The Scholar: St. Mary's Law Review on Race and Social Justice

Volume 12 | Number 3 Article 3

9-1-2010

Texas, Why Wait - The Urgent Need to Improve Programming for Limited English Proficient Students.

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TEXAS, WHY WAIT? THE URGENT NEED TO IMPROVE PROGRAMMING FOR LIMITED ENGLISH PROFICIENT STUDENTS

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There is a crisis in Texas [in which] tens of thousands of middle and high school students, LEP [Limited English Proficient] students, are not learning English and are not being afforded equal educational opportunities. In mass numbers they are not passing the state standardized test, they are being held back in their grade level, and they are dropping out of school, uneducated in the English language, which will undoubtedly not only affect their lives and their futures, but the future of the State of Texas.[1]

I. INTRODUCTION

Indeed, it is a crisis that Texas is not providing equal educational opportunities to its Limited English Proficient (LEP) students. This fact is even more alarming considering that the demographics of our country and our state are changing.[2] The Census Bureau projects that by 2023,

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1. Oral Argument Audio Recording, United States v. Texas, No. 08-40858 (5th Cir. 2009), *available at* http://www.ca5.uscourts.gov/OralArgRecordings/08/08-40858_6-2-2009.wma.

2. *See* Katherine Leal Unmuth, *Students Still Rolling In: Officials Expected Drop in Enrollment, but District Keeps Growing*, DALLAS MORNING NEWS, Sept. 3, 2009, at 8B,

the majority of children in the United States will be minorities.[3] And among the school-age population, "English language learners represent the fastest growing segment."[4] With such indisputable evidence of this evolving population, there is no doubt that more students will be dominant in a language that is not English.[5] If these children are not provided with the tools needed to meaningfully engage in society, they will never reach their full potential and the burden of their underachieving will fall on the remainder of the population.[6] People who know English "are more successful, earn more income, move into better neighborhoods with better schools and make better lives for their families. . . . [I]n turn, their children are also more successful and the whole country benefits."[7] As the populations of the United States and of Texas continue to evolve, it is imperative to find a way to educate our students in the English language.[8]

Both Texas and the nation have undertaken to provide all students with an equal opportunity to education. What "equality" looks like in practice, however, can differ not only state to state, but from district to district and even from school to school.[9] This Article will discuss the legal bases that govern Texas's delivery of education to LEP students and examine

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available at 2009 WLNR 17298221 ("Hispanics are closing in on becoming the majority of Texas schoolchildren.").

3. Press Release, U.S. Census Bureau, An Older and More Diverse Population by Midcentury (Aug. 14, 2008), http://www.census.gov/Press-Release/www/releases/archives/population/012496.html. By the year 2042, minorities are expected to comprise the majority of the national population. *Id.*

4. Kathleen Flynn & Jane Hill, *English Language Learners: A Growing Population*, Pol'y Brief, MID-CONTINENT RES. FOR EDUC. & LEARNING, Dec. 2005, at 1, http://www.mcrel.org/PDF/PolicyBriefs/5052PI_PBEnglishLanguageLearners.pdf (citation omitted).

5. *See* Leah Sullivan, Comment, *Press One for English: To Form a More Perfect Union*, 50 S. TEX. L. REV. 589, 598-99 (2009) ("The 2000 Census reveals that since 1990, there has been a [fifty-two percent] increase in the number of Americans classified as Limited English proficient." (footnote omitted)); Kathleen Flynn & Jane Hill, *English Language Learners: A Growing Population*, Pol'y Brief, MID-CONTINENT RES. FOR EDUC. & LEARNING, Dec. 2005, at 1, http://www.mcrel.org/PDF/PolicyBriefs/5052PI_PBEnglishLanguageLearners.pdf ("Projections suggest that 'language minority students' (those who speak a language other than English at home and who have varying levels of proficiency in English) will comprise over [forty] percent of elementary and secondary students by 2030." (citation omitted)).

6. Audio Recording of Oral Argument, United States v. Texas, No. 08-40858 (5th Cir. June 2, 2009), *available at* http://www.ca5.uscourts.gov/OralArgRecordings/08/08-40858_6-2-2009.wma.

7. Donna Poisl, *Assimilation and the Necessity for English*, AM. CHRON., Oct. 5, 2006, *available at* http://www.americanchronicle.com/articles/view/14381.

8. *See id.* (listing the benefits derived from being able to speak English in the U.S.).

9. Andrea Rodriguez, Comment, *Revealing the Impurities of Ivory Soap: A Legal Analysis of the Validity of the Implementation of the No Child Left Behind Act*, 10 SCHOLAR 75, 93 (2007).

whether the state is meeting its obligation. There is great debate over which method of instruction is best for students to achieve proficiency in English.[10] Some people feel that an English immersion ("sink or swim") approach is best, whereas others favor a bilingual system in which the child's native language is used as a bridge to learn English.[11] This Article will not address which method is best. Rather, it will attempt to explain the system that Texas has adopted, how the Texas Education Agency has implemented it, and whether there is a need for improvement.

