The State of Public Education and the Needs of English Language Learners in the Era of ‘No Child Left Behind’

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INTRODUCTION
I. THE EDUCATION OF ENGLISH LANGUAGE LEARNERS IN A MELTING POT
   A. The Advent of Bilingual Education in the United States
   B. The Twentieth Century Impact of the Melting Pot: Cultural Deprivation
II. WHY THE PERSISTENT NEED FOR BILINGUAL SERVICES IN PUBLIC EDUCATION?
   A. The Cultural Context of Language & Learning
   B. Second Language Acquisition and a Continuum of Services
      1. Basic Interpersonal Communication Skills Masquerading as Cognitive Academic Language Proficiency
      2. Factors Influencing Second Language Acquisition
      3. Providing a Continuum of Services
         a. Hypotheticals
         b. A Continuum?

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INTRODUCTION

Historically, the United States has been viewed as a melting pot of cultural and linguistic diversity.\(^1\) In practice, however, persons who are culturally and/or linguistically different from the dominant, Euro-American\(^2\) society largely have been expected to learn English and conduct themselves according to white, middle-class norms.\(^3\) By the close of the twentieth century, the melting pot metaphor had long been reflective of a "cultural deprivation" paradigm, viewing the cultures and languages of culturally and linguistically diverse\(^4\) persons as inferior to those of the dominant society.\(^5\) Our educational institutions, in particular elementary and secondary schools (K–12), preponderantly embrace the cultural deprivation paradigm with respect to students who are not proficient in English (i.e., English Language Learners).\(^6\)

Over the last three decades, schools that do not embrace the cultural and

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1. See infra text accompanying notes 28–32.
2. "Euro-American" refers to the majority, white (not of Hispanic origin), native English speaking U.S. population.
4. Scholars use the descriptor "culturally and linguistically diverse" to refer to persons whose native language and/or culture differ from that of the dominant, Euro-American culture within which they live. Occasionally, I use the descriptor "culturally and linguistically different" synonymously to avoid obscuring meaning.
5. See infra note 58.
6. See infra note 60. The preferred scholarly term for this population has shifted over the last decade from Limited English Proficient (LEP) to English Language Learner (ELL). Thus, I have conformed to the preferred "ELL" terminology except where contextually inaccurate.
linguistic differences of their student populations have fast-tracked English language learners (ELLs) into special education programs. Schools unwilling or unable to embrace the cognitive and linguistic needs of these students destine many of them to a future lacking in achievement compared to their Euro-American peers. Moreover, politically driven policy decisions, reliance upon the ubiquitous less-than “scientific” research, and poor design and implementation of language development programs have thwarted broad-scale, consistent implementation of educational services that have been proven to raise and sustain the cognitive and linguistic development of ELLs to a level of parity with that of their Euro-American peers.

Since 1998, steps taken by California, Arizona, and Massachusetts, as well as by the federal government, specifically have retracted the availability of services for the cognitive and linguistic development of ELLs in favor of a single year of English-only (i.e., “immersion”) services. These English immersion initiatives are premised largely on the belief that on-going supports and services for the non-native English-speaking child’s first language are an ineffective means of closing the achievement gap between ELLs and Euro-American students. Thomas and Collier demonstrate, however, that inadequately designed, supported, or implemented services, sub-standard research, and the phenomenon of the moving target, are in fact the bases of public disenchantment with bilingual education. Additionally, school administrators and policymakers have insisted that the best research—concluding that “at least 5–7 years, on the average” of native language support is necessary to achieve parity between ELLs and Euro-American students—

7. See JIM CUMMINS, BILINGUALISM AND SPECIAL EDUCATION: ISSUES IN ASSESSMENT AND PEDAGOGY 1–2 (1984) (discussing several egregious past and indiscriminate present educational practices that result in the overrepresentation of ELLs in special education programs); infra text accompanying notes 280–83; see also EVE MÜLLER & JOY MARKOWITZ, PROJECT FORUM, SYNTHESIS BRIEF: ENGLISH LANGUAGE LEARNERS WITH DISABILITIES 2 (2004) (citing authors who “have expressed concern about the disproportionately high number of [English language learners] receiving special education services and the problem of distinguishing . . . those who have true disabilities . . . [from those] who are failing for other reasons”), available at http://www.nasdse.org/FORUM/PDF%20files/ells.pdf.


9. Id. at 19–26, 32–40.

10. See discussion infra Part III.B–C.

11. See infra text accompanying note 170.

12. THOMAS & COLLIER, supra note 8, at 19–27, 41. “[T]he main reason that it takes so long for ELLs to reach grade-level performance on tests in English is that native-English speakers are not standing still waiting for ELLs to catch up with them.” Id. at 40 (citing Wayne P. Thomas, An Analysis of the Research Methodology of the Ramirez Study, 16 BILINGUAL RES. J. 213–45 (1992)).
must be wrong.\textsuperscript{13} The political forces behind these initiatives consistently fail to understand how models that exclusively focus on the acquisition of the second language—ignoring ELL needs for further cognitive and linguistic development in their native language—are "lucky" when they achieve parity in five to seven years, and are much more likely to require eight to ten years.\textsuperscript{14}

The Equal Educational Opportunities Act (EEOA)\textsuperscript{15} guarantees the rights of students with limited English proficiency to full participation in a school's programs.\textsuperscript{16} Castañeda \textit{v. Pickard},\textsuperscript{17} a broadly recognized, Fifth Circuit opinion, provides the standards under which educational programs for these students are evaluated. Castañeda construes the "appropriate action" mandate of § 1703(f) of the EEOA to require, inter alia, that the instructional programs implemented for limited English proficient students will enable them to achieve parity with their native English speaking peers, so as to benefit fully from the educational opportunities available to all other students.\textsuperscript{18}

Yet, the third prong of the Castañeda "appropriate action" analysis\textsuperscript{19} explicitly requires that a program of purported appropriate action will be "employed for a period of time sufficient to give the plan a legitimate trial" before a court meaningfully is able to evaluate the program.\textsuperscript{20} Under the cover of "sufficient time," English-only initiatives are allowed to skirt past the Castañeda and EEOC mandates. For example, shortly after the 1998 voter approval of California's referendum to implement English-only instruction—

\textsuperscript{13} Id. at 33.

\textsuperscript{14} Id.


\textsuperscript{16} 20 U.S.C. § 1703 (prohibiting state action which denies "equal educational opportunity . . . on account of . . . race, color, sex, or national origin, by . . . (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs").

\textsuperscript{17} 648 F.2d 989 (5th Cir. 1981).

\textsuperscript{18} Id. at 1011.

\textsuperscript{19} The appropriate action analysis provides:

For a particular language program to constitute "appropriate action" under section 1703(f), a court must ascertain (1) that a school "is pursuing a program informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy"; (2) that the programs and practices actually used by a school are "reasonably calculated to implement effectively the educational theory adopted by the school"; and (3) that the program "produce[s] results indicating that the language barriers confronting students are actually being overcome."


\textsuperscript{20} Castañeda, 648 F.2d at 1010.
Proposition 227—a federal district court in *Valeria G. v. Wilson* 21 was unable to evaluate whether Proposition 227 constituted appropriate action because it was yet to be implemented; that is, regulations were on the drawing board for implementation in the coming 1998-99 school year. 22 Therefore, in the absence of longitudinal data bearing on a program's efficacy, it is unlikely that English-only initiatives can be enjoined. Six years down the road, however, longitudinal data are emerging in California. 23

As I was asked to address this Symposium from a practitioner’s perspective of disability and diversity in primary and secondary educational settings, 24 this Article shall strongly implicate educational policy. Nonetheless, from a legal perspective, this Article will address the trends over the last decade that have eroded appropriate educational opportunities for ELLs in the United States, and question the validity of English-only programs under the EEOA. Part I of this discussion presents historical and changing perspectives of meeting the needs of ELLs. Part II discusses the necessity for public schools to provide a continuum of second language learning opportunities for the varying needs of ELLs in light of sound research and best practices. Part III reviews the turbulent life of bilingual education in the United States and the status of services for ELLs in 2004.

Thereafter, Part IV will present and discuss achievement data from California indicating a widening of the already significant achievement gap between ELLs and the greater school age population. Subsequently, I apply the *Castañeda* appropriate action analysis in the California context. This Article concludes that under *Castañeda*, programs for serving ELLs, like that in California with a history of performance data demonstrating an on-going cultural deprivation paradigm, are likely to be found in violation of the Equal Educational Opportunity Act for failing to meet the academic and linguistic needs of English language learners.

A final word of introduction: I have attempted what I believe to be a unique goal for this Article in light of it appearing in a scholarly legal periodical. The bilingual education debate is fraught with inaccurate perceptions of what English proficiency is, and what it takes to acquire proficiency. Part II, enunciating the pedagogy of second language acquisition, is written for the politicians, attorneys, and judges who are on the firing line. Though the *Castañeda* court rightfully acknowledged that courts are “ill-equipped” to establish pedagogy—a role “properly reserved to . . . state and local educational


22. *Id.* at 1020–21.

23. *See* discussion *infra* Part IV.

agencies—there are times as these, "[c]onfronted reluctantly," where the federal courts must fulfill their responsibilities assigned to them by Congress and not permit a school "to persist in a policy, which . . . has, in practice, proved a failure."

I. THE EDUCATION OF ENGLISH LANGUAGE LEARNERS IN A MELTING POT

We are the heirs of all time, and with all nations we divide our inheritance. On this Western Hemisphere all tribes and people are forming into [a] federated whole; and there is a future which shall see the estranged children of Adam restored as to the old hearth-stone in Eden.

– Herman Melville

The waves of nineteenth century immigration to the United States brought representatives of nearly every language, culture, and people of the European continent. Certain pronounced reasons—famine, war, persecution, poverty—spurred many; though by the eve of that century, Melville’s characterization of the possibilities for life in the United States added to the popular appeal. Between 1890 and 1920, eighteen million immigrants made a new home in the United States. In 1908, Israel Zangwill, a Jewish immigrant from England, opened his play, The Melting Pot, in Washington, D.C. The notion of a Melting Pot “promise[d] that all immigrants can be transformed into Americans, a new alloy forged in a crucible of democracy, freedom, and civic responsibility.” The melting pot metaphor, while relatively fitting for early European immigrants, has proven far less so for the Latin American and Asian immigrants of the mid to late twentieth century.

This Part will illustrate the inappropriateness of that metaphor for Latino

26. Id.
27. Id. at 1010.
30. Id. at 222–25.
32. Id.
33. Id.
and Asian immigrants. Section A presents how the failure of the metaphor led to a federal bilingual education mandate. Section B discusses the consequences of the persistence of the metaphor, in part, leading to the misidentification of ELLs as disabled.

A. The Advent of Bilingual Education in the United States

In the colonial Americas under the British Crown, authorities tolerated the use of European languages in addition to English. Throughout the nineteenth century, U.S. policies expressed disdain for Native American culture and language; however, local communities frequently used their native European languages in everyday life, including the schoolhouse. A notable aspect of this time period was the relatively egalitarian nature of education in the United States. Publicly-funded elementary schools became widespread among the states toward the end of the nineteenth century. Literacy outpaced that of the European nations. In contrast to the European educational institutions, which favored educating the elite “well into the twentieth century,” schooling rapidly became universal in the United States. Education was and remains highly decentralized compared with that of Europe. Towns and rural communities held extensive control over finances and curriculum. Local control permitted these communities to maintain their cultural and linguistic identities, many to the present day.

Nativist movements—the social and political actions of groups who hold

34. Thomas K. Ricento, Language Policy and Education in the United States, in 1 ENCYCLOPEDIA OF LANGUAGE AND EDUCATION 137 (Ruth Wodak & David Corson eds., 1997).


38. Id. at 1–2.

39. Id. African-Americans, however, attended segregated schools after Emancipation. Id. at 2.

40. Id. at 3.

41. Id.

fear-based antipathies towards immigrant, or otherwise culturally, ethnically, or religiously different persons or practices—changed the linguistic landscape at the turn of the nineteenth century. By the 1920s, English was the firmly established medium of instruction in public and parochial schools, and the laws of twenty-two states prohibited non-English language instruction in elementary education. For instance, Nebraska Laws 1919, chapter 249, sought to make the English language . . . the mother tongue of all children” and “to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals.

In 1923, the U.S. Supreme Court in Meyer v. Nebraska struck down the non-English language prohibitions as “arbitrary[,] . . . without reasonable relation to any end within the competency of the State,” and “unreasonably infringing] the liberty guaranteed . . . by the Fourteenth Amendment.” Justice McReynolds stated: “The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue.” Despite this clear message from the Supreme Court, a federal education policy toward non-English speaking persons and languages would not emerge for another forty-five years.

In 1968—a time of increased federal enforcement of the civil rights in education—Congress enacted the Bilingual Education Act, Title VII of the Elementary and Secondary Education Act. The Act encouraged states to “eliminate English-only instruction policies in schools” and provided funding for low income schools to develop bilingual programs that would transition limited English proficient students toward proficiency. Reauthorization of the Act in 1974 removed the low income requirement; still, “[h]eavy emphasis was


44. Ricento, supra note 34, at 137–38.


46. Id. at 403.

47. Id. at 399.

48. Id. at 401.

49. Ricento, supra note 34, at 138.

50. Id.


given to learning English, instead of to academic achievement. Services expanded once more with the Bilingual Education Act of 1978's provision for reading and writing instruction. Congress came to understand that "bilingual educational practices, techniques and methods" and the use of native languages were necessary "to achieve competence in the English language." In 1984, reauthorization addressed the requirements of ELLs with disabilities for the first time by funding multifunctional resource centers to gather and provide information regarding bilingual special education needs. The following Section discusses the on-going negative impacts of the cultural deprivation paradigm, in spite of these legal mandates for bilingual education services.

