BILINGUAL EDUCATION & LANGUAGE RIGHTS

THE PARAMETERS OF THE BILINGUAL EDUCATION DEBATE IN CALIFORNIA TWENTY YEARS AFTER *LAU v. NICHOLS*

STUART BIEGEL†

INTRODUCTION

Twenty years ago, the U.S. Supreme Court recognized the equal educational opportunity rights of limited-English proficient (LEP) and non-English proficient (NEP) children in *Lau v. Nichols*.[1] During these past two decades, the multi-faceted debate regarding bilingual education has continued unabated. While new statutes have been implemented and a growing body of case law has evolved, many legal and policy issues in this area remain unresolved. This Article analyzes the parameters of the bilingual education controversy in California over the past twenty years. Part I documents the development of the law since *Lau*, while Part II identifies major policy issues that continue to shape the debate in this area.

I. BILINGUAL EDUCATION LAW IN CALIFORNIA: TWO SEPARATE TRACKS

Since January 21, 1974,[2] the bilingual education doctrine in California has developed along two separate, independent tracks: the federal and the state. The federal track, grounded in the *Lau* decision and the Equal Educational Opportunity Act of 1974, can be identified by exploring key decisions at the district and

† Lecturer in Law, UCLA School of Law; Acting Director of Teacher Education, UCLA Graduate School of Education.

1. 414 U.S. 563 (1974).

2. The *Lau* case was heard by the Court on Dec. 10, 1973, and decided on Jan. 21, 1974.

appellate court levels. The state track, by contrast, is essentially the story of one major legislative package and its highly unusual aftermath.

A. *The Federal Track*

In *Lau,* non-English-speaking Chinese students brought a class action suit in which they argued that the San Francisco Unified School District's failure to provide equal educational opportunities for children who did not speak English amounted to a violation of the Fourteenth Amendment.[3] The Supreme Court ruled in favor of the students, but declined to decide the Fourteenth Amendment challenge relying solely on Title VI of the Civil Rights Act of 1964.[4]

Writing for the Court, Justice Douglas explained that no specific remedy would be granted because none had been requested.[5] While he did identify some possible "choices" in this regard,[6] Douglas made it clear that any remedy designed by local district officials would have to be consistent with the Office of Civil Rights' (OCR) interpretation of Title VI, including the following guideline:

> Where an inability to speak and understand the English language excludes national-origin minority group children from

---

3. 414 U.S. at 564. Judge Hufstedler, dissenting from the denial of hearing *en banc* by the Ninth Circuit, outlined the plaintiffs' arguments:

> The majority opinion correctly identifies the two groups of children who brought this action: (1) 1,790 Chinese school children who speak no English and are taught none, and (2) 1,066 Chinese children who speak no English and who receive some kind of remedial instruction in English. The majority's characterization of the relief sought as "bilingual education" is misleading. The children do not seek to have their classes taught in both English and Chinese. All they ask is that they receive instruction in the English language. Access to education offered by the public schools is completely foreclosed to these children who cannot comprehend any of it. They are functionally deaf and mute . . . .
>
> These Chinese children are not separated from their English speaking classmates by state-erected walls of brick and mortar (*Cf.* Brown v. Board of Education (1954) 347 U.S. 483, 74 S. Ct. 686, 98 L.Ed. 873), but the language barrier, which the state helps to maintain, insulates the children from their classmates as effectively as any physical bulwarks. Indeed, these children are more isolated from equal educational opportunity than were those physically segregated blacks in *Brown*; these children cannot communicate at all with their classmates or their teachers.

483 F.2d 791, 805-06 (9th Cir. 1973) (Hufstedler, J., dissenting).

4. *Id.* at 566. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d), has been relied upon by plaintiffs in a number of key education cases. It provides: No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

5. *Id.* at 564, 569.

6. *Id.* at 565 (stating that "[t]eaching English" or "giving instructions in Chinese" were two options available).

> effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.[7]

By providing school districts with little more than these general guiding principles, *Lau* crystallized the volatile dispute in both educational and legal circles that continues unabated today.