II. Background and Analysis

A. *Federal Law*

To fully understand the states' obligation to provide equal educational opportunities, it is necessary to examine the laws that govern the landscape of bilingual education. To that end, any discussion of bilingual education laws must start by mentioning the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Equal Protection Clause reads:

> No [s]tate shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any [s]tate deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[12]

This wording provides the constitutional basis for providing an equal education to language minority students. In *Brown v. Board of Education*, the Supreme Court used the Equal Protection Clause as the basis for its holding that "in the field of public education the doctrine of 'separate but equal' has no place."[13] Although *Brown* is noted as a desegregation case, it is important to the bilingual education movement in that it establishes the right to an equal education for all students.

The first piece of federal legislation to affect LEP students was the Civil Rights Act of 1964.[14] Specifically, Title VI prohibits recipients of federal financial assistance from discriminating "on the grounds of race,

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10. *See* Sandra Cortes, Comment, *A Good Lesson for Texas: Learning How to Adequately Assist Language-Minorities Learn English*, 13 Tex. Wesleyan L. Rev. 95, 115–16 (2006) (comparing bilingual education and English immersion methods).

11. *Id.* at 100–03.

12. U.S. Const. amend. XIV, § 1.

13. 347 U.S. 483, 495 (1954).

14. Sandra Cortes, Comment, *A Good Lesson for Texas: Learning How to Adequately Assist Language-Minorities Learn English*, 13 Tex. Wesleyan L. Rev. 95, 106 (2006) (citing Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (1994)).

color, or national origin."[15] In 1970, the Office for Civil Rights of the former Department of Health, Education, and Welfare (HEW) interpreted the term "national origin" as used in the Civil Rights Act: "'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 programs for these students.'"[16] According to this interpretation, schools risk losing federal funds if they deny a language minority student equal access to education because of the student's limited proficiency in English.[17]

Before the HEW issued its interpretation, however, Congress passed the Bilingual Education Act (BEA) to protect the rights of LEP students.[18] The passage of the BEA marked the first time that a federal entity officially recognized bilingual education.[19] The overarching goal of the law was to decrease the achievement gap between English proficient students and English language learners (ELL) by instructing ELL students in their native language and culture.[20] In this act, Congress explicitly provided funds for school districts that choose to provide bilingual education programs to LEP students.[21] But the law served purely as a persuasive measure and did not mandate that the districts provide these programs.[22]

Four years after Congress passed the BEA, the Supreme Court in *Lau v. Nichols* first spoke to the rights of language minority students using Title VI as the basis for its finding.[23] In *Lau*, students of Chinese ancestry

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15. Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (2006).

16. Sandra Cortes, Comment, *A Good Lesson for Texas: Learning How to Adequately Assist Language-Minorities Learn English*, 13 TEX. WESLEYAN L. REV. 95, 106 (2006) (alteration omitted) (quoting MICHAEL IMBER & TYLL VAN GEEL, A TEACHER'S GUIDE TO EDUCATION LAW 126 (3d ed. 2005)).

17. *See* Programs for English Language Learners Part IV: Glossary, http://www.ed.gov/about/offices/list/ocr/ell/edlite-glossary.html (last visited Dec. 31, 2009) ("Title VI prohibits discrimination on the grounds of race, color, or national origin by recipients of federal financial assistance. The Title VI regulatory requirements have been interpreted to prohibit denial of equal access to education because of a language minority student's limited proficiency in English.").

18. Bethany Li, Note, *From Bilingual Education to OELALEAALEPS: How the No Child Left Behind Act Has Undermined English Language Learners' Access to a Meaningful Education*, 14 GEO. J. ON POVERTY L. & POL'Y 539, 549 (2007).

19. *Id.*

20. *Id.* at 550.

21. Sandra Cortes, Comment, *A Good Lesson for Texas: Learning How to Adequately Assist Language-Minorities Learn English*, 13 TEX. WESLEYAN L. REV. 95, 104 (2006).

22. *Id.*

23. 414 U.S. 563, 566 (1974).

brought a class action suit against the San Francisco school system for failing to provide English language instruction to the approximately 1800 Chinese students out of about 2800 students in the school district who did not speak English.[24] The Court found that students who could not speak English were "effectively foreclosed from any meaningful education."[25] In making this finding, the Court emphasized that "[b]asic English skills are at the very core of what . . . public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education."[26] The Court reiterated, "It seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program."[27]

In the wake of *Lau*, Congress passed the Equal Educational Opportunities Act (EEOA),[28] which extended the *Lau* holding to all school districts—not only those that received federal funds.[29] Specifically, the EEOA states:

> No [s]tate shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.[30]

Although with this language Congress mandated that educational agencies take "appropriate action," the EEOA does not define what that ac-

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24. *Id.* at 564.

25. *Id.* at 566.

