enrollment of ELs whose families may be less experienced or constrained by cultural or language barriers from navigating all possible school options.³²
- States, such as North Carolina and New Jersey, ask that charter schools mirror the demographics of the surrounding school district,³³ while states, such as South Carolina, establish criteria for determining whether the racial composition of the charter school enrollment reflects that of the surrounding school district.³⁴ Others, such as New York, merely require charter schools to demonstrate “good faith efforts” to enroll ELs at levels comparable to or greater than the host district.³⁵

Provisions Specific To EL Populations

- Some states establish criteria for *enrollment preferences* for ELs. For instance, Utah’s charter law allows charter schools to give ELs an enrollment preference if the charter school’s mission is to enhance learning opportunities for ELs.³⁶ New York law allows a charter school to have a preference for students deemed “at risk of academic failure” and identifies ELs within that category.³⁷
- Some states require charters seeking authorization or renewal to develop *EL recruitment and retention plans or set enrollment goals* for ELs.³⁸ Notably, Massachusetts’ charter authorization law requires that the student recruitment and retention plan include specific strategies that will be used to “attract, enroll and retain” EL students and “maximize the number who successfully complete all school requirements....”³⁹ Massachusetts law also requires charter schools to submit an annual report to the state education board that describes the school’s progress towards enrollment goals.⁴⁰ Recently enacted law in Washington (2013) requires that charter applications include the school's plans for identifying, successfully serving, and complying with applicable laws and regulations regarding ELs.⁴¹ New York law requires that charter schools seeking renewal must demonstrate the means by which the school will meet or exceed EL enrollment and retention targets that are in line with EL enrollment and retention figures of neighborhood schools.⁴²
- Some states have enacted laws that *expand opportunities* for ELs to attend charter schools. New York law permits establishment of a charter school designed to provide expanded

learning opportunities for ELs⁴³ and also requires all charter schools to use a uniform charter school application available in the languages commonly spoken in a charter school's neighborhood.⁴⁴ Connecticut permits its state authorizer to give preference to charter school applicants whose primary purpose is to serve sub-groups of at-risk students, including ELs.⁴⁵ Connecticut law also allows exceptions to the lottery policy if a charter school's primary purpose is to serve ELs.⁴⁶

- Though random lotteries are the standard enrollment practice exercised by charters when oversubscribed, a recent non-regulatory federal guideline clarified that charter schools receiving funds under the federal Charter Schools Program may request to use "weighted lotteries" to give slightly better chances for enrollment to educationally disadvantaged students, which includes limited English proficient students, without jeopardizing federal funding, as long as permissible under state law.⁴⁷

Accountability Provisions

States have also enacted laws to ensure that charter schools have the capacity to address the needs of ELs and are held accountable for doing so. Some state statutes, such as those in Florida and New Jersey, explicitly require charter schools to provide instruction to ELs.⁴⁸ A few states require that charter applications specifically describe how the charter school will provide instruction to ELs.⁴⁹ For example, Massachusetts law requires that a charter application describe the school's capacity to address the particular needs of limited English proficient students to learn English and content matter, including the employment of staff qualified to teach ELs.⁵⁰ Further, applicants who wish to establish charter schools in low-performing districts (i.e. districts that have student performance scores in the lowest decile statewide for the two years prior to the application) may only be approved if they have a record of operating at least one school that has successfully served certain student sub-groups, including ELs.⁵¹

Charter laws at the state level may also require charters to comply with additional accountability provisions, including requirements to:

- Measure the effectiveness of EL programs (e.g., Texas⁵²);
- Report achievement levels of ELs compared to that of non-ELs (e.g., Nevada,⁵³ Texas⁵⁴);
- Determine compliance with state and federal laws applicable to ELs (e.g., Arizona⁵⁵); and
- Include performance frameworks as part of charter contracts (e.g., Idaho,⁵⁶ New Mexico⁵⁷). Some states also collect growth measures as part of the performance framework.⁵⁸

III. Charter Schools and EL Data

Primary Data Sources

As outlined above, charter schools, like all public schools, are required to comply with state and federal education reporting requirements. There are three primary sources of data on ELs in charter schools:

- The **National Center for Education Statistics (NCES)** is the primary federal entity for education data and collects data annually from all State Educational Agencies (SEA) via *EDFacts*. *EDFacts* data are used in the Common Core of Data (CCD), which contains information on school characteristics and student demographics, aggregated to the school, district, and state levels.
- The **Civil Rights Data Collection (CRDC)**, conducted by the Department of Education's Office for Civil Rights (OCR), is a biennial data collection to obtain data related to the nation's public school districts and schools' obligation to provide equal educational opportunity. To fulfill this goal, OCR uses the CRDC to collect a variety of information, including student enrollment and educational programs and services data that are disaggregated by race/ethnicity, sex, disability, and limited English proficiency. This information helps OCR administer and enforce the civil rights statutes for which it is responsible. In addition, the information is used by other ED offices as well as policymakers, advocates, and researchers outside of ED.
- The **Schools and Staffing Survey (SASS)** is another source of national data collected periodically by NCES from a representative sample of schools and includes comprehensive information about school environments, as well as teacher and student characteristics. Various state laws and SEA regulations provide for regular collection of school and student data from local school districts.

Gaps in EL Data

Despite the legal provisions governing the reporting of disaggregated data, two recent studies have identified significant gaps in the data on ELs in charter schools, limiting understanding of the enrollment and achievement of ELs in charter schools:

- The U.S. Government Accountability Office (GAO) began a study in August 2012 comparing the enrollment of ELs in charter schools and traditional public schools for the 2011-12 school year. GAO used the only school-level data available to ED at the time, which was a count of ELs enrolled in an English language instruction educational program designed for Limited English Proficient (LEP) students. GAO reported that it was unable to complete the analysis due to problems with the quality of the data, including unreported counts of EL students enrolled in LEP programs for over one-third of charter schools. Subsequently, this raised concerns about potential charter non-reporting with performance data (i.e., assessment and graduation rate data) as well. The GAO offered various explanations for the lack of reporting, including a definitional issue regarding what constitutes a LEP "program" that may have resulted in the exclusion of some students from the reported counts; and failure of some charter schools to submit required data to their states. The Department of

Education (ED) also acknowledged the lack of a data steward for these data to ensure data quality. GAO concluded that these data reporting and collection problems could interfere with ED's ability to assess whether charter schools are effectively serving ELs and complying with relevant federal requirements regarding education of ELs.

- A 2011 study by the Civil Rights Project at the University of California, Los Angeles also attempted to understand the number of EL students enrolled in charter schools nationally. This study relied on CCD, CRDC, and SASS data. Like the GAO study, this study found the data lacking and determined that definitive conclusions about enrollment of ELs in charter schools were difficult to draw.

Beginning in 2013-14, the ED plans to change how it collects and ensures quality of school level data on all ELs. ED is also developing a directory of charter schools and a workbook guide for SEAs in reporting charter school data that will help ensure complete reporting and high quality information.

IV. Policy Implications

As the number of ELs attending charter schools will likely grow in the coming years, now is a good time for policymakers at all levels to consider whether existing policies are adequate to address the needs of the population. This paper has addressed a subset of charter schools' legal obligations to serve ELs and the availability of data on charter schools and ELs. Based on this discussion, we pose the following questions for further consideration by policymakers.

- **How can the legal framework be improved to provide charter schools with clear, consistent and specific guidance regarding their obligations towards ELs?**
Inconsistencies and gaps in the legal framework can often make it challenging for charter schools to understand their legal obligations toward ELs. For instance, as discussed in Section II, not all state charter authorization laws require their charters to report disaggregated performance data for major student subgroups, including ELs, despite ESEA requirements. Additionally, some policies are ambiguous on the specifics of what charter schools will be held accountable for (e.g., How can a school determine whether it has enrolled an appropriate number of ELs? What counts as sufficient outreach to EL families?). Making these policies clearer would give charter schools confidence in their compliance and set the parameters within which charter schools can innovate.
- **Does the legal framework balance the need to ensure accountability with the need to encourage innovation?** One promise of the charter sector is its ability to create schools that approach the challenge of narrowing the achievement gap in non-traditional ways. EL populations already benefit from this innovation, and could benefit even more from continued innovation in the future. While it is vital for policy to guarantee access for ELs to charter schools and hold charter schools accountable for the performance of their ELs, overly prescriptive and detailed policies may dissuade operators from innovating to serve ELs. Given this context, policymakers need to develop policy and regulatory environments that hold charter schools accountable for meeting high standards for EL growth and performance rather than stipulating the specific actions they need to take in order to achieve the standards. There is also a need to identify and evaluate more nuanced approaches

towards accountability that recognize some of the different realities that charter schools face in recruiting, enrolling and meeting the needs of ELs. Funding can be a particularly sensitive issue for ELs, with single campus schools in particular not having the resources necessary to meet the needs of ELs.