B. The Twentieth Century Impact of the Melting Pot: Cultural Deprivation

Contemporary U.S. society is a "mosaic" of peoples with many different cultural and linguistic backgrounds. Viewing educational settings through the mosaic lens enables us to recognize the inherent strengths of a society woven from a diverse fabric. In contrast, the melting pot metaphor reflects a "cultural deprivation" paradigm, intentionally or unconsciously judging the cultures, languages, and abilities of non-Euro-Americans as inferior to those of the dominant society. For example, García and Guerra discuss the undermining of educational reform efforts arising from educators' deficit beliefs about culturally and linguistically diverse students and families, and a general unwillingness to examine traditional assumptions about education.

58. See JOHN L. MANNI ET AL., INTELLIGENCE, MENTAL RETARDATION, AND THE CULTURALLY DIFFERENT CHILD: A PRACTITIONER'S GUIDE 15 (1984). The conception of cultural deprivation "quickly achieved the status of truth and entered the vocabulary of psychologists, educators and policy makers as a causal explanation of school failure among children from low income families." Id. at 29 (quoting Gallagher et al., Poverty and Public Policy, in THE FAMILY: SETTING PRIORITIES 241 (T. Brazelton & V. Vaughn eds., 1979)).
The mosaic metaphor accurately reflects the increasingly diverse cultural and linguistic composition of our nation, and contemplates divergent experiences and thinking as assets that can provide new solutions to old problems. It is apparent, however, that educational institutions in the United States largely still expect students to melt into the cultural and linguistic norm if they are to meet with success. For instance, testing practices in school psychology have not changed much over the last one hundred years, especially with regard to reflecting the inherent resources, strengths, needs, and differences among our nation's culturally and linguistically diverse populations.\textsuperscript{60} The mismatch between the instructional needs of ELLs and the curriculum and instruction in general education has destined many of these students to a future lacking in achievement.\textsuperscript{61}

Among these veritable casualties, over the past three decades there has been a clearly disproportionate overrepresentation of minorities identified as having mental retardation, learning disabilities, and emotional disturbance in K–12 programs.\textsuperscript{62} This has included, for example, occasions of "twice as many Mexican-American students in classes for the educable mentally retarded . . . as would be expected on the basis of proportion in the school population."\textsuperscript{63} These figures arise in large part from the discontinuity between the backgrounds of ELLs and the dominant, Euro-American school culture, resulting in ineffective pedagogical practices, and the misidentification and, thus, misplacement of ELLs in special education programs.\textsuperscript{64}

\textsuperscript{60} Leonard M. Baca & Estella Almanza, Language Minority Students with Disabilities 12 (1991), microformed on ERIC ED339171 (citation omitted).

\textsuperscript{61} Alba A. Ortiz & James R. Yates, Characteristics of Learning Disabled, Mentally Retarded, and Speech-Language Handicapped Hispanic Students at Initial Evaluation and Reevaluation, in Schools and the Culturally Diverse Exceptional Student: Promising Practices and Future Directions 51–62 (Alba A. Ortiz & Bruce A. Ramirez eds., 1988). This is not to say that educational research fails to embrace cultural pluralism, but that a gap exists between research and practice.


\textsuperscript{63} Cummins, supra note 7, at 1; see also Losek & Welch, supra note 62, at 416 (discussing statistics of both over- and underrepresentation of Hispanics, Asian Pacific Americans, and Native Americans in programs serving children with mental retardation (MR). Losek and Welch do not fail to acknowledge that "African Americans are the most overrepresented . . . minority group in every category [of disability under the IDEA], in nearly every state." Id. at 412–13.

\textsuperscript{64} Cummins, supra note 7, at 1–2; Minority Students in Special and Gifted Education 182–85 (M. Suzanne Donovan & Christopher T. Cross eds., 2002). Low scores by ELLs on standardized and other testing instruments that are developed contemplating society's
Once labeled "special," this frequently stigmatizing term sticks with a child throughout elementary and secondary years, and for many, into adulthood. Misplacement of ELLs in special education programs negatively impacts their learning opportunities by ignoring their educational needs as English language learners and imposing inappropriate services. Further troublesome are the long-term and potentially negative effects of special education misplacement on a student's social, psychological, academic, vocational, and economic future.

The cultural deprivation paradigm prevents educational institutions and practitioners from assuming the level of responsibility necessary to develop techniques and strategies that positively impact the learning and assessment needs of ELLs. The paradigm persists as the vision of the melting pot places the responsibility for adjusting to the learning modes of mainstream school culture upon the student. This paradigm is "particularly dangerous because it diverts the attention from real defects in our educational system to imaginary defects

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Euro-American cultural and linguistic background, and incorrect interpretations of the test results, have rendered ELLs ineligible for technical/vocational opportunities. Nivia Zavala, An Overview of Issues on Implementation of Bilingual Special Education Programs, in Teaching the Bilingual Special Education Student 49–50 (A. S. Carasquillo & R. E. Baecher eds., 1990). These factors have also led to the exclusion of ELLs from Gifted and Talented programs. J. H. Garcia, Nonstandardized Instruments for the Assessment of Mexican-American Children for Gifted/Talented Programs, in Addressing Cultural and Linguistic Diversity in Special Education: Issues and Trends 46–57 (1994). School psychologists and diagnosticians routinely make diagnostic recommendations about disability without considering the possible effects of culture or language on an ELL's test performance. Ann C. Willig & Alba A. Ortiz, The Nonbiased Individualized Educational Program: Linking Assessment to Instruction, in Limiting Bias in the Assessment of Bilingual Students 281–302 (Else V. Hamayan & Jack S. Damico eds., 1991); see also Alba A. Ortiz & James R. Yates, Considerations in the Assessment of English Language Learners Referred to Special Education, in English Language Learners with Special Education Needs 66 (Alfredo J. Artiles & Alba A. Ortiz eds., 2002) ("Most assessment personnel have been taught to assess in English and have not been trained to understand the interaction of disabilities and linguistic, cultural, and other student characteristics.").

65. David L. Kirp, Schools As Sorters: The Constitutional and Policy Implications of Student Classification, 121 U. Pa. L. REV. 705, 736 (1973). But see Jake Wagman, Rise in Special Education Taxes Districts, ST. LOUIS POST-DISPATCH, June 6, 2004 (describing savvy parents who manipulate the special education label to gain advantages in the form of classroom and testing modifications for their children in secondary and post-secondary education as one example of the phenomena behind the rise in the special education population), 2004 WL 81884792.


68. MANNI ET AL., supra note 58, at 28–30; García & Guerra, supra note 59, at 150.
[in] the child."\textsuperscript{69} Most ELLs continue to perform at significantly lower levels of achievement than their Euro-American peers in all areas of the curriculum.\textsuperscript{70} The true risk factor for ELLs is not a "deficiency" resulting from their differences from mainstream school culture and language, but rather that they will be taught by teachers who are unable to: (1) communicate with them in their native language, (2) view their cultural differences as strengths, and/or (3) harness their interests, experiences, and aptitudes.\textsuperscript{71}

The next Part transcends law and policy by presenting the little understood pedagogy of second language acquisition, so as to articulate the necessity of a continuum of second language learning services for ELLs. To fully appreciate this discussion, it is important to be aware that persons of Hispanic and Asian origin comprise the most rapidly growing populations in the United States.\textsuperscript{72} The 2000 U.S. Census reported the Hispanic/Latino population at 35.6 million and the Asian population at 10.7 million.\textsuperscript{73} Those speaking "a language other than English" totaled 46.9 million.\textsuperscript{74} Projecting to 2050, the U.S. Census Bureau anticipates an increase of 67 million Hispanic persons and 33.4 million Asian persons.\textsuperscript{75} In 2050, the national demographic landscape likely will emerge 50.1% White (non-Hispanic), 24.4% Hispanic, 14.6% African American, and 8.0% Asian.\textsuperscript{76} It is in this context that I proceed.

II. WHY THE PERSISTENT NEED FOR BILINGUAL SERVICES IN PUBLIC EDUCATION?

Effective pedagogy for the English language learner must target two essential goals. First, English language proficiency is necessary to enable students to maximize academic success and fully partake of the rich privileges

\textsuperscript{69} MANNI ET AL., supra note 58, at 32 (quoting W. Labov, The Logic of Nonstandard English, in LANGUAGE AND POVERTY 60 (F. Williams ed., 1970)). "[E]fforts to raise achievement [are] hindered by school districts' and educators' tendencies to place the problem within the student (and family) or within the school, without examining the links between school practices and student outcomes." García & Guerra, supra note 59, at 150–51.

\textsuperscript{70} See generally discussion infra Part IV.B.

\textsuperscript{71} Cf. García & Guerra, supra note 59, at 154 ("[D]eficit thinking permeates society; schools and teachers mirror these beliefs; ... cultural sensitivity and awareness do not automatically result in equity practices; and ... professional development activities must systematically and explicitly link equity knowledge to classroom practices.").

\textsuperscript{72} See infra text accompanying note 74.


\textsuperscript{74} U.S. Census Bureau, QT-P17: Ability to Speak English (2000) (on file with author).

\textsuperscript{75} Id.

\textsuperscript{76} Id.
and opportunities of the United States. Less well understood and, yet, requisite to successfully acquiring English proficiency and sustainable academic success, is the second goal—native language proficiency. High proficiency in the English language is only achieved to the extent that the English language learner acquires proficiency in his or her native language.77

This Part discusses the profound influences of an English language learner’s native language and culture upon his or her educational achievement. Section A overviews the cultural context of language and learning and how the common pedagogical practices of the melting pot lens set ELLs up for academic failure. Section B extends this discussion into a working knowledge of second language acquisition, how the U.S. educational system is clearly at odds with this process, and, through the use of hypothetical examples, the types and extent of services that ELLs can expect to receive.

A. The Cultural Context of Language & Learning

Language is acquired in socially conditioned, cultural contexts.78 “[C]ulturally-determined experiences” provide the background knowledge that serves “as the foundation for literacy development and academic achievement.”79 “Cultural learning includes all the learning that enables [one] to behave appropriately within [his or her cultural] group”—an ability “critical to one’s self-identification and . . . self-esteem.”80 Cultural learning impacts the perception of what should be taught and reinforced, and how to teach things that are as commonplace as sitting, walking, and talking.81 Culturally learned behaviors also impact an individual’s success at acquiring proficiency in a

77. Thomas and Collier have found: “Only those groups of language minority students who have received strong cognitive and academic development through their first language for many years . . . , as well as through the second language (English), are doing well in school as they reach the last of the high school years.” THOMAS & COLLIER, supra note 8, at 14.

78. See, e.g., Larry J. Mattes & Donald R. Omark, Speech and Language Assessment for the Bilingual Handicapped 63 (1991); Shirley B. Heath, Sociocultural Contexts of Language, in CAL. ST. DEP’T OF EDUC., BEYOND LANGUAGE: SOCIAL AND CULTURAL FACTORS IN SCHOOLING FOR LANGUAGE MINORITY STUDENTS 146 (1986), microformed on ERIC ED304241 (on file with author); Sister Phyllis Supanchek, Language Acquisition and the Bilingual Exceptional Child, in BACA & CERVANTES, supra note 3, at 110; Anne Vermeer, Exploring the Second Language Learner Lexicon, in THE CONSTRUCT OF LANGUAGE PROFICIENCY 150 (Ludo Verhoeven & John H. A. L. De Jong eds., 1992) (noting the importance of the “linguistic and sociocultural context in which a concept is learned” and the significant role that “cultural and historical background . . . play in second language acquisition”).

79. Nancy Cloud, Language, Culture and Disability: Implications for Instruction and Teacher Preparation, 16 TEACHER EDUC. & SPECIAL EDUC. 60, 65 (1993) (citing Dolores Durkin, Teaching Them to Read (5th ed. 1989)).

80. Heath, supra note 78, at 146.

81. Manni et. al., supra note 58, at 112.
second language.  

Many values and concepts present in schools are embedded so deeply in culture that educators and school administrators operate unaware of the effects that their own cultural learning has upon students.  

Culture impacts both a person’s surface dimensions (e.g., dress, language, customs, family structure and composition) and internal dimensions (e.g., values, norms, beliefs, and attitudes), such that a child “may appear largely acculturated if we look at surface features,” while maintaining values and beliefs that are wholly different from those of mainstream society.  

Cultural knowledge and values provide the foundation for reasoning, drawing inferences, and interpreting meanings.  

Table I presents a selective overview of culturally learned behaviors, perspectives, and practices.

Table 1
Culturally Learned Variables

<table>
<thead>
<tr>
<th>Variables</th>
<th>Descriptive Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cooperation vs. Competition</td>
<td>Students who do not value or are not skilled in the ways of competition between individuals may be at a serious disadvantage in U.S. schools.</td>
</tr>
<tr>
<td>Polychronic vs. Monochronic Orientation</td>
<td>The maxim “business before pleasure” in the U.S., in part, refers to a monochronic orientation whereby one thing is done at a time, and at the appropriate time. Polychronic cultures are used to doing several things at once (e.g., working, playing, and eating), and place the needs of the task at hand, such as beginning a meeting when all relevant persons are present, above clock time.</td>
</tr>
</tbody>
</table>


83. Cloud, supra note 79, at 64 (quoting L. Jacobs, Assessment Concerns: A Study of Cultural Differences, Teacher Concepts, and Inappropriate Labeling, 14 Teacher Educ. & Special Educ. 43, 47 (1991)).

