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Educating English Learners: Reconciling Bilingualism and Accountability

Rosemary C. Salomone

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INTRODUCTION

In late July 2011, an estimated 5,000 individuals converged on Washington, D.C., to protest the direction of state and federal education policy.[1] Fueled by social media, the Save Our Schools March and National Call to Action was a grassroots effort organized largely by teachers, with principals, school board members, and activists lending support. Featured speakers included prominent education figures, like historian Diane Ravitch and Jonathan Kozol, a former teacher known for his writings on school inequalities. Specific points of contention focused on high stakes testing and test-based accountability, key elements in the Obama Administration's *Blueprint for Reform*[2] and *Race to the Top* initiative.[3] Attacking student poverty was a repeated rallying cry.

Among the groups joining the protest were advocates for the 5.3 million "English learners" (ELs) who comprise 10.7% of the K–12 school population. These students, mostly from immigrant families, need additional English skills to achieve on par with their English-proficient peers. Though they represent more than 150 languages, seventy-three percent come from homes where Spanish is the dominant language.[4] Their education raises red flags at times related more to conflicts over American identity and failed immigration policies than to sound pedagogy.

In the weeks preceding the march, the blogosphere was ablaze with discussion that proved eye opening on the EL front. It was clear that the discourse on EL education had dramatically changed since the days of 1970s

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[1] Nirvi Shah, *Education Policy Critics March on White House,* EDUC. WK., Aug. 1, 2011, at 11, *available at* http://www.schoolleadership20.com/forum/topics/education-policy-critics-march?xg_source=activity (on file with the Harvard Law School Library); *see also* Amanda Paulson, *Save Our Schools March: A Teacher Revolt Against Obama Education Reform*, CHRISTIAN SCI. MONITOR, July 30, 2011, *available at* http://www.csmonitor.com/USA/Education/2011/0730/Save-Our-Schools-March-a-teacher-revolt-against-Obama-education-reform (on file with the Harvard Law School Library).

[2] U.S. DEP'T OF EDUC., A BLUEPRINT FOR REFORM: THE REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT (2010), *available at* http://www2.ed.gov/policy/elsec/leg/blueprint/blueprint.pdf.

[3] U.S. DEP'T OF EDUC., RACE TO THE TOP PROGRAM: EXECUTIVE SUMMARY (2009), *available at* http://www2.ed.gov/programs/racetothetop/executive-summary.pdf.

[4] NAT'L CTR. ON IMMIGRANT INTEGRATION POLICY, MIGRATION POLICY INST., TOP LANGUAGES SPOKEN BY ENGLISH LANGUAGE LEARNERS NATIONALLY AND BY STATE (2010), *available at* http://www.migrationinformation.org/ellinfo/FactSheet_ELL3.pdf.

multiculturalism and diversity. Gone were the passionate arguments for recognizing the child's home language and culture. The national fixation on accountability had taken center stage, pushing the language question to the sidelines. It also had driven a wedge in the ranks of those who, for decades, had stood steadfastly together fighting the forces of English-Only. The discussion had moved from "best practices" and the relative merits of dual language instruction to the pros and cons of testing and the feasibility of accommodating language differences in designing valid and reliable assessment tools.

The debate reached a fever pitch over the Recommendations of the Working Group on ELL Policy, a task force convened by the Department of Education. How could its members—renowned linguists, educators, and researchers—call for stronger accountability measures?[5] Did they not understand the dangers of over-testing in general or the complexities of testing EL students in particular? Had they abandoned the cause of learning in two languages, a multi-year process that defies pre-mature evaluation?

In this essay, I attempt to reconcile this seeming tension between developing the EL student's bilingual potential and holding state and local educators accountable for student achievement. Striking a reasonable balance between the two objectives, I consider the diverse needs and backgrounds of this growing student population. I further place the discussion in historical context, focusing on wavering federal policies on bilingual education over the past four decades. These policies have relied on two dominant strategies: conditional federal grants whose influence has pushed the bounds of federal authority over education, and vaguely worded civil rights protections articulated in statutes and administrative directives. I begin in the 1960s on the heels of the civil rights movement and its overarching concern for equal opportunity. I continue through the 1970s with the English-Only backlash and the rise of accountability. The latter laid the foundation for the productivity agenda that is now driving public discussion on the reauthorization of the Elementary and Secondary Education Act.

In the end, I move the discourse on dual language instruction onto a pedagogically and politically measured track. In doing so, I outline essential factors for charting a federal role in affording English learners an effective and meaningful education, which gives adequate weight to accountability while allowing local discretion to meet student needs and family preferences regarding home language retention. Most importantly, I present the child's home language not as an inherent "deficiency" or barrier to social and economic advancement, as conventionally believed, but as a personal and national resource in a world where multilingual competencies carry political and economic currency.

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[5] Working Grp. on ELL Policy, Improving Educational Outcomes for English Language Learners: Recommendations for the Reauthorization of the Elementary and Secondary Education Act (2010), *available at* http://www.cal.org/topics/ell/ELL-Working-Group-ESEA.pdf.

Ambivalence and Ambiguities

As a nation built largely on immigration, the United States has a long history of educating children whose dominant language is not English. Until the mid-twentieth century, the common approach was based on the assimilation ideal. The conventional route to social acceptance and economic success was for immigrant children to abandon their home language and culture and adopt the "ways" of mainstream America.[6] Following the Supreme Court's landmark decision in *Brown v. Board of Education*,[7] the modern-day civil rights movement presented an alternative view. With equality as its guiding force, it set the stage for schools to recognize and respect differences among students. It also laid the groundwork for federal policies using a "carrot and stick" approach. The "carrot" awarded federal grants to states and local school districts in exchange for addressing nationally identified interests; the "stick" conditioned funding eligibility on compliance with civil rights mandates.

Two pillars of what became known as the War on Poverty were Title VI of the Civil Rights Act (CRA) of 1964, which prohibited discrimination based on race, color, or national origin in federally funded programs,[8] and Title I of the Elementary and Secondary Act of 1965 (ESEA), which provided an unprecedented infusion of federal funds for remedial instruction to meet the needs of educationally and economically disadvantaged students.[9] To remain eligible for Title I funding, recipients had to comply with Title VI of the CRA.

The Great Society architects could not have foreseen the political and economic events, some far from American shores, that would soon extend their plan on to a broader stage. As those events unfolded in the following decades, Congress, the courts, and federal agencies struggled to define the contours of equal educational opportunity for a new and diverse student population.

The initial catalyst for change was the Hart-Cellar Immigration Act, which dismantled immigration quotas from the 1920s.[10] Fueled by the Cuban Revolution, political unrest in Southeast Asia, and widespread poverty in Mexico, the Act created a steady stream of migrants and refugees entering the country.[11] In the spirit of civil rights, demands for linguistic and cultural

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[6] *See* Rosemary C. Salomone, True American: Language, Identity, and the Education of Immigrant Children 15–45 (2010).

[7] 347 U.S. 483 (1954).

[8] Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 601–02, 78 Stat. 252, 252–53 (codified in scattered sections of 20 U.S.C.).

[9] Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

[10] Immigration and Nationality Act of 1965 (Hart-Cellar Act), Pub. L. 89-236 (1965).

[11] *See* Jeanne Batalova & Aaron Terrazas, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, Migration Pol'y Inst. (Dec. 2010) (noting an increase in the U.S. foreign-born population from 4.7% in 1970 to 12.5% in 2009), http://www.migrationinformation.org/feature/display.cfm?ID=818 (on file with the Harvard Law School Library).

recognition, particularly among Latinos, gave rise to federally funded programs that resurrected unresolved issues of American identity. A look back at those developments reveals the misperceptions and conflicts that still haunt the policy debate over educating English learners.

Conflicting Federal Policies

No government initiative has influenced language policy in the United States as significantly as the Bilingual Education Act of 1968 ("the Act"), also known as Title VII (of the ESEA).[12] Historic in its implicit support for immigrant languages yet crafted in ambiguous terms, the Act laid the path for inconsistent federal policies, which largely reflected shifting political views in Washington and nationwide. Congress seemed unable to answer the question whether English-Only or dual language instruction best met the educational needs of English learners.

At that time, policymakers and educators were increasingly alarmed with low academic achievement, high dropout rates, and poor self-esteem among Latino children in general, and Mexican-Americans in particular.[13] They found blame in the nation's failure to address the language barrier that Spanish-speaking children faced when they entered school. Searching for a remedy, they drew inspiration from the success of bilingual programs for Cuban immigrant children in Dade County, Florida,[14] and similar French-English programs in Canada.[15]

These concerns were the driving force behind the 1968 Act. The Act allocated funds on a competitive basis for innovative programs designed to counter the effects of poverty and limited English proficiency.[16] It offered grants of up to five years, after which school districts presumably would assume the costs of the programs. The poverty factor (dropped in the 1974 amendments) and the underlying "deficit" rationale, which focused on lack of English as a defect rather than bilingualism as a resource, were politically compelling in the 1960s world of compensatory education. As later developments proved, these elements unfortunately cast an indelible stigma on dual language instruction.

The original law had no clear vision of what bilingual education meant in practice. Should the child's home language be used merely as an initial bridge to learning English (the transitional model), or should it be used throughout schooling to develop dual language proficiency and literacy (the

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[12] Pub. L. No. 90-247, 81 Stat. 783 (1968) (codified as amended in scattered sections of 20 and 42 U.S.C.).

[13] *See Bilingual Education Act of 1968: Hearing on H.R. 9840 and H.R. 10224 Before the Subcomm. on Educ. of the Comm. on Educ. and Labor*, 90th Cong. 91 (1967) (statement of Rep. Augustus F. Hawkins).

[14] *See* Gail P. Kelly, *Contemporary American Policies and Practices in the Education of Immigrant Children*, *in* EDUCATING IMMIGRANTS 214, 220–21 (Joti Bhatnagar, ed., 1981).

[15] *See, e.g.*, WALLACE E. LAMBERT & G. RICHARD TUCKER, BILINGUAL EDUCATION OF CHILDREN: THE ST. LAMBERT EXPERIMENT (1972).

[16] Bilingual Education Act of 1968, Pub. L. No. 90-247, § 702–04, 81 Stat. 816–17.

maintenance or developmental model)? Was the aim to promote assimilation or linguistic and cultural diversity? Subsequent statements from the Department of Health, Education, and Welfare (HEW) wavered to and fro on these questions, effectively leaving local school districts to decide for themselves.