1. *Title VI*

Despite the central role of Title VI in the *Lau* case and in the new OCR guidelines that followed,[8] most commentators and jurists believe that this civil rights statute has limited value for LEP and NEP plaintiffs today.

The *Lau* Court recognized that a violation of Title VI could be established solely on the basis of discriminatory effect, without requiring discriminatory intent.[9] Only a few years later, however, five members of the Supreme Court in *Regents of the University of California v. Bakke*,[10] held that the standard for a Title VI violation should be the same as the standard for an equal protection violation[11] as set forth in *Washington v. Davis*.[12] Four of these Justices suggested that the "effects only" test relied upon in *Lau* was no longer applicable.[13]

---

7. *Id.* at 568. Key words and phrases in this passage triggered an ongoing debate and remain subject to varying interpretations. Educators and policymakers have focused particularly on the relative nature of the following: "*effective* participation," "*affirmative* steps," "*rectify* the language deficiency," and "*open* its instructional program." *See generally* MARK YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 793-809 (3d ed. 1992).

8. In the aftermath of *Lau*, the Office of Civil Rights (OCR) set forth additional guidelines to enforce the decision under Title VI. The *Lau* Guidelines, as they would come to be known, outlined procedures to be followed by school districts that enrolled 20 or more LEP students. Topics included the determination of a student's primary language, the classification of students, and the establishment of programs for each classification. After much controversy, it became apparent that the *Lau* Guidelines did not have the force of law. *See* YUDOF, *id.* at 793-94.

9. The federal regulations implementing Title VI provide:

> A recipient, in determining [the services to be provided, the persons eligible to receive them, and who may participate in them] . . . may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin. 45 C.F.R. § 80.3(b)(2) (1992).

Courts have relied on this language to permit a violation of Title VI to be established solely on the basis of discriminatory effect, without requiring discriminatory intent.

10. 438 U.S. 265 (1978).

11. *Id.* at 287 (Powell, J.), 328 (Brennan, White, Marshall & Blackmun, J.J.).

12. Under Washington v. Davis, 426 U.S. 229 (1976), a facially race-neutral state action will trigger strict scrutiny under the suspect classification category of Fourteenth Amendment review only if it is discriminatory in both impact and purpose.

13. *Bakke*, 438 U.S. at 350-53 (Brennan, White, Marshall, & Blackmun, J.J., concurring in the judgment in part and dissenting).

Although *Bakke* did not explicitly overrule *Lau,* it raised serious questions regarding its applicability in future Title VI cases.[14] The 1983 case of *Guardians Association v. Civil Service Commission*[15] generated additional concerns in this regard. The viability of a Title VI effects standard was recognized by the Court under federal regulations, but four of the justices who reached this conclusion were the same four who had questioned the precedential value of *Lau* five years earlier.[16] At the same time, Justice Powell argued in a separate opinion that he now felt *Lau* had been overruled by *Bakke.*[17]

With these confusing and overlapping opinions regarding *Lau* casting doubt on the applicability of Title VI in the area of bilingual education,[18] plaintiffs turned increasingly to the Equal Educational Opportunity Act as the basis for their legal challenges.

2. *The Equal Educational Opportunity Act*

In late 1974, Congress passed the Equal Educational Opportunity Act[19] (EEOA) and included a key provision that appears

14. *See, e.g.,* Rachel F. Moran, *Bilingual Education as a Status Conflict,* 75 CAL. L. REV. 321, 330 (1987).

15. 463 U.S. 582 (1983).

16. In *Bakke,* White, Marshall, Brennan and Blackmun had all questioned the precedential value of *Lau* in light of *Washington v. Davis.* Yet, these same justices all agreed in *Guardians* that the Title VI effects standard should remain viable.