84. Id.


86. For a detailed discussion, see Pat Chamberlain & Patricia Medeiros-Landurand, Practical Considerations for the Assessment of LEP Students with Special Needs, in Limiting Bias in the Assessment of Bilingual Students 111–56 (Else V. Hamayan & Jack S. Damico eds., 1991).
<table>
<thead>
<tr>
<th>Time</th>
<th>Euro-Americans strongly emphasize being on time and using time efficiently.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bodily Movements</td>
<td>A passive style is rewarded in U.S. schools, more active styles may receive special education referrals for behavior problems.</td>
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<tr>
<td>Proximity</td>
<td>Regarding personal space especially during communications, Euro-Americans prefer more space between two speakers, for example, than Latin Americans.</td>
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<tr>
<td>Touching</td>
<td>Euro-Americans are more physically restrained in greetings than persons of other cultures, e.g., Italians or Portuguese.</td>
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<tr>
<td>Eye Contact</td>
<td>Euro-American teachers who do not receive direct eye contact from a student may interpret this behavior as disrespectful or inattentive, while the opposite may be said in an Asian culture.</td>
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<tr>
<td>Gender</td>
<td>Colombian &amp; Asian families may grant boys more freedom outside of the house and few, if any, domestic responsibilities in the house; girls have increased responsibilities within the home and limited freedoms outside. Consequently, boys and girls may be lacking in specific self-help or social skills due to their gender-specific roles.</td>
</tr>
<tr>
<td>Individual vs. Family Orientation</td>
<td>A student with a family orientation may not be apt to compete with family/clan/tribal members within his or her class because that would be drawing undue attention to oneself.</td>
</tr>
<tr>
<td>Verbal &amp; Nonverbal Communication Norms</td>
<td>A smile, a nod, eye contact, overtalking, and undertalking may be differently interpreted as being rude, friendly, or as indicating agreement or deference, across cultures.</td>
</tr>
<tr>
<td>Perceptual Style</td>
<td>Closely related to field independence/sensitivity, whereby a picture, e.g., is seen as discrete parts (independence) or as an integrated whole (sensitivity).</td>
</tr>
<tr>
<td>Cognitive Style</td>
<td>There are two hypothesized ways in which persons process information: 1) global, relational, intuitive, and 2) reflective, methodical, analytical. This latter style is found among the academically successful students in the United States.</td>
</tr>
</tbody>
</table>

Note: Descriptions are not intended to stereotype the behaviors of specific cultures, but merely to provide common examples.
Cultural learning determines how and why people use language—language genres or uses—which vary across settings, tasks, and cultures. Heath, for example, identified six language genres that are prerequisites to success in U.S. schools (see Table 2). These genres operate to account for information, maintain social interactions, acquire information, and share information with intimates or non-intimates according to mainstream cultural rules. They are the primary means by which Euro-American students demonstrate cognitive, academic, and linguistic competencies in U.S. schools.

Table 2
Language Genres Prerequisite to Success in U.S. Schools

<table>
<thead>
<tr>
<th>Language Genres</th>
<th>Descriptive Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Label quests</td>
<td>Adults either name or ask for the name of objects.</td>
</tr>
<tr>
<td>Meaning quests</td>
<td>Adults infer the child’s meaning, interpret their own or other’s behavior, or ask for explanations of meaning/intention.</td>
</tr>
<tr>
<td>Recounts</td>
<td>A child retells information/experiences already known to the listener who may scaffold the telling with questions.</td>
</tr>
<tr>
<td>Accounts</td>
<td>These are explanations entirely generated by the teller/child.</td>
</tr>
<tr>
<td>Eventcasts</td>
<td>Eventcasts provide a running narrative of events simultaneously occurring or about to occur.</td>
</tr>
<tr>
<td>Stories</td>
<td>Fictional accounts must include an animate being that moves through a series of events with goal directed behavior.</td>
</tr>
</tbody>
</table>

Though common to school and parental expectations in Euro-American culture, these genres are but a “small and arbitrary selection” of language

87. Heath, supra note 78, at 145–47.
88. Id. at 148–49.
89. Id.
90. “[S]tudies have consistently demonstrated the narrow range of language uses rewarded in classrooms.” Heath, supra note 78, at 149 (citing ARTHUR N. APPLEBEE, WRITING IN SECONDARY SCHOOL: ENGLISH AND THE CONTENT AREAS (1981); J. LANGER, CHILDREN READING AND WRITING: STRUCTURES AND STRATEGIES (1986); Shirley B. Heath, Being Literate in America: A Sociohistorical Perspective, in THIRTY-FOURTH YEARBOOK OF THE NATIONAL READING CONFERENCE (J.A. Niles ed. 1986)).
91. Heath, supra note 78, at 148. “Those students who achieve academic success either bring to school all of these language uses, and the cultural norms that lie behind them, or they learn quickly to intuit the rules of these language uses . . . .” Id. at 149.
uses. They may vary considerably from the language genres used in the homes and communities of culturally and linguistically diverse students; and families of migrant, refugee, and undocumented workers may neither seek out nor be exposed to these genres. "For many [ELLS], there is little fit between the language uses operative in the school and those developed in the family and community." Melting Pot expectations—that the behavior and language uses of culturally and linguistically different students need conform to those of Euro-American school culture—and mainstream unawareness that ELLs do not come to school already competent in these language uses, set these children up for school difficulties.

The source of school difficulty, however, is not a deficiency in the child, but arises from the learning environment, instruction, or curriculum. Children experiencing difficulties in school may be referred for a special education evaluation on the basis of behaviors that simply do not fit the expectations of school officials and, thus, may be placed in a special education program for lack of academic progress in part due to linguistic, cultural, economic, and other background characteristics perceived as deviant. In the following section, this Article provides the basis for a working knowledge of the process of second language acquisition, so as to clarify how current educational policy and practice negatively impact ELLs.

B. Second Language Acquisition and a Continuum of Services

Institutions of higher education in the United States commonly require exposure to a foreign language as a prerequisite to admittance or for earning a bachelor's degree. The requirement of two years of foreign language course

92. Id. at 151.

93. Id. ELLs "often come to school bringing language uses and cultural beliefs supporting ways of using language that differ greatly from those of the classroom." Id. at 147.

94. Id. at 147.

95. Id. at 151.

96. Ortiz & Maldonado-Colon, supra note 67, at 38.

97. For example, students in the College of Arts and Sciences at the University of Washington must take at least three quarters of a foreign language, and admittance to all of the University's colleges requires two years of high school foreign language instruction. UNIV. OF WASH., GENERAL EDUCATION AND BASIC SKILLS REQUIREMENTS: FOREIGN LANGUAGE [hereinafter FOREIGN LANGUAGE REQUIREMENTS], at http://www.washington.edu/students/ugrad/advising/ged/gedfl.html (last modified Oct. 15, 2004); cf. FOREIGN LANGUAGE ENROLLMENT HITS RECORD LEVEL, BLACK ISSUES HIGHER EDUC., Dec. 4, 2003, at 17, available at 2003 WL 57803947 (discussing the dramatic increase in foreign language study and the broad availability of languages ("148 less commonly taught languages") for study at U.S. institutions of higher education).
work in liberal arts programs is becoming standard. With this in mind, I asked the audience of this Symposium, first, if they had had some experience learning a second language. Clearly, nine out of every ten persons (or more) raised their hands. Second, I asked the audience if they would feel competent to take a university course in a foreign country, where the second language they had studied was the medium of instruction. A single hand was raised. The point of this exercise, though an oversimplification, was to demonstrate to this highly educated audience that the second language skills we acquire in one-to-two years of study are completely inadequate for learning new material delivered in that language.

It is important for the reader to understand that I am not discussing specific methodologies for acquiring a second language; that is truly beyond the scope of this Article. Rather, the subsections to follow provide a framework for comprehending the second language acquisition process and the many variables influential to the process. Additionally, these subsections illustrate the harm that arises from a one-size-fits-all, second language acquisition policy and the need for a continuum of second language acquisition services.

1. Basic Interpersonal Communication Skills Masquerading as Cognitive Academic Language Proficiency

Understanding the necessity of bilingual education and a continuum of second language acquisition services in the public schools requires a foundation in BICS and CALP, that is, Basic Interpersonal Communication Skills and Cognitive Academic Language Proficiency. The BICS and CALP conceptual framework of second language acquisition was developed by Jim Cummins of the Ontario Institute for Studies in Education at the University of Toronto. Professor Cummins has been at the forefront of second language and bilingual pedagogy and educational policy for thirty years.

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99. Cf. Zaida McCall-Perez, The Counselor As Advocate for English Language Learners: An Action Research Project, PROF. SCH. COUNSELING, Oct. 2000, at 13 app. A (identifying knowledge of "the difference between Basic Interpersonal Communication Skills (BICS) and Cognitive Academic Language Proficiency (CALP)" as essential to fully appreciating the needs of ELLs).

100. See generally Jim Cummins, The Entry and Exit Fallacy in Bilingual Education, NAT'L ASS'N FOR BILINGUAL EDUC. J., Spring 1980.

Individuals commonly acquire BICS in their native language by the age of five. These skills include pronunciation, vocabulary, and grammar as practiced in face-to-face, cognitively undemanding, and contextually embedded conversations. That is, BICS proficiency allows the learner to interact with friends in social, low-stress situations, where common interests and knowledge of the subjects of discussion are shared. These situations might include conversations about music, sports, or weekend plans that students engage in at lunch or after school, and are frequently accompanied by body language, emotion, visual cues (such as the use of physical objects), and repetition. BICS, however, "are largely unrelated to academic progress." Language proficiency at the BICS level is commonly acquired in two years of study of a second language by English language learners in bilingual programs.

Cognitive Academic Language Proficiency, in contrast, encapsulates the abilities to learn new concepts, problem solve, infer, and evaluate using the second language in the regular classroom—where context is not embedded and demands upon cognition are high. For example, CALP permits the learner to follow the content of a lecture or precise instructions without visual supports (e.g., overhead projections, graphs, outlines), to use abstract vocabulary, and to perform successfully on standardized tests. Research demonstrates that students of a second language require five to seven years to develop the CALP of native speakers. However, students in ESL programs who receive their content instruction (e.g., history or mathematics) in English-only classrooms may require seven to ten years to develop the same level of CALP.

Many individuals who play a role in the education of ELLs—first and foremost, parents, the extended family, and the culturally and linguistically

102. Jim Cummins, supra note 100, at 28, 30.

103. Id. at 28; Roxanne F. Hudson & Stephen W. Smith, Effective Reading Instruction for Struggling Spanish-Speaking Readers: A Combination of Two Literatures, INTERVENTION IN SCH. & CLINIC, Sept. 2001, at 37.

104. Hudson & Smith, supra note 103, at 37.

105. Id.

106. Cummins, supra note 100, at 31.


108. CUMMINS, supra note 7, at 137.

109. Hudson & Smith, supra note 103, at 37.

110. CUMMINS, supra note 7, at 133; THOMAS & COLLIER, supra note 8, at 33–34.

111. See THOMAS & COLLIER, supra note 8, at 28, 33–34 (discussing the second language proficiency outcomes for immigrants arriving in the United States before age eight, who were on or above grade level in their home country at the time of departure, and served in an English immersion program that was considered "well implemented by experienced, well-trained school staff").
diverse professional and lay communities—commonly are unfamiliar with the BICS/CALP distinctions. Similarly, the professionals who have a direct role in public education—general education teachers, administrators, school counselors, special educators, educational diagnosticians, and speech-language pathologists—often have not been exposed to this important framework in their professional education and development. In the absence of a fundamental grasp of these distinctions, family, community, and professional educators commonly equate, for example, Rosa’s ability to discuss pop music using English among school friends and Hao’s ability to get along well on the soccer field with native English speakers, with their having developed the fundamental English language proficiency necessary to succeed in English-only content classes. Legislators and policymakers are similarly uninformed.

It is, ostensibly, the absence of comprehending these two concepts upon which one-year English immersion programs for ELLs appear based. A single year of English immersion, at best, provides the student with BICS. The student is returned to or placed in general core academic classes and may proceed to converse successfully in English on casual, familiar topics with friends, observing body language, and afforded repeated or rephrased statements and questions. Then biology class begins: familiar topics and vocabulary are stripped away, the pace of discussion picks up, decontextualized work demands and abstract vocabulary emerge, gestural cues are replaced with verbal instructions and writing on the chalk board, and students are asked to evaluate and synthesize brand new abstract information. In this context, the absence of CALP becomes apparent. A process of evolving academic failure is set in

112. See Ortiz & Maldonado-Colon, supra note 67, at 43–44 (discussing the general “lack of understanding of the relationship between the native language and the second language,” and cautioning the interpretation of “good interpersonal communication skills”).

113. See infra text accompanying notes 158–59. Furthermore, as evidenced by informally surveying state department of education websites, linked to from the U.S. Department of Education’s website, State Education Agency (State Department of Education), temporarily available at http://wdocrebcolp01.ed.gov/Programs/EROD/org_list.cfm?category_ID=SEA (last visited Feb. 4, 2005), very little guidance is provided for teacher training in the concepts of BICS and CALP. Searching for “BICS” and “CALP” separately, as they are commonly known, I located 25 documents mentioning either term from the following twenty-three states/territories: Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, New Mexico, New York, Texas, and Wisconsin. Twelve states made no use of either term. In order of frequency, New York, Maine, the District of Columbia, Hawaii, and Illinois accounted for eighteen of the documents (data on file with author).