According to a 1971 HEW manual, "the ultimate goal of bilingual education" was a student "who functions well in two languages on any occasion."[17] Yet the 1974 amendments to the Act defined a bilingual education program as one that provided instruction in English and in the student's native language only to the extent that it would enable the child to progress through the educational system.[18] A congressional report preceding the amendments made clear that the goal of the program, in fact, was not to establish a "bilingual society."[19] Backpedalling perhaps to calm congressional fears, a 1974 HEW memorandum advised that "the ultimate goal" of the federal program was for "children of limited English-speaking ability" to "achieve competence in the English language."[20]

This view soon gained legislative and executive support. The 1978 amendments to the Act allowed instruction in the native language only "to the extent necessary" for students to gain competency in English.[21] The 1984 amendments went further, authorizing a funding "set aside" of between four and ten percent for "special alternative instructional programs" that did not use the native language.[22] What seemed to be a minor adjustment was politically major. For the first time in sixteen years of reauthorizations, bilingual education advocates had to accept other approaches as equally legitimate. The following year, William Bennett, Secretary of Education in the Reagan Administration, called the Bilingual Education Act a "failed path," a "bankrupt course."[23]

Not surprisingly, the 1988 amendments to the Act increased the set-aside for alternative approaches to twenty-five percent with the remaining funds for transitional bilingual programs. They also limited to three years

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[17] U.S. DEP'T OF HEALTH, EDUC., & WELFARE, PROGRAMS UNDER BILINGUAL EDUCATION ACT (TITLE VII, ESEA): MANUAL FOR PROJECT APPLICANTS AND GRANTEES (1971), *available at* http://www.eric.ed.gov/PDFS/ED052657.pdf, quoted in Noel Epstein, Language, Ethnicity, and the Schools: Policy Alternatives for Bilingual-Bicultural Education 20 (1978).

[18] Bilingual Education Act, 1974 Reauthorization, Pub. L. No. 93-380, 88 Stat. 484 (1974).

[19] S. REP. NO. 93-1026, at 4214 (1974) (Conf. Rep.).

[20] Memorandum from Undersec'y Frank Carlucci to Assistant Sec'y for Educ., U.S. Dep't of Health, Educ., & Welfare, Departmental Position on Bilingual Education, *in* COMPTROLLER GEN. OF THE U.S., BILINGUAL EDUCATION: AN UNMET NEED 56 (1976).

[21] Bilingual Education Act, 1978 Reauthorization, § 703(4), Pub. L. 95-561, 92 Stat. 2143, 2269 (1978).

[22] Bilingual Education Act, 1984 Reauthorization, § 702(b)(3), Pub. L. No. 98-511, 98 Stat. 2366 (1984).

[23] William J. Bennett, U.S. Sec'y of Educ., Address to the Association for a Better New York (Sept. 26, 1985), *in* 1 LA RAZA L.J. 213, 218 (1986).

the time students could remain in either one, with an added two years under special circumstances.[24]

The 1994 amendments, adopted under the Clinton Administration and a Democrat-controlled Congress, took an unexpected turn. In words that resonate today, the law recognized that as the world was becoming "increasingly interdependent," multilingual skills were an "important national resource" which demanded "protection and development."[25] Never before had federal law expressly articulated the value of immigrant languages. Yet the amendments also were part of a broader congressional agenda promoting school accountability for student achievement.[26] And so the amendments' express purpose was to "ensure that limited English proficient [(LEP)] students master English" and "meet the same rigorous standards for academic performance expected of all children and youth."[27]

Whatever mild reprieve the 1994 amendments offered bilingual education, it was indeed short lived. The Republican sweep in Congress that year once again reversed the course. While proposals to completely end federal funding for bilingual programs never gained majority support, others aimed at moving toward English immersion progressively took hold.[28] Public sentiment continued to turn against preserving immigrant languages and cultures, tied in part to growing opposition to immigration.[29] The time was ripe for the seismic changes wrought in the No Child Left Behind Act of 2001

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[24] *See* Bilingual Education Act, 1988 Reauthorization, § 7021 (d)(3)(A)-(C), Pub. L. 100-297, 102 Stat. 130, 281–82 (1988) ("No student may be enrolled in a bilingual program for which a grant is made under subsection (a)(1) or (a)(3) of this section for a period of more than 3 years, except where the school in which the student is enrolled (i) conducts a comprehensive evaluation of the overall academic progress of the student, and (ii) the results of the evaluation indicate that lack of English proficiency is impeding the academic progress of the student in meeting grade promotion and graduation standards and, in the case of a handicapped child attainment of the objective in the child's individualized education program.").

[25] Bilingual Education Act, 1994 Reauthorization, § 7102(a)(10), Pub. L. 103-382, 108 Stat. 3518, 3717 (1994) (current version at 20 U.S.C. § 6812 (2006)).

[26] *See, e.g.*, Improving America's Schools Act, 20 U.S.C. § 6311(b)(1)(A)–(C) (2006) (requiring states to "demonstrate that [they have] adopted challenging academic content standards and challenging student academic achievement standards" applicable to all children in subjects including "at least mathematics, reading or language arts, and (beginning in the 2005-2006 school year) science").

[27] Bilingual Education Act, 1994 Reauthorization, §§ 7102(a)(10), 7102(c).

[28] *See, e.g.*, Charles King, *Too Narrow a View of Who's American: Congress: A Bill to End Federal Funding of Bilingual Programs Is Ill-Considered*, L.A. TIMES, Sep. 21, 1995, *available at* http://articles.latimes.com/print/1995-09-21/local/me-48250_1_language-policy (discussing Rep. Toby Roth's bill that would have "effectively halt[ed] funding for bilingual education, abolish[ed] bilingual electoral ballots and allow[ed] individuals to bring civil suits against institutions that violate[d] English-only federal statutes" as an example of initiatives cutting back on "decisions in Congress, state legislatures and the courts [that] have supported bilingual education programs and the use of bilingual ballots for non-English speaking citizens").

[29] *Cf., e.g.*, B. Drummond Ayres Jr., *Court Blocks New Rule on Immigration*, N.Y. TIMES, Nov. 17, 1994, *available at* http://www.nytimes.com/1994/11/17/us/court-blocks-new-rule-on-immigration.html?pagewanted=print&src=pm (discussing a federal judge's temporary block of California's Proposition 187, which required police, health care professionals, and teachers to report the immigration status of all individuals, effectively barring immigrant children from public education).

with its retreat from bilingual education and its march toward state and local accountability.

A Matter of Rights

Before continuing on federal policy through conditional grants, a look at the parallel stream of civil rights protections from the 1960s to the 1990s is in order. Here the federal courts stepped into the fray, weaving in and out of congressional and executive ambivalence in defining the parameters of educational rights for English learners. Avoiding broad constitutional interpretations, the courts ultimately put the weight on narrowly defined and vaguely worded statutory rights.

First, it should be underscored that the Bilingual Education Act of 1968 did not grant EL students a legally enforceable right to a specific educational approach. It was merely a competitive grant program that primarily provided "seed" funds for school districts to develop innovative programs. By 1972, the program served only 112,000 of the estimated five million school-age language minority children.[30] The remainder continued their education in English language classes, often supplemented with small-group instruction in English as a Second Language on a pull out basis. Notwithstanding this limited scope and lack of legal force, the Act's "bilingual" terminology and the early signals from Washington were influential in shaping state and local policies and practices. Together with HEW pronouncements under Title VI, the funding provided under the Act also created a legal mindset and rights-based expectations, especially among Latino educators and advocates. With the exception of several lower court decisions in the 1970s, some tied to desegregation decrees,[31] these expectations ultimately proved futile.

As HEW and Congress wavered on the policy goals of programs under the Act, both established norms that used terms like "appropriate," "effective," and "meaningful" for federal judges to apply in defining the legal right to education for ELs. Avoiding a definitive position on home language and culture, these pronouncements deferred to state and local officials. Meanwhile, there was an implicit understanding that equality for EL students meant something different from mainstream education as a matter of law.

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[30] JAMES CRAWFORD, BILINGUAL EDUCATION: HISTORY, POLITICS, THEORY, AND PRACTICE 42 (4th ed. 1999).

[31] *See* Serna v. Portales Mun. Sch., 499 F.2d 1147 (10th Cir. 1974) (setting aside the constitutional question and deciding the case on Title VI); Aspira of N.Y. v. Bd. of Educ. of N.Y., 394 F. Supp. 1161, 1162 (S.D.N.Y. 1975) (consent decree providing "in detail for a course of [language assessment] testing to (in effect) identify members of the [plaintiff] class . . . and then for the program of instruction these class members are to receive); Morgan v. Kerrigan, 401 F. Supp. 216, 252 (D. Mass. 1975), *motion for stay denied*, 523 F.2d 917 (1st Cir. 1975) (excerpting from desegregation plan for Boston public schools); Bradley v. Milliken, 402 F. Supp. 1096, 1137–45 (E.D. Mich. 1975) (summarizing characteristics of desegregation plan for Detroit public schools); United States v. Texas, 506 F. Supp. 405 (E.D. Tex. 1981) (upholding constitutional and statutory claims and ordering formulation of a desegregation plan), *rev'd*, 680 F.2d 356 (5th Cir. 1982).

The first articulation appeared in a 1970 HEW policy guideline applying Title VI of the Civil Rights Act of 1964 to students whose dominant language was other than English, thus equating language with race or national origin. Where students were excluded from "effective participation" in the education program because of their inability to speak or understand English, school districts had to take "affirmative steps" to rectify the language "deficiency."[32] The Title VI statute and HEW's 1968 regulations thereby moved beyond antidiscrimination and into the realm of affirmative government obligations.[33] The term "effective" suggested that the government would measure compliance in outcomes. The guidelines further broadened equal opportunity on the "inputs" side from the "same is equal" concept of school desegregation, and the "more is equal" notion of added resources in compensatory programs, to encompass a view of "different is equal" in the context of educational approach.

