

# OPPORTUNITY LOST:

Addressing the Widespread Denial of Services  
to California English Learner Students

hello      hola      이봐요

goodbye      adiós      안녕

please      por favor      부디

thank you      gracias      명

friend      amigo      친구

school      escuela      학교의

## A REPORT BY:

ACLU of California | Asian Pacific American Legal Center

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of English Learner (EL) students  
is critical to the success of  
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## EXECUTIVE SUMMARY

Addressing the learning needs of English Learner (EL) students is critical to the success of California’s public schools and ultimately to the productivity and long term economic health of our state.

Students designated as English Learners make up a quarter of all students in the public school system in California, and more than one out of every four EL students in the nation are enrolled in California schools.<sup>1</sup> Additionally, 85% of EL students in California were born in the United States,<sup>2</sup> and many of these students have been in United States public schools for their entire lives.<sup>3</sup> Repeated studies by the California Department of Education, the State Board of Education, and the California Legislature have documented that this student population has gotten short shrift from our schools, and that the consequences have been dire.<sup>4</sup>

The California Constitution and countless federal and state laws mandate the delivery of effective English language instruction to EL students, and such services are the obvious first and essential step in providing access to core curricular requirements and delivering equal educational opportunity. And while there need be no single approach to accomplishing this, there is unanimous agreement that all EL students must receive some form of specialized instruction or intervention to have the opportunity to succeed academically.

Nonetheless, too many California EL students—more than 20,000 children and likely more—are receiving no EL services whatsoever. None. And children are denied services in one out of four districts throughout the state.

In short, our current system suffers from a major breakdown in the most basic aspect of delivering services and assuring educational opportunity to EL students. For the 2010-2011 school year, districts reported the following data to the California Department of Education:

- **20,318 EL students in California** did not receive any language instructional services.
- 251 of the 960 school districts in California that serve EL students reported that they denied EL services to at least one EL student. Thus, **one out of every four school districts in California** that serves EL students reported to the State that they did not provide language support to EL students mandated by law.
- The districts implicated are spread across the entire state. They are small and large, rural and urban, those that have a small EL student population and those that have a large EL student population. The problem occurs in elementary schools, middle schools, and high schools.
- **2 districts** in California report providing no language support services to **more than 1,000 of their EL students**.
- **5 districts** in California report providing no language support services to **more than 500 of their EL students**.
- **35 districts** in California report providing no language support services to **more than 100 of their EL students**.
- **26 districts** in California report providing no language support services to a **majority of their EL students**.
- Some districts with a smaller EL student population report that 100% of their EL students do not receive services, indicating that the district lacks any EL program.
- Some districts with a large EL student population deny services to a substantial percentage of their EL students, reflecting major problems in a program that is critical to meeting the education needs of a large percentage of their students.
- **79 districts** in California report providing no language support services to **more than 10% of their EL students**.<sup>5</sup>

Documentation of these facts is not the result of laborious investigations. Rather, these data—including the names of the districts and schools that deny EL students legally mandated services—are reported annually to the California Department of Education and posted prominently by the Department on a state-maintained website.<sup>6</sup>

The widespread phenomenon of denying services to EL students contributes to poor academic outcomes for EL students in California and the growing group of EL students known as Long-Term English Learners (LTELs), students who have been designated as English Learners for at least six years but are still eligible for specialized services because they have not yet achieved high enough proficiency in English.<sup>7</sup>

The State of California’s education agencies and officials have issued reports and published data demonstrating their awareness that numerous districts are denying EL students the services necessary for academic success (and to which they are entitled by law). Nevertheless, the State and its educational agencies—which have the ultimate responsibility under California law and under federal laws governing services to EL students—have taken no steps to enforce the law and to ensure that school districts correct the problem.

**This report’s principal conclusions are (1) that each year, tens of thousands of EL students have been denied EL services, to which they are entitled by law and without which they cannot reasonably be expected to master the academic skills necessary to succeed in school, and (2) this educational crisis will continue, unless the State of California and its educational agencies take a meaningful role in responding to the public acknowledgement by school districts that they are failing EL students at the most basic level.**

This report begins with an overview of demographics of the EL population in California, followed by a description of the pervasive denial of services to EL students within California. Next, the report proceeds to the legal and social science framework for the provision of services for EL students, explaining how this widespread neglect is not only illegal but also extraordinarily harmful to the long-term educational prospects for these students. The report then describes the State’s role in the creation and perpetuation of this problem. Finally, it offers a research-based approach to ensure that all districts have in place programs that meet the academic needs of **all** EL students that is sound and feasible.

Although improving EL services and outcomes is no simple task, closing the gap between EL students’ academic needs and the instruction currently offered in public schools is the essential first step to improving academic outcomes overall for EL students. The benefits of addressing this issue immediately go well beyond these children, their families, and our communities. The ultimate beneficiary, as when any child is educated to his or her potential, is all of us.

**Core Recommendations.** The State, through the California Department of Education, the State Board of Education, and the State Superintendent of Public Instruction, must fulfill its legal responsibilities by:

1. Investigating any report that EL students are not receiving services.
2. Directing districts with unserved students to develop and submit written plans that involve the provision of required services to all students and, where appropriate, compensatory services.
3. Verifying that districts are adhering to approved remedial plans and confirming the services provided for at least two years through site visits or another independent monitoring process.
4. Tracking the number of long term English learners (LTELs) and English Learners at risk of becoming LTELs (as defined in AB 2193) who are not receiving any specialized instructional services required by law.
5. Developing guidelines for a variety of programs and policies that school districts can adopt to ensure that all EL students receive appropriate services, taking into account the range of unique challenges, needs, and instructional settings in districts across California.

## CALIFORNIA'S ENGLISH LEARNER POPULATION



Under California law, an “English learner” is a child who does not speak English or whose native language is not English and who is not currently able to perform “ordinary classroom work” in English.<sup>8</sup> English Learner (EL) students are the fastest growing student population in schools in the United States and among the lowest achieving subpopulations of students.<sup>9</sup> For the 2010-2011 school year, the State of California reported over 1.4 million ELs enrolled in public schools.<sup>10</sup> Given the high number of EL students attending California public schools, addressing their learning needs must become a priority for the State.