114. For example, Representative Joe Knollenberg of Michigan’s 11th Congressional District, supporting English-only legislation, erroneously stated that the United States has been glued together by the English language for over two hundred years, and that issuing drivers licenses to non-English speakers is one of several factors “shredding the common bond that has made our Nation great.” James Crawford, Address to the Michigan Teachers of English to Speakers of Other Languages (MITESOL), Surviving the English Only Assault: Public Attitudes and the Future of Language Education (Nov. 16, 1996), transcript available at http://ourworld.compuserve.com/homepages/JWCRAWFORD/mitesol.htm.
motion as the student misses large amounts of information intended to be the foundation for further conceptual learning.

2. Factors Influencing Second Language Acquisition

A multitude of variables play a role in second language acquisition. I present an overview of a number of key factors as they frequently participate in the BICS/CALP framework and, thus, inform educational policy. Broadly, these can be divided into internal variables (i.e., characteristics of the learner) and environmental variables (i.e., home and community).\(^{115}\)

Internal variables include learner personality traits, affective state (e.g., lower anxiety, greater motivation, and positive attitudes), learning styles, first language acquisition, and (to some extent) age.\(^ {116}\) Learning styles have a greater impact on second language acquisition than intelligence (as measured by an IQ test).\(^ {117}\) Common learning styles include the sensory modalities of learning, such as visual, aural, tactile, and kinesthetic learning. These are the variations we recognize when we are more successful learners through seeing or hearing new information, or manually doing, practicing, or being in motion with the new information.\(^ {118}\) Other learning style modalities include field independence vs. field sensitivity\(^ {119}\) and reflexivity vs. impulsivity.\(^ {120}\) Children are often successful second language learners when they possess a positive affective state and are exposed to highly contextualized linguistic input in natural learning contexts.\(^ {121}\) Adults are successful with second language acquisition when the learning emphasis is upon form and structure, because adults generally possess enhanced metalinguistic skills (i.e., the abilities to talk, analyze, and think about language outside of its context) and extralinguistic

\(^{115}\) Hamayan & Damico, supra note 82, at 47.

\(^{116}\) Id. at 47–50, 54–56.

\(^{117}\) Id. at 48.

\(^{118}\) Id.; see also CHAMINADE COLL. PREPARATORY, LEARNING STYLES, at http://www.chaminade.org/inspire/learnst.htm (last modified Mar. 28, 1998) (on file with author) (citing COLIN ROSE, ACCELERATED LEARNING (1987)).

\(^{119}\) "[S]tudents who are field independent . . . can extract relevant details from a complex configuration," which lends itself to success in L2 acquisition in "an academic setting where the focus is on rule analysis," Hamayan & Damico, supra note 82, at 48 (citing NEIL NAIMAN ET AL., THE GOOD LANGUAGE LEARNER (1975)).

\(^{120}\) Reflexivity and impulsivity lend themselves to successful L2 acquisition in academic versus natural language learning contexts, respectively. Id.

\(^{121}\) Hamayan & Damico, supra note 82, at 54–56.
knowledge of the world.\textsuperscript{122}

Environmental influences upon a student's second language learning derive from the students' homes, communities, and schools. Persons who speak the second language in these environments serve as language models for ELLs. Family and community members will possess a broad range of skill in the second language. Adults in immigrant families are frequently limited English proficient. Likewise, in the greater culturally and linguistically diverse communities, second language proficiency will vary, offering a range of poor to excellent models.

Interactions with limited English proficient models of the second language expose the ELL to structural errors and low quality second language input that Professors Ortiz and Kushner stress "can have potentially devastating effects."\textsuperscript{123} Infants and toddlers can suffer serious consequences to their cognitive and intellectual development when consistently denied exposure to native language models of CALP (e.g., via limited English proficient parents speaking solely English to the child).\textsuperscript{124} Professor Cloud explains that when parents communicate with their children in their native language, "in which they are proficient and transmit the full extent of the culturally determined knowledge they possess, adequate intergenerational transmission occurs to ensure the success of children."\textsuperscript{125}

However, when parents experience cultural and linguistic ambivalence or rejection and reduce the quantity and quality of the mediation they offer by providing it in a second language in which they are not proficient or by withholding the transmission of traditionally determined beliefs, values, and knowledge, children's cognitive and linguistic development suffers.\textsuperscript{126}

Moreover, proficiency in the native language sets the foundation upon which a second language can be learned.\textsuperscript{127} Possessing CALP skills in the

\textsuperscript{122} Id. at 55–56; Char Mohrline, Survey of Communication Disorders in Adults, "B. Normal Communication Processes," at slide 15, http://www.speech.edinboro.edu/professors/mohrline/Lecture2.ppt (last visited Feb. 4, 2005). Extralinguistic skills comprehend the use of mechanisms that signal "attitude or emotion, and include intonation, stress, rate of delivery, and pause or hesitation." Id. at slides 13–15.

\textsuperscript{123} See Alba A. Ortiz & Millicent I. Kushner, Bilingualism and the Possible Impact on Academic Performance, 6 CHILD & ADOLESCENT PSYCHIATRIC CLINICS N. AM. 657, 664 (1997) (adding that the diminished quality of interactions and "[r]estricted communication patterns can have significant, negative effects on children's cognitive and intellectual development").

\textsuperscript{124} Id.

\textsuperscript{125} Nancy Cloud, Educational Assessment, in LIMITING BIAS IN THE ASSESSMENT OF BILINGUAL STUDENTS 225 (Else V. Hamayan & Jack S. Damico eds., 1991).

\textsuperscript{126} Id.

\textsuperscript{127} THOMAS & COLLIER, supra note 8, at 38.
native language increases the likelihood of achieving similar proficiency in the 
second language; conversely, the absence of proficiency in the native language 
can set a low ceiling for second language proficiency. Among ELLs above 
the age of five who have already acquired BICS in their native language, 
exclusive use of the second language at home is likely to be of little benefit if 
other members of the household have developed no greater proficiency. 
Nonetheless, it is not uncommon for limited English proficient parents to 
encourage their children to utilize the second language at home, to the 
exclusion of the native language, believing that use of the native language 
interferes with second language acquisition and that this type of immersion will 
best serve their child.

Furthermore, the size of the school and the presence or absence of other 
ELLs commonly determines the existence and extent of language support 
services. Schools rarely offer the individual ELL more than two to three 
years of ESL and/or bilingual services and only 13.2% of ELLs receive 
services incorporating significant native language support—facts that may 
permit the student to acquire English BICS, though not CALP. Bearing these

128. Mattes & Omark, supra note 78, at 135.

129. Cloud, supra note 125, at 225.

(describing a study where 61–80% of culturally and linguistically diverse parents encouraged the 
use of English at home).

131. See Cloud, supra note 125, at 225 (explaining that majority assimilationist values, and 
negative attitudes about the use of native languages, exert pressure on culturally and linguistically 
diverse parents to switch to the majority language and culture); id. (stating that educational 
professionals may encourage less native language use in the home, and that it is common for the 
parents of ELLs with disabilities, who are experiencing failure, to reduce native language mediation 
out of sense of hopelessness); see also Jim Cummins, The Development of Bilingual Proficiency 
from Home to School: A Longitudinal Study of Portuguese-Speaking Children, 173 J. Educ. 85, 94 
(1991) (noting that “it is still common practice in many school systems to discourage parents from 
promoting their children’s [native language] in the home . . .”).

132. See, e.g., Cal. Educ. Code § 310 (West 2002) (requiring twenty or more ELLs on the 
same grade level and speaking the same native language in the same school to request bilingual 
services before this specific group is eligible for such services); Ill. Admin. Code tit. 23, § 
228.25(a) (2000) (“When an attendance center has an enrollment of 20 or more limited English 
proficient students of the same language classification, the school district must establish a 
transitional bilingual program for each language classification represented by such students . . . ”); 
19 Tex. Admin. Code § 89.1205(a) (West 2004) (“Each school district which has an enrollment of 
20 or more limited English proficient students in any language classification in the same grade level 
district-wide shall offer a bilingual education program . . . ”). The size of the school will often 
determine whether a LEP population reaches the twenty student threshold.

133. Ortiz & Kushner, supra note 123, at 668.

134. Paul J. Hopstock & Todd G. Stephenson, Special Topic Report #1: Native 
Languages of LEP Students 35 tbl. 5.1 (2003), available at http://www.ncela.gwu.edu/ 
resabout/research/descriptivestudyfiles/native_languages1.pdf. Significant native language support 
is defined as “at least 25% use of the native language in instruction.” Id. at 37 app. A.
many factors influencing second language acquisition in mind, the next subsection describes the necessity for a continuum of services to meet the needs of ELLs.

3. Providing a Continuum of Services

English language learners of all ages are entering and participating in the U.S. public school system in large numbers, representing a multitude of cultural and linguistic backgrounds and highly variable skills (or lack thereof) in English.135 These students have the same right to a meaningful education as do those of the dominant U.S. culture. In 1974, the Supreme Court in Lau v. Nichols, “rely[ing] solely on § 601 of the Civil Rights Act of 1964, . . . [which] bans discrimination based ‘on the ground of race, color, or national origin,’ in ‘any program or activity receiving Federal financial assistance,”136 announced:

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.

. . . .

Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.137

Additionally, one program for English language learners does not fit all. A minimum continuum of services is quite necessary to ensure that (1) the native language of all ELLs reaches CALP and (2) all ELLs acquire CALP in English before being placed in English-only classes for essential content instruction. To illustrate these services, I shall introduce three hypothetical ELL siblings, who, for the sake of this illustration, all immigrated to the United States from Vietnam one year ago. Tuyen is a boy of three; L’a’n is a girl of five; and Nhu is a girl of nine. Their father studied English for one year before coming to the United States and works on a factory assembly line. Their mother is monolingual Vietnamese and a homemaker.

a. Hypotheticals

Tuyen has been at home with his mother since birth. His language

135. See generally id.
137. Id. at 568–69.
development meets age appropriate milestones. He can speak with his parents and siblings using short sentences; he identifies and uses the names of family members and friends, and of such things as domestic animals, household objects and colors, and makes and responds to requests. Tuyen is likely to stay at home speaking solely his native language till age five. At five, he will enter kindergarten possessing BICS in his native language, the origins of CALP, but no English skills. The school, in response to a rapidly growing Vietnamese immigrant population, anticipates hiring their first English-Vietnamese bilingual teacher in two years. If Tuyen receives English-Vietnamese bilingual classes for all essential content for each of the successive K–5 school years, an ESL class for English development, and a Vietnamese class for first language development, he is likely to acquire equivalent CALP in English and Vietnamese by age ten. In order for the school to provide these services, it needs to hire one additional English-Vietnamese bilingual teacher each year to teach the essential content in successive grades. Obviously, this would be ideal.

At age four, La’n’s parents placed her in an English-only preschool belonging to the church that sponsored the family’s immigration to the United States. She expressed anger toward her English-speaking peers when they tried to interact with her. La’n chose to sit alone and participated irregularly. La’n cried frequently on mornings getting ready for school. Her language development has regressed since age four. Entering kindergarten, La’n requires much the same program as projected for her brother, however, she will need some additional attention given to her native language conversational abilities, perhaps in the form of an after school program in the Vietnamese community. However, even assuming the school can add an English-Vietnamese bilingual teacher to the staff each year as suggested for Tuyen, La’n will not benefit. She will always be two years ahead of the bilingual classes. For the needs of La’n, the school cannot wait two years to hire their first English-Vietnamese bilingual teacher.

Instead, La’n is likely to receive essential content in an ESL classroom, where the teacher works with ELLs having several different native languages, and uses very little Vietnamese. This is the first year the school has been able to provide one ESL teacher for each grade level, so the content presented to La’n will be grade appropriate. If La’n receives further formal instruction (i.e.,

138. A highly unusual and remarkable educational undertaking is underway in St. Paul, Minnesota, following the lead of a Spring 2004 delegation of educators and administrators that went to visit a Hmong refugee camp in Thailand. St. Paul, with a current population of 25,000 Hmong, will enroll 1000 children from the camp this fall and emphasize the use of their native language in their instruction. Mary Ann Zehr, District Shifts Strategies to Welcome Refugees, EDUC. WK., Apr. 14, 2004, at 5.

139. The school needs an English-Vietnamese bilingual teacher immediately and will further require an additional such teacher for successive years.
reading/writing as well as listening/speaking) in her native language, perhaps in
the Vietnamese community, she may reach native language BICS by age six,
English language BICS by age eight, and CALP in both languages between ages
fourteen and eighteen. She will miss large pieces of essential content during
these years for her lacking CALP in English, and generally will struggle in most
subject areas.

Nhu had two years of English instruction in Vietnam before emigrating.
Entering fourth grade one year ago, she received her essential content in a
multi-grade ESL class. Her conversational abilities helped her make friends
among English-only speaking students. While Nhu was just beginning the
development of higher order thinking one year ago, her abilities to evaluate and
infer from new information are below grade level. Like her siblings, on-going,
formal native language instruction will be important for several years to ensure
she acquires CALP in Vietnamese. Nhu likely will require ESL services for
essential content for another five to eight years. She will have gaps in her
learning over the years, though not as pronounced as her younger sister’s.

Through the preceding hypotheticals, I have attempted to demonstrate
some of the challenges that English language learners experience in U.S.
schools. In fact, these hypotheticals are very idealistic and represent best-case
scenarios because they employ services rarely available to the vast majority of
ELLs. Recall that schools, unless located in populated urban areas where large
numbers of individuals from a single cultural/linguistic group reside in close
proximity, will rarely offer more than two to three years of ESL and/or bilingual
services. Consequently, Nhu may be at a greater risk than her younger
siblings for inappropriate referral to special education services. School systems
are likely to have difficulty reconciling her ability to converse comfortably and
to follow context-embedded discussions led by her ESL teacher, while not
being able to solve abstract problems, compare and contrast, or analyze new
information on grade level. This inconsistency may introduce a discrepancy
between intelligence and achievement on standardized instruments—often the
defining feature of a learning disability—though not indicative of an ELL’s
true capacities and abilities, as could be demonstrated by assessments conducted
in the language of which the student possesses CALP.

