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CONSTITUTIONAL AND STATUTORY RIGHTS TO REMEDIAL LANGUAGE INSTRUCTION: VARIABLE DEGREES OF UNCERTAINTY

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I. INTRODUCTION

Educational issues have been in the forefront of legal battles over the past twenty or thirty years. One subject of these controversies has been the right of a student with limited English language proficiency to secure remedial instruction. Historically, immigrants to the United States learned the English language by submersion. Through continuous exposure to English in the classroom, non-English-speaking children eventually became acquainted with the new language. Today, because instructional methods have progressed,

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techniques exist to facilitate that learning process, although the submersion approach is still used in some areas of the country to "instruct" linguistic minorities.

"English as a Second Language" (ESL) instruction consists of intensive remedial instruction in the English language for part of the school day. Although the teaching methods and materials are designed to remedy the student's English deficiencies, these programs have been criticized for fostering cognitive confusion by forcing children to learn to read and write in a second language before they have acquired those skills in their native language.[1] Bilingual education, on the other hand, teaches children concurrently in both the English language and their primary language. Bilingual programs may be "transitional" in nature or may take a "maintenance" approach. The primary goal of a bilingual transitional program is to provide the students with instruction in two languages so that they can make the transition to regular all-English classrooms as quickly as possible, whereas the objective of a bilingual maintenance program is to maintain and develop the students' knowledge of their primary language while simultaneously developing English language skills.[2] Often bilingual programs include a cultural component that seeks to enhance the child's cultural identity.[3]

Because of the diverse linguistic backgrounds of school children throughout the United States, the right to remedial language instruction may place considerable responsiblities on educational systems depending on how that right is defined. This article will explore the constitutional and statutory rights of students of limited English language proficiency to ESL instruction, bilingual education, and bicultural education.

II. REMEDIAL LANGUAGE INSTRUCTION AND COURT-ORDERED DESEGREGATION

Courts possess inherent equitable powers to formulate remedial

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1. *See* Note, *Bilingual Education: Serna v. Portales Municipal Schools,* 5 N.M.L. REV. 321, 325-27 (1975).

2. This article will define bilingual education as being either one of these two alternative approaches. For a discussion of various remedial language models see Comment, *Bilingual Education: An Educational and Legal Survey,* 5 J. L. & EDUC. 149 (1976).

3. Some legal commentators conclude that bilingual/bicultural programs are the constitutionally preferred remedial approach. *See* Comment, *The Constitutional Right of Bilingual Children to an Equal Educational Opportunity,* 47 S. CAL. L. REV. 943, 994-97 (1974).

plans to remedy constitutional violations. The United States Supreme Court stated in *Swann v. Charlotte-Mecklenburg Board of Education*[4] that "[O]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[5] Calling upon these equitable powers, courts have ordered compensatory educational programs for minority students to erradicate the lingering effects of past discrimination.[6]

Likewise, pursuant to these inherent powers of equity jurisdiction, courts have also ordered remedial language programs as part of the remedy for unconstitutional segregation in school systems.[7] In *United States v. Texas,*[8] upon a finding that a west Texas school district had practiced discrimination against Mexican-American students, the district court ordered the implementation of a bilingual and bicultural program designed to assist Mexican-American students in adjusting to their newly desegregated school environment.

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4. 402 U.S. 1 (1971).

5. *Id.* at 15.

6. *See* United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 891-92, 900 (5th Cir. 1966), *aff'd,* 380 F.2d 385 (5th Cir. 1967) (en banc), *cert. denied,* 389 U.S. 840 (1967); Hobson v. Hansen, 269 F. Supp. 401, 515 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969). Courts have used their equitable powers to fashion comprehensive remedial plans to correct constitutional violations found in non-educational institutions as well. *See, e.g.,* Taylor v. Perini, 413 F. Supp. 189, 193-97 (N.D. Ohio 1976) (prison system); Morales v. Turman, 364 F. Supp. 166, 175-80 (E.D. Tex. 1973) (juvenile detention homes); Wyatt v. Stickney, 344 F. Supp. 373, 376-77 (M.D. Ala. 1972) (state mental health system).

7. *See* United States v. Texas Educ. Agency, 532 F.2d 380, 398 (5th Cir. 1976); Morgan v. Kerrigan, 401 F. Supp. 216, 242 (D. Mass. 1975), *supplemented,* 409 F. Supp. 1141 (D. Mass. 1975), *aff'd sub nom.* Morgan v. McDonough, 540 F.2d 427 (1st Cir. 1976), *cert. denied,* 429 U.S. 1042 (1977). In Morales v. Shannon, the appellate court reversed the district court's finding of no segregative intent with respect to the assignment of Mexican-American students into two predominantly Spanish elementary schools, but remanded the case on issues concerning bilingual/bicultural education. *See id.* at 413-15. The school district offered these students a limited remedial language program and the district court on remand was directed to examine that effort on the "off chance" that its inadequacies amounted to discrimination. *See* Morales v. Shannon, 516 F.2d 411, 415 (5th Cir. 1975).

8. 342 F. Supp. 24, 29-38 (E.D. Tex. 1971). This decision was one of many remedial orders issued by the federal court for the Eastern District of Texas in conjunction with the desegregation of all school districts in the state. *See* United States v. Texas, 321 F. Supp. 1043, 1060-62 (E.D. Tex. 1970). Previously, the district court had ordered the consolidation of the San Felipe and Del Rio school districts. As part of that order the court directed the parties to file a plan for the consolidation of the two districts which was to include a provision for bilingual/bicultural programs. *See* United States v. Texas, 342 F. Supp. 24, 24 (E.D. Tex. 1971).

This comprehensive plan required both English and Mexican-American students in the elementary grades to develop skills in the English and Spanish languages as well as to develop an appreciation for both cultures.[9] In the context of desegregation suits, other courts have ordered such remedial programs to compensate for educational deficiencies resulting from past unconstitutional segregation. These courts reasoned that once school districts have violated a child's right to an equal educational opportunity, they are under an affirmative duty to mitigate the harshness of their past actions.[10]

While such remedial orders are apparently within the discretionary power of a district court, they are not necessarily obligatory. In *Keyes v. School District No. 1,*[11] the Court of Appeals for the Tenth Circuit reversed the district court's adoption of a comprehensive remedial language plan even though the Denver school district had been found to have unconstitutionally discriminated against Mexican-Americans. The court of appeals determined that the lower court exceeded the limits of its remedial powers by ordering the school district to follow a plan which effectively required a virtual overhaul of the school system's entire approach to education in the way it addressed matters of educational philosophy, curriculum and instruction, internal governance, staffing patterns, and community involvement with the schools.[12] The Tenth Circuit did not preclude the possibility that some type of remedial language program would

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9. *See* United States v. Texas, 342 F. Supp. 24, 29-38 (E.D. Tex. 1971). The court required the educational program of the district to incorporate, affirmatively recognize, and value the cultural environment and language background of all its students in order to foster the development of positive self-concepts in all children. The court's plan also called for the establishment of a staff development training program and parental and community advisory councils. *See id.* at 29. For a discussion of this case see Comment, *Bilingual-Bicultural Education in Texas,* 7 URB. L. ANN. 400, 400 (1974).

10. *See* Arvizu v. Waco Indep. School Dist., 373 F. Supp. 1264, 1279-80 (W.D. Tex. 1973), *modified on other grounds,* 495 F.2d 499 (5th Cir. 1974). The court in *Arvizu* based its remedial order on a finding of constitutionally impermissible segregation, although the court admitted that such segregation was not the result of intentional state action. *See id.* at 1269. Given more recent Supreme Court opinions, the liability portion of this order is questionable. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977); Washington v. Davis, 426 U.S. 229, 242 (1976).

11. 521 F.2d 465 (10th Cir. 1975), *cert. denied,* 423 U.S. 1066 (1976).

12. *See id.* at 482. In concluding that the district court's order was not properly tailored to remedy the constitutional violation, the court observed that "instead of merely removing obstacles to effective segregation, the court's order would impose upon school authorities a pervasive and detailed system for the education of minority students. We believe this goes too far." *Id.* at 482.

be appropriate and remanded the case for the district court to determine "what relief, if any" was necessary to remedy the language deficiencies of Mexican-American students.[13] The appellate court's refusal to affirm the district court's remedial order could reflect a reluctance on the part of a federal court to interfere so pervasively in an issue of local concern.[14]

The fact that ordering remedial language assistance to children who have been the victims of unconstitutional segregation may properly be within the scope of a court's remedial powers does not establish that such programs are required absent the initial finding of a constitutional violation. Is there an independent right to remedial language instruction and, if so, what type of instruction is required? The next four sections will explore the possible constitutional and statutory grounds for recognizing such a right.

III. The Fourteenth Amendment and the Right to Remedial Language Instruction

The fourteenth amendment protects fundamental rights of individuals guaranteed by the Constitution and assures all individuals equal protection under the law.

A. *Fundamental Right Analysis*

To prove an unconstitutional infringement upon a fundamental right, the plaintiff must establish that state action[15] is present and that the right being infringed upon is explicitly or implicitly guaran-

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13. *See id.* at 483.

14. *See* Larry P. v. Riles, 495 F. Supp. 926, 989 (N.D. Cal. 1979). The district court in *Riles* held that the use of I.Q. tests to place students in classes for the educable mentally retarded unconstitutionally discriminated against minority students, yet declined to mandate supplemental assistance to those children who had been disadvantaged. "It is not the role of the court to reach out to order what would amount to a massive expenditure of funds for supplemental assistance." *Id.* at 991.

15. Only state action is prohibited by the fourteenth amendment. *Civil Rights Cases,* 109 U.S. 3, 11 (1883). The concept of what constitutes state action, however, has expanded greatly since the Supreme Court first pronounced that postulate. *See, e.g.,* Monroe v. Pape, 365 U.S. 167, 171 (1961) (illegal search by police officers constitutes state action proscribed by fourth amendment); Terry v. Adams, 345 U.S. 461, 469 (1953) (exclusion of Blacks from pre-primary elections of Democratic Association, tantamount to regular political party, constitutes state action proscribed by fifteenth amendment); Marsh v. Alabama, 326 U.S. 501, 508 (1946) (imposition of criminal punishment by officials of "company town" upon distributor of religious literature constitutes state action proscribed by first and fourteenth amendments).

teed by the Constitution.[16] After such a finding, the court will apply a strict scrutiny analysis to state action that unduly burdens such a right; the state must then justify its action by showing that it is necessary to achieve a compelling state interest and that the means chosen are sufficiently tailored to achieve that goal.[17]

In the context of remedial language programs, state action may be present when states require compulsory attendance yet permit only English to be the instructional language.[18] The Supreme Court has suggested that failure to provide any remedial instruction to students of limited English proficiency may constitute state action as well.[19] Currently, twenty states make no statutory provisions either prohibiting or requiring instruction in a language other than English.[20]

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16. Fundamental rights are those which are "implicit in a concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 (1937); *see also* Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (right to trial by jury in criminal cases); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (freedom of religion); Gitlow v. New York, 268 U.S. 652, 666 (1925) (freedom of speech).

17. *See, e.g.,* Dunn v. Blumstein, 405 U.S. 330, 360 (1972) (durational residency requirements for voters violates Equal Protection Clause because not necessary to further compelling state interest); Graham v. Richardson, 403 U.S. 365, 382 (1971) (state statutes denying welfare benefits to resident aliens or to aliens who have not resided in United States for requisite number of years serve no compelling state interest and are unconstitutional); Shapiro v. Thompson, 394 U.S. 618, 641-42 (1969) (one year residency requirement for welfare recipients exercising their constitutitonal right to travel interstate unconstitutional because not necessary to promote compelling governmental interest).

18. Four states require that all subjects be taught in the English language exclusively. ARK. STAT. ANN. § 80.1605 (1980); N.C. GEN. STAT. § 115c-81(a) (Supp. 1983); OKLA. STAT. ANN. tit. 70, § 11-102 (West 1972); W. VA. CODE § 18-2-7 (1977). Oklahoma allows the State Board of Education to adopt rules for the provision of instruction concerning the history and culture of minority races. OKLA. STAT. ANN. tit. 70, § 24-119 (West Supp. 1982-1983).

Additionally, while Virginia does not require all subjects to be taught in the English language exclusively, the legislature recently enacted a provision which clearly freed school districts from any obligation to teach the standard curriculum in language other than English. *See* VA. CODE § 22.1-212.1 (Supp. 1983). Similarly, the clear legislative preference in South Dakota is for instruction which promotes the mastery of the English language, although instruction in another language is not expressly prohibited. *See* S.D. CODIFIED LAWS ANN. § 13-33-11 (1982).

19. Lau v. Nichols, 414 U.S. 563, 566 (1974); *see also* Guadalupe Org., Inc. v. Tempe Elem. School Dist. No. 3, 587 F.2d 1022, 1026 (9th Cir. 1978); Serna v. Portales Ind. School Dist., 351 F. Supp. 1279, 1281-83 (D.N.M. 1972). In another context, the Supreme Court held that the failure of the government to act constitutes state action. *See* Baker v. Carr, 369 U.S. 186, 208 (1962) (state's failure to correct a serious malapportionment of legislature violates fourteenth amendment).

20. These states are Alabama, Delaware, Florida, Hawaii, Kentucky, Maryland, Mis-

Assuming that state action is present, education must also be shown to be a fundamental right. Education is not explicitly guaranteed by the Constitution, and the Supreme Court has never defined education per se as being a fundamental right. Nonetheless, the Supreme Court has suggested that some minimum quantum of education is implicitly guaranteed by the Constitution since it is essential to the exercise of first amendment rights as well as to participation in the political process. In *San Antonio Independent School District v. Rodriguez,*[21] the Supreme Court upheld Texas' system of school finance since it provided a basic education to all students even though some students enjoyed more educational opportunities than others. The Court, however, left open the question of whether a system which failed to provide "some identifiable quantum of education" would be denying its students a fundamental right.[22]

Conceding that there is a fundamental right to some minimum quantum of education, is placing a non-English-speaking child in an all English-speaking classroom tantamount to denying them a minimum education?[23] The Supreme Court has addressed the issue of remedial language instruction as an independent right in one significant case to date, *Lau v. Nichols.*[24] Although *Lau* was decided on statutory grounds, the Court noted that:

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sissippi, Missouri, Montana, Nebraska, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, Utah, Vermont, Wyoming and the District of Columbia.