For ELs to participate meaningfully in their own education and benefit from academic instruction in English, they must acquire certain skills.<sup>11</sup> These skills include the ability to speak, read, and write English proficiently.<sup>12</sup> By definition, then, these students require specialized instructional services—focused on developing proficiency in academic and conversational English—to access basic equality in their education.<sup>13</sup>

ELs within California are more likely to be students of color and economically disenfranchised compared to their English-proficient counterparts.<sup>14</sup> Eighty-five percent of EL students in California were born in the United States,<sup>15</sup> and many of these students have been in United States public schools for their entire lives. “Over half of the EL students in grade 6 have been in the same district since kindergarten.”<sup>16</sup>

Far too many of these students never exit the EL program. In California, a majority of EL students starting the program in first grade are not redesignated as fluent in English by twelfth grade.<sup>17</sup> Improving academic outcomes for ELs is thus critical to the success of school reforms aimed at improving academic achievement of all students and, more broadly, to reforming California’s public education system.

## FRAMEWORK FOR PROVIDING SERVICES TO CALIFORNIA'S EL STUDENTS

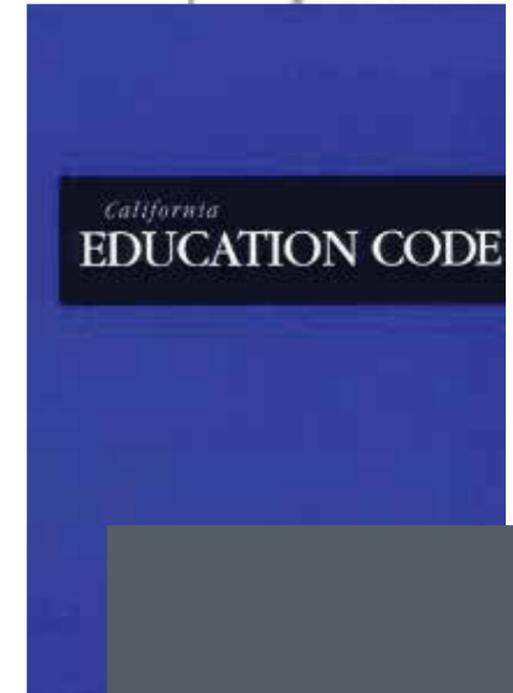
California law specifies three categories of programs for ELs: Structured English Immersion, which is generally limited to the first year after a non-English speaker enrolls in school; English Language Mainstream for students with “reasonable fluency” in English; and alternative programs involving bilingual education or support in the student’s primary language.<sup>18</sup>

Additionally, California regulations require school districts to provide services to students identified as ELs until they are no longer formally designated as such,<sup>19</sup> specifically until they (1) demonstrate English-language proficiency comparable to that of the school district’s average native English-language speakers; and (2) recoup any academic deficits incurred in other areas of the core curriculum as a result of language barriers.<sup>20</sup>

The California Department of Education requires districts to report data annually specifying the services they provide to EL students within their district.<sup>21</sup> The reporting system allows districts to select one of six categories for each EL student in their district:

1. ELs Receiving English Language Development (ELD) Services
2. ELs Receiving ELD and Specially Designed Academic Instruction in English (SDAIE)
3. ELs Receiving ELD and SDAIE with Primary Language (L1) Support
4. ELs Receiving ELD and Academic Subjects through the Primary Language (L1)
5. ELs Receiving Other EL Instructional Services
6. ELs Not Receiving Any EL Instructional Services<sup>22</sup>

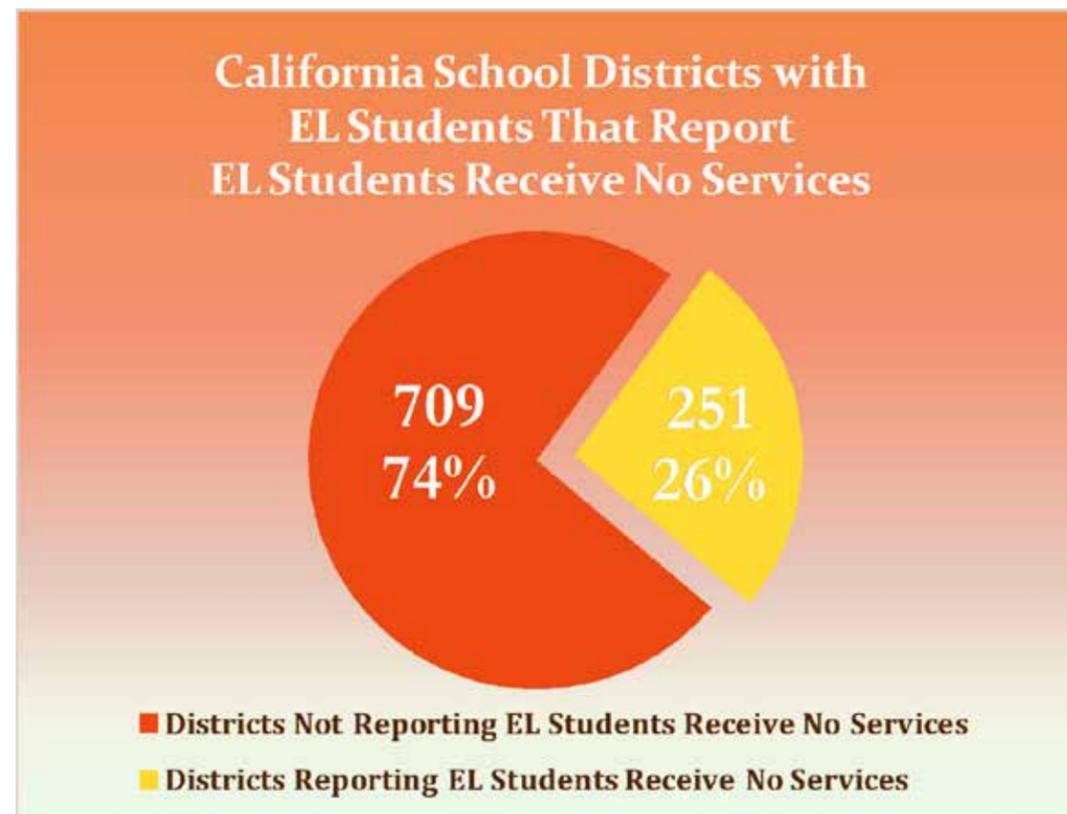
As explained in greater detail below in the section entitled “Denying Services to EL Students Violates Federal and State Law,” whenever a district reports students in category number 6—i.e., students who do not receive any EL instructional services—it thereby acknowledges that it is violating those students’ civil rights, including their rights under the Equal Education Opportunity Act (“EEOA”),<sup>23</sup> the California Constitution,<sup>24</sup> and the California Education Code.<sup>25</sup>