140. See supra text accompanying notes 133–33.

141. 34 C.F.R. § 300.541(a) (2003) (providing that “[a] team may determine that a child has
a specific learning disability if... [it] finds that a child has a severe discrepancy between
achievement and intellectual ability in one or more [academic areas],” such as expressive and
receptive language or mathematics).

142. Cf. PATRICIA H. LATHAM, DEFINING LEARNING DISABILITIES—THE CHALLENGE
(Apr. 2002) (expressing concern that the “severe discrepancy” definition is prone to inaccurate
identifications and suggesting use of “specific diagnostic criteria” as provided by the Diagnostic
ld_indepth/general_info/ld_definitions.html.
b. A Continuum?

English language learners enter public education in the United States at every age; possessing marginally to highly developed native language skills, little or no BICS and CALP in English, and socio-cultural learning and experiences moderately to vastly different from Euro-American society. They enter schools of every size, from the 200-student rural district to that of the 100,000 student metropolis. The implementation of an effective continuum is not often attempted. For instance, my last public school teaching assignment was in a large urban district in a city of 600,000 people. In 2000–2001, our school had 1218 students and twenty-eight ELLs without a budgeted bilingual or ESL instructor;[143] yet the school offered foreign language instruction in Spanish, French, and German.

The difficulty of designing an effective continuum is astounding—given the vast range of languages, degrees of native language and English proficiency in terms of BICS and CALP, varying sizes and budgets of school districts where ELLs locate, and the availability of trained bilingual educators in the multitude of languages, as well as ESL teachers. Nonetheless, the preceding Sections in this Part have highlighted the demand for a modest continuum of bilingual and second language acquisition services in even the smallest school districts. This proposition rests on the assumption that the essential goals of our educational system encompass a level of academic achievement for ELLs on par with Euro-American students and the successful integration of ELLs into the U.S. economy and society. Yet, the common political reaction to this dilemma has been to characterize bilingual services as a failed experiment,[144] eliminate these services, and substitute a single year of English-only instruction. Part III illustrates this phenomenon.


III. THE UNCERTAIN AND INCONSISTENT STATE OF THE LAW

If English was good enough for Jesus Christ, it's good enough for the schoolchildren of Texas.

– Governor Miriam “Ma” Ferguson

Describing it as the “Dismissive Period: 1980s–Present,” Professor Carlos Ovando maps the growing opposition to bilingual education in the United States from President Reagan’s statement that, “It is absolutely wrong and against American concepts to have a bilingual education program that is now openly, admittedly dedicated to preserving their native language and never getting them adequate in English so they can go out into the job market and participate.” Section A will outline the federal protections for the educational rights of ELLs that have been in effect over the past two decades. Thereafter, Sections B and C highlight recent state and federal trends that serve to deny necessary second language acquisition services to ELLs, beginning with California Proposition 227 and closing with the No Child Left Behind Act of 2001.

A. Federal Guidelines

Early federal guidelines to ensure the equal educational opportunities of ELLs arise from Lau v. Nichols. In Lau, the Supreme Court found that a school’s failure to provide non-English speaking students of Chinese ancestry with native language services or English language instruction “denies them a meaningful opportunity to participate in the public educational program and thus violates § 601 of the Civil Rights Act of 1964.” Implementing Lau, the Office for Civil Rights (OCR) of the U.S. Department of Education published policy memoranda in 1985 and 1991. The 1991 memo, Policy Update on Schools’ Obligations Toward National Origin Minority Students with Limited-


148. Id. at 563.

English Proficiency ("1991 OCR Memo"),\textsuperscript{150} emphasized several relevant dimensions of program adequacy, including the necessity of a sound educational approach and proper implementation. I turn to implementation initially.

The 1991 OCR Memo is especially relevant to the preceding discussion of the relationships between BICS, CALP, and educational achievement.\textsuperscript{151} Addressing the necessary degree and length of exposure to the native and English languages, in pertinent part, the memo specifies that the criteria used to determine when an ELL is ready to exit bilingual support services and enter English-only instructional settings should be based on objective standards, . . . the district should be able to explain why it has decided that students meeting those standards will be able to participate meaningfully in the regular classroom. . . . [and] students should not be exited from the LEP program unless they can read, write, and comprehend English well enough to participate meaningfully in the recipient’s program.\textsuperscript{152}

The key terminology in this provision speaks of meaningful participation, which as previously emphasized, does not arise for an ELL after a mere one, two, or three years of English-only instruction.\textsuperscript{153} Moreover, where schools have implemented programs that prioritize English language acquisition above core content instruction, the Memo states that schools “retain an obligation to provide assistance necessary to remedy academic deficits that may have occurred in other subjects while the student was focusing on learning English.”\textsuperscript{154}

To illustrate these rules: in 1995, the OCR began an investigation of allegations against the Denver Public School system for failing to provide necessary services for its 13,000 limited English proficient (LEP) students.\textsuperscript{155} Finding violations of Title VI of the Civil Rights Act of 1964, the OCR entered

\textsuperscript{150} Memorandum from Michael L. Williams, Assistant Secretary for Civil Rights, to OCR Senior Staff (Sept. 27, 1991) [hereinafter 1991 OCR Memo], http://www.ed.gov/print/about/offices/list/ocr/ell/september27.html.

\textsuperscript{151} See generally discussion supra Part II.B.1.

\textsuperscript{152} 1991 OCR Memo, supra note 150.

\textsuperscript{153} See discussion supra Part II.B.1.

\textsuperscript{154} 1991 OCR Memo, supra note 150 (citing Castañeda v. Pickard, 648 F.2d 989, 1011 (5th Cir. 1981)).

into negotiations with the district for voluntary compliance.\textsuperscript{156} Violations included, but were not limited to:

Commonly discontinuing “alternative language program services . . . for LEP students who have not demonstrated proficiency in the four English-language modalities of speaking, reading, writing, and understanding.”

The absence of “criteria for exiting LEP students from bilingual education at the elementary level,” and ignoring program exit criteria at the high school level,

“[E]xit criteria, where established, often disregard LEP students’ ability to read or write English,” and

District failure “to ensure that when LEP students are exited from alternative language services, they are prepared to participate meaningfully in the mainstream classroom.”\textsuperscript{157}

The statements of two educators further demonstrated the district’s general lack of preparation for serving LEP students. One educator, who worked directly with LEP students, “stated that LEP students transition out of bilingual education in two to three years, once they are proficient in oral English skills.”\textsuperscript{158} The second professional “informed OCR that [certain LEP] students should be out of bilingual education and in the mainstream . . . . Because they are more orally proficient in English [than their native language], she explained, they should be able to make it in the mainstream core.”\textsuperscript{159} These educators, evidently, lacked the necessary knowledge of and exposure to BICS and CALP to understand that oral English proficiency, an observable feature of BICS, regardless of its relative development compared with the native language, is insufficient (absent CALP) to enable the LEP student to “participate meaningfully” in the educational program.

When OCR’s negotiations with the Denver Schools failed to arrive at resolution, OCR referred the matter to the Department of Justice (DOJ) in 1997 for enforcement.\textsuperscript{160} The DOJ reached an agreement with the district in 1999 to remediate the violations, implement an effective program of language services

\textsuperscript{156} Id. The OCR also found violations of Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act of 1990 regarding LEP students with disabilities.

\textsuperscript{157} Id.

\textsuperscript{158} Id. (emphasis added).

\textsuperscript{159} Id. (emphasis added).

\textsuperscript{160} Guitierrez letter, supra note 155.
and instruction, and properly equip teachers with the skills for serving ELLs. In Denver, arguably, the parties came to an appropriate conclusion that may partly explain Colorado’s recent reticence to disband bilingual education.

Yet, significant concerns remain with the content and authority of the 1991 OCR Memo. For instance, it permits broad interpretation of what comprise sound educational approaches and considerable discretion in selecting and implementing programs. Selected approaches need only meet the standard of being reasonably calculated to effectively implement “the educational theory adopted by the school.” No uniform state educational standard is required—frowned upon as an intrusion into local decision-making—so long as the selected theory is considered “sound by some experts in the field or, at least, deemed a legitimate experimental strategy.” Thomas and Collier have documented the ineffectiveness of programs for ELLs that meet this low threshold. Finally, the Department of Education has not formalized the 1999 OCR Memo or its 1985 predecessor as regulations.

**B. State Initiatives**

Over the last six years, there have been several high profile cutbacks of services for ELLs. Arguing that bilingual education in particular has been a thirty-year failure, Ron Unz, a wealthy California businessman, has taken his

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163. 1991 OCR Memo, supra note 150.

164. Id. (quoting Castañeda v. Pickard, 648 F. 2d 989, 1010 (5th Cir. 1981)).


167. Castañeda, 648 F.2d at 1009 (emphases added).

168. THOMAS & COLLIER, supra note 8, at 19–26.

crusade to end bilingual education to the people of California, Arizona, Colorado, and Massachusetts. These nativist movements have succeeded in all but Colorado. Unz draws his conclusion that bilingual education doesn’t work from his opinion that ELLs were spending too much time in bilingual programs. In California, Unz sponsored Proposition 227, aimed at dismantling the transitional bilingual services that supported ELLs’ acquisition of CALP. In June 1998, when just 30% of the state’s 1.4 million LEP students received bilingual services, Californians passed the proposition requiring all instruction to be in English. In 2000, Arizona passed Proposition 203, replacing bilingual education with English immersion classes, and allowing ELLs one year to acquire English. In 2002, Massachusetts passed an anti-bilingual education initiative by a vote of two-to-one, also mandating English immersion.

Each of these state programs gives school officials the discretion to provide waivers for ELLs, who are not making adequate progress in English, to receive native language support. Waivers, however, are of questionable utility. In California, for instance, the waiver provision requires that parents who seek bilingual or other than English immersion services for their child, to “personally visit the school,” and give “written informed consent” in light of available program choices, on an annual basis. These requirements, alone, are likely to discourage parents—who are limited English proficient, undereducated, or who have very different culturally based understandings regarding their role in the public school system and their child’s education—from seeking a waiver. Moreover, a meaningful choice of alternative services is highly unlikely for many culturally and linguistically different families because, only where twenty or more students on the same grade level obtain a waiver is


171. See infra note 183 and accompanying text.


177. Cf. CAL. EDUC. CODE § 311 (West 2002) (permitting waivers for three narrow classes of ELLs).

178. CAL. EDUC. CODE § 310.
the school obligated to provide bilingual or similar methodologies on site. \(^{179}\) When a school has nineteen or fewer students with waivers per grade level, the school transfers them to another campus where services are offered. \(^{180}\) In practice, this may amount to a warehousing of ELLs. Waivers are further restricted to students “who already know English,” are over age ten, or have special education needs. \(^{181}\) The waiver provisions in Arizona and Massachusetts are virtually identical to those in California. \(^{182}\)

Colorado, however, has withstood attempts to eliminate instructional services using the native language of ELLs. Amendment 31, again financially backed by Ron Unz, did not pass the Colorado vote in November 2002. \(^{183}\) Other states with large ELL populations, namely Texas (570,022 ELLs), \(^{184}\) have resisted the elimination of bilingual services. \(^{185}\) Florida (254,517), New York (239,097), and Illinois (140,528) similarly serve large populations of ELLs. \(^{186}\) Illinois provides instruction that incorporates use of students’ native languages to 76% of the state’s ELLs. \(^{187}\) Florida has developed heightened standards for educators who serve ELLs. \(^{188}\) Yet, the No Child Left Behind Act has eliminated federal support for bilingual education programs.

\(^{179}\) Id.

\(^{180}\) Id.

\(^{181}\) Id. § 311.

\(^{182}\) ARIZ. REV. STAT. ANN. § 15-753 (Wesl 2002); MASS. GEN. LAWS ANN. ch. 71A, § 5 (West Supp. 2004).


\(^{185}\) Cf. TEX. EDUC. CODE ANN. § 29.051 (Vernon 1996) (acknowledging that “[e]xperience has shown that public school classes in which instruction is given only in English are often inadequate for the education of [LEP] students,” and state policy “provides for the establishment of bilingual education and special language programs in the public schools and provides supplemental financial assistance to help school districts meet the extra costs of the programs”).

\(^{186}\) KINDLER, supra note 184, at 4.

\(^{187}\) Id. at 27 tbl.8.

C. The No Child Left Behind Act of 2001\(^{189}\)

President George W. Bush unveiled the No Child Left Behind Act of 2001 (NCLB) on his third day in office, referring to it as “the cornerstone of [his] administration.”\(^{190}\) The NCLB aims to greatly improve “the academic achievement of all students,”\(^{191}\) in part, by holding state and local educational agencies accountable for:

(1) identifying all low-performing schools that have not made adequate yearly progress; (2) establishing a plan of remediation for each such school; (3) sanctioning and taking corrective action against schools that continue to fail to make adequate yearly progress; and (4) offering families the choice to attend a suitable alternative public school that is passing state standards until such remediation is achieved.\(^{192}\)

The NCLB repealed the Bilingual Education Act of 1968, effective January 8, 2002.\(^{193}\) Title III of the NCLB, otherwise known as the English Language Acquisition Act,\(^{194}\) eliminated the Office of Bilingual Education and Minority Language Affairs and replaced it with the Office of English Language Acquisition, Language Enhancement, and Academic Achievement for Limited-English-Proficient Students (OELALEAALEPS, or OELA for short).\(^{195}\) It appears, given the unwieldy new name, that through the lengths taken by the Bush Administration to rename the office, as one commentator puts it, “the word bilingual has been expunged from the law . . . .”\(^{196}\)

Rod Paige, the U.S. Secretary of Education, nonetheless, acknowledges “a persistent achievement gap between Hispanic students and many of their white


\(^{195}\) CRAWFORD, supra note 193.