For a superior analysis of *Guardians* and its diverse opinions, see *The Supreme Court, 1982 Term: Civil Rights,* 97 HARV. L. REV. 70 (1983) (stating:

> [The] Justices followed a variety of paths to the conclusion that no showing of intent was necessary. Justice White argued that the holdings, though not the language, of *Lau* and *Bakke* were "entirely consistent" in that both decisions promoted a legislative intent to protect racial minorities. He therefore considered *Lau's* approval of an impact standard controlling. Justice Marshall agreed that Title VI proscribed racially disparate impact, but he rested his analysis on the "contemporaneous and consistent [administrative] construction" of the statute. Justices Stevens, Brennan, and Blackmun . . . maintained that *Bakke* had authoritatively construed [T]itle VI to incorporate equal protection principles . . . [but argued] . . . that the agency regulations imposing an "effects" standard were valid because reasonably related to the purposes of the statute.)

Id. at 248 (footnotes omitted).

17. *Guardians,* 463 U.S. 610-11.

18. After travelling a rocky road, the Title VI discriminatory effects test remains viable today, ten years after *Guardians.* Since the Title VI framework is derived from the highly developed "disparate impact" jurisprudence of Title VII, its applicability was called into question by the 1989 Supreme Court case of Wards Cove v. Atonio, 490 U.S. 642 (1989), which significantly altered the Title VII framework. Two years later, however, Congress passed the Civil Rights Act of 1991, ostensibly reversing the *Wards Cove* modifications. Only now are commentators and jurists beginning to sort out how the Title VI framework might be applied in light of the dramatic changes of the past few years. *See, e.g.,* Paul K. Sonn, Note, *Fighting Minority Underrepresentation in Publicly Funded Construction Projects after Croson: A Title VI Litigation Strategy,* 101 YALE L.J. 1577 (1992).

19. 20 U.S.C. § 1703 (1974).

to have explicitly adopted the *Lau* decision's approach.[20] Section 204 of the Act provides:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in the instructional programs.[21]

The broad, general mandate of the EEOA triggered many questions of statutory interpretation, including an inquiry into what groups are covered, what kinds of programs are called for, and whether "equal participation" is synonymous with "effective participation."[22] While the *Lau* guidelines attempted to answer many of these questions,[23] it was the Fifth Circuit in *Castaneda v. Pickard*[24] that ultimately determined the Act's current applicability and scope.

In *Castaneda*, a group of Mexican-American children and their parents challenged the practices of a Texas school district that allegedly resulted in a deprivation of equal educational opportunity. Among plaintiffs' allegations was the charge that the district failed "to implement adequate bilingual education to overcome the linguistic barriers that impede the plaintiffs' equal participation in the educational program of the district."[25]

Applying the EEOA, the court decided the bilingual education issue in favor of the plaintiffs. Judge Randall considered the meaning of "*appropriate action*" in the Act, and concluded that the phrase was not intended to be synonymous with "bilingual education."[26] Randall stated:

> Congress . . . did not specify that a state must provide a program of bilingual education. . . . We think Congress' use of the less specific term, "appropriate action," rather than "bilingual education," indicates that Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA.[27]

---

20. *See* Moran, *supra* note 14, at 329.
21. 20 U.S.C. § 1703(f) (1974).
22. *See, e.g.,* YUDOF, *supra* note 7, at 793.
23. *See supra* note 8.
24. 648 F.2d 989 (5th Cir. 1981).
25. *Id.* at 992. Plaintiffs brought this suit under the Fourteenth Amendment, Title VI, and the EEOA. In addition to the bilingual education component of the lawsuit, plaintiffs' charges included an allegation that the district "unlawfully discriminated against them by using an ability grouping system for classroom assignments . . . based on racially and ethnically discriminatory criteria and resulted in impermissible classroom segregation." *Id.*
26. *Id.* at 1009.
27. *Id.*

In the end, *Castaneda* set forth a three-prong analysis that federal courts continue to follow today when evaluating a school district's language remediation program. First, a court must determine whether the district is pursuing a program "informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy."[28] Second, the court must establish whether "the programs and practices actually used . . . are reasonably calculated to implement effectively the educational theory adopted by the school."[29] Finally, the court must determine whether the school's program, even if premised on sound educational theory and effectively implemented, produces "results indicating that the language barriers confronting students are actually being overcome."[30]