26. *Id.*

27. *Id.* at 568. It is important to note that although the Court based its decision on a violation of Title VI of the Civil Rights Act of 1964, it relied heavily upon guidelines issued by HEW to reach its conclusion. *Id.* at 567. The Court recognized that, under Title VI, HEW "is authorized to issue rules, regulations, and orders to make sure that recipients of federal aid under its jurisdiction conduct any federally financed projects consistently with [the statute]." *Id.* One such order the Court pointed to was, "[w]here the 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.'" *Id.* at 568.

28. 20 U.S.C. §§ 1701-1758 (2006).

29. Bethany Li, Note, *From Bilingual Education to OELALEAALEPS: How the No Child Left Behind Act Has Undermined English Language Learners' Access to a Meaningful Education*, 14 GEO. J. ON POVERTY L. & POL'Y 539, 551 (2007).

30. Equal Educational Opportunities Act of 1974 § 204, 20 U.S.C. § 1703 (2006).

tion should be.[31] The act does include, however, a private right of action for students to enforce the obligation imposed by the EEOA.[32] The Fifth Circuit has taken Congress's inclusion of this private right of action as "deliberately plac[ing] on the federal courts the difficult responsibility of determining whether" schools have "made a genuine and good faith effort . . . to remedy the language deficiencies of their students."[33] As a result, what "appropriate action" requires is up for interpretation by the courts.

The 1981 Fifth Circuit decision in *Castaneda v. Pickard* established a three-prong test for what constitutes "appropriate action" under the EEOA.[34] The court first acknowledged that "Congress'[s] use of the less specific term, 'appropriate action,' rather than 'bilingual education,' indicates that Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA."[35] In recognition of this fact, the court devised a test with the flexibility to "permit [it] and the lower courts to fulfill the responsibility Congress . . . assigned to [it] without unduly substituting [its] educational values and theories for the educational and political decisions reserved to state or local school authorities or the expert knowledge of educators."[36]

Under this test, the first inquiry that a court must make is whether the "school system 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."[37] The second criterion is whether the programs used are "reasonably calculated to implement effectively the educational theory adopted by the school."[38] The final determination to make is whether the program has proved through its results to be successful.[39] On this point, the Fifth Circuit stated:

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31. *Id.*

32. *Id.*

33. Castaneda v. Pickard, 648 F.2d 989, 1009 (5th Cir. 1981).

34. *Id.* at 1009–10.

35. *Id.* at 1009.

36. *Id.*

37. *Id.* The court noted that this is not to be done with "any eye toward discerning the relative merits of sound but competing bodies of expert educational opinion . . . ." *Id.* Instead, it is up to the local educators to choose which theory is appropriate, and courts must then determine whether there is evidence that the program is legitimate. *Id.*

38. *Castaneda*, 648 F.2d at 1010. The school system's program to remedy language barriers must also have the potential to succeed. *Id.* Therefore, this prong of the test is designed to determine if the school system's adopted theory has the "resources and personnel necessary to transform the theory into reality." *Id.*

39. *Id.*

> If a school's program, although premised on a legitimate educational theory and implemented through the use of adequate techniques, fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action.[40]

Although this test is now almost thirty years old, it is still used by federal courts to determine whether school districts are meeting their obligations under the EEOA.

Throughout the years leading up to and following the *Castaneda* decision, Congress reauthorized the Bilingual Education Act five times: in 1974, 1978, 1984, 1988, and again in 1994.[41] With each reauthorization, Congress expanded the population of students who were eligible to receive instruction.[42] For example, the original 1968 act required that only schools with low-income students would receive the funds, but the first reauthorization in 1974 eliminated the poverty requirement.[43] By 1994, the act had evolved to prioritize not only the acquisition of the English language, but also maintenance of the students' native languages.[44] But with the enactment of the No Child Left Behind Act (NCLB)[45] on January 8, 2002, Congress repealed the BEA.[46] James Crawford, a bilingual education advocate, wrote the following obituary for the act:

> Title VII of the [the Bilingual Education Act], which transformed the way language minority children are taught in the United States—promoting equal access to the curriculum, training a generation of educators, and fostering achievement among students—expired quietly on January 8, 2002. The law was 34 years old.[47]

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40. *Id.*

41. Bethany Li, Note, *From Bilingual Education to OELALEAALEPS: How the No Child Left Behind Act Has Undermined English Language Learners' Access to a Meaningful Education*, 14 GEO. J. ON POVERTY L. & POL'Y 539, 549 (2007).

42. *See id.* (describing the impact of the BEA's reauthorizations).

43. Sandra Cortes, Comment, *A Good Lesson for Texas: Learning How to Adequately Assist Language-Minorities Learn English*, 13 TEX. WESLEYAN L. REV. 95, 105 (2006).

44. Bethany Li, Note, *From Bilingual Education to OELALEAALEPS: How the No Child Left Behind Act Has Undermined English Language Learners' Access to a Meaningful Education*, 14 GEO. J. ON POVERTY L. & POL'Y 539, 549 (2007).