## NO SERVICES FOR EL STUDENTS: THE SCOPE OF THE PROBLEM

Notwithstanding the critical importance to the state public education system of ensuring appropriate services and success for EL students, our system is currently failing at the most basic level: Tens of thousands of EL students across the state are not being provided **any** specialized language instruction; school districts report this fact to the State, which has a duty to ensure that at-risk student populations like EL students receive basic equality of educational opportunity; and no meaningful steps are being taken to address the problem on a systematic basis.

Denial of EL Services Is a Pervasive, Statewide Problem. As demonstrated in Figure 1, of the 960 school districts with at least one EL student, 251 districts failed to provide EL services to at least one student.



The school districts reporting that they denied legally mandated services to at least some of their EL students are located all over the State, as reflected in Figure 2.



Thus, school districts denying EL services to students are large and small; are located in urban, rural, and suburban communities; and are located in every geographic region of the state.

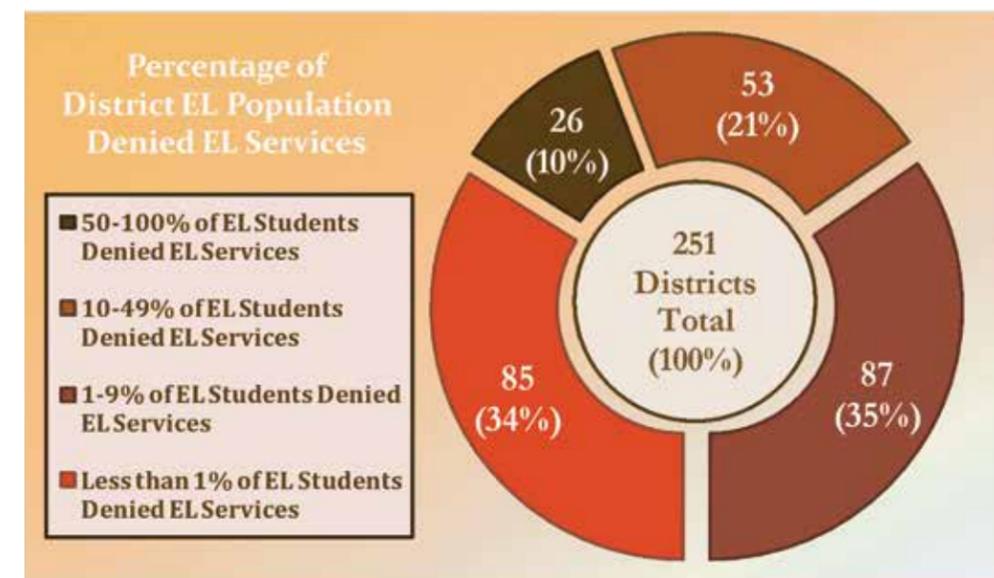
Recent academic studies of California's EL population fully corroborate that the denial of EL services is a major statewide problem. One study of California students who had been designated as ELs for six years or more showed that "three out of four had spent at least two years in 'no services' or in mainstream placements, and that 12% . . . may have spent their entire schooling in mainstream classes with no services."<sup>26</sup> Another study confirmed that "many, perhaps most [EL] students at the higher levels of English proficiency are not in classes that provide sheltered or ELD instruction."<sup>27</sup>

Although Widespread, the Nature of the Denial of EL Services Varies Across Districts. Unsurprisingly, the demographics of the 251 school districts that report denying services to EL students vary considerably.<sup>28</sup> Although the numbers can be parsed a number of different ways, analyzing the numbers in two different ways—the total number of EL students affected by a district’s denial of EL services and the percentage of a district’s EL students affected—provides important insight into the problem. Figures 3 and 4 reflect the 15 districts with the highest percentage of EL students receiving no services and highest total number of EL students receiving no services, respectively.

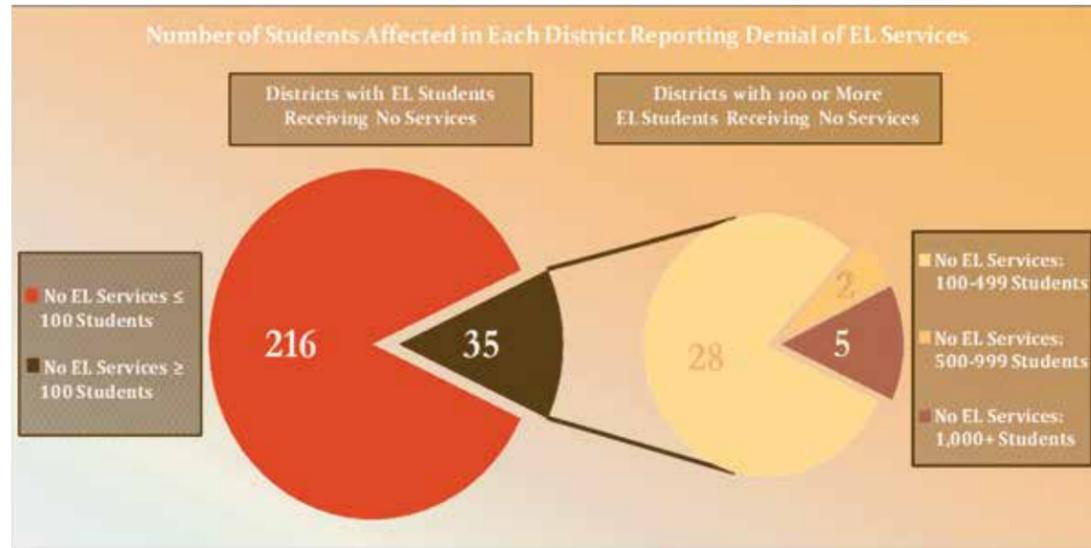
The Fifteen Districts with the Highest Percentages of EL Students Reported as Receiving No Services (Minimum EL Population of 25 Students)				
District	County	EL Students Receiving No Services	Total EL Students in District	Percentage of EL Students Receiving No Services
Wheatland Union High	Yuba	23	27	85%
Mt. Shasta Union Elementary	Siskiyou	27	37	73%
Hermosa Beach City Elementary	Los Angeles	34	59	58%
Gateway Unified	Shasta	89	163	55%
William S. Hart Union High	Los Angeles	1,142	2,118	54%
Fremont Union High	Alameda	474	1,015	47%
Salinas Union High	Monterey	1,618	3,784	43%
Grossmont Union High	San Diego	1,389	3,368	41%
Ballico-Cressey Elementary	Merced	61	168	36%
Keyes Union	Stanislaus	144	418	34%
Gridley Unified	Butte	123	397	31%
Dehesa Elementary	San Diego	30	97	31%
Julian Union Elementary	San Diego	14	46	30%
Marcum-Illinois Union Elementary	Sutter	20	66	30%
Lowell Joint	Los Angeles	116	385	30%
Rescue Union Elementary	El Dorado	39	131	30%

