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## Limited English Proficiency Students Left Behind

Kristen L. Depowski

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# LIMITED ENGLISH PROFICIENCY STUDENTS LEFT BEHIND

*Kristen L. Depowski*<sup>\*</sup>

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## *I. Introduction*

Janelis Peña, a sixteen year-old from Cuba, arrived in Travis County, New York, scared and bewildered.<sup>1</sup> "It was so difficult because I don't speak

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<sup>\*</sup> Candidate for J.D., Washington and Lee University School of Law, May 2008; B.S., New York University, 2005. I would like to thank Professor Dorothy Brown for all of her help and feedback. I would also like to thank my parents, Gregory and Nancy Depowski, for their continuous support.

<sup>1</sup> Raven L. Hill, *Students Find Refuge at International High*, AUSTIN AMERICAN-STATESMAN (Texas), Nov. 5, 2007, at A1.

very good English," Peña said through a translator; "I didn't understand."<sup>2</sup> Like many counties across the country, the immigrant population in Travis County has exploded in the past decade, increasing 230 percent from 1990 to 2005.<sup>3</sup> Some students have been separated from their parents for almost as long as they have been alive, plucked from refugee camps, and forced to walk or swim across borders.<sup>4</sup> This explosion has resulted in a concurring explosion of children in the public school system who struggle to learn and adjust without the benefit of a common language.<sup>5</sup>

Although many educators hope this is an opportunity for such children to "better their lives,"<sup>6</sup> many of these children are being left behind by the very law intended to do the opposite. The No Child Left Behind Act (NCLB),<sup>7</sup> which President Bush signed into law on January 8, 2002, fails to adequately address the needs of these students. Its focus on English-only education and its rapid timeframe for improvements in testing serves only to limit school officials' choices and to shut parents out of the decision-making process.

This Note will evaluate the impact of NCLB on the academic achievement and equality of education for bilingual learners. Part II offers background information on NCLB and Part III provides a historical perspective on the evolving concept of equal education opportunity. While reform movements requiring schools to address the needs of limited English proficiency (LEP) students began in the 1960s with the emergence of the Civil Rights Era, American Society's support in the belief of a right to bilingual education has recently diminished, demonstrated by the passage of legislation such as NCLB and California Proposition 227. Part IV will examine the effects of NCLB on LEP students five years after its passage. Part V offers a community-based education proposal, examining both why we need community education and the approaches that communities may use. Part VI concludes that NCLB's statewide mandates of language education policy fail to accommodate LEP students; a better system would arise from a community-centered approach to education, while giving local educators and parents greater flexibility in their children's education.

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *See id.* (explaining that the purpose of the new international high school in Austin, Texas, is to help the immigrants improve their English competency in order to "better their lives").

<sup>7</sup> No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425. (2002).

## II. No Child Left Behind Background

Beginning with the school effectiveness movement of the early 1970s, the drive to reform educational systems has generated new initiatives and studies including vouchers, charter schools, the importance of parental involvement, and the influence of social class on school achievement.<sup>8</sup> NCLB, an offshoot of these reforms, states that all students must show proficiency in reading and math by 2014.<sup>9</sup> The Act was passed in an effort to reduce wide achievement gaps between poor, minority, and LEP students, and other higher-achieving groups.<sup>10</sup> Schools are required to meet Adequate Yearly Progress (AYP) goals each year, showing improvement in eight subgroups of students: African-American, Asian, Caucasian, economically disadvantaged, English language learner, Hispanic, Native American, and students with disabilities.<sup>11</sup> Schools that fail to meet AYP two years in a row are labeled by the state as needing improvement.<sup>12</sup>

The demographics of U.S. elementary and secondary schools are changing rapidly as a result of record-high immigration.<sup>13</sup> Children of immigrants now compose one-fifth of all United States school-age children.<sup>14</sup> According to a report conducted by the Programme for International Student Assessment (PISA), there are significant differences in student performance with many immigrant children failing to reach baseline performance levels.<sup>15</sup> The

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<sup>8</sup> See JOHN MACBEATH & PETER MORTIMORE, *IMPROVING SCHOOL EFFECTIVENESS 4* (Open University Press 2001) (discussing the notion that although the 1970s could be characterized as an "era of betrayal by the educational establishment . . . which put equality before quality," the research done during that time period set the stage for the massive changes in society which have occurred in the last two decades).

<sup>9</sup> 20 U.S.C. §§ 6311(b)(2)–(3) (2003) (describing accountability and academic assessments); 20 U.S.C. § 6316 (2003) (describing academic assessment and local educational agency and school improvement).

<sup>10</sup> See PAUL E. PETERSON & MARTIN R. WEST, *NO CHILD LEFT BEHIND?: THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY 38* (2003) (describing how progress is "judged over a three-year period and the scores of the lowest achieving students would be weighted more heavily, giving schools credit for closing the achievement gap").

<sup>11</sup> See *id.* (describing the process whereby "report cards" detailing the performance of each student subgroup by state and school each year are distributed, ensuring that subgroups must make "adequate yearly progress" towards the twelve-year deadline of universal proficiency).

<sup>12</sup> See *id.* (explaining the remedies available to schools who fail to make AYP for two or more consecutive years, such as giving students the option to attend another public school within the district, or offering mandatory "supplemental services").

<sup>13</sup> See RANDOLPH CAPPS ET AL., *URBAN INSTITUTE, THE NEW DEMOGRAPHY OF AMERICA'S SCHOOLS: IMMIGRATION AND THE NO CHILD LEFT BEHIND ACT 1* (2005), [http://www.urban.org/UploadedPDF/311230\\_new\\_demography.pdf](http://www.urban.org/UploadedPDF/311230_new_demography.pdf) (describing how "immigration is changing the profile of the nation's elementary and secondary student population during this era of reform") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

<sup>14</sup> See *id.* at 5–7 ("By 2000 there were 11 million children of immigrants out of 58 million total children enrolled in PK through 12th grade.")

<sup>15</sup> See PROGRAMME FOR INTERNATIONAL STUDENT ASSESSMENT, *ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, WHERE IMMIGRANT STUDENTS SUCCEED—A COMPARATIVE REVIEW OF PERFORMANCE AND ENGAGEMENT IN PISA 54–55* (2003), <http://www.oecd.org/dataoecd/2/38/36664934.pdf> ("[I]n the majority of countries there are significant differences between immigrant students and their native counterparts.") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

NCLB not only requires schools to identify and serve immigrant students but requires that these protected populations make progress in learning English, as well as in their reading, math, and science skills.<sup>16</sup>

The key parts affecting LEP and immigrant students are set out in Title I<sup>17</sup> and Title III<sup>18</sup> of the Act. Title I allocated \$11.8 billion to economically disadvantaged children in fiscal year 2003.<sup>19</sup> NCLB accountability means that requirements must be met in return for federal money, and detailed reporting mandates ensure that schools meet "challenging" standards.<sup>20</sup> Although Title III does not specifically mention "bilingual education," it does give schools the "flexibility to implement language instruction education programs . . . that the agencies believe to be the most effective for teaching English."<sup>21</sup> However, notwithstanding that although one of the central mandates of NCLB is the rapid acquisition of English for all students, federal support for bilingual education is essentially non-existent.<sup>22</sup> The law is more likely to encourage English-only approaches.

The Supreme Court has never directly addressed whether or not bilingual education is a necessary part of an equal opportunity in education.<sup>23</sup> Although the right to an "equal education" is well established,<sup>24</sup> there is no official right to a bilingual education.<sup>25</sup> However, with the passage of such

<sup>16</sup> See Michael Fix & Randy Capps, *Immigrant Children, Urban Schools, and the No Child Left Behind Act*, MIGRATION POLICY INSTITUTE, Nov. 2005, <http://www.migrationinformation.org/Feature/display.cfm?id=347> (last visited Aug. 29, 2008) (stating that "reforms not only require schools to identify and serve . . . immigrant students but make them strictly accountable for ensuring these protected populations make progress in learning English as well as in their reading, math, and science skills") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

<sup>17</sup> See No Child Left Behind Act of 2001, Pub. L. No. 107-110 ("The purpose of this title is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and State academic assessments.").

<sup>18</sup> See *id.* ("The purposes of this part are . . . to help ensure that children who are limited English proficient, including immigrant children and youth, attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging State academic content and student academic achievement standards as all children are expected to meet.").

<sup>19</sup> PETERSON & WEST, *supra* note 10, at 25.

<sup>20</sup> *Id.* at 27.