- **Does the legal framework governing charter schools in general create unintended consequences that limit their ability to serve ELs?** As discussed in Section II, a few states permit enrollment of students on a first-come-first-served basis in instances where demand for a school's services may be in excess of its capacity—an approach that may put at a disadvantage ELs whose families may be less experienced at navigating all possible school options. In a similar vein, requiring all charter schools to utilize fully random lottery in order to ensure equitable access for all students may be a constraint for schools that form with the explicit mission of educating ELs. These schools will need multiple tools to boost enrollment and retention, including weighted lotteries as appropriate.
- **Does the legal framework adequately encourage charters to focus on the recruitment, enrollment and performance of ELs?** As discussed in Section II, states differ widely in what they require charter schools to do with respect to ELs, with some forward-thinking states statutorily requiring charters to be very intentional in their efforts to recruit and serve ELs. Additionally, some states have effectively used charter school authorizers to focus schools' attention on ELs. Authorizers are well placed to serve this role since they set the terms under which charter schools will gain approval or renewal of their charters. More and more authorizers are developing “performance frameworks,” many of them based on the National Association of Charter School Authorizers (NACSA) template.⁵⁹ These performance frameworks measure school outcomes using a variety of metrics, including student proficiency, student growth, and post-secondary success. By including measures that disaggregate these metrics by sub-group, including ELs, these frameworks can help focus the attention of schools and authorizers on the needs of these students. Emphasizing measures of student growth rather than student proficiency can ensure that schools and educators provide all ELs the attention they need and not just the students at the cusp of achieving proficiency. In addition, authorizers can encourage schools to include goals and measures as part of such a framework. Authorizers might encourage schools with an explicit mission to serve ELs to create “mission-specific” goals, plans and metrics. For example, mission-specific goals could enable authorizers to reward schools for their success in lifting EL students to proficiency in English, thus exiting them from EL status.
- **How can EL data be improved?** As outlined in Section III above, federal policymakers are already taking steps to address the issues raised in the GAO report and ensure a much better national-level flow of data on the enrollment of and services received by ELs in charter schools. With a much better core of data, researchers, policymakers, authorizers, and school operators can all begin to learn much more about schools' successes and challenges with ELs. However, states can take additional and immediate action by requiring charter schools to report data about the characteristics and performance of their ELs. One important part of the data picture is student achievement and growth. While accountability policies mostly focus on grades 3-12, policymakers can usefully begin to expand that view, generating more data about how ELs fare before third grade and as they move from high

school to college and careers. Earlier data on learning could help schools, preschools, and families improve ELs' readiness in literacy and math before they reach third grade. Similarly, a better flow of data on post-secondary outcomes could help K-12 schools prepare students more effectively for life beyond high school. Finally, policy-makers need to be sensitive to the fact that as some schools achieve success with their EL students, enabling them to exit EL programs, data might show a drop in EL enrollment. Approaches to improving data on EL enrollment need to avoid penalizing such schools or creating perverse incentives to retain students in EL programs for longer than needed. One way of ensuring this would be to ask schools to report not just the aggregate number of ELs enrolled at a given point of time, but also the number of ELs exiting the program along with the reasons for doing so.

By addressing these policy questions, policymakers can take great strides in clarifying charter schools' responsibilities, fostering innovation, ensuring access and improving data and accountability so that the charter sector can make good on the promise it holds for ELs.