21. 411 U.S. 1 (1973).

22. *See id.* at 36-37.

23. Several legal scholars question the constitutionality of instruction solely in English given the fundamental importance of education and the level of exclusion from educational opportunities resulting from such a situation. *See* Grubb, *Breaking the Language Barrier: The Right to Bilingual Education,* 9 HARV. C.R.- C.L. L. REV. 52, 71-91 (1974) (English-only instruction may violate Due Process Clause as well as Equal Protection Clause since such action should be subject to active judicial review); Johnson, *The Constitutional Right of Bilingual Children to an Equal Educational Opportunity,* 47 S. CAL. L. REV. 943, 975-85 (1974) (complusory attendance laws coupled with English as exclusive language of instruction causes pattern of linguistic exclusion which violates fundamental right of access to minimum/adequate education); Sugarman and Widess, *Equal Protection for Non-English-Speaking School Children: Lau v. Nichols,* 62 CALIF. L. REV. 157, 158-68 (1974) (balancing of interests analysis warrants judicial intervention to protect rights of non-English-speaking students to equal educational opportunities); Comment, *Bilingual Education and Desegregration,* 127 U. PA. L. REV. 1564, 1588-89 (1979) (Supreme Court's decision in *Rodriguez* may be limited to objective differences in provision of education so that subjective differences of students' abilities to understand English still may constitute absolute denial of educational opportunities).

24. 414 U.S. 563 (1974).

> [B]asic English skills are at the very core of what these 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.* We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way *meaningful.*[25]

Thus, instruction in a language that is incomprehensible may amount to a denial of a meaningful education or minimal educational opportunities.

Nevertheless, assuming English-only instruction deprives non-English-speaking children of a fundamental right, the state may justify that choice of instruction by demonstrating that it serves a compelling state interest. Several justifications are plausible.[26] The state could argue that submersion is a sound pedagogical method of instructing students in a new language concurrently with other subjects, and urge the judiciary to defer to the knowledgeable judgment of educators.[27] Additionally, the state could contend that this method conserves revenues while providing each student with the same educational curriculum. Finally, the state could vindicate its approach by reasoning that English-only instruction promotes a unilingual society, thereby fostering assimilation into the main-

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25. *Id.* at 566 (emphasis added). Although he admits to crucial weaknesses in his argument, one commentator has asserted that failure to provide speakers of "Black English" with remedial assistance effectively excludes them from participation in the educational program. *See* van Geel, *The Right to be Taught Standard English: Exploring the Implications of Lau v. Nichols for Black Americans,* 25 SYRACUSE L. REV. 863, 905 (1974).

26. Some commentators have advanced several conceivable rationalizations for such a choice although they concurrently have noted the weaknesses of these rationales. *See* Johnson, *The Constitutional Right of Bilingual Children to an Equal Educational Opportunity,* 47 S. CAL. L. REV. 943, 985-89 (1974) (state's justifications may include desire to provide educational opportunity for all children to ensure every child linguistic competence in English and to provide an equal educational opportunity to as many children as possible while making funds available for other socially desired programs); Sugarman & Widess, *Equal Protection for Non-English Speaking School Children: Lau v. Nichols,* 62 CALIF. L. REV. 157, 177 (1974) (state might argue that it is job of family, not school, to teach English; that English may be learned just as quickly through total immersion approach; that districts do not possess adequate monetary resources to aid non-English-speaking children; or that "English only" policy fosters country's interest in single national tongue); *see also* Grubbs, *Breaking the Language Barrier: The Right to Bilingual Education,* 9 HARV. C.R. - C.L. L. REV. 52, 91 (1974) (such state action may be tolerated only on short term basis).

27. The same arguments could be made by school districts which chose not to provide remedial language instruction in those states which do not statutorily address the issue.

stream American community.[28]

The Supreme Court has declared, however, that a state cannot rely solely upon a fiscal restraint argument to justify reducing expenditures if the result is the denial of a fundamental right to an identifiable class.[29] Moreover, the submersion technique is not the least burdensome alternative to providing an equal educational opportunity to all children which would enable them to function in American society; remedial language instruction could achieve that same result in a less onerous fashion. Arguably, the submersion method fails to teach non-English-speaking children effectively. Thus, failure to provide remedial language instruction to non-English-speaking students may represent state action which denies those students a fundamental right which no compelling state interest can legitimize.

Suppose instead that the state or individual school district provides some type of remedial language instruction such as ESL. Is this effort constitutionally sufficient or is bilingual/bicultural education constitutionally required? Some courts have held that an affirmative choice to provide instruction other than bilingual/bicultural education constitutes state action for the purposes of fourteenth amendment review.[30] It would be difficult to establish bilingual/bicultural education as a fundamental right, however, since the court would have to find that ESL fails to provide students with a minimum education assuming that there is an implicit right to that minimum quantum.

Some legal commentators and educators argue that requiring children to perform in another language before they have developed cognitive skills in their primary language inevitably deprives them of being able to function adequately in either language.[31] Neverthe-

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28. For a discussion of the historical justification of English-only instruction see Shelton, *Legislative Control Over Public School Curriculum,* 15 WILLAMETTE L.J. 473, 477-81 (1979). The district court in *Guadalupe* also discussed the assimilation rationalization. *See* Guadalupe Org., Inc. v. Tempe Elem. School Dist. No. 3, 587 F.2d 1022, 1027 (9th Cir. 1978).

29. *See* Shapiro v. Thompson, 394 U.S. 618, 631-33 (1969) (while state may legitimately attempt to limit expenditures for public programs, it may not accomplish such purpose by invidious distinctions between classes of its citizens).

30. *See* Lau v. Nichols, 414 U.S. 563, 566 (1974); Guadalupe Org., Inc. v. Tempe Elem. School Dist. No. 3, 587 F.2d 1022, 1026 (9th Cir. 1978).

31. *See* Margulies, *Bilingual Education, Remedial Language Instruction, Title VI, and Proof of Discriminatory Purpose: A Suggestive Approach,* 17 COLUM. J.L. & SOC. PROBS. 99,

less, there is considerable authority which advocates the use of ESL as an instructional approach; comparative research studies on ESL and bilingual/bicultural instructional methods have failed to prove that one method is clearly preferable to the other.[32] Given this split of authority, courts may refrain from the intense evaluation of ESL which would be necessary to support a conclusion that ESL does not provide a minimum or minimum/adequate education. The federal judiciary's lack of expertise counsels against such interference as does its respect for state and local autonomy.[33]

Several courts have reviewed the legal sufficiency of non-bilingual/bicultural remedial programs. In *Keyes,* the Tenth Circuit, observing that the Denver school system maintained a variety of programs for students of limited English proficiency, refused to order a specific bilingual/bicultural program.[34] The court asserted that the fourteenth amendment did not entitle such students "to an educational experience tailored to their unique cultural and developmental needs."[35] Likewise, in *Otero v. Mesa County Valley School Distict No. 51*[36] plaintiffs sought a particular type of bilingual instruction, claiming that the school district's efforts to assist students of limited English proficiency were grossly inadequate. The district court followed the Tenth Circuit's lead in *Keyes* and held that there was no constitutional right to bilingual/bicultural education. The court apparently was impressed by the good faith efforts of school officials to provide the amount of remedial assistance they deemed necessary. Overwhelmed by the volume of expert testimony on instructional methods, the court chose not to pronounce educational policy for the school district but instead deferred to the judgment of the local educators as to the appropriate type and level of assist-

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103-05 (1981); Comment, *Bilingual Education: Serna v. Portales Mun. Schools,* 5 N.M.L. REV. 321, 324-27 (1975).

32. Rotberg, *Some Legal and Research Considerations in Establishing Federal Policy in Bilingual Education,* 52 HARV. EDUC. REV. 149, 153-57 (1982). In *Castaneda v. Pickard*, the Fifth Circuit Court of Appeals noted the controversy among experts concerning the advantages of these approaches to learning. *See* Castaneda v. Pickard, 648 F.2d 989, 1010 n.10 (5th Cir. 1981).

33. *See* San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 41-42 (1973); Keyes v. School Dist. No. 1, 521 F.2d 465, 490 (10th Cir. 1975) (Barrett, J., specially concurring).

34. Keyes v. School Dist. No. 1, 521 F.2d 465, 485 (10th Cir. 1975).

35. *Id.* at 482.

36. 408 F. Supp. 162 (D. Colo. 1975), *vacated on other grounds,* 568 F.2d 1312 (10th Cir. 1977), *on remand,* 470 F. Supp. 326 (D. Colo. 1979), *aff'd,* 628 F.2d 1271 (10th Cir. 1980).

ance.[37] The Ninth Circuit in *Guadalupe Organization, Inc. v. Tempe Elementary School District No. 3*[38] reiterated the rationale of *Keyes* and *Otero.* Since the school district adopted some remedial measures to cure the language deficiencies of Mexican-American and Yaqui Indian children, the appellate court determined that the school district had no constitutional duty to provide the bilingual/bicultural program requested by the appellants.[39]

Although there is explicit language in each of these decisions that bilingual/bicultural education is not constitutionally required, in each case plaintiffs requested a particular program. The tone of each opinion suggests that the courts were somewhat indignant of the plaintiff's desire to substitute their judgment on educational matters for that of either the school district or the judiciary.[40] Arguably,

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37. *See id.* at 172. The plan the plaintiffs sought in *Otero* was almost identical to the one being sought in *Keyes.* The district judge was quite candid about his inability to decipher the claims of all the experts and eventually concluded:

> I found the Cardenas Plan to be illogical, unbelievable and unacceptable, and the only part of Dr. Cardenas' testimony I wholeheartedly agreed with was his response to a question I asked him at the end of his stint on the witness stand. I asked him, in effect, that if we assume a good faith though imperfect effort on the part of a school board to provide any needed bilingual/bicultural education, is a school district and are the students better off under school board supervision or under the supervision of a poorly informed federal judge. Dr. Cardenas quite candidly said that the school district and the students are better off with the program being operated under the good faith efforts of the school board and its employees. I agree, and I find that District 51, the members of the board of District 51, the school officials, the principals, and in fact, all of the defendants in this case were at all times acting in complete good faith in attempting to ascertain the amount of bilingual/bicultural education which was needed by the students of District 51 and in providing the amount of that education which they believed was needed. I am sure they did a better job than I could do.

Id. at 170.

38. 587 F.2d 1022 (9th Cir. 1978).

39. *See id.* at 1026-27; *see also* Heavy Runner v. Bremner, 522 F. Supp. 162, 164 (D. Mont. 1981) (memorandum opinion) (no constitutional right to bilingual/bicultural education per se).

40. In *Deerfield Hutterian Assoc. v. Ipswich Bd. of Educ.*, the plaintiffs were Hutterites who spoke Tyrolean German. *See* Deerfield Hutterian Assoc. v. Ipswich Bd. of Educ., 468 F. Supp. 1219, 1223 (N.D.S.D. 1979). Because of their religious beliefs, they challenged the local school board's decision to offer a bilingual/bicultural education program in the town of Ipswich instead of at the Hutterite colony. *See id.* at 1222. The court refused to reverse that board's decision on fourteenth amendment grounds stating:

> The opportunity to be educated at the expense of the state is not a right which has no limits. . . . The state does not have an obligation to educate every group or individual according to the whims or desires of that individual or group, even if the desires are based on religious beliefs. Here, the Ipswich School Board has made an education available on a reasonable basis to the Hutterites. It need do no more.

therefore, there is a right to dual language instruction when only some negligible remedial assistance is offered if the precise plan is left to the discretion of school officials.

When evaluating constitutional claims in conjunction with federal statutory rights, some courts have ordered bilingual/bicultural education even where the school district offered a remedial language program.[41] Moreover, one court found a school district's *bilingual* program to be legally inadequate. Critically evaluating the school district's program, the court in *Rios v. Read*[42] determined that it failed to identify those children in need of remedial instruction, failed to test for reading and writing proficiency or to offer valid tests for exit from the program, failed to establish a reliable review of the performance of bilingual teachers, and neglected the cultural aspect of bilingual education.[43] The court concluded that the New York school district, under the pretense of offering bilingual education, was providing merely a basic course in English. Although *Rios* was decided on federal statutory grounds, language in the opinion suggests that *effective* bilingual/bicultural education is a right of linguistic minority students in the early years of schooling.[44]

If failure to provide bilingual education does not deny children their fundamental right to a minimum quantum of education, then a school district need only show that its remedial language program is rationally related to a legitimate state interest.[45] Generally, the judi-

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Id. at 1229.

41. *See* Serna v. Portales Mun. Schools, 351 F. Supp. 1279, 1281 (D.N.M. 1972), *aff'd on other grounds,* 499 F.2d 1147 (10th Cir. 1974). In *Serna,* the district court was not impressed with the school district's assertions that a lack of funds and a shortage of teachers limited the amount of remedial assistance they could provide. The court ordered that they expand their programs, increase recruiting efforts for teachers, and investigate and utilize potential sources of funding in order to provide an equal educational opportunity for Mexican-American students. *Id.* at 1283. The appellate court upheld the lower court's decision on Title VI grounds. *See id.* at 1283.

42. 480 F. Supp. 14 (E.D.N.Y. 1978).

43. *Id.* at 18-24.

44. *See id.* at 23. The court stated that:

> A denial of educational opportunities to a child in the first years of schooling is not justified by demonstrating that the educational program employed will teach the child English sooner than programs comprised of more extensive Spanish instruction. While the District's goal of teaching Hispanic children the English language is certainly proper, it cannot be allowed to compromise a student's right to meaningful education before proficiency in English is obtained.

Id. at 23.