<sup>21</sup> See Pub. L. No. 107-110, § 3102(1), 115 Stat. 1425, 1690 (emphasizing the need for "immigrant children and youth [to] attain English proficiency and meet the same challenging State academic content and student academic achievement standards as all children are expected to meet").

<sup>22</sup> See James Leonard, *Title VII and the Protection of Minority Languages in the American Workplace: The Search for a Justification*, 72 MO. L. REV. 745, 767-68 (2007) ("There was previously a commitment to bilingual education that has apparently vanished with the No Child Left Behind Act.").

<sup>23</sup> See Tristan W. Fleming, *Education on Equal Terms: Why Bilingual Education Must be Mandated in the Public Schools for Hispanic and LEP Students*, 17 GEO. IMMIGR. L.J. 325, 337 (2003) (describing how although the Equal Educational Opportunities Act has been on the books since 1974, it has never been interpreted by the U.S. Supreme Court).

<sup>24</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that separate educational facilities are inherently unequal).

<sup>25</sup> See ROSEANN DUENAS ET AL., LANGUAGE IDEOLOGIES: CRITICAL PERSPECTIVES ON THE OFFICIAL

legislation as the "English Language Fluency Act"<sup>26</sup> and Title III of NCLB,<sup>27</sup> Congress has signaled a push to end bilingual education. Furthermore, Congress maintains that immigrant students' rapid acquisition of English is the best means to extinguish the achievement gap.<sup>28</sup>

### III. The Changing Concept of Equal Education Opportunity

#### A. LEP Student's Right to Education

Any discussion of the history of a student's right to education in modern day America should begin with the seminal *Brown v. Board of Education* decision.<sup>29</sup> *Brown*, decided by the Supreme Court on May 17, 1954, stands for the principle that educational "opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."<sup>30</sup> Although the Court has never officially defined "equal" opportunity in education, there are a series of holdings leading up to the passage of the 1974 Equal Educational Opportunities Act (EEOA)<sup>31</sup> that have discussed the issue.<sup>32</sup>

In 1973, the Court, in *San Antonio Independent School District v. Rodriguez*, held that the Constitution does not explicitly guarantee the right to free public education.<sup>33</sup> However, the majority opinion reaffirms the central

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ENGLISH MOVEMENT, VOLUME I: EDUCATION AND THE SOCIAL IMPLICATIONS OF OFFICIAL LANGUAGE 77 (2000) ("While there appears to be a limited right to rectify language deficiencies where school polices have had the effect of discriminating against national-origin minorities under Title VI, there is not an absolute right to bilingual education.").

<sup>26</sup> English Language Fluency Act, H.R. 3892, 105th Cong. (1998).

<sup>27</sup> No Child Left Behind Act of 2001, Title III, Pub. L. No. 107-110, § 3102(1), 115 Stat. 1425, 1690.

<sup>28</sup> See *id.* (stating that the purpose of NCLB is "to assist local educational agencies to develop and enhance their capacity to provide high-quality instructional programs designed to prepare limited English proficient students, including recent immigrant students, to enter all-English instructional settings within 3 years").

<sup>29</sup> See *Brown*, 347 U.S. at 493 (stating that "[t]he opportunity of an education, where the state has undertaken to provide it, is a right which must be made available to all on equal terms"). In *Brown*, the Supreme Court considered whether the segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprived the children of the minority group of equal educational opportunities. *Id.* at 493. The Court examined such factors as the psychological impact of separation on minority children, and the effect of this separation on their educational opportunities. *Id.* at 494. Convinced that the doctrine of "separate but equal" has no place in the field of public education, the Court held that separate educational facilities are inherently unequal. *Id.* at 495.

<sup>30</sup> *Id.*

<sup>31</sup> Equal Educational Opportunities Act, 20 U.S.C. § 1703 (1974).

<sup>32</sup> See, e.g., *Lau v. Nichols*, 414 U.S. 563, 566 (1974) ("Under these state-imposed standards 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."); see also *Hargrave v. Kirk*, 313 F. Supp. 944, 948 (1970) (discussing plaintiff's position that education is a "sine qua non to the proper functioning of our polity," and that "education must be regarded as a fundamental right") (internal quotations omitted).

<sup>33</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 110 (1973) (stating that "only interests guaranteed by the Constitution are fundamental for purposes of equal protection analysis" and therefore, "public

holding of *Brown*—that a system which “fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process” might create “an interference with fundamental rights.”<sup>34</sup> The suggestion of basic education as a fundamental right supports the continuing *Brown* rationale of equality.

One year later, a group of non-English speaking Chinese students brought suit against San Francisco school officials claiming that unequal educational opportunities violated the Fourteenth Amendment.<sup>35</sup> The Court held that under the Civil Rights Act of 1964, “where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.”<sup>36</sup> The Court did not reach the equal protection argument, nor did they order a specific remedy, but bilingual education and English as a Second Language (ESL) instruction were presented as viable options.<sup>37</sup>

To codify the Court’s decision, Congress enacted the EEOA, which provides that “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>38</sup> Congress’ broad mandate to recipient schools leaves open the question of what it means “to take appropriate action.”

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education is not constitutionally guaranteed”).

<sup>34</sup> *Id.* at 37.

<sup>35</sup> *See Lau*, 414 U.S. at 563 (stating that the Court reviewed an “[a]ction by students of Chinese ancestry who do not speak English for relief against alleged unequal educational opportunities in that they do not receive courses in the English language”).

<sup>36</sup> *Id.* at 568.

<sup>37</sup> *See id.* at 565 (describing § 71 of the California Education Code). In *Lau*, the Court noted that the California Education Code “permits a school district to determine ‘when and under what circumstances instruction may be given bilingually.’” *Id.* The California Education Code also states that it is “‘the policy of the state’ to insure ‘the mastery of English by all pupils in the schools.’” And bilingual instruction is authorized ‘to the extent that it does not interfere with the systematic, sequential, and regular instruction of all pupils in the English language.’” *Id.*

<sup>38</sup> 20 U.S.C. § 1703. *See also* Robert L. Lamborn, *The Fiber of the Common Bond*, 13 GEO. MASON L. REV. 367, 379 (2005) (“Congress passed the Equal Education Opportunities Act of 1974 to codify the *Lau* decision.”).

The Fifth Circuit, in *Castaneda v. Pickard*,<sup>39</sup> defined "appropriate action" as it pertains to bilingual education as an affirmative obligation on schools to eliminate language barriers faced by Mexican-American children.<sup>40</sup> The court developed a three-part test: First, "the court must examine carefully the . . . soundness of the educational theory or principles upon which the challenged program is based."<sup>41</sup> Second, the court must evaluate "whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school."<sup>42</sup> Finally, after a legitimate trial period, the court must determine whether there are indications that the language barriers confronting students are actually being overcome.<sup>43</sup>

*Castaneda* did not require bilingual education programs to meet these standards. It required only that "appropriate action to overcome language barriers" be taken through well-implemented programs.<sup>44</sup> The Supreme Court has never interpreted the language of section 1703(f), and the legislative history is unclear.<sup>45</sup> Since *Lau*, courts have battled over whether meeting these

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<sup>39</sup> See *Castaneda v. Pickard*, 648 F.2d 989, 1009 (1981) (recognizing that by obligating schools to address the problem of language barriers, Congress intended to insure that schools make a genuine and good faith effort to remedy language deficiencies). In *Castaneda*, a group of Mexican-American students and their parents claimed that the bilingual education and language remediation programs offered by their local school district were educationally deficient and unsound and that the school district, therefore, was in violation of Title VI and the EEOA. *Id.* at 1006. The court set forth a three-part test to determine whether a school district takes appropriate actions to overcome language barriers that confront language-minority students, including that a school "is pursuing a program informed by an education theory recognized as sound by some experts." *Id.* 1009-10. The court reasoned that Congress, at the time it adopted the EEOA, did not intend to require local education authorities to adopt any particular type of language remediation program. *Id.* at 1008. The court held the bilingual education program at issue not violative of Title VI. *Id.* at 1015.

<sup>40</sup> *Id.* at 1005 (stating that the EEOA "clearly imposes on an educational agency a duty to take appropriate action to remedy the language barriers of transfer students as well as the obstacles confronting students who begin their education under the auspices of that agency").

<sup>41</sup> *Id.* at 1009.

<sup>42</sup> *Id.* at 1010.

<sup>43</sup> *Id.* ("If a school's program, although premised on a legitimate educational theory and implemented through the use of adequate techniques, fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned."); see also CAROL L. SCHMID, *THE POLITICS OF LANGUAGE: CONFLICT, IDENTITY, AND CULTURAL PLURALISM IN COMPARATIVE PERSPECTIVE* 71 (2001) (explaining how the court in *Castaneda* "specified that at a minimum schools must have a program predicated on and 'reasonably calculated' to implement a 'sound' education theory and must be adequate in actually overcoming language barriers of the students").