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¹https://nces.ed.gov/programs/coe/indicator_cgf.asp

² See e.g., Clair, Nancy. (2011) *Charter Schools and ELLs: An Authorizer and School Leader Guide to Educating ELLs*. National Association of Charter School Authorizers. Retrieved from http://www.qualitycharters.org/assets/files/images/stories/publications/Issue_Briefs/IssueBriefNo22_CharterSchoolsandELLs.pdf?q=images/stories/publications/Issue_Briefs/IssueBriefNo22_CharterSchoolsandELLs.pdf ; Mansukhani, Sunil. (2013) *Serving English Language Learners: A Toolkit for Public Charter Schools*. National Alliance for Public Charter Schools. Retrieved from <http://www.publiccharters.org/publications/serving-english-language-learners-toolkit-public-charter-schools/>

³ See e.g., Clair, Nancy (2011). *Charter Schools and ELLs: An Authorizer and School Leader Guide to Educating ELLs*. National Association of Charter School Authorizers. Retrieved from http://www.qualitycharters.org/assets/files/images/stories/publications/Issue_Briefs/IssueBriefNo22_CharterSchoolsandELLs.pdf?q=images/stories/publications/Issue_Briefs/IssueBriefNo22_CharterSchoolsandELLs.pdf ; Mansukhani, Sunil. (2013) *Serving English Language Learners: A Toolkit for Public Charter Schools*. National Alliance for Public Charter Schools. Retrieved from <http://www.publiccharters.org/publications/serving-english-language-learners-toolkit-public-charter-schools/>

⁴ While not the focus of this white paper, additional civil rights and other laws are applicable to all students attending charter schools, including ELs. More information on the applicable civil rights laws can be found at www.ed.gov/ocr.

⁵ 414 US 563 (1974)

⁶ *Lau* also established that the Office for Civil Rights, under the former Department of Health, Education and Welfare, has the authority to establish regulations for Title VI enforcement.

⁷ 20 U.S. Code §1703. Retrieved at <http://www.law.cornell.edu/uscode/text/20/1703>

⁸ See U.S. Department of Justice website at <http://www.justice.gov/crt/about/edu/types.php>

⁹ Mansukhani, Sunil (2013). *Serving English Language Learners: A Toolkit for Public Charter Schools*. National Alliance for Public Charter Schools retrieved at <http://www.publiccharters.org/publications/serving-english-language-learners-toolkit-public-charter-schools/>

¹⁰ 648 F.2d 989 (Fifth Circuit, 1981). Retrieved at <http://faculty.ucmerced.edu/khakuta/LAU/IAPolicy/IA1bCastanedaFullText.htm>

¹¹ <http://www2.ed.gov/about/offices/list/ocr/ell/september27.html>

¹² 413 U.S. 189 (1973). Retrieved from <http://supreme.justia.com/cases/federal/us/413/189/>

¹³ 457 U.S. 202 (1982). Retrieved from <https://supreme.justia.com/cases/federal/us/457/202/case.html>

¹⁴ 557 US 433 (2009). Retrieved from <http://www.supremecourt.gov/opinions/08pdf/08-289.pdf>

¹⁵ Bilingual Education Act, 1968, Sec. 702 defines students with “limited English-speaking ability” as ‘children who come from environments where the dominant language is other than English’.

¹⁶ Public Law 95-561 (Nov. 1, 1978) cited in Stewner-Manzanares, Gloria. (1988). *The Bilingual Education Act: Twenty Years Later*. National Clearinghouse for Bilingual Education.

¹⁷ The Bilingual Education Act did not require bilingual education, but gave states latitude to create their own innovative programs to teach English. Subsequent reauthorizations defined bilingual education and provided funds to expand staff and research for bilingual programs. Beginning in the 1990s, support for teaching ELs in English only grew at the state level, and in 2001 NCLB replaced the Bilingual Education Act (Title VII of the ESEA) with Title III described

herein. Garcia, Ofelia et al. (2008). *From English Language Learners to Emergent Bilinguals*. Campaign for Educational Equity.

¹⁸ Title I provides financial assistance to LEAs for the education of low-income children.

¹⁹ EL students who have been in the U.S. for less than one year do not have to test in language arts the first year. Schools are permitted to administer language arts and math tests in the native languages of EL students as available from the state and employ a student's native language for the purpose of teaching the English language and content.

²⁰ U.S. Department of Education (2012). *ESEA Flexibility*.