Today, most bilingual education litigation is decided under the EEOA and the *Castaneda* three-part test. Professor Rachel Moran explains that such an analysis "looks only at whether a program has the effect of excluding NEP and LEP students from the educational program and does not require proof of discriminatory intent."[31] In a sense, recognition of this analysis constituted a victory for those who favored at least some education in a student's primary language. However, the remedial consequences of an EEOA victory are far different than they might have been under the OCR's *Lau* guidelines, since the Act's "appropriate action" requirement appears broad enough to encompass educational programs taught entirely in English.[32]

B. *The State Track*

In the aftermath of *Lau,* the California Legislature passed the Chacon-Moscone Bilingual-Bicultural Education Act of 1976.[33] The aggressive, far-reaching Chacon-Moscone Act mandated bilingual education in California and established the state as a leader in this volatile area.

The Act recognized that a lack of English language communication skills presented "an obstacle" to the equal educational opportunity rights of LEP students which could be "removed *by*

28. *Id.*
29. *Id.* at 1010.
30. *Id.* For a representative example of how this three-part analysis has been applied by the federal courts in recent years, see Teresa P. v. Berkeley Unified School District, 724 F. Supp. 698 (N.D. Cal. 1989).
31. Moran, *supra* note 14, at 331.
32. For additional analysis regarding the applicability of federal law in this area, see Michael A. Rebell & Anne W. Murdaugh, *National Values and Community Values: Part II: Equal Educational Opportunity for Limited English Proficient Students,* 21 J. L. & EDUC. 335, 356-73 (1992).
33. Cal. Educ. Code §§ 52160-52178 (Deering 1987).

instruction and training in the pupils' primary languages while such pupils are learning English."[34] In its central provision, the Act (as amended in 1980) required: Each pupil of limited-English proficiency enrolled in the California public school system in kindergarten through grade 12 shall receive instruction in a language understandable to the pupil which recognizes the pupil's primary language *and* teaches the pupil English.[35] In grades K-6, school districts with at least fifteen LEP students speaking the same primary language in the same grade level had to "offer" these students "full bilingual instruction" and "bilingual-bicultural education."[36] At the junior high and high school levels, districts were required to evaluate individually all LEP students not receiving at least "partial bilingual education" and provide educational services "in a manner consistent" with *Lau,* the EEOA, and applicable federal regulations.[37]

In 1987, legislation was enacted to continue the Chacon-Moscone Act,[38] but the legislation was vetoed by Governor George Deukmejian, who declared that local school districts should be free to "fashion their own programs."[39] However, while the *mandatory* bilingual education program ceased to be operative, the "Sunset Statutes" became applicable.[40]

---

34. Cal. Educ. Code § 52161 (Deering 1987) (emphasis added). The Legislature also found that "the dropout rate is excessive among limited-English-speaking pupils," and that "this represents a tremendous loss in human resources." *Id.* Cal. Educ. Code § 52163 (m) (Deering 1987) defines "pupils with limited-English proficiency" as those "who do not have the clearly developed English language skills of comprehension, speaking, reading and writing necessary to receive instruction only in English at a level substantially equivalent to pupils of the same age or grade whose primary language is English." *Id.*

35. Cal. Educ. Code § 52165 (Deering 1987) (emphasis added).

36. Cal. Educ. Code § 52165(a) (Deering 1987) (exact language prior to 1980 amendment). School districts with at least ten K-6 LEP students speaking the same primary language at the same grade level had to offer at least "partial bilingual education." *Id.* Section 52163 (Deering 1987) (exact language prior to 1980 amendment) of the Chacon-Moscone Act provided the following pertinent definitions:

> (a) "Partial bilingual instruction" means listening, speaking, reading and writing skills developed in both languages. Material related to culture and history is taught in the language the pupil understands better.
> (b) "Full bilingual instruction" means basic language skills developed and maintained in both languages. Instruction in required subject matter or classes is provided in both languages in addition to culture and history.
> (c) "Bilingual-bicultural education" is a system of instruction which uses two languages, one of which is English, as a means of instruction. It is a means of instruction which builds upon and expands the existing language skills of each participating pupil, which will enable the pupil to achieve competency in both languages.