<sup>44</sup> *Id.* at 1009-10; see also *Castaneda*, 648 F.2d at 998 ("Nothing in our earlier cases involving ability grouping circumscribes the discretion of a school district, even one having a prior history of segregation, in choosing to group children on the basis of language for purposes of a language remediation or bilingual education program.").

<sup>45</sup> See *Guadalupe Org. v. Tempe Elementary Sch. Dist.*, 587 F.2d 1022, 1030 (stating that "[b]ecause Section 1703(f) was proposed as an amendment from the floor of the House, there is very little legislative history").



standards requires bilingual education that includes native-language instruction, or whether English immersion classes are sufficient.<sup>46</sup>

In 1978, a group of Hispanic children brought a class action suit alleging that the Brentwood Union Free School District's plan to restructure its bilingual program was inadequate.<sup>47</sup> The court held that where a bilingual education program is implemented under EEOA Section 1703(f), it must include instruction in the child's native language in most subjects.<sup>48</sup> The court also suggested that the District's plan needed more specific methods for "identifying on admission those children who are deficient in the English language and for monitoring the progress of such children by the use of recognized and validated tests to ascertain achievement levels and proficiency in the English language."<sup>49</sup>

That same year, the Ninth Circuit rejected a student class action claim to compel the school district to provide bilingual education for all non-English speaking Mexican-American and Yaqui-Indian students.<sup>50</sup> The court further clarified that "appropriate action" did not necessarily mean bilingual-bicultural education staffed with bilingual instructors.<sup>51</sup>

It was not until recently that states began prohibiting schools from using LEP students' native languages in teaching them English and other subjects. Over twenty-five states have enacted some type of English-only law.<sup>52</sup> Most recently, in March 2007, Idaho signed a bill that declared English as "the official language of the state" and "the sole language of the government."<sup>53</sup> Although legislation does not specify what legal steps states should take to implement

<sup>46</sup> See, e.g., *Cintron v. Brentwood Union Free Sch. Dist.*, 455 F. Supp. 57, 59 (1978) (discussing school district's intent to restructure its bilingual program).

<sup>47</sup> See *id.* at 61 (describing plaintiff's claim that "[n]o reliable method . . . is used to identify students in the upper school grades who have English language deficiencies" and that "no language test is administered to evaluate the scores [of achievement tests] in the light of possible English language deficiencies").

<sup>48</sup> See *id.* at 64 (holding that the program should "have a training program for bilingual teachers and bilingual aides," should "be both bilingual and bicultural," and it "must provide a method for transferring students out of the program when the necessary level of English proficiency is reached"); see also EEOA, 20 U.S.C. § 1703(f) (1974) ("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 education agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.").

<sup>49</sup> *Cintron*, 455 F. Supp. at 64.

<sup>50</sup> See *Guadalupe Org.*, 587 F.2d at 1027-30 (9th Cir. 1978) (holding the Fourteenth Amendment, the Civil Rights Act of 1964, and the Equal Educational Opportunity Act of 1974 did not impose a duty to provide a bilingual-bicultural education).

<sup>51</sup> See *id.* (stating that "[t]here exists no constitutional duty imposed by the Equal Protection Clause to provide bilingual-bicultural education").

<sup>52</sup> See Dennis Baron, Op-Ed, *No Translation Needed: 'Door is Closed.'* L.A. TIMES, Mar. 14, 2004, at M5 (stating that "no matter how hard minority-language speakers work to preserve their speech, they inexorably shift to English").

<sup>53</sup> See IDAHO CODE ANN. 2007 § 73-121 ("English is hereby declared to be the official language of the state of Idaho.").

these laws, these English-only laws are constitutionally questionable because the federal government has never declared a national language.<sup>54</sup>

In 1997, the Supreme Court declined to decide the constitutionality of Arizona's English-only amendment—by dismissing the case after eight years of litigation—without ruling on its merits.<sup>55</sup> Two lower federal courts had overruled the measure as a violation of the First Amendment right to freedom of speech for state employees and elected officials; nevertheless, the Supreme Court reversed those decisions on procedural grounds.<sup>56</sup>

The Supreme Court's failure to address the constitutionality of English-only laws has heightened the ambiguity surrounding the term "equality" in the classroom. American schools, as a microcosm of society, put English-only laws at the forefront of the language debate in American society. In the absence of long-term data and experiments bearing on a program's effectiveness, it is unlikely that English-only initiatives can be enjoined.

### *B. The Growing Opposition to Bilingual Education in the United States*

Andersson and Boyer define bilingual education as "instruction in two languages and the use of those two languages as mediums of instruction for any part of, or all, of the school curriculum."<sup>57</sup> The education of language-minority children is one of the most controversial issues surrounding new immigration.<sup>58</sup> Studies comparing the different models of bilingual education programs do not consistently find a successful model.<sup>59</sup> The most popular and widespread form of bilingual education in the United States is transitional bilingual education,

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<sup>54</sup> See Brian L. Porto, "English Only" Requirement for Conduct of Public Affairs, 94 A.L.R. 5th 537, 537 (2001) ("Numerous American institutions conduct their activities in English only, even though the Federal Government has not recognized English as the official language of the United States under the Constitution or federal law.").

<sup>55</sup> *Arizonians for Official English v. Arizona*, 520 U.S. 43, 43 (1997) (discussing Article 28 of Arizona's constitution—also known as Proposition 106, adopted by voters in 1988—which requires all levels of state and local government to "act in English and no other language").

<sup>56</sup> See *Yniguez v. Mofford*, 730 F. Supp. 309, 309 (D. Ariz. 1990) (holding that a provision prohibiting use of any language other than English was overbroad and therefore void); see also *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 949 (9th Cir. 1995) (reversing the District Court's decision on procedural grounds).

<sup>57</sup> THEODORE ANDERSSON & MILDRED BOYER, *BILINGUAL SCHOOLING IN THE UNITED STATES* 12 (U.S. Government Printing Office 1970).

<sup>58</sup> See SANDRA DEL VALLE, *LANGUAGE RIGHTS AND THE LAW IN THE UNITED STATES: FINDING OUR VOICES* 217 (Multilingual Matters 2003) (stating that "[t]he education of language-minority children is one of the most controversial and significant issues raised by the new immigration").

<sup>59</sup> See Jay P. Greene, *A Meta-Analysis of the Effectiveness of Bilingual Education* (Mar. 2, 1998) (Tomas Rivera Policy Inst., Working Paper), available at <http://ourworld.compuserve.com/homepages/JWCRAWFORD/greene.htm> (last visited Aug. 29, 2008) ("[T]he unfortunate reality is that the vast majority of evaluations of bilingual programs are so methodologically flawed in their design that their results offer more noise than signal.") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

which is usually time-limited and does not attempt to retain the native language.<sup>60</sup>

Critics of bilingual education often use the continued under-achievement of LEP students, especially Latinos, as proof of the failure of the system. In his book, *One Nation, One Standard*, Herman Badillo declares that "bilingualism has actually become monolingualism, [and] has hindered not only Hispanic progress in education but, more broadly, Hispanic assimilation into American life."<sup>61</sup> Badillo claims that bilingual education actually prevents Hispanic students from performing well in school.<sup>62</sup>

Rod Paige, former U.S. Secretary of Education, stated that "Hispanic students are more likely to drop out of school than any other group. Moreover, there is a persistent achievement gap between Hispanic students and many of their white and Asian peers."<sup>63</sup> One reason for this, he suggests, is that Hispanic students are learning English for the first time.<sup>64</sup>

Many such critics hoped that Congress' passage of NCLB would address the problem. Although the National Association for Bilingual Education supported passage of NCLB in 2001, they quickly grew unhappy with its progress: In 2004, Executive Director James Crawford issued a statement denouncing the effects of NCLB.<sup>65</sup> Crawford claims NCLB is failing because it fails to address important topics such as resource inequities, shortages of qualified teachers, and substandard school facilities.<sup>66</sup> "The law's aims are worthy. Unfortunately, its approach to school accountability is overly rigid, punitive, unscientific, and likely to do more harm than good . . . Nowhere is this more true [sic] than in the case of English language learners."<sup>67</sup>

The LEP subgroup itself is a problematic model. When an LEP student makes significant progress in a subject they are reclassified as English proficient

<sup>60</sup> See DEL VALLE, *supra* note 58, at 221 (stating that under transitional bilingual education, there is an expectation that the native language will be lost and replaced by the majority language).