Four years later, in the landmark case of *Lau v. Nichols*,[34] brought on behalf of Chinese-speaking students in the San Francisco public schools, a unanimous Supreme Court relied on the "effective" and "affirmative" language of HEW's 1970 guidelines to rule in favor of the plaintiffs. The Court further incorporated into the Title VI statute the reasoning of "constructive exclusion" and "intangible considerations" from *Brown* and earlier desegregation cases.[35] The Court concluded that "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are *effectively foreclosed* from any *meaningful* education."[36]

On the inputs side, the program had to be "different." On the outputs side, it had to be "effective," holding school officials accountable for producing results. The Court stopped short of mandating bilingual instruction. It even suggested that some special form of instruction in English would be

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[32] Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595 (July 18, 1970); *see also* Martin F. Gerry, *Cultural Freedom in the Schools: The Right of Mexican-American Children to Succeed*, *in* MEXICAN AMERICANS AND EDUCATIONAL CHANGE 226 (Alfredo Castañeda et al. eds., 1974) (thoroughly discussing the Office for Civil Rights' May 1970 memorandum to school districts, which is referenced in 35 Fed. Reg. 11,595).

[33] *See* 45 C.F.R. § 80.3(b)(2) (2010) ("A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program . . . may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.").

[34] 414 U.S. 563 (1974); *see also* Rachel F. Moran, *The Story of* Lau v. Nichols*: Breaking the Silence in Chinatown*, *in* EDUCATION LAW STORIES 111 (Michael A. Olivas & Ronna Greff Schneider eds., 2008) (detailed historical account of the *Lau* litigation); SALOMONE, *supra* note 6, at 119–31 (discussing the *Lau* decision).

[35] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (quoting McLaurin v. Okla. State Regents, 339 U.S. 637, 641 (1950)).

[36] *Lau*, 414 U.S. at 566 (emphasis added).

acceptable.[37] Yet the decision's vague wording left it wide open to interpretations that ironically both energized the bilingual education movement and rallied the forces of opposition. It also greased the political wheels of Washington. Over the next two years, both the funds allocated for Title VII programs and the number of participating students nearly doubled.[38]

Inspired by *Lau*, a U. S. Civil Rights Commission report concluded the following year that bilingual education was the most effective method for teaching large numbers of students who did not speak English adequately.[39] Armed with that report, HEW issued task force recommendations sent to school districts in the form of a memorandum. The *Lau Remedies* as they were called, though developed to implement the *Lau* decision, were far more prescriptive. The legal presumption was in favor of bilingual instruction.[40]

As HEW rushed to open regional *Lau* Centers to assist school districts in compliance, opposition to bilingual education mounted and the legal force of the *Remedies* came under attack. Having failed to allow the public the opportunity to comment on the *Remedies* before they became final, as required for legislative regulations under the federal Administrative Procedure Act, HEW lacked any legal authority to enforce them. A year later, the agency announced that these were mere guidelines and did not "require" bilingual education.[41] In the meantime, HEW regional offices had negotiated 350 "*Lau*" plans or consent agreements mandating instruction in the home language.

In 1978, HEW officials found themselves in federal court signing a consent decree whereby they agreed to withdraw the guidelines and issue a regulatory policy following required procedures.[42] When the newly created Department of Education published proposed Title VI regulations in 1980, they elicited over 4500 written public comments, many critical; close to 450 individuals testified at public hearings.[43] The proposal soon fell under the

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[37] *See id.* at 565 ("Teaching 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.").

[38] CHRISTIAN J. FALTIS & SARAH J. HUDELSON, BILINGUAL EDUCATION IN ELEMENTARY AND SECONDARY SCHOOL COMMUNITIES: TOWARD UNDERSTANDING AND CARING 15 (1998).

[39] KATHLEEN A. BUTO ET AL., U.S. COMM'N ON CIVIL RIGHTS, A BETTER CHANCE TO LEARN: BILINGUAL BICULTURAL EDUCATION 137 (1975); *see also* S. MCPHERSON PEMBERTON, U.S. COMM'N ON CIVIL RIGHTS, A BETTER CHANCE TO LEARN: BILINGUAL BICULTURAL EDUCATION, A REVIEW AND ANALYSIS 22 (1975).

[40] *See* U.S. Dep't of Health, Educ., & Welfare, Office for Civil Rights, Task Force Findings Specifying Remedies for Eliminating Past Educational Practices Ruled Unlawful Under Lau v. Nichols (1975).

[41] Memorandum from the Dep't of Health, Educ., & Welfare to Reg'l Offices (Apr. 8, 1976), *quoted in* Noel Epstein, *Bilingual Aid Clarified*, WASH. POST, Apr. 20, 1976, at A1.

[42] Nw. Arctic Sch. Dist. v. Califano, No. A-77-216 (D. Alaska Sept. 29, 1978) (consent decree) (agreeing that the school district was not obligated to follow the Office for Civil Rights' order to invent a written form for an Eskimo language in order to provide the Eskimo students with bilingual instruction).

[43] ROSEMARY C. SALOMONE, EQUAL EDUCATION UNDER LAW: LEGAL RIGHTS AND FEDERAL POLICY IN THE POST *BROWN* ERA 99–100 (1986).

axe of congressional pressure and of a new administration disinclined to legally impose an instructional method on states and local school districts.[44]

In the years that followed, a changed Court membership progressively uprooted many of *Lau*'s underpinnings.[45] Litigators turned to the Equal Educational Opportunities Act (EEOA), which codified the essential holding of *Lau*.[46] Adopted in 1974 and specifically intended to restrict court-ordered busing as a remedy to school segregation,[47] the EEOA prohibited the state from denying "equal educational opportunity" based on national origin.[48] One small provision, with scarce legislative history to back it up, required states "to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."[49]

The term "appropriate" implied that education judgment should play into the calculus on a case-by-case basis. School officials had to remedy student deficiencies in some undetermined way. Yet unlike Title VI, the EEOA applied to all state and local programs regardless of federal funding. Nor did it require proof that school officials intended to deny equal education opportunity, but only that their policies or practices had a discriminatory impact on students with "language barriers." It also provided a private right of action, allowing parents and students to take their grievances to federal court.

In 1981, the Court of Appeals for the Fifth Circuit decided *Castañeda v. Picard*,[50] which has since become a benchmark for measuring compliance nationwide. The circuit court brought clarity to the EEOA by laying out three criteria to determine whether school officials were taking "appropriate action" to provide equal educational opportunity. First, the program had to be informed by an educational theory that at least some experts recognized to be sound or that seemed to be "a legitimate experimental strategy."[51] Second, it had to be reasonably designed to effectively implement the educational theory by providing the "practices, resources and personnel necessary

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[44] *See* Marjorie Hunter, *U S. Education Chief Bars Bilingual Plan for Public Schools*, N.Y. TIMES, Feb. 3, 1981, at A1.

[45] *See, e.g.*, Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 607 (1983) (holding that "a private plaintiff should recover only injunctive, noncompensatory relief for a defendant's unintentional violations of Title VI"); Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (denying a "freestanding private right of action to enforce regulations promulgated under" Title VI).

[46] *See* Castañeda v. Picard, 648 F.2d 989, 1008 (1981) ("[T]he essential holding of *Lau*, i.e., that schools are not free to ignore the need of limited English speaking children for language assistance to enable them to participate in the instructional program of the district, has now been legislated by Congress, acting pursuant to its power to enforce the fourteenth amendment.").

[47] Rachel F. Moran, *Undone by Law: The Uncertain Legacy of* Lau v. Nichols, 16 BERKELEY LA RAZA L.J. 1, 7 (2005) ("However, in 1974, the Nixon administration promoted the EEOA as anti-busing legislation, a package of educational remedies that could be used to counter mandatory school desegregation.").

[48] 20 U.S.C. §§ 1701–58 (2006).

[49] *Id.* § 1703.

[50] 648 F.2d 989, 1009–10 (5th Cir. 1981).

[51] *Id.* at 1009.

to transform the theory into reality."[52] And third, following a trial period, it had to produce positive outcomes in overcoming language barriers; there needed to be evidence that students were learning both English and subject-matter content.[53]

By linking EEOA compliance to standards specifically related to English language learners, the *Castañeda* test affirmed a growing shift in educational goals from *Brown*'s mandate of "equal educational opportunity," with the end of full inclusion, to mere "minimal access."[54] The court further concluded that Congress had left the choice of a specific approach to the "educational and political decisions" of state and local authorities.[55]

A 1991 Office for Civil Rights memorandum, which continues to guide federal enforcement efforts, expressly incorporated the *Castañeda* guidelines for enforcing both the EEOA and Title VI. It also made clear that Title VI "does not mandate any particular program of instruction for LEP students."[56] Yet where school districts choose to offer bilingual classes, teachers must speak, read, and write in both languages and must have received training in bilingual education methodology.[57]

And so, summing up, while English language learners do not have a right to instruction in their home language under either the Constitution or federal statutes, they do have a right under the EEOA to an education that effectively develops their proficiency in English and maintains their academic progress in other subject areas. That being said, there is still much interpretive room for the courts to assess specific state and local policies and practices. There also remains the related and equally vexing policy questions of "best practices" and whether dual language instruction promotes or impedes equal educational opportunity. Those questions are now almost eclipsed by the frenetic push toward accountability through testing.

Backlash Meets Accountability

The seeds of the accountability movement were sown in the late 1970s, when a confluence of forces created a backlash against federal compensatory programs in general and bilingual programs in particular. An economic downturn with spiraling inflation had brought severe cuts in state and local education spending. The American public began to question federal expenditures for programs that were failing to close the achievement gap between disadvantaged black and Latino students and middle-class white students.

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[52] *Id.* at 1010.

[53] *Id.*

[54] *See* Rachel F. Moran, *Equal Liberties and English Language Learners: The Special Case of Structured Immersion Initiatives*, 54 How. L.J. 397, 410 (2011).

[55] *Castañeda*, 648 F.2d at 1009.

[56] Memorandum from Michael L. Williams, Dep't of Educ. Assistant Sec'y for Civil Rights, to Office for Civil Rights Staff, Policy Update on Schools' Obligations Toward National Origin Minority Students With Limited-English Proficiency (Sept. 27, 1991), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/lau1991.html.

[57] *Id.* at I.A.2 (listing staffing requirements).

Among the programs targeted was bilingual education, whose link to immigration and American identity added a particularly divisive dimension.

Concerns with swelling numbers of immigrants from Latin America, together with reports of students trapped for years in segregated bilingual classrooms, brought transitional bilingual education under a barrage of attacks. Opposition often was tied to an English-Only movement, whose goals included designating English as the nation's official language.[58] Despite persistent efforts, Official-English never materialized at the national level. The educational agenda, on the other hand, met initial success through voter initiatives adopted in California, Arizona, and Massachusetts.[59] Each state aimed at replacing bilingual education with Structured (or Sheltered) English Immersion (SEI), an approach offering intensive instruction in English that may be combined with content-area instruction using linguistically modified materials.[60] In practice, these measures put significant obstacles in the path of parents, especially in California and Arizona, who sought bilingual instruction for their children.