45. Pub. L. No 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.).

46. Bethany Li, Note, *From Bilingual Education to OELALEAALEPS: How the No Child Left Behind Act Has Undermined English Language Learners' Access to a Meaningful Education*, 14 GEO. J. ON POVERTY L. & POL'Y 539, 554 (2007).

47. James Crawford, *OBITUARY: The Bilingual Ed Act, 1968-2002*, 16 RETHINKING SCHOOLS ONLINE 4, 2002, http://www.rethinkingschools.org/archive/16_04/Bil164.shtml.

With its passage, the NCLB transformed the BEA into the English Language Acquisition, Language Enhancement, and Academic Achievement Act.[48] This change ushered in a focus on English language acquisition and discouragement of "bilingual education" or native language instruction.[49] In fact, the word "bilingual" was removed from the entire law, except in a provision that changes the name of the federal Office of Bilingual Education and Minority Language Acquisition to the Office of English Language Acquisition, Language Enhancement, and Academic Achievement for Limited-English-Proficient Students (OELALEAALEPS).[50] In addition, although the NCLB ostensibly increased funding for ELL and immigrant education programs, in reality, the impact of these extra dollars will be reduced.[51] Previously, under Bilingual Education Act, money ("Title VII funds") was distributed to school districts on the basis of competitive grants.[52] Now, under the NCLB's "Title III" funding program, districts will automatically receive funding based on the number of language minority students enrolled.[53] As a result, the money will be spread across more states, more programs, and more students.[54] Another issue with NCLB is that it restricts the amount of money that can be spent on teacher training, research, and support services to 6.5% of the total budget.[55] In its first year, this figure cut the amount of funding for these resources by more than half of what it was the previous year.[56] Qualified teachers are essential to the success of bi-

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. James Crawford, *OBITUARY: The Bilingual Ed Act, 1968-2002*, 16 RETHINKING SCHOOLS ONLINE 4, 2002, http://www.rethinkingschools.org/archive/16_04/Bil164.shtml. During the 1990s, the former Office of Bilingual Education and Minority Language Affairs provided grant funding for a number of programs. OFFICE OF BILINGUAL EDUC. AND MINORITY LANGUAGES AFFAIRS, U.S. DEP'T OF EDUC., ACHIEVING THE GOALS—GOAL 5—FIRST IN THE WORLD IN MATH AND SCIENCE TECHNOLOGY RESOURCES (1996), http://www.ed.gov/pubs/AchGoal5/obemla.html. One such grant was the Program Development Implementation Grant, which aided schools to "develop and implement new comprehensive, coherent, and successful bilingual education or special alternative instructional programs" for bilingual students. *Id.*

53. James Crawford, *OBITUARY: The Bilingual Ed Act, 1968-2002*, 16 RETHINKING SCHOOLS ONLINE 4, 2002, http://www.rethinkingschools.org/archive/16_04/Bil164.shtml.

54. *Id.* While more students are being served under the new automatic formula-based grants, as compared to the Title VII competitive funding scheme, less money is spent per student. *Id.* Figures from 2001 indicate that $360 of federal money was spent per student, compared to only $135 under Title III funding the following year. *Id.*

55. *Id.*

56. *Id.*

lingual or ESL programs.[57] Without qualified instructors, "the blind would be leading the blind."[58]

The overall purpose of the law is to "ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging [s]tate academic achievement standards and state academic assessments."[59] In achieving this goal, the statute offers "greater decision-making authority and flexibility to schools and teachers in exchange for greater responsibility for student performance."[60] Although the NCLB provides increased flexibility in administration of these programs, the EEOA's overarching mandate to take "appropriate action" to overcome the language barriers faced by limited English proficient children remains.

B. *Texas Law*

While much of these policy decisions were occurring at the federal level, Texas was taking the education of its language minority students into its own hands as well. At the outset, bilingual education advocates had to contend with a Texas "English-only" law passed in 1918.[61] The "English-only" law criminalized speaking a foreign language in school.[62] Thankfully, the Texas Bilingual Education Act of 1969 repealed this antiquated vestige of Texas's past.[63] The 1969 bill acknowledged English as the primary language of instruction in school, but highlighted "the fact that instruction in the earlier years which includes the use of language the child understands makes learning easier."[64] The act gave the Texas Education Agency (TEA) and local schools ultimate control over bilingual

57. United States v. Texas, 572 F. Supp. 2d 726, 767 (E.D. Tex. 2008).

58. *Id.* The court explained that there are three elements necessary for successful implementation of programs designed to help LEP students: "adequate evaluation of LEP student progress, adequate remedial education, and qualified personnel." *Id.* at 764 (citation omitted). It is important that both teachers of LEP students and monitors of struggling LEP programs are certified in bilingual ESL education in order to "understand the problems confronted in LEP education and to be able to offer appropriate solutions." *Id.* at 767.

59. 20 U.S.C. § 6301 (2006) (footnote omitted).

60. *Id.* § 6301(7).

