An equal educational opportunity for language minority students: A legal analysis of language education after Lau

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UMI®
AN EQUAL EDUCATIONAL OPPORTUNITY FOR LANGUAGE MINORITY STUDENTS: A LEGAL ANALYSIS OF LANGUAGE EDUCATION AFTER LAU

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Bachelor of Science
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A thesis submitted in partial fulfillment of the requirements for the

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ABSTRACT

An Equal Educational Opportunity for Language Minority Students: A Legal Analysis of Language Education After Lau

by

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An Equal Educational Opportunity for Language Minority Students: A Legal Analysis of Language Education After Lau is a legal/historical study that examined the current legal standards applicable to the education of language minority students in the United States. This was achieved by analyzing the jurisprudence emerging from the interpretation and application of the Lau v. Nichols Supreme Court decision.

Several questions were considered during the research of this dissertation. These included: How has the legal precedent established in Lau v. Nichols been interpreted and applied by subsequent law cases involving the education of language minority students? What role has the Office for Civil Rights played in securing compliance with the Lau precedent? What are the legal implications for school administrators in providing programs for language minority students?

The significance of this study was found in examining the jurisprudence following Lau concerned with a language minority student’s right to an equal
educational opportunity in America’s schools. This study will benefit school level and program administrators responsible for organizing and implementing programs for language minority students by serving as a resource for providing legally sound programs for language minority students.

This dissertation used an analytical, qualitative research design. As a legal/historical analysis, it included search, selection and criticism of the sources, presentation of facts and generalizations, and the use of inductive case law analysis. Law cases were examined for their usage of Lau as a precedent.

Included in this study is a history of language minority education in the United States, the Federal government’s involvement in the education of language minority students, the role of the Office for Civil Rights, and an analysis of the Supreme Court’s landmark decision in Lau v. Nichols.
TABLE OF CONTENTS

Title Page.................................................................i
Signature Page.........................................................ii
Abstract...............................................................iii
Table of Contents.....................................................v
Acknowledgements..................................................viii

Chapter I  Introduction..................................................1
Who are language minority students?.........................2
Educating language minority students-theory and practice.....3
Federal involvement in the education of language minorities......5
Statement of the problem.............................................8
Purpose of the Study..................................................8
Research Questions....................................................9
Research Design........................................................9
Significance of the Study..............................................9
Limitations of the Study.............................................11
Definition of Terms..................................................12
 Constitutional Amendments.................................14
Federal Statutes.......................................................15
Federal Court System..............................................15
Summary...............................................................16

Chapter II  Review of Related Literature..........................19
Historical overview of language minority education in the United States...19
Federal role in the education of language minority students..............22
Enforcement of Title VI of the Civil Rights Act of 1964.................28
Historical Background of the Lau Case............................30
United States District Court Decision.............................31
United States Court of Appeals for the Ninth Circuit Decision.........34
United States Supreme Court Decision............................44
Summary.....................................................................50

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Chapter III  Research Methodology .................................................................51
  Qualitative Research Design.................................................................51
  Legal Research Methodology.................................................................52
  Common Law/Case Law...........................................................................55
  The Doctrine of Precedent....................................................................57
  Shepardizing............................................................................................58
  Evaluating the Law................................................................................61
  Summary..................................................................................................62

Chapter IV  Findings of the Study .................................................................64
  Legal Decisions Since Lau v. Nichols......................................................69
    Serna v. Portales Municipal Schools, 1974........................................69
    Aspira of New York v. Board of Education of City of New York, 1975...74
    Rios v. Read, 1978..............................................................................81
    Guadalupe Organization, Inc. v. Temple Elementary School District, 1978...85
    Castaneda v. Pickard, History and District Court Decision.................92
    1981 Appellate Court Decision.........................................................95
    1986 Appellate Court Decision.........................................................100
    Keyes v. School District No. 1, 1983..................................................101
    Gomez v. Illinois State Board of Education and Sanders...................105
    History and District Court Decision..................................................106
    1987 Appellate Court Decision.........................................................107
    Valeria v. Wilson, 1998.................................................................113
    Flores v. State of Arizona, 2000......................................................116
    Role of the Office for Civil Rights......................................................120
    Summary............................................................................................135

Chapter V  Summary, Conclusions, and Recommendations ......................136
  Introduction.........................................................................................136
  Question 1: How has the legal precedent established in Lau v. Nichols been interpreted and applied by federal court cases involving the education of language minority students? ......................................................137
  Significance of cases...........................................................................138
  Summary............................................................................................145
  Question 2: What role has the Office for Civil Rights played in securing compliance with the Lau precedent?.....................................................149
  Question 3: What are the implications for school administrators in providing programs for language minority students resulting from the jurisprudence and compliance activities? .....................................................153
  Further Research................................................................................156
  Concluding Statements.......................................................................157
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CHAPTER I

INTRODUCTION

Ethnic diversity has become commonplace in American society today. In the United States, the ethnic minority population is increasing at a much faster rate than is the general population (Banks, 1991). In 1986, the non or limited English speaking population in the United States consisted of approximately 1.5 million persons (Macias and Kelly, 1996). In fifteen years, this figure has more than doubled. According to a 1992 National Association for Bilingual Education publication, more than 7.5 million school age children in the United States were from homes in which a language other than English was spoken. "From the 1980s to the 1990s, the level of immigration to the United States rose by thirty-three percent," (Gi Huan An, 1996, p.134). In 1996, 22.6 million or nine percent of the population were foreign born. "The changing ethnic texture of the United States population has major implications for all of the nation's institutions, including schools, universities, and the work force," (Banks, 1991, p. 5).

American classrooms are experiencing the largest influx of immigrant students since the turn of the century. Students of color will make up about forty-six percent of the nation’s student population by the year 2020 (Banks, 1991). Regarding the language education of these students, Collier and Thomas (1999) commented, “As we look at the rapidly changing demographics in the United States, with language minorities predicted to be 40% of the school-age population by the decade of the
2030s, it is clear that we still have much to accomplish. U.S. schools are currently under-serving English language learners, and this school population will continue to grow, challenging schools to continue to change” (p.1). Ovando and Collier (1997) commented that if current population trends continue, it is projected that somewhere between the years 2030 and 2050, school aged children, labeled minorities by the federal government, will be the majority in U.S. schools across the country. The need to educate students who are non or limited English speakers will become a greater challenge for school officials as their numbers increase.

Who are language minority students?

According to August and Garcia (1988), “A language minority student is one: (a) who is characterized by substantive participation in a non-English-speaking social environment, (b) who has acquired the normal communicative abilities of that social environment, and (c) who is exposed to substantive English speaking environments during the formal educational process” (p.4). The category, language minority student, includes students with many levels of English language proficiency. Language minority students may not have sufficient proficiency in English to excel academically in all English classrooms, or they may possess varying degrees and types of bilingualism.

Ovando and Collier (1997) commented that, "...students who are either a monolingual in the home language or have some English proficiency but are still more fluent in their home language until recently have been referred to as limited English proficient (LEP) students" (p.7). Currently, the term English-language Learner (ELL) has become popular in that it conveys a message that a student is in the process of
learning English, without the connotation that the student is in some way defective or limited in his language abilities, (Ovando & Collier, 1997). In this dissertation, the terms, limited-English proficient, English language learner and language minority student will be used interchangeably.

*Educating language minority students – theory and practice.*

Educational programs for language minority students reflect a myriad of instructional approaches. August and Garcia (1988) noted that, “Although programs that serve language minority students have the same goal of helping children acquire the English proficiency necessary to succeed in school, they differ in the manner in which they incorporate the native language of the student” (p.39).

One of the most common approaches for providing bilingual education in the United States is to transition students from their native language to English in a few short years. “In transitional classes, students of limited English proficiency receive instruction in their native language in all subject areas as well as instruction in English as a second language, but only for a limited time” (Ovando and Collier, 1985, p.38). This type of program uses native language instruction to avoid loss of grade-level skills while mastery of the second language is taking place. Once students are considered proficient enough in English to work academically in all-English classes, they are moved out of the bilingual classroom. “Most transitional programs exit students into all-English after a maximum of two years in the program” (p.39). Ovando and Collier further noted that the highest priority of a transitional bilingual program is the teaching of English, with the goal of mainstreaming second language students as soon as possible.
English as a second language instruction is an integral part of bilingual education programs. “ESL instruction in a bilingual classroom includes English taught from a second language point of view in language arts classes and content area instruction in English, provided at the students’ level of English proficiency,” (Ovando and Collier, 1985, p.44). In settings where bilingual education classes are not provided, English as a second language-only programs have been developed in public schools where non-English speaking students do not share a common native language.

Many English-only programs focus on content-area ESL instruction, also known as Sheltered English, and are effective at teaching English through less focus on language itself and more emphasis on hands-on, motivating tasks in math, science, and social studies, which encourages natural acquisition. Minicucci and Olsen (1992) defined Sheltered English as an approach in which content instruction is offered in English to classes composed solely of students learning English. “In the Sheltered English classroom, the focus is on subject-matter and the students’ attention is focused on the message (content) rather than the medium (language)” (Minicucci and Olsen, 1992, p.7). Sheltered English classes incorporate the use of visual cues, manipulatives, language modifications, and focus on key concepts rather than details. “As second language students increase their mastery of English, they are gradually moved into academic classes with native speakers of English” (Ovando & Collier, 1997, p.45).

Immersion programs are another English-only approach. An English immersion program provides instruction only in English and is another form of teaching English in a self-contained class (Ovando & Collier, 1997).

Providing sound educational programming for language minority students has provided challenges to many school systems across America. Gi Huan An (1996)
noted that, “With the steady pace of immigration, school systems across the country are grappling with the problem of educating immigrant children whose primary language is not English” (p. 134). School districts across America are obliged to provide educational programs for their limited-English-speaking students. This obligation may derive from either state or Federal legislation, community pressure, or court order (Teitelbaum & Hiller, 1977).

**Federal involvement in the education of language minorities**

The Federal government became involved in the education of language minority students through the civil rights movement and the establishment of bilingual education. The landmark Civil Rights Act of 1964 was a product of the growing demand during the early 1960s for the Federal Government to launch a nationwide offensive against racial discrimination (U.S. Department of Justice, 2001). Title VI prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving Federal financial assistance. Specifically, Title VI provides that:

> [n]o 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, (42 U.S.C. Section 2000d).

The Civil Rights Act of 1964 was one of the first legal mandates to deal with equal educational opportunity. Congress established the Office for Civil Rights (OCR) in the mid 1960s pursuant to Title VI of the Civil Rights Act of 1964 to oversee the implementation of consent decrees in the desegregation efforts of schools. The OCR expanded its enforcement activities under Title VI to include ensuring equal
educational opportunities for national origin minority students who were limited-
English speaking,
(U.S. Department of Justice, 2001).

Passage of The Civil Rights Act of 1964 marked a new period of legislative and
judicial activism aimed at assisting language minority students succeed in public
schools. Tietelbaum and Hiller (1977) noted that, “Even the most prescient could not
foresee at the time of its passage that Title VI of the Civil Rights Act of 1964 would
become a principal weapon of linguistic minorities in their battle to establish bilingual
programs and gain equal schooling” (p.140).

The federal government’s involvement in the educational programming needs
of language minorities began with the Bilingual Education Act of 1968 (20 U.S.C.
Section 779). The first federal legislation for bilingual education, passed by Congress
in 1968 under Title VII of the Elementary and Secondary Education Act, created a
change in policy for linguistic minorities. The Bilingual Education Act was added as
Title VII of the Elementary and Secondary Education Act. “Its primary function was to
legitimize bilingual education programs, allocate funds for experimental programs, and
foster research on bilingual education” (Ovando & Collier, 1997, p.43).

Hakuta (1986) noted that the Bilingual Education Act of 1968 heralded the
official coming of age of the federal role in the education of limited-English speakers.
Seven and a half million dollars were appropriated in 1969 to support experimental
programs responsive to the special educational needs of children of limited speaking
ability in schools having a high concentration of such children from families with
incomes below $3,000 per year, (Bilingual Education Act of 1968 (20 U.S.C. Section
779). According to Hakuta, “Title VII appropriations for bilingual education steadily

Over the past several decades, federal policy protecting the rights of language minority students has gradually evolved through court decisions and federal legislation. “When the Bilingual Education Act did not prove to be the panacea that many of its supporters had hoped it would be, parents of minority language children gradually turned to the federal courts in search of a constitutional right to bilingual education” (McFadden, 1983, p.9).

Lau v. Nichols (414 U. S. 563), marked the federal government’s first significant involvement in litigation affecting language minority students. Lau v. Nichols was a class action lawsuit initiated in 1971 by non-English speaking Chinese students. The San Francisco Unified School District was accused of failing to provide all non-English speaking students with special language instruction. The Supreme Court held that to require a child to have basic English skills before the child could meaningfully participate in education was “to make a mockery of public education,” (Lau v. Nichols, 414 U. S. 563). The Court further held that the school experience is rendered incomprehensible and meaningless for a child who does not speak English. In rendering a decision, the Supreme Court cited Section 601 and 602 of the Civil Rights Act of 1964 and Federal regulations by the Department of Health Education and Welfare from 1970 that called for schools receiving federal funds to address the language needs of limited English proficient students. August and Garcia (1988) noted
that, "The 1974 United States Supreme Court Decision in Lau v. Nichols is the landmark statement of the rights of language minority students indicating that limited English proficient students must be provided with language support" (p.7).

Statement of the Problem

It has been approximately thirty years since the U.S. Supreme Court’s decision indicating that limited-English proficient students must be provided with language support in Lau v. Nichols. Since the Lau v. Nichols decision, a thorough analysis of subsequent jurisprudence has not been attempted. The role of the Office for Civil Rights in securing compliance with the Lau precedent has not been thoroughly reviewed. Such an analysis and review will aid efforts of school administrators charged with the education of language minority students.

Purpose of the Study

"The purpose of a study of educational law is to become knowledgeable about 'what the law actually is' as it applies to education" (McMillan & Schumacher, 1997, p.409). The purpose of this dissertation is to identify and assess the current legal standards applicable to the education of language minority students in the United States. The role of the Office for Civil Rights in securing compliance with the Lau precedent was examined. This was achieved by analyzing the jurisprudence emerging from the interpretation and application of the Lau decision. This dissertation reviewed historical and legal developments in legislation and enforcement and analyzed legal decisions citing and interpreting Lau v. Nichols regarding the equal educational opportunity of language minority students.
Research Questions

1. How has the legal precedent established in *Lau v. Nichols* been interpreted and applied by federal court cases involving the education of language minority students?

2. What role has the Office for Civil Rights played in securing compliance with the Lau precedent?

3. What are the implications for school administrators in providing programs for language minority students resulting from the jurisprudence and compliance activities?

Research Design

The research design for this legal/historical study included search, selection and criticism of sources, presentation of facts and generalizations, and inductive case law analysis (McMillan & Schumacher, 1997). As an analytical, qualitative research design, this study reviewed pertinent law decisions including the Lau decision in 1974 and the historical and legal developments in legislation and enforcement impacting the education of language minority students. Sources used included: case law, law reviews, journal articles, books, law digests, court cases, pertinent web sites, and LEXIS-NEXIS.

Significance of the Study

In determining the significance of a research study, one must consider whether a study includes discussion of related literature that builds an argument for the need and significance of the study. The study must also demonstrate that it will be beneficial by contributing to the general body of knowledge or by affecting relevant
policy issues. A study should also emphasize usefulness to practitioners in implementing organizational needs (Marshall & Rossman, 1989).

This research study is significant in that it does address all three areas. Collier and Thomas (1999) indicated that by the decade of the 2030s, language minorities are predicted to make up forty percent of the nation's school population. The increased number of language minority children has created the necessity to provide services to address their various needs. With the steady pace of immigration, school systems across the country are struggling with educating children whose primary language is not English. The legal landscape has come to reflect some of this phenomenon in that children have a right to equal educational opportunity, regardless of race or gender (Gi Huan An, 1996).

Given the changes in demographics, the increasing need for information in the area of educating language minorities, and the challenge to school systems across the country, this dissertation examined the current legal standards applicable to the education of language minority students in the United States. This was achieved by analyzing the jurisprudence emerging from the interpretation and application of the Supreme Court decision in Lau v. Nichols and in exploring the role of the Office for Civil Rights in the enforcing the right to equal educational opportunity for language minority students.

This study benefits school level and program administrators responsible for organizing and implementing programs for language minority students by serving as a resource for providing legally sound programs for language minority students.
Limitations of the Study

This dissertation was concerned with assessing the interpretation and application of the *Lau* precedent. It examined federal legal decisions rendered over approximately a thirty-year period. Subsequently, the reasoning behind these law cases may change as society changes. In addition, educating language minority students is not only a legal issue, but a controversial one as well. Care was taken to examine both sides of issues, with both sides being represented and cited in the study.

This dissertation is legal and historical in nature, and all analysis will be confined to an historical and legal description of the topic. This study examined only the legal cases at the Federal level after *Lau* concerned with the rights of language minority students to an equal educational opportunity. Legal decisions regarding unfair labor practices, segregation or immigration were not included unless the issue of educating language minorities emerged within the case. The legal cases chosen for review were shepardized on NEXIS-LEXIS and were limited to those included in that computer research bank.

In addition, another limitation of this study was the researcher's personal bias toward how language minority children should be educated. Borg and Gall (1989) commented that the values and experiences of the researcher can bias the study. They further commented that a threat to external validity in a qualitative study is the experimenter effect. This is the degree to which the biases of the expectations of the observer have led to distortions of data.
Definition of Terms

For the purpose of this study the following definitions will be used:

Amicus Curia: Friend of the court; a person with strong interest or views on the subject matter of an action, but not a party to the action, may petition the court to file a brief (Black’s Law Dictionary, 1991, p.54).

Appellate Court: A court having jurisdiction of appeal and review of decisions of lower courts; a court to which causes are removable by appeal, certiorari, error or report (Blacks Law Dictionary, 1991, p.64).

Bilingual Education: The use of two languages as mediums of instruction (Ovando & Collier, 1985).


Certiorari: A writ of common law origin issued by a superior to an inferior court requiring the latter to produce a certified record of a particular case tried therein. The writ is issued in order that the court issuing the writ may inspect the proceedings and determine whether there have been any irregularities (Blacks Law Dictionary, 1991, p.156).

Common Law: As distinguished from statutory law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from the usages and customs. In general, it is a body of law that develops and derives through judicial decisions (Blacks Law Dictionary, 1991, p.189).
Defendant: The person defending or denying; the party against whom relief or recovery is sought in an action or suit (Blacks Law Dictionary, 1991, p.290).

English as a second language: A structured language acquisition program designed to teach English to students whose native language is not English (Ovando & Collier, 1985, p. 2).

Ethnic Diversity: The cultural differences that exist within and between various ethnic groups (Banks, 1991, p. 68).

Finding tools: A means to locate primary sources in researching legal history. These include citators, annotations, legal encyclopedias, and Lexis, a computer based legal research system (Cohen & Olsen, 1996, p. 5-6).

Language minority student: A language minority student is one: (a) who is characterized by substantive participation in a non-English-speaking social environment, (b) who has acquired the normal communicative abilities of that social environment, and (c) who is exposed to substantive English speaking environments during the formal educational process (August and Garcia, 1988, p. 4).

Monolingual Education: The use of only one language to instruct students (Ovando & Collier, 1985).

Plaintiff: A person who brings an action; the party who complains or sues in a civil action and is so named on the record; a person who seeks remedial relief for an injury to rights (Blacks Law Dictionary, 1991, p.796).

Precedent: An adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law (Blacks Law Dictionary, 1991, p.814).
Primary sources of law: Recorded rules which will be enforced by the state. These can be found in constitutions, decisions of appellate courts, statutes passed by legislatures, executive decrees, and in regulations and rulings of administrative agencies (Cohen & Olsen, 1996, p.3).

Remand: The act of an appellate court when it sends a case back to the trial court and orders the trial court to conduct limited new hearings or an entirely new trial, or to take some further action (Blacks Law Dictionary, 1991, p.896).

Secondary materials: Works which are not primary authority, but which discuss and analyze legal doctrine. These include law reviews, treatises, restatements and practice manuals. Used to help analyze a problem and provide references for both primary sources and other secondary materials (Cohen & Olsen, 1996, p.6).