\(^{196}\) Id.
and Asian peers." 197 Mr. Paige further identifies the challenges of the many ELL Hispanic students 198 as the most significant cause of this achievement disparity, and that preventing students as these from "being left behind . . . . is the underlying fundamental basis for . . . . education reforms under the No Child Left Behind Act." 199 How then does the Bush administration imagine closing this gap having gutted federal bilingual education law?

The NCLB defines a challenging role for the newly created OELA:

(1) 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 . . .

. . . .

(4) to assist State educational agencies and local educational agencies to develop and enhance their capacity to provide high-quality instructional programs designed to prepare limited English proficient children . . . . to enter all-English instruction settings . . .

. . . .

(8) to hold State educational agencies, local educational agencies, and schools accountable for increases in English proficiency and core academic content knowledge of limited English proficient children by requiring—

(A) demonstrated improvements in the English proficiency of limited English proficient children each fiscal year; and

(B) adequate yearly progress for limited English proficient children, . . . and

(9) to provide State educational agencies and local educational agencies with the flexibility to implement language instruction educational programs, based on scientifically based research on teaching limited English proficient children, that the agencies believe to be the most effective for teaching English. 200


198. Limited English Proficient students in the United States are 76.9% native Spanish speakers. HOPSTOCK & STEPHENSON, supra note 134, at 5.

199. Id.

Ensuring that these objectives are met, however, is not consistent with the essential needs of ELLs. This Article has emphasized the importance of three indicators: (1) grade level academic achievement regardless of English language proficiency, (2) timely and appropriate intervention and assessment that prevents the inappropriate referral of culturally and linguistically diverse students experiencing difficulty in school to special education programs, and (3) English language proficiency. These indicators comprise the true yardstick of the NCLB’s success for ELLs. The first indicator speaks to closing the achievement gap, which for limited English proficient children demands at a minimum, considerable native language support. The second indicator speaks to educator training in BICS and CALP and sound assessment methodology. The ordering of this shortlist is not by mistake; English language proficiency properly belongs third.

The overarching emphasis of English language proficiency under the NCLB—prioritizing English language instruction above all others—threatens to widen the achievement gap and may predispose ELLs to inappropriate special education referral. For instance, the law’s adequate yearly progress (AYP) mandate requires schools to meet their “annual measurable achievement objectives . . . relating to the development and attainment of English proficiency by limited English proficient students.” When AYP is not achieved, schools face sanctions. The NCLB assessment requirements permit schools to defer the reading/language arts achievement testing of their ELLs for three years (five in some circumstances), while all the same requiring annual assessments of English language proficiency. This practice places considerable pressure upon schools to emphasize English language instruction at the expense of academic achievement for three to five year periods.

Furthermore, the NCLB requires annual mathematics assessment of ELLs, “in a valid and reliable manner,” “[t]o the extent practicable” in

205. 34 C.F.R. § 200.6(b)(2). “[The] State must assess, using assessments written in English, the achievement of any limited English proficient student in meeting the State’s reading/language arts academic standards if the student has attended schools in the United States . . . for three or more consecutive years.” *Id.* § 200.6(b)(2)(i).
206. *Id.* § 200.6(b)(3)(i).
207. *Id.* §§ 200.2(a)(1), 200.6.
208. *Id.* § 200.6(b)(1)(i).
their dominant language.209 For the 79% Spanish-speaking majority of ELLs in
the United States,210 valid and reliable standardized assessment tools have
become widely available over the last decade.211 However, more than 400
language groups comprise the nation’s ELL population,212 for which valid and
reliable standardized tools are virtually non-existent.213 This leaves schools in
the historical lurch of their own devices to accurately measure academic
achievement in a manner so as to not predispose ELL students to
misidentification for disabilities.214 Given that academics will take the backseat
to English language proficiency for three-to-five years under the NCLB, even
valid and reliable assessments will discover ability-achievement discrepancies
that erroneously indicate a learning disability.215

Conceding to the frustrations that education officials have experienced
with these policies, in February 2004 the Department of Education came
forward with more “flexible” provisions.216 Purported to be “Policies to Help
English Language Learners,”217 they provide considerable flexibility for
education officials to escape accountability while adding nothing to ensure that
ELLs acquire the skills that this Article emphasizes are the yardstick to success.
Of key concern, the policy provides:

Since LEP students exit the LEP subgroup once they attain English
language proficiency, states may have difficulty demonstrating
improvements on state assessments for these students. Accordingly,

209. Id. § 200.6(b)(1)(i)(B) ("The State must assess limited English proficient students . . .
in the language and form most likely to yield accurate and reliable information on what those
students know and can do . . . until the students have achieved English language proficiency.").

Programs, U.S. Dep't of Educ., AskNCLEA No. 5: What Are the Most Common Language Groups
for LEP Students? (2002) [hereinafter AskNCLEA No. 5], at http://www.ncela.gwu.edu/expert/faq/
05toplangs.htm.

211. See, for example, the extensive lists of Spanish reading and mathematics assessment
tools, at CTR. FOR POSITIVE PRACTICES, SPANISH READING ASSESSMENT TOOLS, at
http://www.positivepractices.com/BilingualEducation/ SpanishReadingAssessmentT.html (last
modified Aug. 15, 2004), and CTR. FOR POSITIVE PRACTICES, SPANISH MATH ASSESSMENT:
ANNOTATED BIBLIOGRAPHY, at http://www.positivepractices.com/BilingualEducation/Spanish
MathAssessmentAnno.html (last modified Aug. 15, 2004).

212. AskNCLEA No. 5, supra note 210.

213. MATTE & OMARK, supra note 78, at 80.

214. See generally supra text accompanying notes 62–71; infra notes 279–284; supra note
7 and accompanying text.

215. See supra note 141.

216. Press Release, U.S. Dep't of Education, Secretary Paige Announces New Policies to
2004/02/02192004.html.

217. Id.
the . . . new flexibility . . . for AYP calculations, allow[s] states for up to two years to include in the LEP subgroup students who have attained English proficiency.218

This policy change tacitly acknowledges that the preponderant emphasis on English language acquisition stalls and undermines academic achievement.

The verdict is out on whether the NCLB will be able to “ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education.”219 Given the shifting nature of U.S. Department of Education policies and regulations, that is, the extensions and exclusions to assessing LEP students, meaningful data may not arise for some time. Anecdotal sources suggest that under Arizona law the literacy skills of students at Hollinger Elementary (Tucson) attending English immersion classes are falling behind their peers who were granted waivers to receive bilingual instruction.220 On the other hand, in March 2004, California’s State Superintendent of Public Instruction boasted great strides under Proposition 227;221 whether this is a political necessity, progress only of the culturally depriving sort, or a genuine closing of the achievement gap, is quite another question. California’s claims speak only to improving the English proficiency of ELLs and nothing of maintaining or improving their academic achievement in core subject areas.222

Part IV will present and discuss the achievement data of California ELLs since the implementation of Proposition 227. I focus on California because it is the state with the largest and longest presently running English immersion program,223 offering achievement data over the course of five years,224 and having the greatest number of ELLs among the states.225 Subsequently, I argue that the time is ripe to legally challenge the effectiveness of English-only programs and Proposition 227, for failing to provide ELLs with opportunities for meaningful participation and the “assistance necessary to remedy [the]

218. Id. (emphasis added).
221. See Press Release, California Department of Education, State Schools Chief O’Connell Announces Significant Gains in Percentage of English Learners Reaching Proficiency (Mar. 18, 2004) (“The preliminary results show that 43 percent of California English learners scored at early advanced or advanced in overall English proficiency . . . compared to 34 percent scoring at the same level in 2002 and to 25 percent in 2001—an increase of 18 percent in three years . . . .”), http://www.cde.ca.gov/re/nr/nr/yr04rel23.asp.
222. Id.
223. See discussion supra Part III.B.
224. See infra note 231 and accompanying text.
225. In 2002, California enrolled over 1.5 million ELLs. KINDLER, supra note 184, at 4.
academic deficits that . . . have occurred in other subjects while [ELLs were] focusing on learning English.”

IV. THE GROWING ACHIEVEMENT GAP AND THE CASTAÑEDA ANALYSIS

This Part will present and discuss achievement data from California finding a widening of the already significant achievement gap between ELLs and the greater school age population since Proposition 227’s implementation. Section A reviews the sources of the California data for their inherent strengths and weaknesses. Section B presents specific findings and highlights critical trends in ELL achievement. Then, Section C discusses the relevant issues of an early, unsuccessful challenge to Proposition 227. Applying the Castañeda analysis to the findings in Section B, I conclude that the California law has failed in its duty, after a sufficient trial period, to provide ELLs with effective assistance to overcome deficits incurred in core academics while participating in the English immersion program.

A. California Achievement Data

I obtained the data used in this analysis from the “Standardized Testing and Reporting (STAR) Results” websites of the California Department of Education (DOE). The California legislature instituted the STAR program in 1997 to measure, in a manner that purportedly provides “valid, reliable, and comparable individual pupil scores in grades 2 to 11 . . . . the degree to which pupils are achieving the academically rigorous content and performance standards adopted by the State Board of Education.” The assessments that make up the STAR Program have varied since 1997, however, the Stanford Achievement Test, Ninth Edition (“Stanford 9”) was used consistently in the years 1998 through 2002. This is one of three reasons I chose to use primarily the Stanford 9 data: (1) they best permit longitudinal comparison; (2)

226. 1991 OCR Memo, supra note 150 (citing Castañeda v. Pickard, 648 F.2d 989, 1011 (5th Cir. 1981)).

227. Castañeda v. Pickard, 648 F.2d 989, 1011 (5th Cir. 1981). This is the primary standard implicated by this article, in that, the de-emphasis on core academics during English Immersion and/or the instruction of core academics in English to ELLs who lack CALP in the English language, poses serious consequences for the long-term academic achievement of ELLs.


230. CAL. EDUC. CODE § 60640(a)(1)–(4).

231. These facts are evident by viewing the sources infra note 235.
the results are directly comparable from year to year due to the Stanford 9’s design and testing protocols; and (3) the 1998–2002 data coincide with the first five years of Proposition 227’s implementation.

It is important to note that the data I am reviewing are drawn from a type of testing instrument (i.e., standardized, norm-referenced) properly criticized as oftentimes being an unfair and inaccurate measure of culturally and linguistically diverse student ability and achievement. I am compelled to proceed with this type of data, nonetheless, because it is effectively the only type of large-scale data California relies upon to determine the very thing this Part seeks to understand—how ELLs are faring in the new anti-bilingual education climate. Again, due to its large-scale use, it may also be the only data a court of law will consider in determining the appropriateness of a statewide educational program.

The precise data used are available to the public on eight California DOE websites. I have recompiled the data into six sets as follows: Group I is comprised of the students who were in Grade 2 in the Spring of 1998, whom I follow for five years of assessment until they reach Grade 6 in 2002; Group II is similarly comprised of those students who were in Grade 3 in 1998, and subsequently in Grade 7 in 2002; this pattern continues until Group VI is comprised of the 1998 Grade 7 students who reach Grade 11 in 2002. These groups are not precisely the same from year to year—due to family mobility, grade retention and other factors—but they allow easy comparison of the

232. CAL. DEP’T OF EDUC., ABOUT STAR 2002 (Spring 2002) (“The Stanford 9 is a national norm-referenced achievement test, and the test questions and scoring are the same from year-to-year. Therefore, results from the 2002 administration may be compared with the results from any of the previous four years.”), at http://star.cde.ca.gov/star2002/help/AboutSTAR.html.

233. See discussion infra Part IV.C.

234. See Ortiz & Yates, supra note 64, at 66 (explaining that when standardized assessments are adapted or translated for administration to ELLs, their results become invalid and unreliable).

general performance of similarly situated students (largely the same population) over time on a variety of academic content measures. Each group is further divided into two subset populations: (1) the performance of "ALL" students, and (2) the performance of ELLs. More precise subsets such as "native English speaking" students, which would have been preferable to the ALL subset (because this subset includes the ELLs), were not available from the data in the first year.\footnote{236} It was, therefore, necessary to use the two most consistent subsets available in each of the five years.