The Fifteen Districts with Most EL Students Reported as Receiving No Services				
District	County	EL Students Receiving No Services	Total EL Students in District	Percentage of EL Students Receiving No Services
Los Angeles Unified	Los Angeles	4,150	194,904	2%
Compton Unified	Los Angeles	1,697	10,505	16%
Salinas Union High	Monterey	1,618	3,784	43%
Grossmont Union High	San Diego	1,389	3,368	41%
William S. Hart Union High	Los Angeles	1,142	2,118	54%
Oxnard Union High	Ventura	588	3,433	17%
Cupertino Union	Alameda	526	1,975	27%
Fremont Union High	Alameda	474	1,015	47%
Twin Rivers Unified	Sacramento	407	8,852	5%
Vista Unified	San Diego	406	6,649	6%
Kern Union High	Kern	401	2,956	14%
Oakland Unified	Alameda	347	13,825	3%
San Marcos Unified	San Diego	269	3,902	7%
West Contra Costa Unified	Contra Costa	222	9,946	2%
Newman-Crows Landing Unified	Stanislaus	222	1,163	19%

• **PERCENTAGE OF EL STUDENTS AFFECTED.** For nearly one-third of school districts that report denying services to EL students (79 out of 251), the denial of EL services affects at least 10% of the district’s EL population. Additionally, for 10% of the districts (26 out of 251), a majority of the EL students are denied EL services. Figure 5 summarizes the percentage of the EL population denied services among the 251 school districts that report denying EL services to eligible students.



• **TOTAL NUMBER OF EL STUDENTS AFFECTED.** As Figure 6 reflects, out of the 251 school districts that acknowledge that they deny EL services to eligible students, 35 deny services to more than 100 EL students. Additionally, seven of these school districts deny EL services to 500 or more EL students. A substantial majority of districts (80%) deny services to fewer than 100 students, suggesting that many of the districts implicated have few EL students and are denying services to almost all of them, or that they are denying services to a small percentage of a large EL population.



In short, although the failure to provide language services to EL students is a pervasive statewide problem, the nature of the EL population and of the reasons for failing to provide them services varies among districts.<sup>29</sup> Accordingly, any solution to the problem will need to be flexible enough to address the diverse causes, and leave room for inevitable variances in local programs.

As documented in the following sections, the widespread failure of school districts to provide EL services to EL students is illegal and contributes in the first instance to the persistently low academic achievement of EL students.



## IMPORTANCE OF PROVIDING ENGLISH LEARNER INSTRUCTIONAL SERVICES

Although there is debate over the most effective way to address the needs of EL students, there is broad consensus that completely denying EL students instruction or services to address their English language knowledge and skills is predictive of long-term academic failure.

	ELs Receiving English Language Development (ELD) Services	ELs Receiving (ELD) and Specially Designed Academic Instruction in English (SDAIE)	ELs Receiving ELD and SDAIE with Primary Language (L1) Support	ELs Receiving ELD and Academic Subjects through the Primary Language (L1)	ELs Receiving Other EL Instructional Services	ELs not Receiving any EL Instructional Services	Total Number of English Learner Students
Statewide Totals	111,698	888,104	258,165	71,809	91,807	20,318	1,441,901

Source: California Department of Education, Dataquest, 2010-11 English Learners, Instructional Settings and Services, available at: [http://data1.cde.ca.gov/dataquest/EIP2\\_State.asp?RptYear=2010-11&RptType=ELPart2\\_1a](http://data1.cde.ca.gov/dataquest/EIP2_State.asp?RptYear=2010-11&RptType=ELPart2_1a)

As the chart above reflects, school districts report to the California Department of Education how many students receive EL services annually. Districts must indicate for each student whether he or she is being served in one of five instructional settings (each of which involves some form of specialized language instruction) or is receiving no services.

Research shows that placing EL students into a mainstream English setting with no specialized instruction from teachers trained on language acquisition techniques results in the lowest academic outcomes of any "approach" to instructing EL students.<sup>30</sup> In fact, "[s]tudents who have been in these settings in elementary school are the lowest achievers in comparison to students in any specially designed EL program. By middle school and high school, EL students who have been in any form of specialized instruction are more likely to score at grade level and less likely to drop out of high school than those who were in mainstream settings," i.e., those who have not received any specialized services.<sup>31</sup> Research also demonstrates (unsurprisingly) that "students who receive[d] no [EL] intervention performed at the lowest levels and had the highest drop-out rates."<sup>32</sup>

Students who have been in EL programs for several years but have not yet been reclassified are at particular risk of being denied EL services because when those students transition from a structured English immersion classroom setting into mainstream classes, "the continuing language development instruction to which they are legally entitled does not always occur."<sup>33</sup> Even the most effective EL programs, with specialized interventions to address the language development needs of the students, generally require 4 to 7 years to develop academic language proficiency,<sup>34</sup> underscoring the importance of providing instruction tailored to the language acquisition needs of EL students until they have reclassified.