Constitutional Amendments

Fourteenth Amendment

The Fourteenth Amendment to the Constitution maintains in part that no state shall” deprive any person of life, liberty or property without due process of law” (Legislative Reference Service, Library of Congress, 1964, p.1174). This amendment holds that no state shall “deny to any person within its jurisdiction the equal protection of law” (Legislative Reference Service, Library of Congress, 1964, p.1174). The equal protection clause of the Fourteenth amendment has been used in education cases dealing with discrimination based on race, sex, ethnic background, age, handicaps, and with state financing of public schools.
Federal Statutes

The U.S. Constitution, Article I, Section 8 grants Congress "the power to lay and collect taxes, duties, imposts, and excises to pay debts and provide for the common defense and general welfare of the United States" (Legislative Reference Service, Library of Congress, 1964, p. 137). Congress applies this to education as an educated populace is critical for the economic and civic prosperity of the United States. In passing federal statutes and providing tax dollars for school programs within the states, the federal government acts under the "General Welfare" clause of the United States Constitution, (Legislative Reference Service, Library of Congress, 1964, p. 146).

Federal Court System

Article III, Section 1 of the U.S. Constitution maintains, the "Judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish" (Legislative Reference Service, Library of Congress, 1964, p. 563).

The federal system of courts has the District Court level, the Court of Appeals and the Supreme Court of the United States. In the United States District Courts, each state has at least one federal judicial district within its boundaries, with some states having several. The intermediate appellate courts at the federal level are known as the United States Courts of Appeals. Each federal Court of Appeals covers a geographic part of the United States called a circuit, with thirteen federal Courts of Appeals in existence.

The United States Supreme Court is the highest court in the nation and is the ultimate authority on interpretation of the Constitution (Wren & Wren, 1983). It
chooses the cases it wishes to review by granting a writ of certiorari. These cases establish nation-wide precedents. The United States Supreme Court is the court of final appeal on federal law questions (Dunkee & Shoop, 1992).

**Summary**

In this chapter, legal and policy issues regarding the education of language minority students were discussed. Included is a definition of language minority students, a brief history of language minority education, the federal government’s involvement in the education of language minority students, the role of the Office for Civil Rights, and an overview of the Supreme Court’s landmark decision in *Lau v. Nichols*. The significance of *Lau v. Nichols* in shaping national policy relative to educating language minorities was introduced.

The purpose of this dissertation was to determine the current legal standards applicable to the education of language minority students in the United States. This was achieved by analyzing the jurisprudence emerging from the interpretation and application of the *Lau* decision. This study serves as a resource for school administrators responsible for developing educational programs for language minority students.

Several questions were considered during the research of this dissertation. These included: (a) how has the legal precedent established in *Lau v. Nichols* been interpreted and applied by subsequent law cases involving the education of language minority students, (b) what role has the Office for Civil Rights played in securing compliance with the *Lau* precedent, and (c) what are the legal implications for school administrators in providing programs for language minority students?
An analytical, qualitative research design was used in this legal/historical study. This included search, selection, and criticisms of sources, the presentations of facts and generalizations, and an inductive case law analysis. Pertinent law decisions were reviewed using a variety of sources.

The significance of this dissertation was found in its analysis of law concerning the education of language minority students over the past twenty-eight years since the Lau decision. This study benefits school level and program administrators responsible for organizing and implementing programs for language minority students by serving as a resource for providing legally sound programs for language minority students. Definitions of both legal terms and terms specific to the education of language minority students were included in Chapter one to assist the reader in understanding the legal analysis of case law.

In Chapter two, the review of literature provided the history of language minority education in the United States, the development of the role of the federal government in the education of language minorities, and a historical review of the Lau v. Nichols case. It included both the decision in Lau and the legal implications as discussed by legal scholars.

Chapter three described the components of legal research, including precedents of case law. This dissertation is a qualitative study, accessing legal documents and the discussion by the legal community regarding the education of language minority students.

Chapter four reviewed judicial precedents and scholarly analysis after Lau v. Nichols that pertain to the equal educational opportunity of language minority students. The role of the Office for Civil Rights in enforcing the Lau precedent was explored.
Chapter five presented conclusions and recommendations that emerged from this study. These include suggestions for school administrators responsible for establishing and monitoring sound educational programming for language minority students. Recommendations for further research were also presented.
CHAPTER II

REVIEW OF RELATED LITERATURE

This review of literature provides the history of language minority education in the United States, the development of the role of the federal government in the education of language minorities, and a historical review of the Lau v. Nichols case. It included both the decision in Lau and the legal implications as discussed by legal scholars.

Historical overview of language minority education in the United States

School policies and practices affecting non-English speakers have developed and been influenced by events in American history, immigration changes, political movements, and through case law. “Bilingualism is nothing new in the American education experience” (Fitzpatrick, 1978, p.1). Bilingual Education was not uncommon in the United States during the eighteenth and nineteenth centuries. As the largest immigrant group in the 1770s, Germans living in farming areas had no teachers available who were familiar with English. There was little need for these settlers to speak English during their early settlement years. Leibowitz (1978) commented that, “most of the school laws made no mention of the language to be employed in the public schools” (p.4).
In the 1830s, Germans in Ohio fought to exercise influence on the course of study in the public schools of the state. These settlers did not want English excluded, but they asked that German be taught as well. In response to this demand from the Germans, legislators in Ohio passed a law endorsing the German language to be taught in public schools in those districts where large German populations resided. In 1840, German-English public schools were introduced in Ohio, (Leibowitz, 1978). Like Ohio, several other Midwestern states passed laws permitting instruction in German and other languages. Leibowitz (1978) noted, “They were in the majority in the regions they inhabited; their English speaking counterparts were the minority population, giving the German element a political and social advantage not available to other groups at that time” (Leibowitz, 1978, p.5).

By the second half of the nineteenth century, bilingual education or non-English-language instruction was provided in some form in public schools. German was taught in Pennsylvania, Maryland, Ohio, Indiana, Illinois, Missouri, Nebraska, Colorado and Oregon. Swedish, Norwegian and Danish were taught in Wisconsin, Illinois, Minnesota, Iowa, North Dakota and South Dakota. Spanish was taught in the southwest (Kloss, 1977). Ovando and Collier (1997) indicated that, “Toward the end of the 1800s, however, there were increasing demands for all immigrants to be assimilated into one cultural and linguistic mold” (p.35). They further indicated that over 8 million new immigrants from southern, eastern, and central Europe were admitted to the United States between 1900 and 1910. In reaction to this new wave of immigration, “Those northern and western European immigrants already established in the United States clamored for power to control institutions, and one solution to the
power struggle focused on the schools" (p. 35). Higham (1992) noted that schools were charged with the task of Americanizing all immigrants, and that by 1919, there were fifteen state laws passed calling for English-only instruction.

"From 1880-1925, English language requirements expanded rapidly gaining special vigor after World War I" (Leibowitz, 1980 p. 8). Leibowitz (1980) commented that English literacy requirements expanded rapidly as a condition of voting and holding office during this time. He further noted that in education, thirty-seven states required English as the language of instruction in the public schools. In 1923, the courts first addressed the issue of instruction in a foreign language in schools in Meyer v. Nebraska (262 U.S. 390, 1923). In this case, a parochial school teacher was found guilty of teaching reading in German. The lower court ruled that foreign language teaching promoted thinking and allegiances not in keeping with the interest of the United States. The Supreme Court found that literacy in a foreign language was not harmful and did not endanger the health, morals, or cognitive ability of students. The Nebraska law was held unconstitutional under the Fourteenth Amendment.

In the early 1920s, extremely restrictive immigration laws were passed by the U.S. Congress creating a national origins quota system that discriminated against eastern and southern Europeans and excluded Asians (Ovando and Collier, 1997). Crawford (1992) indicated that with fewer numbers of new immigrants, second-generation immigrants stopped using their native languages thus leading to the disappearance of bilingual instruction in American public schools for nearly half a century (Crawford, 1992).
During the half-century from World War I to the 1960's, "Language minority students were subjected to severe punishment whenever they resorted to a language other than English on the playground or in the classroom" (Arias & Cassanova, 1993, p. 9). Immigrants were taught in English, largely for purposes of "Americanization" (Ovando & Collier, 1997). They further noted that the field of teaching English as a second language focused on the teaching of English as a foreign language in other countries. A return to the teaching of English as a second language began to take place in the United States in the 1960s in response to increasing numbers of immigrant and refugees, the civil rights movement of the 1960s and growing numbers of international students attending universities in the United States.

**Federal role in the education of language minority students**

The Federal government became involved in the education of language minority students through the civil rights movement and the establishment of bilingual education. New initiatives were reflected in federal legislation in response to the growth of immigration during the 1960s. Immigration laws in the early 1960s increased the number of immigrants allowed to enter the United States and eliminated the national origins quota system. This provided for more diversity among immigrants from all regions of the world (Ovando & Collier, 1997). In addition, the population of language minorities continued to increase throughout the 1960's. "The 1960 Census counted the Spanish-surnamed populations in five southwestern states of Arizona, California, Colorado, New Mexico and Texas, and the figures were indeed significant" (Leibowitz, 1978, p.8). Compared to the 1950 census, the total Spanish surnamed...
population in the southwest had increased by more than fifty percent. The 1960 Census statistics on the educational level of the Spanish surnamed students in the five southwestern states showed that Mexican-American children had completed an average of 8.12 years as compared to the White-American average of more than 14 years of schooling (Leibowitz, 1978).

Similar growth in Spanish surnamed population was experienced on the east coast as well. Leibowitz (1978) noted that, “On the east coast, there was a large number of Puerto Ricans- over 600,000 in New York City and, by 1966, almost 21 percent of the total public school population of that city-for whom Spanish was the native tongue” (p.8). In 1963, Dade County, Florida, initiated an experimental bilingual education program in the first three grades of the Coral Way School. This came about to meet the needs of a large number of Cuban refugees settling in South Florida during this time period. The programs spread to other elementary and middle schools in Dade County, Florida, and by the late 1960s several other cities began locally supported bilingual programs (Malakoff & Hakuta, 1990). The federal government responded to this increased constituency through subsequent legislation.

“The landmark Civil Rights Act of 1964 was a product of the growing demand during the early 1960s for the Federal Government to launch a nationwide offensive against racial discrimination” (U.S. Department of Justice, 2001, p.4). In calling for the enactment of the Civil Rights Act of 1964, President John F. Kennedy identified simple justice as the justification for Title VI of the Civil rights act of 1964. The Title VI Legal Manual (2001) stated:
Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination. Direct discrimination by Federal, State, or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation (p.6).

Congress recognized the need for a statutory nondiscrimination provision such as Title VI to apply across-the-board to ensure that the funds of the United States were not used to support racial discrimination.

Senator Humphrey, the Senate manager of H.R. 7152, which became the Civil Rights Act of 1964, identified several reasons for the enactment of Title VI. First, several Federal financial assistance statutes, enacted prior to Brown v. Board of Education, 347 U.S. 483 (1954), expressly provided for Federal grants to racially segregated institutions under the "separate but equal" doctrine that was overturned by Brown. Although the validity of these programs was doubtful after Brown, this decision did not automatically invalidate these statutory provisions. Second, Title VI would eliminate any doubts that some Federal agencies may have had about their authority to prohibit discrimination in their programs. Third, through Title VI, Congress would ensure the uniformity and permanence to the nondiscrimination policy in all programs and activities involving Federal financial assistance (U.S. Department of Justice, 2001).
President Lyndon Johnson signed the Civil Rights Act of 1964 into law on July 2, 1964, after more than a year of hearings, analyses, and debate. During the course of congressional consideration, Title VI was one of the most debated provisions of the Act. Title VI prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving Federal financial assistance. Specifically, Title VI provides that:

[n]o 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 (U.S.C. Section 2000d).

Tietelbaum and Hiller (1977) noted that, “Even the most prescient could not foresee at the time of its passage that Title VI of the Civil Rights Act of 1964 would become a principal weapon of linguistic minorities in their battle to establish bilingual programs and gain equal schooling” (p.140). Because each school district receiving federal financial assistance had to comply with the anti discrimination provision, Title VI became an increasingly powerful lever for eradicating discrimination in education (Tietelbaum and Hiller, 1977).

Following the passage of Title VI, heightened civil rights awareness led to the arousal of strong sentiment among groups concerning the educational needs of language minority children (Molina, 1978). Cardenas (1986), noted that:

By 1966 the frustrations associated with the instruction of children with limited English proficiency in English had become intolerable for many. Language minority children were dropping out of school at rates of 80% or higher, and
their achievement levels averaged two grade levels below the norm on standardized tests (p.361).

In 1966, the National Education Association (NEA) sponsored a conference on the education of Spanish-speaking children in the schools of the southwest. This led to the publication of NEA's 1967 report entitled, "The Invisible Minority, Pero No Vencibles." A strong recommendation was made in this report to instruct in Spanish those students who spoke Spanish as their native tongue (Leibowitz, 1978). As a result, complaints to the Department of Health, Education, and Welfare of violations of Title VI of the 1964 Civil Rights Act finally stimulated Congressional hearings sponsored by Senator Yarborough (Molina, 1978). Leibowitz (1978) indicated that Senator Ralph Yarborough of Texas introduced a bill to amend existing Elementary and Secondary Education Act legislation to provide assistance to local educational agencies in support of bilingual education programs.

Senator Yarborough's bill was aimed at assisting the Spanish surnamed populace only. At the same time, a number of similar bills advocating bilingual education were introduced by a New York congressman. "It was not until 1968 that the United States finally established a national policy for providing equal educational opportunity to language minority children through bilingual education" (Molina, 1978, p.16).

"The first federal legislation for bilingual education, passed by Congress in 1968 under Title VII of the Elementary and Secondary Education Act, created a small but significant change in policy for linguistic minorities" (Ovando & Collier, 1985 p. 26). The Bilingual Education Act of 1968 represented the first national
acknowledgement of special educational needs of children of limited English proficiency. The Bilingual Education Act of 1968 legitimized bilingual programs at the federal level. Its primary function was to legitimize bilingual education programs, allocate funds for experimental programs, and foster research on bilingual education, (Ovando & Collier, 1985).

August and Garcia (1988) noted that grants were awarded to local educational agencies, institutions, of higher education, or regional research facilities to: (a) develop and operate bilingual education programs, native history and cultural programs, early childhood education programs, adult education programs, and programs to train bilingual aides, (b) make efforts to attract and retain as teachers, individuals from non-English speaking backgrounds, and (c) establish cooperation between the home and school.

"During the first half of the 20th century, several states had statutory prohibitions against the use of languages other than English for instruction" (Ovando and Collier, 1997, p.50). Gonzalez (1994) noted that, state legislatures responded to the passage of the Bilingual Education Act by passing legislation legitimizing bilingual programs, repealing or ignoring the earlier laws. Leibowitz (1978) commented that the passage of the 1968 Bilingual Education Act led to increased attention on the needs of language minorities, and resulted in legal activity at both the Federal and State level.

Several states passed legislation supporting the implementation of the new law. Leibowitz (1978) indicated that California passed a law authorizing bilingual education in May 24, 1967. "The New Mexico Legislature adopted in 1969 a law permitting any school district to set up 'a bilingual and bicultural program of study', and Arizona the
same year passed legislation to permit school districts where students have English-
language difficulties to provide special program of bilingual education in the first three
grades” (p.10). According to Baker and de Kanter (1985), by 1979, thirty three states
had passed laws authorizing bilingual education, permitting school districts to offer
courses in a language other than English. School districts, supported by state
legislation, applied for and received federal funding for bilingual programs. Once
federal funds were received, language programs were expected to comply with Title
VI.

*Enforcement of Title VI of the Civil Rights Act of 1964*

Congress established the Office for Civil Rights (OCR) in the mid 1960s as
part of the federal effort to desegregate southern school systems pursuant to Title VI of
the Civil Rights Act of 1964. In 1970, the OCR, then part of the former Department of
Health, Education and Welfare (HEW), expanded its enforcement activities under
Title VI to include ensuring equal educational opportunities for national origin
minority students who were limited-English speaking, (U.S. Department of Justice,
2001). In monitoring compliance, The Office for Civil Rights, as part of its
responsibilities to implement Title VI of the Civil Rights Act of 1964, issued a
memorandum in 1970 regarding concerns about discrimination in schools, based on
national origin (Appendix B).

The May 25, 1970 Title VI policy memorandum, published in the Federal
Register (35 Fed. Reg. 11595, 1970) was entitled: Identification of Discrimination and
Denial of Services on the Basis of National Origin. The 1970 memorandum reflected
the HEW's findings that when English is the language of instruction but no special assistance is provided to non-English speaking students, local school districts had impermissibly excluded language minorities from participation in the educational program, denied them the benefits of that program, and subjected them to discrimination all on account of national origin. The May 25, 1970 Memorandum stated:

Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students (Appendix B).

This memorandum served as the basis for the U.S. Supreme Court's decision in Lau v. Nichols. Leibowitz stated that, "The major importance of the Memorandum stems from the affirmance of its policy view by the United States Supreme Court in Lau v. Nichols" (Leibowitz, 1978 p.10).

August and Garcia (1988) indicated that, "The 1974 United States Supreme Court Decision in Lau v. Nichols (414 U. S. 563) is the landmark statement of the rights of language minority students indicating that limited English proficient students must be provided with language support" (p.7).

Lau v. Nichols originated as a class action lawsuit in 1970 by non-English speaking Chinese students. These students accused the San Francisco Unified School District with failing to provide all non-English speaking students with special language instruction. The Chinese students alleged a violation of their Constitutional rights.
under the Equal Protection Clause of the Fourteenth Amendment and a violation of Title VI of the Civil Rights Act.

**Historical Background of the Lau Case**

On March 25, 1970, Kinney Kinmon Lau and other non-English speaking Chinese students filed suit in Federal District Court in San Francisco against Alan Nichols, President of the San Francisco Board of Education. The suit was filed on behalf of 3000 Chinese-speaking students (Wang, 1975). The class action suit, *Lau v. Nichols*, alleged that the Chinese-speaking children had a right to an education which they were not receiving in the San Francisco Unified School District because they needed special help in English.

The plaintiffs claimed that the absence of programs designed to meet the linguistic needs of language minority students violated both Title VI and the Equal Protection Clause of the Fourteenth Amendment to the Constitution. The plaintiffs urged that equality in education goes beyond providing the same buildings and books to all students. The Chinese students felt that since they could not understand the language of the classroom, they were being deprived of an adequate education, let alone one equal to the other English-speaking students. "They claimed that their educational exclusion was a function of state action since school attendance was compulsory, the use of the English language was mandated by the state, and fluency in English was a prerequisite to high school graduation" (Teitelbaum and Hiller, 1977, p. 4). In addition, the plaintiffs claimed that the difference in treatment amounted to discrimination because it affected a distinct national-origin group.
According to Wang (1975), "The suit was not developed in a vacuum; it was the last resort after all known channels for seeking equal educational opportunity had been exhausted" (p. 3). The Chinese American community had tried many meetings, negotiations, peaceful and violent demonstrations, and proposals to rectify the educational deprivation suffered by the limited English speaking Chinese students.

*United States District Court Decision*

What was in question was whether non-English speaking students received an equal educational opportunity when instructed in a language they could not understand. The plaintiffs claimed that the absence of programs designed to meet the linguistic needs of the Chinese students violated both Title VI and the Equal Protection Clause of the Fourteenth Amendment to the Constitution. Because they could not understand the language of the classroom, the Chinese students argued that they were deprived of even a minimally adequate education, let alone an education equal to that of other children. The plaintiffs further claimed that the difference in treatment, amounted to invidious discrimination because it affected a distinct national origin group. The plaintiffs argued that the Constitution prohibited withholding from them the means of comprehending the language of instruction.

During the District Court hearing in *Lau v. Nichols*, the school district acknowledged the grave needs of these children to receive special instruction, but vigorously contended that such needs did not constitute legal rights because they were provided the same educational setting offered to other children throughout the district. In its decision, the Federal District Court agreed with the school district and denied any
relief to the Chinese students. The court ruled that the student's rights to an equal educational opportunity had been satisfied by their receipt of the same education made available on the same terms and conditions to the other tens of thousands of students in the San Francisco Unified School District. In essence, the court ruled that the school district had no obligation or legal duty to rectify this situation. The case was appealed to the Ninth Circuit Court of Appeals.

Prior to the district court decision in Lau (1970) reaching the Ninth Circuit Court of Appeals, a similar case, Serna v. Portales, was decided involving the rights of language minority students to a bilingual–bicultural program in the Portales school system in New Mexico in 1972. For the 1971-72 school year, Spanish surnamed students, who by and large knew very little English when they entered the school system, comprised a sizable minority of students attending the Portales schools. Approximately 34 percent of elementary students, 29 percent of junior high school students, and 17 percent of high school students were Spanish surnamed. Undisputed evidence showed that Spanish surnamed students did not reach the achievement levels attained by their Anglo counterparts. The low performance was coupled with a negative impact upon Spanish-surnamed children when they were placed in a school atmosphere that did not adequately reflect the educational needs of this minority. Despite having knowledge of this effect, the Portales Municipal School District neither applied for funds under the federal Bilingual Education Act, nor accepted funds for a similar purpose when offered by the State of New Mexico (Serna v. Portales, 1972).