61. CARLOS KEVIN BLANTON, THE STRANGE CAREER OF BILINGUAL EDUCATION IN TEXAS, 1836-1981, at 146 (2004).

62. *Id.* at 65.

63. *Id.* at 147.

64. Latino Education Policy in Texas, Major Historical Antecedents to Texas Bilingual Legislation, http://www.edb.utexas.edu/latino/bilingual_edu_page.html (last visited Dec. 17, 2009).

programs, and *allowed*, but did not require, districts to provide bilingual instruction through the sixth grade.[65]

Texas bilingual education programs got another boost in 1971, when the Fifth Circuit, deciding a desegregation case, ordered:

> [Texas] shall insure that school districts are providing equal educational opportunities in all schools. The [TEA], through its consulting facilities and personnel, shall assist school districts in achieving a comprehensive balance curriculum on all school campuses . . . . These curricular offerings and programs shall include specific educational programs designed to compensate minority group children for unequal educational opportunities resulting from past or present racial and ethnic isolation, as well as programs and curriculum designed to meet the special educational needs of students whose primary language is other than English.[66]

In 1973, the Texas legislature recognized this mandate and passed a law that required "bilingual education through the first six grades" in any school district that had twenty or more LEP students.[67] Two years later, however, Texas passed a law that made participation by the upper elementary grades in bilingual education once again optional.[68] Finally, in 1981, the legislature enacted the Bilingual and Special Language Programs Act (S.B. 477), which determined the legal status of bilingual education in Texas for the next two decades.[69] That law compelled bilingual education through the elementary grades for school districts with twenty or more LEP students in the same grade.[70] The bill also authorized the TEA to adopt "'standardized entry-exit criteria'" and compelled the agency to institute certain measures to ensure compliance, including on-site monitoring.[71] Although this framework is more than twenty-five years old now, it is still largely reflected in the system that is used today.

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65. CARLOS KEVIN BLANTON, THE STRANGE CAREER OF BILINGUAL EDUCATION IN TEXAS, 1836-1981, at 147 (2004).

66. United States v. Texas, 447 F.2d 441, 448 (5th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972).

67. CARLOS KEVIN BLANTON, THE STRANGE CAREER OF BILINGUAL EDUCATION IN TEXAS, 1836-1981 at 147 (2004).

68. *Id.* at 150.

69. *Id.* at 151.

70. United States v. Texas, 680 F.2d 356, 372 (5th Cir. 1982).

71. *Id.*

C. *The Current State of Texas's System for Bilingual and Special Language Programs*

Current Texas law requires that a student must be assessed within the first four weeks of school to determine the student's language of "primary proficiency."[72] If the determination is made to label the student as a LEP student, the parent must also agree to approve the student's entry into, exit from, or placement in the program.[73] When a parent chooses not to allow his or her student entry into the program, the decision is referred to as a "parental denial."[74] After this determination, the language proficiency assessment committee of a district shall report the number of LEP students on each campus to the district's board of trustees.[75] Any district that has twenty or more LEP students in the same grade level must "offer a bilingual or special language program."[76] And for any district that is required to offer these programs, the district is required to offer "bilingual education in kindergarten through the elementary grades," "bilingual education, instruction in English as a second language, or other transitional language instruction . . . in post-elementary grades through grade [eight]," and "instruction in English as a second language in grades [nine] through [twelve]."[77] In practice, LEP students in kindergarten through the sixth grade receive bilingual instruction, and LEP students in seventh through twelfth grade receive ESL instruction, unless they are in special education classes.[78] This current system is failing Texas's language minority student population.

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72. TEX. EDUC. CODE ANN. § 29.053(b) (Vernon 2006) (defining the role of the language proficiency assessment committee). Each campus's language proficiency assessment committee is to report to the TEA "the number of students of limited English proficiency on each campus and shall classify each student according to the language in which the student possesses primary proficiency." *Id.* Each committee is made up of "a professional bilingual educator, a professional transitional language educator, a parent of a limited English proficiency student, and a campus administrator." *Id.* § 29.063(b).

73. *Id.* § 29.056(a).

74. United States v. Texas, 572 F. Supp. 2d 726, 736 (E.D. Tex. 2008). "In 2005-2006, on a statewide basis, 4.9% of LEP students were reported as receiving parental denials to participate in bilingual and ESL programs." *Id.* at 737. In that same year, "some school districts reported five times or more the rate of denials than the statewide average." *Id.*

75. *Id.* at 735. The TEA is responsible for monitoring the language proficiency assessment committees (LPACs), which, in turn, must categorize the LEP students. *Id.* If school districts do not follow the correct standards, the TEA has the authority to sanction them. *Id.* The TEA is also in charge of setting standards for the identification and classification of LEP students, including the circumstances under which LEP students may enter and exit the program. *Id.*

76. TEX. EDUC. CODE ANN. § 29.053(c) (Vernon 2006).

77. *Id.* § 29.053(d).

