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Cover Page Footnote

12 Campaign for Fiscal Equity, Inc. v. New York (CFE I), 655 N.E.2d 661, 664 (N.Y. 1995). 13 This data is current as of September 2019. Information and Data Overview, N.Y.C. DEP'T OF EDUC., <https://infohub.nyced.org/reports/school-quality/information-and-data-overview> (last visited Sep. 13, 2021) (follow "Demographic Snapshot" link; then follow "View the Demographic Snapshot" link). 14 Julie Sugarman & Courtney Geary, English Learners in New York State, MIGRATION POL'Y INST. (Aug. 2018), https://www.migrationpolicy.org/sites/default/files/publications/EL-factsheet2018-NewYorkState_FinalWeb.pdf.

WATCH YOUR LANGUAGE: HOW A SCHOOL
DISTRICT'S FAILURE TO PROVIDE
MEANINGFUL COMMUNICATION HAS
IMPACTED STUDENTS DURING THE
PANDEMIC

Amy Leipziger*

INTRODUCTION

Mr. X, a Mandarin speaker,¹ received a form from his son's school that was entirely in English, and, unable to read it, asked the teacher about its contents. He was simply told to sign it. What he didn't know was that by doing so, he had waived his right to obtain a necessary educational evaluation for his son. Ms. H, a Spanish-speaker, went to her daughter's school for a meeting, and, when she asked for an interpreter, was refused and told that she should

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¹ When referring to a speaker's language, I refer to his or her dominant, or preferred, language and the one that they primarily speak. The speaker may speak other languages, such as English, but is most comfortable speaking the language indicated.

“learn to speak English.”² Stories of parents such as these being denied information from schools, before the COVID-19 pandemic, were emblematic of the struggles that Limited English Proficient (LEP)³ families experience every day in schools throughout the country.

Since the COVID-19 pandemic, however, it has become even harder for LEP families to obtain the most basic information from their children’s schools. Parents report that they receive notices about COVID-19-related school closings in English rather than in their preferred language, or that they don’t receive timely information about COVID-19 testing in schools, distribution of remote devices, or how to access pertinent information about their child’s

²Complaint & Jury Demand at 1, *Garcia v. Carranza*, Civ. No. 19-3342 (E.D.N.Y. June 7, 2019); see also *LSNYC Sues NYC DOE for Discriminating Against Non-English Speaking Parents by Denying Them Translation Services*, LEGAL SERVICES NYC (June 7, 2019), <https://www.legalservicesnyc.org/news-and-events/press-room/1481-lsnyc-sues-nyc-doe-for-discriminating-against-non-english-speaking-parents-by-denying-them-translation-services>.

³ A person does not qualify as LEP simply because they speak Spanish, or some language other than English. The term LEP applies for those individuals whose *primary language* is one other than English, and who have limited English proficiency in one of the four domains of language proficiency (reading, writing, speaking, or listening). LEP is also the legal term used in both the Elementary and Secondary Education Acts, and by the U.S. Departments of Education and Justice in their 2015 ‘Dear Colleague’ guidance letter. In addition to LEP, other appropriate terms include “non-English speaker,” “limited English fluency” (LEF), and “monolingual.” See, e.g., U.S. Dep’t of Just., Civ. Rts. Div. & U.S. Dep’t of Educ., Off. for Civ. Rts., *Guidance to Ensure English Learner Students Have Equal Access to a High-Quality Education* (Jan. 7, 2015), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf> [hereinafter DOE/DOJ Dear Colleague Letter]; Paul Scarborough, *The “P” In “LEP”*, EQUAL ACCESS LANGUAGE SERVS. LLC (June 2020), <https://equalaccesslanguageservices.com/the-p-in-lep/>.

classes.⁴ Sarah,⁵ a nine-year-old girl living in Brooklyn, learning to speak English, spent weeks during Spring 2020 unable to access any remote instruction. Sarah's mother repeatedly called the school to try and report that she was having difficulty accessing the remote platform, but the school continually failed to provide her with a Spanish-speaking interpreter. Sarah's mother was unable to communicate the problem, and, as a result, Sarah fell even further behind in her work than many of her peers because she lacked access to the curriculum.⁶ Jeffrey, a seven-year-old boy living in Queens, received materials and information about remote instruction only in English. His mother, a Bengali speaker, found it difficult to understand these materials and to help him navigate his schoolwork. As a result, Jeffrey lost valuable instruction and became disengaged and detached from his school. Nancy, an eight-year-old girl in Queens, struggled to learn English during remote learning. Consequently, she stopped participating in all her other remote classes, and her grandmother, a Spanish speaker who is ill at

⁴ The term "primary language," when used with respect to an individual who is LEP, means the language normally spoken by the individual or, in the case of a child, the language normally used by the parents of the child. Other applicable terms include "native language" and "home language". See 34 C.F.R. § 300.29(a)(1) (2021).

⁵ Each of these anecdotes are taken from my personal practice and, in order to preserve anonymity, pseudonyms have been used.

⁶ These anecdotes first appeared in an article discussing the need for school translation and interpretation services for immigrant families in New York City. See Amy Leipziger, *Needed: School Translation Services for Immigrant Families*, N.Y. DAILY NEWS (Sept. 17, 2020, 5:00 AM), <https://www.nydailynews.com/opinion/ny-oped-school-translation-immigrant-families-20200917-jtybrbpu5jhl5kv6nxsas7qh5u-story.html>.

ease with technology, was at a loss for ways to help Nancy make progress in school.

In New York City, the school district has failed parents and students alike. The school district didn't simply deprive the parents of Sarah, Jeffrey, and Nancy of their right to interpretation and translation—it effectively denied these students, both English Language Learners (ELL) and not, the resources necessary to obtain a meaningful education. Federal, state, and local laws require schools to provide sufficient language services to ensure that LEP families have reasonable access to the same services and information as English-speaking individuals.⁷ This right to interpretation and translation under the law is commonly referred to as “language access.” When the New York City Department of Education (NYCDOE) denied language access to immigrant families in need during the pandemic, it exacerbated a pre-existing burden, leaving these parents unable to support their child's learning during remote instruction, or to help their children make progress academically.⁸

ELL students have always struggled with learning a new language while simultaneously keeping up with the academic rigors of school. But when the pandemic shuttered school doors in March 2020, making everything contingent on remote learning, these students found themselves even

⁷ *Supra* note 2.

⁸ *Education in a Pandemic: The Disparate Impacts of COVID-19 on America's Students*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., <https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf> (last visited Sep. 13, 2021).

further behind the ball.⁹ As we enter the start of the 2021-2022 school year, the third academic year disrupted by COVID-19, we know that, while learning loss has been felt by every student, the toll has been especially severe for ELL students. The practice of remote learning during the pandemic has all but foreclosed any opportunity for ELLs, who live in homes where English is rarely spoken, if at all, to develop language skills and make progress academically.¹⁰ While many school districts, like the NYCDOE, are planning to resume in-person learning in the 2021-2022 school year, the need for remote learning will continue in some circumstances for the foreseeable future.¹¹ As a result, LEP families, including ELLs, will continue to need help navigating a system that seems intent on depriving them of the critical information necessary to succeed in school.

This article examines some of the obstacles that LEP parents have experienced with the NYCDOE during the pandemic, the impact these obstacles have had on their children's education, and whether the NYCDOE's refusal to provide language access

⁹ Juliana Kim, *With Remote Learning, a 12-Year-Old Knows Her English Is Slipping Away*, N.Y. TIMES (Dec. 29, 2020), <https://www.nytimes.com/2020/12/29/nyregion/coronavirus-english-language-students.html?referringSource=articleShare>.

¹⁰ *Id.*

¹¹ Julia March & Selim Algar, *DOE Mulling Remote Schooling Options for Kids in Special Circumstances* (July 30, 2021, 2:36 PM), <https://nypost.com/2021/07/30/doe-mulling-remote-schooling-options-for-kids-in-special-circumstances>. With the rise in the Delta variant of COVID-19 across the United States at the time of publishing this article, some school districts are already reversing course and mandating remote learning for the start of the 2021-2022 school year. See Meredith Deliso, *As Delta Variant Surges, Remote Learning in the Spotlight For Another School Year* (Aug., 20, 2021, 4:02 AM) <https://abcnews.go.com/GMA/News/delta-variant-surges-remote-learning-spotlight-school-year/story?id=79531347>.

amounts to a denial of a sound basic education under state constitutional law.¹² I chose to focus primarily on New York City because it boasts the nation's largest school system, with nearly 1.1 million students, and is comprised of 1,876 schools.¹³ A large share of these students have significant language needs. In New York state, forty-six percent of children in low-income families have one or more foreign-born parents, a figure considerably higher than the national average of thirty-two percent.¹⁴

Part I consists of an overview of federal and state law, including the legal rights and protections afforded to ELLs and LEP parents. Part II reviews the statistics and demographics of the growing LEP population in New York City and NYC schools. Part III examines the NYCDOE's practice of providing language access, and its failures, during the pandemic. Part IV examines Article XI § 1 of the New York Constitution (the "Education Article"), how courts have thus far considered this claim, and posits whether LEP parents have grounds to allege that the state has denied their children a sound basic education based on a failure to provide language access during the pandemic.