Until 1970, none of the teachers or principals were Spanish surnamed, including those teaching the Spanish language. The plaintiffs asserted that educational
discrimination existed throughout the Portales school system. They claimed the educational program was tailored to educate the middle class child from an English speaking family without regard for the educational needs of the children from Spanish-speaking environments.

The school district argued that failure to afford a program of bilingual instruction did not deny equal protection of the law to students in the Portales school district when the existence of specialized needs are not the result of discriminatory actions.

In *Serna*, the district court found that there was evidence that Hispanic students did not receive an adequate education because efforts were not made to assimilate them into the schools by providing bilingual education and cultural awareness. Judge Mechem directed the district to investigate and utilize wherever possible the sources of available funds to provide a quality educational opportunity for its Spanish surnamed students. He further directed the public schools to create a plan to remedy the situation, (*Serna v. Portales*, 1972). This case was appealed to the Tenth Circuit Court of Appeals.

*Serna* followed the 1970 district court decision in *Lau v. Nichols*. In the district court decision in *Lau*, the court ruled that the student’s rights to an equal educational opportunity had been satisfied by their receipt of the same education made available on the same terms and conditions to the other tens of thousands of students in the San Francisco Unified School District. However in *Serna*, the district court in New Mexico directed the Portales schools to provide specialized bilingual programs for its language minority students.
In 1973, Lau v. Nichols reached the Ninth Circuit Court of Appeals. The appeal resulted from the district court’s adverse disposition of the civil rights class action filed by the Chinese students to compel the San Francisco Unified School District to provide all non-English-speaking Chinese students attending district schools with bilingual compensatory education in the English language. Both the Ninth Circuit Appellate Court decision and the Supreme Court decision are analyzed for their relevance to this study.

**U.S. Court of Appeals for the Ninth Circuit Decision**

KINNEY KINMON LAU, a Minor, by and through Mrs. Kam Wai Lau, his Guardian ad Litem, et al., Plaintiff-Appellant, v. ALAN H. NICHOLS, President, et al., Defendant-Appellees

United States Court of Appeals for the Ninth Circuit

483 F.2d 791; 1973 U.S. App. LEXIS 12283

January 8, 1973

Circuit Judges Chambers, Trask, and Hill

Facts:

The plaintiffs-appellants were Chinese students attending the San Francisco Unified School District. The defendants-appellees were the superintendent and members of the Board of Education of the School District, and members of the Board of Supervisors of the City and County of San Francisco.

Two classes of non-English-speaking Chinese pupils were represented in this action. The first class, composed of 1,790 of the 2,856 Chinese-speaking students in...
the school district who admittedly needed special instruction in English, and received
no such help at all. The second class of 1,066 Chinese-speaking students received
compensatory education, 633 on a part-time (one hour per day) basis, and 433 on a
full-time (six hours per day) basis. Little more than one-third of the 59 teachers
involved in providing this special instruction were fluent in both English and Chinese,
and both bilingual and English-as-a-second language (ESL) methods were used. As of
September 1969, there were approximately 100,000 students attending San Francisco
district schools, of which 16,574 were Chinese.

The Chinese students alleged violations of the United States Constitution, the
California Constitution, Section 601 of the Civil Rights Act of 1964, and provisions of
the California Education Code. The students contended that the school district abridged
their rights to an education and to bilingual education, and disregarded their rights to
equal educational opportunity among themselves and with English-speaking students.
They sought declaratory judgment and for preliminary and permanent injunctive relief
mandating bilingual compensatory education in English for all non-English-speaking
Chinese students.

The district court denied the Chinese students all relief, and found for the
school district. The district court expressed well-founded sympathy for the plight of the
students represented in this action, but concluded that their rights to an education and
to equal educational opportunities had been satisfied. Their rights had been satisfied in
that they received the same education made available on the same terms and conditions
to the other tens of thousands of students in the San Francisco Unified School District.
The school district had no duty to rectify the Chinese student’s language deficiencies,
as long as they provided these students with access to the same educational system made available to all other students.

In appealing this case, the students argued that the district court misconstrued the meaning of the mandate of Brown v. Board of Education (1954), that education, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. In Brown, the students argued that equal terms meant without segregation imposed by law, because even though there was surface equality, it caused a sense of inferiority in minority children which affected their ability and motivation to learn and tended to retard their educational and mental growth.

As applied to the facts of this case, the Chinese students reasoned that Brown v. Board of Education mandated consideration of the student's responses to the teaching provided by his school in determining whether he had been afforded equal educational opportunity. Even though the students were given the same course of instruction as all other school children, they were denied education on equal terms with them if they could not understand the language of instruction and were, therefore, unable to take as great an advantage of their classes as other students. According to the Chinese students, Brown v. Board of Education required schools to provide equal opportunities to all and equality was to be measured not only by what the school offers the child, but by the potential which the child brings to the school. If the student is disadvantaged with respect to his classmates, the school has an affirmative duty to provide him special assistance to overcome his disabilities, whatever the origin of those disabilities may be.
The appellate court noted that the Chinese student's reading of Brown was extreme, and could not be accepted. In Brown, the Court held that legally constituted and enforced dual school systems were unconstitutional as a denial of equal protection; that state-maintained separate but equal educational facilities, sanctioned by Plessy v. Ferguson (1886), were no longer to be allowed. Brown concerned affirmative state action discriminating against persons because of their race. It struck down the denial of admission of black children to schools attended by white children under laws requiring or permitting segregation according to race. It followed the dictate of the Fourteenth Amendment, that no State shall deny to any person the equal protection of the law.

Holding:

The judgment of the district court, which found for the school district in the civil rights action filed by non-English-speaking Chinese pupils who had alleged that the school district abridged their equal educational opportunity rights because bilingual education was not being provided, was affirmed. It was affirmed because the language deficiency suffered by appellants was not caused directly or indirectly by any state action.

Rationale:

In affirming the decision of the lower court, the Ninth Circuit Court of Appeals based its decision on the Fourteenth Amendment. Although the Chinese students could be viewed as members of an identifiable racial minority class that had historically been discriminated against by state action in the area of education, the Chinese students had not alleged any segregation. More importantly, the court
reasoned that there was no showing that students' lingual deficiencies were at all related to any past discrimination. The Appellate Court rejected the argument that the school district had an affirmative duty to provide language instruction to compensate for Chinese students' handicaps, because the language deficiencies were from state-imposed segregation.

The appellate court reasoned that in segregation cases, the constitutional claim is predicated upon some form of State or governmental action, present or historical, which had created a classification asserted to be invidious and thus violative of the Fourteenth Amendment. In this case, the State had established the schools, available to all without cost. The classification claimed invidious was not the result of laws enacted by the State presently or historically, but the result of deficiencies created by the appellants themselves in failing to learn the English language. The court noted that, "For this the Constitution affords no relief by reason of any of the Constitutional provisions under which appellants have sought shelter," (Lau v. Nichols, 1973). The appellate court further stated that,

Every student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school system. That some of these may be impediments which can be overcome does not amount to a 'denial' by the Board of educational opportunities within the meaning of the Fourteenth Amendment should the Board fail to give them special attention, this even though they are characteristic of a particular ethnic group. Before the Board may be found to
unconstitutionally deny special remedial attention to such deficiencies there must first be found a constitutional duty to provide them (Lau v. Nichols, 1973, p.796).

In its decision, the appellate court commented that however commendable and socially desirable it might be for the school district to provide special remedial educational programs to disadvantaged language minority students, the appellate court found no constitutional or statutory basis upon which to mandate the specialized instruction. Since the language deficiency suffered by the students was not caused directly or indirectly by any State action, the court agreed with the judgment of the district court. Under the facts of this case, the school district’s responsibility to the Chinese students under the Equal Protection Clause extended no further than to provide them with the same facilities, textbooks, teachers and curriculum as is provided to other children in the district.

In February 1973, members of the appellate court in active service reviewed a request for en banc consideration. A majority of the court rejected the request. Judge Trask filed a special concurring opinion in the rejection of en banc consideration. In this opinion he stated that a basic misapprehension of the factual situation seemed to color, if not pervade, the dissent from the court’s refusal to grant en banc consideration. He noted that the majority opinion conceded that the children who speak no English receive no education. Those who did not speak English, however, were not assumed to receive no education. Although some students did not receive special help, there is no indication that these students were not exposed to whatever English courses were afforded. “The majority opinion does not equate the need for ‘special help’ in English
with receiving 'no education.' Although the Chinese here were an identifiable group who needed special help in English, they were a small portion of approximately 15,500 Chinese students," (Lau v. Nichols, 1973). He commented that it was not difficult to assume that they were part of an even larger group of students who need special help in English.

Justice Irving Hill, dissenting on the opinion of Justice Trask, stated that a child's right to an equal educational opportunity was of the greatest importance and should not be abridged without persuasive justification. He stated that no such justification was presented to the trial court because that court held that the facts presented by plaintiffs failed to make out a claim upon which relief could be granted under the Equal Protection Clause. While apparently conceding that the students had suffered a disadvantage in gaining an education as against English-speaking pupils, the trial court held that the disadvantage did not come within the scope of the Equal Protection Clause.

Justice Hill further noted that he would reverse the judgment and remand the case to the trial court for the taking of further evidence on the school district's justification, if any, for their failure to provide the bilingual teaching which was sought by the students. In his opinion, the facts in this case indicated that the San Francisco School System withheld from a readily identifiable segment of an ethnic minority the minimum English language instruction necessary for that segment to participate in the educational processes with any chance of success.

Justice Hill also commented that the students did not seek to be taught in Chinese, in whole or in part. They sought only to learn English. The students claimed,
with apparent justification, that they could not learn English effectively unless the person teaching them spoke and understood Chinese. Justice Hill indicated that the right to equal educational opportunity is one of the most vital and fundamental of all of the rights enjoyed by Americans. In recommending that the case be remanded back to the lower court, Justice Hill noted that the school district could be allowed to show the limits of their resources, the conflicting demands made upon those resources, and their judgment as to the priorities to be applied to those resources and demands. The court would then decide whether the students were justified in their refusal to provide bilingual instruction for the teaching of English to all of the Chinese-speaking pupils who required it.

In his dissent, Justice Hill concluded that when the state chooses to provide education and makes attendance at school compulsory, it has a duty to grant to each child an equal educational opportunity and a duty to avoid illegal discrimination. That duty does not arise because of the existence of either a present intent to discriminate or past historical discrimination. Rather, the duty arises because once the state chooses to put itself in the business of educating children, it must give each child the best education its resources and priorities allow.

Circuit Judge Hufstedler, with whom Judge Ely concurred, also dissented from the rejection of en banc consideration. Circuit Judge Hufstedler noted that the case presented unusually sensitive and important constitutional issues. Hufstedler commented that the majority's characterization of the relief sought as bilingual education was misleading. The children did not seek to have their classes taught in both English and Chinese. All they requested was that they receive instruction in the
English language. He noted that access to education offered by the public schools is completely foreclosed to these children who cannot comprehend any of it. In his opinion, the children were functionally deaf and mute. Their plight was not a matter of constitutional concern, according to the majority opinion, because no state action or invidious discrimination was present.

The majority opinion stated that state action was absent because the state did not directly or indirectly cause the children's language deficiency, and that discrimination was not invidious because the state offered the same instruction to all children. Judge Hufstedler reasoned that the Chinese children were not separated from their English-speaking classmates by state-erected walls of brick and mortar, but the language barrier, which the state helped to maintain, insulated the children from their classmates as effectively as any physical barrier.

The implications of the Ninth Circuit Court of Appeals were devastating in that surface equality was ruled adequate. In Lau v. Nichols (1973), the court ruled that the uniform use of English did not constitute unlawful discrimination and declared that English-language instruction must be paramount in the schooling process. Following this disappointment, the Chinese-American students petitioned the U.S. Supreme Court to take their case and reverse the decision of the appellate court. The Supreme Court granted the petition to hear the case on June 12, 1973.

The United States Department of Health, Education and Welfare (HEW), concerned with the impact of the lower court's decision on its policies regarding non-English speaking students and on its authority to govern the use of bilingual education funding, requested and was granted permission to argue in support of the Lau
petitioners as amici curiae. Teitelbaum and Hiller (1977) indicated that the HEW raised the same constitutional arguments as the petitioners yet, its presentation rested largely on Title VI guidelines and on its right to place reasonable conditions on the receipt of federal monies.

A brief of amici curiae urging reversal of the Ninth Circuit decision was also filed by the National Education Association. The NEA reasoned that the Ninth Circuit had erred in dismissing the federal statutory claim based on Title VI as if it were no different from the claim of Fourteenth Amendment rights. It stressed that HEW regulations and guidelines construing Title VI were entitled to great weight according to prior Supreme Court decisions. The NEA further commented that regardless of how the Supreme Court might construe the principles of the Equal Protection Clause as applied to Lau, the brief argued that HEW's interpretations of Title VI outlawed the actions of the San Francisco school district.

The Chinese Consolidated Benevolent Association, an agency serving as the official liaison between the Chinatown area and other elements of the San Francisco community, filed an amicus curiae urging reversal of the Ninth Circuit decision. Their position was based on the social and economic effects caused within the Chinese community in San Francisco due to lack of English skills. This agency indicated that lack of any English language skills not only totally excludes students from equal educational opportunities, but dramatically contributes to the poverty, delinquency, and employment problems in San Francisco's Chinatown. In their argument the Chinese agency stressed that compensatory language instruction must be afforded to these non-
English speaking students if they are to benefit from the books, materials, facilities, and programs which were geared solely for the use of English speaking students.

Additional briefs were filed by the (a) San Francisco Lawyers' Committee for Urban Affairs (b) Center for Law and Education, Harvard University, (c) Puerto Rican Legal Defense and Education Fund, Inc, (e) Mexican American Legal Defense and Educational Fund, and (e) American Jewish Committee. Each of these briefs urged the reversal of the Ninth Circuit decision and noted both the constitutional argument and claimed violations to Title VI guidelines.

United States Supreme Court Decision

LAU et. al. v. NICHOLS et. al.

Supreme Court of the United States

414 U.S. 563; 94 S. Ct. 786; 39 L. Ed. 2d 1; 1974 U.S. LEXIS 151

December 10, 1973, Argued

January 21, 1974, Decided

Facts:

This appeal resulted from the Ninth Circuit Court of Appeal’s adverse disposition of a civil rights class action filed by the appellants to compel the San Francisco Unified School District to provide all non-English-speaking Chinese students attending district schools with bilingual compensatory education in the English language. Chinese students in the San Francisco school district initiated a class action against the school system alleging violations of the Fourteenth Amendment and Section 601 of the Civil Rights Act of 1964.
The District Court denied relief. The Court of Appeals affirmed. The appellate court held that there was no constitutional violation or violation of Section 601. The Court of Appeals reasoned that "every student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school system" (Lau v. Nichols 1973, p.796).

Holding:

On certiorari, the United States Supreme Court reversed and remanded the decision of the lower courts. Justice Douglas wrote, "No specific remedy is urged upon us. 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. Petitioners ask only that the Board of Education be directed to apply its expertise to the problem and rectify the situation" (p. 564). Justice Douglas, expressing the view of five members of the court, held that the school district, which received federal financial assistance, violated Section 601 which bans discrimination based on race, color, or national origin in any program or activity receiving federal financial assistance. The school district also violated the implementing regulations of the Department of Health, Education, and Welfare, by failing to establish a program to remedy the special linguistic needs of the Chinese students in the San Francisco school district.

Justice Stewart, joined by Justices Burger and Blackmun, concurred in the result and expressed the view that although it was not clear that Section 601 had been violated, the validly promulgated regulations and guidelines of the Department of
Health, Education, and Welfare had been violated. Justice White concurred in the result as well.

Rationale:

In delivering the opinion, Justice Douglas relied on Title VI of the Civil Rights Act of 1964 and California Education Code 71 which stated that English shall be the basic language of instruction in all schools. It permitted a school district to determine when and under what circumstance instruction was to be given bilingually and bilingual instruction was authorized to the extent that it did not interfere with the systematic, sequential, and regular instruction of all pupils in the English language.

Also, 8573 of the Education Code provided that no pupil shall receive a diploma of graduation from grade 12 who has not met the standards of proficiency in English, as well as other prescribed subjects. In addition, 12101 of the California Education Code stated that children between the ages of six and 16 years were subject to compulsory full-time education. Justice Douglas reasoned:

Under these state-imposed standards 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. Basic English skills are at the very core of what these public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom
experiences wholly incomprehensible and in no way meaningful, (Lau v. Nichols, 1974, p.566)).

The Court did not reach the Equal Protection Clause but relied solely on Section 601 of the Civil Rights Act of 1964 to reverse the Court of Appeals. That section bans discrimination based on the ground of race, color, or national origin, in any program or activity receiving Federal financial assistance. The school district received large amounts of federal financial assistance. In 1970, the Department of Health, Education, and Welfare, which had authority to promulgate regulations prohibiting discrimination in federally assisted school systems, required school districts that were federally funded to rectify the language deficiencies in order to open the instruction to students who had linguistic deficiencies (Appendix B).

This 1970 requirement provided that where national origin-minority group students' inability to speak and understand the English language excluded them from effective participation in the educational program offered by a school district, the district was required to take affirmative steps to rectify the language deficiency in order to open its instructional program to these students (Appendix B). Section 602 of the Civil Rights Act authorized HEW to issue rules, regulations, and orders to make sure that recipients of federal aid under its jurisdiction conduct any federally financed projects consistently with Section 601. HEW's regulations specified that the recipients may not provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program; or restrict an individual in any way in the enjoyment of any advantage or
privilege enjoyed by others receiving any service, financial aid, or other benefit under
the programs. In the decision, Justice Douglas noted,

It seems obvious that the Chinese-speaking minority receive fewer benefits
than the English-speaking majority from respondents' school system, which
denies them a meaningful opportunity to participate in the educational program
- all earmarks of the discrimination banned by the regulations, (Lau v. Nichols,

Since the San Francisco school district contractually agreed to comply with
Title VI and its regulations, "Simple justice requires that public funds, to which all
taxpayers of all races contribute, not be spent in any fashion which encourages,
entrenches, subsidizes, or results in racial discrimination," (Lau v. Nichols, 1974,
p.567). As a result, the Supreme Court reversed the judgment of the Court of Appeals
and remanded the case for the fashioning of appropriate relief.

Justice Stewart, Burger, and Blackmun concurred in the result. In Justice
Stewart's opinion, it was not entirely clear that Section 601 of the Civil Rights Act of
1964, standing alone, would render illegal the expenditure of federal funds on these
schools. He noted that for that section provides that 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. However, the interpretive guidelines
published by the Office for Civil Rights of the Department of Health, Education, and
Welfare in 1970, 35 Fed. Reg. 11595, clearly indicated that affirmative efforts to give
special training for non-English-speaking pupils were required by Title VI as a
condition to receipt of federal aid to public schools. The HEW had reasonably and consistently interpreted Section 601 to require affirmative remedial efforts to give special attention to linguistically deprived children.

Justice Blackmun, joined by Burger, stated that numbers were at the heart of this case. Blackmun noted that 1,800 students comprised a very substantial group that was being deprived of any meaningful schooling because the children could not understand the language of the classroom.

Ovando and Collier (1998) commented that Lau v. Nichols has had by far the most the most significant impact in defining legal responsibilities of schools serving language minority students. However, the Supreme Court left unclear how extensive a language program was required. Crawford (1992) indicated that in Lau, the U.S. Supreme Court guaranteed children an opportunity to a meaningful education, regardless of their language background. He noted that due to the Lau decision, schools would have to assume responsibility for overcoming language barriers. While Lau did not prescribe a pedagogical means to this end, “affirmative steps” might involve bilingual instruction, English as a second language classes, or perhaps another approach.

According to Hakuta (1986) although opportunities for experimentation with bilingual programs became available through Title VII, local school systems were under no obligation to use them. He noted that the primary instrument for the spread of bilingual education in the United States came in the form of litigation through Lau v. Nichols. Teitelbaum and Hiller (1977) commented that the Supreme Court decision
in *Lau v. Nichols* did not endorse bilingual education yet, it legitimized and stimulated the movement for an equal educational opportunity for language minority students.

Teitelbaum and Hiller (1977) further commented that, "*Lau* raised the nation’s consciousness of the need for bilingual education, encouraged additional federal legislation, energized federal enforcement efforts, led to federal funding of nine regional “general assistance *Lau* centers,” aided the passage of state laws mandating bilingual education, and spawned more lawsuits" (p.139). In addition, in *Lau*, litigation has served as a necessary strategy for educational reform. Teitelbaum and Hiller (1977) further noted that, "*Lau* and related cases are convincing evidence that litigation is essential to secure compliance with the law where school systems are unresponsive to the call for educational reform" (p. 140).