78. *United States v. Texas*, 572 F. Supp. 2d at 736.

Texas defines a bilingual program as "a full-time program of dual-language instruction that provides for learning basic skills in the primary language of the students enrolled in the program and for carefully structured and sequenced mastery of English language skills."[79] By contrast, an ESL course is considered "a program of intensive instruction in English from teachers trained in recognizing and dealing with language differences."[80]

Texas has the following stated policy regarding education of its language minority students:

> English is the basic language of this state. Public schools are responsible for providing a full opportunity for all students to become competent in speaking, reading, writing, and comprehending the English language. Large numbers of students in the state come from environments in which the primary language is other than English. Experience has shown that public school classes in which instruction is given only in English are often inadequate for the education of those students. The mastery of basic English language skills is a prerequisite for effective participation in the state's educational program. Bilingual education and special language programs can meet the needs of those students and facilitate their integration into the regular school curriculum. Therefore, in accordance with the policy of the state to ensure equal educational opportunity to every student, and in recognition of the educational needs of students of limited English proficiency, . . . the establishment of bilingual education and special language programs [are provided] in the public schools and . . . supplemental financial assistance [is provided] to help school districts meet the extra costs of the programs.[81]

From this policy, it is clear that Texas recognizes that instruction given only in English is ineffective to teach a LEP student. The policy states that "[e]xperience has shown that public school classes in which instruction is given only in English are often inadequate for the education of those students" whose primary language is not English.[82] It is also true that ESL courses provide "a program of intensive instruction in English."[83] For that reason, it is perplexing why Texas has chosen the blanket policy of providing ESL courses for grades nine through twelve, when

79. TEX. EDUC. CODE ANN. § 29.055(a) (Vernon 2006).
80. *Id.*
81. *Id.* § 29.051.
82. *Id.*
83. *Id.* § 29.055(a).

its "experience has shown" that a more individualized assessment of each student's needs is required, regardless of their grade level.[84]

Indeed, a federal district court in Texas recently found that the TEA had not met its obligation under the EEOA to overcome language barriers for secondary LEP students.[85] The court analyzed the case under the three prongs delineated in *Castaneda* to determine whether the educational agency was taking "appropriate action" under the EEOA.[86] According to that test, the court had to determine whether the TEA's educational theory was sound, whether it had taken reasonable steps to implement the programs properly, and finally, whether the program had achieved successful results.[87] The court first decided that because "the bilingual program used in elementary schools and the ESL program used in secondary schools—each employing different educational theories and implemented differently by TEA—are distinct . . . [they] must be analyzed as such."[88]

Regarding the first prong, the court noted that "[t]here is no dispute that [the] bilingual and ESL programs [employed by the state] are sound in theory."[89] The court then moved on to the second prong of the test.[90] In this case, the United States alleged that Texas failed to "adequately monitor the components of the LEP program."[91] On that point, the court noted that "[e]ffective implementation includes effective monitoring of the progress of LEP students and ultimately of the program itself."[92] Texas law requires the TEA to monitor the effectiveness of school districts' compliance with the requirements of Texas's bilingual-ESL statute.[93] Before 2003, the TEA monitored these programs through an onsite monitoring system; however, the Texas State Auditor's Office continually found that the TEA never effectively implemented this program.[94]

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84. TEX. EDUC. CODE ANN. § 29.051 (Vernon 2006); United States v. Texas, 572 F. Supp. 2d 726, 736 (E.D. Tex. 2008).

85. *United States v. Texas*, 572 F. Supp. 2d at 779. The court found that poor student performance was clear and convincing evidence of "the failure of the ESL secondary program in Texas." *Id.* Furthermore, the court explained that the root cause of the poor performance was "the difference in programs[:] the bilingual program in primary grades and the ESL program in secondary grades." *Id.* at 780.

86. *Id.* at 763–71.

87. *Id.* at 759 (citing Castaneda v. Pickard, 648 F.2d 989, 1009-10 (5th Cir. 1981)).

88. *Id.* at 762.

89. *Id.* at 763–64. At the very least, the program must be considered a "legitimate experimental strategy." *Id.* at 763.

90. *United States v. Texas*, 572 F. Supp. 2d at 764.

91. *Id.* at 756.

92. *Id.* at 765.

93. *Id.* at 735.