<sup>61</sup> HERMAN BADILLO, *ONE NATION, ONE STANDARD* 4 (Sentinel 2006).

<sup>62</sup> See *id.* at 66 (referring to a study done by the Board of Education which found that students, even recent immigrants, who took most of their classes in English generally fared better academically than did students in bilingual programs, where little English is spoken).

<sup>63</sup> Press Release, U.S. Department of Education, Remarks by U.S. Secretary of Education Rod Paige on Hispanic Education (Oct. 14, 2003), available at <http://www.ed.gov/news/pressreleases/2003/10/10142003a.html>.

<sup>64</sup> See *id.* (explaining that the needs of Hispanic students are traditionally ignored and NCLB aims to remedy this).

<sup>65</sup> JAMES CRAWFORD, *NO CHILD LEFT BEHIND: MISGUIDED APPROACH TO SCHOOL ACCOUNTABILITY FOR ENGLISH LANGUAGE LEARNERS 1* (2004), available at [http://users.rcn.com/crawj/langpol/Crawford\\_NCLB\\_Misguided\\_Approach\\_for\\_ELLs.pdf](http://users.rcn.com/crawj/langpol/Crawford_NCLB_Misguided_Approach_for_ELLs.pdf) (asserting that the law does little to address obstacles to achievement).

<sup>66</sup> *Id.* at 2 ("[T]he law does little to address the most formidable obstacles to their achievement: resource inequities, critical shortages of teachers trained to serve ELLs, inadequate instructional materials, substandard school facilities, and poorly designed instructional programs.").

<sup>67</sup> *Id.* at 1.

and are no longer a member of the LEP subgroup.<sup>68</sup> As a result, they are the least stable among the four at-risk subgroup categories, and upon reclassification, their scores are no longer counted towards AYP.<sup>69</sup> Therefore, past members of the LEP subgroup will almost always be low performing when compared to their non-LEP peers.

According to a March 2007 report by the Migration Policy Institute's National Center on Immigrant Integration Policy, only four percent of LEP eighth grade students were proficient in reading, and seventy-one percent scored below "basic" on reading.<sup>70</sup> Individual states are given the option to offer English-tutoring classes for LEP students. In May 2004, Maryland Governor Robert Ehrlich denounced the idea of "multiculturalism" and proclaimed that, "[w]ith respect to this culture, English is the language."<sup>71</sup> According to Maryland's State Performance Report for School Year 2005–2006, only one half of all LEP students tested scored "proficient" or "advanced" in reading/language arts.<sup>72</sup>

School systems are strained as they struggle to meet the demands of a growing population of students who do not speak English fluently. In the 2003–2004 school year, California and Texas had the largest reported number of students receiving LEP services.<sup>73</sup> In California, there were 1.6 million students (twenty-six percent of all students) who received English Language Learner (ELL) services; and in Texas, there were 0.7 million students (sixteen percent of all students) who received ELL services.<sup>74</sup> Given wide latitude by the EEOA, one of these states chose to propose laws banning bilingual education.

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<sup>68</sup> See *id.* at 3 (describing how when LEP students have learned English, they exit the subgroup and their scores are no longer counted in the computation of AYP, so it is a mathematical impossibility for the LEP subgroup to reach full proficiency, as required by NCLB).

<sup>69</sup> *Id.* (noting that the "[the ELL subgroup] is a highly diverse population in terms of socioeconomic status, linguistic and cultural background, level of English proficiency, amount of prior education, and instructional program experience" and that "it is also a highly fluid population, as newcomers enter . . . and others leave after being reclassified as fully proficient in English . . .").

<sup>70</sup> NATIONAL CENTER ON IMMIGRANT INTEGRATION POLICY, MEASURES OF CHANGE: THE DEMOGRAPHY AND LITERACY OF ADOLESCENT ENGLISH LEARNERS (2007), available at [http://www.migrationpolicy.org/pubs/Measures\\_of\\_Change.pdf](http://www.migrationpolicy.org/pubs/Measures_of_Change.pdf).

<sup>71</sup> Paul Schwartzman & Matthew Mosk, 'Racist' Label by Ehrlich Riles Democrats, WASH. POST, Sept. 14, 2004, at B01.

<sup>72</sup> U.S. DEPARTMENT OF EDUCATION, CONSOLIDATED STATE PERFORMANCE REPORT: PARTS I AND II 15 (2005–06), available at [http://www.marylandpublicschools.org/NR/rdonlyres/0146EDA2-5F91-47DD-9A84-16164BDEA25C/12107/Final2\\_8\\_07.pdf](http://www.marylandpublicschools.org/NR/rdonlyres/0146EDA2-5F91-47DD-9A84-16164BDEA25C/12107/Final2_8_07.pdf).

<sup>73</sup> U.S. DEPARTMENT OF EDUCATION, NATIONAL CENTER FOR EDUCATION STATISTICS, SECONDARY STUDENTS, STAFF, SCHOOLS, AND SCHOOL DISTRICTS: SCHOOL YEAR 2003–04 (2006), available at <http://nces.ed.gov/fastfacts/display.asp?id=96>.

<sup>74</sup> *Id.*

### 1. California Proposition 227

California voters passed Proposition 227 (Proposition) on June 2, 1998.<sup>75</sup> Spearheaded by Ron Unz, a California millionaire and businessman, the new law sought to eliminate bilingual education in California.<sup>76</sup> All students were placed in English language classrooms, so that they could be taught English as "rapidly and effectively as possible."<sup>77</sup> While Proposition 227 did not prohibit bilingual education altogether, it did "emphasize the importance of English, made English the default language of instruction, and made instruction in any language other than English difficult for schools."<sup>78</sup>

Immediately following the passage of Proposition 227, public interest attorneys filed suit against Governor Pete Wilson and state educators—on behalf of the 1.4 million students classified as LEP—alleging that the law restricted immigrant children's access to equal education guaranteed under the Civil Rights Act of 1964 and the EEOA.<sup>79</sup> The court declined to enjoin enforcement of Proposition 227, and held that under the *Castaneda v. Pickard* three prong test, "structured English immersion" was deemed permissible as a plan for teaching LEP students.<sup>80</sup>

Indeed, Proposition 227 does offer alternatives to parents who do not support full English immersion. Under Article 3, parents may apply for a waiver to transfer their children to classes where they are taught English and other subjects through bilingual education techniques.<sup>81</sup> The parental exception may be granted under certain circumstances such as when the child already knows

<sup>75</sup> Proposition 227, § 1, 1998 Cal. Legis. Serv. A-6 to A-9 (West) (codified at CAL. EDUC. CODE §§ 300–340 (West Supp. 1999)).

<sup>76</sup> *Id.*

<sup>77</sup> 1998 CAL. EDUC. CODE § 300(f).

<sup>78</sup> Linda A. Cistone-Albers, *Deconstructionist and Pragmatist Analyses Reveal the "Intent to Discriminate" in Proposition 227—A California Initiative*, 27 W. ST. U. L. REV. 215, 216 (1999–2000).

<sup>79</sup> See *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007, 1019 (N.D. Cal. 1998) (determining that students failed to establish that implementation of challenged statute could not, in any circumstance, constitute "appropriate action" to overcome language barriers, as required by EEOA).

<sup>80</sup> The court in *Valeria G. v. Wilson* stated:

The state of the art in the area of language remediation may well be such that respected authorities legitimately differ as to the best type of educational program for limited English speaking students and we do not believe that Congress in enacting § 1703(f) intended to make the resolution of these differences the province of federal courts.

*Id.*

See also *Castaneda v. Pickard*, 648 F.2d 989, 989 (stating that programs must be based on an educational theory recognized as sound by experts).

<sup>81</sup> 1998 CAL. EDUC. CODE § 310 ("Under such parental waiver conditions, children may be transferred to classes where they are taught English and other subjects through bilingual education techniques or other generally recognized educational methodologies permitted by law.")