37. Cal. Educ. Code § 52163(f) (1977) (prior to 1980 amendment).

38. Cal. Educ. Code §§ 62000, 62006 (Deering 1987 & Supp. 1993)(regarding the mandatory review prescribed by the legislature before the mandatory bilingual education program could be continued).

39. *See Governor Buries Bilingual Education Bill and 6 Other Education Proposals*, L.A. DAILY JOURNAL, July 27, 1987, at 2.

40. Cal. Educ. Code §§ 62000-62002.5 (Deering 1987 & Supp. 1993).

The Sunset Statutes of the California Education Code provide continuing funds for specific programs that may cease to be mandatory. If a program is not renewed, school districts may still choose to continue offering the specialized services to their students, and money will remain available from the state for the purpose of providing these services.[41] The statutes designate the State Department of Education as the government body in charge of disbursing these funds.[42]

Thus, in 1987, the State Department of Education was faced with an important policy decision—what sort of "bilingual education" programs would be required before school districts could receive state funds. Section 62002 provides in part:

> If the Legislature does not enact legislation to continue a program . . . the funding of that program shall continue for the general purposes of that program as specified in the provisions relating to the establishment and operation of the program . . . The funds shall be used for the intended purposes of the program . . . .[43]

Superintendent of Public Instruction Bill Honig took an aggressive position based upon a facial reading of Section 62002. In a program advisory distributed to all the school districts in the state, Honig noted that the "purposes" language of the education code was quite broad and included many of the basic requirements of the Chacon-Moscone Act. Thus, California school districts were no longer *required* to comply with the Act, but if they wished to continue receiving money for bilingual education programs they had to continue providing services that were consistent with the general purposes of the old bilingual-bicultural requirements.[44]

In the summer of 1992, the California legislature attempted to change the nature of state law in this area by enacting a new bilingual education bill that would have re-established a modified version of the Chacon-Moscone Act. The new bill would have required public schools with 100 or more students speaking the same primary language to teach them in that language until the students became familiar with English. However, Governor Pete Wilson vetoed the bill, arguing as Deukmejian did five years ear-

41. *Id.*

42. Cal. Educ. Code § 62003 (Deering 1987 & Supp. 1993).

43. Cal. Educ. Code § 62002 (Deering 1987 & Supp. 1993).

44. *See* Bill Honig, Program Advisory to County and District Superintendents and Selected Program Directors, regarding Options Available to Districts for Achieving Compliance with the Staffing and Instructional Requirements of the State Program for Students of Limited English Proficiency, California State Dep't of Educ., May 20, 1988, at 1.

lier that such legislation would limit the flexibility of local school boards.[45]

II. Major Policy Concerns

Over the past twenty years, a number of central, pervasive problems continue to limit the ability of educators, policymakers, and lawmakers to effect change in this area. New issues have also arisen in recent years that may further exacerbate these problems.

A. *Recurring Problems*

Perhaps the most frustrating of all the recurring problems is *misunderstanding.* For many Americans, the term "bilingual education" still generates xenophobic images of recalcitrant, "un-American" immigrants who refuse to learn English and who are determined to transform the United States into another Latin American or Asian country.[46] Although proponents of bilingual education have made great progress in this area at the highest levels of government,[47] many people still do not realize that bilingual education is simply a vehicle for maximizing a student's educational experience in a new land by providing opportunities to study at least some of the course material in his or her primary language while s/he is in the process of learning English. In most education circles today the central question is not *whether* to implement bilingual education programs but *how* to expedite this process in an effective manner.[48]

---

45. *See* Lonnie Harp, *Wilson Vetoes Richmond, Bilingual-Education Bills,* Educ. Week, Oct. 14, 1992, at 16.

46. *Too many* sources documenting this perspective are available to the researcher. *See, e.g.,* Michael Quintanilla, *Voice of Experience: Painful Memories Buoy Leticia Quezada's Fight for Bilingual Schools,* L.A. Times, Jan. 28, 1990, at E1; Peter Schmidt, *Asians Often Face Bigotry in Schools, Report Says,* Educ. Week, Mar. 11, 1992, at 20.