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ For a directory of state regulations regarding the education of EL students, see <http://www.colorincolorado.org/policy/legislation/state/>

²⁵ <http://dashboard.publiccharters.org/dashboard/policy/page/overview/year/2013>

²⁶ Forty-two states and the District of Columbia have laws governing charter school authorization. The eight states that do not have charter school laws are: Alabama, Kentucky, Montana, Nebraska, North Dakota, South Dakota, Vermont, and West Virginia. See Model Law Rankings Database, National Alliance for Public Charter Schools at <http://www.publiccharters.org/get-the-facts/law-database/>

²⁷ Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Indiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Washington, Wyoming

²⁸ See Model Law Rankings Database, National Alliance for Public Charter Schools at <http://www.publiccharters.org/get-the-facts/law-database/>.

²⁹ See Model Law Rankings Database, National Alliance for Public Charter Schools at <http://www.publiccharters.org/get-the-facts/law-database/>. States such as Illinois and Oklahoma are silent regarding open enrollment.

³⁰ Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas, Louisiana, Maine, Maryland, Mass, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, and Washington. See Model Law Rankings Database, National Alliance for Public Charter Schools at <http://www.publiccharters.org/get-the-facts/law-database/>

³¹ Colorado, New Mexico, and Texas. See Model Law Rankings Database, National Alliance for Public Charter Schools at <http://www.publiccharters.org/get-the-facts/law-database/>

³² The National Alliance for Public Charter Schools cautions that first-come, first-served enrollment policies “often discriminate against students who do not have parents aggressively pursuing each and every potential school option.” See *A New Model Law for Supporting the Growth of High-Quality Public Charter Schools*. National Alliance for Public Charter Schools (June 2009). Retrieved from http://www.publiccharters.org/wp-content/uploads/2014/01/ModelLaw_P7-wCVR_20110402T222341.pdf

³³ See e.g., North Carolina, N.C.G.S. § § 115C-238.29F(g)(5). Retrieved from http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_115C/GS_115C-238.29F.html; New Jersey, N.J. Rev. Stat. §18A:36A-8 (e). Retrieved from <http://law.justia.com/codes/new-jersey/2013/title-18a/section-18a-36a-8>

³⁴ See e.g., South Carolina law (S.C. Code Ann. §59-40-50(7), retrieved from <http://www.scstatehouse.gov/code/t59c040.php>) provides that the racial composition of the charter school should not differ by more than 20 percent of the local population) and Nevada law (Nev. Rev. Stat. § 386.580 (1), retrieved at <http://www.leg.state.nv.us/NRS/NRS->

386.html#NRS386Sec580) provides that the racial composition of the charter school should not differ by more than 10 percent of the surrounding district).

³⁵ New York law requires charter schools to “demonstrate good faith efforts” to enroll EL student populations comparable to or greater than the host districts’ EL enrollment figures. See N.Y. U.C.C. Law §2854 (2)(a). Retrieved from [http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=\\$\\$EDN2854\\$\\$@TXEDN02854+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=11655118+&TARGET=VIEW](http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$$EDN2854$$@TXEDN02854+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=11655118+&TARGET=VIEW)

³⁶ Utah Code § 53A-1a-506. Retrieved from <http://www.le.utah.gov/code/TITLE53A/htm/53A01a050600.htm>

³⁷ Amendments to New York’s charter school law enacted in 2010 (S.7678/A.10928) permits charter schools to adopt policies and practices to promote increased attention to ELL students in an effort to expand their enrollment in charter schools.

³⁸ See e.g., Massachusetts, Mass. Gen. Laws Ch. 71, §89(e)(xiv) retrieved from <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXII/Chapter71/Section89> and Connecticut, Conn. Gen. Stat. § 10-66bb(d)(15) retrieved from http://www.cga.ct.gov/current/pub/chap_164.htm#sec_10-66bb

³⁹ Mass. Gen. Laws ch 71, §89(e)(xiv) retrieved from <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXII/Chapter71/Section89>

⁴⁰ Mass. Gen. Laws ch 71, §89(jj) retrieved from <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXII/Chapter71/Section89>

⁴¹ Wash. Rev. Stat 28A.710.130(1)(m) retrieved from <http://apps.leg.wa.gov/rcw/default.aspx?cite=28A.710.130>