As an education advocate working on behalf of students and parents in NYC, the author has seen

¹² Campaign for Fiscal Equity, Inc. v. New York (*CFE I*), 655 N.E.2d 661, 664 (N.Y. 1995).

¹³ This data is current as of September 2019. *Information and Data Overview*, N.Y.C. DEP'T OF EDUC., <https://infohub.nyced.org/reports/school-quality/information-and-data-overview> (last visited Sep. 13, 2021) (follow "Demographic Snapshot" link; then follow "View the Demographic Snapshot" link).

¹⁴ Julie Sugarman & Courtney Geary, *English Learners in New York State*, MIGRATION POL'Y INST. (Aug. 2018), https://www.migrationpolicy.org/sites/default/files/publications/EL-factsheet2018-NewYorkState_FinalWeb.pdf.

firsthand the grave reality that the COVID-19 pandemic has imposed on LEP parents trying to navigate their child's school system. LEP parents have a legal right to have access to information in their native languages so they can be as well-informed as English-speaking families about their children's education.¹⁵ The NYCDOE's continued refusal to adhere to their obligations under the law will continue to stifle the academic growth and achievement of these students, and deny them, and their parents, equal opportunity to succeed.

I. A STARTING POINT: THE BASELINE FOR LEP AND ELL RIGHTS UNDER THE LAW

Title VI of the Civil Rights Act of 1964 protects LEP persons by ensuring them meaningful access to government programs.¹⁶ The text of Title VI provides that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."¹⁷ An individual's preferred language is treated as an aspect of, or proxy for, national origin. This is predicated on the idea that limited English proficiency and/or having a primary language other

¹⁵ *Frequently Asked Questions on Legal Requirements to Provide Language Access Services*, MIGRATION POL'Y INST., <https://www.migrationpolicy.org/programs/language%20%20access-translation-and-interpretation-policies-and-practices/frequently-asked> (last visited Sep. 13, 2021).

¹⁶ Civil Rights Act of 1964, Pub. L. No. 88-352 § 601, 78 Stat. 241, 252 (codified at 42 U.S.C. § 2000d).

¹⁷ *Id.*

than English is often an indicator that a person was born in a country other than the U.S. A school district that fails to comply with its obligation to provide interpretation and translation to LEP families under Title VI, therefore, has a disparate impact on them based on their national origin. Often, immigrant families that identify as LEP have children that are designated as English Language Learners (ELLs) in school.¹⁸ However, a child's proficiency in English should in no way affect the language needs of the parents, meaning a child may be proficient in English despite their parent(s) being identified as LEP.

The Supreme Court extended the protections of Title VI to ELLs and LEP parents for the first time in 1974.¹⁹ *Lau v. Nichols* involved a class action by approximately 1,800 non-English speaking students of Chinese ancestry against the San Francisco Unified School District. The students claimed that the school district's failure to provide them with any form of supplemental language instruction violated their rights under the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.²⁰ The U.S. Supreme Court held that the school district's lack of a language program violated Title VI because it effectively denied the students of Chinese descent a "meaningful opportunity" to participate in their education, thereby treating them differently than other students because of their national origin.²¹ Specifically, the Court found that Title VI prohibits conduct that has a disproportionate impact on LEP persons because such behavior constitutes national origin

¹⁸ *Our Nation's English Learners*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/datastory/el-characteristics/index.html> (last visited Sep. 13, 2021)

¹⁹ See *Lau v. Nichols*, 414 U.S. 563 (1974).

²⁰ *Id.* at 564–65.

²¹ *Id.* at 568.

discrimination.²² Where a public school system teaches exclusively in English and fails to provide English language instruction to non-English speaking students (here, pupils of Chinese ancestry), the “district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students,” as required by Title VI.²³

Lau’s landmark holding recognized that recipients of Federal financial assistance, notably school districts, have an affirmative responsibility under Title VI to provide LEP persons with a meaningful opportunity to participate in public programs.²⁴ The Court in *Lau* interpreted Title VI as prohibiting discrimination where it had the effect, if not the intent, of discrimination based on national origin.²⁵ The Department of Education’s Office for Civil Rights (OCR) issued a Memorandum in July 1970—a memorandum that was affirmed by the Supreme Court in *Lau v. Nichols*—that provided that recipients must adequately notify minority groups comprised of limited-English proficient parents of those school activities that are called to the attention of other parents.²⁶ Furthermore, in order for such notice to be deemed adequate, it “may have to be provided” to LEP parents in a language other than English.²⁷ This would set the foundation for LEP parents to assert their rights under the law by

²² *Id.*

²³ *Id.* (quoting Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11595 (July 17, 1970)).

²⁴ *Id.* at 570.

²⁵ *Id.* at 568.

²⁶ Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11595 (July 17, 1970).

²⁷ *Id.*

demanding that school districts provide them with effective notice of educational activities.

In the years following the Supreme Court's landmark holding in *Lau*, school districts across the country took significant steps to provide necessary language access services and support to ELL students and LEP parents.²⁸ Unfortunately, the Court subsequently cast doubt on *Lau's* validity in *Alexander v. Sandoval*. In *Sandoval*, the Court held that Title VI does not provide individuals with a private right of action to enforce regulations that have a disparate impact.²⁹ Though the Court's decision curtailed the possibility of pursuing Title VI claims based on a denial of language access, LEP parents would gain additional safeguards for their children's rights to equal education under the law with the Equal Educational Opportunities Act (EEOA), 20 U.S.C. §1701 *et seq.* Congress passed the EEOA in 1974, in part, to codify the legal protections

²⁸ For example, the Office for Civil Rights (OCR) initiated compliance reviews of school districts to determine whether English language learner students in the district were denied equal educational opportunities in the district's programs and services, and whether the district adequately notified minority parents/guardians of school activities that are called to the attention of other parents/guardians. OCR also mandated that schools tell parents if their child needs language instruction, and what program the school will use to help their child learn English. For an OCR compliance letter to one Pennsylvania-area school district, *see* Letter from Wendella P. Fox, Dir., Off. for C.R., U.S. Dep't of Educ., to Dr. Francis X. Antonelli, Superintendent of Schs., Hazleton Area Sch. Dist. (Apr. 10, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03105002-a.pdf>.

²⁹ *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001); *see also* *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 283 (1978) (finding it "unnecessary to resolve this question [whether a right of action for private parties exists under Title VI] in the instant case.")

afforded to ELLs under *Lau*.³⁰ In fact, testimony in the bill's legislative history revealed that the EEOA was intended to bolster the rights of ELLs guaranteed by *Lau*.³¹

The EEOA requires that a school district take "appropriate action to overcome language barriers that impede equal participation of its students in instructional programs."³² However, this condition is not limited strictly to the language barriers of students. Because parents play a vital role in ensuring education opportunities for their children, the school district's duty under the EEOA to take "appropriate action" includes providing LEP parents with access to information sufficient to enable them to ensure their children's equal participation in instructional programs, which includes translations and interpretation services for LEP parents.

The most significant case to interpret the EEOA's "appropriate action" clause is the Fifth Circuit's decision in *Castaneda v. Pickard*.³³ The case

³⁰ By passing the EEOA in 1974, Congress thus embraced *Lau*'s core principles and solidified the legal rights afforded to ELLs. See Claire Raj, *The Gap Between Rights and Reality: The Intersection of Language, Disability, and Educational Opportunity*, 87 *TEMPLE L. REV.* 283, 295 (2015).

³¹ Interestingly, the EEOA was passed as a floor amendment to the Education Amendments of 1974, and had no legislative history that year; however, there is a legislative history attached to the identical bill introduced in 1972. That bill failed to receive Senate approval. For a further discussion, see SANDRA DEL VALLE, *LANGUAGE RIGHTS AND THE LAW IN THE UNITED STATES: FINDING OUR VOICES* 243, 270 (2003); Eric Haas, *The Equal Educational Opportunity Act 30 Years Later: Time to Revisit "Appropriate Action" for Assisting English Language Learners*, 34 *J.L. & EDUC.* 361, 361 (2005).

³² 20 U.S.C. § 1703(f) (2018).

³³ *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981). Measuring § 1703(f)'s reach, the Fifth Circuit found that by using

involved a class of Mexican-American students and their parents who sued a Texas independent school district alleging that the school district failed to implement acceptable bilingual education programs. The plaintiffs alleged that the failure to address language access needs “impeded students’ equal participation in school and, consequently, violated Title VI of the Civil Rights Act of 1964 as well as the EEOA.”³⁴ The Fifth Circuit in *Castaneda* outlined a three-part test to determine whether a school district is fulfilling its obligation to take “appropriate action” to overcome language barriers through its school programs. It stated that courts are directed to examine (a) whether the school program is based on a sound educational theory; (b) whether the school program is reasonably calculated to effectively implement that educational theory; and (c) whether the school program actually produces results “indicating that the language barriers confronting students are actually being overcome.”³⁵ The *Castaneda* analysis of the “appropriate action” standard has been the prevailing framework for claims involving the EEOA, and subsequent cases have adopted its reasoning.³⁶

the “less specific term ‘appropriate action,’” Congress left state and local authorities a “substantial amount of latitude” to choose the “programs and techniques they would use” to satisfy § 1703(f)’s mandate. *Id.* at 1009.