94. *Id.* at 736. In 1996, the Texas State Auditor's Office discovered that the TEA had monitored only eighteen percent of the school districts from 1991 through 1994. *Id.* The

For this reason, in 2003, the TEA replaced the on-site system with a performance-based model: the Performance Based Monitoring Analysis System (PBMAS).[95] But after the court extensively reviewed the data collected from the PBMAS, it found the system "fatally flawed."[96] Among those flaws, the court remarked:

> PBMAS under-identifies LEP students; the achievement standards used for intervention are arbitrary and not based upon equal education opportunity; monitors are not qualified; the failing achievement of higher grades is masked by passing scores of lower grades; and the failure of individual school campuses is masked by only analyzing data on the larger district level. In a monitoring system such as PBMAS, the reliability of the data on which the system is based should be paramount.[97]

Since PBMAS is based on seriously flawed data, the court concluded that "PBMAS, in its present form, does not constitute appropriate action to transform the educational theory into reality."[98]

The court then examined the third (results) prong of *Castaneda*.[99] On this point, the court recognized "'that the best evidence of a sound and effectively implemented program lies in the results that it achieves.'"[100] The court first reviewed the results of the bilingual program administered to Texas's primary LEP students—those in kindergarten through sixth grade.[101] As to those students, the court found the following:

> The performance of primary LEP students in bilingual education programs is not overwhelming. LEP students in the primary grades are not advancing on pace with their peers: LEP students are retained at significantly higher rates than their all-student peers, and the disparity in retention rates has gradually increased since 1994.

Auditor's Office concluded that "[n]onperformance of these monitoring visits reduces the [a]gency's ability to ensure that Bilingual Education Program funds are spent appropriately, that districts are properly classifying students, and that districts are providing equal educational opportunities for bilingual students." *Id.*

95. United States v. Texas, 572 F. Supp. 2d 726, 736 (E.D. Tex. 2008). Unlike the old system, the new PBMAS involves "a result and data-driven system that evaluates performance in four program areas." *Id.* These program areas are "bilingual education and ESL, career and technology education, No Child Left Behind Act of 2001 . . . and special education." *Id.*

96. *Id.* at 765.

97. *Id.* (citation omitted).

98. *Id.*

99. *Id.* at 772.

100. *United States v. Texas*, 572 F. Supp. 2d at 772 (quoting Teresa P. v. Berkeley Unified Sch. Dist., 724 F. Supp. 698, 716 (N.D. Cal. 1989)).

101. *Id.* at 775.

> Encouragingly, primary LEP students have started to narrow the margin with all students on the TAKS [Texas Assessment of Knowledge and Skills] test. Former LEP students also have had remarkable success two years after exiting the program, though the data may be distorted by a few high achievers. . . . [B]ecause of the bilingual program's recent success in decreasing the margin of performance [between LEP students and all students on the TAKS test], the [c]ourt will defer to the state for the time being. However, the [c]ourt recognizes that it has perhaps set the bar unreasonably low in order to defer to the state; if the upward trend, narrowing the performance margin, does not continue, the [c]ourt may be inclined to revisit its ruling upon a party's motion.[102]

Although this analysis of Texas's primary LEP students is not glowing, there are positive aspects to it. On the other hand, the court's review of the secondary students' results was not as optimistic:

> Secondary LEP students in bilingual education fail terribly under every metric. Secondary LEP students drop-out of school at a rate at least twice that of the all-student categories. Secondary LEP students are retained at rates consistently double that of their peers. Secondary LEP students consistently perform worse than their peers by a margin of [forty percent] or more on the TAKS all-tests category, and the performance gap generally increased over time in individual subjects. Even [those students who exited the bilingual or ESL program two years previously] lag behind all students in secondary grades. As with the primary grades, the prolonged duration of LEP students in LEP programs potentially indicates that the performance of former LEP students represents the failure of the majority and the success of a few.[103] Contrary to [Texas's] sentiment, a [forty-seven percent] failure rate for eleventh[-] and twelfth[-]grade LEP students demonstrates that the system is indeed failing to overcome language barriers. [Texas has] had a quarter century to demonstrate [it is] overcoming language barriers on the secondary

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102. *Id.* (summarizing the mixed results of LEP student primary school education). The court explained that any encouraging data "may not be as impressive as it first appears because, as the long term LEP data indicates, many students will remain in the program for more than four years. . . ." *Id.* at 774–75. The fact that only half of sixth-grade LEP students earned passing grades on all of the tests, according to the court, "is not an endorsement of the program's success." *Id.*

103. "TEA's goal is that all LEP students will leave LEP programs after three years." *Id.* at 751.

level, and the data demonstrates consistent and continued failure to fulfill this difficult, but necessary, responsibility.[104]

It is significant to note that even state education employees agree with the court's assessment of the secondary LEP students' progress.[105] In fact, "Dr. Joe Benal, a member of the Texas State Board of Education, testified that the test scores for the higher grade levels for the 2005-2006 term were 'horribly bad.'"[106] In addition, Dr. Shirley Neeley, Texas's Commissioner of Education, testified in reference to the 2005 test scores that, "'[t]here's not anybody in their right mind that would say these . . . are good scores."[107]

Based on these conclusions, the court required the TEA to submit a new monitoring plan and a new or modified language program for secondary LEP students by the end of January 2009.[108] Texas filed an appeal and a stay pending appeal. The Fifth Circuit granted those requests but, at the same time, ordered that the appeal be expedited "'[t]o minimize the harm that a stay could involve for the equal educational opportunities of secondary students with limited English proficiency.'"[109]

III. Conclusion

Regardless of the outcome in the courts, it is imperative that Texas change the current delivery of its ESL program. As previously mentioned, Texas state law recognizes that "public school classes in which instruction is given only in English are often inadequate for the education of those students" whose primary language is not English.[110] Based on this principle, it is contradictory to offer an ESL program that provides "a program of intensive instruction in English" to secondary students whose primary language is not English and who may not be sufficiently compe-

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104. *Id.* at 778 (citation omitted).