As anti-bilingual forces were gaining momentum, a parallel demand for greater school accountability gave rise to a state-level testing and standards movement that particularly burdened students who lacked proficiency in English. By the early 1980s, a number of states had adopted minimum competency tests as a condition for high school graduation.[61] Supporters hailed "high-stakes" testing as a means to assess and improve learning.[62] A Fifth Circuit decision bolstered that view.[63] Critics, on the other hand, condemned the harsh consequences, especially for minority and disadvantaged students.[64] Either way, "high-stakes" testing paved the way for later federal initiatives that adopted an increasingly outcomes-based approach.

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[58] *See* SALOMONE, *supra* note 6, at 146–52.

[59] *See* CAL. EDUC. CODE §§ 300–340 (2010); ARIZ. REV. STAT. ANN. §§ 15-751–755 (2010); MASS. GEN. LAWS ANN. ch. 71A, §§ 1–8 (2010).

[60] *Id.*

[61] *See* SCOTT F. MARION & ALAN SHEINKER, UNIV. OF MINN., NAT'L CTR. ON EDUC. OUTCOMES, *Issues and Consequences for State-Level Minimum Competency Testing Programs* (Jan. 1999), *available at* http://www.eric.ed.gov/PDFS/ED440515.pdf (noting that more than forty states had instituted some form of minimum-competency testing through the early 1980s).

[62] *See id.*

[63] *See* Debra P. v. Turlington, 644 F.2d 397 (5th Cir. 1981), *reh'g en banc denied*, 654 F.2d 1079 (5th Cir. 1981) (remanding for further proceedings but noting that such tests would be constitutional provided they covered materials strictly from the curriculum).

[64] *See* Merle Steven McClung, *Competency Testing Programs: Legal and Educational Issues*, 47 FORDHAM L. REV. 651 (1979). *See generally* GEORGE F. MADAUS ET AL., THE PARADOXES OF HIGH STAKES TESTING: HOW THEY AFFECT STUDENTS, THEIR PARENTS, TEACHERS, PRINCIPALS, SCHOOLS, AND SOCIETY (2009).

In 1983, a rash of unsettling reports[65] further legitimized the growing reliance on test scores. The most widely publicized, *A Nation at Risk*,[66] commissioned by the United States Department of Education, gave life to the outcomes movement. The report warned of a "rising tide of mediocrity" placing American education in grave danger.[67] Merely alluding to the racial- and economic-achievement gap,[68] the central message was that student performance in general was lagging because the United States had lowered its standards. With its emphasis on test scores, the report set the tone and direction for today's standards-based measures and their focus on accountability. The shift from inputs-oriented reform providing additional resources, to a results-oriented approach focusing on student achievement kicked into high gear.

As the years passed, the English-Only and accountability forces each gained steam. They eventually converged on a national platform in Title III of the No Child Left Behind Act of 2001 (NCLB).[69] The implications of that convergence for EL students continue to surface in current federal-funding initiatives and proposals for reauthorizing the ESEA.[70]

No Child Left Behind

A sweeping overhaul of the ESEA, and a key legacy of the George W. Bush Administration, the NCLB[71] was adopted with broad bipartisan support in Congress.[72] Using the power of the federal purse, the law aimed to hold schools accountable for student outcomes by requiring states, by 2005–2006, to annually test students in grades three through eight in reading and math, and at least once in grades ten through twelve. By 2007–2008, it required testing students in science at least once in grades three through five, six through nine, and ten through twelve. It further mandated that tests of English proficiency be administered to all LEP students as of the 2002–2003

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[65] *See* ERNEST L. BOYER, HIGH SCHOOL: A REPORT ON SECONDARY EDUCATION IN AMERICA (1983); EDUC. COMM'N OF THE STATES TASK FORCE ON EDUC. FOR ECON. GROWTH, ACTION FOR EXCELLENCE: A COMPREHENSIVE PLAN TO IMPROVE OUR NATION'S SCHOOLS (1983); JOHN I. GOODLAD, A PLACE CALLED SCHOOL: PROSPECTS FOR THE FUTURE (1984); NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983); PAUL E. PETERSON, TWENTIETH CENTURY FUND TASK FORCE ON FED. ELEMENTARY & SECONDARY EDUC. POLICY, MAKING THE GRADE (1983).

[66] A NATION AT RISK, *supra* note 65.

[67] *Id.* at 5.

[68] *Id.* at 13.

[69] English Language Acquisition, Language Enhancement, and Academic Achievement Act, Pub. L. No. 107-110, §§ 3001–3141, 115 Stat. 1690 (2002) (codified as amended in scattered sections of 20 U.S.C.) [hereinafter English Language Acquisition Act].

[70] *See* Rosemary C. Salomone, *The Common School Before and After* Brown*: Democracy, Equality, and the Productivity Agenda,* 120 YALE L.J. 1454, 1476–77 (2011) (reviewing MARTHA MINOW, In *Brown*'s Wake: Legacies of America's Educational Landmark (2010)).

[71] No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended primarily in scattered sections of 20 U.S.C.).

[72] *See* Shannon K. McGovern, Note, *A New Model for States As Laboratories for Reform: How Federalism Informs Education Policy*, 86 N.Y.U. L. REV. 1519, 1521 (2011).

school year. Schools that could not meet determined benchmarks would face severe penalties, including complete restructuring with new leadership and staff. The NCLB expired in September 2007 but remains in place until Congress takes further action.[73]

Title III of the NCLB eliminated the competitive grants of the original Bilingual Education Act. It instead allocated funds on a formula basis to each state based on the enrollment of LEP students, including "immigrant children and youth."[74] The law had two main goals: helping students gain proficiency in English and meeting state academic content and achievement standards.[75] With no legislative findings addressing the benefits of bilingual education or dual language proficiency, Congress removed all references to bilingualism or bilingual education from the federal lexicon, including various programs and offices. The title of the law itself changed from the Bilingual Education Act to the English Language Acquisition Act. The new nomenclature was more than symbolic. The Act's purpose and effect shifted both the discourse and local practice decidedly toward developing English language skills.

The Act did not expressly prohibit or mandate any particular instructional method as long as the program was grounded in "scientifically based research" and "demonstrated to be effective" in teaching English.[76] Any interest in maintaining or developing the home language of EL students was limited to dual language immersion programs, an approach gaining appeal among middle-class, mainstream families. These programs are the "new face of bilingual education—without the stigma."[77] They typically combine fifty percent English dominant and fifty percent other language dominant students in the same classroom with the ultimate goal of developing proficiency and literacy in both languages.

Yet despite this small bow to bilingualism, the law provided pointed incentives in the form of testing mandates and annual yearly progress (AYP) requirements for state and local officials to bypass dual language approaches and move students quickly and exclusively toward English proficiency.[78]

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[73] *See, e.g.*, Sam Dillon, *With Bipartisan Support, Law on Expansion of Charter Schools Passes the House*, N.Y. TIMES, Sept. 14, 2011, at 24 (noting that the House approval of a bill supporting the expansion of charter schools was "the first part of a legislative package planned by Republicans to carry out a piecemeal rewrite" of the NCLB).

[74] English Language Acquisition Act, *supra* note 69, at §3120.

[75] *See id.* § 3102(7) ("The purposes of this part are to streamline language instruction educational programs into a program carried out through formula grants to State educational agencies and local educational agencies to help limited English proficient children, including immigrant children and youth, develop proficiency in English, while meeting challenging State academic content and student academic achievement standards.").

[76] *Id.* § 3102(9) ("The purposes of this part are to provide State educational agencies and local educational agencies with the flexibility to implement language instruction educational programs, based on scientifically based research on teaching limited English proficient children, that the agencies believe to be the most effective for teaching English.").

[77] Teresa Watanabe, *Dual-Language Immersion Programs Growing in Popularity*, L.A. TIMES, May 8, 2011, *available at* http://articles.latimes.com/2011/may/08/local/la-me-bilingual-20110508.

[78] *See* English Language Acquisition Act, *supra* note 69, at § 1111.

The law judged schools by the percentage of LEPs reclassified as fluent in English each year.[79] It also expected schools to demonstrate English test results in the lower grades,[80] though realistically it could take years for EL students to develop conversational English and even more time to develop academic English skills in speaking, listening, reading, and writing.

The testing requirements in the NCLB provoked sharp disagreements that continue to shape the debate among educators and scholars. Some maintain that "attaching incentives to increases in student achievement" will motivate school officials to improve student learning and achievement.[81] With much of the emphasis placed on low-achieving students, they argue, disaggregating data by race, ethnicity, and language proficiency promises to close the achievement gap while improving overall performance for all students.[82]

Others disagree. As Diane Ravitch has explained, "The problem with using tests to make important decisions about people's lives is that standardized tests are not precise instruments."[83] Some note that the NCLB, relying on state-defined proficiency thresholds, diverted attention from the quality of the educational experience and created a perverse incentive for diluting standards.[84] The potential sanctions for failing schools encouraged educators to "game the system," prepping students on specific exam questions and, at worst, even altering student answer sheets, as cheating scandals in New York and Atlanta revealed.[85]

For critics like linguist Jim Cummins, federal and state testing policies create a "pedagogical divide in which 'poor kids get behaviorism and rich kids social constructionism,'"[86]—in other words, "skills for the poor and knowledge for the rich."[87] While lower-achieving students, many of them racial minorities and poor, get a steady diet of English and math via "teaching to the test,"[88] students in more privileged communities enjoy an enriching education including social sciences, the arts, science, civics, literature,

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[79] *See id.*

[80] *See id.* § 1111(b)(2)(C).

[81] Sandy Kress et al., *When Performance Matters: The Past, Present, and Future of Consequential Accountability in Public Education*, 48 HARV. J. ON LEGIS. 185, 192 (2011).

[82] *See* Eric A. Hanushek & Margaret E. Raymond, *Does School Accountability Lead to Improved Student Performance?*, 24 J. POL'Y ANALYSIS & MGMT. 297, 298 (2005).

[83] DIANE RAVITCH, THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION 152 (2010).

[84] *See* JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA 10–11 (2010).

[85] Sharon Otterman, *Allegations of Exam-Tampering Soar*, N.Y. TIMES, Nov. 1, 2011, at A21; Christina A. Samuels, *Test-Tampering Found Rampant in Atlanta System,* EDUC. WK., July 13, 2011, at 1.