⁴² NY U.C.C. Law § 2851(4)(e) retrieved from [http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=\\$\\$EDN2851\\$\\$@TXEDN02851+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=11655118+&TARGET=VIEW](http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$$EDN2851$$@TXEDN02851+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=11655118+&TARGET=VIEW) For additional discussion, see Rachel Cromidas, “High-needs enrollment targets could challenge some charters,” May 16, 2012 at <http://ny.chalkbeat.org/2012/05/16/high-needs-enrollment-targets-could-challenge-some-charters/>

⁴³ NY U.C.C. Law § 2854(2)(a) retrieved from [http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=\\$\\$EDN2854\\$\\$@TXEDN02854+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=11655118+&TARGET=VIEW](http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$$EDN2854$$@TXEDN02854+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=11655118+&TARGET=VIEW)

⁴⁴ NY U.C.C. Law § 2854(2)(a) retrieved from [http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=\\$\\$EDN2854\\$\\$@TXEDN02854+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=11655118+&TARGET=VIEW](http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$$EDN2854$$@TXEDN02854+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=11655118+&TARGET=VIEW)

⁴⁵ Conn. Gen. Stat. § 10-66bb(c)(3) retrieved from http://www.cga.ct.gov/current/pub/chap_164.htm#sec_10-66bb

⁴⁶ Conn. Gen. Stat. §§ 10-66bb(d)(8)(D) and 10-66bb(j) retrieved from http://www.cga.ct.gov/current/pub/chap_164.htm#sec_10-66bb

⁴⁷ “Charter Schools Program: Title V, Part B of the ESEA, Nonregulatory Guidance.” U.S. Department of Education, January 2014 at <http://www2.ed.gov/programs/charter/legislation.html>. See also Katie Ash, “Some Charters Can use Weighted Lotteries, New Federal Guidance Says,” *Education Week*, January 29, 2014 at http://blogs.edweek.org/edweek/charterschoice/2014/01/charters_receiving_federal_funds_may_now_use_weighted_lotteries.html?cmp=ENL-EU-NEWS2. Prior to the guideline, federal interpretation of the Charter Schools Program authorizing funds for charter school programs disqualified charter schools that reserved seats for any subsets of applicants from receiving these funds.

⁴⁸ See e.g., Florida, Fl. Stat. §1003.56 (retrieved from http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=1000-1099/1003/Sections/1003.56.html) requiring that instruction in the English language be provided to limited English proficient students and that parent involvement in the program is addressed; and the New Jersey Administrative Code providing that a charter school shall provide an enrolled limited English proficient student with all required courses and support services to meet the Core Curriculum Content Standards in accordance with N.J. Rev. Stat. §§18A:7A-4 and 18A:7A-5 and N.J.A.C. 6A:15. (N.J.A.C. 6A-11-4.7 retrieved from <http://www.lexisnexis.com/hottopics/njcode/>)

⁴⁹ See e.g., Iowa (Iowa Code § 256F.3(7)) and Massachusetts (Mass. Gen. Laws ch 71, §89(e)(vi) retrieved from <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXII/Chapter71/Section89>)

⁵⁰ Mass. Gen. Laws ch 71, §89(e)(vi) retrieved from <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXII/Chapter71/Section89>

⁵¹ Mass, Gen. Laws ch 71, §89(i)(3) retrieved from <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXII/Chapter71/Section89>

⁵² See e.g., Texas (Tex. Bus & Com. Code §29.062 retrieved from <http://www.statutes.legis.state.tx.us/Docs/ED/htm/ED.29.htm#29.062>). Pursuant to Tex. Bus & Com. Code §29.053 (retrieved from <http://www.statutes.legis.state.tx.us/Docs/ED/htm/ED.29.htm#29.062>) districts with enrollments of 20 or more students of limited English proficiency in any language classification in the same grade level are required to provide bilingual instruction and must therefore evaluate the effectiveness of this instruction.

⁵³ See e.g., Nevada; Nev. Rev. Stat. § 385.3487 (retrieved from <http://www.leg.state.nv.us/NRS/NRS-385.html#NRS385Sec3487>) explicitly requires districts to include each charter school sponsored by the district in annual accountability reports regarding the progression of EL students in attaining proficiency in the English language. The reports must include demographic information about EL students; the achievement and proficiency of EL students compared to students who are English proficient; and a comparison of EL students vs. non-EL students regarding retention rates, graduation rates, dropout rates, grade point averages, state examinations, and state EL assessments.