³⁴ See Raj, *supra* note 30 at 296 (2015).

³⁵ *Castaneda*, 648 F.2d at 1009–10.

³⁶ See, e.g., *Issa v. Sch. Dist. of Lancaster*, 847 F.3d 121, 130 (3d Cir. 2017) (holding that the School District failed prongs one and three of the three-part test set out in *Castaneda v. Pickard*); *United States v. Texas*, 601 F.3d 354, 366 (5th Cir. 2010) (holding that the district court abused its discretion in finding that Texas schools’ use of a Performance Based Monitoring Analysis System failed both the ‘implementation’ and the ‘results’ prongs of *Castaneda*); *Flores v. Arizona*, 516 F.3d

In *Horne v. Flores*, the Supreme Court, however, narrowed the reach of *Castaneda*'s three-part test by emphasizing that school districts have tremendous flexibility in choosing how to meet their obligation to take "appropriate action" to overcome language barriers.³⁷ By giving more discretion to school districts in addressing the needs of ELLs, and creating additional hurdles for courts to rule that a school district has failed to take "appropriate action," it became ostensibly more difficult to hold school districts accountable for their failure to implement effective ELL programs.

In 2002, OCR and the Civil Rights Division of the Department of Justice (DOJ) issued guidance to school districts providing specific directions about the method (including translation and interpretation) for delivering information to LEP individuals in a timely and effective manner. Consistent with *Lau*'s holding, the memorandum stated that per "DOJ regulations implementing Title VI . . . recipients of Federal financial assistance have a responsibility to ensure meaningful access to their programs and activities by persons with limited English proficiency."³⁸ Both the DOJ and OCR share authority for enforcing Title VI in the education context, while the DOJ oversees enforcement of, and

1140, 1148 (9th Cir. 2008), as amended on denial of reh'g (Apr. 17, 2008), rev'd sub nom. *Horne v. Flores*, 557 U.S. 433, 454 (2009) (applying *Castaneda*'s three-pronged analysis to Arizona's school funding system); *Gomez v. Illinois State Bd. of Educ.*, 811 F.2d 1030, 1041-42 (7th Cir. 1987) (applying the three-part *Castaneda* analysis).

³⁷ *Horne v. Flores*, 557 U.S. 433, 454 (2009).

³⁸ Guidance for Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455 (June 18, 2002).

compliance with, Title VI by recipients of federal funds.

All of these policy memoranda and recommendations culminated with a “Dear Colleague” letter in 2015, written jointly by the DOE and DOJ Civil Rights Division, which provided guidance concerning the importance of providing access to LEP parents of public-school children. It stated:

School districts and SEAs [State Educational Agencies] have an obligation to ensure meaningful communication with LEP parents in a language they can understand and to adequately notify LEP parents of information about any program, service, or activity of a school district or SEA that is called to the attention of non-LEP parents. At the school and district levels, this essential information includes but is not limited to information regarding . . . special education and related services, IEP meetings, . . . student discipline policies and procedures, . . . report cards, requests for parent permission for student participation in district or school activities, parent-teacher conferences, parent handbooks, . . . and any other school and program choice options.

. . . SEAs and school districts must provide language assistance to LEP parents effectively with appropriate, competent staff – or

appropriate and competent outside resources. It is not sufficient for the staff to merely be bilingual. . . . School districts should ensure that interpreters and translators have knowledge in both languages of any specialized terms or concepts to be used in the communication at issue.

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The “Dear Colleague” letter notes further that “translations that are inaccurate are inconsistent with the school district’s obligation to communicate effectively with LEP parents.”⁴⁰ It cautioned “against the use of web-based automated translations,” and stated that “to ensure that essential information has been accurately translated and conveys the meaning of the source document, the school district would need to have a machine translation reviewed, and edited as needed, by an individual qualified to do so.”⁴¹ School districts must provide language access to LEP parents with “appropriate, competent staff – or appropriate and competent outside resources.”⁴² It is not sufficient to use bilingual staff. The school district should ensure that interpreters are competent to translate in and out of English, and that interpreters and translators are trained on the role of interpreter and translator, the ethics of interpretation and translation, and the need to maintain confidentiality.⁴³

The DOE and DOJ “Dear Colleague” guidelines require school districts to ensure meaningful

³⁹ DOE/DOJ Dear Colleague Letter, *supra* note 3, at 37–39.

⁴⁰ *Id.* at 38 n.103.

⁴¹ *Id.*

⁴² *Id.* at 38.

⁴³ *Id.* at 39.

communication with LEP parents in a language they can understand and to adequately notify LEP parents of information about any program, service, or activity of a school district that is called to the attention of non-LEP parents.⁴⁴ At the school and district levels, this essential information includes, but is not limited to, information regarding:

Language assistance programs, special education and related services, IEP meetings, grievance procedures, notices of nondiscrimination, student discipline policies and procedures, registration and enrollment, report cards, requests for parent permission for student participation in district or school activities, parent-teacher conferences, parent handbooks, gifted and talented programs, magnet and charter schools, and any other school and program choice options.⁴⁵

The above guidelines exemplify the DOE and DOJ's efforts to "actively enforce *Castaneda*."⁴⁶

The DOE requires school districts to design and implement a plan for determining "whether parents are limited English proficient and identifying

⁴⁴ *Id.* at 37.

⁴⁵ *Id.* at 38.

⁴⁶ Travis W. England, *Bilingual Education: Lessons from Abroad for America's Pending Crisis*, 86 WASH. UNIV. L. REV. 1211, 1218 (2009) (emphasis added).

their language needs.”⁴⁷ The process should be designed to identify all limited English proficient parents, including those “parents and guardians whose primary language is not common in the district or whose children are proficient in English.”⁴⁸ For example, a school district may conduct an informal interview or home language survey at the time of the child’s enrollment to determine whether a parent requires oral or written communication in a language other than English.⁴⁹ For LEP parents who speak languages that are less common at a particular school, the school may use a cover page explaining in those languages how a parent may receive oral interpretation of the form and should offer interpreters to ensure parents accurately report their language communication needs on the form. The DOE mandates that the school’s initial inquiry be translated into languages that are common in the school and surrounding community, in order for the inquiry to reach parents in a language they are likely to understand.⁵⁰

The DOE further mandates that school districts provide effective language assistance to limited English proficient parents, such as “by offering translated materials or a language interpreter.”⁵¹ This assistance must be free to all LEP

⁴⁷ U.S. DEP’T OF JUST. & U.S. DEP’T OF EDUC., INFORMATION FOR LIMITED ENGLISH PROFICIENT (LEP) PARENTS AND GUARDIANS AND FOR SCHOOLS AND SCHOOL DISTRICTS THAT COMMUNICATE WITH THEM 2 (2015), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-lep-parents-201501.pdf> [hereinafter DOE/DOJ GUIDANCE FOR LEP PARENTS AND GUARDIANS].

⁴⁸ *Id.*

⁴⁹ DOE/DOJ Dear Colleague Letter, *supra* note 3, at 38.

⁵⁰ *Id.*

⁵¹ DOE/DOJ GUIDANCE FOR LEP PARENTS AND GUARDIANS, *supra* note 47, at 2.

parents/families and be provided by appropriate and competent staff, or through appropriate and competent outside resources.⁵² In addition, “school districts should ensure that interpreters and translators have knowledge in both languages of any specialized terms or concepts to be used in the communication at issue, and are trained on the role of an interpreter and translator, the ethics of interpreting and translating, and the need to maintain confidentiality.”⁵³

The pandemic did more than just completely upend the education system, as school districts were forced to transition to remote learning, it also changed the way in which school districts communicate with LEP parents. For example, the NYCDOE has transitioned away from providing parents with information using the traditional “backpacked” paper notices in favor of distributing information via emails, websites, text-based messaging, and online portals. In doing so, schools have created an unfair burden for LEP parents who lack digital literacy, and now face even further barriers to language access. Language has become—*but should not be*—a barrier to an ELL’s right to an education and an LEP parent’s ability to have meaningful, direct communication with their children’s school. How then should a school district determine the most appropriate policies and practices to ensure they are complying with their obligations under the law?

⁵² *Id.*

⁵³ *Id.*

II. DEMOGRAPHICS & POPULATION OF LEP/ELL IN THE NYCDOE

DOE and DOJ guidance mandate that it is the NYCDOE's responsibility, and not the parents' burden, to identify the language needs whenever those needs become apparent. Thus, it is critically important for the NYCDOE to take parents at their word about their communication needs if they request language assistance, and to keep in mind that parents can themselves be LEP even if their child is proficient in English.