The ELL subset poses some limitations. The composition of this subset is quite possibly more dynamic than the general population because the primary intent of Proposition 227 was to quickly move ELLs out of programs that support the native language and into the mainstream, following a year's immersion in English.\footnote{237} Unlike the larger ALL population where, at least, the vast majority of student's stay within the same group (I through VI), advancing from grade to grade each year, those students identified as ELLs may only retain that label for one, two, or three years.\footnote{238} Consequently, more so than the ALL subset, the extent to which comparison from year to year of ELL data is meaningful rests on viewing each year's data as a snapshot of the general achievement of ELLs as demonstrated on a spring testing day.\footnote{239}

One smaller set of data arising from the same sources will also be presented. The California Standards Test assessments for English/Language Arts and Mathematics were used in spring 2001, 2002, and 2003, thereby permitting comparisons between the more precise subsets of "ELL" and "English Only and Fluent English Proficient" (EOFEP) students. The California Standards Test has replaced the Stanford 9 as California's primary assessment tool.\footnote{240}

Lastly, it is useful to note that, although the identifying term "LEP" is used in the 1998 and 1999 data, transitioning to the term "English Learners" (ELs)

\footnote{236. See generally supra note 235.}

\footnote{237. See CAL. EDUC. CODE § 300(f) (West 2002) ("It is resolved that: all children in California public schools shall be taught English as rapidly and effectively as possible."); \textit{id.} § 305 ("Children who are English learners shall be educated through sheltered English immersion during a temporary transition period not normally intended to exceed one year.").}

\footnote{238. \textit{Id.} §§ 300(f), 305.}

\footnote{239. Ysseldyke and Bielinski would caution that achievement scores arising from a dynamic subset population may evidence lower than accurate performance if the shifting nature of the population is not accounted for. \textit{See JOHN BIELINSKI & JAMES E. YSSELDYKE, INTERPRETING TRENDS IN THE PERFORMANCE OF SPECIAL EDUCATION STUDENTS} (NCEO Technical Report 27, 2000), at http://education.umn.edu/NCEO/OnlinePubs/ TechReport27.htm (discussing the effects of a 20% change in the special education population annually on achievement data).}

\footnote{240. Email from Standardized Testing and Reporting, Cal. Dep't of Educ., to William Myhill (July 6, 2004, 09:09 CST) (on file with author).}
by 2001, the meaning of the designation remains the same. Section B, to follow, presents data demonstrating the persistence of the achievement gap between ELLs and the general population and between ELLs and EOFEP students. This Article will then be positioned to proceed with a legal challenge to Proposition 227.

B. Results & Discussion

The Stanford 9 provides for the assessment of students in grades two through eleven every year in Reading, Mathematics, and Language. Spelling is assessed in grades two through eight. The Stanford 9 provides for Science and Social Science assessment only in grades nine through eleven. Data from the first three of these core content assessments illustrate a marked California achievement gap.

241. See generally supra note 235. The term “EL” is synonymous with “ELL.”


243. See generally supra note 235.

244. Id.

245. Id.
In 1998, LEP students fared comparatively poorly on the Reading, Math, and Language assessments. The national percentile rank of the average LEP student score in Reading was consistently 20 or more points lower than for ALL students. The average discrepancy in Reading for the six groups was 24.8 points. The average LEP student score in Math was consistently 16 or more points lower than for ALL students. The average discrepancy in Math for the six groups was 19.7. The average LEP student score in Language was consistently 20 or more points lower than for ALL students. The average
discrepancy in Language for the six groups was 23.3.

Similar figures arise from the Spelling data. For example, the average LEP student score in Spelling in 1998 was consistently 16 or more points lower than for ALL students, and across the six groups, the average discrepancy was 21.2. None of the groups were assessed in Science or Social Science with the Stanford 9 in 1998.

To look at mean scaled scores rather than NPR average scores changes little, and if anything, inflates the achievement gap. For example, the average Reading gap using mean scaled scores is 32.1 versus 24.8 (NPR average); for Math, 21.6 versus 19.7; and for Language, 25.2 versus 23.3. Both forms of data indicate the greatest achievement gaps are in Reading.

Table 4 presents the change in these gaps over the five years of data. Each “Change in Gap” is the difference between the 1998 and 2002 gaps for the respective subject. Each “Resulting Gap” is the difference between the 2002 ALL Student score and the 2002 ELL score for the respective subject. A negative “Change in Gap” indicates that ELLs made a relative achievement gain on ALL students, thus closing the gap by the negative quantity for the respective subject. In no categories for this data did ELLs close the gap or move ahead of ALL students.

246. See generally supra note 235.
Table 4
Change in Achievement Gap Between ALL Students and ELLs

<table>
<thead>
<tr>
<th>*National Percentile Rank</th>
<th>Reading</th>
<th>Math</th>
<th>Language</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>NPR</td>
<td>Mean Scaled Score</td>
<td>NPR</td>
</tr>
<tr>
<td>2002</td>
<td>Avg. Score</td>
<td></td>
<td>Avg. Score</td>
</tr>
<tr>
<td>Group I (Grade 6)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Change in Gap Resulting Gap</td>
<td>8</td>
<td>2.4</td>
<td>10</td>
</tr>
<tr>
<td></td>
<td>28</td>
<td>29</td>
<td>26</td>
</tr>
<tr>
<td>Group II (Grade 7)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Change in Gap Resulting Gap</td>
<td>7</td>
<td>3.2</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>29</td>
<td>34.9</td>
<td>24</td>
</tr>
<tr>
<td>Group III (Grade 8)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Change in Gap Resulting Gap</td>
<td>4</td>
<td>0</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>29</td>
<td>32.8</td>
<td>23</td>
</tr>
<tr>
<td>Group IV (Grade 9)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Change in Gap Resulting Gap</td>
<td>-3</td>
<td>-1.6</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>23</td>
<td>31.1</td>
<td>22</td>
</tr>
<tr>
<td>Group V (Grade 10)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Change in Gap Resulting Gap</td>
<td>-3</td>
<td>2.6</td>
<td>-4</td>
</tr>
<tr>
<td></td>
<td>24</td>
<td>33.8</td>
<td>20</td>
</tr>
<tr>
<td>Group VI (Grade 11)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Change in Gap Resulting Gap</td>
<td>-2</td>
<td>-4.3</td>
<td>-2</td>
</tr>
<tr>
<td></td>
<td>27</td>
<td>33.5</td>
<td>21</td>
</tr>
</tbody>
</table>

Table 4 demonstrates that the achievement gaps between ELLs and ALL students in Groups I, II, and III for Reading, Math, and Language increased notably from 1998 to 2002. On average, the national percentile rank of the average ELL increased by 7.33 in Group I, 8.33 in Group II, and 5.67 in Group III. The older students (Groups IV, V, and VI) fared slightly better. Group IV’s gap grew by only .33 and Groups V and VI saw their gaps close by -1.67 and -2.00, respectively. These results suggest a trend: the younger the student, the larger the achievement gap.

Table 5 presents the 1998 and 2002 national percentile rank for average scores for each Group by subject. This illustrates changes in achievement over time. Furthermore, Table 5 provides an explanation for the ostensibly improved results among Groups IV, V, and VI (as seen in Table 4). In getting to this point, first note, the data in Table 5 indicate that among Groups I, II, and III, progress is evident over time in each of the three test subject areas for both ALL
students and ELLs. Moreover, these data clarify that the increasing achievement gaps among Groups I, II, and III arise from ALL students consistently making greater progress over time than the ELLs. Groups IV, V, and VI present a different picture. In Reading, especially, rather than ELLs gaining on ALL students (suggested by Table 4), the national percentile rank of average scores in these Groups is declining among both ALL students and ELLs; and ALL students are experiencing larger declines in achievement than the ELLs. Therefore, rather than the gaps closing due to ELL gains, they appear to have closed, in part, due to ALL losses. Nonetheless, the data do indicate that ELLs in Groups V and VI, in part, did close their gaps through notable Mathematics gains.

Table 5
Relative Improvement of ALL Students and ELLs: 1998–2002

<table>
<thead>
<tr>
<th></th>
<th>Group I</th>
<th>Group II</th>
<th>Group III</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>ALL</td>
<td>LEP/ ELL</td>
<td>ALL</td>
</tr>
<tr>
<td>Reading</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>From</td>
<td>39</td>
<td>19</td>
<td>36</td>
</tr>
<tr>
<td>To</td>
<td>49</td>
<td>21</td>
<td>46</td>
</tr>
<tr>
<td>Improvement</td>
<td>10</td>
<td>2</td>
<td>10</td>
</tr>
<tr>
<td>Math</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>From</td>
<td>43</td>
<td>27</td>
<td>42</td>
</tr>
<tr>
<td>To</td>
<td>62</td>
<td>36</td>
<td>54</td>
</tr>
<tr>
<td>Improvement</td>
<td>19</td>
<td>9</td>
<td>12</td>
</tr>
<tr>
<td>Language</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>From</td>
<td>40</td>
<td>19</td>
<td>39</td>
</tr>
<tr>
<td>To</td>
<td>55</td>
<td>30</td>
<td>57</td>
</tr>
<tr>
<td>Improvement</td>
<td>15</td>
<td>11</td>
<td>18</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Group IV</th>
<th>Group V</th>
<th>Group VI</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>ALL</td>
<td>LEP/ ELL</td>
<td>ALL</td>
</tr>
<tr>
<td>Reading</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>From</td>
<td>40</td>
<td>14</td>
<td>43</td>
</tr>
<tr>
<td>To</td>
<td>35</td>
<td>12</td>
<td>33</td>
</tr>
<tr>
<td>Improvement</td>
<td>-5</td>
<td>-2</td>
<td>-10</td>
</tr>
<tr>
<td>Math</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>From</td>
<td>41</td>
<td>21</td>
<td>48</td>
</tr>
<tr>
<td>To</td>
<td>54</td>
<td>32</td>
<td>48</td>
</tr>
<tr>
<td>Improvement</td>
<td>13</td>
<td>11</td>
<td>0</td>
</tr>
<tr>
<td>Language</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>From</td>
<td>44</td>
<td>21</td>
<td>47</td>
</tr>
<tr>
<td>To</td>
<td>51</td>
<td>26</td>
<td>41</td>
</tr>
<tr>
<td>Improvement</td>
<td>7</td>
<td>5</td>
<td>-6</td>
</tr>
</tbody>
</table>
Though Science and Social Science data are not available for all five years, the presence of a significant achievement gap in these subjects is still worthy of note. Table 6 indicates that a 20 point gap existed between ALL and ELL achievement in both Groups V and VI, and in both subjects when they were initially assessed (Grade 9). Table 6 further demonstrates that ELLs fared less successfully or more poorly than ALL students over the three years for which data are available.

Table 6
Relative Improvement 2000–2002: Science & Social Science

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>ALL</td>
<td>ELL</td>
</tr>
<tr>
<td>Science From To Improvement</td>
<td>45</td>
<td>25</td>
</tr>
<tr>
<td></td>
<td>45</td>
<td>23</td>
</tr>
<tr>
<td></td>
<td>0</td>
<td>-2</td>
</tr>
<tr>
<td>Social Science From To Improvement</td>
<td>45</td>
<td>25</td>
</tr>
<tr>
<td></td>
<td>38</td>
<td>16</td>
</tr>
<tr>
<td></td>
<td>-7</td>
<td>-9</td>
</tr>
</tbody>
</table>

The data presented above (Tables 3–6) demonstrate two significant findings: (1) striking achievement gaps remain between California’s ELL student population and the student population as a whole, and (2) the most impressionable ELLs in these data (Groups I, II, and III) have experienced increasing disparities in their academic achievement. That these achievement gaps have held their ground over the first five years of Proposition 227, and have widened for those students most impacted by the law, would seem to be directly at odds with the DOE’s claimed gains. Yet, when considering the nature of those claims—gains in English proficiency alone—academic declines are not surprising. English immersion is the required tool of Proposition 227 to increase English language proficiency; and the law sacrifices the acquisition of core content during the period of English immersion. In other words, when ELLs abruptly lose native language support, are dropped into an English immersion program, and then are pushed into all-English content classes in the absence of having CALP in the English language, they cannot effectively acquire core content and will fall further behind their native-English-speaking peers each year.

247. See supra note 221.


Turning to the results of the California Standards Test (CST), these data corroborate the findings from the Stanford 9 data, that is, striking achievement gaps also remain for California's ELL students when compared with the "English Only and Fluent English Proficient" (EOFEP) students. I primarily address 'English/Language Arts' data because this is the only specific CST assessment that each Group took in the first three years of the CST's implementation (2001–2003). 'Mathematics' data are presented only for 2002 for Groups I through IV because this was the only year in which more than one Group took the Mathematics subtest.\(^{250}\)

CST data take on an added significance in light of the CST's close ties with the No Child Left Behind Act, also originating in 2001. Pursuant to the NCLB, California defines achieving Adequate Yearly Progress (AYP) in terms of four factors: (1) meeting its annual measurable objectives on the CST English/Language Arts and Mathematics subtests; (2) showing a 95% participation rate on these assessments; (3) making progress on the Academic Performance Index (a school rating system); and (4) making progress on high school graduation rates.\(^{251}\) Moreover, as to the first of these, California's annual "measurable objectives" are defined in terms of the percentage of students scoring at the 'Proficient' or 'Advanced' levels on the CST English/Language Arts and Mathematics subtests.\(^{252}\)

The CST, unlike the Stanford 9, provides results in terms of the percent of students that achieve prescribed levels of proficiency with the given subject matter.\(^{253}\) Table 7A illustrates the changes in overall EOFEP and ELL proficiencies in English/Language Arts from the initial 2001 percentages to the 2003 percentages. Table 7B presents comparative percentages for EOFEP versus ELL proficiency in Mathematics for a single year (2002).

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250. See generally supra note 235.