45. Where neither fundamental rights nor suspect classes are involved, state action is

ciary will not interfere in state action of this nature, providing it is not palpably arbitrary. Remedial language programs have been approved under a rational basis review[46] and in the context of other educational concerns school districts have prevailed under this less rigorous level of scrutiny.[47]

B. *Equal Protection Analysis*

Courts will also strictly scrutinize state action that classifies or discriminates among similarly situated persons based on a suspect classification: race, national origin, or alienage. Again, state action may be defined as requiring all children to attend school contemporaneously with prohibiting instruction in a language other than English or with failing to provide remedial instruction.[48] Yet linguistic

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constitutinally sound if it is rationally related to a legitimate governmental interest. *See, e.g.,* Schweiker v. Wilson, 450 U.S. 221, 237 (1981) (given budgetary constraints, Congress may rationally limit supplemental security income allowances to Medicade recipients in public institutions); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 168-71 (1980) (Railroad Retirement Act's grandfather provision which expressly preserves "windfall" benefits for some classes of employees is rational method of drawing lines between groups of employees in order to phase out those benefits); Dandridge v. Williams, 397 U.S. 471, 486-87 (1970) (Maryland regulation placing absolute limit of two hundred fifty dollars per month on amount of grant under AFDC, regardless of size of family or its need, is rational means of allocating limited public welfare funds).

46. *See* Guadalupe Org., Inc. v. Tempe Elem. School Dist. No. 3, 587 F.2d 1022, 1027 (9th Cir. 1978); Deerfield Hutterian Assoc. v. Ipswich Bd. of Educ., 468 F. Supp. 1219, 1230-31 (D.S.D. 1979).

47. *See* San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973) (state school financing system); *cf.* Plyler v. Doe, 457 U.S. 202, 252-53 (1982) (Burger, C.J., dissenting) (denying education to illegal aliens is "rational" means to legitimate state purpose). *Plyler* involved a state law which prohibited school districts from including illegal aliens in their student count for the purposes of determining the appropriate level of state financial assistance. In a dissenting opinion, Justice Burger concluded that in the absence of a fundamental right or suspect classification, the statute was rationally related to legitimate state interests in utilizing the resulting savings to improve the quality of education, to enhance other social programs, or to reduce the tax burden. Plyler v. Doe, 457 U.S. 202, 252 (1982) (Burger, C.J., dissenting). A commentator evaluating the rights of speakers of Black English concluded that school districts which failed to provide those students with special instruction would prevail under a rational basis review. *See* van Geel, *The Right To Be Taught Standard English: Exploring the Implications of Lau v. Nichols for Black Americans,* 25 SYRACUSE L. REV. 863, 899 (1974).

48. A problem arises, however, with respect to state action under an equal protection analysis. The state through its central education agency may be liable for the acts or omissions of individual school districts, if under state law it is responsible for supervising those districts and for requiring standards of instruction. *See* Idaho Migrant Council v. Bd. of Educ., 647 F.2d 69, 71 (9th Cir. 1981); United States v. School Dist., 577 F.2d 1339, 1347 (6th Cir. 1978). But should the state's act prohibiting dual language instruction or its omis-

minorities are not necessarily members of a suspect class since their alleged unequal treatment is not based directly upon a racial or national origin classification.[49] Nevertheless, their learning disability coincides precisely with a characteristic that distinguishes national origin groups. Because of this intimate association between language and ethnicity,[50] linguistic minorities may be treated as a suspect class.[51] Moreover, a recent Supreme Court decision suggests that the definition of a suspect class is expanding to include groups which are saddled with disabilities beyond their control.[52]

Even if the state action involves a suspect classification, it must still be discriminatory to be unconstitutional. A statute or policy providing for instruction only in English is neutral on its face in that it treats all children alike. Its application to children of differing linguistic skills, however, may operate to discriminate against non-English-speaking students. Examining the performance of linguistic minority students tends to reveal that such discrimination may ex-

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sion be imputed to the individual districts for purposes of establishing a violation of the Equal Protection Clause, since intent is a necessary element? If possible, each independent school district may have the right to a hearing on whether its remedial language policy is the result of discrimination. *See* United States v. Gregory-Portland Ind. School Dist., 654 F.2d 989, 998 (5th Cir. 1981).

49. Guadalupe Org., Inc. v. Tempe Elem. School Dist. No. 3, 587 F.2d 1022, 1026 n.3 (9th Cir. 1978). The Supreme Court recently held that illegal aliens per se do not constitute a suspect class either. Plyler v. Doe, 457 U.S. 202, 219 n.19 (1982); *see also* Martin Luther King Jr. Elem. School Children v. Michigan Bd. of Educ., 451 F. Supp. 1324, 1327-28 (E.D. Mich. 1978) (students whose unsatisfactory performance was based on cultural, social, and economic handicaps rather than physical handicaps did not constitute a suspect class even though they all happened to be black).

50. Mexican-Americans have been held to be an ethnically identifiable minority group for purposes of an equal protection analysis. *See* Cisneros v. Corpus Christi Ind. School Dist., 467 F.2d 142, 145 (5th Cir. 1972).

51. *See* Johnson, *The Constitutional Right of Bilingual Children to an Equal Educational Opportunity,* 47 S. CAL. L. REV. 943, 979-81 (1974). Conversely, for speakers of Black English the link between language and ethnicity is weaker since features of Black English are found in the speech patterns of other groups. *See* van Geel, *The Right To Be Taught Standard English: Exploring the Implications of Lau v. Nichols for Black Americans,* 25 SYRACUSE L. REV. 863, 898 (1974).

52. *See* Plyler v. Doe, 457 U.S. 202, 216 n. 14 (1982). The court observed that:

> The experience of our Nation has shown that prejudice may manifest itself in the treatment of some groups. Our response to that experience is reflected in the Equal Protection Clause of the Fourteenth Amendment. Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish.

Id. at 216 n.14.

ist.[53] But defining the right to equal educational opportunities in terms of equalized performances or outcomes is problematic since a wide variety of socio-economic factors affect achievement levels;[54] furthermore, the evaluation instruments themselves are subject to multiple interpretations and errors.

Reliance on educational outcomes may not be necessary to conclude that linguistic minorities are being denied equal opportunities. Arguably, failure to provide any remedial instruction is a blatant constitutional violation; courts may take judicial notice of the fact that a child in an all-English class who does not speak English is not in the same position as one who does.[55] The case of *Brown v. Board of Education*[56] established that segregated schools were inherently unequal; likewise, English-only instruction may be inherently unequal and discrimination can be assumed. In concluding that segregation with sanction of law has the tendency to retard the educational and mental development of black children,[57] the *Brown* Court recognized the relationship between segregation and educational, psychological, and social harms.[58] Correspondingly, placing the majority's language in a position of supremacy in the classroom denigrates the linguistic minority's language and culture, thereby generating a stigma of inferiority.[59] This stigma coupled with in-

53. *See* Rangel & Alcala, *Project Report: De Jure Segregation of Chicanos in Texas Schools,* 7 HARV. C.R. - C.L. L. REV. 307, 321-22 (1972); *see also* Serna v. Portales Mun. Schools, 351 F. Supp. 1279, 1282-83 (D.N.M. 1972) (poorer performance by Spanish-speaking children on I.Q. tests as compared to Anglo students indicates lack of equal educational opportunity if school program does not reflect needs of minority), *aff'd on other grounds,* 499 F.2d 1147 (10th Cir. 1974). To support the finding of a constitutional violation the district court in *Serna* relied heavily on evidence that Spanish surnamed pupils performed less well than others on achievement and I.Q. tests. *See* Serna v. Portales Mun. Schools, 351 F. Supp. 1279, 1282-83 (D.N.M. 1972), *aff'd on other grounds,* 499 F.2d 1147 (10th Cir. 1974). *But see* Otero v. Mesa County Valley School Dist. No. 51, 408 F. Supp. 162, 165 (D. Col. 1975) (poor performance is not necessarily the result of language deficiencies).

54. *See* Yudof, *Equal Educational Opportunity and the Courts,* 51 TEXAS L. REV. 411, 430 (1973).

55. *See id.* at 430-31; *see also* Sugarman & Widess, *Equal Protection for Non-English Speaking School Children: Lau v. Nichols,* 62 CALIF. L. REV. 157, 162 (1974) (discrimination against Spanish-speaking children taught only in English is readily apparent).

56. 347 U.S. 483 (1954).

57. *See id.* at 494-95.

58. For a discussion of sociological data and its use in desegregation cases see Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts,* 78 HARV. L. REV. 564 (1965) and Fiss, *The Charlotte-Mecklinburg Case—Its Significance for Northern School Desegregation,* 38 U. CHI. L. REV. 697 (1971).

59. *See* Roos, *Bilingual Education: The Hispanic Response to Unequal Educational Op-*

comprehsible instruction, effectively deprives them of an equal *access* to education.

Even so, the purpose behind the decision to offer instruction exclusively in English must be tainted with an intent to discriminate.[60] Neutral state action serving legitimate goals does not violate the Equal Protection Clause solely because it affects a greater proportion of one group than another.[61] Yet an invidious intent need not be the sole motivating factor upon which the state action is rooted.[62] The question is whether a discriminating purpose was a motivating factor in the decision, and disproportionate impact is relevant evidence to support that conclusion.[63] Some courts have located this forbidden purpose by presuming that the state, like an individual, presumes the natural and foreseeable consequences of its actions.[64] The Supreme Court, however, recently confined this presumption to an inference by requiring proof that the cause of action was chosen at least in part by and not merely in spite of, its adverse effects upon an identifiable group.[65] Nonetheless, a positive foreseeable consequences test is still some evidence of an impermissible purpose.[66]

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portunity, 42 J. L. & CONTEMP. PROBS. 111, 126 (1978); Comment, *Cultural Pluralism,* 13 HARV. C.R. - C.L. L. REV. 133, 151-53 (1978); Sugarman & Widess, *Equal Protection for Non-English Speaking School Children: Lau v. Nichols,* 62 CALIF. L. REV. 157, 172-76 (1974). Expert testimony concerning the feelings of inadequacy and lowered self-esteem experienced by Spanish surnamed children faced with a school environment in which only the English language was acceptable may have influenced the Tenth Circuit in *Serna*. *See* Serna v. Portales Mun. Schools, 499 F.2d 1147, 1149-50 (10th Cir. 1974).

60. In the absence of previous segregation by law, proof of segregative intent is a prerequisite to remedial orders. Keyes v. School Dist. No. 1, 413 U.S. 189, 203 (1973). Prior to *Keyes* some courts had only required that a significant nexus exist between state action and the resulting denial of educational opportunity. *See* Cisneros v. Corpus Christi Ind. School Dist., 467 F.2d 142, 148 (5th Cir. 1972).

61. *See* Washington v. Davis, 426 U.S. 229, 242 (1976).

62. *See id.* at 242.

63. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977).

64. Many of these decisions involved a school district's superimposition of a neighborhood assignment policy on a racially segregated housing pattern producing the "unavoidable consequence" of segregated schools. *See* Cisneros v. Corpus Christi Ind. School Dist., 467 F.2d 142, 146-49 (5th Cir. 1972) (school board by rigid superimposition of neighborhood school plan upon historic pattern of marked residential segregation which had transposed residential homogeneity into ethnic and racial homogeneity in public school system, produced inevitable segregation); *see also* United States v. Texas Educ. Agency, 532 F.2d 380 (5th Cir. 1976); Arvizu v. Waco Ind. School Dist., 373 F. Supp. 1264, 1268-69 (W.D. Tex. 1973).

65. *See* Personnel Adm'r v. Feeney, 442 U.S. 256, 279 n. 25 (1979).

66. *See* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 536 n.9 (1979); Columbus Bd.

Finding an invidious intent in the failure to provide remedial language instrucion is a difficult task.[67] Such a failure has a disproportionate effect upon linguistic minorities and has the inevitable result of inhibiting their participation in the educational program.[68] Yet these two propositions alone are insufficient to prove discriminatory intent. Additional proof of a rich history of an unequal treatment of linguistic minorities coupled with the school district's decision to offer English-only instruction, however, may establish an invidious purpose.[69] Such additional proof may be hard to adduce for linguistic minorities who are new immigrants and have no pattern of treatment from which to draw evidence. The argument could be made that showing a history of discrimination against those groups which are not of the majority language and culture provides the necessary proof.[70] In addition, the presumptions discussed by the Supreme

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of Educ. v. Penick, 443 U.S. 449, 464-65 (1979); *see also* United States v. Texas Educ. Agency, 564 F.2d 162, 168-70 (5th Cir. 1977) (neighborhood assignment plan complemented by gerrymandering, allowing dual overlapping zones, and tailoring design, location, and size of school to fit only racial or ethnic group demonstrated pervasive intent to discriminate); Larry P. v. Riles, 495 F. Supp. 926, 980-82 (N.D. Cal. 1979) (given historical background of I.Q. testing, use of such tests to place disproportionate number of blacks in mentally retarded classes established discriminatory intent); Margulies, *Bilingual Education, Remedial Language Instruction, Title VI, and Proof of Discriminatory Purpose: A Suggested Approach,* 17 COLUM. J.L. & SOC. PROBS. 99, 137 (1981) (author suggests that Supreme Court has recently given greater weight to this type of evidence).

67. For a discussion of the duties of school districts under *Lau* and *Brown* including the difficulty of establishing discriminatory intent see Comment, *Bilingual Education and Desegregation,* 127 U. PA. L. REV. 1564 (1979). In *United States v. Gregory-Portland Ind. School Dist.,* the Fifth Circuit implied that a now-repealed Texas statute permitting English only instruction was motivated by a xenophobic impulse following World War I and provided no probative evidence for current racial prejudice. *See* United States v. Gregory-Portland Ind. School Dist., 654 F.2d 989, 999-1001 (5th Cir. 1981).

68. *Cf.* Plyler v. Doe, 457 U.S. 202, 235 (1982) (Blackmun, J., concurring). The Court struck down a Texas statute which denied local school districts the benefit of state funds which were used to educate illegal aliens. Justice Blackmun professed in his concurring opinion that "it does not take an advanced degree to predict the effects of a complete denial of education upon those children targeted by the State's classification." *Id.* at 235 (Blackmun, J., concurring). Likewise, it does not take an advanced degree to predict that instruction exclusively in English will deny linguistic minorities equal access to educational opportunities.