[86] Meteor Blades, *Jim Cummins Demolishes NCLB's Ideology and Practice,* DAILY KOS (July 26, 2007, 11:49 AM), http://www.dailykos.com/story/2007/7/26/131722/394 (quoting Jim Cummins, Address at California Teachers of English to Speakers of Other Languages Conference (July 25, 2007)) (on file with the Harvard Law School Library).

[87] *Id.*

[88] *Id.* (quoting Jim Cummins, Address at California Teachers of English to Speakers of Other Languages Conference (July 25, 2007)).

and foreign languages. A 2011 report from a blue-ribbon panel's ten-year study found that test-based incentive systems, like the NCLB annual yearly progress measures and high school exit exams, have yielded little or no effect on student learning and, in some cases, have undermined the very purposes of such incentives.[89]

High-stakes testing for EL students, with its added language factor, complicates matters even further. To its credit, the NCLB allowed certain accommodations for language differences. Districts could administer the reading/language arts and math content assessments in the student's home language. On the English assessments, they could apply other strategies for the first three years the student had been in U.S. schools, and up to two additional years depending on circumstances. They could offer the test in small groups, provide extra time or flexible scheduling, use simplified instructions, give instructions recorded in the native language, or allow students to use a bilingual dictionary.[90]

None of these accommodations, however, is ideal. Each compromises test validity and reliability. Moreover, some EL students lack literacy skills or the vocabulary and syntax to test in any language. Some lack the word-searching skills that bilingual dictionaries require. Simplifying the language of the test can also simplify its constructs and content. The tests currently used are normed on an English-dominant population, are related to grade levels, and present multiple-choice and open-ended questions that may be unfamiliar to some EL students depending on past schooling.[91]

English learners vary widely in levels of English proficiency and in other background characteristics, including the age at which they enter U.S. schools, their level of prior schooling, and their literacy in each language. And so critics argue that to classify them into one group for measuring accountability and to expect all to become proficient in English within the same number of years is educationally unsound and fundamentally unjust.[92] Though approximately two-thirds of ELs are native-born Americans and enter U.S. schools in kindergarten, many older students in particular come from other countries and with prior schooling that is limited, interrupted, or of poor quality.[93] Some are refugees or asylum seekers from cultures that differ dramatically from mainstream American life. The time it takes for these students to adjust emotionally and to master academic English can differ widely.

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[89] Nat'l Research Council, Incentives and Test-Based Accountability in Education (Michael Hout & Stuart W. Elliott eds., 2011).

[90] *See* Salomone, *supra* note 6, at 158–59.

[91] *See id.* at 158–61.

[92] *See id.* at 159.

[93] *See id.* at 160.

The Obama Administration's Assessment Initiatives

Under pressure from states to allow greater flexibility, the Obama Administration has repeatedly called upon Congress to fix the NCLB's "broken accountability system."[94] After much foot-dragging, Congress is now seriously weighing proposals to reauthorize the Elementary and Secondary Education Act (ESEA). In the meantime, in March 2010, the Administration issued a *Blueprint for Reform* (*Blueprint*) setting forth a plan to revamp the law.[95] The *Blueprint* continues the focus on testing and accountability yet departs from the NCLB in significant ways. It also reaffirms provisions in the Administration's *Race to the Top* competition, first announced in 2009, awarding education stimulus funds to the states.

In the absence of decisive congressional action on the ESEA, and under pressure from the states for relief from NCLB mandates and timelines, the Administration announced in September 2011 that the Department of Education would grant states waivers in return for their meeting certain conditions that track provisions outlined in the *Blueprint*.[96] The "waiver" program most notably calls on states to develop new academic standards and statewide assessments to assure that students leave high school "college and career-ready" so "that the U.S. once again leads the world in the proportion of college graduates"[97]—a goal that critics argue may prove as elusive as the NCLB 2014 target date. Eleven states submitted waiver requests in the first round of applications in November 2011.[98]

Even before the waiver program, some of the Administration's proposals had begun to see the light of day. The National Governors Association had coordinated an effort among the states to develop *Common Core State Standards* that define what students should learn in English and math from kindergarten through high school. As of January 2012, all but four states had adopted the *Standards*.[99] With $362 million of federal funds, two consortia had begun to develop a new generation of tests in math and English language arts aligned with the *Standards*.[100] The plan is for states to use these voluntarily by the 2014–2015 school year.

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[94] Press Release, The White House, President Obama Calls on Congress to Fix No Child Left Behind Before the Start of the Next School Year (Mar. 14, 2011) (on file with the Harvard Law School Library).

[95] BLUEPRINT, *supra* note 2.

[96] U.S. DEP'T OF EDUC., BRINGING FLEXIBILITY & FOCUS TO EDUCATION LAW: SUPPORTING STATE AND LOCAL PROGRESS (2011).

[97] *See id.* at 1.

[98] *No Child Left Behind Waivers: 11 States Seek Relief From Federal Education Law*, HUFFINGTON POST (Nov. 15, 2011, 3:26 PM), http://www.huffingtonpost.com/2011/11/15/no-child-left-behind-waiv_n_1095306.html (on file with the Harvard Law School Library).

[99] *In the States*, COMMON CORE STATE STANDARDS INITIATIVE, http://www.corestandards.org/in-the-states (last visited Jan. 8, 2012) (on file with the Harvard Law School Library).

[100] JACQUELINE E. KING, AM. COUNCIL ON EDUC., IMPLEMENTING THE COMMON CORE STATE STANDARDS: AN ACTION AGENDA FOR HIGHER EDUCATION 3–4 (Jan. 2011), *available at* http://www.acenet.edu/links/pdfs/cpa/ImplementingTheCommonCoreStateStandards_2011.html.

In September 2011, the Department of Education awarded a $10.5 million, four-year grant to a twenty-eight-state consortium led by the Wisconsin Department of Education, along with several partners, to create an online English-language proficiency assessment system that tracks the Common Core Standards. The project includes formative assessments, benchmark assessments, and an annual summative assessment, which are all computer based.[101] The tests will measure student progress in English speaking, listening, reading, and writing skills. According to the terms of the grant competition, in addition to student placement and curriculum, the tests could be used to assess school accountability including the evaluation of principal and teacher performance.[102] Participating states must agree to certain prescriptions that could dramatically reorder EL policies nationwide. Chief among these is a common definition of "English learner" for classifying students for services and ultimately mainstreaming them. States also must disaggregate the data by subgroups such as "English learners whose formal education has been interrupted," by "level of English proficiency," and by "native language."[103]

Though the competition announcement alluded to common English-language proficiency standards, it provided no funds for their development. To fill the gap, the Carnegie Corporation awarded a one million dollar grant to Stanford University for that purpose. Co-chairing the project is Stanford professor Kenji Hakuta, a widely recognized expert on language learning and a member of the Working Group on ELL Policy, whose support for testing and accountability has gained the ire of some EL advocates.[104] Among groups represented on the project's steering committee is the National Council of La Raza. While La Raza, like the Mexican American Legal Defense and Educational Fund, has been a longtime advocate of bilingual education, both groups maintain that test results hold school officials' feet to the fire to provide adequate services to EL students and move them toward meeting state standards.[105]

In October 2011, the Working Group on ELL Policy sent a letter echoing those concerns to the Senate Committee working on a draft bill of the ESEA. Supporting a "strong federal framework" and invoking the Supreme Court's decision in *Lau v. Nichols*, the letter underscored that "English Learners need both English language skills *and* meaningful access to aca-

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[101] Press Release, Wis. Dep't of Pub. Instruction, Wisconsin Wins $10.5 Million Federal Enhanced Assessment Grant (Sept. 27, 2011).

[102] Applications for New Awards; Enhanced Assessment Instruments Grants Program—Enhanced Assessment Instruments, 76 Fed. Reg. 21,978, 21,979 (Apr. 19, 2011).

[103] *Id.* at 21,978–79.

[104] *See* Mary Ann Zehr, *Stanford to Lead Creation of ELL Standards for "Common Core,"* EDUC. WK. LEARNING THE LANGUAGE BLOG (July 12, 2011, 5:43 AM), http://blogs.edweek.org/edweek/learning-the-language/2011/07/stanford_to_lead_creation_of_e.html (on file with the Harvard Law School Library).

[105] *See Impact of No Child Left Behind on English Language Learners: Hearing Before the Subcomm. on Early Childhood, Elementary and Secondary Educ. of the H. Comm. on Educ. & Labor*, 110th Cong. 30–33 (2007) (statement of Peter Zamora, Washington, D.C., Regional Counsel, Mexican American Legal Defense and Educational Fund).

demic content."[106] The group urged that any revisions contain a "solid accountability framework" requiring states to set "reasonable timeframes" for ELs to attain both English language and academic proficiency.[107] The law also should include "reporting requirements" on English at all language-proficiency levels, on "academic content outcomes," and on the "long-term performance" of students who have exited out of EL services.[108]

Current State of EL Policy

To fully understand the tension between bilingualism and accountability and its consequences for EL education, one has to consider the broader context of current EL policy and its related factors. That context includes both the Administration's position on dual language instruction and its commitment and strategies to enforce civil rights statutes promoting educational opportunity, as well as the Supreme Court's interpretation of existing law.

Executive Interpretation and Enforcement

Deciphering the current state of federal policy on EL education is a bit like reading tea leaves, though one point is unmistakably clear. The NCLB not only modified the terminology, it closed the door to bilingual schooling as national language policy, making English acquisition the centerpiece. Quietly following that lead, the Obama Administration's near silence on the language question speaks volumes on how far the federal focus has shifted since the 1960s when the original Bilingual Education Act was adopted.

The *Blueprint* takes no position on dual language versus English immersion. It notes that the federal government would continue to meet the needs of "diverse learners," including "English Learners."[109] The government also would continue to award substantial formula grants to provide "high-quality language instruction educational programs" for ELs. The proposal leaves states and school districts broad discretion in deciding how that might be done. It merely lists optional approaches, including "dual language programs, transitional bilingual education, sheltered English immersion, newcomer programs for late-entrant English Learners, or other language instruction educational programs."[110]

A government report on improving education for Latinos takes a similarly neutral stance. "While there are certain practices that have been shown to benefit ELs," the report states, "more research and evaluation is needed

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[106] Letter from Working Grp. on ELL Policy to Senator Tom Harkin, Chairman, Senate Comm. on Health, Educ., Labor, & Pensions & Senator Michael Enzi, Ranking Member, Senate Comm. on Health, Educ., Labor, & Pensions (Oct. 26, 2011), http://www.edweek.org/media/workinggroup_letter_final.pdf (on file with the Harvard Law School Library).