47. For example, in a major policy shift, the Department of Education in 1989 reversed its prior position and came out in support of bilingual education. *See* Lori Silver, *Education Department, in Shift, Favors Bilingual Education,* L.A. Times, Aug. 26, 1989, at A1.

48. Rebell and Murdaugh outline the basic educational approaches to bilingual education: (1) English as a Second Language (ESL)—where students are removed "from the English-only classroom for special instruction in English"; (2) Immersion—where students are placed "in classrooms according to language groups, where they are taught English in a structured curriculum by teachers who know the native language"; (3) Transitional Bilingual Education—where students are taught "basic subjects in a student's native language with appropriate complementing instruction in English. As students become more proficient in English, the native language is gradually phased out"; (4) Bilingual Maintenance Education—where students are allowed "to develop and retain proficiency in both English and the native language"; (5) Bilingual/Bicultural Maintenance Education—where students are permitted "to gain proficiency in both languages and immerse themselves in the ethnolinguistic culture"; and (6) Culturally Pluralistic Programs—where both major-

A related problem is the politicizing of this issue. Decisions that should turn on what might be best for the students are too often based on which political constituency is most important to those in power.[49] In many circles, bilingual education is still seen as a liberal policy imperative, and its supporters are typically characterized as a special interest group by certain politicians.[50] Many believe that both Deukmejian's veto of the Chacon-Moscone Act's extension in 1987 and Wilson's veto of the new 1992 legislation were ultimately based on these anachronistic political considerations.

Even if misunderstandings can be overcome and politics can be transcended, educators are still faced with day-to-day problems of implementation.[51] Qualified teachers must be found[52] to address the needs of the LEP and NEP children that now comprise over 20% of *all* students in the California public schools.[53] In addition, appropriate methods must be devised to provide the equal educational opportunities mandated by the Supreme Court in *Lau*.[54] Although many impressive programs

---

ity and minority language speakers are placed "in a multilingual/multicultural classroom." Rebell & Murdaugh, *supra* note 32, at 340-41. The authors also refer to the "method" of *submersion*, which simply places language minority students in English-only classrooms. *Id.* at 340.

49. *See, e.g.*, Lori S. Orum & Raul Yzaguirre, *Secretary Bennett's Bilingual Education Initiative: Historical Perspectives and Implications*, 1 LA RAZA L.J. 225 (1986). *See generally* C.B. STEIN, SINK OR SWIM: THE POLITICS OF BILINGUAL EDUCATION (1986).

50. *See, e.g.*, Richard Reeves, *The Killing of Public Education*, L.A. Times, Dec. 23, 1992, at B7; Lawrence Kutner, *Parent and Child: Bilingualism Filled With Misconceptions*, N.Y. TIMES, Nov. 19, 1992, at A12; Richard Bernstein, *In U.S. Schools, A War of Words*, N.Y. TIMES MAG., Oct. 14, 1990, at 34.

51. *See, e.g.*, Sandy Banks, *Schools Are Frustrated by Bilingual Class Demands*, L.A. TIMES, Nov. 21, 1989, at A1; Peter Schmidt, *LEP Students Denied Remedial Help, Study Finds*, EDUC. WEEK, June 17, 1992, at 11.

52. Finding qualified bilingual instructors continues to be a major challenge for public school districts nationwide. *See, e.g.*, Peter Schmidt, *Shortage of Bilingual Teachers Is Focus of Both Concern and Attention*, EDUC. WEEK, Feb. 12, 1992, at 10.