English, the child is above ten years old, or when the child has special needs.<sup>82</sup> Conversely, a parental enforcement provision allows parents to sue any teacher who violates the English-only provision.<sup>83</sup> Under this provision, any teacher may be held personally liable for fees and actual damages by the child's parent or legal guardian.<sup>84</sup>

In January 2006, the California Department of Education (CDE) released a five-year evaluation that attempted to quantify and describe the effects of Proposition 227 on California students.<sup>85</sup> The study analyzed the language education instructional approaches of six schools. Cahuenga Elementary School reported that they increased the scores of their Hispanic students by 261 points on California's Academic Performance Index since 1998.<sup>86</sup> To achieve this, Cahuenga applied new instructional strategies to existing standards and extracurricular activities. For instance, they implemented a "biliteracy" approach to instruction—in which one classroom at each grade level offered English immersion—in hopes that native language literacy would be retained.<sup>87</sup>

Reports demonstrate, however, that other California schools "have cut elective time and budgets in response to the increasing emphasis on test scores."<sup>88</sup> Responses to Proposition 227's mandate to teach LEP's "overwhelmingly in English" varied greatly from school to school.<sup>89</sup> Without conclusive evidence that one instructional model for educating LEP's is more effective than another, schools were left confused over the law's requirements.<sup>90</sup>

Generally, opponents of Proposition 227 have been unsuccessful in their lawsuits against California school districts.<sup>91</sup> In 2001, the California Teachers Association brought a § 1983 claim against the California State Board of

<sup>82</sup> *Id.* § 311 (setting forth the circumstances under which the parental exception may be granted).

<sup>83</sup> *Id.* § 320 ("If a California school child has been denied the option of an English language instructional curriculum in public school, the child's parent or legal guardian shall have legal standing to sue for enforcement of the provisions of this statute. . . .").

<sup>84</sup> *Id.* ("Any . . . public school teacher or administrator who willfully and repeatedly refuses to implement the terms of this statute by providing such an English language educational option at an available public school to a California school child may be held personally liable for fees and actual damages by the child's parents or legal guardian.").

<sup>85</sup> AMERICAN INSTITUTES FOR RESEARCH & WESTED, EFFECTS OF THE IMPLEMENTATION OF PROPOSITION 227 ON THE EDUCATION OF ENGLISH LEARNERS, K-12 (2006), available at [http://www.wested.org/online\\_pubs/227Reportb.pdf](http://www.wested.org/online_pubs/227Reportb.pdf).

<sup>86</sup> *See id.* at 154 (explaining that "[n]ot only has the school 'not failed'—they have excelled and increased the scores of their Hispanic students by 261 points on the API over the last 6 years").

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 10 (noting the vague mandate to instruct "overwhelmingly in English" resulted in different levels of success in implementation).

<sup>90</sup> *Id.* (stating key barriers identified by the report, including "1) the short timeline and insufficient guidance for implementing regulations in the law initially, 2) confusion over what the law requires and allows, and 3) the lack of clear operational definitions for the various instructional approaches to the education of English learners").

<sup>91</sup> *See infra* notes 92-94 and accompanying text.

Education, asserting that the parental enforcement provision restricting educators' use of languages other than English in public schools was unconstitutionally vague in violation of the First and Fourteenth Amendments.<sup>92</sup>

The court held that, assuming such instructional speech received First Amendment protection, the parental enforcement provision passed constitutional muster.<sup>93</sup>

Perhaps plaintiffs should take their cue from Judge Legge in *Valeria*, who opined that in order to win, plaintiffs must establish that the implementation of Proposition 227 could not, in any circumstance, constitute "appropriate action" as required by the EEOA; his opinion rendered the majority of language programs constitutionally acceptable.<sup>94</sup> Until then, "[i]t is not the province of this court to impose on the people of California its view of which is the better education policy [for LEP students]."<sup>95</sup>

## 2. *The No Child Left Behind Act*

### a. *Overview*

On January 8, 2002, President George W. Bush signed NCLB into law, declaring that "[f]rom this day forward, all students will have a better chance to learn, to excel, and to live out their dreams."<sup>96</sup> NCLB aims for: increased accountability among states, school districts, and schools; greater choice for parents and students, particularly those attending low-performing schools; more flexibility for states and local educational agencies in the use of federal education dollars; and a stronger emphasis on reading, especially for young children.<sup>97</sup>

Title I and Title III of NCLB reauthorize the Elementary and Secondary Education Act of 1965 (ESEA) to revise and consolidate various programs that address the needs of disadvantaged students.<sup>98</sup> Under the ESEA, the federal government spent more than \$130 billion to help educate disadvantaged children.<sup>99</sup> Forty years later, only thirty-two percent of fourth graders can read

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<sup>92</sup> See *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1146 (2001) (explaining the California Teachers Association's substantive constitutional claim).

<sup>93</sup> See *id.* (rejecting claim of plaintiffs on grounds that the state's pedagogical interests take clear precedence over the teachers' First Amendment interests).

<sup>94</sup> See *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007, 1017 (N.D. Cal. 1998) (explaining the necessary elements plaintiff must establish in order to prove a violation of 20 U.S.C. § 1703(f)).

<sup>95</sup> *Id.* at 1015.

<sup>96</sup> President George W. Bush, Statement upon Signing the No Child Left Behind Act of 2001 (Jan. 8, 2002), available at <http://www.ed.gov/news/newsletters/achiever/2002/09152002.html> (last visited Aug. 29, 2008) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

<sup>97</sup> *Id.*

<sup>98</sup> No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425.

<sup>99</sup> Press Release, Office of the Press Secretary, Fact Sheet: No Child Left Behind Act (January 8,

skillfully at grade level.<sup>100</sup> Many of the sixty-eight percent who cannot read well are poor or minority children.<sup>101</sup>

The goal of Title I is to strengthen existing accountability systems by significantly raising expectations for states, local school districts, and schools, so that all students will reach proficiency in reading and mathematics by the year 2014.<sup>102</sup> Each year, states are required to report their AYP in terms of percentage of students scoring at the "proficient" level or higher.<sup>103</sup> States may establish their own timelines to ensure that all students will be proficient by 2014, including LEP students.<sup>104</sup> Although accommodations may include native-language versions of the assessment in the areas of reading and language arts, NLCB mandates that students who have been in U.S. schools for three consecutive years will be assessed in English.<sup>105</sup>

The NCLB defines LEP students as: (a) three to twenty-one years of age, (b) enrolled or preparing to enroll in elementary or secondary school, (c) born outside the United States or speaking a language other than English, and (d) not meeting the state's proficient level of achievement required in English-only

2002), available at <http://www.whitehouse.gov/news/releases/2002/01/20020108.html> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

<sup>100</sup> U.S. Dep't of Education, *Why No Child Left Behind is Important to America* (2002), <http://www.ed.gov/nclb/overview/importance/edlite-index.html> (last visited Aug. 29, 2008) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

<sup>101</sup> *Id.*

<sup>102</sup> See Press Release, *supra* note 99 (explaining how the President's plan would, for the first time, ask states to begin using annual statewide assessments and insist that states show that progress is being made annually toward narrowing the achievement gap).

<sup>103</sup> See PETERSON & WEST, *supra* note 10, at 26 (explaining the process of AYP reporting). In particular:

States must participate in the National Assessment of Educational Progress (NAEP) tests in two grades every other year as an informal check on the rigor of the state tests. 'Report cards' detailing the performance of each student subgroup by state and school each year must be distributed. Crucially, that performance must make [AYP] toward the twelve-year deadline of universal proficiency.

*Id.*

<sup>104</sup> See *id.* (noting states' latitude in implementing the specifics of a process to achieve universal proficiency over a twelve year timeline).

<sup>105</sup> See U.S. DEPARTMENT OF EDUCATION, *NO CHILD LEFT BEHIND: A TOOLKIT FOR TEACHERS 29* (2004), available at <http://www.ed.gov/teachers/nclbguide/nclb-teachers-toolkit.pdf> [hereinafter *TOOLKIT FOR TEACHERS*] (explaining that students who have attended U.S. schools for three years must be tested in English). NCLB states that:

In order to make AYP, schools must test at least 95 percent of the various subgroups of children, including English language learners . . . [I]n the area of reading and language arts, students who have been in U.S. schools for three consecutive years must be assessed in English, with an additional two years as needed, on a case-by-case basis.

*Id.*



classrooms.<sup>106</sup> This broad definition gives states a fair amount of flexibility in defining which students constitute the LEP subgroup.

A large portion of Title I funding is targeted at high-poverty schools and districts.<sup>107</sup> Funds are directed toward improving basic programs operated by school districts, such as Reading First, Early Reading First, and Even Start.<sup>108</sup> These programs significantly increase the federal investment in scientifically-based reading instruction programs, specifically to support language, literacy, and pre-reading development in the early grades.<sup>109</sup>

Title III consolidates current Bilingual Education Act programs and the Emergency Immigrant Education Program into a state-administered grant program that provides funding to districts based on the number of LEP and immigrant students they serve.<sup>110</sup> Title III requires districts to provide language instruction to their LEP students, and each school or district using these funds must implement an effective means of outreach to parents of LEP children.<sup>111</sup>

Congress claims that NCLB provides unprecedented federal support for education in the United States.<sup>112</sup> Since taking office, President Bush has called for an increase of \$11 billion to education funds and has increased funding for LEP students by fifty percent.<sup>113</sup> However, many claim that this increased funding has actually acted to the detriment of LEP students.<sup>114</sup> By combining the bilingual and immigrant education programs into a single-formula grant program to states, the block-grant plan allows states to spend bilingual education funds on

<sup>106</sup> No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1961.