**Summary**

This review of literature included the history of language minority education in the United States. The development of the role of the federal government in the education of language minorities was discussed. The development of federal legislation including the Civil Rights Act and the Bilingual Education Act was discussed. An historical review of the *Lau v. Nichols* case including the District, Appellate and Supreme Court decisions was presented. The 1974 *Lau v. Nichols* decision by the United States Supreme Court has emerged as the landmark decision marking the importance of an equal educational opportunity for language minority students.
CHAPTER III

RESEARCH METHODOLOGY

The purpose of this study was to determine the current federal legal standards applicable to educational programming for language minority students. This was achieved by reviewing historical and legal developments in legislation and enforcement, analyzing legal decisions including Lau v. Nichols and other legal cases involving the equal educational opportunity of language minority students. This study attempts to serve as a resource for school administrators responsible for developing educational programs for language minority students.

Qualitative Research Design

"Qualitative research is based on naturalistic-phenomenological philosophy that views reality as multilayered, interactive, and a shared social experience interpreted by individuals" (McMillan & Schumacher, 1997, p. 392). In qualitative research, most descriptions and interpretations are portrayed with words rather than numbers. McMillan and Schumacher (1997) stated that while different qualitative techniques can be used to provide verbal descriptions, the goal of each is to capture the richness and complexity of behavior that occurs in natural settings from the participants' perspective. Once collected, the data are analyzed inductively to generate findings.
An inductive analysis design indicates that categories and patterns emerge from the data rather than being imposed prior to data collection (McMillan & Schumacher, 1997). Qualitative research that is termed analytical, can be applied to the investigation of legal and policy concepts through an analysis of documents. Legal analysis focuses on selected law and court decisions to provide a better understanding of the law and legal issues (Wren & Wren, 1983). In this study, the court cases and decisions concerning the equal educational opportunity of language minority students citing Lau v. Nichols, the landmark U. S. Supreme Court case were examined.

This research design is a case study, similar to that used in law schools throughout the nation. According to McMillan & Schumacher (1997), the law is never static and an analysis of relevant court cases is necessary to derive the legal principles and understand the law at that point in time. Each court case was analyzed by examining the facts, the questions raised in the case, the decision and the rationale behind the decision, and the implications of this decision upon the educational system (McMillan & Schumacher, 1997).

Lau v. Nichols is the landmark decision in the education of language minority students. The research involved identifying the legal principles induced from the analysis of this case. The research process not only the legal court decision, but any applicable laws and statutes as well as commentary from other sources such as books, newspaper articles, and law reviews.

*Legal Research Methodology*

Educational law influences curriculum, finance, personnel, student assignment, and many other day-to-day operations of schools (McMillan &
Schumacher, 1997). McMillan & Schumacher further stated that the courts of law have a particularly important role in a legal system dependent upon precedent cases. "Constitutional provisions, federal and state statutes, and city ordinances are generally legal abstractions without practical meaning until they are interpreted by a court of law and are made to apply in a given situation" (McMillan & Schumacher, 1997, p. 483). "Legal research is the process of finding the laws that govern most of our life activities and the materials which explain or analyze these laws" (Cohen & Olson, 1996, p. 1). To determine the impact of both past actions and the implications of contemplated actions, Cohen & Olson (1996) believed that research is essential in legal issues. Legal research is also crucial to school leaders because it provides the parameters within which school leaders must operate (Rossow, 1990).

Wren & Wren (1983) recognized that legal research does not occur in a factual vacuum. They asserted that the purpose of researching law is to ascertain the legal consequences of a specific set of actual or potential facts. Wren & Wren (1983) also contended that it is always the facts of any given situation that suggest and dictate the issues of law that need to be researched.

Cohen & Olson (1996) noted that legal research involved the use of a variety of printed and electronic sources. Electronic sources may include LEXIS-NEXIS, which is a "high-end, expensive database" (McKim, 1996, p. 168). McKim further commented that LEXIS was a database of actual legal information, used by law offices and law students for research. LEXIS-NEXIS was used in this research. In addition to the computer databases, printed sources can include court decisions,
Cohen & Olson (1996) also suggested that legal sources might differ in their relative authority. Some are binding; some are only persuasive in varying degrees; and some are only useful tools for finding other material. These variations require that researchers evaluate the sources they study.

Whether researching by book or computer, one must be familiar with the three broad categories of legal literature: (a) primary sources, (b) finding tools, and (c) secondary materials” (Cohen & Olson, 1996). Primary sources of law include those recorded rules that will be enforced by the state. These rules are found in constitutions, in decisions of appellate courts, in statues passed by legislatures, in executive decrees, and in regulations and rulings of administrative agencies. One major category of primary sources, noted Cohen & Olson (1996), were judicial decisions.

The United States is a "common law" country, its law is expressed in an evolving body of doctrine determined by judges on the basis of cases, which they must decide, rather than on a group of abstract principles. As established rules are tested and adapted to meet new situations, the common law grows and changes over time (Cohen & Olson, 1996).

Wren & Wren (1983) stated that a legal researcher sees three branches of government that make law, including the legislature, the administrative agencies and the judiciary (p. 3). Wren & Wren (1983) further pointed out that each of these branches makes a different kind of law. Statutory law is created by legislatures
passing bills, which then becomes law when signed by the executive. Administrative
law, created by agencies, consists of rules and decisions issued by these agencies.
Finally, the judiciary makes common law, which is sometimes informally referred to
as judge-made laws, which Wren & Wren stated, are found in court decisions.
Common law was the focus of this analysis.

*Common Law/Case Law*

The United States judicial system consists of hierarchies of courts, which
include trial courts, appellate courts and a court of last resort, usually the Supreme
Court of the jurisdiction. “This judicial system incorporates the processes of appellate
review, where higher courts review the decisions of lower courts and of judicial
review, where the courts determine the validity of legislative and executive actions”
(Cohen & Olson, 1996, p. 4). Wren and Wren (1983) also commented that there are
usually several levels within the court system, each of which “…performs a specific
function” (p. 7). Noting that the federal courts have three levels, as do many state
courts, Wren & Wren (1983) referred to these as a trial level, an intermediate
appellate level, and a final appellate level.

At the federal level, these trial courts are called United States District Courts,
and each state has at least one federal judicial district within its boundaries, with some
states having several (Wren & Wren, 1993). According to Wren and Wren (1983),
“the number of districts in a state is primarily determined by population and also the
geographic size of the state” (p. 7).
The intermediate appellate courts at the federal level are known as the United States Courts of Appeals. Each federal Court of Appeals covers a geographic part of the United States called a circuit, with thirteen federal Courts of Appeals in existence (Wren & Wren, 1983). To appeal a district court decision, a party to a lawsuit will normally appeal to the U.S. Court of Appeals covering that district (Wren & Wren, 1983). The Supreme Court of the United States is the final appellate court in the federal court system.

Court decisions are reported in many different venues. Wren and Wren (1983) compiled lists of sources for legal research on each level of courts. For the United States Supreme Court, Wren and Wren suggested U.S. Reports and the Supreme Court Reporter. The Federal Reporter, Second Series, the Federal Reporter and Federal Cases are all described as excellent sources for the U.S. Court of Appeals. The U.S. District Courts cases are reported in the Federal Supplement, Federal Reporter, Second Series, Federal Reporter, Federal Cases, and Federal Rules Decisions. State Courts decisions may be found in State and Regional reporters.

In this dissertation, the primary sources for legal research included court cases concerning the education of language minority students. Secondary sources included legal periodicals, such as law reviews, that analyze and interpret case laws. Also used as secondary sources were a legal dictionary to assist in the definitions of legal terms as well as previous dissertations on file to present other views on the legal topic.
The finding tools used by this researcher to locate primary and secondary sources included Shepard's Citations and LEXIS - NEXIS which was used to provide precedents and citations of Lau v. Nichols (1974). Computer searches to locate law reviews and dissertations pertaining to the legal search were also utilized.

**The Doctrine of Precedent**

"Judicial decisions are one of the most important sources of legal authority in the common law system," (Cohen & Olson, 1993, p.16). The doctrine of precedent or "stare decisis" stated Cohen and Olson (1993), sought to ensure that people in "like circumstances are treated alike" (p.17). Courts follow this doctrine of precedent so that people can study earlier disputes, evaluate the legal impact of planned conduct, and modify their behavior to conform to existing rules (Cohen & Olson, 1993).

Wren & Wren (1983) also commented on this need for internal evaluation of judicial decisions and stated:

This court-created doctrine of precedent says, essentially, that when a court has applied a rule of law to a set of facts, that legal rule will apply whenever the same set of facts is again presented to the court. In effect, cases with facts identical to those of a case already decided will presumably yield the same result as the earlier case (p. 90).

Wren & Wren (1983) also stated that the doctrine of precedent promoted the even-handed administration of justice, ensured certainty and established guidelines for those individuals planning future conduct. They further noted that this doctrine allowed parties to know in advance how particular legal disputes may be resolved if
they commenced action. Wren & Wren contended that the more similarities one could find between one's problems and those of a decided case, the "more likely that the decided case would determine your problem's outcome" (p.80).

**Shepardizing**

"The most commonly used tool for verifying the current validity of law is a service known as Shepard's Citations" (Cohen & Olson, 1996, p. 70). One must be able to find cases, which control or influence a court's decision making for the doctrine of precedent to operate effectively. In order to determine applicable law, lawyers must have some means of locating cases on point, that is, earlier decisions factually and legally relevant to a dispute at hand. They must then determine whether these decisions are valid law and have not been reversed, overruled, or otherwise discredited (Cohen & Olson, 1996). Judicial decisions are published in chronological order and not by topic, and are not generally updated after first publication. Because of this, other resources are needed to find decisions and to verify their current status (Cohen & Olson, 1996).

Wren & Wren (1993) stated that the final step in doing legal research is updating the law. This is to make sure that the legal rules being used have not changed and are still valid law (Wren & Wren, 1983). Shepardizing is the most widely used method of updating the law. It involves tracing the subsequent treatment of cases, statutes, and some other legal authorities by using the reference works called Shepard's Citations (Wren & Wren, 1983).
Shepard’s Citations is used by legal researchers to ascertain a known authority’s current status (Wren & Wren, 1983). “It allows a researcher to trace the development of a legal doctrine from the time a known case was decided forward to the present” (Cohen & Olson, 1996, p. 70). Cohen and Olson (1996) suggested that citation indexes, which indicate later citations to a given document, are now widely used in scholarly research. According to Cohen and Olson (1996), shepardizing accomplishes three major purposes. The first purpose is to trace a case’s judicial history by providing parallel citations for the decision and references to other proceedings in the same case. Second, it may be used to verify the current status of a case to determine whether it is still good law or if it has been overruled, limited or otherwise diminished. And last, research may lead to other citing cases, as well as periodical articles, attorney general opinions, and other resources.

Shepard’s Citations publishes citators for the Supreme Court, the lower federal courts, every state, the District of Colombia, Puerto Rico, and each region of the National Reporter System (Cohen & Olson, 1996). For the purpose of shepardizing, the known material or case is known as the cited authority (Wren & Wren, 1983). There are numerous sets of Shepard’s Citations, only one of which will work for any given authority of the case being shepardized (Wren & Wren, 1983).

Cohen & Olson (1996) further noted that Shepard’s Citations is also available online through WESTLAW and LEXIS. These are electronic versions of citations and can have several advantages over the print counterparts. Citing entries are compiled into one listing, eliminating the need to search through multiple volumes and pamphlets. Case treatments and names of publications can be spelled out rather
than abbreviated because page space is not a concern. The researcher can have a
computer search for specific treatments or head note numbers rather than scanning a
list. Also, the online versions allow the researcher to go from a Shepard's display
directly to the text of citing cases (Cohen & Olson, 1996).

In this study, both the Shepard's Citations found in the law library and the
online electronic LOGS were used to shepardize the Lau decision. To use the LEXIS
shepardizing program, the case law number was typed for the computer program to
case number. The number 414 refers to the volume of the Supreme Court Reporter in
which the case is published, and the decision begins on page 563 in that volume of the
Supreme Court Reporter.

According to the LEXIS-NEXIS information sheet, a researcher may use the
Shepard's Citation service to verify citations; check the validity of a case using
Shepard's editorial analysis; trace the history and treatment of a pertinent case which
has cited the case; find parallel citations; find citations by courts in other jurisdictions;
and find citing references by administrative agencies, law reviews, articles and texts.

Each case must be reviewed and analyzed to see if it would fit the research
parameter. Cases citing Lau concerned with ensuring the legal rights of language
minority students to an equal educational opportunity were described and analyzed in
this dissertation. Those cases not pertaining to an equal educational opportunity or
related to labor practices, immigration or segregation were analyzed or presented in
this dissertation.
Evaluating the Law

In evaluating the usefulness, to the researcher, of a case, statute, administrative regulation or constitutional provision, an analysis involves both internal and external evaluation. An internal law evaluation involves reading the particular legal authority and determining whether it applies to the fact situation in the research problem (Wren & Wren, 1983). The similarities and the differences of the facts must be examined as well as a determination of the authority's intended legal significance and impact to the research question (Wren & Wren, 1983, p. 80).

"The need for internal evaluation of judicial decisions is tied to the doctrine of stare decisis. This court-created document says, essentially, that when a court has applied a rule of law to a set of facts, that legal rule will apply whenever the same set of facts is again presented to the court" (Wren & Wren, 1983, p. 80). The more similarities a researcher finds between the two cases, the more likely the decided case will determine the outcome of the case in question. The less similar the two cases, the less likely the decided case will control the decision (Wren & Wren, 1983). "The intent of the law must also be examined to determine if it can be narrowly or loosely interpreted" (Wren & Wren, 1983, p. 84).

An external evaluation of the law allows a researcher to evaluate the current status and validity of the authority (Wren & Wren, 1983). To determine the current status of court decisions that are relevant, subsequent court decisions must be evaluated, interpreted and applied to the court case in question (Wren & Wren, 1993).
In evaluating the applicable court cases after Lau, this researcher "briefed" the cases according to Wren & Wren (1983, p. 92). The points in the brief included: (a) the name of the case- citation, (b) date the decision was rendered, (c) votes of the judges, author of the minority decision, (d) author(s) of concurring opinion, (e) author(s) of dissenting opinion, (f) procedural posture of the case, (g) legal topic covered by the case, (h) summary of facts, (i) questions presented by the case, (j) answers to the questions presented, (k) summary of the court's reasoning in reaching the answers, (l) summary of significant concurring opinions, (m) summary of dissenting opinions, and (n) the significance of the case (Wren & Wren, 1983). According to Wren & Wren (1983), not all of these points must be included in every brief. A researcher must make the decision as to what to include and what to omit in briefing a court case.

Summary

Qualitative research that is termed analytical includes the investigation of legal and policy concepts through an analysis of documents. "Legal analysis focuses on selected law and court decisions to provide a better understanding of the 'law' and legal issues" (McMillan & Schumacher, 1997, p.43-44). In this dissertation, the jurisprudence emerging from Lau v. Nichols (1974) concerning the education of language minority students was examined. An inductive analysis design was used in this dissertation.
In this chapter, the research methodology to be used in Chapter Four was outlined. The legal research techniques used in this qualitative study, as well as legal doctrines used in research were also explained.
CHAPTER IV

FINDINGS OF THE STUDY

The landmark U. S. Supreme Court decision in *Lau v. Nichols* has had by far the most significant impact in defining legal responsibilities of schools serving limited-English-proficient students (Ovando and Collier, 1997). The *Lau* decision marked the importance of an equal educational opportunity for language minority students. Following the *Lau v. Nichols* U. S. Supreme Court decision in January of 1974, additional federal legislation regarding the equal educational opportunity of language minority students emerged. According to Lyons (1988), just weeks after the announcement of the Supreme Court's decision in *Lau*, Congress adopted the Equal Educational Opportunities Act (EEOA) as an amendment to the Education Amendments of 1974. The focus of the EEOA was to limit the use of student transportation to achieve school desegregation, the EEOA amendment was opposed by civil rights and student advocate organizations. Included with the anti-busing and pro-neighborhood school provisions of the EEOA were new statutory responsibilities placed on school districts serving language-minority students. The Equal Educational Opportunities Act, 20 U.S.C. 1703(f) stated the following:

No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by
(b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps, consistent with part 4 of this subchapter, to remove the vestiges of a dual school system;

(c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;

(d) discrimination by an educational agency on the basis of race, color, or national origin in the employment, employment conditions, or assignment to schools of its faculty or staff;

(e) the transfer by an educational agency, whether voluntary or otherwise, of a student from one school to another if the purpose and effect of such transfer is to increase segregation of students on the basis of race, color, or national origin among the schools of such agency; or

(f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs (Appendix C).
Section (f) of the Equal Educational Opportunities Act directly addressed denial of equal educational opportunity and went into effect shortly after the Lau decision. This federal legislation codified the Supreme Court's holding which required school districts to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

The Equal Educational Opportunities Act did not define appropriate action, nor did its legislative history amplify the intent of Congress. Congress' silence about this provision led constituents to look for possible direction in the 1974 reauthorization of the 1968 Bilingual Education Act. While the Bilingual Education Act operated as a competitive assistance-grant program and was not mandatory, it was different from the EEOA's requirement that education agencies take appropriate action to overcome language barriers. The 1974 amendments to the Bilingual Education Act evinced strong support for educational programs of instruction in both English and the student's native language (Lyons, 1988).

A major effort to help school districts understand their responsibilities to national origin minority students was made on August 11, 1975. The Education Commissioner of the Department of Health, Education and Welfare (HEW) announced policy guidelines for school districts' compliance with the Title VI requirements that had just been upheld in the Lau decision. Those guidelines, prepared for HEW by an expert task force, were widely circulated in memorandum form to school officials and the public, but were never published in the Federal Register. Officially titled "Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful Under Lau v. Nichols," the
guidelines were usually referred to as the Lau Remedies or Lau Guidelines (Appendix D).

The "Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful Under Lau v. Nichols" (1975) or Lau Remedies were detailed and specific. They specified procedures for: (a) identifying language minority students and assessing their English proficiency, (b) determining appropriate instructional treatments, (c) deciding when students were ready for mainstream class, and (e) determining the professional standards expected of teachers of language minority students.

The Lau Remedies went beyond the Lau ruling to specify that schools should instruct elementary students through their strongest language until they could participate effectively in English-only classrooms. English as a Second Language (ESL) instruction was prescribed for all students for whom English was not the strongest language. Finally, any school district that wished to rely exclusively on ESL would be obliged to demonstrate that their programs were as effective as the bilingual programs described in the Lau Remedies. Through the 1975 Lau Remedies, school districts were now required to demonstrate that an effective educational program was provided for language minority students limited in their English proficiency (Ovando & Collier 1997).

Tietelbaum and Hiller (1977) commented that although the OCR did not look on the Lau Remedies as a regulation with the force of law, they were entitled to weight as an agency interpretation and were to be considered comparable to the May 25 memorandum. Tietelbaum and Hiller (1977) further noted that in dealing with the
courts, school districts would have difficulty asserting that the Lau Remedies were unreasonable or inconsistent with Title VI as bilingual education was not mandated and alternative programs were acceptable if shown to be equally effective.

Although the Lau Remedies were never promulgated as formal regulations, they quickly evolved into the de facto standards that the Office for Civil Rights staff applied for determining an education agency’s compliance with Title VI under Lau. Between 1975 and 1980, OCR carried out nearly six hundred Title VI compliance reviews, which led to the negotiation of 359 school district Lau plans by July of 1980. Virtually all of them were based on Lau Remedies. In addition, the Lau Remedies were frequently cited by federal courts in cases involving claims both under Title VI and the Equal Educational Opportunities Act.

The jurisprudence concerned with the equal educational opportunity of language minority students at the Federal level was analyzed in chapter four, in particular for any references to Lau v. Nichols (1974). Court cases interpreting and applying Lau were examined. The court cases analyzed were chosen both by citing the Lau decision within their opinions and by legal questions raised in the lawsuits regarding the right of language minorities to an equal educational opportunity. Court decisions not pertaining to the education of language minority students were not analyzed, including those related to employment practices, students with disabilities, segregation, and failure to provide bilingual or translation services to clients.

Of the two hundred and twenty-one court cases listed by LEXIS-NEXIS as citing the Lau decision, only twelve directly involved the right of language minority students to an equal educational opportunity. These cases were analyzed in
chronological order, with the most recent cases being discussed last. This chronological progression mapped an historical viewpoint of the Supreme Court's precedent decision in Lau and the decisions following this opinion. Court cases that were reviewed by two courts, a lower court and an appeals court were analyzed separately. The higher court's date of decision was used for chronology order. The format for analyzing these twelve cases included: (a) the name of the case, (b) court of record, (c) citation, (d) date the decision was rendered, (e) names of the judges, (f) factual summary, and (g) decision and rationale of the court.