53. According to the California State Department of Education, LEP students (which also include NEP students) constituted 19.9% of all students enrolled in the California public schools in 1991. The highest concentrations of LEP students were found in kindergarten through grade three. Indeed, in 1991, fully 29% of all kindergarten students in California public schools were LEP. These numbers are invariably higher today. *See LEP Enrollment in California Continues to Increase*, BILINGUAL EDUC. OUTREACH, (Cal. State Dep't of Educ. Bilingual Office), Feb. 1992. A total of 77% of all identified LEP students in 1991 spoke Spanish. *Id.* Census Bureau figures reported in late 1992 indicated that 46% of all the people in Los Angeles County lived in "foreign-language households." In San Francisco, the figure was 42%. *See Multilingual America: Languages of the Home*, L.A. TIMES, Nov. 16, 1992, at JJ2.

54. For examples of ongoing debates and new findings in this regard, see De La Luz Reyes, *Challenging Venerable Assumptions: Literacy Instruction for Linguistically Different Students*, 62 HARV. EDUC. REV. 427 (1992); Ashly Dunn, *A War of Words Over Language*, L.A. TIMES, Nov. 16, 1992, at JJ2; Jean Merl, *How to Teach the Non-English Speaking—a Bilingual Debate*, L.A. TIMES, Sept. 21, 1992, at A3; William Celis, *Bilingual Teaching: A New Focus on Both Tongues*, N.Y. TIMES, Nov.

currently exist,[55] critics still argue that half-hearted efforts by school districts put LEP and NEP students at a significant disadvantage and perpetuate a two-tiered system of education in this country.[56]

Within the Chicano, Latino, Asian, and Pacific-Islander communities, another issue is the question of self-definition.[57] Furthermore, proponents of bilingual education have always argued that this process must also include bicultural education,[58] and the concept of biculturalism invariably triggers numerous disputes regarding group identity, assimilation, and belonging.[59]

B. *Recent Developments*

A new testing controversy at the state level and an increasing racial polarization at the local level are among the recent developments that will undoubtedly influence the course of the bilingual education controversy in California.

1. *"High Stakes" Testing under SB 662*

In 1991, the legislature enacted Senate Bill 662, mandating "systematic achievement testing" of all pupils in grades 4, 5, 8, and 10.[60] Pursuant to this mandate, the State Department of Education directed its assessment personnel to design and implement a statewide pupil assessment program in accordance with the testing requirements of the new legislation.[61]

Although the California public schools had been required to administer California Assessment Program (CAP) tests in recent years, only school-wide test scores were compiled and released.

27, 1991, at A6. *See generally* CAL. STATE. DEP'T OF EDUC., CHARACTERISTICS OF AN EFFECTIVE BILINGUAL EDUCATION PROGRAM, BILINGUAL EDUCATION HANDBOOK (1990).

55. Research by Victor Mendiola conducted through the UCLA Undergraduate Student Research Program revealed the existence of many exemplary bilingual programs in the Southern California area. For example, Mendiola visited the Lennox Middle School in Lennox and the Edison Elementary School in Santa Monica, observed classroom activities, met with administrators, and filed highly positive reports. Interview with Victor Mendiola, UCLA student, in Los Angeles, CA. (Nov. 1992).

56. *See, e.g.*, Manuel J. Diaz, *Standardized Testing: Role-Playing as a Barrier to Education*, 5 UCLA J. EDUC. 105 (1991).

57. Examples of explorations in the area of "self-definition" abound. *See, e.g.*, Rogelio R. Gomez, *Foul Shots*, N.Y. TIMES MAG., Oct. 13, 1991, at 24; Jeanne Park, *Eggs, Twinkies and Ethnic Stereotypes*, N.Y. TIMES, Apr. 20, 1990, at A2.

58. The Chacon-Moscone Act itself was called "The Bilingual-Bicultural Act of 1976." *See generally supra* notes 33-37 and accompanying text.

59. For an excellent overview of this increasingly important topic and an analysis of its applicability within the context of bilingual education, see Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 351-57 (1986).