The New York City school system has long struggled to integrate immigrant families into the educational process and help LEP parents engage in their children's education. This is all the more remarkable in a city that is home to one of the most diverse populations in the world, with more than three million foreign-born residents from more than 200 different countries.⁵⁴ New Yorkers come from every corner of the globe and speak over 200 different languages. According to the Department of City Planning, "nearly one-half of all New Yorkers speak a language other than English at home, and almost 25%, or 1.8 million persons, are not English Proficient."⁵⁵ The DOE's Audited Register data from the 2018–2019 school year shows that more than forty-two percent of students enrolled in NYC public schools communicate in a language other than English at home, which means more than 396,000 students live in households where English is *not* the

⁵⁴ N.Y.C. DEP'T OF CITY PLAN., *Language Access*, <https://www1.nyc.gov/site/planning/about/language-access.page> (last visited Sept. 14, 2021).

⁵⁵ *Id.*

primary language spoken.⁵⁶ Given the number of ELL students in New York City schools and the variety of primary languages spoken in families' homes, it is critical that the NYCDOE ensure meaningful access and opportunities for LEP households. Data from the United States Department of Education does not reveal what percentage of ELL students have an LEP parent at home, but the national data suggests a large percentage of parents are LEP.⁵⁷

Moreover, ELLs, and their LEP parents, are more likely to live in poverty and have less formal education than English-speaking families, which creates an additional obstacle to LEP parents' ability to advocate for their children.⁵⁸ In fact, studies have shown that living in poverty and having limited access to information are both significant contributors to parents' inability to understand educational choices made by schools for their

⁵⁶ N.Y.C. DEP'T OF EDUC. DIV. OF MULTILINGUAL LEARNERS, 2018–2019 ENGLISH LANGUAGE LEARNER DEMOGRAPHIC REPORT 69 (2019), <https://infohub.nyced.org/docs/default-source/default-document-library/ell-demographic-report.pdf> [hereinafter 2018–2019 ELL DEMOGRAPHIC REPORT]. All figures in the ELL Demographic Report are based on the NYCDOE's 2018–2019 final ELL dataset. The difference in ELL figures between the NYCDOE's annual ELL survey and the Audited Register is because the latter is a snapshot in time, while the former looks at all ELLs who came in and out of the NYCDOE school system during the entire school year.

⁵⁷ See *Information and Data Overview*, *supra* note 13.

⁵⁸ Jie Zong & Jeanne Batalova, *The Limited English Proficient Population in the United States in 2013*, MIGRATION POL'Y INST. (July 8, 2015), <https://www.migrationpolicy.org/article/limited-english-proficient-population-united-states#Poverty>.

children, and hampers their ability to effectively advocate for their children.⁵⁹

III. NYCDOE IN THE COVID-19 ERA: POLICY FAILURES, POOR ACADEMIC RESULTS, AND LOOMING CONSEQUENCES FOR STUDENTS

A. New York City Public Schools—A Stark Reality for Parents and Students Alike

The NYCDOE requires that various steps be taken to provide effective language assistance to LEP parents. The NYCDOE has Chancellor’s Regulation that detail a wide range of policies that govern the management of the schools, staff, and students. Chancellor Regulation A-663 establishes the procedure for ensuring that LEP parents have opportunity for meaningful participation regarding

⁵⁹ For example, one study found that while low-income parents were concerned about their children’s education, they had little awareness of the particular disability classification assigned to their child; were not aware of the types of services that might be available to their child; and neither knew the formal terms of the statute (such as “due process,” “least restrictive environment,” or “mainstreaming”) nor recognized the concepts when explained to them. See Ellen Anderson Brantlinger, *Making Decisions About Special Education Placement: Do Low-Income Parents Have the Information They Need?*, 20 J. LEARNING DISABILITIES 94, 96–98 (1987). Another study found that mothers who were welfare recipients tended not to understand the rights afforded to them under the IDEA, instead uncritically accepting the programs offered to their disabled children by their schools. See N. Kagendo Mutua, *Policed Identities: Children with Disabilities*, 32 EDUC. STUD. 289, 292–93, 295 (2001). While these parents may be well-intentioned and involved, they are unlikely to press for better services or to raise claims about insufficient IEPs.

programs and services for their child's education. It states,

Schools shall provide parents whose primary language is a covered language with a translation of any document that contains individual, student-specific information regarding, but not limited to, a student's health, safety, legal or disciplinary matters; and entitlement to public education or placement in any Special Education, English Language Learner or non-standard academic program.⁶⁰

The regulation was intended to ensure the provision of appropriate translation and interpretation services.

As far as identification, when a child is enrolled in a NYCDOE school, parents receive a Home Language Identification Survey (HLIS) to determine the child's primary language and the language spoken in the home.⁶¹ If they indicate that a language other than English is communicated in their home, their child may be administered the New York State Identification Test for English Language Learners (NYSITELL), which is designed to determine the

⁶⁰ Covered languages mean the ten most common primary languages other than English spoken by persons living in New York City as identified by the Department of Education. N.Y.C DEP'T OF EDUC., REGUL. OF THE CHANCELLOR A-663(i)(A), <https://www.schools.nyc.gov/docs/default-source/default-document-library/a-663-english>. These ten languages are: Arabic, Bengali, Chinese, French, Haitian Creole, Korean, Russian, Spanish and Urdu.

⁶¹ *Id.* at 13.

child's English language proficiency.⁶² Students who score below a state-determined level on the assessment are identified as ELLs, and are therefore entitled to ELL programs and services.⁶³ Based on the parents' English proficiency status, NYCDOE is required to provide these households with the interpretation and translation services they need in order to participate in their children's education in a manner equal to their English proficient counterparts.⁶⁴

At the beginning of every school year, New York's public schools send home a "blue card" to be filled out by a parent. This is an emergency contact card, but it also specifically asks the parent to identify their preferred language for oral and written communication.⁶⁵ By filling out their "blue card" for each school that their children attend, parents regularly inform NYCDOE of the language that is spoken in their homes, and the language they feel comfortable communicating in, thereby putting the DOE on notice that they are LEP.⁶⁶

In New York, the *Parents' Bill of Rights for New York State's English Language Learners* (Parents' Bill of Rights) also serves as another benchmark to ensure that schools are providing the requisite

⁶² 2018–2019 ELL DEMOGRAPHIC REPORT, *supra* note 56, at 6 (discussing the ELL identification process).

⁶³ *Id.*

⁶⁴ See Complaint & Jury Demand at 13, *Garcia v. Carranza*, Civ. No. 19-3342 (E.D.N.Y. June 7, 2019) [hereinafter Complaint & Jury Demand].

⁶⁵ N.Y.C DEP'T OF EDUC., REGUL. OF THE CHANCELLOR A-663 (June 26, 2009), <https://www.schools.nyc.gov/docs/default-source/default-document-library/a-663-english>; see also *English Language Learners*, NYC DEP'T OF EDUC., <https://www.schools.nyc.gov/learning/multilingual-learners/english-language-learners> (last visited Sept. 14, 2021).

⁶⁶ See Complaint & Jury Demand at 12..

language access. The Bill provides that parents or guardians of ELLs have “the right under federal law to have a qualified interpreter/translator in your preferred language for critical interactions with the school district.”⁶⁷ The *Parents’ Bill of Rights* also guarantees the right to receive written notice in English *and in their preferred language* about school programs and their child’s educational progress.⁶⁸ Schools are also required to hold orientations for families of newly enrolled ELLs to inform parents about the different ELL programs available in their schools, where parents are provided materials and information about the curriculum and programming. These materials *must* be provided to parents in their home/primary language.⁶⁹ Importantly, for LEP parents, they must be able to ask the school any questions with assistance from an interpreter, if desired or necessary.⁷⁰

Notably, this struggle by LEP families to obtain information from a public-school district at the start of the pandemic was not unique to New York City but was apparent in school districts around the country. A recent study by the Migration Policy Institute found that one of the most significant barriers to ELLs’ ability to participate in remote

⁶⁷ N.Y. STATE EDUC. DEP’T, OFF. OF BILINGUAL EDUC. & WORLD LANGUAGES, PARENTS’ BILL OF RIGHTS FOR NEW YORK STATE’S ENGLISH LANGUAGE LEARNERS 1, http://www.nysed.gov/common/nysed/files/bilingual/ParentsBillofRights_EnglishLanguage_FINAL.pdf (last visited Sept. 14, 2021).