Legal Decisions Since Lau v. Nichols

SERNA et al. v. PORTALES MUNICIPAL SCHOOLS

United States Court of Appeals for the Tenth Circuit

499 F.2d 1147; 1974 U.S. App LEXIS 7619

July 17, 1974

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Facts:

For the 1971-72 school year, Spanish surnamed Americans, who by and large knew very little English when they entered the school system, comprised a sizable minority of students attending the Portales schools. Approximately 34 percent of elementary students, 29 percent of junior high school students, and 17 percent of high school students were Spanish surnamed. The four Portales elementary schools were Lindsey, James, Steiner, and Brown. The Spanish-surnamed population was concentrated on the North side of the railway tracks, which divides Portales. Brown, James, and Steiner were located South of the tracks and are made up of 78 to 88 percent Caucasian students.

In contrast, Lindsey school’s enrollment consisted of nearly 86 percent Spanish surnamed students. At Lindsey, only 4 students with Spanish surnames in the first grade spoke English as well as the average Caucasian first grader. Students at Lindsey were shown to be almost a full grade behind children attending other schools in reading, language mechanics, and language expression. Undisputed evidence showed that Spanish surnamed students did not reach the achievement levels attained by their Caucasian counterparts. An educational psychologist established that in his opinion, language difficulties accounted for 80 to 85 percent of the differences indicated in achievement testing. The low performance was coupled with a negative impact upon Spanish-surnamed children when they were placed in a school atmosphere that did not adequately reflect the educational needs of this minority. Lindsey students fell further behind in intelligence quotient tests as they moved from
the first to the fifth grade. Despite having knowledge of this effect, the Portales Municipal School District neither applied for funds under the federal Bilingual Education Act, nor accepted funds for a similar purpose when offered by the State of New Mexico.

Until 1970, none of the teachers or principals were Spanish surnamed, including those teaching the Spanish language. The Portales superintendent testified that, for the 1971-2 school year, only one out of approximately 80 applications for elementary school teaching positions was from a Spanish surnamed person.

Nevertheless, Portales aggressively recruited and hired six Spanish surnamed teachers. At Lindsey, a program was established to teach first graders English as a second language and federal funds were accepted to establish a program to serve the needs of pre-school Spanish surnamed children.

In this case, the plaintiffs asserted that educational discrimination existed throughout the Portales school system. They claimed the educational program was tailored to educate the middle class child from an English speaking family without regard for the educational needs of the children from Spanish-speaking environments.

The school district argued that failure to afford a program of bilingual instruction did not deny equal protection of the law to students in the Portales school district when the existence of specialized needs were not the result of discriminatory actions. The district also argued that the trial court’s decision and the relief granted constituted unwarranted and improper judicial interference in the internal affairs of the Portales school district.
The question raised in this case was whether a school, comprised of a sizable minority Mexican-American students, denies equal education opportunity in violation of the Fourteenth Amendment and statutory rights under Title VI of the 1964 Civil Rights Act by:

a) failing to provide bilingual instruction that accounts for the special educational needs of the Mexican-American students even though the needs for such education are not the result of discriminatory action; b) failing to hire any teachers of Mexican-American descent; c) failing to structure a curriculum that accounts for the particular education needs of Mexican-American children; d) failing to structure a curriculum that reflects the historical contributions of people of Mexican and Spanish descent to the State of New Mexico and the United States; and, e) failing to hire and employ any administrators of Mexican-American descent (Serna v. Portales, 1974, p. 1149).

Holding:

The Appeals Court held that violations of Title VI exist only where a substantial group is being deprived of a meaningful education. Under 35 Fed Reg. 11595 of 1970 as cited in Lau v. Nichols, where the inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by the district, a district must take affirmative steps to rectify language deficiency in order to open its instructional program to students.
The appellate court held that Portales must develop a bi-cultural program so as to offer psychological support to the subject matter instruction.

"The use of the child’s mother tongue as a medium of instruction concurrent with an effort to strengthen the child's command of English acts to prevent retardation in academic skill and performance. The program is also intended to develop the child's self-esteem and a legitimate pride in both cultures. Accordingly, a bilingual education normally includes a study of the history and cultures associated with the mother tongue," (Serna v. Portales, 1974, p.1150).

Rationale:

The Appeals Court declined to affirm the district court finding that the Portales municipal schools denied equal protection of the law by not offering a program of bilingual education that met their special education needs. Instead, the Appeals Court followed the rationale behind Lau v. Nichols, relying upon Title VI, Section 601 of the Civil Rights Acts of 1964, which bans discrimination on the ground of race, color, or national origin in any program or activity receiving federal financial assistance.

Expert opinion was offered to show that when Spanish surnamed children come to school and find that their language and culture are totally rejected and that only English is acceptable, feelings of inadequacy and lowered self esteem develop. “If a child can be made to feel worthwhile in school, then he will learn even with a poor English program... children who are not achieving often demonstrate both academic and emotion disorders. They are frustrated and they express their
frustration in lack of attendance, lack of school involvement, and lack of community involvement. Their frustrations are reflected in hostile behavior, discipline problems, and eventually dropping out of school" (Serna v. Portales, 1974, p.1150).

ASPIRA OF NEW YORK, INC. v. BOARD OF EDUCATION OF CITY OF NEW YORK et al.

United States District Court for the Southern District of New York

394 F. Supp. 1161; 1975 U.S. Dist. LEXIS 12183

May 28, 1975

District Judge Frankel

Facts:

A consent decree dated August 29, 1974 implemented the principles of Lau v. Nichols in which the plaintiff class of Hispanic students, was to receive a program including intensive training in English language skills, instruction in substantive courses in Spanish, and reinforcement of Spanish skills. The decree provided, in detail, a course of testing to identify the members of the class, those whose English language difficulties prevented them from effectively participating in the learning process and who could better learn in Spanish. The decree also outlined a program of instruction that these students were to receive.

The testing program formulated by the defendant involved administering a test called the [language assessment battery, L.A.B.] in English. To serve as a norming group, the test was given to a sample population of English speaking students. The
test was then administered to all Hispanic students. The third step involved the norming process. The Defendant Board of Education, acting on the judgment of its experts, determined that, a Spanish version L.A.B. would be given only to those Hispanic students whose scores fell below the tenth percentile score of the norming group. They further determined that from among those students given the Spanish version, the bilingual program would be provided for those students who scored better on the Spanish version, as they were able to more effectively participate in Spanish.

It was later proposed that the Spanish version of the L.A.B. would also be normed from a Spanish-speaking population. Thus, Spanish-speaking students taking the Spanish version of the test would be ranked on the basis of percentiles taken from the Spanish-speaking sample. All Hispanic students scoring below the tenth percentile would be excluded from the bilingual program on the ground that they were shown to be unable to participate more effectively in Spanish.

In its resolution, the court examined and compared the linguistic scores of monolingual English-speaking students to those of Spanish-speaking students in order to define the class of students entitled to the bilingual program. In its examination of score distributions, the court found a sharp tendency for scores to cluster at or above the twentieth percentile.

The defendant's position that only Hispanic students scoring in the tenth percentile on the English version of the L.A.B. should be eligible for testing with the Spanish version was a central argument. The plaintiffs urged that there should be no cutoff at all. The plaintiff's position was that every Spanish-surnamed student should
receive the Spanish L.A.B. and be assigned to the bilingual program if the student scored better on the Spanish version than the English version.

Determining where the cutoff should be emerged as a major issue. Defendants stated that all monolingual English children should be capable of effective participation in English language instruction and that any Spanish-speaking student who was able to score above the bottom ten percent of the English speaking norming group, "may be assumed capable of effective participation in instruction in English," (Aspira of New York v. Board of Education, 1975, p.1163). The plaintiffs attacked the entire testing procedure and sought to "test those 200,000 Hispanic children, out of an overall total of 300,000 Hispanic children, receiving the lowest scores on the English version of the L.A.B." (Aspira of New York v. Board of Education, 1975, p.1163).

Holding:

The court held that the Spanish L.A.B. would be administered to all Hispanic students whose English L.A.B. scores fell below the twentieth percentile score of the norming group. The court identified this group as those students whose English language deficiency prevents them from effectively participating in the learning process. The court further ordered that Hispanic students who took the Spanish version L.A.B. were to be included in the bilingual class if they scored higher on the Spanish than on the English version of the exam.

Rationale:

The court noted that, "it seems reasonable to assume that a Hispanic student scoring better than a fifth of his English speaking peers on the English version of the

The court further noted while it is not possible to say with precise and certain meaning that an English version score at a given percentile is similar to the same percentile score on the Spanish version, distinctions between students separated by a percentile will produce results that seem capricious at the points of division. The court added, “But we are merely a court consigned to the drawing of lines, and we do the best we can,” (Aspira of New York v. Board of Education, 1975, p.1165).

Elis CINTRON et al. v. BRENTWOOD UNION FREE SCHOOL DISTRICT et al.

United States District Court for the Eastern District of New York

455 F. Supp. 57; 1978 U.S. Dist. LEXIS 20260

January 10, 1978

District Justice Mishler

Facts:

The Brentwood school district had a student enrollment of about 19,000 of whom approximately 3700 were Hispanic. The elementary system had twelve schools with a student enrollment of about 10,000 including approximately 2,000 Hispanic students. A bilingual educational program, supplemented by an ESL program, was offered from 1973 to 1978. Puerto Rican and other Hispanic children who had English deficiencies sought injunctive and declarative relief claiming violations of Title VI of the Civil Rights Act of 1964, and the Civil Rights Act of
1871. The suit was filed in response to the announced intention of the defendant Brentwood Union Free School District to restructure its bilingual program known as Project Avelino and substitute it with Plan V.

Project Avelino began in 1973 with the kindergarten and first grade. The program was offered to students whose dominant or exclusive language was Spanish. It expanded each year into the next grade. Each year approximately 100 children entered the program as they enrolled in kindergarten, while some students enrolled in grades 1 and 2. Bilingual teachers and aides taught curriculum subject matter for students in kindergarten and the first grade in Spanish. Kindergarten and first grade students received some exposure to English. As the students progressed from year to year, the use of English increased while the use of Spanish decreased. It was expected that by the time a student reached the sixth grade, all courses could be taught entirely in English.

Students also received instruction in the history and culture of their countries of origin. Only art, music, physical education, and other specialty subjects were taught exclusively in English. Specialty instructors relieved the bilingual teachers during such periods.

Individual attention was given to students within the class who had a greater capacity to absorb English instruction. Nonetheless, the Spanish-speaking student who had the greater capacity to absorb English instruction remained segregated. Opportunity for interaction with English-speaking students was limited to physical education and lunch. No provision was in place for permitting students who had attained a level of English proficiency that allowed for learning in the English
language to move out of the program. Retention in Project Avelino was carried out in order to maintain the student’s Spanish cultural level.

Faced with declining enrollment and necessary teacher cutbacks, Brentwood announced its intention to restructure its bilingual program known as Project Avelino and substitute it with Plan V. Under Plan V, seven elementary schools would offer an ESL center run in the same manner as under Project Avelino and a Spanish basic skills room for remedial help and cultural instruction. Hispanic students in the bilingual program would spend the majority of their school day in the homeroom with English speaking students. Non-English speaking students would also attend the Spanish basic skills room for periods up to one and a half hours.

The Brentwood school district identified students with English language deficiencies at kindergarten. Parents of such students were advised of placement options of English classes, ESL program or a bilingual program. However, no reliable method was used to identify students in the upper school grades who had English language deficiencies. While achievement tests were administered to all students, no language test was administered in light of possible English language deficiencies. However, language tests administered to students in the bilingual program found that fifty-three of those enrolled in the program were able to function adequately in all English classes.

Holding:

Project Avelino failed to meet statutory and regulatory standards. It was found to be in violation of the Equal Educational Opportunities Act of 1974 and the Lau guidelines established in 1975 following Lau v. Nichols. Project Avelino
students were kept separate and apart from English speaking students in music and art classes in violation of Lau guidelines. The court found that Project Avelino was deliberately conducted as a maintenance program and discouraged transfer out of the program. No mechanism was provided for removing students who had reached a level of proficiency in English that would allow them to participate in English instruction.

Brentwood was directed to submit a plan in compliance with Lau guidelines. The plan was to contain more specific methods for identification of students, monitoring progress, and transferring students out when they had achieved the necessary level of English proficiency. It should not isolate children into racially or ethnically identifiable classes, but should encourage contact between non-English speaking and English speaking students in all but subject matter instruction.

Rationale:

Lau guidelines stated that, "In such courses or subjects as art, music, or physical education, a program of bilingual education shall make provision for the participation of the children with limited speaking ability in regular classes" (Appendix D). In addition, the Equal Educational Opportunity Act of 1974 stated that no state shall deny equal educational opportunity to an individual on account of his race, color, sex, or national origin by the deliberate segregation by an educational agency of students on the basis of race, color, national origin, among or within schools.

Rose Marie RIOS et al. v. Henry P. READ et al.
Facts:

Students in the Patchogue-Medford School District of Puerto Rican ancestry who had English language deficiencies brought suit against school officials and members of the Board of Education alleging denial of equal educational opportunity in violation of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.

The goal of the transitional program in the Patchogue-Medford School District was to teach the child to be able to read and write English within three years thereby integrating the student as soon as he or she indicated comprehension of spoken English. Instruction for English language deficient students was offered only in the English language. Students with English language deficiencies were instructed in English with their English-speaking counterparts unless the classroom teacher recognized a need for bilingual instruction. Some instruction in Spanish was offered to kindergarten students and first-graders. No textbooks in Spanish were available. English language deficient students received an average of 40-50 minutes a day in subject matter instruction in Spanish and the remainder of school day in English. There was no sequentially planned instruction in subject matters in Spanish.

The students complained about the supervision of bilingual teachers in the transitional program. They argued that the bilingual teachers reported to a supervisor
who did not speak Spanish, was unfamiliar with the methodology of teaching English as a Second Language, and had no bilingual education training. Bilingual teachers were not evaluated according to their bilingual teaching methods but only to the contract between the Teachers Union and the Board of Education.

The school district was composed of 11,000 students of whom approximately 800 were Hispanic. Of the 800 Hispanic students attending school, 186 participated in the bilingual program offered. Of the 186 participating in the bilingual program, 163 emigrated from Puerto Rico. The school district denied the allegations and affirmatively alleged that, from July 1972 to July 1977, the District offered a bilingual program that adequately met the needs of students whose dominant language was Spanish and which complied with the constitutional and statutory mandate requiring the same learning opportunity be afforded to Spanish speaking students as their English speaking counterparts.

Following Lau v. Nichols (1974), HEW created a task force for the purpose of establishing standards of compliance with Title VI and its implementing regulations. In 1975, the task force made its findings in “Remedies Available For Eliminating Past educational Practices Rules Unlawful Under Lau v. Nichols” also known as the Lau Remedies or guidelines (Appendix D).

The school district challenged the use and value of the Lau guidelines in this case. The school district argued that:

a) there are not enough students with English language deficiencies in the District to warrant application of the Lau guidelines as a minimum standard;

b) the Transitional Bilingual Program is in substantial compliance with the
Lau guidelines; c) the program is "highly effective and successful in achieving its objectives; and, d) the Bilingual Education Act of 1974 is not applicable (Rios v. Read, 1978, p.15).

In this case, an issue raised was whether a district court acquires jurisdiction only upon the exhaustion of administrative remedies available under the regulations promulgated by HEW. Another issue raised was whether a transitional bilingual program stressing ESL and including substantive bilingual instruction in content courses with bilingual components as part of the text materials that is highly effective and successful in achieving its objective satisfies equal educational opportunity requirements.

Holding:

The court found that plaintiffs do not have to exhaust all available administrative remedies before bringing forth a private cause of action to effect compliance with Title VI and its implementing regulations. In addition, the school district cannot be allowed to compromise a student’s right to meaningful education before proficiency in English is obtained. A denial of educational opportunities to a child in the first years of schooling is not justified by demonstrating that the educational program employed will teach the child English sooner than programs comprised of more extensive Spanish instruction.

The school district was directed to draft a proposed plan for a bilingual education program and provide a copy of the proposal to the plaintiffs. The plaintiffs had 30 days from receipt of the proposal to serve objections to the plan on defendants. The plan was required to comply with the Lau guidelines.
Rationale:

To require exhaustion of administrative remedies would be futile; the administrative procedures under Title VI provide no effective remedy to the plaintiffs here. In the wake of *Lau v. Nichols*, HEW created a task force with a view to establishing standards of compliance with Title VI and its implementing regulations. The procedures established were designed to effectuate voluntary compliance. HEW procedures allowed compliance to be pursued through the suspension, termination of, or refusal to grant or continue Federal financial assistance, or by any other means authorized by law. Plaintiffs sought continuance of the funding in order to provide an adequate bilingual program in compliance with Title VI. Following the administrative procedures would frustrate the very purpose of the plaintiff’s suit and destroy the opportunity for a nondiscriminatory program. Deference to HEW administrative procedures would be inappropriate in this case.

The *Lau* guidelines supplied the mechanism for testing compliance and could be used outside of administrative procedures. The Office for Civil Rights uses the *Lau* Remedies or guidelines in determining whether a bilingual school is in compliance with Title VI. HEW published a regulation in 1970 interpreting Title VI that stated, "Where inability to speak and understand English excludes national origin minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students." (Appendix B). The school district claimed primary jurisdiction for HEW and thus would not object to the application of HEW guidelines.
The school district has the obligation of identifying children in need of bilingual education by objective, validated tests conducted by competent personnel. It must establish procedures for monitoring the process of students in the bilingual program and may exit them from the program only after validated tests have indicated the appropriate level of English proficiency so as to be able to be instructed along with English-speaking students of comparable intelligence.

The purpose of Title VI of the Civil Rights Act of 1964, the Equal Educational Opportunity Act of 1974, and the Bilingual Education Act of 1974 as they relate to bilingual education is to assure the language-deficient child that he or she will be afforded the same opportunity to learn as that offered his or her English-speaking counterpart. The bicultural element is necessary only to enhance the child’s learning ability.

GUADALUPE ORGANIZATION, INC. et al. v. TEMPE ELEMENTARY SCHOOL DISTRICT et al.

United States Court of Appeals, Ninth Circuit

587 F.2d 1022; 1978 U.S. App. LEXIS 6949

December 18, 1978

Circuit Judges Choy and Sneed, District Judge Spencer Williams

Facts:

This appeal is from the district court’s adverse determination of a civil rights class action suit filed by plaintiff-appellants to compel the Tempe Elementary School District No. 3 to provide all non-English speaking students with bilingual-bicultural
education. The district court case was unavailable. In this case, the appellants asserted that their right to an equal educational opportunity had been disregarded in violation of the Equal Protection Clause of the Fourteenth Amendment. They also claimed that the school district’s failure to provide bilingual-bicultural education also violated rights granted by Section 601 of the Civil Rights Act of 1964, and the Equal Educational Opportunity Act of 1974. The district court granted the appellee’s motion for summary judgment.

In this case, the elementary school children of Mexican-American and Yaqui Indian origin argued that Tempe Elementary School District No. 3:

a) failed to provide all non-English-speaking Mexican-American or Yaqui Indian students with bilingual-bicultural education; b) failed to hire enough teachers of Mexican-American or Yaqui Indian descent who can adequately teach bilingual courses and effectively relate to the educational and cultural needs of the appellants; and, c) failed to structure a curriculum that takes into account appellant’s particular educational needs or reflects the historical contributions of peoples of same descent to the State of Arizona and the United States, (Guadalupe Org. v. Tempe Elementary School District No. 3, 1978, p. 1023).

The district court initially dismissed the appellant’s complaint on May 21, 1973 on the basis of the appellate court’s holding in Lau v. Nichols (1973). The appellate court, by an order dated April 5, 1975, remanded this action for further consideration in accordance with the decision of the Supreme Court in Lau v. Nichols. Upon remand, defendant-appellees made a motion for a more definite statement to

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clarify the distinction between the relief sought in this case and that ordered by the Supreme Court in *Lau v. Nichols*. The issue presented was whether bilingual education constitutes a fundamental right and whether a school district must provide bilingual-bicultural education in response to identified special educational needs.

**Holding:**

The appellate court held that no constitutional duty imposed by the Equal Protection Clause exists to provide bilingual-bicultural education.

"The refusal to confer additional benefits when, on account of how peculiar the nature of those benefits, the denial impairs the value of existing programs can give rise to a violation of Fourteen Amendment Rights. Nonetheless, the constitution neither requires nor prohibits the bilingual-bicultural education sought here," (Guadalupe Org. v. Tempe Elementary School District No. 3, 1978, p.1024).