[107] *Id.*

[108] *Id.*

[109] Blueprint, *supra* note 2, at 5.

[110] *Id.* at 20.

on the types of language instruction education programs that are most effective."[111] The report gives a nod to programs that "produc[e] bilingual students who are bicultural and bi-literate," singling out a Spanish program in St. Paul, Minnesota, for its success in closing the EL achievement gap.[112]

A series of negotiated agreements with states and school districts demonstrates that the Administration is using civil rights enforcement as another avenue for promoting its accountability agenda and improving educational outcomes for EL students. Under "Accountability for ELs," the government report highlights a settlement agreement signed by the Boston School Committee and the Departments of Justice and Education in October 2010. The Committee agreed to provide students with Sheltered English Immersion in their core content classes along with English as a Second Language instruction. In announcing the settlement, Thomas E. Perez, the Assistant Attorney General for the Civil Rights Division, confirmed that "[a]ll students who are not proficient in English are entitled to language acquisition services to overcome language barriers that impede their equal and meaningful participation in education programs."[113]

In March 2011, the Departments of Justice and Education likewise reached a settlement agreement with the Arizona Department of Education. The state agreed to revoke its one-question Home Language Survey and reinstate its former three-question format to fully identify all students in need of EL services.[114] In September 2011, in response to a letter from the Justice Department, the Massachusetts Board of Education agreed to grant the Commissioner of Education authority to draft regulations outlining the training and preparation required of Sheltered English Immersion teachers.[115] The following month, the Department of Education entered into a voluntary resolution agreement with the Los Angeles Unified School District to "revamp in almost its entirety" its EL program.[116] In November 2011, Office for Civil Rights officials reached an agreement with the Durham, North Caro-

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[111] U.S. Dep't of Educ., Winning the Future: Improving Education for the Latino Community 11 (2011).

[112] *Id.* at 12.

[113] Press Release, Dep't of Justice Office of Pub. Affairs, Departments of Education and Justice Reach Settlement With Boston School Committee to Ensure Equal Opportunities for ELL Students (Oct. 1, 2010), http://www.justice.gov/opa/pr/2010/October/10-crt-1109.html (on file with the Harvard Law School Library).

[114] Press Release, U.S. Dep't of Educ., U.S. Departments of Education and Justice Reach Settlement With Arizona Department of Education to Ensure That Potential ELL Students Are Properly Identified (Mar. 25, 2011), http://www.ed.gov/news/press-releases/us-departments-education-and-justice-reach-settlement-arizona-department-educati (on file with the Harvard Law School Library).

[115] Press Release, Dep't of Justice Office of Pub. Affairs, Massachusetts Takes Steps to Require Sheltered English Immersion Training in Response to Justice Department's Letter (Sept. 27, 2011), http://www.justice.gov/opa/pr/2011/September/11-crt-1264.html (on file with the Harvard Law School Library).

[116] Press Release, U.S. Dep't of Educ., Education Department Announces Resolution of Civil Rights Investigation of Los Angeles Unified School District (Oct. 11, 2011), http://www.ed.gov/news/press-releases/education-department-announces-resolution-civil-rights-investigation-los-angeles (on file with the Harvard Law School Library).

lina, schools that focused on improving the flow of information to non-English-speaking parents.[117] At that time, the Office was conducting about seventy-five investigations nationwide aimed to result in similar "voluntary resolutions."[118]

These enforcement efforts focus more directly on education procedure than on the substance of instruction, although at times the former can significantly affect the latter. They fall in line with the *Castañeda v. Picard* guidelines[119] and the "whatever works" standard for EEOA compliance. As noted, the Office for Civil Rights in 1991 officially adopted those guidelines for determining violations of both the EEOA and Title VI.[120] In like manner, the Department of Justice has publicly stated that enforcing the EEOA is a "top priority" and that "[a]ll English Language Learners have the right to *appropriate* language support until they achieve English proficiency."[121] The Department has taken the position that "districts must provide educationally sound EL programs that are *adequately* resourced and that enable students to achieve English proficiency so that they can *meaningfully* participate in educational programs."[122]

The Supreme Court and Accountability

The notion of "adequate" resources is one that litigators relied upon in recent years to challenge funding levels as a measure of equality for ELs. With the law and the courts remaining silent on the scope of "different is equal," advocates believed they could transpose onto the EEOA the compensatory notion of "more is equal" while avoiding the question of instructional methods or native-language teaching.[123] The Supreme Court rejected that argument in 2009 in *Horne v. Flores*.[124] The significance of the decision for purposes of the present discussion lies not in that precise ruling, but rather in more subtle implications regarding state and local accountability for EL proficiency in English and the core academic curriculum.

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[117] Leslie Maxwell, *Feds Press Durham, N.C., Schools to Improve Services to Latino Families*, EDUC. WK. LEARNING THE LANGUAGE BLOG (Nov. 25, 2011), http://blogs.edweek.org/edweek/learning-the-language/2011/11/feds_press_durham_nc_schools_t.html (on file with the Harvard Law School Library).

[118] *Id.*

[119] *See* Castañeda v. Picard, 648 F.2d 989, 1009-10 (5th Cir. 1981); Moran, *supra* note 54, at 409.

[120] Memorandum from Michael L. Williams, *supra* note 56.

[121] Press Release, Dep't of Justice Office of Pub. Affairs, Justice Department Announces Changes in Illinois Rules Concerning English Language Learner Students (July 13, 2010) (emphasis added), http://www.justice.gov/opa/pr/2010/July/10-crt-800.html (on file with the Harvard Law School Library).

[122] Mary Ann Zehr, *The Justice Department Provides Stats on ELL Investigations*, EDUC. WK. LEARNING THE LANGUAGE BLOG (July 28, 2010, 9:30 AM), http://blogs.edweek.org/edweek/learning-the-language/2010/07/statistics_from_the_justice_de.html (statement of Xochitl Hinojosa, spokeswoman, U.S. Dep't of Justice) (emphasis added) (on file with the Harvard Law School Library).

[123] SALOMONE, *supra* note 6 at 171.

[124] 129 S. Ct. 2579 (2009).

The case was initially filed in 1992 on behalf of EL students in the Nogales, Arizona, school district. The plaintiffs sought adequate state funding to guarantee equal educational opportunity. After years of pre-trial proceedings and settling various claims, the district court in 2000 found that state funds allocated to Nogales were inadequate under *Lau v. Nichols*.[125] The following year, the court applied the order statewide and granted injunctive relief.[126]

A narrow Supreme Court majority saw the matter differently. In a 5-4 ruling, the Court deferred to state and local authorities in deciding the contours of an "appropriate" education.[127] The Justices specifically noted federalism concerns, especially in cases where "a federal-court decree has the effect of dictating state or local budget priorities."[128] The focus of the EEOA, the Court noted, is on the "quality of educational programming and services to students, not the amount of money spent" on them.[129]

The Justices further rejected the argument that achievement results mandated under the NCLB could be the deciding factor in finding a violation of the EEOA.[130] But they also acknowledged that the "assessment and reporting requirements" under the NCLB could provide "persuasive evidence" on the "effectiveness" of a school district's EL programs.[131] The implications of that dictum for using testing mandates as one factor in considering EEOA compliance presented an interesting question for the district court on remand.[132]

Perhaps the most striking aspect of the majority opinion, and one related to accountability, was its sweeping assertion upholding "documented, academic support for the view that SEI [Structured English Immersion] is significantly more effective than bilingual education."[133] The Court's conclusion relied on just two studies cited in an *amicus curiae* brief submitted by the American Legal Defense Fund, an anti-immigrant group.[134] The conclusion also ran counter to the weight of research findings that point to either no differences or positive differences in favor of bilingual as compared with English-Only instruction.[135] Arizona's own trial witnesses could not verify

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[125] Flores v. Arizona, 160 F. Supp. 2d 1043, 1044 (D. Ariz. 2000).

[126] Flores v. Arizona, No. CIV. 92-596TUCACM, 2001 WL 1028369, at *2 (June 25, 2001).

[127] *Horne*, 129 S. Ct. at 2605–07.

[128] *Id.* at 2595.

[129] *Id.* at 2587.

[130] *See id.* at 2602 ("The Court of Appeals concluded, and we agree, that because of significant differences in the two statutory schemes, compliance with NCLB will not necessarily constitute 'appropriate action' under the EEOA.").

[131] *Id*. at 2602–03.

[132] *See* Jeffrey Mongiello*, The Future of the Equal Educational Opportunities Act § 1703(F) After* Horne v Flores*: Using No Child Left Behind Proficiency Levels to Define Appropriate Action Towards Meaningful Educational Opportunity*, 14 HARV. LATINO L. REV. 211, 224–25 (2010) (discussing role of NCLB benchmarks in "appropriate action" litigation).

[133] *Horne*, 129 S. Ct. at 2601.

[134] *Id.* at 2601 n.10.

[135] *See* WAYNE P. THOMAS & VIRGINIA P. COLLIER, A NATIONAL STUDY OF SCHOOL EFFECTIVENESS FOR LANGUAGE MINORITY STUDENTS' LONG-TERM ACADEMIC ACHIEVEMENT 324

that the State's program had improved student performance to a large extent.[136] In any case, the Justices sent the matter back to the district court to determine whether a statewide solution was in order where there were no findings of a statewide violation.

Interested parties are watching carefully to see how the Arizona case unfolds on remand. The trial was concluded in January 2011, following twenty-two days of testimony. The district court has yet to decide whether "changed circumstances" demonstrate that the State is fulfilling its obligation under the EEOA by means other than the additional funding required by the original court orders. Those changes include a state-mandated four hours per day of SEI instruction for all EL students, enactment of the No Child Left Behind Act with its accountability measures, and increased state funding for EL education.

In the least, both sides agree that an appropriate education for ELs demands a "different" approach to some degree. The legally acceptable contours of that difference have wide-sweeping implications for the education of EL students nationwide. Critics have noted that the SEI instructional program, as implemented by the State of Arizona, is especially troublesome. Not only does it limit the time available for EL students to participate in the grade-level academic curriculum, but it also segregates them from their mainstream peers for a considerable portion of the school day.[137] If the district court finds the program "appropriate" under the EEOA, it would effectively uphold the concept of "sequential instruction," where educators first develop English proficiency and only then provide access to the core curriculum, causing EL students to lose academic ground in the content areas while they learn English. In the end, it would widen the achievement gap with English-proficient students and undermine the spirit of *Lau*.[138] Whatever reliance, if any, the district court places on state measures of student achievement will also prove consequential.