Among our state's EL population, EL students who do not receive specialized instruction are likely to be the lowest performing and the most at risk of dropping out or experiencing persistent academic failure.

## DENYING SERVICES TO EL STUDENTS VIOLATES FEDERAL AND STATE LAW

In addition to ignoring a compelling body of research, failing to provide EL students with services to address their language acquisition needs violates clear mandates of both California and federal law.

**State Constitutional Right to Equal Educational Opportunity.** Under the California Constitution, students have a fundamental right to basic equality in their education in public schools. An educational agency violates students' constitutional rights where it (1) creates a real and appreciable impairment on the right to education that falls substantially below statewide standards, and (2) does not have a compelling reason for doing so. School districts serve as agents for the state, and the State itself "bears the ultimate authority and responsibility to ensure that its district-based system of common schools provides basic equality of educational opportunity."<sup>35</sup>

**Equal Educational Opportunities Act.** Under the federal Equal Educational Opportunities Act (EEOA), (1) districts must pursue a program informed by an educational theory recognized as sound by experts in the field, or, at least, deemed a legitimate experimental strategy, (2) the programs and practices actually used by the districts must be reasonably calculated to implement effectively the educational theory adopted, and (3) the district's program must not continue to fail, after being used for enough time to give the program a legitimate trial, in producing results indicating that the language barriers confronting EL students are actually being overcome.<sup>36</sup> The United States Supreme Court has recognized "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."<sup>37</sup> In other words, "schools are not free to ignore the need of limited English speaking children for language assistance to enable them to participate in the instructional program of the district."<sup>38</sup>

When a school district declines to provide any instructional services for its EL students, this treatment violates both the California Constitution and the EEOA. Under the EEOA, districts must pursue a program for addressing the language development needs of EL students that is recognized as pedagogically sound, and providing no services to EL students is no program at all. Thus, EL students who do not receive the language development services that would allow them to access the academic curriculum are denied equal educational opportunity.

## THE STATE'S CONTRIBUTING ROLE IN CREATING AND PERPETUATING THE FAILURE OF DISTRICTS TO DELIVER EL SERVICES

The California Constitution "makes public education uniquely a fundamental concern of the State and prohibits maintenance and operation of the common public school system in a way which denies basic educational equality to the students. The State itself bears the ultimate authority and responsibility to ensure that its district-based system of common schools provides basic equality of educational opportunity." *Butt v. California*, 4 Cal. 4th 668, 685 (1992). Because education is a fundamental right, any action that has a real and appreciable impact upon such right is subject to strict scrutiny. *Serrano v. Priest (Serrano II)*, 18 Cal. 3d 728, 761, 767-768 (1976). The State therefore "is obliged to intervene when a local district's fiscal problems would otherwise deny its students basic educational equality, unless the State can demonstrate a compelling reason for failing to do so." *Butt*, 4 Cal. 4th at 692. This duty is non-delegable.

In *Lau v. Nichols*, 414 U.S. 563 (1974), the United States Supreme Court held that the failure of the San Francisco school system to provide English language instruction to approximately 1,800 non-English speaking Chinese students denied them a meaningful opportunity to participate in the public education program in violation of Title VI of the Civil Rights Act of 1964. *Lau* thus holds that school districts must provide non-English speaking students meaningful access to the curriculum remains the law under the EEOA.<sup>39</sup>

This core holding of *Lau* has been affirmed in *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981), a federal

court decision that sets forth a three-part test to evaluate whether a State or district is complying with the EEOA. Under the EEOA, "No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin" by "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."<sup>40</sup> *Castaneda* makes clear that the EEOA preserves the principles set forth in *Lau*. Under the first prong of the *Castaneda* test, the court evaluates the "soundness of the educational theory or principles upon which the challenged program is based."<sup>41</sup> Numerous courts across the nation have adopted this test.<sup>42</sup> The EEOA leaves no room for the absence of any EL instructional program or denial of EL services to EL students.<sup>43</sup>

In 2012, the California Department of Education represented that "all English Learners are provided with English language development (ELD) instruction targeted to their English proficiency level and appropriate academic instruction in one of three settings" to ensure that they acquire full proficiency in English and meet the same grade-level academic standards expected of all students.<sup>44</sup> This assertion, however, is contradicted by the Department's recognition in the very same fact sheet that "[a] total of 20,318 English Learners do not receive any instructional services required for English Learners."<sup>45</sup>

Despite this acknowledgement that more than 20,000 students are not receiving the legally mandated services needed to provide access to a basic education to EL students, the State agencies responsible for the constitutional and statutory rights of students have taken no action to enforce any of the applicable laws. Nor has any State agency publicly acted to correct this unlawful practice, investigate the total failure to offer EL services, or provide meaningful guidance to districts on providing required EL instruction to all of their EL students, as required by law.



## WHAT CAN WE DO TO ADDRESS THIS PROBLEM?

1. The State, through the California Department of Education, the State Board of Education and the State Superintendent of Public Instruction must carry out their legal responsibilities to enforce the law.
  - Districts must provide services or immediately develop a plan for doing so, and the State must hold these districts accountable.
2. The State should create a system to investigate reports that ELs are not receiving services.
  - The State currently generates a report using district data indicating the instructional services provided to EL students.
  - Whenever a district reports that one or more EL students are receiving no EL services, CDE must investigate the basis for the report and determine whether the district is failing to provide EL services as required by law.
3. If CDE determines the district is failing to provide EL services as required by law, it should direct the district to develop and submit a written plan to ensure that all EL students are provided EL services and begin providing the necessary services.
  - The plan should be for a period of no less than two years.