Summary judgment was entered in favor of the school district as the school district satisfied Section 601 of the Civil Rights Act of 1964 in its adoption of measures to cure language deficiencies of non-English-speaking students to make available meaningful education and equality of educational opportunity.

**Rationale:**

While *Lau v. Nichols* (1974) required school districts to take affirmative steps to rectify the language deficiencies of non-English-speaking students, it did not overturn the 9th Circuit Court of Appeals decision as to the constitutional grounds. The Ninth Circuit had previously ruled in *Lau v. Nichols* (1973) that the Equal Protection Clause of the Fourteenth Amendment did not require a school district to
provide all non-English-speaking students attending district schools with bilingual-bicultural education, even when the students constituted a sizable minority. This holding remains applicable precedent as the Supreme Court declined discussion of the Fourteenth Amendment. **Lau v. Nichols** (1974) also did not overturn the application of the rational basis test. Bilingual education is not a fundamental right guaranteed by the Constitution. Absent the presence of a fundamental right or a racial classification, strict scrutiny is not required. Defendants did not have to show that the action was necessary to achieve a compelling government interest. No suspect classification was involved, which would require a showing of discriminatory intent. No course of conduct here was alleged from which an inference of intentional discrimination could be drawn.

Thus, the rational basis test applies, which requires the plaintiff to show that the action is not rationally related to any legitimate state interest. Differences in treatment of students in the educational process, which in themselves do not violate specific constitutional guarantees, are upheld so long as they are rationally related to a legitimate state interest. The decision of the school district to provide a predominantly monocultural and monolingual educational system was a rational response to a legitimate state interest in promoting unity within the national-state and curtailing the force of “multiple linguistic and cultural centers that impede both the egress of each center’s own and the ingress of all others” (**Guadalupe Org. v. Tempe Elementary School District No. 3**, 1978, p. 1024).

**Section 601 of the Civil Rights Act of 1964** gives a right to bilingual instruction. However, unlike the facts in **Serna v. Portales**, in which the district court
ordered more and better bilingual-bilcultural educational initiatives, no violation of
Section 601 was found in this case. In this case, the remedial instruction in English
was acknowledged as sufficient to allow Mexican-American and Yaqui students to
participate effectively in the educational program. Assuming adequate remedial
instruction, education in English reflecting American culture and values only was not
a discriminatory course of conduct.

IDAHO MIGRANT COUNCIL et al. v. BOARD OF EDUCATION et al.

United States Court of Appeals for the Ninth Circuit

647 F.2d. 69; 1981 U.S. App. LEXIS 20260

June 5, 1981

Circuit Judge Hug

Facts:

The appellant, Idaho Migrant Council, challenged a judgment of the United
States District Court for the District of Idaho granting summary judgment in favor of
the appellees, Idaho State Department of Education, the State Board of Education, and
the Superintendent of Public Instruction. The district court decision was unavailable.
In this case, the Idaho Migrant Council, a nonprofit organization representing Idaho
public school students with limited English language proficiency, sought declaratory
and injunctive relief asserting that the Board of Education violated federal law by
failing to exercise its supervisory powers over local school districts to ensure
provision of equal education opportunity.
The Idaho Migrant Council asserted that it was the responsibility of the State Agency, pursuant to the Equal Educational Opportunities Act of 1974, Title VI of the Civil Rights Act, and the Fourteenth Amendment, to supervise local districts to ensure that limited English proficient students were given instruction which addressed their linguistic needs.

The State Agency maintained that it was not empowered, under state law, to supervise federal requirements at the local level. The State Agency argued that the proper parties to the suit were the local districts. The board of education argued, and the district court found on summary judgment, that defendants were not empowered to supervise compliance with federal law by the local school districts.

In this case, no facts were presented and the question was not presented as to whether the State of Idaho, through its state educational agencies, was currently in compliance with the Equal Educational Opportunity Act of 1974 and Title VI. The issue presented was whether the Idaho State Department of Education, the Idaho State Board of Education, and the Superintendent of Public Instruction had an obligation to supervise local school districts to ensure compliance with federal law.

Holding:

Summary judgment was reversed. The State Agency was empowered under Idaho state law and required by federal law to ensure that the needs of students with English language deficiencies were addressed. "On remand, the district court should receive evidence regarding the educational needs of students with limited proficiency in English, and the nature of the programs currently in place that address the needs of
those students, in order to determine whether federal requirements are being met,"

Rationale:

Pursuant to Idaho Constitutional Article 9, section 2 and Idaho Code sections
33-116, 118, and 199, the Idaho State Department of Education, the Idaho State Board of Education, and the Superintendent of Public Instruction had the power to supervise local school districts. Also, the Equal Educational Opportunities Act of 1974, imposes a duty on the defendants to ensure that language deficiencies are addressed. The Equal Educational Opportunities Act of 1974 provides in part that, "No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by ...the failure of an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs" (Appendix C). The term 'educational agency' is defined to include both local school boards and the state board of education or other agency or officer primarily responsible for the state supervision of public elementary and secondary schools.

"Title VI of the Civil Rights Act of 1964 also creates an obligation on the part of the State Agency" (Idaho Migrant Council v. Board of Education, 1981, p.72). By entering into a contractual agreement with the United States and receiving federal funds, the State Agency agreed to comply with Title VI. In following Lau v. Nichols, the appellate court found a specific statutory obligation on the part of the state and did not reach the Fourteenth Amendment issue. The State Board of Education was
required under federal law and empowered under Idaho state law to ensure that needs of students with limited English language proficiency were addressed.

Elizabeth and Katherine CASTANEDA et al. v. Mrs. A. M. PICKARD, President,
Raymondville Independent School District, Board of Trustees, et al.

History and District Court Decision

Castaneda v. Pickard originated in 1978 where the plaintiffs, Mexican-American students and their parents, claimed that ability grouping practices unlawfully segregated the Mexican-American students of Raymondville Independent School District (RISD). They claimed that RISD deprived the Mexican-American children and their class of rights secured to them by the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and the Equal Educational Opportunities Act of 1974. The students charged that the school district:

a) used an ability grouping system for classroom assignments that was based on racially discriminatory criteria and resulted in impermissible classroom segregation; b) discriminated in the hiring and promotion of Mexican-American faculty; c) administered extracurricular programs with the purpose and effect of denying Mexican-American students an equal opportunity to participate in such activities; and, d) failed to implement adequate bilingual education to overcome the linguistic barriers that impede the plaintiff's equal participation in the educational program of the district (Castaneda v. Pickard, 1981, p.991).
In 1978, seventy-seven percent of the population of the Raymondville Independent School District was Mexican-American and almost all of the remaining twenty-three percent were Caucasian. Willacy County ranked 248th out of the 254 Texas counties in average family income. One-third of the population of Raymondville was composed of migrant farm workers. Three-quarters of the students in the Raymondville schools qualified for the federally funded free school lunch programs.

The district operated five schools. L.C. Smith and Pittman housed students in kindergarten through fifth grade. The student body at Smith was virtually all Mexican-American. Pittman had approximately eighty-three percent Mexican-American students. There was one junior high school, which had eighty-seven percent Mexican-American students, and one high school, in which the enrollment was eighty percent Mexican-American.

As part of the Raymondville school district's language remediation effort, the primary ability assessed in the early grades by the ability grouping practices was English language proficiency. Predominantly Spanish speaking children were placed in groups designated low and received intensive bilingual instruction. High groups were those composed of students whose dominant language was English. Ability groups for first, second, and third grades were determined by three factors: a) school grades, b) teacher recommendations, and c) standardized achievement test scores. These tests were administered in English and did not accurately assess the ability of a student with limited English language skills who had received as substantial part of his or her education in another language as part of a bilingual education program.
The Raymondville school district provided a bilingual program for students through third grade. The bilingual program offered in the Raymondville schools was developed with the assistance of expert consultants and stressed the goal of teaching fundamental reading and writing skills in both English and Spanish. The plaintiffs claimed that the language programs were unsound because the programs overemphasized the development of English language skills to the detriment of the child’s overall cognitive development. The plaintiffs were also concerned with the placement testing of language minority students and the qualifications of the teachers working in language programs.

The original case was tried in June 1978. On August 17, 1978 the district court entered judgment in favor of the defendants based upon a determination that the policies and practices of the RISD, in the areas of hiring and promotion of faculty and administrators, ability grouping of students, and bilingual education did not violate any constitutional or statutory rights of the plaintiff class.

Although Castaneda v. Pickard dealt with the district’s hiring practices, the language and ability grouping of students and the soundness of the language programs in the Raymondville school district, this study examined the 1981 and 1986 appellate court decisions for their relevance to the rights of language minority students to an equal educational opportunity with regard to language education.
Facts:

The plaintiffs contested the district court's finding in favor of the defendant based upon its determination that the policies and practices of the school district, ability grouping of students, and the bilingual education program did not violate any constitutional or statutory rights of the plaintiffs.

Holding:

The appellate court affirmed the district court's conclusion that RISD's bilingual education program was not in violation of Title VI. However, the appellate court reversed the judgement of the district court in favor of the defendant school district and remanded the case back to the district court to make findings regarding the history of the district. On remand, the district court was asked to determine whether the district, in the past, discriminated against Mexican Americans, and to consider whether the effects of any such discrimination had been fully erased.

The appellate court noted that the legality of the district's language remediation program was distinct from the ability grouping and teacher discrimination issues. Noting the importance of effective language remediation programs, the appellate court directed the district court to conduct a hearing to identify the precise causes of the language deficiencies affecting some of the RISD
teachers working in bilingual programs and to establish a timetable for the parties to follow in devising and implementing a program to alleviate the deficiencies.

Rationale:

The plaintiffs claimed that the bilingual education and language remediation programs of RISD were educationally deficient and unsound. The plaintiffs claimed that the district's failure to alter and improve these programs placed the RISD in violation of Title VI and the Equal Educational Opportunities Act. The plaintiff claimed that RISD's programs failed to comport with the requirements of the Lau Guidelines promulgated in 1975.

The Court of Appeals agreed with the district court that RISD programs did not violate Title VI. In its reasoning, the appellate court noted that following the Supreme Court's decision in Lau, the HEW developed the Lau Guidelines as a suggested compliance plan for school districts which, as a result of Lau, were in violation of Title VI. The court found that RISD did indeed offer a program of language remediation. The court further noted their serious doubts not only about the relevance of the Lau Guidelines to the case at hand but also about the continued vitality of the rationale of the Supreme Court's opinion in Lau v. Nichols (1974) which gave rise to those guidelines.

The Court of Appeals noted,

Lau was written prior to Washington v. Davis (1976) in which the court held that a discriminatory purpose, and not simply disparate impact, must be shown to establish a violation of the Equal Protection Clause, and University of California Regents v. Bakke (1978), in which, a majority of the court

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interpreted Title VI to be coextensive with the Equal Protection Clause, (Castaneda v. Pickard, 1981, p. 984).

Justice Brennan's opinion in Bakke explicitly acknowledged that these developments raised questions about the vitality of Lau. Although the Supreme Court did not expressly overrule Lau in Bakke, it clarified for the appellate court that Title VI, like the Equal Protection Clause, is only violated by conduct animated by an intent to discriminate and not by conduct which, although benignly motivated, has a differential impact on persons of different races. The appellate court found that the language programs of the RISD were not intended to discriminate and thus did not violate Title VI.

The plaintiffs also claimed that the district's language program violated section 1703 (f) of the Equal Educational Opportunities Act. The appellate court noted that Congress has provided almost no guidance in how to determine whether a school district's language remediation program efforts are appropriate. Justice Randall commented,

Confronted, reluctantly, with this type of task in this case, we have attempted to devise a mode of analysis which will permit ourselves and the lower courts to fulfill the responsibility Congress has assigned to us without unduly substituting our educational values and theories for the educational and political decisions reserved to state or local school authorities or the expert knowledge of educators, (Castanda v. Pickard, 1981, p. 996).

The court held that the responsibility of the federal court was three fold, thus establishing the following three-pointed test; 1. The court must examine carefully the
evidence of record regarding the soundness of the educational theory or principles upon which a challenged educational program is based. The court's responsibility in this regard is to ascertain whether a school system is pursuing a program informed by an educational agency recognized as sound by experts in the field; 2. The court must determine whether the programs used by a school system are reasonably calculated to implement effectively the educational theory adopted by the system, and; 3. The court must decide whether a school's program, although ostensibly premised on a legitimate educational theory and adequately implemented initially, fails, after a period of time sufficient to give the plan legitimate trial, to obtain results that would indicate that language barriers confronting the students are actually being removed.

In this case, the plaintiffs challenge to the appropriateness of the RISD's efforts to overcome language barriers did not rest on an argument over the soundness of its programs, but rather on the alleged inadequacy of the program implemented by the district. The plaintiffs contended that in three areas essential to the adequacy of a bilingual curriculum, staff, and testing, RISD fell short. In its findings, the appellate court determined that teachers employed in the RISD bilingual program had limited command of Spanish. Thus a bilingual education program, however sound in theory, was clearly unlikely to have significant impact on its students if the teachers termed to be qualified despite the fact that they operated in the classroom with their own unremedied language disability.

"Until deficiencies in this aspect of the program's implementation are remedied, we do not think RISD can be deemed to be taking appropriate action to overcome its students language barriers," (Castaneda v. Pickard, 1981, p.998). The
court also held that RISD should take whatever steps were necessary to acquire validated Spanish language achievement tests for administration to students in bilingual programs.

This case was remanded to the district court. On remand, the district court was to determine whether RISD had a past history of discrimination and whether it has maintained a unitary school system for a sufficient period of time. And, if RISD inaccurately labeled predominantly Spanish-speaking children as "low ability," the court was ordered to consider the extent to which the labeling may in and of itself evidence a discriminatory intent to stigmatize these children as inferior on the basis of their ethnic background.

In its unpublished decision, the district court on remand found that the RISD had implemented an adequate bilingual education program and did not discriminate against Mexican-Americans in its ability grouping and teacher hiring practices. No vestiges of discrimination were found remaining in RISD. The district court also found the recruiting and employment practices of RISD to be free from discrimination. Finally, the district court held that RISD's bilingual education program survived scrutiny under the Equal Educational Opportunities Act.

1986 Appellate Court Decision

United States Court of Appeals for the Fifth Circuit

781 F.2d 456; 1986 US App LEXIS 22271; 40 Fair Empl. Prac Cas. (BNA) 154;
40 Emp. Prac. Case (CCH) P36, 253

January 28, 1986

Facts:
This case is on appeal from the district court's finding on remand that the Raymondville schools had implemented an adequate bilingual education program and did not discriminate against Mexican-Americans in its ability grouping and teacher hiring practices. On appeal, the plaintiffs claimed that the district court erred in its conclusions that there were no remaining vestiges of historical discrimination in RISD. The plaintiffs also claimed that the district court erred in its ruling regarding the hiring and promotion of Mexican-Americans, and its ruling that the RISD had taken appropriate action and made genuine efforts to overcome the language disabilities of RISD students.

Holding:

The appellate court affirmed the district court's judgement in favor of the defendant school district. The appellate court concluded that the district court's findings of fact were not clearly erroneous and rejected the plaintiff's contention that the district court's findings lacked support in the record. Justice Randall noted,

Our review on appeal is not to determine whether RISD has taken every possible step to improve the education of its Spanish speaking students, but only to decide whether the district court's conclusion that RISD has met the requirements of the fourteenth amendment, Title VI and EEOA is supported by the record. We are not persuaded that the court's findings lack record support or that RISD has violated its duty under the fourteenth amendment, Title VI or the EEOA, (Castaneda v. Pickard, 1986, p.458).

Rationale:
The district court, on remand found that most of the bilingual teachers in Raymondville were fluent in Spanish, and that the teacher training and evaluation procedures were in compliance with the Texas Bilingual Education Act and the EEOA. The district court examined RISD's bilingual program under the requirements of state law and concluded that it was in compliance with state law and "passed muster" under the EEOA. The appellate court noted that, "We hold fast to our conviction...that in enacting Section 1703 (f), Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use," (Castaneda v. Pickard, 1986, p.459).

WILFRED KEYES, et al., CONGRESS OF HISPANIC EDUCATORS, et al., Plaintiff-Interveners v. SCHOOL DISTRICT NO. 1, Denver, Colorado, et al., Defendants

United States District Court for the District of Colorado


December 30, 1983

District Judge Matsch

Facts:

This case was directed toward the problems of children with language barriers, however the analysis was made in the context of a desegregation case that had been in litigation since 1969. The plaintiffs in this case claimed that the LEP children were denied equal educational opportunity because the school system failed to take
appropriate action to address their linguistic needs. They also claimed that LEP children were denied the equal protection of laws in violation of the Fourteenth Amendment to the United States Constitution. Plaintiffs further claimed that the school district violated Title VI of the Civil Rights Act of 1964 and section 1703 (f) of the Equal Educational Opportunities Act, which mandates school districts to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

In Keyes v. School District No. 1 413 U.S. 189 (1973), the Supreme Court found that a dual system was in existence and required further proceeding to ensure that the school board discharged its affirmative duty to desegregate the entire system root and branch. The Congress of Hispanic Educators and Mexican-American parents of minor children attending the Denver Public Schools filed a motion that was granted to intervene as plaintiffs to participate in the remedy phase hearings. The plaintiff-intervenors were represented by attorneys from the Mexican American Legal Defense and Educational Fund (MALDEF).

MALDEF lawyers actively participated in hearings on the desegregation plans submitted by the plaintiff class and the defendant. Parts of that plan addressed the special interests and need of Hispanic children as urged by Dr. Jose Cardenas, an expert witness. On April 17, 1974, implementation of a desegregation plan was ordered. On appeal, the Tenth Circuit Court of Appeals held that those special requirements went beyond the District Court judge's findings.

In Keyes v. School District No.1 521 F.2d 465 (1975), the Court of Appeals ruled that the District Court made no finding, on remand, that either the School
District's curricular offerings or its methods of educating minority students constituted illegal segregative conduct or resulted from such conduct. The Court determined that a meaningful desegregation plan must provide for the transition of Spanish-speaking children to the English language. However, the court of appeals determined that the Cardenas Plan went well beyond helping Hispanic students to reach the proficiency in English necessary to learn other basic subjects. Instead of removing obstacles to effective desegregation, the court's order would impose upon school authorities a pervasive and detailed system for the education of minority children.

The District Court's adoption of the Cardenas Plan would thus interfere with such state and local attempts to deal with the problems associated with educating minority students. The case was remanded to the district court for a determination of relief to ensure that minority children would have an opportunity to acquire proficiency in English. Following implementation of a desegregation plan, the plaintiffs filed a supplemental complaint in intervention expanding the group to all students limited in English proficiency. This followed several years of unsuccessful efforts to negotiate and compromise the English language proficiency issues. The plaintiff-intervenors in this case contended that children with limited-English proficiency in the Denver Public Schools were being denied equal access to educational opportunity because the school system had failed to take appropriate action to address their special needs.

Holding:
The Court held that the defendant district failed to satisfy the requirements of Section 1703 (f) of the Equal Educational Opportunities Act. In reaching its decision, the Court relied on the three-point test established in *Castaneda v. Pickard* (1981). In addition, the Court held that inquiry into whether there was denial of equal protection or a violation of Title VI were not necessary here as it was clear from the language of *Castaneda* that the affirmative obligation to take appropriate action to remove language barriers imposed by Section 1703 (f) of the Equal Educational Opportunities Act did not depend upon any finding of discriminatory intent, and a failure to act was not excused by any amount of good faith.

**Rationale:**

The plaintiff’s first cause of action was based on Section 1703 (f) of the EEOA which provides that no state shall deny equal educational opportunity by the failure of an educational agency to take appropriate action to overcome the language barriers that impede equal participation by its students in its instructional programs. Since the EEOA does not define appropriate action nor does it provide criteria for a court to evaluate whether or not a school district has taken appropriate action, the clearest statement of this requirement is set fourth by the Fifth Circuit in *Castaneda v. Pickard*. In using the three-point test established in *Castaneda*, the court concluded that while language programs of Denver Public schools were sound in theory, the program lacked adequate resources, personnel and practices to implement that theory. Bilingual teachers lacked necessary bilingual skills, ESL teachers lacked training in methodologies for language acquisition, and the defendant’s program failed to adopt adequate tests to measure the results of student progress. The Court found that it was
not necessary to address the third point of the Castaneda test because of the finding that the district failed to take reasonable action to implement its language programs. The court reasoned that the inadequacies of programs and practices made it premature to consider any analysis of results.