<sup>107</sup> See TOOLKIT FOR TEACHERS, *supra* note 105, at 3 (discussing the allocation of Title I funds under No Child Left Behind).

<sup>108</sup> See *id.* at 4 (describing how NCLB focuses on funding proven education programs). The TOOLKIT FOR TEACHERS issued by the U.S. Dep't of Education states:

[NCLB] puts a special emphasis on implementing education programs and practices that have been clearly demonstrated to be effective through rigorous research. Federal funding is targeted to support such programs. For example, the Reading First program makes federal funds available to states to help reading teachers in the early grades strengthen existing skills and gain new ones in effective, scientifically based instructional techniques.

*Id.*

<sup>109</sup> *Id.* ("No Child Left Behind puts a special emphasis on implementing education programs and practices that have been clearly demonstrated to be effective through rigorous scientific research.")

<sup>110</sup> *Id.* at 14 (discussing the English Language Acquisition State Grants Program).

<sup>111</sup> *Id.* at 37 ("Unprecedented amounts of money are being put into improving the teaching of reading in our nation.")

<sup>112</sup> See Press Release, *supra* note 63 (stating the efforts made to provide the best possible education to children).

<sup>113</sup> *Id.*

<sup>114</sup> See generally Illinois Ass'n for Multilingual Multicultural Educ., *NABE Alert—Reauthorization of ESEA on Congressional Fast Track; Block Grants Threaten Bilingual Ed and Other Programs*, IAMME BULLETIN, Mar. 2001, at 12, available at <http://www.iamme.org/online/pdfs/2001spring.pdf> (discussing the effects of the Bush Administration's education plan upon bilingual education).

other priorities, which may deprive Latino and immigrant students of the education services they need.<sup>115</sup> For instance, bilingual students who have been in the United States for three to five years are suffering because funds are going towards very basic instruction.<sup>116</sup>

While NCLB has not repealed bilingual education, it has repealed EEOA's requirement that not less than seventy-five percent of funds for the previous competitive grant program be used for programs that use a child's native language in instruction.<sup>117</sup> In its place, NCLB attaches performance measures to federal funding by giving districts more flexibility in using bilingual funds in exchange for effectively transitioning LEP students into English fluency.<sup>118</sup> In order for all students to meet higher standards, NCLB emphasizes teaching English to LEP students so they can be mainstreamed into regular classroom settings as soon as possible.<sup>119</sup>

#### *b. NCLB and the Education of LEP Students*

During the *Brown v. Board of Education* hearings, Thurgood Marshall defined "equal" as "getting the same thing, at the same time and in the same place."<sup>120</sup> Rod Paige hailed NCLB as Congress's attempt at achieving this ideal, and he describes NCLB as "one of the legacies of *Brown v. Board of Education*."<sup>121</sup> The notion that certain children cannot learn is inherently unequal, and the message of NCLB is just that: Congress will not tolerate schools that practice "the soft bigotry of low-expectations."<sup>122</sup>

NCLB encourages schools to emphasize English language instruction by attaching performance measures to federal funding for bilingual education. School districts are rewarded with funds in exchange for effectively transitioning LEP students into English fluency and improving their achievement.<sup>123</sup> LEP

<sup>115</sup> See *id.* at 12 (discussing the problems followed by President Bush's plan).

<sup>116</sup> See No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 3111(b), 115 Stat. 1425, 1691-92 (identifying eligible uses of funds).

<sup>117</sup> See *id.* (allowing the State to make a grant "only if the State education agency involved agrees to expend at least 95 percent" of the funds).

<sup>118</sup> *Id.* (providing for assistance in promoting English language learning).

<sup>119</sup> See *id.* at 1690 (describing the goal of English language instruction).

<sup>120</sup> EbzB Productions, *Questions about Brown v. Board and the Civil Rights Movement*, <http://www.ebzb.org/studyguides/bvbstudy.pdf> (last visited Aug. 29, 2008) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

<sup>121</sup> Rod Paige, U.S. Secretary of Educ., Address at the *Brown v. Board of Education* 50th Anniversary Commission at Howard University School of Law (Nov. 13, 2002) (transcript available at <http://www.ed.gov/news/speeches/2002/11/11132002.html>) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

<sup>122</sup> *Id.*

<sup>123</sup> See No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 3102(1), 115 Stat. 1425, 1690 (stating the act is to help children who are limited English proficient attain English proficiency).

students are generally exempted from testing during their first year in an American school.<sup>124</sup> After one year, they are then required to be assessed in either English or in their native language, at the discretion of their home state, for the next three to five years.<sup>125</sup> After five years, students are expected to be sufficiently proficient in English to test only in English.<sup>126</sup>

In addition to capping the lifespan of bilingual educational programs, NCLB's provisions also cut the resources available for bilingual students.<sup>127</sup> After passage of NCLB, the "English Language Acquisition, Language Enhancement, and Academic Achievement Act have replaced the Bilingual Education Act," and the Office of Bilingual Education and Minority Language Affairs was replaced by the Office of English Language Acquisition, Language Enhancement, and Academic Achievement for Limited English Proficient Students.<sup>128</sup>

NCLB's focus on short-term test results functionally eliminates bilingual education in the classroom. LEP students are assessed in academic content areas before they are proficient in English, making NCLB a problematic measure of academic achievement. In *Foundations of Bilingual Education and Bilingualism*, Colin Baker lists factors that determine the effectiveness of bilingual schools and classrooms.<sup>129</sup> Baker argues that standardized testing is least conducive to the academic achievement of LEP students, mainly because language minority students "thrive in an atmosphere where linguistic and cultural diversity is assumed, sharing a bicultural or multicultural curriculum with multiple perspectives and linguistic equality of opportunity."<sup>130</sup>

Standardized testing, Baker argues, is insensitive to the "qualitative aspects of languages and to the great range of language competences . . . [and fails] to measure the discourse patterns that children from different cultures use

<sup>124</sup> See DENNIS HOLMES & SUSAN DURON, LEP STUDENTS AND HIGH-STAKES ASSESSMENT: INTRODUCTION, <http://www.nclla.gwu.edu/pubs/reports/highstakes/intro.htm> (last visited Aug. 29, 2008) (stating the serious implications upon LEP students by the standard-based reform movement, particularly with regard to high-stakes assessment) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

<sup>125</sup> See DENNIS HOLMES & SUSAN DURON, LEP STUDENTS AND HIGH-STAKES ASSESSMENT: FEDERAL LEGISLATION AND ASSESSMENT OF LEP STUDENTS, <http://www.nclla.gwu.edu/pubs/reports/highstakes/federallegislation.htm> (last visited Aug. 29, 2008) (discussing the testing requirements for LEP students) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

<sup>126</sup> See *id.* (discussing the assessment of LEP students under the influences of Title I and Title VII).

<sup>127</sup> See Sandra Cortes, *A Good Lesson for Texas: Learning How to Adequately Assist Language Minorities Learn English*, 13 TEX. WESLEYAN L. REV. 95, 107-08 (2006) (describing the current legislation related to bilingual education).

<sup>128</sup> *Id.*

<sup>129</sup> See COLIN BAKER, FOUNDATIONS OF BILINGUAL EDUCATION AND BILINGUALISM 261 (4th ed. 2006) ("Apart from individual classroom and school characteristics, the effectiveness of bilingual education is influenced by social, economic, political and cultural context of such education.")

<sup>130</sup> *Id.* at 295.

with considerable competence."<sup>131</sup> It takes five to seven years for LEP students to reach parity in academic English with their native English-speaking peers.<sup>132</sup> Without doubt, NCLB's system of high-stakes testing subjects LEP students to testing without adequate preparation.