69. *See* Comment, Margulies, *Bilingual Education, Remedial Language Instruction, Title VI and Proof of Discriminatory Purpose: A Suggested Approach,* 17 COLUM. J. L. & SOC. PROBS. 99, 152-53 (1981); *The Constitutional Right of Bilingual Children to an Equal Educational Opportunity,* 47 S. CAL. L. REV. 943, 946-53 (1974).

70. That is, invidious purpose lies in the state's preferential treatment of the majority language culture vis-a-vis that of linguistic minorities. "That a legislature seeks to advantage one group does not, as a matter of logic or of common sense, exclude the possibility that

Court in *Keyes* may be applicable to this situation as well.[71] If there is proof of historical discrimination against one linguistic minority group then the burden should be upon the state to show that it has not treated other linguistic minorities equally disfavorably. Unlike the *Keyes* situation, however, where the segregation of one minority group in a school system has a reciprocal effect on the racial composition of other schools, discrimination against one linguistic minority does not necessarily result in discrimination against another. Nevertheless, continual preference of the majority's language over minority groups' languages will produce the same effect on all such groups and will be some evidence of an invidious intent to discriminate against linguistic minorities generally.

If discriminatory intent is shown, the state may rebut this evidence by showing that the same result would have occurred even in the absence of such intent.[72] In the context of remedial language instruction where performance evaluations have supported the finding of an unequal educational opportunity, the state or school district must show that factors other than the instructional method caused the students' poor performance.[73] If the finding of a constitutional violation was premised upon a denial of equal access argument, then the state or school district must show that it would have chosen to offer English-only instruction in any event, presumably because of the soundness of that approach.

If neither argument is successful, then the state must carry the difficult burden of proving that its policy is necessary to accomplish a compelling state interest and that a less intrusive but equally effec-

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it also intends to disadvantage another." Personnel Adm'r. v. Feeney, 442 U.S. 256, 282 (1979) (Marshall, J., dissenting).

71. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 197-208 (1973).

72. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270-71 n. 21 (1977). There is language in some previous lower court decisions to suggest that the inquiry revolved around the question of whether affirmative action to the contrary would have remedied the situation rather than whether the same result woud have occurred because of the overriding presence of neutral factors. *See* United States v. Texas Educ. Agency, 467 F.2d 848, 863 n. 22 (5th Cir. 1972) (en banc).

73. Numerous studies conclude that socio-economic factors are often responsible for a child's academic performance; moreover, some attitudinal studies detected no difference between limited English-speaking students in bilingual programs and those in regular classrooms on a range of measures including attitude, self-concept, motivation, social values, absenteeism, grade retention and dropout rates. *See* Rotberg, *Some Legal and Research Considerations in Establishing Federal Policy in Bilingual Education,* 52 HARV. EDUC. REV. 149, 152-156 (1982).

tive method is unavailable.[74] The court might require the independent school districts to justify their instructional methods similarly to the way in which employers must validate employment tests if such employment practice excludes a disproportionate number of minorities.[75]

If the state or school district offers instead some remedial assistance, is it nevertheless a violation of the Equal Protection Clause not to offer a bilingual/bicultural program? An argument could be made that any program other than bilingual education is inherently unequal and creates the same stigma of inferiority by forcing linguistic and cultural assimilation.[76] Although bilingual/bicultural programs may nurture the development of limited English-speaking students and offer to them a greater potential for success,[77] ESL programs do not necessarily deny them an equal educational opportunity.[78] Offering an ESL program instead of a bilingual/bicultural program may be discriminatory if the school district has a history of past discrimination.

Discriminatory intent would be even more difficult to establish in this instance. The Supreme Court in *Keyes,* however, noted that the *remoteness* in time of past segregative acts has no relevance to the issue of present discriminatory intent.[79] Therefore, if the state or

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74. *See* Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

75. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (employment practices which operate to exclude disproportionate number of minorities must be related to job performance).

76. *See* van Geel, *The Right to Be Taught Standard English: Exploring the Implications of Lau v. Nichols for Black Americans,* 25 SYRACUSE L. REV. 863, 871-73 (1974).

77. *See* Kobrick, *A Model Act Providing for Transitional Bilingual Education Programs in Public Schools,* 9 HARV. J. ON LEGIS. 260, 265-67 (1972) (bilingual programs may enhance ability of linguistic minorities to learn English while encouraging development of native language skills); Montoya, *Bilingual-Bicultural Education: Making Equal Educational Opportunities Available to National Origin Minority Students,* 61 GEO. L. J. 991, 996 (1973) (nationwide commitment to provide productive bilingual problems needed to compensate for past neglect of non-English-speaking students and to provide them with equal educational opportunities).

78. *See* Guadalupe Org., Inc. v. Tempe Elem. School Dist. No. 3, 587 F.2d 1022, 1029 (9th Cir. 1978). In *Martin Luther King Jr. Elem. School Children v. Michigan Bd. of Educ.,* the court rejected the plaintiffs' argument that the practice of labeling culturally and economically handicapped children as educable mentally retarded stigmatized them and violated the fourteenth amendment. *See* Martin Luther King Jr. Elem. School Children v. Michigan Bd. of Educ., 451 F. Supp. 1324, 1326-28 (E.D. Mich. 1978).

79. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 211 (1973). Furthermore, on remand the Tenth Circuit affirmed the lower court's rejection of expert testimony on practices

school district historically pursued an arguably discriminatory policy of providing English-only instruction, that policy may be relevant to prove that current remedial programs are vain attempts to fulfill constitutional obligations and are not designed to provide equal educational opportunity.[80] Additionally, if a school system practiced intentional discrimination in the past, it is under a continuing duty to eradicate the effects of that action.[81] In the context of intentional segregation, the Supreme Court defined part of the duty as "the obligation not to take any action that would impede the process of disestablishing the dual system and its effects."[82] Offering remedial language instruction may not fulfill this affirmative duty; and, evidence that the school district widened the gap between non-English-speaking students and English-speaking students by expanding its honors curriculum or programs for gifted and talented children instead of enhancing its remedial language program suggests that an intent to discriminate may linger.

Nevertheless, the state could probably show that the same educational methods would be employed, absent any lingering invidious intent. Many authorities on language instruction endorse ESL and other remedial programs; bilingual education is not necessarily the optimal aproach for all situations.[83] Given the split of authority on

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put into effect after the initiation of the suit as not probative of discriminatory intent. *See* Keyes v. School Dist. No. 1, 521 F.2d 465, 474 (10th Cir. 1975).

80. *See* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 501-02 (1979) (Rehnquist, J., dissenting). Justice Rehnquist argued that a definite causal relationship must be established between past acts or omissions and current practices. *See id.* at 501-02 (Rehnquist, J., dissenting). Moreover, in two recent cases concerning the adequacy of remedial language programs, the appellate courts remanded the cases to the lower courts to evaluate whether needs of limited English- speaking students *currently* were being addressed. *See* Idaho Migrant Council v. Board of Educ., 647 F.2d 69, 71 (9th Cir. 1981); Heavy Runner v. Bremner, 522 F. Supp. 162, 165 (D. Mont. 1981) (memorandum opinion). *But see* United States v. Gregory-Portland Ind. School Dist., 654 F.2d 989, 1002 (5th Cir. 1981) ("Mexican schools" operated by school district thirty years ago not necessarily motivated by invidious intent and their existence proves nothing in regard to current motives).

81. *See* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 537 (1979).

82. *Id.* at 538; *see* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 462-63 (1979); Wright v. Council of Emporia, 407 U.S. 451, 460-62 (1972).

83. Several studies suggest in fact that bilingual instruction is more likely to succeed when the children being taught come from middle and upper rather than lower socio-economic environments. *See* Rotberg, *Some Legal and Research Considerations in Establishing Federal Policy in Bilingual Education,* 52 HARV. EDUC. REV. 149, 159-60 (1982).

what is the most advantageous approach,[84] it seems doubtful that the judiciary would find that choosing to provide ESL instruction violates the Equal Protection Clause, even if there is evidence of past discriminatory omissions.[85] That choice would most likely survive a rational basis review as well.[86]

C. *An Intermediate Review*

The preceeding discussion centers on the traditional two tier judicial review of alleged fourteenth amendment violations whereby courts strictly scrutinize state action which deprives individuals of a fundamental right or classifies them based upon race, national origin, or alienage, and apply a rational relationship test to other actions. Recent Supreme Court decisions, however, suggest that the Court is adopting a less categorical approach.[87]

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84. In Otero v. Mesa County Valley School Dist. No. 51, 408 F. Supp. 162 (D. Col. 1975) (memorandum opinion), the district judge observed that:

> [I]f the expert testimony proved anything, it proved that educational theory is not an exact science, and an expert can be found who will testify to almost anything. Listening to these experts causes one to conclude that if psychiatrists' disagreements are to be compared to differences between educators, psychiatrists are almost of a single mind.

Id. at 164. Federal courts, however, have not refrained from issuing far-reaching remedial orders to reform other public institutions. See Taylor v. Perini, 413 F. Supp. 189, 189 (N.D. Ohio 1976).

85. For a collection of essays on educational policies and judicial decision-making see R. RIST & R. ANSON, EDUCATION, SOCIAL SCIENCE AND THE JUDICIAL PROCESS (1977).

86. *Cf.* Guadalupe Org., Inc. v. Tempe Elem. School Dist. No. 3, 587 F.2d 1022, 1027 (9th Cir. 1978).

87. An intermediate level of review is available for classifications based upon gender. *See, e.g.,* Caban v. Mohammed, 441 U.S. 380, 391 (1979) (New York law permitting unwed mother but not unwed father to block adoption of their child by withholding consent violates Equal Protection Clause because it bears no substantial relation to any important state interest); Orr v. Orr, 440 U.S. 268, 278-83 (1979) (Alabama statutory scheme imposing alimony requirements on husbands but not wives violates Equal Protection Clause); Craig v. Boren, 429 U.S. 190, 210 (1976) (statutory gender classification prohibiting sale of 3.2 percent beer to males under twenty-one and to females under eighteen violates Equal Protection Clause because it does not serve important governmental objectives nor is substantially related to achievement of professed objectives). Classifications based upon legitimacy are also subject to an intermediate level of review. *See, e.g.,* Lalli v. Lalli, 439 U.S. 259, 275-76 (1978) (classifications based upon legitimacy invalid under fourteenth amendment if not substantially related to permissible state interests); Trimble v. Gordon, 430 U.S. 762, 766-68 (1977) (Illinois laws allowing illegitimate children to inherit by intestate succession only from their mothers while allowing legitimate children to inherit from both parents violates Equal Protection Clause); Mathews v. Lucas, 427 U.S. 495, 516 (1976) (provision of Social Security Act waiving proof of dependency for legitimate heirs while requiring such proof for illegitimate claimants is constitutionally permissible because it is reasonably related to likelihood of dependency at death).

In resolving whether or not state action is unconstitutional, the Court appears to be using a weighted assessment of several factors: 1) the importance of the interest involved; 2) the degree of infringement upon that right; 3) the invidiousness of the state's classification; and, 4) the legitimacy of the state's interest.[88] Societal and constitutionally important rights are replacing fundamental rights. Suspect classes are being substituted by disadvantaged classes whose disabilities stem from their historically inferior treatment, their political impotency, and their lack of control over the trait upon which the classification is based. The inquiry into the justification for the state's action is being transformed from a question of whether it serves a compelling state interest or whether it is rationally related to a legitimate state interest to whether it furthers a substantial goal and whether the means chosen to achieve that goal are appropriate.

Illustrative of this approach applied to educational issues is the recent Supreme Court case of *Plyler v. Doe.*[89] In *Plyler* the Court reviewed a Texas law which withheld from local school districts state funds that were to be used to educate illegal aliens and which authorized local school districts to deny enrollment of these children in their public schools.[90] The district court struck down the statute holding that the net effect of the law, barring undocumented children from public schools, was not rationally related to the state interest of improving the quality of education.[91]

Using an intermediate level of review, the Supreme Court examined the law in light of the four factors listed above.[92] Writing for the majority, Justice Brennan acknowledged that public education is not a right guaranteed by the Constitution, but argued that "neither is it merely some governmental 'benefit' indistinguishable

88. *See* San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 70 (1973) (Marshall, J., dissenting). In his dissent, Justice Marshall observed the spectrum of standards used by the Court in reviewing alleged violations of the Equal Protection Clause. *See id.* at 70 (Marshall, J., dissenting). Apparently the Ninth Circuit adopts such a variable review. *See* Berkelman v. San Francisco Unified School Dist., 501 F.2d 1264, 1267 (9th Cir. 1974); *see also* Larry P. v. Riles, 495 F. Supp. 926, 985-86 (N.D. Cal. 1979).

89. 457 U.S. 202 (1982).

90. *See id.* at 205; TEX. EDUC. CODE ANN. art. 21.031 (Vernon Supp. 1982-1983).

91. Doe v. Plyler, 458 F. Supp. 569, 589-92 (E.D. Tex. 1978), *aff'd,* 628 F.2d 448 (5th Cir. 1980), *aff'd,* 457 U.S. 202 (1982).

92. *See* Plyler v. Doe, 457 U.S. 202, 223-24 (1982) (Blackmun, J., concurring).

from other forms of social welfare legislation."[93] The majority recognized the fundamental role of education in sustaining the nation's political and cultural heritage. Additionally, the Court recognized a new fundamental function of education: that of maintaining an ordered society through its role as a socializing agent.[94] Apparently assuming that school districts would opt not to admit undocumented children in the absence of state funding, the Court inferred that the practical effect of the statute would be to totally deprive those children of this right.[95]

Justice Brennan stated that the class affected by that denial was part of a disfavored group and that the legislative classification, while not facially invidious, was of the type which "give[s] rise to recurring constitutional difficulties."[96] Language in the opinion also suggests that the Court attached importance to the fact that the classification affected a minority group which was held in *low esteem* by the majority of citizens.[97] In sum, the Court observed that the Texas law imposed "a lifetime hardship on *a discrete class of children not accountable for their disabling status.*"[98] Given the importance of the right, the degree of intrusiveness of the state's action, and the invidiousness of the classification, the Court concluded that the state failed to justify its action by showing that it furthered substantial state interests or that this group was an appropriate target to be burdened in order to achieve those goals.[99]

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93. *Id.* at 221.