251. See Explanatory Notes, supra note 242.

252. Id.

253. See generally supra note 235.
Table 7A
CST English / Language Arts Relative Improvement 2001–2003

<table>
<thead>
<tr>
<th>English/Language Arts Standards</th>
<th>Group I</th>
<th>Group II</th>
<th>Group III</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>EOFEP</td>
<td>ELL</td>
<td>EOFEP</td>
</tr>
<tr>
<td>% Advanced or Proficient</td>
<td>37 ... 33</td>
<td>4 ... 5</td>
<td>39 ... 37</td>
</tr>
<tr>
<td>% Basic</td>
<td>40 ... 34</td>
<td>31 ... 30</td>
<td>38 ... 36</td>
</tr>
<tr>
<td>% Below or Far Below Basic</td>
<td>23 ... 23</td>
<td>65 ... 64</td>
<td>24 ... 26</td>
</tr>
</tbody>
</table>

Note: First number (2001) ... Second Number (2003)

<table>
<thead>
<tr>
<th>English/Language Arts Standards</th>
<th>Group IV</th>
<th>Group V</th>
<th>Group VI †</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>EOFEP</td>
<td>ELL</td>
<td>EOFEP</td>
</tr>
<tr>
<td>% Advanced or Proficient</td>
<td>38 ... 39</td>
<td>3 ... 4</td>
<td>34 ... 37</td>
</tr>
<tr>
<td>% Basic</td>
<td>37 ... 32</td>
<td>25 ... 24</td>
<td>35 ... 30</td>
</tr>
<tr>
<td>% Below or Far Below Basic</td>
<td>25 ... 29</td>
<td>72 ... 72</td>
<td>31 ... 32</td>
</tr>
</tbody>
</table>

† Group VI data are for 2001–2002 only. In 2003, Group VI was in Grade 12 for which there is no longer a CST English / Language Arts assessment.
Table 7B
CST Math Performance 2002

<table>
<thead>
<tr>
<th>Math Standards</th>
<th>Group I</th>
<th>Group II</th>
<th>Group III</th>
<th>Group IV</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>EOFEP</td>
<td>ELL</td>
<td>EOFEP</td>
<td>ELL</td>
</tr>
<tr>
<td>% Advanced or Proficient</td>
<td>39</td>
<td>11</td>
<td>35</td>
<td>9</td>
</tr>
<tr>
<td>% Basic</td>
<td>31</td>
<td>27</td>
<td>32</td>
<td>25</td>
</tr>
<tr>
<td>% Below or Far Below</td>
<td>30</td>
<td>63</td>
<td>33</td>
<td>66</td>
</tr>
<tr>
<td>Basic</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 7A presents a striking disparity between ELLs and EOFEPs in the CST data beginning three years after Proposition 227 became law and changing little over the first three years of the NCLB. Among the six Groups, on average, 37.2% of EOFEPs were scoring on the AYP-defined Advanced or Proficient levels in English/Language Arts in 2001, and 38.2% in 2003. Comparatively, only 2.7% and 4.4% of ELLs in 2001 and 2003 achieved Advanced or Proficient status.254 In 2001 and 2003 respectively, 26.5% and 26.6% of EOFEPs performed ‘Below Basic’ or ‘Far Below Basic’ on the English/Language Arts assessment. Among ELLs, 72.7% performed Below or Far Below Basic in 2001, decreasing slightly to 68.2% in 2003.

One trend in this data is perhaps contrary to that discussed regarding the Stanford 9 results (i.e., the younger the student, the larger the achievement gap). Here it appears, the younger the ELL, the slightly less likely that he or she will be in the Below or Far Below Basic range. About a 2% improvement is apparent from Group to Group in 2003.255 The relative significance of this small change is questionable in light of virtually no shift in ELL Advanced or Proficient levels.

Table 7B, limited to a single year of data, further indicates the unmistakable gaps in achievement in the math context. Here, both EOFEPs and ELLs perform notably better than the Group one year older and notably not as well as the Group one year younger. For example, among Group III, 24% of EOFEP students scored in the Advanced or Proficient range compared to 13% of their counterparts in Group IV and 35% of their counterparts in Group II. This holds true for ELLs, for example, as 7% of Group III ELLs scored in the Advanced or Proficient range compared with 4% in Group IV and 9% in Group

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254. This does not include the data for Group VI, which had no 2003 data.

255. Id.
II. This effect, however, may simply result from increasingly difficult assessments by age. More importantly, the large achievement disparity actually increases as the student gets younger. The gap between EOFEPs and ELLs in Group IV is only 9% compared to 17% for Group III, 26% in Group II, and 28% in Group I.

Neither these data, nor the scope of this Article, can provide for the most accurate analysis of how ELLs are faring under Proposition 227. These data do not provide insight into the individual achievement gains/losses of an ELL whose English language proficiency improves over time and who then leaves the ELL subset for the Fluent English subset. Nor do these data address other, potentially devastating impacts—emotional, psychological, social, or cultural—of an English-only program on the lives of English language learners and their families.

What I hope to have shown, nonetheless, is that forces are delaying and/or negatively impacting ELL achievement at least since the time of Proposition 227's approval by the voting California public. To have produced such a large-scale impact on ELLs as found in the Stanford 9 data—the younger the student, the larger the achievement gap—strongly implicates a statewide shift in educational policy as might be manifested through significant curricular, methodological, or service provision changes. I now turn to what this growing disparity may mean in a court of law.

C. Revisiting Castañeda in Light of Valeria G. v. Wilson

_Castañeda v. Pickard_ provides the framework for evaluating whether an educational program is “appropriate action” that guarantees equality of educational opportunity for children “without regard to race, color, ... or national origin,” as mandated by § 1703(f) of the Equal Educational Opportunities Act (EEOA). This statute, in pertinent part, requires educational agencies “to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.” _Castañeda_ is a 1981, Fifth Circuit decision that addressed, inter alia, the adequacy and legality of the bilingual education program serving Mexican-American students in Raymonville, Texas.

In 1998, shortly after voter approval of Proposition 227, in _Valeria G. v. Wilson_, advocates for bilingual education sought to enjoin the

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256. 648 F.2d 989 (5th Cir. 1981).
259. _Castañeda_, 648 F.2d at 992-93.
implementation of the law, inter alia, on the basis of an appropriate action violation. Plaintiffs in Valeria G. faced an insurmountable battle. Their claim was subject to the strict standard of a facial challenge because Proposition 227 was, as yet, an unapplied law. The challenge occurred before the California State Board of Education had promulgated standards, guidelines, and curricula for the Proposition's implementation.

Additionally, in the absence of the law's past or present implementation, the plaintiffs faced considerable ripeness and standing issues. But at the heart of the court's analysis, the plaintiffs could not meet the three-part burden of the Castañeda 'appropriate action' test:

For a particular language program to constitute "appropriate action" under section 1703(f), a court must ascertain (1) that a school "is pursuing a program informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy"; (2) that the programs and practices actually used by a school are "reasonably calculated to implement effectively the educational theory adopted by the school"; and (3) that the program "produce[s] results indicating that the language barriers confronting students are actually being overcome."263

First, the defendants maintained that Proposition 227 was "sound by some experts in the field," relying primarily upon the sheltered English immersion practices of other nations. The court subsequently found that "respected authorities legitimately differ" as to the efficacy of the law. Second, the court found that in the absence of the law's implementation, there were "no programs or practices 'actually used' [pursuant to Proposition 227] in California schools" to evaluate under the second prong. Third, specifically in the absence of data reflecting on the progress of LEP students under the law, there were once again no results for the court to evaluate.

Six years later, a successful challenge to Proposition 227 under the EEOA

261. Id. at 1011, 1016.

262. Valeria G., 12 F. Supp. 2d at 1015 ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.").

263. Id.

264. Id. at 1016.

265. Id. at 1017–18 (quoting Castañeda v. Pickard, 648 F.2d 989, 1009–10 (5th Cir. 1981)).

266. Id.

267. Id.


269. Id. at 1021.
has become possible. Further analysis of the Castañeda opinion, however, will be necessary to establish the appropriate grounds. The third prong of the appropriate action test is not limited to requiring that an educational program for ELLs overcomes their language barriers. The Castañeda court wisely acknowledged that LEP students face an added task upon entering school—"not encountered by students who are already proficient in English"—that is, having to learn the core academics and English.\textsuperscript{270} The court then articulated,

In order to be able ultimately to participate equally with the students who entered school with an English language background, the limited English speaking students will have to acquire both English language proficiency comparable to that of the average native speakers and to recoup any deficits which they may incur in other areas of the curriculum as a result of this extra expenditure of time on English language development.\textsuperscript{271}

This, the court continued, places "a duty [on educational authorities] to provide limited English speaking ability students with assistance in other areas of the curriculum where their equal participation may be impaired because of deficits incurred during participation in an agency's language remediation program."\textsuperscript{272} Finally, the court announced that the failure of the school to take remedial action "to overcome the academic deficits" of LEP students, regardless of their progress toward English proficiency, "might pose a lingering and indirect impediment to these students’ equal participation in the regular instructional program."\textsuperscript{273}

Section B, supra, documented serious achievement gaps in core academic skills between ELLs and the general population that have existed throughout the implementation of California’s Proposition 227. In certain instances those gaps have grown markedly. Californian ELLs are no closer to achieving parity of educational opportunity or academic achievement with their native English speaking peers than they were in 1998. Moreover, by defining English acquisition as the primary need of its ELLs, California has failed to take action to prevent and overcome its English language learners’ academic deficits. A court of law could determine that these failures impede the equal participation of ELLs in California’s instructional programs and, thus, are a violation of § 1701(f) of the Equal Educational Opportunities Act.

\textsuperscript{270} Castañeda v. Pickard, 648 F.2d 989, 1011 (5th Cir. 1981).
\textsuperscript{271} Id. (emphasis added).
\textsuperscript{272} Id.
\textsuperscript{273} Id.
CONCLUSIONS

The repeal of bilingual education on the state and federal levels demonstrates a scientifically misguided, political demand that culturally and linguistically different persons melt into a nineteenth century vision of being ‘American.’ The behaviors of the middle-class Euro-American culture still serve as the yardstick of success in school and society. The elimination of bilingual education appears to be the consuming vision of Ron Unz—portraying himself as an educational policy and second language acquisition scholar—the national voice behind cultural deprivation since Proposition 227 passed six years ago in California. The consequences of denying bilingual services are proving severe for the educational achievement of English language learners. Sound research is adamant: English-only instruction does not permit ELLs to reach parity of educational opportunity and achievement with their Euro-American peers. California data bear these truths out. There is no reason to believe that achievement gaps between ELLs and Euro-Americans will do anything but hold their course, if not widen, in the ensuing English-only environments.

There remains a need for further data. The progress of ELLs in Arizona and Massachusetts (in addition to California) must be followed closely, not just with respect to their English proficiency, but also, the type of English proficiency (BICS vs. CALP), the native language development and proficiency, and academic achievement relative to Euro-American peers. There is also a need for carefully designed studies that track large numbers of individual ELLs as they enter into, move through, and transition out of ELL status, such as was conducted by Thomas and Collier in the 1990s.

The elimination of bilingual services puts ELLs at risk for misidentification as having a disability. When value is not given to a child’s native language and culture, there may be detrimental effects to his or her self-

274. See supra notes 88–90 and accompanying text; see also MANNI ET AL., supra note 58, at 78 (discussing the limitations of intelligence testing based on middle class norms for determining ELLs IQ).


276. Unz’s website includes an extensive list of self-published writings. See ONE NATION / ONE CALIFORNIA., COLUMNS BY RON UNZ (listing over two hundred apparent self-published writings), at http://www.onenation.org/columns.html (last visited Feb. 4, 2005). Nonetheless, Unz prominently displays several seemingly racist columns on his One Nation / One California websites. Id. Oddly, the Slicing Babies in Half in Massachusetts and No Arabs Need Apply columns, for example, “cannot be found” via their hyperlink, or via Google.com. Last Google™ search last performed Feb. 4, 2005 at http://www.google.com/.

277. See discussion supra Part III.B.

278. See generally THOMAS & COLLIER, supra note 8.
concept, and conflict may arise between the home and school.\textsuperscript{279} ELLs experiencing difficulties in school are inappropriately referred for a special education evaluation on the basis of behaviors that simply do not fit the expectations of educators,\textsuperscript{280} yet which are appropriate in the child’s native culture,\textsuperscript{281} or for lack of academic success in part due to linguistic, cultural, economic, and other background characteristics perceived as deviant.\textsuperscript{282} Teachers interact differently with students for whom they have low expectations.\textsuperscript{283} Errors in determining the needs of ELLs often occur when school personnel lack an understanding of second language acquisition and educationally relevant cultural differences.\textsuperscript{284}

This issue of the denial of bilingual services to ELLs is ripe for an EEOA challenge in California. Data are mounting that demonstrate how “the programs and practices” required by Proposition 227 and implemented by the California Department of Education do not afford equal educational opportunities to ELLs.\textsuperscript{285} First, ELLs have not acquired essential cognitive and academic language proficiency in English—thus, they are denied equal participation in educational programs provided only in English.\textsuperscript{286} Second, California schools have failed to remediate the core academic deficits of ELLs, which have remained or widened during and following the provision of English-only services.\textsuperscript{287} Finally, these factors challenge the “soundness of the [English-only] educational theory” and how “reasonably calculated” English-only practices are to achieving academic parity.\textsuperscript{288}

\begin{footnotesize}
\begin{enumerate}
\item BACA & CERVANTES, supra note 3, at 27, 30.
\item Ortiz & Maldonado-Colon, supra note 67, at 38.
\item Shernaz B. García & Alba A. Ortiz, Preventing Inappropriate Referrals of Language Minority Students to Special Education, NEW FOCUS, June 1988, at 6.
\item Ortiz & Maldonado-Colon, supra note 67, at 38.
\item See supra notes 7, 62–64 and accompanying text.
\item Valeria G. v. Wilson, 12 F. Supp. 2d 1007, 1018 (N.D. Cal. 1998) (quoting key language from the court’s second prong of the appropriate action analysis).
\item Castañeda v. Pickard, 648 F.2d 989, 1011 (5th Cir. 1981).
\item Id. at 1010–11 (quoting key language from the third prong of the appropriate action analysis).
\item Id. at 1009–10 (quoting key language from the first and second prongs of the appropriate action analysis).
\end{enumerate}
\end{footnotesize}