#### IV. NCLB Five Years Later

On September 25, 2007, the National Assessment of Educational Progress (NAEP) released its findings on the academic achievement of elementary and secondary students in the United States.<sup>133</sup> As part of the Nation's Report Card, of which NCLB requires participation, 700,000 students are tested nationwide to determine whether standards are being met.<sup>134</sup>

The results are organized according to fourth and eighth grade math and reading scores. According to the results, fourth and eighth grade math scores and fourth grade readings scores have shown improvement, but eighth grade reading scores have declined.<sup>135</sup> The average math score for the nation's fourth-grade student is at its highest level in seventeen years, and the percentage of fourth-graders in public schools scoring at or above proficiency rose to thirty-nine percent this year.<sup>136</sup> Reading results, however, have increased only modestly since the law took effect. Only three states—Florida, Hawaii and Maryland—and the District of Columbia registered meaningful gains in reading in both eighth and fourth grades. Thirty states showed no change in either grade.<sup>137</sup>

Overall, results indicate that achievement gaps between white and minority students have narrowed minimally.<sup>138</sup> Math and reading gaps between

<sup>131</sup> *Id.* at 11.

<sup>132</sup> See WAYNE P. THOMAS & VIRGINIA COLLIER, NATIONAL CLEARINGHOUSE FOR BILINGUAL EDUCATION, SCHOOL EFFECTIVENESS FOR LANGUAGE MINORITY STUDENTS 7 (1997), available at <http://www.ncele.gwu.edu/pubs/resource/effectiveness/thomas-collier97.pdf> (providing a summary of the definition of "success").

<sup>133</sup> See Sam Dillon, *Math Scores Rise, but Reading is Mixed*, N.Y. TIMES, Sept. 26, 2007, at A20 (explaining how America's public school students are doing significantly better in math since the federal No Child Left Behind Act took effect in 2002, but gains in reading achievement have been marginal, with performance declining among eighth graders).

<sup>134</sup> See *id.* (stating that the national tests were given to 700,000 fourth and eighth grade students in all fifty states in 2007).

<sup>135</sup> See *id.* (explaining the fourth and eighth grade math and reading scores obtained from the test).

<sup>136</sup> *Id.*

<sup>137</sup> JIHYUN LEE ET AL., NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEPARTMENT OF EDUCATION, THE NATION'S REPORT CARD: READING 2007 (Sept. 2007), <http://nces.ed.gov/nationsreportcard/pubs/main2007/2007496.asp> (last visited Aug. 29, 2008) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

<sup>138</sup> See Dillon, *supra* note 133 ("The results also showed that the nation had made only incremental progress in narrowing historic gaps in achievement between white and minority students, a fundamental goal of the federal law.").

black and white fourth and eighth graders have narrowed, but gaps remain the same when comparing Hispanic and white students.<sup>139</sup> According to educators, regardless of the modest improvements, the law has been a success because it requires that students of all racial and demographic "subgroups" attain the same proficiency, which has at least focused schools on closing achievement gaps.<sup>140</sup>

Since October 2007, President Bush has been urging Congress to reauthorize NCLB, touting the new National Report Card as evidence of its success. Secretary of Education Margaret Spellings has highlighted the most recent results, proclaiming, "No Child Left Behind is working. It's doable, reasonable and necessary. Any efforts to weaken accountability would fly in the face of rising achievement."<sup>141</sup> However, educational advocacy groups, such as Education Trust, are not so quick to use test scores as a measure of NCLB's success, cautioning that although scores may have risen, many of the improvements were taking place before NCLB.<sup>142</sup>

Measuring the success of LEP students is also difficult because of the construct of the subgroup itself. When LEP students fail to meet proficiency standards, the school is labeled as "failing." However, when students reach English proficiency they join mainstream classrooms. By its nature, then, the LEP subgroup will never reach true proficiency standards because as soon as they meet English proficiency they are forced to join a new group where they are inevitably behind. One potential side effect of the "[d]emands that disabled and limited English [speaking] students reach [English] proficiency" is that these demands actually "set those students and their teachers up for failure."<sup>143</sup> The testing and sanctions are too rigid to take into account the range of challenges confronting different students and different schools.

English immersion programs do not operate on the premise that certain children cannot learn, but rather assume that children may learn only once they are able to understand the language of instruction. Understanding the language being taught is obviously essential to learning in any environment; however, an effective language education program is one that factors in the many different

<sup>139</sup> *Id.*

<sup>140</sup> See Peter Baker, *An Extra 'S' on the Report Card*, WASH. POST, Sept. 26, 2007, at A10 (quoting Amy Wilkins, vice president of the Education Trust, who claims that the gap "is starting to narrow," but not fast enough).

<sup>141</sup> Press Release, U.S. Department of Education, Secretary Spellings Highlights Gains Made on the Nation's Report Card under No Child Left Behind (Sept. 25, 2007) available at <http://www.ed.gov/news/pressreleases/2007/09/09252007.html> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

<sup>142</sup> See Dillon, *supra* note 133, at A20 (noting that many test scores were rising before NCLB was enacted).

<sup>143</sup> See DEBORAH MEIER & GEORGE WOOD, *MANY CHILDREN LEFT BEHIND: HOW THE NO CHILD LEFT BEHIND ACT IS DAMAGING OUR CHILDREN AND OUR SCHOOLS* xi (2004) (describing how the lofty goals of NCLB ignore the fact that some students simply cannot pass the tests required to demonstrate proficiency).

interests at stake. Under NCLB, teachers are teaching skills in isolation instead of units of study in order to maximize testing results. Standardized testing allows student to test well, while still doing poorly in class, creating poor writers who do not have to extend responses or create; instead, students simply "parrot" back.

High attrition rates among new teachers suggest that standardized testing reduces the quality of teaching and learning in schools.<sup>144</sup> Standardized testing diminishes the role of teachers, and distances students from active learning. According to the National Commission on Teaching and America's Future, forty-six percent of new teachers leave the profession within the first five years of beginning their teaching career.<sup>145</sup> High attrition rates are just one of the many characteristics of low-performing schools. More than 10,000 schools have already been put on NLCB's list of "schools in need of improvement."<sup>146</sup> According to a 2004 study conducted by the Public Education Network (PEN), "when a school is labeled as 'failing' the community perception is that the school is abandoned—by students . . . teachers, principals and the community."<sup>147</sup>

#### V. Community Based Education Reform

NCLB's "one size fits all" approach to education lacks the flexibility to accommodate individual students' needs. It focuses on English-only education and sets a rapid time frame to test improvements, which limits school officials' choices and creativity in the field of language education programs. This section will examine a better way to approach the education of LEP students through a system that gives schools greater freedom to experiment, responds to the needs of individual communities, and encourages greater parental involvement.

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<sup>144</sup> See LINDA MCNEIL, *CONTRADICTIONS OF SCHOOL REFORM: EDUCATIONAL COSTS OF STANDARDIZED TESTING 3* (2000) (describing the long-term effects of standardized testing as creating inequities and widening the gap between the quality of education for poor and minority youth and that of more privileged students).

<sup>145</sup> NATIONAL COMMISSION ON TEACHING AND AMERICA'S FUTURE, *NO DREAM DENIED: A PLEDGE TO AMERICA'S CHILDREN* (2007), [http://www.nctaf.org/documents/no-dream-denied\\_full-report.pdf](http://www.nctaf.org/documents/no-dream-denied_full-report.pdf) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

<sup>146</sup> Diana Jean Schemo, *Failing Schools Strain to Meet U.S. Standard*, N.Y. TIMES, Oct. 16, 2007, at A1.

<sup>147</sup> PUBLIC EDUCATION NETWORK, *OPEN TO THE PUBLIC: HOW COMMUNITIES, PARENTS, AND STUDENTS ASSESS THE IMPACT OF THE NO CHILD LEFT BEHIND ACT 2* (July 2007), [http://www.publiceducation.org/nclb\\_main/2007\\_NCLB\\_National\\_Report.pdf](http://www.publiceducation.org/nclb_main/2007_NCLB_National_Report.pdf) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

### A. Why We Need Community Based Education

The issue of language education not only deals with the question of how to educate children with diverse needs, but also how the goals of an educational system are linked to language, cultural identity, and nationality. Community-based education reform addresses these needs through parents, community leaders, politicians, policymakers, and school leaders working together with regard to where they want to take their densely populated neighborhoods and schools.<sup>148</sup>

NCLB does not provide enough flexibility to local school communities to address these issues. In order to receive Title I funds, states are required to implement "a single, statewide . . . accountability system that is the same accountability system the State uses for all public elementary schools and secondary schools or all [districts] in the State."<sup>149</sup> However, states have many diverse communities that make a uniform state mandate for language education policy inappropriate.