60. Cal. Educ. Code § 60603 (Deering 1987 & Supp. 1993).

61. Cal. Educ. Code §§ 60602-60603 (Deering 1987 & Supp. 1993).

The new testing program, by contrast, focuses on *individual* student scores which would be reported to parents, teachers, potential employers, and institutions of higher education.[62] Thus, unlike the previous programs, performance on these "high-stakes" tests could significantly affect a student's future.[63]

Officials currently designing the new testing programs have been recognized nationally and internationally for their innovative work on the "cutting edge" of authentic, performance-based assessment. Yet parents of students in language remediation programs are only beginning to discover that LEP and NEP students are not even mentioned in SB 662. The legislation purports to address the needs of all California public school students,[64] but does not require any special treatment for students with little or no knowledge of English. Thus LEP and NEP students might be required to take these tests in English at the designated times along with everyone else, and their test results might be reported in such a way that their ability to succeed in future endeavors would be seriously compromised.[65]

It should be noted that these concerns are currently being discussed at the highest levels by educators, policymakers, and testing officials. There is widespread agreement among those charged with implementing this program that the needs of LEP and NEP students must be addressed.[66] Yet this new legislation and the apparent failure of lawmakers to consider the needs of so many students in this regard only serves to crystallize another ongoing concern. While mandatory testing can be a positive vehicle for educators in helping them to diagnose problem areas and plan effective remediation programs, these same tests can become "unreasonable obstacles to advancement on the basis of individual merit"[67] if used improperly. In this era of proliferating

62. Cal. Educ. Code § 60601(c)(1) (Deering 1987 & Supp. 1993).

63. "High-stakes" testing is the popular name for testing programs that seek to "drive" the curriculum in the schools by establishing negative consequences for poor test results. *See generally* Airasian, *State Mandated Testing and Education Reform: Context and Consequences,* 95 AM. J. EDUC. 393 (1987).

64. Cal. Educ. Code § 60601(c) (Deering 1987 & Supp. 1993).

65. SB 662 establishes a new reporting requirement whereby students' scores are not only reported in terms of numerical or percentile scores, but also "in terms describing a pupil's academic capabilities and in terms of employment skills possessed by the pupil." Cal. Educ. Code § 60601(c)(10) (Deering 1987 & Supp. 1993).

66. The author has been involved in these discussions on a personal level, meeting with Department of Education officials and test-makers throughout the past year.

67. In Plyler v. Doe, 457 U.S. 202 (1982), the Supreme Court recognized a right of "advancement on the basis of individual merit." *Id.* at 221-22. *See generally* Stuart Biegel, *Reassessing the Applicability of Fundamental Rights Analysis: The Fourteenth Amendment and the Shaping of Educational Policy after Kadrmas v. Dickinson Public Schools,* 74 CORNELL L. REV. 1078, 1103-08 (1989).

standardized testing, parents must continue to carefully monitor these developments.

2. *The Cultural Diversity Context*

Bilingual education today is increasingly viewed as a key issue in the cultural diversity debate.[68] Furthermore, discussions concerning the efficacy of bilingual and bicultural education programs often embody elements of the larger, all-encompassing controversies regarding multiculturalism and racial politics.[69]

Whether the cultural diversity context is useful or detrimental for proponents of bilingual education remains to be seen. Some would argue that this context helps clarify the broad-based nature of the controversy and the extreme urgency of the topic. Yet others fear that the bilingual education debate might be overshadowed by the larger and more complex issues of multiculturalism, which are too often derided or viewed as irreconcilable by many people.

CONCLUSION

Despite a multitude of problems that remain unresolved, there is no doubt that much progress has been made in the area of bilingual education over the past twenty years. School districts are aware that under federal law they must address the needs of LEP and NEP students and cannot simply blame others when young people show up at the schoolhouse gate with limited English skills. In California, K-12 educators know that special state funds are only available to them for bilingual instruction if aggressive programs are implemented at individual school sites.

It is at the local school level, after all, that the most important work must be done. Supportive and highly trained educators who are sensitive to the needs of young people will continue to have the greatest impact in this area. If the efforts of these teachers are buttressed by an understanding of this controversy at the highest levels of government, the next twenty years will be even more satisfying and even more productive.

---

68. *See, e.g.,* Dunn, *supra* note 54.

69. *See generally* JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991); NITZA HIDALGO ET AL., FACING RACISM IN EDUCATION (1990).