⁶⁸ *Id.*

⁶⁹ N.Y. STATE EDUC. DEP’T, OFF. OF BILINGUAL EDUC. & WORLD LANGUAGES, A GUIDE FOR PARENTS OF ENGLISH LANGUAGE LEARNERS IN NEW YORK STATE 4, <http://www.nysed.gov/common/nysed/files/programs/bilingual-ed/guideforparentsofellsinnysenglish.pdf> (last visited Sept. 14, 2021)

⁷⁰ *Id.*

learning, and succeed in education, was the school-family language barrier, as well as the parents' limited capacity to support home learning.⁷¹ Teachers and schools across the country reported that without school staff who can communicate in languages other than English, the shift to remote learning left many ELLs behind, essentially bringing their education to a halt.⁷²

B. A Lookback at the Provision of Language Access Services During a Time of Remote Learning

In the New York City school system, families including LEP parents and ELL students comprise more than forty percent of all families enrolled in schools.⁷³ Yet, the school district has long ignored its legal obligation to provide interpretation and translation services to LEP families. Neither a federal complaint filed with the Office of Civil Rights of the U.S. Department of Education in 2012,⁷⁴ nor a federal

⁷¹ Julie Sugarman & Melissa Lazarin, *Educating English Learners During the COVID-19 Pandemic: Policy Ideas for States and School Districts*, MIGRATION POL'Y INST. (Sept. 2020), <https://www.migrationpolicy.org/research/english-learners-covid-19-pandemic-policy-ideas>.

⁷² Dana Goldstein et al., *As School Moves Online, Many Students Stay Logged Out*, N.Y. TIMES (Apr. 8, 2020), <https://www.nytimes.com/2020/04/06/us/coronavirus-schools-attendance-absent.html>.

⁷³ See, *New York City Public Schools in 2018-2019: A Snapshot*, INDEP. BUDGET OFF. OF THE CITY OF NEW YORK (last visited Aug. 18, 2021), <https://www.ibo.nyc.ny.us/iboreports/a-snapshot-of-student-demographics-2019.html>.

⁷⁴ Press Release, Advocates for Children of New York & New York Lawyers For The Public Interest, Inc., Legal Advocacy Groups File Complaint Against the NYC Department of Education to Stop Discrimination Against Limited English Proficient Parents (June 20, 2012) (on file with authors).

lawsuit filed in 2019,⁷⁵ has kept the NYCDOE from continually violating the rights of LEP families to have language access.

When schools closed at the start of the pandemic,⁷⁶ the NYCDOE, like so many other school districts around the country, spent considerable time and resources to transition to remote instruction and distance learning platforms. What quickly became apparent, however, was that the NYCDOE had given little to no thought as to what this transition would mean for the ability of LEP families to access information. For example, shortly after schools closed and the transition to remote learning began, the NYCDOE sent a survey to parents to request computers or iPads, but the survey was only made available in English. The result was that a great many LEP parents were left without access to remote learning tools in those first two months of remote instruction.⁷⁷ That the device request form was only available online, and that the device hotline was only available in English for months, led to gaps for families who could not already access the internet or did not speak English.⁷⁸ Though the survey was eventually translated into other languages, many parents were not informed of this fact, thereby further delaying their efforts to participate in remote learning.

⁷⁵ Press Release, Legal Services NYC, LSNYC Sues NYCDOE for Discriminating Against Non-English Speaking Parents by Denying Them Translation Services (June 7, 2019) (on file with author).

⁷⁶ N.Y. Exec. Order No. 202.4 (Mar. 16, 2020). The Executive Order issued by Governor Andrew Cuomo directed all schools in New York to close by Wednesday, March 18, 2020 for two weeks.

⁷⁷ Leipziger, *supra* note 6.

⁷⁸ *Id.*

Despite the steps intended to ensure that LEP parents in NYC have access to information in their preferred language, and the various litigation putting the NYCDOE on notice of the need to improve their policies and practice, LEP parents have struggled to obtain even the most basic information from their child's school during the Covid-19 pandemic. At the start of the pandemic, some of the author's clients reported that that when they received calls from the school alerting them to device distribution, they were denied an interpreter when they requested one. One Spanish speaking client received notices in English about disciplinary action related to alleged behavior issues on Zoom. Some LEP parents received notices that their children's classroom was closed or quarantined due to a COVID exposure only in English, while others reported that they were being asked to rely on their minor children to interpret calls from the school. This ever-growing chasm in which LEP parents are unable to obtain information from public schools has forced them to rely on other sources for help in obtaining critical education-related information.

By spring of 2020, reports surfaced that communications from schools had worsened, leaving thousands of LEP parents and students behind.⁷⁹ In a study conducted by the Global Strategy Group in Spring 2020, more than one-third (38%) of LEP families surveyed reported that their child's school had not provided materials for how to access remote

⁷⁹ See *Pandemic Response Education Platform for Immigrant Families*, NEW YORK IMMIGR. COAL. (Apr. 14, 2020), <https://www.nyc.org/2020/04/pandemic-response-education-platform-for-immigrant-families/>; see also Leipziger, *supra* note 6.

instruction in languages other than English.⁸⁰ During a New York City Council hearing in Fall 2020, many LEP families reported having “never received information in their home languages about summer school, the schedule for the fall, remote orientation days, and/or bus schedules for their fall [2020] semester.”⁸¹

As an education advocate in New York City, what was not immediately apparent at the start of the pandemic, but quickly became quite clear, was just how much the NCYDOE’s failure to provide language access to LEP parents impacted students, widening the academic achievement gap. For the last four months of the 2019–2020 school year, those families struggled to get access to timely information, services, and support.⁸² As a result of the shift from in-person instruction to remote learning, parents were thrust into playing a larger and more integral role in their children’s education. But, for those parents for whom English is not their primary language, it also required an ability to regularly

⁸⁰ *Parents’ Survey Identifies Key Needs for New York Families Navigating New Reality*, GLOB. STRATEGY GRP. (Apr. 6, 2020), <https://s3-us-east-2.amazonaws.com/edtrustmain/wp-content/uploads/sites/5/2020/04/07121352/Coronavirus-Parent-Poll.pdf> (last visited Aug. 18, 2021).

⁸¹ *Reopening NYC Public Schools – Health and Safety: Hearing Before the N.Y.C. Council, Comm. on Educ. Jointly with the Comm. on Health*, 2020 Leg. 279 (Oct. 16, 2020) [hereinafter *Hearing*] (statement of Andrea Ortiz, New York Immigr. Coal.).

⁸² Eliza Shapiro & Juliana Kim, ‘Remote Learning Is Not Working’: Shutdown Hurts Children, Parents Say, N.Y. TIMES, <https://www.nytimes.com/2020/11/19/nyregion/schools-closing.html> (last updated Nov. 23, 2020); Melissa Lazarin, *COVID-19 Spotlights the Inequities Facing English Learner Students, as Nonprofit Organizations Seek to Mitigate Challenges*, MIGRATION POL’Y INST. (June 2020), <https://www.migrationpolicy.org/news/covid-19-inequities-english-learner-students>.

communicate and interact with teachers and school officials, something that proved quite challenging.⁸³ The routine denial of language access left parents unable to help their own children access the platforms, remote plans, instructional materials, and academic support necessary to achieve that minimum quality of education.⁸⁴

At the start of the 2020-2021 school year, the New York City Council held a hearing to address the reopening of schools, and community groups testified about the challenges that LEP parents were experiencing during remote learning. The Coalition for Asian American Children and Families (CACF) reported that Covid-19 had magnified the barriers experienced by the most marginalized Asian Pacific Americans with language access. CACF testimony noted the “egregious gap in language access” services had forced Asian American communities to once again “rely upon the community-based organizations (CBOs) who serve them in the absence of proper [language access] resources by the City,” as CBOs—rather than school districts, teachers, and administrators—act as interpreters and crowdsource translated materials regarding the most basic information about the pandemic.⁸⁵ Thus, the gap in language access for parents prevents “vital communication about school decisions and the pandemic from reaching the community,” and the mere availability of languages is not enough “without

⁸³ Shapiro & Kim, *supra* note 82.

⁸⁴ Reema Amin, *NYC schools scramble to help students who lack devices as online learning ramps up again*, CHALKBEAT N.Y. (Sept. 22, 2020), <https://ny.chalkbeat.org/2020/9/22/21451613/nyc-schools-device-access-remote-learning>.

⁸⁵ *Hearing*, *supra* note 81, at 81 (testimony of Hallie Yee, Coal. for Asian Am. Child. & Families).

effective outreach and implementation of language access policies . . .”⁸⁶ During the same hearing, the New York Immigration Coalition reported that the DOE’s failure to engage in outreach with immigrant communities, or address the intersectionality of digital literacy and language access in remote learning, was disproportionately impacting the immigrant and ELL communities.⁸⁷ Without language access resources for LEP parents and children, such as translation and interpretation services, the most marginalized pockets of the community suffer, and the students’ “health and very lives are endangered if [their parents’] are unable to communicate with their schools and healthcare providers” in their primary languages.⁸⁸ Providing students and parents with these language services are fundamental to receiving a quality education, and as discussed below, the failure to do so arguably violates their rights to a sound basic education under state constitutional law.

The 2020–2021 school year in NYC began with a high percentage of parents opting to continue remote learning for their children.⁸⁹ Unsurprisingly, this meant that the lack of language access in schools, and its disparate impact on ELLs and immigrant communities, continued unabated.⁹⁰ Even those

⁸⁶ *Id.*

⁸⁷ *Hearings*, *supra* note 81.