⁵⁴ http://elltx.org/bilingual_esl.html Texas Education Code (TEC) Section29.066, Public Education Information Management System (PEIMS) Reporting Requirements: A school district that is required to offer bilingual education or special language programs shall include the following information in the district's Public Education Information Management System (PEIMS) report: (1) demographic information, as determined by the commissioner, on students enrolled in district bilingual education or special language programs; (2) the number and percentage of students enrolled in each instructional model of a bilingual education or special language program offered by the district; and (3) the number and percentage of students identified as students of limited English proficiency who do not receive specialized instruction.

⁵⁵ See Arizona: Ariz. Rev. Stat §§ 15-756.08 (retrieved from <http://www.azleg.gov/FormatDocument.asp?inDoc=/ars/15/00756.htm&Title=15&DocType=ARS>) requires the office of English Language Acquisition services in the state's Department of Education to conduct extensive monitoring of charter schools and school districts to determine compliance with state and federal laws applicable to ELs. Schools found to be noncompliant lose monies from the state fund established to support structured English immersion programs for ELs (see Ariz. Rev. Stat. 15-751(5) retrieved from <http://www.azleg.gov/FormatDocument.asp?inDoc=/ars/15/00751.htm&Title=15&DocType=ARS> and 15-756.04 retrieved from <http://www.azleg.gov/FormatDocument.asp?inDoc=/ars/15/00756->

04.htm&Title=15&DocType=ARS), but schools cannot reduce the amount of monies spent on the district's or charter's EL programs because of the loss of this funding. The state continues to monitor schools found to be noncompliant to ensure that they are not reducing EL program funding notwithstanding loss of the structured English immersion funds.

⁵⁶ Idaho (I.C. §§ 33-5205B retrieved from <http://legislature.idaho.gov/idstat/Title33/T33CH52SECT33-5205B.htm> and I.C. §§ 33-5209A retrieved from <http://legislature.idaho.gov/idstat/Title33/T33CH52SECT33-5209A.htm>);

⁵⁷ New Mexico (N.M. Stat. § 22-8B-9.1 retrieved from <http://public.nmcompcomm.us/nmpublic/gateway.dll/?f=templates&fn=default.htm>); see also, Maine (Me. Rev. Stat. Ann. Tit. 20-A, § 2409 retrieved from <http://www.mainelegislature.org/legis/statutes/20-A/title20-Asec2409.html>); Idaho (I.C. §§ 33-5205B and 33-5209A); Nevada (Nev. Rev. Stat. §386.527(1)(a) retrieved from <http://www.leg.state.nv.us/NRS/NRS-386.html#NRS386Sec527>), New York (N.Y.U.C.C. §2852(5), retrieved from [http://www.statutes.legis.state.tx.us/Docs/ED/htm/ED.12.htm#12.110](http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$$EDN2852$$@TXEDN02852+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=11655118+&TARGET=VIEW); Texas (Tex. Bus & Com. Code §12.111 retrieved from <a href=)); and Washington (RCW 28A.710.170 retrieved from <http://apps.leg.wa.gov/rcw/default.aspx?cite=28A.710.170>)

⁵⁸ According to the “School Accountability ‘Report Cards,’ December 2013 report, Education Commission of the States at <http://ecs.force.com/mbdata/MBquest3RT?Rep=ar10> the District of Columbia and the following states are implementing growth measures: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Minnesota, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. But Hawaii, Idaho, Indiana, Kansas, Maryland, New York, Pennsylvania, Texas and Virginia do not report growth measures as part of their state report card. See e.g., Nevada (Nev. Rev. Stat. §§386.528(1)(a) retrieved from <http://www.leg.state.nv.us/NRS/NRS-386.html#NRS386Sec528> and 385.3595 retrieved from <http://www.leg.state.nv.us/NRS/NRS-385.html#NRS385Sec3595>) and Washington (Wash. Rev. Code § 28A.710.170 retrieved from <http://apps.leg.wa.gov/rcw/default.aspx?cite=28A.710.170>).

⁵⁹ See http://www.qualitycharters.org/assets/files/images/stories/pdfs/Academic_Gen_Frmk_and_Guid_FOR_REVIEW_6.28.12.pdf?q=images/stories/pdfs/Academic_Gen_Frmk_and_Guid_FOR_REVIEW_6.28.12.pdf