- Districts should be required to provide compensatory services for students unlawfully denied EL services, unless CDE approves a plan that includes an instructional strategy that is reasonably likely to remediate students who had been denied EL services.
  - CDE should ensure that district plans adequately address the following issues:
    - o EL students are entitled to specialized instructional services that will ensure that they are able to access the core academic curriculum.
    - o Providing a qualified teacher who does not provide specialized instructional services for EL students does not fulfill districts' obligation to provide EL students with EL services.
  - If the district does not develop a plan or provide services to all ELs, the district should be subject to appropriate oversight and sanctions to enforce the law.
4. CDE should verify that the district is complying with the plan and that all students are receiving EL services after its adoption and at the start of the next school year. In addition, the State should track whether services are actually being provided, by conducting site visits or through some other independent monitoring process, to ensure that teachers are actually providing EL services (rather than simply putting credentialed teachers in the classroom but providing no specialized instruction).
  5. CDE should develop a system to track data about the long term English Learners (LTELs), English learners at risk of becoming LTELs, and English learners who are not receiving any specialized instructional services. LTELs are English learners who:
    - Are enrolled in any of grades 6 to 12;
    - Have been enrolled in schools in the United States for more than six years;
    - Have remained at the same English language proficiency level on the CELDT for two or more consecutive years; and
    - Score far below basic or below basic on the CST for ELA.
  6. CDE should develop guidelines for programs and policies that districts can adopt to ensure that all EL students receive appropriate services.
    - The guidance should include a non-exhaustive list of approved programs that districts can implement, including English Language Development, Structured English Immersion, and targeted intervention or tutoring services.
    - In developing guidelines, CDE should take into account the need for a wide variety of programs that address each district's unique needs, including the number of EL students, proportion of EL students to total enrollment, and larger districts without sufficient qualified staff to provide required instruction.

## CONCLUSION

There are a number of appropriate common-sense, research-based methods for ensuring the delivery of basic English acquisition services to EL students. Although schools have the opportunity to develop and design their programs to meet the needs and priorities of the local community, the State must develop and maintain some minimum expectation of access to educational opportunity for all students and have some meaningful mechanism to ensure that districts correct significant breakdowns that cut to the heart of programs designed to meet the needs of such an important population within California's public education system.

The failure to provide EL students with language services is a long-standing problem that has been publicly acknowledged by hundreds of school districts and state officials charged with ensuring that our public schools comply with basic education and civil rights laws. The time for action is now: the longer that we tolerate such a fundamental breakdown in the statewide process for serving EL students, the longer our education system will fail to meet the needs of a substantial portion of our state's children.

## ENDNOTES

<sup>1</sup> California Department of Education, DataQuest [hereinafter Dataquest], <http://dq.cde.ca.gov/dataquest/LEPbyLang1.asp?cChoice=LepbyLang1&cYear=2010-11&cLevel=State&cTopic=LC&myTimeFrame=S&submit1=Submit> (last visited January 14, 2013) (indicating a total EL count in California at 1,441,387); MIGRATION POLICY INSTITUTE, ELL INFORMATION CENTER FACT SHEET SERIES, NUMBER AND GROWTH OF STUDENTS IN US SCHOOLS IN NEED OF ENGLISH INSTRUCTION (2010), [http://www.migrationinformation.org/ellinfo/FactSheet\\_ELL1.pdf](http://www.migrationinformation.org/ellinfo/FactSheet_ELL1.pdf) (last visited January 14, 2013) (calculating 5.3 million ELs in the United States and indicating that 28% of EL students in the United States live in California); LEGISLATIVE ANALYST'S OFFICE, ANALYSIS OF THE 2007-08 BUDGET BILL: EDUCATION E-121, available at [http://www.lao.ca.gov/analysis\\_2007/education/ed\\_an107.pdf](http://www.lao.ca.gov/analysis_2007/education/ed_an107.pdf) (last visited January 14, 2013) (counting 1.6 million ELs in California).

<sup>2</sup> CHRISTOPHER JEPSEN & SHELLEY DE ALTH, ENGLISH LEARNERS IN CALIFORNIA SCHOOLS 10 (2005) (CITING TAFOYA, SONIA M., "THE LINGUISTIC LANDSCAPE OF CALIFORNIA SCHOOLS," CALIFORNIA COUNTS, VOL 3., NO. 4, PUBLIC POLICY INSTITUTE OF CALIFORNIA, SAN FRANCISCO, CALIFORNIA, 2002).

<sup>3</sup> 76% of elementary school students and 56% of high school students who are ELs were born in the United States. A majority of ELs in high schools are second- or third- generation U.S. citizens. NATIONAL EDUCATION ASSOCIATION, ENGLISH LANGUAGE LEARNERS FACE UNIQUE CHALLENGES 1 (2008), <http://www.weac.org/Libraries/PDF/ELL.sflb.ashx> (last visited January 14, 2013) (citing R. CAPPS ET AL., THE NEW DEMOGRAPHY OF AMERICA'S SCHOOLS: IMMIGRATION AND THE NO CHILD LEFT BEHIND ACT 18 (2005)).

<sup>4</sup> See, e.g., Patricia Gándara & Russell W. Rumberger, Resource Needs for California's English Learners, 5-10 (2006), available at <http://irepp.stanford.edu/documents/GDF/STUDIES/22-Gandara-Rumberger/22-Gandara-Rumberger%283-07%29.pdf>.

<sup>5</sup> See Dataquest, [http://dq.cde.ca.gov/dataquest/EIP2\\_State.asp?RptYear=2010-11&RptType=ELPart2\\_1b](http://dq.cde.ca.gov/dataquest/EIP2_State.asp?RptYear=2010-11&RptType=ELPart2_1b) (follow County hyperlinks). A chart listing data for all counties for the 2010-11 school year is available at <http://www.aclu-sc.org/cases/english-learners/white-paper/>.

<sup>6</sup> See California Department of Education, What's In DataQuest?, <http://dq.cde.ca.gov/dataquest/what-sinq.asp> (last visited January 14, 2013); California Department of Education, FACTS ABOUT ENGLISH LEARNERS IN CALIFORNIA, March 8, 2012, <http://www.cde.ca.gov/ds/sd/cb/cefelfacts.asp>.

<sup>7</sup> LAURIE OLSEN, REPARABLE HARM: FULFILLING THE UNKEPT PROMISE OF EDUCATIONAL OPPORTUNITY FOR CALIFORNIA'S LONG TERM ENGLISH LEARNERS 1 (Californians Together 2010), available at [www.californiantogether.org/docs/download.aspx?fileId=227](http://www.californiantogether.org/docs/download.aspx?fileId=227) (last visited January 14, 2013); Cal. Educ. Code § 313.1(a).