94. *See id.* at 222 n. 20. The Court stated that "the significance of education to our society is not limited to its political and cultural fruits. The public schools are an important socializing institution, imparting those shared values through which social order and stability are maintained." *Id.* at 222 n.20.

95. *See id.* at 222. The school district involved in this suit did not actually prohibit undocumented children from attending its schools, but required them to pay tuition, which arguably, would have the same effect as an absolute bar to admission. *See id.* at 206.

96. *Id.* at 217.

97. *See id.* at 222. The Court stated that "by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority." *Id.* at 222.

98. *Id.* at 223 (emphasis added). Two of the justices concurring in the opinion also commented on the overall unfairness of the classification. Justice Blackmun argued that the state action involved forced undocumented children into being members of a permanent underclass. *See id.* at 234 (Blackmun, J., concurring). Justice Powell further observed that the classification effectively punished innocent children because of their parents' violations of immigration laws. *See id.* at 238-39 (Powell, J., concurring).

99. *See id.* at 224-30. The state argued that the statute was designed to discourage illegal immigration, to avoid a drain on the state's purse, and to preserve resources for its

An application of this type of analysis to state action which prohibits remedial language instruction or which fails to provide any assistance should culminate in the finding of a constitutional violation. The right involved is the same "important" right the Court discussed in *Plyler.* The degree of infringement is comparable to that involved in *Plyler* as well. English-only instruction effectively denies non-English-speaking children a meaningful education in the same way that terminating state funding for the education of undocumented children induces local districts to choose the permissible route to closing their doors to them.[100] Linguistic minorities also are members of a disfavored group, who are not responsible for their disabilities; moreover, the low esteem in which they are held by the majority stems from the higher value that is placed on assimilation as opposed to cultural pluralism.

Given this assessment, it is doubtful that the state's interests in fiscal restraint, local autonomy, and a homogenous society justify burdening this group in order to achieve those goals. Failure to provide bilingual/bicultural education, however, may not amount to a constitutional violation under this analytical approach. If some remedial assistance is offered, the degree of infringement is correspondingly less and courts may abstain from interfering.

D. *The Remedy*

It may be argued that the protection now afforded linguistic minorities by federal statutes diminishes the significance of establishing a constitutional violation. While the Equal Educational Opportunities Act[101] requires that affirmative steps be taken to alleviate language barriers, these steps may not be affirmative strides. A constitutional violation, on the other hand, allows the court to exercise its broad, equitable powers to eliminate the evil "root and branch."[102] Thus, while federal law may make ESL programs avail-

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lawful residents. The Court responded that the law would not deter illegal immigration since undocumented workers did not come to the United States in search of an education and that the record did not show that money spent on the education of undocumented children diminished the quality of education or that the overall quality of education would be improved as a result of any savings generated by their exclusion. *See id.* at 230.

100. *See* Plyler v. Doe, 457 U.S. 202, 221-22 (1982).

101. 20 U.S.C. § 1703(f)(1976).

102. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 12 (1971); Green v. County School Bd., 391 U.S. 430, 437-38 (1968). The harm could be eradicated by exempt-

able to linguistic minorities, judicial relief may afford them bilingual/bicultural education.[103] Moreover, a Title VI violation arguably requires a showing that a significant number of children are affected, whereas one child of limited English proficiency may be entitled to such a bilingual/bicultural program under the Constitution.[104]

Recently, however, the Supreme Court limited a court's remedial authority in desegregation cases to redressing only the incremental segregative effect which a school district's actions had on the racial distribution of students.[105] In other words, in formulating a remedy courts must ask, "but for the constitutional violations, would the school district reflect this degree of integration?" Translated to the remedial language context, the question becomes, "but for the unconstitutional omissions, would bilingual/bicultural education be a part of the curriculum?" If the answer is negative, then perhaps neither federal law nor the Constitution require such programs.[106]

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ing non-English-speaking students from compulsory attendance laws as well. *See* Grubb, *Breaking the Language Barrier: The Right to Bilingual Education,* 9 HARV. C.R.—C.L. L. REV. 52, 87-92 (1974).

103. *But see* Keyes v. School Dist. No. 1, 521 F.2d 465, 481-82 (10th Cir. 1975) (court order imposing bilingual/bicultural program oversteps boundary of its remedial powers).

104. *See* Otero v. Mesa County Valley School Dist. No. 51, 408 F. Supp. 162, 171 (D. Col. 1975). *But see* Comment, *The Legal Status of Bilingual Education in America's Public Schools: Testing Ground for a Statutory and Constitutional Interpretation of Equal Protection,* 17 DUQ. L. REV. 473, 493 n. 144 (1979) (courts will read a significant number requirement into constitutional right).

105. *See* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977); *see also* Keyes v. School Dist. No. 1, 413 U.S. 189, 250 (1973) (Powell, J., concurring in part, dissenting in part).

106. *See* Comment, *Bilingual Education and Desegregation,* 127 U. PA. L. REV. 1564, 1585-86 (1979). The author argues that if the Constitution requires some type of remedial language program it may also require that assignment to the program's classes be non-discriminatory. Opening the program to all students on a voluntary basis and providing reliable exit criteria to insure that it does not become a dead-end track may suffice. *See id.* The Fifth Circuit has held that language grouping per se is unobjectionable, even in school districts with a past history of discrimination since the benefits of such a practice might outweigh the adverse effects of such segregation. *See* Castaneda v. Pickard, 648 F.2d 989, 998 (5th Cir. 1981). The court, however, warned that care must be taken, particularly in those districts with a history of past discriminatory treatment, to insure that any labeling does not confuse a low level of English proficiency with a low level of intelligence, thereby stigmatizing students of limited English proficiency as inferior on the basis of their ethnic background. *See id.* at 998; *see also* Morales v. Shannon, 516 F.2d 411, 414 (5th Cir. 1975) (ability groupings not unconstitutional per se).

IV. TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 AND REMEDIAL LANGUAGE PROGRAMS

Title VI of the Civil Rights Act[107] prohibits any program or activity receiving federal financial assistance from discriminating on the basis of race, color, or national origin.[108] Unlike a constitutional violation which clearly necessitates a showing of discriminatory intent, a Title VI violation *may* be established by showing that the state action in question produced discriminatory effects. In interpreting federal administrative regulations promulgated by the Department of Health Education and Welfare (HEW) pursuant to section 602 of the Civil Rights Act, the Supreme Court in *Lau v. Nichols*[109] stated that "[d]iscrimination is barred which has that *effect* even though no purposeful design is present . . . ."[110]

The Court's holding in *Regents of the University of California v. Bakke*[111] that the scope of Title VI is co-extensive with that of the Constitution, however, may have overruled *sub silentio Lau*'s discriminatory effects test[112] by requiring a showing of discriminatory intent for Title VI violations.[113] Arguably, the *Lau* Court made an implicit finding of intent using a less refined intermediate standard of review. The plaintiffs in *Lau* were Chinese-speaking students in San Francisco who were members of a race which bore scars from decades of discriminatory treatment.[114] Additionally, the San Fran-

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107. 42 U.S.C. § 2000d (1976).

108. Since most states and school districts receive federal assistance, establishing a Title VI violation would be an effective incentive for discontinuing discriminatory practices.

109. 414 U.S. 563 (1974).

110. *Id.* at 568 (emphasis in original).

111. 438 U.S. 265, 287, 340 (1978).

112. *See* Margulies, *Bilingual Education, Remedial Language Instruction, Title VI and Proof of Discriminatory Purpose: A Suggested Approach,* 17 COLUM. J. L. & SOC. PROBS. 99, 128-30 (1981); Comment, *Bilingual Education and Desegregation,* 127 U. PA. L. REV. 1564, 1576 (1979). *But see* Guadalupe Org., Inc. v. Tempe Elem. School Dist. No. 3, 587 F.2d 1022, 1026 n.2 (9th Cir. 1978); Larry P. v. Riles, 495 F. Supp. 926, 986 (N.D. Cal. 1979).

113. *See* Castaneda v. Pickard, 648 F.2d 989, 1007 (5th Cir. 1981) (discriminatory purpose must be shown to establish violation of Title VI and although school district's remedial language program may have been deficient there was no evidence of intentional discrimination); *see also* Regents of the University of California v. Bakke, 438 U.S. 265, 287, 340 (1978) (Title VI proscribes only those racial classifications violative of Equal Protection Clause). Prior to *Bakke,* the Tenth Circuit held that a school district's remedial language program violated Title VI because it had the effect of discrimination even though, arguably, no purposeful design was present. *See* Serna v. Portales Mun. Schools, 499 F.2d 1147, 1154 (10th Cir. 1974).

114. *See* Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886).

cisco public schools required English proficiency as a pre-requisite for graduation yet provided *no* remedial instruction. In light of these facts, the Court determined that the state and school system's actions were "earmarks of the discrimination banned by the [federal] regulations."[115] Such circumstances could constitute the type of *intentional* discrimination barred by the fourteenth amendment under an intermediate level of review as well. On the other hand, after concluding that HEW had reasonably exercised its authority under the Civil Rights Act,[116] the Court attached great significance to the rules and guidelines promulgated by HEW which seem to focus on the *effects* of state action when establishing liability.[117]

If state action which merely results in a disproportionate impact upon linguistic minorities suffices to violate Title VI, must the action concern a situation as egregious as that of *Lau?* Justice Blackmun, in his concurring opinion, emphasized the magnitude of the impact cautioning that "for me numbers are at the heart of this case."[118] Consequently, some courts have attached significance to the number of limited English proficient students who are affected when examining whether or not Title VI has been violated.[119] Other courts, however, have attached less importance to the number of linguistic minorities involved.[120] In *Rios,* for example, the court found a Title VI violation where only seven percent of the school's students were of Hispanic origin.[121]

An additional question is whether Title VI is violated only when

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115. Lau v. Nichols, 414 U.S. 563, 568 (1974).

116. *See id.* at 567-69.

117. *See id.* at 566-67.

118. *Id.* at 572 (Blackmun, J., concurring).

119. *See* Serna v. Portales Mun. Schools, 499 F.2d 1147, 1154 (10th Cir. 1974) (violation of Title VI found where substantial group deprived of meaningful education); Otero v. Mesa County Valley School Dist. No. 51, 408 F. Supp. 162, 165, 171 (D. Colo. 1975) (no violation of Title VI found where only about eight percent of students were of limited English proficiency and school district was making more than token effort to remedy their deficiencies).

120. *See* Heavy Runner v. Bremner, 522 F. Supp. 162, 164-65 (D. Mont. 1981). The court refused to grant a summary judgment motion against plaintiffs alleging a Title VI violation. In dicta, the court asserted that the Equal Educational Opportunities Act and the Civil Rights Act mandate remedial assistance regardless of the number of children affected by the state action. *See id.* at 164-65. However, the court requested the parties to submit further evidence on the number of students having limited proficiency in English and the degree of their impediment. *See id.* at 164-65.

121. *See* Rios v. Read, 480 F. Supp. 14, 23-24 (E.D.N.Y. 1978); *see also* Cintron v. Brentwood Union Free School Dist., 455 F. Supp. 57, 59, 64 (E.D.N.Y. 1978) (school dis-

no remedial assistance is offered or whether limited remedial programs will constitute a violation of Title VI. The Ninth Circuit in *Guadalupe* refused to find a statutory violation since the school district provided remedial instruction "intended to assure that [English deficient students] derived equivalent value from [the school's] existing programs."[122] Comparatively, the Tenth Circuit in *Serna v. Portales Municipal Schools*[123] determined that placing Spanish-speaking children in all English classes deprived them of their statutory rights.[124] One court, however, has found a statutory violation even when school districts offered some remedial assistance,[125] and in *Cintron v. Brentwood Union Free School District,*[126] the district court held that the school district was in violation of Title VI although it offered a bilingual program in grades one through five and ESL instruction in the post-elementary grades.[127]

If narrowly interpreted, *Lau* could require merely that school districts offer some type of remedial language assistance if substantial numbers of limited English proficient students are enrolled in their schools. The *Lau* Court refrained from ordering a specific remedy suggesting instead that "[t]eaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another. There may be others."[128] The administrative regulations to which the court de-

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trict's remedial program violated Title VI where approximately twenty percent of students were of Hispanic origin.)

122. Guadalupe Org., Inc. v. Tempe Elem. School Dist. No. 3, 587 F.2d 1022, 1028 n.5 (9th Cir. 1978). The appellate court also noted that there was no evidence that the remedial program offered was the type of dead-end track referred to in *Lau. See id.* at 1029-30; *see also* Castaneda v. Pickard, 648 F.2d 989, 1006-09 (5th Cir. 1982) (*Lau* does not dictate type of remedial assistance required and school district's programs, while deficient in some areas, held to be legally sufficient.)

123. 499 F.2d 1147 (10th Cir. 1974).

124. There was evidence in the record, however, that the school district did offer a bilingual program in the first grade and ESL instruction for English deficient students in the second through sixth grades. *See* Serna v. Portales Mun. Schools, 351 F. Supp. 1279, 1281 (D.N.M. 1972). The fact that the school never applied for federal funds nor accepted state funds for bilingual programs, even though undisputed evidence showed that Spanish surnamed students did not reach the achievement levels attained by their Anglo counterparts, may have influenced the appellate court. *See* Serna v. Portales Mun. Schools, 499 F.2d 1147, 1149 (10th Cir. 1974).

125. *See* Rios v. Read, 480 F. Supp. 14, 18-20 (E.D. N.Y. 1978).

126. 455 F. Supp. 57 (E.D.N.Y. 1978).

127. *See id.* at 64.