The plaintiffs second claim involved denial of equal protection and a violation of Title VI of the Civil rights Act of 1964. In Lau v. Nichols (1974), the Supreme Court held that failure of the San Francisco school system to provide meaningful education to non-English speaking students had the effect of denying them equal educational opportunity in violation of Section 601 of the Civil Rights Act of 1964. The Court did not find it necessary to consider whether that was also a violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

In this case, the Court indicated that it was not necessary to consider the constitutional question or Title VI as Section 1703 (f) of the Equal Educational Opportunities Act provided a much more specific direction to take appropriate action.

JORGE and MARISOL GOMEZ, et. al., v. ILLINOIS STATE BOARD OF EDUCATION and TED SANDERS in his official capacity as Illinois State Superintendent of School.

History and District Court Decision

The plaintiffs in this class action were Spanish-speaking children of limited English proficiency who were enrolled in various school districts in Illinois. The plaintiffs claimed that the defendants failed to provide local school districts with proper guidelines for the identification and placement of LEP children and failed to
monitor and enforce the compliance of local school districts with the law. The plaintiffs further claimed that LEP children were denied the equal protection of laws in violation of the Fourteenth Amendment to the United States Constitution, and that the defendants violated Title VI of the Civil Rights Act of 1964 and section 204 (f) of the Equal Educational Opportunities Act.

Under Illinois state law, the board of education was required to promulgate guidelines for the identification and education of limited-English proficient children, but if there were less than twenty children needing services in a particular school, there was no review of services in that school. The students, on behalf of all Spanish speakers, brought suit against the school board and superintendent for failing to promulgate uniform guidelines, which the students claimed resulted in most schools counting their LEP children in such a way that they came under the twenty child requirement to avoid implementing services.

The district court dismissed the plaintiff's complaint and directed the plaintiff to file a new complaint under Section 1703 (f) of the Equal Educational Opportunities Act of 1974 (EEOA) in the federal district court where the school districts were located.

1987 Appellate Court Decision

United States Court of Appeals for the Seventh Circuit

811 F.2d 1030; 1987 U.S. App LEXIS 1757

January 30, 1987

Judges: Coffey and Flaum, US Circuit Judges, and
Facts:

Under Illinois state law, the board of education was required to promulgate guidelines for identifying and educating limited English proficient students, but if there were less than twenty children in a particular school, there was no review of services. The students brought suit against the state superintendent for failing to promulgate uniform regulations, which the students claimed resulted in most schools counting their LEP children in such a way that they came under the twenty child requirement to avoid implementing services. The district court dismissed the plaintiff's complaint and directed the plaintiff to file a new complaint under Section 1703 (f) of the Equal Educational Opportunities Act of 1974 (EEOA) in the federal district court where the school districts were located. The district court decision was appealed by the plaintiffs.

Holding:

The Court of Appeals affirmed the dismissal of the Equal Protection and Title VI claims because the plaintiffs failed to allege that the board and superintendent acted with discriminatory intent. However, the Appeals Court reversed the dismissal of the complaint because the district court failed to analyze the complaint in a light most favorable to the students.

Rationale:

In reaching its decision, the appellate court relied on the three-point test established in Castaneda v. Pickard (1981) to determine appropriate action. In this case, the first step of the Castaneda analysis, whether the program at issue was based
on sound educational theory, was not implicated. This was because the plaintiffs did not challenge the transitional bilingual program selected by the state of Illinois. The plaintiffs did claim that the defendants failed to meet the second step of Castaneda, which relates to implementation. The Court concurred with the conclusion of the Ninth Circuit in Idaho Migrant Council v Board of Education (1981) that Section 1703 (f) of the Equal Educational Opportunity Act requires that state as well as local educational agencies ensure that the needs of LEP children are met. "Whether the plaintiffs can prove their case is a matter that must be determined on remand, not on appeal," (Gomez v. Illinois, 1987, p. 1035). Therefore, the dismissal of the complaint by the district court was improper and reversed.

The appellate court further ruled that the district court correctly concluded that because the plaintiffs did not allege that defendants acted with discriminatory intent, the Fourteenth Amendment claim and the Title VI claim must fail. "After the Supreme Court case of University of California Regents v. Bakke, it now appears that Title VI, like the Equal Protection Clause of the Fourteenth Amendment, is violated only by conduct animated by an intent to discriminate and not by conduct which, although benignly motivated, has a differential impact on persons of different races," (Castaneda v. Pickard, 1981, p. 991). "Thus, while Bakke did not expressly overrule Lau v. Nichols (1974), it renders that decision obsolete, insofar as it found a violation of Title VI merely on proof of discriminatory impact without any showing of discriminatory intent," (Gomez v. Illinois, 1987, p. 1034). The district court's dismissal of the complaint was affirmed in part and reversed in part and the action was remanded for further proceedings.
TERESA P., CESAR P., JORGE A. P., EVANGELINA P., CARMEN P., and
CARLOS P., by their next friend T. P.; MERCELO J., CAROLINA J. and
GUADALUPE J., by their next friend M. J.; FREDDIE P. by their next friend C. T.;
JUAN A. and MARIA A. by their next friend V.A.; P.K. V.;JOSE A., on behalf of
themselves and all similarly situated, v. BERKELEY UNIFIED SCHOOL
DISTRICT, et al.

United States District Court for the Northern District of California


September 8, 1989

District Judge Lowell Jensen

Facts:

The plaintiffs in this case consisted of all students enrolled in the Berkeley
Unified School District (BUSD) who were of limited English proficiency. BUSD,
under California law, was responsible for providing public education to all students
residing within the City of Berkeley. The plaintiffs challenged the language
remediation program of Berkeley Unified School District on two grounds. First, the
plaintiffs argued that the BUSD violated section 1703(f) of the Equal Educational
Opportunity Act (EEOA), which requires appropriate action by school districts to
overcome language barriers. Second, the plaintiffs alleged that the BUSD violated
Title VI of the Civil Rights Act of 1964 which prohibits racial discrimination in
programs receiving federal aid. As a relief, the plaintiffs requested that the Court
issue an injunction ordering BUSD to design and implement a comprehensive plan to
ensure plaintiffs equal educational opportunity and effective participation in the
learning process.

In June, 1988, out of a total enrollment of 8,000 students, 571 students were of
limited English proficiency. These students were spread out among the District's
schools. In addition to providing initial testing for placement, the District
administered standardized achievement tests to assess progress in reading, language
arts and math. The District employed two types of special language services: (1) a
Spanish bilingual program, and (2) ESL programs in three separate forms.
Procedures were in place for monitoring and reclassification of LEP students.

The District's regular curriculum for LEP students was supplemented by
educational programs designed to provide additional assistance with English language
development academic content. The evidence of LEP student achievement indicated
that Berkeley LEP students were learning English and participating successfully in the
District's regular curriculum. While the District had hired ESL teachers who lacked
special certification on alternative grounds when credentialed teachers for particular
openings were unavailable, the District's teaching staff had received in-service
training and workshops on educational strategies for effective teaching of LEP
students.

The plaintiffs in this case claimed that they were denied equal educational
opportunity because the Berkeley Unified School District failed to take appropriate
action to overcome the language barriers of its students. The plaintiffs alleged that
testing and procedures for identification and assessment of limited English proficient
students was inadequate, and that BUSD employed inappropriate criteria and
procedures for determining when special language services were no longer necessary or appropriate. The plaintiffs also claimed that BUSD failed to allocate adequate resources, failed to assure that teachers and other instructional personnel have requisite qualifications, credentials, and skills to provide language services effectively. Finally, the plaintiffs contended that BUSD had not provided them with adequate English language development instruction, and adequate native language instruction.

Holding:

The district court examined the documentary evidence, heard oral testimony, considered the arguments of counsel, and reviewed the written memoranda of the parties. Based on finding of fact and a review of the applicable law, the district court concluded that the plaintiffs failed to establish a violation of either section 1703(f) or Title VI and entered a judgment in favor of the defendants.

Rationale:

The plaintiff's first cause of action was based on 1703(f) of the EEOA which provides that no state shall deny equal educational opportunity by the failure of an educational agency to take appropriate action to overcome the language barriers that impede equal participation by its students in its instructional programs. Since the EEOA does not define appropriate action nor does it provide criteria for a court to evaluate whether or not a school district has taken appropriate action, the clearest statement of this requirement is set forth by the Fifth Circuit in Castaneda v. Pickard (1981). In using the three-point test established in Castaneda, the court concluded that the plaintiffs did not meet their burden to show that the BUSD programs were not
pedagogically sound. Evidence showed that the educational theories, upon which the BUSD programs were grounded, were sound in theory.

The plaintiffs also failed to meet their burden to show that the actual programs and practices were not reasonably calculated to effectively implement the educational theories upon which an overall program is premised. The Court found that, "The overwhelming weight of evidence in this case establishes that the special language programs of BUSD assure equal educational opportunity for LEP students and are effective in removing the language barriers faced by LEP students," (Teresa P. v. Berkeley, 1989, p. 701).

The plaintiff's second claim for relief was based in Title VI of the Civil Rights Act of 1964. Regulations issued under this statutory mandate require that recipients of federal funding 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, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program. "Although in court cases such as Guardians Ass'n v. Civil Service Comm. of New York (1983), a majority of the Supreme Court held that a violation of Title VI requires proof of discriminatory intent, a different majority held that under the regulations of Title VI, proof of discriminatory effect may suffice to establish liability," (Teresa P. v. Berkeley, 1989, p. 702).

Lau v. Nichols (1974) previously held that under the regulation of Title VI, proof of discriminatory effect may suffice to establish liability. Lau held that discrimination which had the effect of depriving students an equal educational
opportunity was barred by section 601 of the Civil Rights Act. Plaintiffs in this case offered no evidence, statistically or otherwise, of racially discriminatory effect, thus the Court concluded that they had failed to sustain their burden of proof under Title VI.

VALERIA G. et al., Plaintiffs v. PETE WILSON, et al., Defendants

United States District Court for the Northern District of California

12 F. Supp. 2d 1007; 1998 U.S. Dist. LEXIS 10675

July 15, 1998

District Judge Legge

Facts:

On June 2, 1998 the voters of California approved Proposition 227, an initiative statute entitled “English Language in Public Schools” (Valeria G. v. Wilson, 1998). Proposition 227, approved by a margin of 61 percent to 39 percent, rejected the use of bilingual education programs in effect in California. The statute amended the California Education Code to change the system under which students who are of limited English proficiency were educated in the state of California. In this case, the plaintiffs moved for a preliminary injunction, enjoining defendants from implementing Proposition 227, pending the trial in the case (Valeria G. v. Wilson, 1998).

Proposition 227 required that LEP children receive instruction pursuant to an educational system known as structured English immersion. The initiative required that children who were English learners be educated through structured English
immersion during a temporary transition period not to exceed one year. The plaintiffs contended that Proposition 227 violated the Equal Educational Opportunities Act, Title VI of the Civil Rights Act, the Supremacy Clause of the United States Constitution, and the Equal Protection Clause of the United States Constitution.

Holding:

On July 15, 1998, the district court denied the plaintiff's preliminary injunction against enforcement of Proposition 227. The court found that structured English immersion was permissible as a plan for teaching students with limited English proficiency under federal law. This decision was based on the 1981 ruling in Castaneda v. Pickard (1981) where a three-pointed test was used for determining what constituted appropriate action on the part of school districts to address the educational rights of students learning English.

Rationale:

The plaintiffs contended that Proposition 227 violated the Equal Educational Opportunities Act of 1974 which imposes on states and educational agencies an obligation to "take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs," (U.S.C. Section 1703 (f)). To prove a violation of this act, the plaintiffs needed to establish that implementation of Proposition 227 would not constitute "appropriate action" as required by law. Because the Equal Educational Opportunities Act did not require school districts to provide bilingual programs, the near elimination of bilingual
education programs by Proposition 227 did not in and of itself violate the Equal Educational Opportunities Act.

In using the three-point test established in Castaneda, the court concluded that structured English immersion is a valid educational theory thus satisfying the first point of the Castaneda test. The Court found that it was not necessary to address the second or third point of the Castaneda test because Proposition 227 had not yet been implemented thus there were no programs or practices to analyze or results to evaluate.

Under the Supremacy Clause of the Constitution, any state law which interferes with or is contrary to federal law must yield. In determining whether Proposition 227 violated the Supremacy Clause of the Constitution, the court found no conflict between Proposition 227 and the ability of school districts to comply with either the Equal Educational Opportunities Act or the policies expressed in the Bilingual Education Act. The EEOA requires appropriate action, and the Bilingual Education Act merely encourages bilingual education programs, it does not require them. Thus the plaintiffs did not establish a probability that Proposition 227 violated the Supremacy Clause of the Constitution.

The plaintiffs argued that Proposition 227 violated Title VI of the Civil Rights Act because it imposed an unjustifiable disparate impact on national origin minorities by denying LEP students meaningful access to academic curriculum during the structured immersion program. In addressing whether Proposition 227 violated Title VI of the Civil Rights Act, the court considered whether a showing of an adverse
disparate impact is sufficient to establish a Title VI violation or whether a showing of discriminatory intent is required.

Since the plaintiffs did not argue that Proposition 227 intentionally discriminated against LEP students, the court found no evidence of discriminatory intent, and regulations under Proposition 227 had not yet been implemented, there was no evidence of adverse effect. “This court cannot conclude from the face of Proposition 227 that it will inevitably result in an adverse effect, exclusion, denial of benefits or discrimination,” (Valeria G. v. Wilson, 1998, p.1009).

MIRIAM FLORES, individually and as a parent of MIRIAM FLORES, a minor child, et. al., Plaintiffs, v. STATE OF ARIZONA, et.al., Defendants.

United States District Court for the District of Arizona

172 F. Supp. 2d 1225; 2000 U.S. Dist. LEXIS 20799

January 24, 2000

District Judge Marque

The plaintiffs in this case, parents of children enrolled in Arizona public schools filed an action seeking declaratory relief against defendants, the State of Arizona, and various school districts. On August 28, 1997, the court certified this case as a class action law suit and defined the class as, all minority at risk and limited English proficient children, now, hereafter, enrolled in Nogales Unified School District, as well as their parents and guardians. In an order filed on April 14, 1999 in Flores v. Arizona, 48, F. Supp 2d 937, 1998, the court dismissed the plaintiff’s claim under 42 U.S.C. Section 1983 which provided that “every person who, under color of
any statute, ordinance, regulation, custom, or usage, of any state or territory
subjects or causes to be subjected any citizen of the Untied States to the deprivation of
any rights, privileges, or immunities secured by the Constitution and laws, shall be
liable to the party injured in an action at law, suit in equity, or other proper
proceedings for redress...,” (Flores v. Arizona, 1998, p. 1228). However, the district
court held that the plaintiff’s claims to violations of Title VI and the Equal
Educational Opportunities Act could proceed.
Facts:

The plaintiffs filed an action against the defendants for failing to provide
limited English proficient children with a program of instruction calculated to make
them proficient in speaking, understanding, reading, and writing English while
enabling them to master the standard academic curriculum as required for all students.
The plaintiffs charged that the defendants failed to adequately fund, administer, and
oversee the public school system in districts enrolling predominantly low-income
minority children, and that the defendants allowed these schools to provide less
educational benefits and opportunities than those provided to students attending
primarily anglo-schools.

Holding:

The court ruled for the parents in part, holding that the state and school
districts were violating the Equal Educational Opportunities Act of 1974 because the
state’s arbitrary and capricious appropriation for English instruction was not
reasonably calculated to effectively implement the English instruction plan, and the
state failed to take appropriate action to remedy language barriers in its school districts by failing to follow through with practices, resources, and personnel necessary to transform theory into reality. The court ruled for the state and school districts in part, holding that the state and school district practices did not violate Title VI.

Rationale:

In Flores, the court noted that, "For the State to adopt appropriate practices and allocate adequate resources, it must first establish minimum standards for providing LAU funding and program oversight," (Flores v. Arizona, 2000, p.1229). The state had established minimum academic standards, which were promulgated as the Arizona Essential Skills. The corresponding test, the Arizona Instrument to Measure Skills (AIMS) was used to measure attainment of the skills. The State also established a minimum base level amount for the LAU programs of $150 per LEP student. The court found this level of funding to be inadequate and resulted in the following LAU deficiencies: (a) too many students in a classroom, (b) not enough classrooms, (c) not enough qualified teachers, including ESL and bilingual teachers to teach content area studies, (d) not enough teacher aides, (e) an inadequate tutoring program, and (f) insufficient teaching materials for both ESL classes and content area courses. The court further found that the State’s funding for LAU programs was arbitrary, capricious, and bore no relation to the actual funding needed to ensure that LEP students were achieving mastery of the Arizona Essential Skills. The EEOA was violated in that the State’s arbitrary and capricious LAU appropriation was not
reasonably calculated to effectively implement the LAU educational theory which it approved and the Nogales school system adopted.

The plaintiffs alleged a violation of Title VI’s implementing regulations, which prohibit any recipient of federal funding from utilizing criteria or methods of administration which have the effect of subjecting individuals to discrimination (Title VI Legal Manual, 2001). The court ruled in favor of state and school districts holding that the state and school district practices did not violate Title VI. Under Title VI’s implementing regulations, proof of discriminatory intent is not a prerequisite to a private cause of action against governmental recipients of federal funds. Proof of discriminatory effect suffices to establish liability under the regulations. In question was whether the impact of the AIMS, the state mandated achievement test, had a disproportionate and adverse impact of minority students in the Nogales school district. After reviewing the evidence, the court found that students might fail the test for other reasons besides language barriers such as being “at risk.” The court noted that, “members of this group are not protected from discriminatory treatment” (Flores v. Arizona, 2000, p.1330).

Role of the Office for Civil Rights

The Office for Civil Rights enforces five federal statutes that prohibit discrimination in programs and activities receiving federal financial assistance from the Department of Education. Discrimination on the basis of race, color, or national origin is prohibited by Title VI of the Civil Rights Act of 1964; sex discrimination,
including sexual harassment is prohibited by Title IX of the Education amendments of 1972; discrimination on the basis of disability is prohibited by Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990; and age discrimination is prohibited by the Age Discrimination Act of 1975, (U.S. Department of Education, 2002).

The Office for Civil Rights has authority to enforce these laws in all programs and activities that receive federal financial assistance. These include programs and activities operated by institutions and agencies, such state education agencies, elementary and secondary schools, colleges and universities, vocational schools, rehabilitation agencies, libraries and museums (U.S. Department of Education, 2002).

In the United States Department of Education, the Office for Civil Rights (OCR) is responsible for ensuring that school systems do not engage in discriminatory actions that violate Title VI of the Civil Rights Act of 1964. Title VI prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving Federal financial assistance. Specifically, Title VI provides that:

[n]o 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 (U.S.C. Section 2000d).

The OCR was established by Congress in the mid 1960s as part of the federal effort to desegregate southern school systems. In the 1970s, the OCR expanded its enforcement activities under Title VI to include ensuring equal educational opportunities for national origin minority students with limited English proficiency
(Littlejohn, 1998). The headquarters, or Office of the Assistant Secretary for Civil Rights, located in Washington D.C. provides overall leadership, support and coordination to the twelve enforcement offices throughout the United States. The headquarters office issues policy clarifications to help recipients of federal funds meet their civil rights obligations when new issues emerge, or when new legislation or court decisions take place (Office for Civil Rights, 2000).

The Office for Civil Rights investigates complaints filed by individuals or their representatives, who believe they have been discriminated against because of race, color, national origin, sex, disability or age. The complaint process provides a forum for resolution of alleged discrimination against individuals protected by civil rights laws. The primary objective of the OCR is to resolve complaint allegations promptly, fairly, and appropriately. Over six thousand complaints were filed in 2000. According to the Office for Civil Right’s 2000 Annual Report to Congress, the OCR used a variety of techniques to resolve these six thousand complaints. The techniques vary from facilitating voluntary resolutions between parties to negotiating agreements with recipients for voluntary compliance. If these methods fail, the OCR issues violation letters and enters into negotiations to correct any violations. As a last resort, the OCR may seek enforcement through the administrative hearing process or refer cases to the Department of Justice, (Office for Civil Rights, 2000).

The Office for Civil Rights also initiates compliance reviews of recipient institutions and agencies, and monitors the progress in eliminating discriminatory practices of institutions and agencies that are implementing plans by OCR. Compliance reviews are selected based on various sources of information such as
survey data, or information provided by parents, students, education groups, media, community organizations or the public (Office for Civil Rights, 2000). Compliance reviews benefit large numbers of students though policy or program changes by recipients of federal funds to secure equal educational opportunity. In 2000, the OCR initiated forty-seven compliance reviews and brought seventy-one previous reviews to successful resolution, (Office for Civil Rights, 2000).

The Office for Civil Rights protects the rights of language minority students to an equal educational opportunity by institutions receiving federal financial assistance. OCR relies upon three policy documents to interpret Title VI requirements for language minority students. These include: (a) The May 25, 1970 memorandum, (b) a December 3, 1985 document entitled OCR’s Title VI Language Minority Compliance Procedures, and (c) a September 27, 1991 Policy Update on School’s Obligations toward National Origin Minority Students with Limited-English Proficiency (Appendixes B, C, and D).