⁸⁸ *Hearing*, *supra* note 81, at 81 (testimony of Hallie Yee, Coal. for Asian Am. Child. & Families).

⁸⁹ Eliza Shapiro & Michael Gold, *N.Y.C. public school students will be able to opt back in to in-person instruction, the mayor says*, N.Y. TIMES (Mar. 19, 2021), <https://www.nytimes.com/2021/03/19/nyregion/nyc-schools-students-in-person.html>.

⁹⁰ Juliana Kim, *With Remote Learning, a 12-Year-Old Knows Her English Is Slipping Away*, N.Y. TIMES (Dec. 29, 2020), <https://www.nytimes.com/2020/12/29/nyregion/coronavirus-english-language-students.html?referringSource=articleShare>.

parents who chose hybrid learning, or a patchwork of days in-person and remote, struggled to communicate with their children's schools to keep up with class schedules, the demands of remote learning, and the rapidly changing dynamics in the school district. In October 2020, during a City Council hearing on the re-opening of schools, the New York Immigration Coalition reported that ELLs and immigrant families as a whole are "entering the 2020–2021 [school] year having experienced an outsized academic 'slide,' especially among immigrants who could not access distance learning this Spring and who have limited resources at home."⁹¹ After just eight weeks of in-person instruction that Fall, NYC closed schools once again,⁹² sending more than a million school children back home to learn from their kitchen tables rather than in the classroom.⁹³ The remainder of the 2020–2021 school year was just as disruptive, with regular school closures due to positive Covid-19 cases, and students ping-ponging back and forth between remote learning and in-person instruction.⁹⁴

C. New York City Schools: Do LEP families have the tools to navigate the road ahead?

⁹¹ *Hearings, supra* note 81, at 128.

⁹² Leipziger, *supra* note 6.

⁹³ Eliza Shapiro, *New York City to Close Public Schools Again as Virus Cases Rise*, N.Y. TIMES (Nov. 18, 2020), <https://www.nytimes.com/2020/11/18/nyregion/nyc-schools-covid.html>.

⁹⁴ Eliza Shapiro, *New York City Schools Have Been Closing a Lot. That's About to Change*, N.Y. TIMES (Apr.5, 2021), <https://www.nytimes.com/2021/04/05/nyregion/new-york-school-closure-rules.html>.

By the conclusion of the 2020–2021 school year, the prolonged period of remote learning had exacted a toll felt by students everywhere.⁹⁵ But nowhere was this impact more keenly felt than by ELL students.⁹⁶ It was these students, rather than their English-speaking peers, residing in homes where English is rarely spoken, who faced considerable deficits not just in academics, but in the acquisition of routine language skills.⁹⁷ These ELL

⁹⁵ Most of the research concludes that students of color and those in high-poverty communities have fallen further behind their peers, exacerbating long-standing gaps in American education. See Laura Meckler & Hannah Natanson, ‘A lost generation’: Surge of research reveals students sliding backward, most vulnerable worst affected, WASH. POST (Dec. 6, 2020), https://www.washingtonpost.com/education/students-falling-behind/2020/12/06/88d7157a-3665-11eb-8d38-6aealadb3839_story.html; A recent report by McKinsey & Co. highlights that this loss will escalate during the 2020-2021 school year. See Emma Dorn et. al. *COVID-19 and learning loss—disparities grow and students need help*, MCKINSEY & CO., (Dec. 8, 2020), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/Covid-19-and-learning-loss-disparities-grow-and-students-need-help#>.

⁹⁶ Libby Pier et al., *Covid-19 and the Educational Equity Crisis*, POL’Y ANALYSIS FOR CAL. EDUC. (Jan. 25, 2021), <https://edpolicyinca.org/newsroom/Covid-19-and-educational-equity-crisis>.

⁹⁷ *Id.* A recent study by PACE (an independent, non-partisan research center in California led by faculty at Stanford University) evaluated learning loss during the Covid-19 pandemic and found that learning loss has been more severe for ELLs than for other students. Their research revealed “significantly more learning loss from Fall 2019 to Fall 2020 compared to previous years for: (a) students from a socioeconomically disadvantaged background across Grades 4–8, and (b) English language learners (ELLs), particularly across Grades 4–9.” *Id.* Both demographic groups also struggled with Math in early grades. In early grades for both English language arts and math, “ELLs have lost substantially more learning than other students. In some grades, the impact is quite severe. . . . Grade 5 ELLs’ learning grew almost 3 scale

students are deprived of the engagement and interaction that is so critical to language acquisition, obstacles which do not hamper their English-speaking peers. As a result, ELL students fell behind at a disproportionately faster rate,⁹⁸ and the long term impact⁹⁹ from this is one from which they will not soon recover.¹⁰⁰ Research has shown that language learning is driven by opportunities to comprehend, produce, and engage in meaningful interpersonal interactions in the new language.¹⁰¹ These interactions, whether they stem from hearing and speaking English in their classrooms, repeating phrases overheard in the hallways, or talking to kids on the playground and in the cafeteria, all provide

score points slower during the pandemic (roughly 30 percent of a year of typical growth), while other students lost the equivalent of roughly 10 percent of a year of typical growth.” *Id.* These findings demonstrate that the equity impact of remote instruction is severe—certain student groups, such as low-income students and ELLs, have fallen behind at a disproportionately faster rate compared to their peers.

⁹⁸ Leslie M. Babinski et al., *English-Language Learners Need More Support During Remote Learning*, EDUC. WK. (June 19, 2020), <https://www.edweek.org/technology/opinion-english-language-learners-need-more-support-during-remote-learning/2020/06>; Pier et al., *supra* note 96 (“There has been substantial learning loss, especially in the earlier grades, in both ELA and Math. But most importantly, we [found] that the pandemic and its related disruptions to schooling in California have disproportionately affected low-income students and ELLs.”).

⁹⁹ Sugarman & Lazarin, *supra* note 71, at 1 (“Research suggests that these losses may linger for years to come”).

¹⁰⁰ Kim, *supra* note 90.

¹⁰¹ Susan Gass & Alison Mackey, *Input, Interaction and Output: An Overview*, 19 AILA REV. 3 (2006); M.H. Long, *The Role of the Linguistic Environment in Second Language Acquisition*, in HANDBOOK OF SECOND LANGUAGE ACQUISITION 413–68 (W. Ritchie & T. Bhatia eds., 1996); Alison Mackey, Rebekha Abbuhl & Susan Gass, *Interactionist Approaches*, in THE ROUTLEDGE HANDBOOK OF SECOND LANGUAGE ACQUISITION 723 (S. Gass & A. Mackey eds., 2012).

opportunities to create or improve language spontaneously, and to receive feedback on comprehension. It is these communications that are so instrumental to an English language learner's ability to fill the gap between their current language skills and those of more proficient speakers. For ELLs, the deprivation of in-person interaction and its role in developing language skills can hardly be replicated with online videos, worksheets, and remote instruction.

Practitioners, policymakers, and educators need look no further than the Court's ruling in *Castaneda* to underscore this point. *Castaneda* (along with scores of DOE guidelines that followed it) is instructive in considering the NYCDOE's obligation to LEP parents and ELL students during this ongoing period of remote learning. The NYCDOE may claim that their remote learning curriculum was based on sound educational theory given the extraordinary challenges presented by the pandemic in the 2019-2020 school year; however, they would be hard-pressed to prove that it was reasonably calculated to implement language instruction or that it produced results to help ELL students overcome significant language barriers. Most notably, the web-based instructional programs for English learners did little to support ELLs' language development, nor was there intensive, consistent instruction necessary to create a meaningful opportunity to practice their language skills.¹⁰² The NYCDOE would likely also fail to pass the third prong set

¹⁰² *Challenges Providing Services to K-12 English Learners and Students with Disabilities during Covid-19*, U.S. GOV. ACCOUNTABILITY OFFICE, GAO -21-43 (Nov. 19, 2021), <https://www.gao.gov/assets/gao-21-43.pdf>.

out in *Castaneda*.¹⁰³ For instance, Nancy, Jeffrey, and Sarah's parents, like so many other LEP families during the pandemic, received little to no communication about their school's classes, programs, or assignments in their preferred language.¹⁰⁴ They also struggled to access web-based instruction because school officials routinely failed to communicate effectively about how to use these platforms, as well as other logistics of distance learning.¹⁰⁵ Thus, parents who did not already possess the technology and digital literacy to access online platforms necessary for remote instruction had to grapple with the additional challenge of communicating with their schools' teachers, mental health counselors, and administrators.¹⁰⁶

For LEP parents, the correlation between language access and digital literacy during remote learning in the Covid-19 era is systemically impacting their children's ability to obtain a meaningful education in school. If LEP parents cannot avail themselves of the information that is needed to help their children succeed in remote learning, the end result is that these children are being denied their right to a sound and basic education.¹⁰⁷

¹⁰³ In a recent report from the General Accounting Office, there were widespread disparities among school districts as to how many teachers engaged in interactive, or two-way instruction (also known as synchronous learning) resulting in students having very different experiences throughout any one school district. *Id.* at 11.