128. Lau v. Nichols, 414 U.S. 563, 565 (1974).

ferred in finding an effects-oriented violation[129] also did not specify the type of remedial program required.[130] Thus, Title VI itself may not mandate bilingual/bicultural programs.[131]

After the *Lau* decision HEW issued a new set of guidelines, based on the recommendations of a special Task Force, to measure a school district's compliance with Title VI.[132] These guidelines, still in effect,[133] require some type of remedial instruction at all grade levels if there are twenty or more students with limited English proficiency in the same language group. The *Lau* Guidelines allow school districts to employ either ESL or High Intensive Language Training Programs in the secondary schools and permit three variations of bilingual programs at the elementary and intermediate levels: multilingual/multicultural education, bilingual/bicultural education, and transitional bilingual/bicultural education.[134] The guidelines also specify identification and evaluation procedures, teacher qualifications, and the appropriate racial mix for classes in which verbalization is not essential.

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129. *See id.* at 570 (Stewart, J., concurring). Justice Stewart's concurrence, in which Chief Justice Burger and Justice Blackmun joined, questioned whether Title VI itself would render illegal the expenditure of federal funds on the San Francisco schools without reference to the regulations and guidelines. *See id.* at 570.

130. *See* 45 C.F.R. § 80(3) (1980); 35 Fed. Reg. 11,595 (1970).

131. *See* Comment, *Cultural Pluralism,* 13 HARV. C.R.—C.L. L. REV. 133, 153-54 (1978). Since no specific remedial program is required under *Lau,* school districts could possibly operate token programs to avert the termination of federal funds. One commentator, therefore, argues that a strict scrutiny standard of review should be applied to vindicate these statutory rights as well. *See* Comment, *The Legal Status of Bilingual Education in America's Public Schools: Testing Ground for a Statutory and Constitutional Interpretation of Equal Protection,* 17 DUQ. L. REV. 473, 501 (1979). Courts, however, might order bilingual/bicultural programs upon finding a statutory violation. Acting pursuant to its equitable powers under Title VI, the Tenth Circuit in *Serna* affirmed such an order by the district court. *See* Serna v. Portales Mun. Schools, 499 F.2d 1147, 1154 (10th Cir. 1974). Whether equitable powers do exist to remedy statutory violations to the same extent they do to remedy constitutional violations, however, is open to question. *See* Guadalupe Org., Inc. v. Tempe Elem. School Dist. No. 3, 587 F.2d 1022, 1028 n.4 (9th Cir. 1978).

132. *See* OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, TASK FORCE FINDING SPECIFYING REMEDIES FOR ELIMINATING PAST EDUCATIONAL PRACTICES RULES UNLAWFUL UNDER LAU V. NICHOLS (1975).

133. The Department of Education has not published any proposed or final rules to replace the *Lau* Guidelines. Letter from Harry M. Singleton, Asssistant Secretary for Civil Rights, United States Department of Education, to Debra Dobray (March 1, 1983) (discussing replacement of *Lau* Guidelines).

134. For a more thorough discussion of the *Lau* Guidelines see Rotberg, *Some Legal and Research Considerations in Establishing Federal Policy in Bilingual Education,* 52 HARV. EDUC. REV. 149 (1982).

On the whole, the *Lau* Guidelines represent a rather ambitious definition of a school district's obligations under Title VI. The question remains whether they will be granted the same deference granted to the administrative regulations by the Supreme Court in *Lau.* The *Lau* Guidelines were not promulgated pursuant to the Administrative Procedure Act and therefore lack an administrative rule's force of law. While the *Lau* Court relied in part on similar guidelines, Justice Stewart in his concurring opinion observed that such guidelines must be "reasonably related to the purpose of the enabling legislation."[135] Perhaps, therefore, these guidelines exceed the authority of section 601 of the Civil Rights Act.

Concluding that the *Lau* Guidelines were not the sort of administrative document to which courts customarily give great weight, the Fifth Circuit in *Castaneda v. Pickard*[136] refused to find a school district's remedial language program violative of Title VI even though it varied from the guidelines' requisites.[137] Other courts, however, have apparently elevated the guidelines to the status of statutory obligations.[138] In *Cintron* the district court held that the school district's remedial language program and its proposed program did not comport with the guidelines in: 1) identifying English deficient students; 2) monitoring their progress through the use of recognized tests; 3) training bilingual teachers and aides; 4) providing a method for transferring students out of the program when the necesary level of English proficiency was attained; 5) adequately addressing the cultural component of the program; and, 6) allowing linguistic minorities to be isolated into ethnically identifiable classes. Consequently, the court found the district to be in violation of Title VI and directed the school officials to submit a plan for complying with

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135. Lau V. Nichols, 414 U.S. 563, 571 (1974) (Stewart, J., concurring). The Court relied on guidelines set forth in 35 Fed. Reg. 11,595 (1970).

136. 648 F.2d 989 (5th Cir. 1981).

137. *See id.* at 1007.

138. *See* Larry P. v. Riles, 495 F. Supp. 926, 962-68 (N.D. Cal. 1979) (guidelines interpreting requirements of Title VI and Education for All Handicapped Children Act regarding placement criteria for special classes merit strict enforcement); Rios v. Read, 480 F. Supp. 14, 23 (E.D.N.Y. 1978) (school district whose remedial program did not comply with *Lau* Guidelines was in violation of Title VI). Professor van Geel, in evaluating the right of speakers of Black English to special training in Standard English, argues that if the Department of Education issued a rule pursuant to Title VI requiring such a program, courts would probably sustain it. *See* van Geel, *The Right To Be Taught Standard English: Exploring the Implications of Lau v. Nichols for Black Americans,* 25 SYRACUSE L. REV. 863, 900-05 (1974).

the guidelines.[139]

Even if courts defer to the *Lau* Guidelines, ESL programs may be utilized since the guidelines suggest that exceptions will be made to the bilingual/bicultural requirements if a school district can justify its approach. How rigorous an evaluation will courts be willing to make of such remedial programs, which differ from the guidelines, in determining their compliance with Title VI? Some courts are reluctant to hold that only a certain type of remedial language program is appropriate, choosing instead to approve the good faith efforts of educators whose programs meet the threshold test of not being a permanent dead-end track.[140] Other courts have critically examined a school district's methods in terms of its *effectiveness.*[141] In conclusion, even if Title VI may be violated without the presence of a discriminatory intent, under both federal court decisions and agency regulations, remedial relief may be appropriate only when a significant number of limited English-speaking students are denied an equal opportunity. Further, that remedial relief may not be defined as bilingual/bicultural education.

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139. *See* Cintron v. Brentwood Union Free School Dist., 455 F. Supp. 57, 64 (E.D.N.Y. 1978).

140. *See* Guadalupe Org., Inc. v. Tempe Elem. School Dist. No. 3, 587 F.2d 1022, 1029-30 (9th Cir. 1978); Keyes v. School Dist. No. 1, 521 F.2d 465, 482-83 (10th Cir. 1975); Otero v. Mesa Valley School Dist. No. 51, 408 F. Supp. 162, 171 (D. Col. 1975); *cf.* Heavy Runner v. Bremner, 522 F. Supp. 162, 165 (D. Mont. 1981) (court suggested as alternative to court determination, that parties strive to develop remediation program suitable to both school district officials and parents of linguistically handicapped children); Deerfield Hutterian Assoc. v. Ipswich Bd. of Educ., 468 F. Supp. 1219, 1229 (D.S.D. 1979) (offer to provide remedial program fulfilled school district's obligations).

141. *See* Serna v. Portales Mun. Schools, 499 F.2d 1147, 1151, 1154 (10th Cir. 1974) (district's program which offered Title VI program for preschool children, thirty minutes per day Spanish instruction for children in first four grades, teaching aide at Junior High School level to service linguistically handicapped children, and ethnics studies course in high school amounts to token effort); *see also* Rios v. Read, 480 F. Supp. 14, 23 (E.D.N.Y. 1978); Cintron v. Brentwood Union Free School Dist., 455 F. Supp. 57, 63 (E.D.N.Y. 1978); Aspira of New York, Inc. v. Board of Educ., 423 F. Supp. 647, 655 (S.D.N.Y. 1976). The parties in *Aspira* previously had joined in a consent decree which provided for a comprehensive bilingual/bicultural program. Subsequently, the district court, critically scrutinizing the school board's efforts to implement the order, found them in contempt and directed them to focus their efforts on providing an effective remediation program. *See* Aspira of New York, Inc. v. Board of Educ., 423 F. Supp. 647, 655 (S.D.N.Y. 1976); Comment, *The Legal Status of Bilingual Education in America's Public Schools: Testing Ground for a Statutory and Constitutional Interpretation of Equal Protection,* 17 DUQ. L. REV. 473, 486-87 (1979).

V. The Equal Educational Opportunities Act and Remedial Language Instruction

The Equal Educational Opportunities Act of 1974 (EEOA) prohibits states from denying equal educational opportunities to individuals on account of race, color, sex, or national origin by failing "to take appropriate action to overcome language barriers that impede equal participation by students in it's instructional programs."[142] Thus, the EEOA's protection extends to all individuals and not just to groups of linguistic minorities. Arguably, the EEOA as a whole proscribes conduct which is permissible under the Constitution[143] and potentially affords greater relief to students of limited English proficiency. The EEOA does not appear to require proof of discriminatory intent as a necessary element to establish a violation[144]. Moreover, the statutory prohibition encompasses denials of equal opportunity on account of race; therefore, a suspect class need not be the target of the state action. Language barriers closely associated with race should merit remedial action.[145] In *Martin Luther King Jr. Elementary School Children v. Michigan Board of Education,*[146] the district court held that the EEOA extends protection to students who speak "[b]lack English" reasoning that the definition of language barriers was not limited to foreign lan-

142. Equal Educational Opportunities Act, 20 U.S.C. § 1703(f) (1976).

143. *Compare* United States v. Hinds County School Bd., 560 F.2d 619, 623 (5th Cir. 1977) (congressional declaration of policy goes beyond rights guaranteed to school children under fourteenth amendment in prohibiting student assignment on basis of sex) *with* Castaneda v. Pickard, 648 F.2d 989, 1000-01 (5th Cir. 1981) (discriminatory conduct in employment practices proscribed by EEOA is co-extensive with fourteenth amendment and does not encompass conduct which might violate Title VI).

144. *See* Castaneda v. Pickard, 648 F.2d 989, 1007-08 (5th Cir. 1981); Martin Luther King Jr. Elem. School Children v. Michigan Bd. of Educ., 463 F. Supp. 1027, 1031 (E.D. Mich. 1978).

145. In *Heavy Runner v. Bremner*, the court denied the defendant's motion for summary judgment and held that Indian students who alleged that they had limited proficiency in English may exhibit the type of language barrier referred to in the statute since the native Blackfeet language was primarily or partially spoken in their homes by various family members. In denying the motion, the court also relied on the school district's applications for federal grants which stated that over seventy percent of the Indian children tested were deficient in English. *See* Heavy Runner v. Bremmer, 522 F. Supp. 162, 163 (D. Mont. 1981) (memorandum opinion).

146. 451 F. Supp. 1324, 1335 (E.D. Mich. 1978), *decided sub nom.* Martin Luther King Jr. Elem. School Children v. Ann Arbor School Dist. Bd., 473 F. Supp. 1371 (E.D. Mich. 1979).

guage barriers.[147] Subsequently, the court found that such students faced a language barrier because school officials failed to recognize the black vernacular.[148] In finding a denial of equal opportunity, the court relied on expert testimony that the failure to recognize the dialect caused children to feel ashamed and impeded their learning since black English was accepted in their community.[149]

Prevailing on the liability issue may be easier for plaintiffs under the EEOA than under the Constitution or Title VI. Will the remedial relief ordered pursuant to the EEOA, however, be as expansive as that available under a court's equity jurisdiction to remedy constitutional violations or under Title VI if the court follows the *Lau* Guidelines? In approving the school district's remedial program the court in *Guadalupe* held that the appropriate action required of the state under the EEOA need not include bilingual programs staffed with bilingual teachers nor specific programs to address the cultural needs of linguistic minorities.[150] Likewise, in *Deerfield Hutterian Association v. Ipswich Board of Education*,[151] the court found the affirmative steps taken by the school district to be sufficient to satisfy the statutory requirements of the EEOA. The plaintiffs in *Deerfield* were Hutterite children who spoke an oral language, Tyrolean German. For religious reasons, the Hutterites discouraged association with non-Hutterites; therefore, few Hutterite children attended school after education was no longer compulsory. As a result, few qualified teachers were available to conduct bilingual education programs. Faced with this difficult situation, the Ipswich Board of Education offered to do whatever was necessary to establish a bilingual/bicultural program in the town's schools. The Hutterites, however, refused to allow their children to leave the colony to attend the

147. *Id.* at 1332. Although this definition of a language barrier may be expansive, the court subsequently warned that:

> Section 1703(f) cannot be used as a vehicle to attack all the problems engendered by poverty and racial discrimination even if these are problems with which the plaintiffs are confronted. This court does not intend to permit an expansion of the duty created by § 1703(f) to include elimination of what plaintiffs identify as cultural and economic barriers.

Martin Luther King Jr. Elem. School Children v. Michigan Bd. of Educ., 463 F. Supp. 1027, 1030 (E.D. Mich. 1978).

148. *See id.* at 1375-76.

149. *See id.* at 1375-77.

150. *See* Guadalupe Org., Inc. v. Tempe Elem. School Dist. No. 3, 587 F.2d 1022, 1030 (9th Cir. 1978).

151. 468 F. Supp. 1219, 1232-33 (D.S.D. 1979).

schools, arguing that their children would suffer psychological damage from being exposed to a world in which their religious beliefs would be questioned. The court held that the school board's good-faith overture satisfied the appropriate action mandates of the EEOA.[152] Conversely, in holding that the school district's remedial programs violated the EEOA, the courts in *Rios* and *Cintron* defined appropriate action to include bilingual education.[153] The *Rios* court, reading the EEOA in conjunction with Title VI, also noted that "though not expressly provided by statute, the legislative history suggests that the program must also be bicultural as a psychological support to the subject matter instruction."[154] The *Cintron* court determined that the deficiencies of the district's remedial program constituted a perversion of the purpose of a bilingual program and a misuse of funds.[155]

The duties of a school district under the EEOA seem unclear. The decision in *Martin Luther King* is particularly troublesome for several reasons.[156] First, the language barrier did not stem from a lack of understandable communication between the students and teachers. Rather, the court found that the barrier existed because "in the process of attempting to teach the students how to speak standard English the students are made somehow to feel inferior and are thereby turned off from the learning process."[157] Such a conclusion requires substantial reliance on controversial psychological and sociological data, precarious grounds from which to derive a violation of federal law. Second, the school district took affirmative steps to remedy the problem. Teachers used reading materials specially designed to assist speakers of black English to learn standard English and frequently offered tailored programs in oral reading

152. *See id.* at 1233..