(2002), *available at* http://escholarship.org/uc/item/65j213pt.pdf (advocating a "socioculturally supportive school environment for language minority students that allows natural language, academic, and cognitive development to flourish"); Kellie Rolstad et al., *The Big Picture: A Meta-Analysis of Program Effectiveness Research on English Language Learners*, 19 EDUC. POL'Y 572, 590 (2005); Robert E. Slavin & Alan Cheung, *A Synthesis of Research on Language of Reading Instruction for English Language Learners*, 75 REV. EDUC. RES. 247, 274 (2005); David J. Francis et al., *Language of Instruction*, *in* DEVELOPING LITERACY IN SECOND-LANGUAGE LEARNERS: REPORT OF THE NATIONAL LITERACY PANEL ON LANGUAGE-MINORITY CHILDREN AND YOUTH (Diane August & Timothy Shanahan eds., 2006); FRED GENESEE ET AL., EDUCATING ENGLISH LANGUAGE LEARNERS: A SYNTHESIS OF RESEARCH EVIDENCE 181–83 (2006); ROBERT E. SLAVIN ET AL., READING AND LANGUAGE OUTCOMES OF A FIVE-YEAR RANDOMIZED EVALUATION OF TRANSITIONAL BILINGUAL EDUCATION 2 (2010), *available at* http://www.bestevidence.org/word/bilingual_education_Apr_22_2010.pdf.

[136] *Horne*, 129 S. Ct. at 2623 (Breyer, J., dissenting).

[137] MARY MARTINEZ-WENZL ET AL., UCLA CIVIL RIGHTS PROJECT, IS ARIZONA'S APPROACH TO EDUCATING ITS ELS SUPERIOR TO OTHER FORMS OF INSTRUCTION? 19 (2010), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/language-minority-students/is-arizonas-approach-to-educating-its-els-superior-to-other-forms-of-instruction/martinez-wenzl-is-arizona-approach-superior-2010.pdf.

[138] Cecilia Rios-Aguilar & Patricia Gándara, Horne v. Flores *and the Future of Language Policy*, 114.9 TEACHERS C. REC. 1–2 (2012).

Summing Up and Moving On

As the foregoing discussion reveals, the education of English learners has proven contentious in both law and policy. Yet there is indeed a silver lining to this cloud of confusion. The past two decades have given rise to a set of legal and pedagogical parameters within which educators, policy makers, and advocates now struggle to chart a workable course that serves the best interests of this increasing population of students. And so the time is ripe for reframing the debate and revamping national policy on the basis of two significant factors: a reasonable position on the federal government's legitimate role in shaping state and local decision making, and a consensus among stakeholders on a comprehensive plan that achieves not merely a balance but a synergy between dual language proficiency and accountability.

The Limits of Federal Intervention

Education in the United States traditionally has been a matter of state responsibility and local control. Even where Congress has defined legal rights to equal educational access,[139] it has couched those rights in vague terms like "appropriate" and "effective" that allow for state and local discretion.[140] Separation of powers and the limits of judicial expertise likewise constrain the federal judiciary from intruding on education decision making. And so the courts typically nibble at the edges of education policy by demanding procedural regularity while sidestepping education substance. As *Lau* demonstrated, the Court is reluctant to prescribe specific instructional approaches. The *Lau Remedies* and the failed 1980 proposed regulations under Title VI further made clear that any attempts by executive officials to do so invite fierce opposition.

The federal government also shapes education policy through civil rights enforcement. Judging from recently negotiated settlements, the Justice Department and the Office for Civil Rights seem to be limiting their investigations to procedural matters. They focus, for example, on the standards used to identify students in need of EL services, and the adequacy of teacher preparation or parent information, though as the Boston agreement showed, the resulting remedy may be of a substantive nature. They further rely on institutional inputs, rather than student outcomes, as measures of "meaningful participation."

Beyond legal norms and executive enforcement, the more controversial question lies in the conditions that Congress primarily, and the President

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[139] U.S. Const. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

[140] *See, e.g.*, Individuals with Disabilities Education Act, 20 U.S.C. § 1400(d) (2010) (guaranteeing the right to a "free appropriate public education"); Equal Educational Opportunities Act, 20 U.S.C. § 1703(f) (2010) (mandating that school officials take "appropriate" action to overcome language barriers that impede students from "equal participation" in the instructional programs).

derivatively, place on how states and school districts may spend federal funds that they voluntarily accept.[141] Such conditions are intended to induce states and localities into promoting national policy objectives. Yet the NCLB, the *Race to the Top* initiative, and the *Blueprint for Reform* proposals are pointed examples of where the fine line between inducement and coercion has been blurred.[142]

Given the billions of federal dollars now at stake in the reauthorization of the ESEA, and the extent to which states in dire need of those funds acquiesce to federal directives—some more reluctantly than others—the federal government is fast becoming the dominant partner in this uneasy relationship.[143] That observation is now surfacing among Republican presidential candidates who promise to return education policy making to state and local governments.[144] It also has become a point of contention in current congressional debates over revamping the ESEA. Yet despite all the federal overreaching in recent years, one still has to wonder whether, without the carrots and sticks, states and local school districts would once again close their eyes to rigorous academic standards and equal educational opportunity for traditionally overlooked students like English learners.

Often lost in the crossfire of this ongoing debate over the federal role is the important distinction between legal rights and education policy, though often one inspires the other. While the first defines a minimum floor of legally enforceable state obligations in the interest of equal opportunity, the second encompasses broader educational understandings and societal objectives. The 1968 Bilingual Education Act not only legitimized bilingual education as a matter of federal funding policy, it also mobilized a bilingual education advocacy movement that never fully realized its goals as a matter of law. That failure sapped what was a controversial innovation of its legal and political force. At the same time, a persistent achievement gap between white and EL (specifically Latino) students convinced policy makers, educators, and the general public that transitional bilingual education programs were not the solution to the problem.[145]

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[141] U.S. CONST. art. I, § 8, cl. 1 (empowering Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States").

[142] *See* South Dakota v. Dole, 483 U.S. 203, 211 (1987) (holding that "in some circumstances financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion'" (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937))).

[143] *See generally* Salomone, *supra* note 70, at 1476–77 (2011) (discussing how the current productivity agenda in federal education policy is undermining *Brown*'s dual promise to promote equality and democracy).

[144] Trip Gabriel, *G.O.P. Candidates Take an Anti-Federal Stance*, N.Y. TIMES, Oct. 9, 2011, at A28.

[145] *See Achievement Gap*, EDUC. WK., July 7, 2011, *available at* http://www.edweek.org/ew/issues/achievement-gap (noting that fourth and eighth grade Latino students continue to trail white students by an average of more than twenty test-score points in reading and math assessments, a difference of two grade levels, as well as that "[a]chievement disparities are often attributed to socioeconomic factors") (on file with the Harvard Law School Library); F. CADELLE HEMPHILL ET. AL., NAT'L ASSESSMENT OF EDUC. PROGRESS, ACHIEVEMENT GAPS:

While the wholesale rejection of dual language instruction that followed was an extreme response, it nonetheless was understandable given the surrounding context. Decades of wrangling over bilingual versus English-Only approaches had, to some extent, pushed to the margins other significant factors, like teacher preparation and instructional quality, which affect EL student achievement.[146] Many transitional programs, eager to preserve the home language and culture, unwittingly overlooked the diverse needs of the EL population as immigration patterns shifted over time. More fundamentally, some programs lost sight of the quality and content of what students were learning.

Meanwhile, advocates failed to hold schools sufficiently accountable for developing adequate skills in academic English, which is essential to participating in mainstream classrooms and mastering content in other subject areas. More attention should have been directed to creating appropriate measures for evaluating students' language abilities, especially in English. And so the concept of bilingual instruction fell victim to its flaws. The problem now is that the current emphasis on accountability and testing has pushed the pendulum on dual language development too far in the opposite direction.

Reframing the Debate

This takes us back to where this essay began: the disagreement among EL advocates over standards and testing, and the apparent digression from the language question that previously dominated the advocacy agenda. The constant drumbeat of accountability, productivity, and competition emanating from Washington over the past decade has not merely moved the debate toward English immersion and English proficiency. For better or for worse, it has consumed the energies of EL advocates who press to maintain a collective voice in a discussion whose terms and direction they do not control. Struggling to protect the interests of EL students, some qualifiedly embrace testing and accountability measures while others take a firm line of opposition. Yet regardless of where they stand, the sheer force of those efforts has diverted their attention from the benefits of dual language instruction and bilingualism, and the various ways in which schools can realize the full potential of these students regardless of when they entered U.S. schools, their prior schooling, or their level of literacy in each language.

The *Recommendations* of the Working Group on ELL Policy are here worthy of serious note.[147] They in fact present a thoughtful and refreshingly

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How Hispanic and White Students in Public Schools Perform in Mathematics and Reading on the National Assessment of Educational Progress iii (2011), *available at* http://nces.ed.gov/nationsreportcard/pdf/studies/2011459.pdf (noting that thirty-seven percent of fourth grade and twenty-one percent of eighth grade Latino students are English learners).

[146] *See* Martinez-Wenzl, *supra* note 137, at 13.

[147] Working Grp. on ELL Policy, Ctr. For Applied Linguistics, Improving Educational Outcomes for English Language Learners: Recommendations for the Reauthorization of the Elementary and Secondary Education Act (2010) [hereinafter

non-ideological starting point for reframing the national debate on federal involvement in educating English learners. First of all, they recognize the "crucial role" that the ESEA has played in "building national capacity" to meet EL "educational needs."[148] Addressing the twin goals of English proficiency and meaningful participation, they further consider both accountability and multilingualism in promoting equal educational access.[149] They recognize the failure of schools to meet the needs of EL students, implicitly acknowledging the deficiencies in past practices and reform efforts.[150] They note, for example, that among schools held accountable for adequate yearly progress for English learners under the NCLB, thirty percent did not reach their targets for that subgroup in 2005–2006 and that this percentage was "substantially higher" in schools with high concentrations of students living in poverty.[151]

The *Recommendations* more specifically attempt to reconcile the seeming tension between accountability and bilingualism. They call for providing EL students with "an equal opportunity to acquire the same content and high-level skills" advocated on behalf of other students; a "meaningful accountability system"; and "high quality curriculum, effective instructional practices and teachers, and supportive school environments."[152] They propose that the ESEA require states to distinguish among EL subgroups by language proficiency,[153] use uniform and standardized state-wide tests for identification and classification of ELs,[154] establish appropriate timeframes for individual students to attain proficiency in academic English,[155] set performance expectations aligned with English proficiency for content area achievement,[156] and establish accountability measures for all schools and districts receiving ESEA funds, including programs not funded under Title III, the NCLB's English-language acquisition provision.[157]

At the same time, though they avoid the politically loaded terminology of "bilingual education," they encourage bilingual language and literacy development[158] and multilingualism "for all American students."[159] In doing so, they underscore the personal and national benefits of language learning—enhancing "cognitive and social growth"; developing English literacy; and promoting global "competitiveness," "national security," and inter-cultural "understanding."[160] In the end, they propose that federal law permit

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Recommendations], *available at* http://www.cal.org/topics/ell/ELL-Working-Group-ESEA.pdf.