¹⁰⁴ Ngozi Adichie & Norma Ginez, *The public schools are failing us again*, N.Y. DAILY NEWS (June 30, 2021), <https://www.nydailynews.com/opinion/ny-oped-the-public-schools-fail-us-again-20210630-thon7knhbzadvdnp5uaeubfoi-story.html>.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ In New Mexico, one such example was that of Plaintiffs Wilhelmina Yazzie and Louise Martinez, mothers of two

IV. UNDERSTANDING A SOUND BASIC EDUCATION UNDER NEW YORK STATE LAW

LEP parents are not unique in feeling a responsibility to meaningfully participate in their children's education. What distinguishes them is the experience they have had in helping their children navigate remote learning. New data shows families' needs for translation and interpretation services have grown since remote learning began because LEP parents now play a critical role in their children's at-home education--namely, to help their children get online, access remote learning platforms and

ELL students, where the court found in favor of Plaintiffs and held that the state of New Mexico had violated the Education Clause, Due Process Clause, and Equal Protection Clause of the state constitution by failing to provide at-risk students with a uniform statewide system of public schools sufficient for their education. For purposes of this case, at-risk students included children who came from economically disadvantaged homes and children who are ELLs. The court also concluded that the state failed to provide sufficient funding for New Mexico school districts to offer the language access programs and services that are required by the Constitution.). Final J. and Order, *Yazzie v. New Mexico*, No. D-101-CV-2014-02224 (Dist. Ct. N.M. Feb. 14, 2019) (In the Zuni Pueblo, roughly 31% of students are English Language Learners, 100% are low-income, and about 12% are Students with Disabilities. Most notably, as it pertains to remote instruction for these students, “[a]bout 70% of all students and families who reside in Zuni Pueblo do not have Internet or Wi-Fi in their homes or access to broadband. For families who have the Internet at home, many have limited access or cannot afford Internet plans that are sufficient for remote learning.”). *Yazzie* Pls. Expedited Mot. for Further Relief Concerning Defs. Failure to Provide Essential Technology to At-Risk Public School Students, 11, *Yazzie v. New Mexico*, No. D-101-CV-2014-02224 (Dist. Ct. N.M. June 1, 2020).

instructional materials, and receive academic support necessary to their schooling.¹⁰⁸ The combination of remote learning and a denial of language access has exacerbated the disparate outcomes for group of students, one that will undoubtedly have a detrimental impact for years to come. Notably, ELL students in New York City public schools had some of the worst academic outcomes of any subgroup of students, with higher dropout rates and lower graduation rates during the pandemic.¹⁰⁹ The failure of the NYCDOE to provide language access during the pandemic has therefore magnified the problem wherein parents cannot directly support their children’s learning, and increased the risk of those students from skipping classes, failing classes, and dropping out in higher numbers than their English-speaking peers.¹¹⁰

To assess whether students received an adequate education while participating in remote learning during the pandemic, we must consider how New York statutory law ensures that the state provides a minimum quality of education. Article XI § 1 of the New York Constitution (the “Education Article”) provides that “[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.”¹¹¹ As a municipality of New York, New York City—and its public-school system—are

¹⁰⁸ Babinski et al., *supra* note 98 (“Additional resources from schools and districts for interpretation and translation with clear two-way communication may be necessary to support both teachers and families during remote instruction for ELLs.”).

¹⁰⁹ See *Oversight -Impact of Covid-19 on Student Learning and Academic Achievement: Hearing Before the N.Y.C. Council, Comm. on Educ.* 2020 Leg. 81 (Jan. 20, 2021).

¹¹⁰ U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS., *supra*, note 8.

¹¹¹ N.Y. Const. art. XI, § 1.

bound by the New York State Constitution and any laws passed by the State Legislature. Thus far, these state constitutional claims have contested solely whether school districts were adequately funded to provide critical education services to a community. For instance, cases considered whether school districts were providing adequate teaching, appropriate facilities, and instrumentalities of learning, to ensure an education that would prepare these youth to become productive members of society.

A. How school finance cases detailed glaring inadequacies in education

In *Levittown v. Nyquist*, a landmark state decision in 1982, plaintiffs, who included “property-poor” school districts and public school students, challenged the constitutionality of New York’s system for financing public schools.¹¹² The plaintiffs in *Levittown* claimed that the system violated the equal protection clauses of both the state and federal Constitutions, as well as the Education Article of the State Constitution, because it resulted in grossly disparate financial support, and thus grossly disparate educational opportunities, in the school districts.¹¹³ Further, plaintiffs alleged that “property-rich” districts had an ability to raise greater local tax revenue, thus enabling them to provide enhanced educational programs beyond the fiscal abilities of the poorer school districts.¹¹⁴

¹¹² Bd. of Educ., *Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982).

¹¹³ *Id.* at 361.

¹¹⁴ *Id.* at 361-62.

The New York Court of Appeals found that the Education Article mandates that the State provide “a sound basic education” to all children living within New York state.¹¹⁵ The Court concluded that neither the Education Article nor the State Constitution’s Equal Protection Clause necessitates that New York provide equal educational opportunities in every school district, and that the constitutional language makes no reference to any requirement that the education must be substantially equivalent in each district.¹¹⁶ The Court recognized, however, that student-plaintiffs can prove a violation of their right to a “sound basic education” by successfully demonstrating “gross and glaring inadequacy” in their schools.¹¹⁷

In 1993, the Campaign for Fiscal Equity¹¹⁸ filed suit, claiming that the underfunding of New York City schools based on the system’s structure at the time denied students their constitutionally-protected right to quality education.¹¹⁹ The case concerned the State’s responsibility under the Education Article of the State Constitution to provide children in NYC school districts with the “opportunity” for a “sound basic education.”¹²⁰ Expanding on its holding in *Levittown*, the New York Court of Appeals construed that a sound basic education should “consist of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function

¹¹⁵ *Id.* at 369.

¹¹⁶ *Id.* at 368.

¹¹⁷ *Id.* at 369.

¹¹⁸ The Campaign for Fiscal Equity (CFE) was a not-for-profit advocacy organization that sought to protect and promote the constitutional right to a sound basic education for all public-school students in the State of New York.

¹¹⁹ Campaign for Fiscal Equity, Inc. v. State (*CFE I*), 655 N.E.2d 661 (N.Y. 1995).

¹²⁰ *Id.* at 664.

productively as civic participants capable of voting and serving on a jury.”¹²¹ The right to such an education, in turn, entitles students to schools that provide various “essentials,” such as “minimally adequate” classrooms, school facilities, “instrumentalities of learning[,]” and reasonably up-to-date curricula taught by sufficient and adequately trained personnel.¹²² The Court further explained that evidence of whether students are receiving a sound basic education may include—in addition to proof about these “essentials”—facts showing the outcomes of the educational process, such as examination results.¹²³ Notwithstanding, such a claim alleging a violation of one’s right to a sound basic education must “establish a causal link between the [City’s] present funding system and any proven failure to provide a sound basic education[.]”¹²⁴

In 2003, the Court of Appeals struck a blow for parents and their ability to assert claims under the state Education Article. In *Paynter v. State*, African-American schoolchildren and their parents sued the state of New York, the State Education Department, Rochester City School District (RCSD), and 24 suburban school districts, alleging that as a result of high levels of poverty concentration and racial isolation in their schools, the state had failed to deliver its students the “opportunity” for a sound basic education, as required by the Education Article.¹²⁵ The Court held that the state bore no responsibility to improve demographic compositions of student bodies, and that its policies and practices *did not* constitute a viable claim under the state

¹²¹ *Id.* at 666.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 667.

¹²⁵ *Paynter v. State*, 797 N.E.2d 1225, 1227 (N.Y. 2003).

Education Article.¹²⁶ Notably, a dissent authored by Judge Smith suggested the contrary, reasoning that the state *does* have an obligation to ensure that students have access to a sound basic education.¹²⁷ In his view, it was the state’s prerogative to support the proposition that “all children can learn[,]” and that the Constitution thus places the burden of ensuring that all children have that right to learn squarely on the state, not on the school district or city.¹²⁸

And yet, the same Court, which had struck down *Paynter*, concluded in *Campaign for Fiscal Equity, Inc. (CFE II)* that the constitutional guarantee of a sound basic education means that the state *must* afford New York City students “the opportunity for a meaningful high school education, one which prepares them to function productively as civic participants.”¹²⁹ *CFE II* required that the state implement meaningful reforms and a system of accountability to improve the school district.¹³⁰ Following the holdings in *CFE I* (the predecessor to *CFE II*) and *CFE II*, plaintiffs have consistently brought claims alleging a violation of the right to receive a sound basic education in New York courts, and since the beginning of the Covid-19 pandemic, such actions seeking to vindicate the rights of schoolchildren and their parents residing in New York City have been even more paramount.¹³¹

¹²⁶ *Id.* at 1229.