153. *See* Rios v. Read, 480 F. Supp. 14, 22-23 (E.D.N.Y. 1978); Cintron v. Brentwood Union Free School Dist., 455 F. Supp. 57, 64 (E.D.N.Y. 1978).

154. *See* Rios v. Read, 480 F. Supp. 14, 22 (E.D.N.Y. 1978).

155. *See* Cintron v. Brentwood Union Free School Dist., 455 F. Supp. 57, 63 (E.D.N.Y. 1978).

156. *See* Martin Luther King Jr. Elem. School Children v. Ann Arbor School Dist. Bd., 473 F. Supp. 1371, 1373 (E.D. Mich. 1979). The plaintiffs in *Martin Luther King* did not seek dual language instruction in black English and standard English for speakers of the black vernacular. They only requested that the school district provide remedial assistance to these students. *See id.* at 1373.

157. *Id.* at 1379.

and phonics as well.[158] Third, there was no evidence that the "barrier" caused the children's reading problem.[159] The evidence inferred that, while it may have been the cause, "absences from class, classroom misbehavior, learning disabilities, and emotional impairments" may have contributed to the problem as well.[160] Admitting all these facts, the court nevertheless concluded that the school district's failure to provide leadership to help its teachers in appreciating "black English" as a home and community language of many black students constituted a violation of the EEOA.[161]

Rather than define the appropriate action required, the court requested that the district devise a remedial plan, which it subsequently approved in virtually all respects.[162] The court only amended it to require that some evaluation be made of the progress of the students' reading skills in order to ascertain the effectiveness of the teachers' training program.[163]

The Fifth Circuit embraces an approach that is more deferential to local school authorities. In *Castaneda* the court expressed a reluctance to interfere in the decisions of state and local agencies as to what type of remedial program would satisfy the "appropriate action" criteria of the EEOA.[164] The court interpreted the EEOA in conjunction with federal laws which provide financial assistance to school districts for developing and implementing bilingual programs. It concluded that the general thrust of this legislation was to grant state and local authorities a substantial amount of latitude in choosing the appropriate programs and techniques.[165] Nevertheless, forced to evaluate the sufficiency of a school district's remedial language program, the court enunciated a test which posed three key questions: 1) is the program premised on a legitimate educational theory? 2) is the program, as implemented, reasonably calculated to effectuate that theory? and, 3) after an adequate trial period, is the

158. *See id.* at 1380.

159. *See id.* at 1382.

160. *See id.* at 1391.

161. *See id.* at 1383.

162. *See id.* at 1390. Experts at the trials suggested several remedial approaches but the court determined that the solution was within the school district's prerogative. *See id.* at 1377.

163. *See id.* at 1390.

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

165. *See id.* at 1008-09.

program actually overcoming the language barriers?[166]

As applied to the school district involved in *Castaneda,* the court determined that the remedy adopted, bilingual education,[167] was recognized as being a sound approach to language remediation.[168] In examining that theory as implemented by the district,[169] the court dismissed the plaintiff's contention that the program over-emphasized English skills in the primary grades to the neglect of other areas of the curriculum. It observed that even if this assertion was valid, the choice of teaching all subjects either simultaneously or sequentially was within the district's discretion as long as students with limited English proficiency reached parity with their English speaking counterparts within a reasonable amount of time.[170] The court, however, directed the district to administer appropriate tests to these students in their own language to measure their progress in areas of the curriculum other than English.[171] The court also noted that some of the remedial language teachers employed by the district possessed a limited command of Spanish, even though they completed a special course conducted by the state education agency.[172] Declaring competent teachers to be an essential element of any language remediation program, the court instructed the district to improve the qualifications of its bilingual teachers.[173] After ordering these changes in the school district's program, the Fifth Circuit declined to evaluate the overall effectiveness of the program to determine whether it fulfilled the requirements of the statute. The court observed that:

> [S]uch an inquiry may become proper after the inadequacies in the implementation of the RISD's program, which we have identified,

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166. *See id.* at 1009-10.

167. There was no mention by the court of a cultural element in the school district's program. *See id.* at 1008-10.

168. *See id.* at 1010-11.

169. *See id.* at 1005. The school district offered bilingual education in grades kindergarten through three, English classes with Spanish-speaking aides in grades four and five, and special diagnostic centers in grades four through twelve to identify limited English-speaking students and address their remedial needs. Additionally, the district offered ESL and special tutoring to students in all grades. *See id.* at 1005.

170. *See id.* at 1010-11.

171. *See id.* at 1013-14.

172. *See id.* at 1012-13.

173. *See id.* at 1013. The court also noted that while Spanish-speaking aides might be an "appropriate interim measure" until the inadequacies of the teachers were addressed, they could not alleviate the need for qualified bilingual instructors. *See id.* at 1013.

> have been corrected and the program has operated with the benefit of these improvements for a period of time sufficient to expect meaningful results.[174]

In sum, the degree of appropriate action which courts demand from school districts varies from requiring them to make good faith efforts, to requiring them to provide effective bilingual programs, to requiring them to address language difficulties for which they *might* have been *a* contributing factor. While the Fifth Circuit purported to develop an analytical inquiry for examining EEOA claims, arguably it left open more questions than it asked or answered.[175] While the *Castaneda* opinion suggests that the court will examine the effectiveness of remedial language programs,[176] precisely how the court will make that ultimate determination remains a mystery. Although the protection of EEOA arguably extends to *a* linguistically *handicapped* child, that child's entitlement under the EEOA may be limited depending on whether the child has been the object of discrimination.

VI. State Statutes and Remedial Language Programs

Several state statutes now address the problems of linguistic minorities. The rights of students of limited English proficiency under these laws may or may not exceed the guarantees afforded by the federal Constitution and federal laws, depending on the individual state's enactment.

Some such statutes are permissive in nature. Several states, while requiring instruction in English, permit instruction in another language as in order to assist students with limited English proficiency.[177] Other state statutes, while not mandating remedial programs, empower the state education agency to develop such pro-

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174. *Id.* at 1114-15. The court did not attempt to delineate an appropriate measure to use in eventually determining the program's effectiveness. It did preclude the possibility of exclusive reliance on achievement test scores since a low score could reflect the existence of obstacles to learning other than language. *See id.* at 1115 n.14.

175. *See id.* at 1009-10. The Fifth Circuit has suggested that a less rigorous definition of appropriate action may be applied to a school district's obligations to transfer students or to migrant students. *See id.* at 1005-06 n.8.

176. *See id.* at 1009-11.

177. *See* Idaho Code § 33-1601 (1981); La. Rev. Stat. Ann. § 17:272-17:273 (West Supp. 1982); Minn. Stat. Ann. § 126.07 (West Supp. 1983); N.H. Rev. Stat. Ann. § 189.19 (Supp. 1981); Wash. Rev. Code Ann. § 28A.05.015 (1982).

grams.[178] Still others either outline regulations for such programs or authorize the state education agency to promulgate such guidelines in order that school districts might qualify for state funds.[179]

On the other hand, several states require some form of remedial assistance. Some statutes do not specify a particular type of program[180] or delegate the responsibility for establishing requirements to the state education agency so that school districts who operate programs in accordance with those requirements may obtain grants.[181] Other statutes, however, require particular types of remedial programs when twenty or more students with limited English proficiency are enrolled in a district's schools. In some states the program is limited to three years[182] or until English proficiency is reached, whichever event occurs first,[183] although other statutes allow the students to continue in the program at the discretion of school authorities and with the approval of their parents.[184]

Several states set no time limit on the program.[185] Additionally, Alaska requires a bilingual/bicultural program if there are eight or more students of limited English proficiency in a district's schools,[186] while Wisconsin requires such a program in grades kindergarten through three if there are ten or more such students[187] and California requires one for ten or more students through grade six.[188]

Most of these statutes also make available state funds for the programs[189] and several states define their program to include a cultural

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178. *See* ME. REV. STAT. ANN. tit. 20-A, § 4602 (Supp. 1983) (school board may provide bilingual education program); NEV. REV. STAT. § 389:150 (1979) (program to accomodate needs of American Indians); PA. STAT. ANN. tit. 24, §§ 15-1511, 13-1327 (Purdon Supp. 1983-1984) (provisions allowing development of bilingual education program).

179. ARIZ. REV. STAT. ANN. § 15-705 to - 708 (Supp. 1982); IND. CODE ANN. §§ 20-10.1-5.5-1 to -9 (Burns Supp. 1983); KAN. STAT. ANN. §§ 72-9501 to -9510 (1980); N.Y. EDUC. LAW § 3204(1)-(5) (McKinney 1980 & Supp. 1982-1983).

180. *See* GA. CODE ANN. § 32-609a (1980); OR. REV. STAT. §§ 336.074, 336.079 (1981).

181. *See* COLO. REV. STAT. §§ 22-24-101 to -106 (Supp. 1982); IOWA CODE ANN. § 280.4 (West Supp. 1983-1984); R.I. GEN. LAWS §§ 16-54-1 to -5 (Supp. 1982).

182. *See* N.J. STAT. ANN. §§ 18A:35-18-19 (West Supp. 1983-1984).

183. *See* MICH. COMP. LAWS ANN. §§ 380.1151 to 380.1158 (West Supp. 1982-1983).

184. *See* ILL. ANN. STAT. ch. 122, § 14C-1 to -3 (Smith-Hurd Supp. 1983-1984); MASS. GEN. LAWS ANN. ch. 71A, §2 (West Supp. 1983-1984).

185. *See* CONN. GEN. STAT. ANN. §§ 10-17a—10-17g (West Supp. 1983-1984); N.M. STAT. ANN. § 22-23-1 to -6 (Supp. 1982).

186. *See* ALASKA STAT. § 14.30.400 (1982).

187. WIS. STAT. ANN. § 115.97(2) (West Supp. 1983-84).

188. CAL. EDUC. CODE § 52179 (Deering 1978).

189. *See* ALASKA STAT. § 14.30.410 (1982); CAL. EDUC. CODE § 52177(a) (Deering

component.[190] Statutes may also provide for optional participation by English students in a bilingual program[191] or for participation by English deficient students with English fluent students in courses in which verbalization is not essential, in order to mitigate the segregatory tendencies of remedial language programs.[192] Moreover, in order to guard against the prospect that the program will become a dead-end track, several states allow the parents to retain the right to withdraw their child from the program.[193] Other recurring elements of such statutes[194] include provisions for the following: 1) the certification of bilingual teachers;[195] 2) the identification of eligible students along with criteria for exit from the program;[196] 3) the establishment of parental advisory counsels;[197] 4) the option to offer pre-school and summer programs;[198] and, 5) the cooperation among districts in providing remedial programs.[199]

Supp. 1983); COLO. REV. STAT. § 22-24-106(e) (Supp. 1982); CONN. GEN. STAT. ANN. § 10-17g (Supp. 1983-1984); ILL. ANN. STAT. ch. 122, § 14c-12 (Smith-Hurd Supp. 1983-1984); MASS. GEN. LAWS ANN. ch. 71A, § 8 (West Supp. 1983-1984); N.M. STAT. ANN. § 22-23-6 (1978); WIS. STAT. ANN. § 115.995 (West Supp. 1983-1984).

190. Those states include Alaska, California, Illinois, Massachusetts, New Jersey, New Mexico, and Wisconsin. Connecticut and Michigan allow the cultural component to be optional.

191. *See* WIS. STAT. ANN. §115.97(1) (West Supp. 1982-1983).

192. *See* ILL. ANN. STAT. ch. 122, § 14c-7 (Smith-Hurd Supp. 1983-1984); MASS. GEN. LAWS ANN. ch. 71A, § 5 (West 1978); N.J. STAT. ANN. § 18A:35-20 (West Supp. 1983-1984).

193. CAL. EDUC. CODE § 52173 (Deering Supp. 1983); ILL. ANN. STAT. ch. 122, § 14c-4 (Smith-Hurd Supp. 1983-1984); MICH. COMP. LAWS ANN. § 380.1155 (West Supp. 1982-1983); WIS. STAT. ANN. § 115.96(3) (West Supp. 1983-1984).

194. *See generally* Kobrick, *A Model Act Providing For Transitional Bilingual Education Programs in Public Schools,* 9 HARV. J. ON LEGIS. 260 (1972) (suggestions as to provisions for bilingual education statute, many of which have been incorporated into several states' statutes).

195. *See* CAL. EDUC. CODE § 52166 (Deering Supp. 1983); MASS. GEN. LAWS ANN. ch. 71A, § 6 (West 1978); MICH. COMP. LAWS ANN. § 380.1157 (West Supp. 1982-1983).

196. CAL. EDUC. CODE § 52164 (Deering Supp. 1983); COLO. REV. STAT. 22-24-105 (Supp. 1982); CONN. GEN. STAT. ANN. §§ 10-17b—10-17f (Supp. 1983-1984); MASS. GEN. LAWS ANN. ch. 71A, § 2 (West 1978); MICH. COMP. LAWS ANN. § 380.1157(3) (West Supp. 1982); N.J. STAT. ANN. § 18A:35-17 (West Supp. 1983-1984).

197. *See* CAL. EDUC. CODE § 52176 (Deering Supp. 1983); ILL. ANN. STAT. ch. 122, § 14c-10 (Smith-Hurd Supp. 1983-1984); MICH. COMP. LAWS ANN. § 380.1156 (West Supp. 1982); WIS. STAT. ANN. § 115.98 (West Supp. 1983-1984).

198. *See* ILL. ANN. STAT. ch. 122, § 14c-11 (Smith-Hurd Supp. 1983-1984); MASS. GEN. LAWS ANN. ch. 71A, § 7 (West 1978 & Supp. 1983-1984); WIS. STAT. ANN. § 115.99 (West Supp. 1983-1984).