105. United States v. Texas, 572 F. Supp. 2d 726, 751 (E.D. Tex. 2008).

106. *Id.* (citation omitted). Students are given additional chances to retake the TAKS test later on in their junior and senior years of high school. *Id.* According to the court, "[t]he LEP student failure rate after they retake the eleventh grade TAKS is even more alarming." *Id.* "[O]nly 53% of LEP students passed all the TAKS subject areas, compared with 78% of students who had completed LEP programs one year previously, 82% of students who had completed LEP programs two years previously, and 90% for non-LEP students." *Id.*

107. *Id.* (citation omitted).

108. Press Release, Mexican American Legal Defense and Education Fund, Major Ruling in Case for Texas English Language Learner Students (July 25, 2008), *available at* http://www.maldef.org/news/releases/us_texas_072508.

109. Terrence Stutz, *Court Delays Deadline for New Bilingual Education Program in Texas*, Dallas Morning News, Feb. 2, 2009, *available at* 2009 WLNR 1972844.

110. Tex. Educ. Code Ann. § 29.051 (Vernon 2006).

tent in English to understand the instruction.[111] Moreover, from the data presented to the court in *United States v. Texas* and the admissions of education department employees, it is clear that the Texas ESL program should not remain as it is. A change to the ESL program offered to secondary LEP students would positively impact LEP students in Texas, as well as taxpayers in general.

Data presented to the court in *United States v. Texas* shows that during the 2003-2004 academic year, seventh- through twelfth-grade LEP students dropped out at twice the rate of all students.[112] Without a high school diploma, these students are starting out with less chance to succeed. A high school dropout earns $9211 less per year than a high school graduate.[113] A lack of command of the English language can only compound this problem. Further, it is no secret that high school dropouts cost the state.[114] It is estimated that "[four] in [ten] receive government assistance," they are "more likely to be unemployed," they are "[eight] times as likely to be incarcerated," and their earning loss represents a "significant loss in tax revenue."[115] Each year's class of dropouts costs Texas "$11.8 billion in lost gross state product (GSP) over their working lives."[116]

It is clear that the population of Texas is changing.[117] In 2000, of the Texas population that was sixty-five years of age and above, 72.6% were Anglo and 16.7% were Hispanic.[118] But for the under–five age group, the Hispanic population surpassed the Anglo population.[119] Anglos comprised 39.5% of that population and Hispanics made up 44%.[120] Although these figures do not directly affect the number of English language learners, they are remarkable for the magnitude of population

111. *United States v. Texas*, 572 F. Supp. 2d at 736.

112. *Id.* at 742.

113. CTR. FOR PUB. POL'Y PRIORITIES, TEXAS DROPOUT CRISIS: MAGNITUDE AND IMPACT 22 (2007), http://www.cppp.org/files/10/1-23-07%20—%20Full%20Dropout%20Presentation%20-%20FINAL.ppt.

114. *Id.* at 26.

115. *Id.*

116. The Cost of Underpaying Texas Teachers, http://www.window.state.tx.us/specialrpt/teachersalary06/ (last visited Dec. 31, 2009).

117. Katherine Leal Unmuth, *Students Still Rolling In: Officials Expected Drop in Enrollment, but District Keeps Growing*, DALLAS MORNING NEWS, Sept. 3, 2009, at 8B, *available at* 2009 WLNR 17298221.

118. Steven Murdock, Professor of Sociology, Rice Univ., Presentation at Children's Law Symposium in Houston: The Population of the United States, Texas, and Houston: Historical Patterns and Future Trends (Oct. 16, 2009) (power point on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

119. *Id.*

120. *Id.*

change they exhibit.[121] Moreover, data exists on language minority students. Between 1979 and 2003, the number of English language learners in the United States grew by 124%, and it is projected that by 2030, English language learners will comprise 40% of elementary and secondary students.[122] Texas must be equipped to meet the needs of this evolving population. If the system for "overcoming language barriers" does not improve, that cost of $11.8 billion will certainly increase.[123] Change lies in the hands of the state. Texas need not wait for a mandate from the court system.

121. *Id.*

122. Kathleen Flynn & Jane Hill, *English Language Learners: A Growing Population*, Pol'y Brief, MID-CONTINENT RES. FOR EDUC. & LEARNING, Dec. 2005, at 1, http://www.mcrel.org/PDF/PolicyBriefs/5052PI_PBEnglishLanguageLearners.pdf (citations omitted).

123. The Cost of Underpaying Texas Teachers, http://www.window.state.tx.us/specialrpt/teachersalary06/ (last visited Dec. 31, 2009).