¹²⁷ *Id.* at 1231.

¹²⁸ *Id.* at 1248.

¹²⁹ *Campaign for Fiscal Equity, Inc. v. State (CFE II)*, 801 N.E.2d 326, 332 (N.Y. 2003).

¹³⁰ *Id.* at 348.

¹³¹ *See, e.g., Aristry-Farer v. State*, 81 N.E.3d 360 (N.Y. 2017). Plaintiffs, a coalition of parents, contended that New York’s one-time withholding of \$290 million from NYC school district, as a penalty for the City’s failure to comply with state law requiring

The landmark holdings in *Levittown* and *Campaign for Fiscal Equity* laid the foundation for parents alleging that their children had been denied the right to receive the most basic education. As part of the State's constitutional obligation to provide a sound basic education, it must provide appropriate educational inputs, including teaching, facilities, and instrumentalities¹³² of learning.¹³³ The NYCDOE's failures to provide language access to LEP parents during remote learning is an example of a failure of a school district to provide a critical instrumentality of learning. The fact is that the NYCDOE has delayed publishing translations of announcements about major policy changes, including how to access basic services, how to get, setup or troubleshoot devices or Wi-Fi, summer school, or school closures. And NYCDOE schools have also continually failed to inform families about what services and supports are available for ELL students. These instances, just like the parents who did not receive notices about how to request devices in a language they could understand, amount to "gross and glaring inadequacies" in their

districts to conduct performance reviews of teachers and administrators, violated the State Constitution's Education Article. *Id.* at 365. Applying the reasoning set out in *CFE I* and *II*, the New York Court of Appeals dismissed Aristy-Farer's claims, finding that the parents' causes of action did not state a cognizable claim because the Education Article does not mandate a particular amount of state funding. *Id.* at 371. The remainder of Plaintiffs' claims were found to be inadequately pled as there was no specific allegation linking the failure to fund public schools with deficiencies in NYC's education program. *Id.*

¹³² *Campaign for Fiscal Equity, Inc. v. State (CFE I)*, 655 N.E.2d 661, 664 (N.Y. 1995). According to the court in *CFE I*, such instrumentalities include desks, chairs, pencils, and reasonably current textbooks.

¹³³ *CFE II*, 801 N.E.2d at 333.

children’s education.¹³⁴ Weighing these stories in the context of the broader legal landscape, not only do these denials of language access violate parents’ rights under Title VI and the EEOA, but they also deprive these students of the various “essentials” mandated by the court in *CFE I*, those most basic and necessary tools for a child to receive a sound education.¹³⁵ Notably, the dissent in *Paynter* articulated the notion that the Education Article does not require the state to ensure that parents are active participants in their children’s education,¹³⁶ but the Court of Appeals could not have imagined the realities of providing education in a pandemic world. Now parents are instrumental to ensuring the success of their children’s education, as they act as teachers, and counselors, and provide technical and emotional support in a remote learning environment. Without parents, and their ability to effectively communicate with schools in the preferred language of their choosing, children would be at a loss to access the essentials of school, whether that is a functioning device, a remote platform, or critical instruction.

B. A Sound Basic Education Denied for ELLs, and Children of LEP Parents

Evidence abounds that since the Covid-19 pandemic, LEP parents have been left behind by the continued practice of the NYCDOE of ignoring their language access needs. In doing so, the district has diminished their children’s right to receive a quality

¹³⁴ *Paynter v. State*, 797 N.E.2d 1225, 1228 (N.Y. 2003), (citing *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359, 369 (N.Y. 1982)).

¹³⁵ *CFE I*, 655 N.E.2d at 666.

¹³⁶ *Paynter*, 797 N.E.2d at 1248.

of education, whether at home during remote learning or in a school classroom. Thus far, the NYCDOE does not yet have estimates on learning loss for the city's roughly 142,000 English language learner students—among the largest populations of English learners in the country.¹³⁷

As mentioned earlier, for one of the author's clients, Jeffrey, the reality of the NYCDOE's denial to provide translation and interpretation to his mother is keenly felt in his ability to perform his schoolwork. His Bangla-speaking mother struggles to help him with remote instruction because she is neither digitally literate nor does she have sufficient language proficiency to understand the directions he receives for remote learning. Making matters worse is that Jeffrey's teacher continues to send emails, and leave phone messages for her, in English, despite knowing that she is not able to effectively communicate in English. Another example is Alex, a seventeen-year-old student and unaccompanied minor, who had just enrolled in school prior to the Covid-19 shutdown. In his case, he immediately felt the denial of language access when his school failed to provide him with the necessary information to request a device and failed to confirm that he had Wi-Fi to access it or materials to understand how to use it. All because they refused to communicate with him in Spanish. These are just a few examples of how students have felt the lack of language access.

As the client stories, academic literature, and testimony before the New York City Council hearing demonstrate, the ongoing Covid-19 crisis will continue to result in the widening of already

¹³⁷ In the 2019–20 school year, there were 142,386 ELL students (12.6 percent) enrolled citywide. N.Y.C. DEP'T OF EDUC., *supra* note 13.

significant opportunity and communication gaps for LEP parents and their children. As *CFE I* and its progeny made clear, the use of state constitutional claim has broader implications as it speaks to the state's over-arching responsibility to not just ensure an equality of education between English and non-English speakers, but also to provide a minimum basic quality of education. And for ELLs, that obligation requires that school districts like the NYCDOE provide language access to LEP parents in order to ensure that their children receive a meaningful education.

CONCLUSION

This article has considered the legal framework for LEP families, and the possibility of legal action based on their right to a sound basic education in New York. This right is not unique to New York, but exists in a number of state constitutions and statutory regimes.¹³⁸ States like Florida,¹³⁹ Montana,¹⁴⁰ Tennessee,¹⁴¹ and Washington¹⁴² have each enacted statutory provisions that guarantee some right to a “basic

¹³⁸ In 1973, the U.S. Supreme Court ruled in *San Antonio Independent School District v. Rodriguez* that there is no fundamental right to education provided for by the Constitution of the United States. Because of this, the burden for providing a system of public education falls to the states. *See* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

¹³⁹ FLA. CONST. art. IX, § 1(a).

¹⁴⁰ MONT. CODE. ANN. § 20-9-309 (2012).

¹⁴¹ TENN. CODE ANN. §§ 49-1-302(a)(4)(B), 49-3-307 (2012).

¹⁴² WASH. REV. CODE. §§ 28A.150.220-28A.150.275 (2012).

education” as required by their state constitutions.¹⁴³ As such, other states should look to their own constitutions to determine if they can bring similar claims alleging a deprivation of one’s right to receive a sound basic education.¹⁴⁴

As an advocate doing direct representation in low-income communities with large immigrant populations, the author has seen first-hand the detrimental impact the denial of language access has had on LEP parents and their children. Though language access litigation is critical, the transition to remote learning during the pandemic has created a new opportunity to help LEP and low-digital literacy families receive more language support and the educational resources they so desperately need during this time. As articulated above, LEP and low-digital literacy families reside in every pocket of this country, and the struggles they face are wide-ranging, and are not limited solely to educational challenges during a pandemic. Despite efforts on the part of educators to provide continuity

¹⁴³ Before 1960, only two states embraced education as a fundamental right: Wyoming and North Carolina. Following *Brown v. Board of Education*, education activists nationwide began demanding access to a quality education for all children. In 1976, California’s Supreme Court declared in *Serrano v. Priest* that education is a fundamental right under its constitution. By the 1980s, states like Mississippi, Oklahoma, Wisconsin, and Kentucky followed suit and recognized the right to a quality education under their state constitutions. For a comprehensive review of every state’s constitutional language regarding public education, see Emily Parker, *Constitutional Obligations for Public Education. 50-State Review*, EDUC. COMM’N OF THE STATES (Mar. 2016), <https://files.eric.ed.gov/fulltext/ED564952.pdf>.

¹⁴⁴ See Michael A. Rebell & Jessica R. Wolff, *Students’ Constitutional Right to a Sound Basic Education: New York State’s Unfinished Agenda*, THE CAMPAIGN FOR EDUC. EQUITY TEACHERS COLL., COLUMBIA UNIV. (Nov. 2016), <https://files.eric.ed.gov/fulltext/ED573134.pdf>.

of learning during the past three school years through remote learning, these efforts have clearly fallen drastically short for many ELLs and their LEP parents. Under Title VI, and the EEOA, school districts are required to ensure that English-language learners can meaningfully participate in instruction. A state constitutional claim, on behalf of LEP parents and ELL students, could help create new avenues for legal advocacy in ensuring that school districts provide the most basic language access to families. For students like Sarah, Jeffrey, Nancy, and Alex, this fundamental shift could make all the difference, as schools would have to provide necessary and critical language resources for families in order to ensure that ELL students are receiving the same quality education as their English-speaking peers.