199. *See* ILL. ANN. STAT. ch. 122, § 14c-5 (Smith-Hurd Supp. 1983-1984); MASS. GEN. LAWS ANN. ch. 71A, § 4 (West Supp. 1982); MICH. COMP. LAWS ANN. §§ 380.1153(4)—

Is there possibly a nexus between state legislation regarding remedial language programs and judicial decisions? The New Mexico statute, which provides for bilingual education, was enactd one year after the Tenth Circuit's endorsement of bilingual education in *Serna.* Comparatively, the Colorado statute, enacted in 1979, allows local school districts great latitude in administering special instruction programs and reflects the conservative approach taken by the courts in *Keyes* and *Otero.* Arizona's statute which makes remedial language programs optional, reflects the conservative approach taken in *Guadalupe* as well. Where courts have issued less definitive statements on the rights of linguistic minorities,[200] their legislatures have also circumvented the issue.[201] Thus, a connection may exist between judicial and legislative activity.[202] The last section of this article will concentrate on the significant interaction that occurred between the courts and the legislature in defining the right to language remediation in Texas.[203]

VII. THE RIGHT TO REMEDIAL LANGUAGE INSTRUCTION IN TEXAS

The needs of Mexican-American students prompted the evolution of the right to remedial language instruction in Texas.[204] In 1969 the legislature repealed a longstanding statute which prohibited in-

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380.1153(5) (West 1978); N.J. STAT. ANN. § 18A:35-21 (West Supp. 1983-1984); WIS. STAT. ANN. § 115.977(2) (West Supp. 1983-1984).

200. *See* Idaho Migrant Council v. Board of Educ., 647 F.2d 69, 70-71 (9th Cir. 1981); Heavy Runner v. Bremner, 522 F. Supp. 162, 164 (D. Mont. 1981); Deerfield Hutterian Assoc. v. Ipswich Bd. of Educ., 468 F. Supp. 1219, 1228-29 (D.S.D. 1979).

201. North Dakota and Montana make no provision for remedial language programs while only Idaho permits such programs. *See* IDAHO CODE § 33-1601 (1981).

202. *But see* Cintron v. Brentwood Union Free School Dist., 455 F. Supp. 57, 63-64 (E.D.N.Y. 1978); Rios v. Read, 480 F. Supp. 14, 20 (E.D.N.Y. 1978). Both courts envisioned a broad federal statutory duty for school districts, yet the New York statute gives preference to the local option alternative and merely provides guidelines for programs to qualify for state funds. *See* N.Y. EDUC. LAW §§ 3204(1)—3204(5) (McKinney 1981).

203. Michigan demonstrates the reverse of the Texas situation in that the court's decision in Martin Luther King Jr. Elem. School Children v. Ann Arbor School Dist. Bd., 473 F. Supp. 1371, 1391 (E.D. Mich. 1979) follows the agressive approach initially taken by the Michigan legislature in 1977 concerning language remediation. *See* MICH. COMP. LAWS ANN. §§ 380.1151—380.1158 (West Supp. 1982).

204. *See generally* J. VEGA, EDUCATION, POLITICS AND BILINGUALISM IN TEXAS (1983) (general discussion of need for remedial education). For a historical background on Mexican-Americans as an identifiable ethnic group see Comment, *Mexican-Americans and the Desegregation of Schools in the Southwest,* 8 HOUS. L. REV. 929 (1971).

struction in a language other than English in the state's schools to permit remedial instruction when it would be educationally advantageous to students.[205] Two years later, as part of a statewide desegregation order, a federal district court directed the Texas Education Agency (TEA) to conduct a study of the educational needs of minority students and to make recommendations for compensatory programs.[206] Subsequently, in 1973 the legislature enacted a law to provide for bilingual/ bicultural education in grades one through three in those school districts which enrolled at least twenty students with limited English speaking ability at any one of those grade levels.[207] This law made state funds available for operational expenses and transportation costs as well.[208] In 1975 the legislature extended this funding to optional programs at the fourth and fifth grade levels.[209]

In the same year the League of Latin American Citizens and the G.I. Forum filed suit to "enforce" the earlier court order which directed the TEA to study the needs of minority students. Claiming that Mexican-Americans in Texas had been subjected to de jure discrimination by the State of Texas and the TEA, the plaintiffs also sought a comprehensive bilingual education program for the state.[210] Six years later in 1981, the district court entered its judgment in the case. The court held that the state and the TEA had intentionally discriminated against Mexican-Americans and, using its equitable powers to remedy constitutional violations, ordered a remedial language program to eliminate the vestiges of that discrimination.[211] Although the court held that failure to provide a remedial language program was not an independent violation of the Constitution or of Title VI, it determined that the state's limited

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205. Act of March 10, 1969, ch. 289, 1969 Tex. Gen. Laws 871, 871-72.

206. *See* United States v. Texas, 330 F. Supp. 235, 247-48 (E.D. Tex. 1971) (memorandum opinion), *aff'd in part, modified and remanded in part with directions,* 447 F.2d 441 (5th Cir. 1971), *cert. denied,* 404 U.S. 1016 (1972).

207. *See* Act of April 30, 1973, ch. 392, § 1, 1973 Tex. Gen Laws 860-63. The program was to be made available for three years or until English proficiency was reached, whichever event occurred first, although students were allowed to re-enroll with the approval of their parents and the school district.

208. *See id.*

209. *See* Act of May 16, 1975, ch. 334, § 6, 1975 Tex. Gen. Laws 897.

210. In the earlier case the district court retained jurisdiction for the purpose of entering any and all further orders which might become necessary to enforce or modify the decree. *See* United States v. Texas, 506 F. Supp. 405, 409 (E.D. Tex. 1981).

211. *See id.* at 440-41.

program violated the EEOA[212] and developed its own comprehensive plan for language remediation in Texas.[213] In response to this statewide order, the governor appointed a Task Force to examine the existing system of education for students with limited English proficiency and to make recommendations for remedying their linguistic difficulties.[214] The report of this Task Force formed the basis of the comprehensive Bilingual Education and Special Languages Program Statute passed by the legislature in June of 1981.[215]

Despite this enactment, the district court refused to vacate its remedial order as moot.[216] It found the statutory program to be inadequate in three respects: 1) in failing to specifically prescribe eligibility criteria, 2) in allowing the state too much time to propose a plan to employ and train a sufficient number of bilingual teachers, and 3) in exempting from its coverage school districts with fewer than twenty students of limited English proficiency in any one grade from the obligation of providing remedial instruction.[217]

On appeal, the Fifth Circuit reversed the lower court's decision on several grounds.[218] The appellate court determined that the stipulations entered into on behalf of the state did not support a finding of historical discrimination against Mexican-Americans in Texas.[219]

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212. *See id.* at 437. The court reasoned that restricting a bilingual program to the lower primary grades failed to ameliorate the effects of the statewide system of discrimination against Mexican-Americans since students at all grade levels bore the burden of discrimination. *See id.* at 437.

213. *See id.* at 436-41. The court rejected the *Lau* Guidelines as being dispositive in the formulation of an appropriate remedy. The court's plan provided bilingual education for all Mexican-American students of limited English proficiency. It specified procedures for identifying such students as well as for testing those students before they exited from the program. It also directed the TEA to monitor the efforts of the local districts to comply with the order. *See id.* at 439-41.

214. Exec. Order WPC-20 (March 10, 1981), 6 Tex. Reg. 959 (1981).

215. TEX. EDUC. CODE ANN. §§ 21.451-21.463 (Vernon Supp. 1982-1983).

216. United States v. Texas, 523 F. Supp. 703, 733 (E.D. Tex. 1981).

217. *See id.* at 733.

218. United States v. Texas, 680 F.2d 356, 373-74 (5th Cir. 1982).

219. *See id.* at 369. The court found that the stipulations could support only two factual conclusions:

> The first is that at some past time in Texas, total immersion in English, the dominant language of our culture, was viewed at the best and fastest way to master it. The second is that about 40 years ago intentional de facto segregation of Mexican-American students occurred in as many as 2.1 percent of Texas school districts, the largest percentage for which counsel could find written assertion in the literature of the subject. It is difficult for us to avoid concluding that these form a slender basis indeed for the sweeping statewide order imposed by the trial court on the basis of past constitutional violations.

Additionally, in observing that procedural irregularities permeated the trial of the case, the court resolved that "a procedure so fundamentally flawed cannot . . . serve as an appropriate basis for the far-ranging and essentially legislative remedial order entered by the trial court."[220] Finally, the court concluded that in the absence of proof establishing a state-sanctioned system of discrimination, no remedial order based on unconstitutionally invidious local practices could be entered without first affording each school district an opportunity to be heard.[221] Although the district court held that the state's 1981 remedial language program failed the second prong of the *Castaneda* test[222] because it relied too heavily on ESL instruction in the upper grade levels,[223] the Fifth Circuit declined to express an opinion on whether the legislative scheme complied with the EEOA. The appellate court reiterated the notion of local responsibility by stating that appropriate action under the EEOA was a question peculiar to each school district.[224]

The Texas statute requires a transitional bilingual/bicultural program in the elementary grades and either bilingual/bicultural education or ESL instruction in the post-elementary grades when school districts enroll twenty or more students with limited proficiency in English in the same grade level in any language classification.[225] Pursuant to its authority to promulgate rules under the act, the State Board of Education requires school districts to offer some type of remedial assistance by administrative regulations even where there are less than twenty such students as well.[226] Local districts, however, can exercise flexibility in their approach since the statute allows remedial programs to take account of an individual student's learning experiences.[227]

Id. at 369.

220. *Id.* at 370.

221. *See id.* at 372-73; *see also* United States v. Gregory-Portland Indep. School Dist., 654 F.2d 989, 996 (5th Cir. 1981) (since state agency has no authority over location of schools or assignment of students under state law, segregatory intent must be establised in each district.).

222. *See* Castaneda v. Pickard, 648 F.2d 989, 1009-10 (5th Cir. 1981).

223. United States v. Texas, 506 F. Supp. 405, 435-39 (E.D. Tex. 1981).

224. United States v. Texas, 680 F.2d 356, 374 (5th Cir. 1982).

225. TEX. EDUC. CODE ANN. §§ 21.451 - 21.463 (Vernon Supp. 1982-1983).

226. Tex. Educ. Agency, 19 TEX. ADMIN. CODE § 77.352 (Shepard's May 1, 1982).

227. *See id.* § 77.353(b)(1). Administrative rules provide that the degree of emphasis placed upon each component of a bilingual program be dependent upon the language proficiency and the social, emotional and achievement levels of the individual child. The regula-

The statute contains provisions similar to those of other states in that it provides for state funding for programs, cooperation among districts in establishing programs, optional pre-school and summer programs, participation by English-speaking students in the programs, parental approval of a child's placement in the program, and a "language proficiency assessment committee" in each district to involve parents in the operation of the program. It allows the State Board of Education to establish rules for the certification of bilingual education teachers[228] and to establish evaluation criteria for enrolling students in and exiting them from the program.[229] The rules regarding evaluation criteria subsequently promulgated by the State Board of Education, however, do not provide for testing students in other subjects in their primary language. The *Castenada* court thought such testing to be essential in order to measure the ade-

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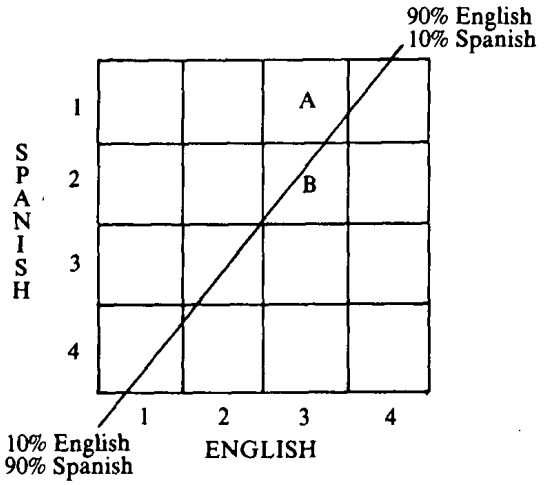
tions also allow the time alloted to each student for ESL instruction to be based on the English language competency of the student. Arguably, such flexibility is crucial because at a certain level of proficiency dual language instruction may confuse the students demonstrated by the following graph:



For example, students exhibiting a proficiency level of blocks A and B are "English dominant" and may regress if they are required to develop their Spanish skills to that same level.

228. *See id.* § 141.216. The rules require additional college level courses for teachers seeking endorsements for bilingual education or ESL. Perhaps this fairly rigorous requirement is in response to the *Castaneda* court's determination that the TEA training program did not adequately prepare some of the teachers in the school district.

229. Tex. Educ. Agency, 19 TEX. ADMIN. CODE § 77.356 (Shepard's May 1, 1982).

quacy of a language remediation program under the EEOA.[230] The statute also requires the TEA to apply sanctions, which may include loss of state funding or accreditation to a district which fails to comply with the law. This provision is troublesome in light of Fifth Circuit decisions which allow districts an opportunity to answer for alleged failures to comply with federal law.[231] The State Board of Education's rules, however, promulgated in conjunction with the statute provide procedural safeguards.[232]

Texas' law offers substantial remedial assistance to linguistic minorities. Nevertheless, well over seventy-one languages are spoken in Texas schools and as of early 1983, over eleven thousand students with limited proficiency in English received neither ESL instruction nor bilingual education.[233] Thus, some school districts still may not be fulfilling their obligations under the Constitution, federal laws, or state law—although exactly what some of those obligations entail remain far from clear.

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230. *See* Castaneda v. Pickard, 648 F.2d 989, 1011-12 (5th Cir. 1981).

231. *See* United States v. Texas, 680 F.2d 356, 372-73 (5th Cir. 1982); United States v. Gregory-Portland Indep. School Dist., 654 F.2d 989, 998 (5th Cir. 1981).

232. Tex. Educ. Agency, 19 TEX. ADMIN. CODE § 77.365 (Shepard's May 1, 1982).

233. LANGUAGE TALLY NO. 14C, DIVISION OF BILINGUAL EDUCATION, TEXAS EDUCATION AGENCY, January 3, 1983.