[148] *Id.* at 2.
[149] *See id.* at 2–3.
[150] *See id.* at 1.
[151] *Id.*
[152] *Id.* at 2–3.
[153] *Id.* at 4.
[154] *See id.*
[155] *Id.* at 7.
[156] *Id.* at 7–8.
[157] *Id.* at 8–9.
[158] *Id.* at 9.
[159] *See id.* at 3.
[160] *Id.*

local officials to use Title III funds for programs that develop proficiency as well as content area knowledge in native and heritage languages.[161]

The *Recommendations* make several important points that address shortcomings in both Structured English Immersion programs and the transitional bilingual programs they have replaced. They also denote sensitivity to the nuances of dual language learning and the demographic changes that many schools now face. Schools, they note, must address both English language proficiency and content area knowledge from the start of schooling. Educators should hold EL students to the same high academic expectations as others, though the definition of student growth for ELs may differ. It can take four to five years for EL students to gain proficiency in academic English, and even more if they are being educated bilingually.[162] The *Recommendations* further underscore the need to train educators who understand the language and culture of ELs, especially in areas of the country not accustomed to serving such students.

These proposals and points, set forth by prominent scholars and researchers, many of them avid supporters of dual language instruction, deserve serious attention. That being said, however, they fall down on a number of more subtle details. In some cases, they oversimplify matters. In other cases, they miss the mark, perhaps more in what they do not say than in what they prescribe. And so they leave room to explore additional factors in providing an effective and meaningful education for EL students.

In stressing accountability and testing, the *Recommendations* risk continuing and even enhancing a regime where schools subject EL students to a steady diet of "teaching to the test," not only for English proficiency but also for knowledge in the content areas. An elaborate system of formative and summative standardized assessments leaves little time for enrichment learning and developing the analytic skills needed for advanced coursework and college. Such a system, moreover, provides no incentives for schools to offer native language development. In fact, it creates disincentives.

A measure of reason needs to prevail. Perhaps testing English proficiency at the beginning of each school year (as a diagnostic tool) and content knowledge at the end of the school year, combined with informal teacher-developed formative assessments as the school year progresses, would suffice. The document should include caveats in this regard. It also should more explicitly underscore that testing must not dictate the pacing of the curriculum or its content. A shared set of standards and testing instruments do not necessitate a common curriculum. And while common state measures are useful in identifying ELs for local and state accountability purposes, schools should be afforded flexibility in utilizing broader means,

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[161] *Id.* at 12.

[162] *See* KENJI HAKUTA ET. AL., UNIV. OF CAL. LINGUISTIC MINORITY RESEARCH INST., HOW LONG DOES IT TAKE ENGLISH LEARNERS TO ATTAIN PROFICIENCY? 13 (2000), *available at* http://www.stanford.edu/~hakuta/Publications/(2000)%20-%20HOW%20LONG%20DOES%20IT%20TAKE%20ENGLISH%20LEARNERS%20TO%20ATTAIN%20PR.pdf.

including teacher judgment, for purposes of prescribing program placement and instruction suited to the individual needs of students.

In suggesting native language assessments for students literate in their native language, the *Recommendations* gloss over both the limitations of translation on test validity and the problems that other forms of accommodation pose. Moreover, requiring states to establish content area performance goals for students at each English language proficiency level within a set timeframe, while worthy as an ideal, is likely to present practical problems in how schools might measure student progress in each subject area and at each level. In fact, students should be exempt altogether from content area tests administered in English until they have completed at least a year of specialized English language instruction.

The *Recommendations* also make a surprisingly tepid argument for bilingualism and dual language learning. Placing native language proficiency last in the list of "guiding principles" conveys a message of relatively low priority that may disserve the intent of the authors. A more overarching rationale, presented at the outset and built around the personal benefits of multilingualism and its global imperative (now buried and bifurcated between pages 9 and 12) would strengthen the case for developing native and heritage language skills. Such a rationale would more specifically tie the student's language and culture to "meaningful participation" in the educational process. The drafters of the *Recommendations* admittedly may have shied away from these details for fear they might dilute the force of their core argument to hold schools accountable for EL achievement.

Moving beyond the *Recommendations*, a comprehensive plan for reframing the debate and revamping the federal role should incorporate research findings supporting the academic benefits of dual language instruction[163] and bilingualism.[164] Beyond school performance, psychologists have inked bilingualism with mental flexibility, creative thinking,[165] and heightened social sensitivity to others' communication needs.[166] On the other side, the potential drawbacks of Structured English Immersion, the now favored approach, demand explicit attention. As the Arizona program has shown, Structured English Immersion isolates EL students from the English-speaking mainstream. It also risks their losing ground in content areas

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[163] *See generally* MARTINEZ-WENZL, *supra* note 137 (discussing academic benefits of dual language instruction).

[164] *See* Ellen Bialystok, *The Impact of Bilingualism on Language and Literacy Development*, *in* THE HANDBOOK OF BILINGUALISM 597 (Tej K. Bhatia & William C. Ritchie eds., 2004) (noting a "metalinguistic awareness" that gives bilingual children a more refined "cognitive process" for developing skills like reading).

[165] *See* Ellen Bialystok, *Cognitive Effects of Bilingualism: How Linguistic Experience Leads to Cognitive Change*, 10 INT'L J. OF BILINGUAL EDUC. & BILINGUALISM 210 (2007).

[166] Fred Genesee et al., *Communication Skills of Bilingual Children*, 46 CHILD DEV. 1010, 1014 (1975).

while intensively learning English, thus diminishing their chances of completing high school on time.[167]

A national plan further would earmark federal funds for carefully controlled longitudinal studies to determine best instructional practices for particular groups of EL students.[168] It would describe successful programs that reflect a range of student profiles and parental preferences on home language retention. Across the country, school districts now offer an array of choices, including international high schools affiliated with community colleges, newcomer schools that focus on English and admit students who have resided in the United States for a short number of years, and dual language immersion programs that offer English-proficient and non-English-proficient students the opportunity to develop skills in two languages. All these models are producing positive academic results in linguistically integrated environments while avoiding the ethnic segregation for which transitional bilingual programs have been validly faulted.

In building the case for dual language instruction, such a plan should recognize transnational lifestyles among many EL students and families, which both necessitate and facilitate skills in the home language. Technological advances, most specifically the Internet, now allow immigrant children to maintain ongoing contact, unknown to previous generations, with their family's home country. Low-cost air travel enables them to travel back for extended periods during holidays and summer vacations. On a related note, consideration should be given to the benefits of home language proficiency in preserving family and community ties that enhance student self-esteem and promote academic achievement.[169] These are significant points that must be heard above the din of standards, testing, and accountability.

Finally, and perhaps most importantly, a comprehensive national plan should provide incentives for schools to establish programs that value and nurture the linguistic and cultural resources EL students bring to the school setting without losing sight of English proficiency and its critical importance to academic achievement. What is needed is a federal commitment to build on these resources by providing funds not merely for developing English and

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[167] CECILIA RIOS-AGUILAR ET AL., CIVIL RIGHTS PROJECT AT UCLA, IMPLEMENTING STRUCTURED ENGLISH IMMERSION IN ARIZONA: BENEFITS, COSTS, CHALLENGES, AND OPPORTUNITIES 3 (2010) (finding that Arizona's four-hour English block neglected core content areas essential for graduation, isolated students, limited their chances of graduating on time, and made unrealistic assumptions on the time within which EL students could gain proficiency in English).

[168] Claude Goldenberg, *Teaching English Language Learners: What the Research Does—and Does Not—Say*, AM. EDUCATOR, Summer 2008, at 8, 12, *available at* http://www.aft.org/pdfs/americaneducator/summer2008/goldenberg.pdf.

[169] *See* Carl. L. Bankston III & Min Zhou, *Effects of Minority-Language Literacy on the Academic Achievement of Vietnamese Youth in New Orleans*, 68 SOC. OF EDUC. 1 (1995); ALEJANDRO PORTES & RUBÉN G. RUMBAUT, LEGACIES: THE STORY OF THE IMMIGRANT SECOND GENERATION 274 (2001); Paul Smokowski et al., *Acculturation and Adjustment in Latino Adolescents: How Cultural Risk Factors and Assets Influence Multiple Domains of Adolescent Mental Health*, 30 J. OF PRIMARY PREVENTION 371 (2009); David Aguayo et al., *Culture Predicts Mexican Americans' College Self-Efficacy and College Performance*, 4 J. OF DIVERSITY IN HIGHER EDUC. 79 (2011).

content area standards and assessments, but for building the infrastructure for improving dual language instruction and developing innovative approaches through research and staff development.

The *Recommendations of the Working Group on ELL Policy* present a thoughtful beginning for charting such a course. The additional factors discussed here selectively extend those proposals into an overarching vision that places bilingualism upfront in the conversation, while creating a synergy with accountability in the interest of affording EL students of all backgrounds an effective and meaningful education.

Conclusion

Forty years of debating federal law and policy on educating English learners have gradually brought clarity to several key issues. It is now settled that states and school districts are legally accountable for providing this long-overlooked and growing population with English proficiency and "meaningful participation" in the education program. And while that right does not include instruction in the home language as a matter of law, a mounting body of research points to the merits of dual language instruction for many students as a matter of policy. As recent disagreements over accountability and assessment reveal, the reauthorization of the Elementary and Secondary Education Act presents a critical point in these developments. It is now time to integrate current understandings on language and testing into federal policies that reconcile national interests both in developing the linguistic potential of these students, and in assuring them access to quality education equal to their English proficient peers.