<sup>8</sup> Cal. Educ. Code § 306(a).

<sup>9</sup> National Hispanic Caucus of State Legislators & Tomás Rivera Policy Institute, CLOSING ACHIEVEMENT GAPS: IMPROVING EDUCATIONAL OUTCOMES FOR HISPANIC CHILDREN (April 2010), available at <http://www.trpi.org/PDFs/Closing%20Achievement%20Gaps.pdf> (last visited January 14, 2013); National Education Association *supra* note 3, at 1.

<sup>10</sup> California Department of Education, FACTS ABOUT ENGLISH LEARNERS IN CALIFORNIA, March 8, 2012, <http://www.cde.ca.gov/ds/sd/cb/cefelfacts.asp>.

<sup>11</sup> Claude Goldenberg, What the Research Does Not Say, AMERICAN EDUCATOR 8-10 (Summer 2008); Richard Verdugo & Brittney Flores, English-Language Learners : Key Issues, 39 EDUCATION AND URBAN SOCIETY 167, 171-74 (2007).

<sup>12</sup> Sheldon Barr, et al., Core Strategies to Support English Language Learners, 76 THE EDUCATIONAL FORUM 105, 107-09 (2012); KENJI HAKUTA, ET AL., HOW LONG DOES IT TAKE ENGLISH LEARNERS TO ATTAIN PROFICIENCY? 1-4 (2000).

<sup>13</sup> JIM CUMMINS, READING AND THE BILINGUAL STUDENT: FACT AND FRICTION, IN ENGLISH LEARNERS, REACHING THE HIGHEST LEVEL OF ENGLISH LITERACY 5 (Gilbert G. Garcia ed., 2003).

<sup>14</sup> OLSEN, *supra* note 7, at 18.

<sup>15</sup> JEPSEN & ALTH, *supra* note 2, at 10 (CITING TAFOYA, SONIA M., "THE LINGUISTIC LANDSCAPE OF CALIFORNIA SCHOOLS," CALIFORNIA COUNTS, VOL 3., NO. 4, PUBLIC POLICY INSTITUTE OF CALIFORNIA, SAN FRANCISCO, CALIFORNIA, 2002).

<sup>16</sup> *Id.*

<sup>17</sup> Yang Sao Xiong, *Structuring Inequity: How California Selectively Tests, Classifies, and Tracks Language Minority Students*, eScholarship University of California 145, 158 (2006), <http://escholarship.org/uc/item/98d66346> (last visited January 14, 2012).

<sup>18</sup> Cal. Educ. Code §§ 305-306.

<sup>19</sup> Although parents may opt out of a specific instructional setting for ELs, 5 C.C.R. § 11301, the State must ensure that districts continue to provide instructional services for ELs until they are reclassified. See, 5 C.C.R. § 11302; California Department of Education, *FACTS ABOUT ENGLISH LEARNERS IN CALIFORNIA*, March 8, 2012, <http://www.cde.ca.gov/ds/sd/cb/cefelfacts.asp>. California Department of Education, *EL FAQs*, available at [www.cde.ca.gov/sp/el/er/documents/elfaq.doc](http://www.cde.ca.gov/sp/el/er/documents/elfaq.doc) (last visited January 15, 2013) ("Parents may request that their children be exempted from a specific instructional setting ... However, districts still have an obligation to ensure that students receive ELD and access to other core content areas from teachers who are qualified to provide such instruction.") (citations omitted).

<sup>20</sup> 5 C.C.R. § 11302.

<sup>21</sup> See California Department of Education, *Language Census*, <http://www.cde.ca.gov/ds/dc/lc/> (last visited January 14, 2013) (indicating items collected annually from districts by CDE); California Department of Education, *CALPADS System Documentation, CALPADS Data Guide v. 4.1*, 136 <http://www.cde.ca.gov/ds/sp/cl/systemdocs.asp> (last visited January 14, 2013) (detailing the data EL program staff must provide to CDE).

<sup>22</sup> California Department of Education, *2010-11 English Learners, Instructional Settings and Services*, [http://dq.cde.ca.gov/dataquest/EIP2\\_State.asp?RptYear=2010-11&RptType=ELPart2\\_1a](http://dq.cde.ca.gov/dataquest/EIP2_State.asp?RptYear=2010-11&RptType=ELPart2_1a). (last visited December 14, 2012). The statewide total for each of the six categories is reported under the head "Row B - Number of EL Students receiving instructional services." Data is available for each school year beginning with 1999-2000, with the most recently reported data for the 2010-11 school year.

<sup>23</sup> 20 U.S.C. § 1703(f). "No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by - ... (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."

<sup>24</sup> CAL. CONST. art. I, § 7, subds. (a), (b); art. IV, § 16, subd. (a); *Butt v. California*, 4 Cal. 4th 668, 680-81 (1992) (holding the State is ultimately responsible for ensuring that school districts do not violate public school students' fundamental right to equal educational opportunity).

<sup>25</sup> See Cal. Educ. Code § 440(a) (stating that local educational agencies "shall provide instructional services to limited-English-proficient pupils and immigrant pupils").

<sup>26</sup> OLSEN, *supra* note 7, at 14.

<sup>27</sup> A draft of this document is available online. Susana Dutro & Carrol Moran, *Rethinking English Language Instruction: An Architectural Approach* 29 (2002), available at <http://elachieve.org/syseld/images/stories/docs/participant/home/Rethinking.pdf> (last visited January 14, 2013).

<sup>28</sup> An excel file with complete data on provision of services to EL students for all California public school districts is available at <http://www.aclu-sc.org/cases/english-learners/white-paper/>.

<sup>29</sup> This variability could help explain why some districts are not providing services as the law requires. For example, in districts denying services to a small percentage of their EL population, the district likely has an EL program and the issue may be that some students are falling through the cracks, or that a single school is not offering EL services. In districts denying services to the majority or all of their EL population, by contrast, the district may not have a comprehensive EL program at all, or may include numerous schools failing to provide EL services.