The complexity of bilingual education bars simple solutions. Decades of research have shown that there is not a simple answer to the question of whether bilingual education is more, or less, effective than English immersion.<sup>150</sup> Justice Harlan recognized the danger in attempting to solve state issues through a generalized approach in his dissent in *Roth v. United States*.<sup>151</sup> Furthermore, as Justice Brandeis warned, states are the traditional experimenting grounds for governmental innovation.<sup>152</sup>

<sup>148</sup> See *Seventh Annual Harvard Latino Law, Business, and Public Policy Conference: Investing in our Future*, 8 HARV. LAT. L. REV. 93, 138 (2005) (addressing how the race dialogue in the United States relates to the U.S. Latino community).

<sup>149</sup> 20 U.S.C. § 6311(b)(2)(A).

<sup>150</sup> See BAKER, *supra* note 129, at 146 (stating that research results on bilingualism and cognition are simplistic and ambiguous, having classified bilinguals in an imprecise manner); see also Greene, *supra* note 59, at 7 ("[T]he unfortunate reality is that the vast majority of evaluations of bilingual programs are so methodologically flawed in their design that their results offer more noise than signal.").

<sup>151</sup> See *Roth v. United States*, 354 U.S. 476, 498 (1957) (Harlan, J., dissenting) (disagreeing with the majority's decision that the federal government should have broad powers to prosecute obscenity, and opining that such authority should rest with the states). The dissent stated:

I am very much afraid that the broad manner in which the Court has decided these cases will tend to obscure the peculiar responsibilities resting on state and federal courts in this field and encourage them to rely on easy labeling and jury verdicts as a substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.

*Id.* (Harlan, J., dissenting).

<sup>152</sup> See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). Justice Harlan also warns about allowing due process to incorporate ideas that are not fully developed by States. *Roth*, 354 U.S. at 497 (Harlan, J., dissenting). This Note heeds Justice Harlan's warning by asserting that the solution

### 1. Boundaries

NCLB as a plan for language education policy fails to address the two main arguments regarding the constitutional limits of both bilingual and English-only education. First, bilingual education may violate *Brown* by segregating non-native speakers. Second, English-only education may also violate the Equal Protection Clause by discriminating against LEP students. Both sides face uncertain legal challenges.

Bilingual education can create a dual system in which non-native speakers are never integrated well (if at all) with English speakers. Just as the plaintiffs in *Brown* asserted that the "separate but equal" system perpetuated inferior accommodations, services, and treatment for black Americans, so too could a dual system of language education create inferior conditions for LEP students.<sup>153</sup> The *Brown* Court was concerned with the psychological effects of segregation, equal facilities notwithstanding.<sup>154</sup> Similar concerns are raised in research evaluating the effects of bilingual education on the self-esteem of LEP students.<sup>155</sup>

Indeed, Badillo asserts that bilingual education is a major obstacle to the assimilation of Hispanic Americans into mainstream society.<sup>156</sup> His concerns are rooted in the policy justifications in *Brown*: "To separate . . . [students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."<sup>157</sup> Badillo argues that Hispanic students "remain trapped within an underachieving minority group" that is only furthered by bilingual education programs.<sup>158</sup> Thus, to the extent that the segregation of LEP students is analogous to the explicit racial discrimination addressed in *Brown*, bilingual education may face similar constitutional challenges.

A second argument surrounding the constitutional limits of bilingual and English-only education is the possible unconstitutionality of English-only education. Supporters of English immersion instruction seek to make English the official language of the United States in order to prevent "ethnic separatism

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to educational problems does not lie in federalizing mandates without proven success.

<sup>153</sup> See *Brown v. Board of Education*, 347 U.S. 483, 486 n.1 (1954) ("The Chancellor also found that segregation itself results in an inferior education for Negro children.").

<sup>154</sup> See *id.* at 494-95 (noting how a sense of inferiority affects the motivation of a child to learn).

<sup>155</sup> See generally Susan Alexander, *Some Ethical Issues in Applied Social Psychology: The Case of Bilingual Education and Self-esteem*, 22 J. OF APPLIED SOC. PSYCHOL. 1741 (1992) (exploring an application of self-esteem theory in the schools).

<sup>156</sup> See *supra* note 61 and accompanying text.

<sup>157</sup> *Brown*, 347 U.S. at 494.

<sup>158</sup> BADILLO, *supra* note 61, at 51.



and the breakdown of national unity."<sup>159</sup> However, opponents argue that although English immersion instruction may not violate *Brown*, it should nonetheless be subjected to heightened scrutiny because of its effect on LEP students, arguably a protected class based on race or national origin. The plaintiffs in *Valeria v. Gray Davis* raised this equal protection challenge to Proposition 227, claiming that because LEP students constitute a discrete and insular minority, any classification based on their status as such is subject to strict scrutiny.<sup>160</sup>

Even if the NCLB passes constitutional muster, it is not an ideal program for LEP students. Indeed, there is no proven method to teach LEP students. Rather, given the various models of bilingual education, experimentation in the field of language education policy should be done on the local level, leaving the ultimate decision-making in the hands of the state, community, and parents.

### B. Approaches that Schools May Use

The overwhelming and growing number of schools that cannot satisfy NCLB's escalating demands demonstrates that NCLB's system of accountability does not work.<sup>161</sup> Although it is beyond the scope of this Note to fully evaluate the effectiveness of bilingual education program options for LEP students, an examination of research-driven school reform plans could offer a starting point.

A more viable plan comes from Connecticut Governor Judi Rell's proposal to increase funding for every Connecticut school district, but also to significantly enhance the State's early childhood programs in the poorest cities, increase high school requirements and open the way for families to attend any magnet school they wish, as long as space is available.<sup>162</sup> More importantly, to

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<sup>159</sup> See CENTER FOR APPLIED LINGUISTICS, OFFICIAL LANGUAGE AND ENGLISH PLUS: AN UPDATE (2004), <http://www.cal.org/resources/digest/lewell01.html> (last visited Feb. 16, 2008) ("Providing education or services in other languages, it is feared, will give rise to ethnic separatism and the breakdown of national unity; the way to prevent this rift is to make English the official language.") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

<sup>160</sup> *Valeria v. Davis*, 307 F.3d 1036, 1039 (9th Cir. 2002) ("[P]laintiffs contend that Proposition 227 unconstitutionally restructures the political process by placing decision-making over bilingual education, and only bilingual education, at the state-wide level."). In *Valeria*, the court found that there was no equal protection violation because Proposition 227, while having racial dimensions in its application, dealt with a racially-neutral issue, the language taught in public schools, in a racially-neutral manner. *Id.*

<sup>161</sup> See Schemo, *supra* note 146 (describing the high number of schools that are unable to meet the NCLB standards).

<sup>162</sup> See Press Release, The Office of Governor M. Jodi Rell, Governor Rell Announces Nearly \$410 Million for School Construction (Nov. 1, 2007), <http://www.ct.gov/governorrell/cwp/view.asp?A=2791&Q=398408> (last visited Feb. 16, 2008) ("These funds will continue the progress we are making in public school education and ensure that our school facilities are the best we can offer our children. By building, renovating, and expanding our schools, we are investing in our children's future and in the future of this state.") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

comply with federal mandates under NCLB, Governor Rell's proposal would give the State Education Department the authority to step in and redesign failing schools, and the State Board of Education the power to require districts to create full-day kindergarten and summer school programs for children who do not meet proficiency levels on standardized tests.<sup>163</sup> Above all, funding would be provided to schools irrespective of results.

This Note proposes individualized academic plans for LEP students that provide flexibility in their learning programs, similar to Governor Rell's proposal. A committee composed of local community leaders, teachers, and parents, should be designated to develop a plan that would be better able to identify learning needs and allow for appropriate assessments of each individual student. This committee could hold public hearings and town hall meetings to engage parents, families, and communities in local education.

The committee's recommendations could focus on teacher training by requiring professional development programs that teach the skills needed for effective parental and community communication and engagement. The committee could also involve local employers by encouraging them to grant a reasonable amount of leave for parents to participate in their children's school activities. Although LEP students should not be left out of the standardized testing movement of NCLB, more flexibility is necessary to effectively teach and assess these students.

## VI. Conclusion

Although NCLB had good intentions, it is failing a key group of students that it was designed to help. NCLB's focus on short-term test results functionally eliminates bilingual education in the classroom without a suitable alternative to teaching LEP students academic material. Furthermore, NCLB assesses LEP students on academic content areas before they are proficient in English, making NCLB a problematic measure of academic achievement, and further isolating a group of students that is already suffering from exclusion.

NCLB's statewide mandate of language education policy frustrates the individualized and unique needs of LEP students. A better system would appreciate the diversity within this subgroup, and experiment among different instructional approaches appropriate for their communities. A community-centered approach to education is crucial to enabling states, local educators, and parents, to play a greater role in their children's education.

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<sup>163</sup> *Id.*