<sup>30</sup> GINA MARIE GIANZERO, *THE ROLE OF THE SCHOOL DISTRICT IN IMPROVING EDUCATIONAL OPPORTUNITIES AND OUTCOMES FOR ADOLESCENT ENGLISH LANGUAGE LEARNERS* 337 (2010), available at [http://sdsu-dspace.calstate.edu/xmlui/bitstream/handle/10211.10/486/Gianzero\\_Gina.pdf?sequence=1](http://sdsu-dspace.calstate.edu/xmlui/bitstream/handle/10211.10/486/Gianzero_Gina.pdf?sequence=1) at 113 (last visited January 14, 2013); OLSEN, *supra* note 7, at 15; WAYNE THOMAS & VIRGINIA COLLIER, *A NATIONAL STUDY OF SCHOOL EFFECTIVENESS FOR LANGUAGE MINORITY STUDENTS' LONG-TERM ACADEMIC ACHIEVEMENT* 2 (CREDE 2002), available at [http://crede.berkeley.edu/research/crede/research/llaa/1.1\\_final.html](http://crede.berkeley.edu/research/crede/research/llaa/1.1_final.html).

<sup>31</sup> OLSEN, *supra* note 7, at 15.

<sup>32</sup> KATHRYN LINDHOLM-LEARY & GRACIELA BORSATO, *ACADEMIC ACHIEVEMENT IN EDUCATING ENGLISH LANGUAGE LEARNERS: A SYNTHESIS OF RESEARCH EVIDENCE* 202 (Genessee et al, eds., Cambridge University Press, 2006) (CITING THOMAS, W., AND COLLIER, V. 2002. *A NATIONAL STUDY OF SCHOOL EFFECTIVENESS FOR LANGUAGE MINORITY STUDENTS' LONG-TERM ACADEMIC ACHIEVEMENT FINAL REPORT: PROJECT 1.1 SANTA CRUZ, CA, AND WASHINGTON, DC: CENTER FOR RESEARCH ON EDUCATION, DIVERSITY, AND EXCELLENCE*).

<sup>33</sup> GINA MARIE GIANZERO, *THE ROLE OF THE SCHOOL DISTRICT IN IMPROVING EDUCATIONAL OPPORTUNITIES AND OUTCOMES FOR ADOLESCENT ENGLISH LANGUAGE LEARNERS* 337 (2010), available at [http://sdsu-dspace.calstate.edu/xmlui/bitstream/handle/10211.10/486/Gianzero\\_Gina.pdf?sequence=1](http://sdsu-dspace.calstate.edu/xmlui/bitstream/handle/10211.10/486/Gianzero_Gina.pdf?sequence=1) at 113 (last visited January 14, 2013).

<sup>34</sup> Hakuta, et al., *supra* note 12, at 10.

<sup>35</sup> *Butt*, 4 Cal. 4th at 685. The denial of EL services to eligible students also violates the California Education Code. See Cal. Educ. Code § 440(a).

<sup>36</sup> *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981).

<sup>37</sup> *Lau v. Nichols*, 414 U.S. 563 (1974).

<sup>38</sup> *Castaneda*, 648 F.2d at 1008.

<sup>39</sup> *Castaneda*, 648 F.2d at 1008 ("[T]he essential holding of *Lau*, i.e., that schools are not free to ignore the need of limited English speaking children for language assistance to enable them to participate in the instructional program of the district, has now been legislated by Congress, acting pursuant to its power to enforce the fourteenth amendment, in § 1703(f)").

<sup>40</sup> 20 U.S.C. § 1703(f).

<sup>41</sup> *Castaneda*, 648 F.2d at 1009.

<sup>42</sup> See, e.g., *Gomez v. Illinois*, 811 F.2d 1030, 1043 (7th Cir. 1987).

<sup>43</sup> The structure of California's system for serving EL students, including the requirement in Proposition 227 that EL students must be taught in English in most cases, see Cal. Educ. Code § 305, and the provision allowing parents to request a change in certain instructional settings, see Cal. Educ. Code § 311, does not affect the basic legal requirement that EL students receive some form of specialized instruction to address their language acquisition needs.

<sup>44</sup> CalEdFacts, *Facts About English Learners in California*, Last Revised March 8, 2012, available at <http://www.cde.ca.gov/ds/sd/cb/cefelfacts.asp> (last visited October 15, 2012).

<sup>45</sup> CalEdFacts, *Facts About English Learners in California*, Last Revised March 8, 2012, available at <http://www.cde.ca.gov/ds/sd/cb/cefelfacts.asp> (last visited October 15, 2012).

<sup>46</sup> Within the past 15 years, the State has announced the creation of an English Learner Integrated Action Team, charged with developing a statewide plan for English learners, an English Learner Support Division, charged with aligning English Language Development standards with common academic standards in English/language arts, the State Seal of Biliteracy, to recognize students with high proficiency in one or more languages other than English, the passage of a bill to assess reclassification standards throughout the state, and the passage of a bill to define and recognize the existence of long term English learners, and the State has convened Accountability Leadership Institutes for English Learner, Immigrant and Migrant Students. See California Department of Education, *News Release* December 21, 2011, available at <http://www.cde.ca.gov/nr/ne/yr11/yr11rel103.asp> (last visited January 15, 2013); California Department of Education, *News Release*, July 5, 2012, available at <http://www.cde.ca.gov/nr/ne/yr12/yr12rel68.asp> (last visited January 15, 2013); Alex Padilla, *Governor Brown Signs Padilla's English Learner Reform Bills*, September 27, 2012, available at <http://sd20.senate.ca.gov/news/2012-09-27-governor-brown-signs-padilla-s-english-learner-reform-bills> (last visited January 15, 2013); Santa Clara County Office of Education, *13th Annual Accountability Institute*, available at [http://www.sccoe.org/depts/ell/accountability/ali\\_13thannual.asp](http://www.sccoe.org/depts/ell/accountability/ali_13thannual.asp) (last visited January 15, 2013). These important steps demonstrate the existence of the capacity to provide guidance, technical assistance and oversight of English learner programs at a statewide level. Although the State has taken steps that acknowledge the importance of this growing student subgroup, the persistent existence of the no services issue demonstrates that without concerted statewide action to ensure that all ELs receive EL instructional services, the problem will continue.