As part of its responsibilities to implement Title VI of the Civil Rights Act of 1964, the OCR issued the 1970 memorandum regarding concerns about discrimination in schools, based on national origin. This memorandum indicated that school systems were required to take affirmative steps to rectify language deficiencies in national origin minority students in order to open their instructional programs for these students. In Lau v. Nichols, the U.S. Supreme Court reviewed and affirmed the May, 1970 memorandum as reasonable interpretation of Title VI requirements.

The 1970 Office of Civil Rights Memorandum and the Lau v. Nichols decision led to the expansion of Title VI enforcement, resulting in the 1975 Lau
Remedies which were developed to provide OCR guidelines for compliance (Appendix D). The Lau Remedies were entitled, “Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful under Lau v. Nichols.” These new guidelines outlined educational approaches found to be affirmative steps toward opening the instructional program for language minority students. School districts were required to submit voluntary compliance plans to the OCR if they were found to be non-compliant with Title VI or if they had twenty or more students of the same language group identified as having a home or primary language other than English.

While the Lau Remedies did not mandate bilingual education, they at a minimum, created a presumption in favor of bilingual education at the elementary and intermediate levels. English as a second language instruction was endorsed as one of the acceptable options at the secondary level. School officials were free to propose and pursue educational approaches other than those outlined in the Lau Remedies so long as they demonstrated affirmatively that the educational program would be equally effective in ensuring an equal educational opportunity.

According to Littlejohn (1998), from 1975 to 1980 the OCR used its national database to identify approximately 500 school systems with large numbers of language minorities who were not being provided bilingual or ESL programs. The OCR negotiated plans with these school districts, in many instances requiring bilingual education programs. Littlejohn further noted that although many school officials strongly objected to a bilingual education requirement, few were willing to
challenge OCR interpretations as it was easier to accept a federally sanctioned program than to defend another type of program.

In 1980, an effort to publish the Lau Remedies into Title VI regulations by publishing them in the Federal Register for public review and comments failed. According to Littlejohn (1998), the publication of the Lau Remedies in the Federal Register became enmeshed in presidential election politics. In May, 1980, the Department of Health, Education and Welfare was disbanded and replaced with the United States Department of Education. Littlejohn (1998) commented that by June of 1980, OCR’s leadership convinced Shirley Hufstedler, the first Secretary of Education, that a Title VI regulation requiring bilingual education should be issued prior to the presidential election in order to gain Hispanic support for the Democrats in the southwestern United States.


Opposition to the proposed bilingual requirements proposed in the language minority NPRM was overwhelming and widespread. Over 5000 public comments
were received by the Department of Education in opposition to the new requirements for bilingual education. According to Littlejohn (1998), by late fall of 1980, Congress considered amending the Title VI regulations to prevent the OCR from conducting investigations on issues related to language minorities. In February 2, 1981, the language minority NPRM was withdrawn as the Department of Education determined that the proposed regulations were intrusive and burdensome (U.S. Department of Education, 1985).

Following the withdrawal of the language minority NPRM, the OCR established non-prescriptive interim procedures pertaining to the effective participation of language minority students in the educational program offered by a school district. Under these procedures, OCR reviewed the compliance of school districts on a case-by-case basis. Any educational approach that ensured the effective participation of language minority students in the district's educational program was accepted as a means of complying with Title VI requirements (U.S. Department of Education, 1985).

The December 3, 1985 policy entitled Office for Civil Right's Title VI Language Minority Compliance Procedures emphasized a more flexible approach to programs for language minority students (Appendix E). Littlejohn (1998) commented that the December 1985 policy was developed because more than 500 bilingual plans negotiated by OCR with school districts between 1976 and 1980 were still in effect. The 1985 policy set forth three key elements. The first clarified under what circumstances school systems were required to submit compliance agreements or
corrective action plans to OCR regarding deficiencies in programs for language minorities.

Although the May 25th Memorandum and the Lau v. Nichols decision require school districts to “take affirmative steps” to open their instructional programs to language minority students, OCR does not require the submission of a written compliance agreement unless a violation of Title VI has been established (U.S. Department of Education, 1985). The second element defined which students are covered by the May 25, 1970 Title VI guideline:

The affirmative steps required by the May 25th Memorandum have been interpreted to apply to national origin minority students who are learning English as a language, or whose ability to learn English has been substantially diminished through lack of exposure to the language. The May 25th Memorandum does not generally cover national origin minority students whose only language is English, and who may be in difficulty academically, or who have language skills that are less than adequate (U.S. Department of Education, 1985, p.2).

The 1985 policy guidance also emphasized OCR’s post-Lau Remedies policy of providing substantial flexibility to school districts in determining programs for language minority students:

In providing educational services to language minority students, school districts may use any method or program that has proven successful, or may implement any sound educational program that promises to be successful. Districts are expected to carry out their programs, evaluate the results to make
sure the programs are working as anticipated, and modify programs that do not meet these expectations (U.S. Department of Education, 1985, p. 3).

According to the 1985 policy guidance, OCR considers two general areas in determining whether a school district that enrolls language minority students is in compliance with Title VI. These are:

a) whether there is a need for the district to provide an alternative program designed to meet the educational needs of all language minority students; and

b) whether the district's alternative program is likely to be effective in meeting the educational needs of its language minority students (Appendix E).

In viewing a school district's compliance with Title VI regarding effective participation of language minority students in the educational program, OCR does not require schools to follow any particular educational approach. The test for legal adequacy is whether the strategy adopted by a school district works, or promises to work, on the basis of past practice or in the judgment of experts in the field. The OCR examines all the available evidence and determines whether the preponderance of evidence supports the conclusion that the school district is implementing a sound educational program that ensures the effective participation of its language minority students (U.S. Department of Education, 1985).

The most recent policy guidance was developed to update the legal foundation for OCR policy and to clarify issues related to staff requirements, criteria for exiting students from alternative programs and evaluating programs for language minority students. In the September 27, 1991 Policy Update on School's Obligations Toward
National Origin Minority Students with Limited-English Proficiency. Michael L Williams, then Assistant Secretary for Civil Rights, clarified the policy guidance by stating that the policy update adheres to OCR’s past determination that Title VI does not mandate any particular program of instruction for LEP students, (U.S. Department of Education, 1991). It further stated that,


The 1991 policy update adopted the standard applied in the Fifth Circuit decision in Castaneda v. Pickard (1981) to determine whether school systems were in compliance with Title VI.

In determining whether the recipient is operating a program for LEP students that meets Title VI requirements, OCR will consider whether:

(1) the program the recipient chooses is recognized as sound by some experts in the field or is considered a legitimate experimental strategy;

(2) the programs and practices used by the school system are reasonably calculated to implement effectively the educational theory adopted by the school; and (3) the program succeeds, after a legitimate trial, in producing results indicating that students’ language barriers are actually being overcome (Appendix F).
In determining the soundness of the educational approach, or the first point in the Castaneda standard, the 1991 policy update named transitional bilingual education, bilingual/bicultural education, structured immersion, developmental bilingual education, and English as a second language instruction as acceptable methods. A district that uses any of these approaches has complied with the first requirement of Castaneda. If a district uses a different approach, it is in compliance with Castaneda if it can show that the approach is considered sound by some experts in the field or that it is considered a legitimate experimental strategy (U.S. Department of Education, 1991).

In determining proper implementation, or the second point in the Castaneda standard, the 1991 policy update identified problematic implementation issues that have included staffing requirements, exit criteria, special education, and access to programs such as gifted and talented education. The 1991 policy update stated, “When formal qualifications have been established, and when a district generally requires its teachers in other subjects to meet formal requirements, a recipient must either hire formally qualified teachers for LEP students or requires that teachers already on staff work toward attaining those formal qualifications” (Appendix F). These requirements impacted both bilingual education as well as English as a second language instruction.

With regard to bilingual education, the 1991 policy update indicated that if a recipient selects bilingual education for its LEP students, teachers of bilingual classes should be able to speak, write, and read in both languages and should have received adequate instruction in the methods of bilingual education. If a recipient uses a
method other than bilingual education, the recipient should have ascertained that
teachers who use those methods have been adequately trained in them.

In determining exit criteria for language minority students, the 1991 policy
update indicated that once students have been placed in an alternative language
program, they must be provided with services until they are proficient enough in
English to participate meaningfully in the regular educational program. While
recipients are provided wide latitude in determining criteria, for exiting students, from
alternative language programs, the 1991 policy update identified the following basic
standards which should be met. First, exit criteria should be based on objective
standards, such as standardized test scores. Second, students should not be exited
from the specialized program unless they can read, write, and comprehend English
well enough to participate meaningfully in the recipient’s program. Finally,
alternative programs cannot be dead end tracks to segregate language minority

The OCR’s overall policy on the issue of special education is that school
systems may not assign students to special education programs on the basis of criteria
that essentially measure and evaluate English language skills. The 1991 policy update
urged that Lau compliance reviews should include an inquiry into the placement of
limited-English proficient students into special education programs where there are
indications that language minority students may be inappropriately placed in such
programs, or where special education programs provided for these students do not
address their inability to speak or understand English. Regarding gifted and talented
education, the 1991 policy update stated that language minority students cannot be
categorically excluded from programs such as gifted and talented education. Recipients of federal funding with processes for identifying gifted and talented students must also locate and identify gifted and talented language minority students who could benefit from the program (U.S. Department of Education, 1991).

In determining program evaluation, or the third point in the Castaneda standard, Castaneda required recipients to modify their programs if they proved to be unsuccessful after a legitimate trial. As a practical matter, recipients cannot comply with this requirement without periodically evaluating their programs. If a recipient does not periodically evaluate or modify its programs, as appropriate, it is in violation of the Title VI regulation unless its program is successful. Generally, success is measured in terms of whether the program is achieving the particular goals the recipient has established for the program. If the recipient has established no particular goals, the program is successful if its participants are overcoming their language barriers sufficiently well and sufficiently promptly to participate meaningfully in the recipient's programs (U.S. Department of Education, 1991).

The 1991 policy update also addressed the segregation of language minority students caused by the provision of language services. In Castaneda (1981), it stated that the segregation of these students is permissible because the benefits which would accrue by remedying the language barriers which impede their ability to realize their academic potential in an English language educational institution may outweigh the adverse effects of segregation. The 1991 policy update indicated that in compliance reviews, OCR will examine whether the degree of segregation in the program is necessary to achieve the program's educational goals. Practices which could violate
the anti-segregation provisions of the Title VI regulation can include segregating language minority students for both academic and nonacademic subjects, such as recess, physical education, art and music and maintaining students in an alternative language program longer than necessary to achieve the district's goals for the program.

When individuals or parties suspect that discrimination is present in an organization or they have been discriminated against, a formal complaint may best be registered online. A complaint form may be completed at the U.S. Office for Civil Rights website. OCR will actively work with complainants as well as examine other sources of information to ensure that the agency has sufficient information to evaluate the complaint appropriately. OCR staff members will provide appropriate assistance to complainants, including persons who speak a language other than English, in providing the information required by OCR to investigate a complaint. Persons filing a complaint should be prepared to provide: (a) a written explanation of what happened, (b) a way to contact the complainant, (c) identification of the person or group injured by the alleged discrimination, (d) identification of the person or institution alleged to have discriminated, and (e) sufficient information to understand the factual bases for the complainant's belief that discrimination has occurred and when that discrimination has occurred (Office for Civil Rights, 2000).

Once a complaint is received, the OCR may decline to proceed further with complaint allegations for a number of reasons. These may include if a complaint is so weak, or insubstantial that it is without merit. If the same or similar allegations of a complaint have been recently resolved the OCR may decline to proceed with the
complaint. Other reasons may include: (a) the complaint allegations are foreclosed by previous decisions by federal courts or OCR policy, (b) litigation has been filed raising the same allegations, (c) the information received from the complainant does not provide sufficient detail to proceed with complaint resolution, and (d) if it is determined that a compliance review is the most effective means of addressing multiple individual complaints against the same recipient (Office for Civil Rights, 2000).

In conducting fact-finding investigations, the OCR can: (a) collect data, (b) interview witnesses, and (c) evaluate evidence and make findings and conclusions based on the civil rights laws, regulations and OCR's policies. When a civil rights problem is found, the OCR seeks an agreement from the institution to remedy the problem. OCR monitors the implementation of the remedies. In all instances, the OCR's objective is to complete complaint evaluation as promptly as possible. The time required varies depending upon the nature of the complaint and the amount of information provided (Office for Civil Rights, 2000).

The target date for the completion of a complaint evaluation is 30 days from when the complaint was received. If OCR is unable to achieve voluntary compliance, OCR will initiate enforcement action which may include: (a) initiating administrative proceedings to terminate federal financial assistance to the recipient, or (b) referring the case to the Department of Justice for judicial proceedings to enforce any rights of the United States under any law of the United States (Office for Civil Rights, 2000).

OCR's goal is that every complaint is appropriately addressed. Complainants who believe their complaint was not resolved appropriately may promptly contact the
staff person who worked on the complaint and explain the reason for disagreeing with the resolution. If concerns continue, the second step is to write to the Office Director. If the complainant is still not satisfied with the Office Director's response, he or she may write to the Deputy Assistant Secretary in Washington, D.C. OCR will modify its final decision only if there has been a clear error in the facts or legal analysis. General statements of disagreement are not enough to support a change in OCR decisions (Office for Civil Rights, 2000).

In an effort to prevent discrimination, the Office for Civil Rights also provides information and other support services, known as technical assistance, to schools and colleges, as well as to community, student and parent groups. Technical assistance is given by the OCR's headquarters and twelve enforcement offices through a variety of methods that include on-site consultations, conferences, training, community meetings and published materials. Technical assistance is provided to help recipients of federal financial assistance comply with civil rights laws and to inform citizens of their rights under these laws. As part of its technical assistance activities, the OCR distributes information and materials. It also provides consultations on the requirements of civil rights laws under its authority, (Office for Civil Rights, 2000).

Summary

In this chapter, law cases interpreting and applying Lau with regard to the equal educational opportunity of language minority students were examined and analyzed. The role of the U.S. Office for Civil Rights in securing compliance with the Lau precedent was examined.
The twelve cases examined, were distributed among the Second, Fifth, Seventh, Ninth, and Tenth Federal Judicial Circuits. Of the twelve cases examined, the Castaneda case may be the most significant case following the Lau decision to impact the education of language minority students.

In its effort to secure compliance with Title VI, the Office for Civil Rights has provided direction for school systems through policy guidance derived from federal court decisions in both Lau and Castaneda.

In Chapter Five, findings, conclusions and recommendations are discussed and include suggestions for program administrators responsible for the oversight of programs for language minority students. Also, recommendations for further research are addressed.
CHAPTER V

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

Introduction

School districts throughout many parts of the country are experiencing a substantial increase in the enrollment of language minority students who cannot speak, read, or write English well enough to participate meaningfully in educational programs without appropriate support services. In the absence of specific steps to address the language barriers experienced by these students, they are at risk of losing the educational opportunities provided to students generally, (U.S. Department of Education, 1999).

In Lau v. Nichols,(1974) the United States Supreme Court affirmed the Department of Education memorandum of May 25, 1970, that directed school districts to take affirmative steps to help language minority students overcome language barriers and to ensure them meaningful participation in the educational programs of school districts. This study examined the legal history of the 1974 Supreme Court decision in Lau v. Nichols. There have been no lawsuits involving the equal educational opportunity of language minority students accepted by the Supreme Court since Lau.

The purpose of this study was to identify and assess the current legal standards applicable to the education of language minority students in the United States. This study was, in part, to decide if the Lau decision is still the precedent to be followed by school
districts, and to determine if there are any other legal decisions or guidelines that impact the right of language minority students to an equal educational opportunity.

The questions explored in this dissertation included examining how the legal precedent established in Lau v. Nichols was interpreted and applied by subsequent law cases involving the education of language minority students; interpreting what role the Office for Civil Rights has played in securing compliance with the Lau precedent; and investigating what legal implications exist for school administrators in providing programs for language minority students.

**Question 1:** How has the legal precedent established in *Lau v. Nichols* been interpreted and applied by federal court cases involving the education of language minority students?


The federal cases since Lau involving the equal educational opportunities of language minority students are distributed among the Second, Fifth, Seventh, Ninth, and Tenth Federal Judicial Circuits. The Second Federal Judicial Circuit had three cases, Aspira, Rios, and Cintron, each involving the right to or role of bilingual education as a method for instructing language minority students. The Fifth Circuit jurisdiction had the Castaneda case, and the Gomez case was in the Seventh Federal Judicial Circuit. The Serna case and the Keys case were both in the Tenth Federal Judicial Circuit. There appears to be a majority of cases in the Ninth Federal Judicial Circuit, located in the southwestern United States, spanning from 1974 to 2000. Following Lau in 1974, five cases originated in the Ninth Federal Judicial Circuit. These include Guadalupe, Idaho, Teresa P., Valeria G., and Flores.

Significance of cases

Serna v. Portales Municipal Schools (1974), raised the question as to whether a school, comprised of a sizable number of Mexican-American students, denied equal educational opportunity by failing to provide a bilingual program for its language minority students. This case followed the 1970 district court decision in Lau v. Nichols where the court ruled that the student's rights to an equal educational opportunity had been satisfied by their receipt of the same education made available on the same terms and conditions to the other tens of thousands of students in the San Francisco Unified School District. However in Serna (1970), the district court in New Mexico directed the Portales schools to
provide specialized bilingual programs for its language minority students. On appeal in 1974, the appellate court found there was adequate evidence that the school districts proposed program was only a token plan that would not benefit the students.

This case resulted in a federal court mandate to implement a bilingual/ bicultural curriculum for students in the Portales school district. It also resulted in the revision of assessment procedures to monitor the academic achievement of Hispanic students and a mandate for the school district to recruit bilingual personnel.

In Aspira of New York v. Board of Education (1976), far reaching implications for the rights of language minorities stemmed from district judge Frankel’s consent decree which recognized the importance of bilingual education. In this case, Hispanic students were to receive a program including intensive training in English language skills, instruction in substantive courses in Spanish, and reinforcement of Spanish skills. In addition, it mandated a system for the identification of Hispanic students in need of specialized instruction, and it described necessary teacher qualifications. This case specifically addressed the testing procedures for determining which students were eligible for bilingual instruction programs. As in Serna, the court mandated bilingual instruction for language minority students. The decree prescribed a program of English language acquisition, Spanish instruction in the core curriculum, and testing to identify non-English speaking students.

The 1975 Lau Guidelines influenced the district court’s decision in Cintron v. Brentwood Union Free School District (1978). Brentwood was directed to submit a plan in compliance with Lau Guidelines containing specific methods for identification of
students, monitoring progress, and transferring students out of language programs when they had achieved the necessary level of English proficiency. The plan could not isolate children into racially or ethnically identifiable classes, and was required to encourage contact between non-English speaking and English speaking students in all but subject matter instruction.

The district court in Rios v. Read (1978) ruled that the Patchogue-Medford school district in New York was obligated under the Lau precedent to provide quality programs for its language minority students. This court also relied on Lau Guidelines in its decision. The court found fault with the school's language program that emphasized English instruction for the majority of the day and native language instruction for small periods of time. In this case, the court ruled that ESL and bilingual instruction was to be provided by competent bilingual personnel.

Cases such as Guadalupe v. Organization Inc. v. Tempe Elementary School District (1978) and Castaneda v. Pickard (1981-1986) exemplified the direction of western states in the Ninth Circuit and southern states in the Fifth Circuit were taking in interpreting the Lau decision, Title VI and the Equal Educational Opportunities Act. In Guadalupe v. Organization Inc. v. Tempe Elementary School District (1978), the court was called upon to trace the bounds of equal educational opportunity as required by the constitution. The case also differentiated between constitutional requirements and the statutory rights under Title VI of the 1964 Civil Rights Act, which formed the basis for the guidelines set forth in Lau. The Equal Protection Clause of the Fourteenth Amendment does not require a school district to provide all non-English-speaking students attending
district schools with bilingual compensatory education, even when the students constitute a sizable minority.

This case raised the question as to whether bilingual education constituted a fundamental right and whether a school district was required to provide bilingual-bicultural education for its language minority students. In *Lau*, the Supreme Court ruled that the school district must take affirmative steps to overcome educational barriers faced by non-English speakers. Because of interpretive phrases such as affirmative steps or appropriate action, the remedies provided by school districts can take many different directions. In this case, the court did not require a bilingual program of instruction but instead held that remedial English was an adequate remedy and that both an English-language program and curriculum emphasizing American culture did not constitute discriminatory effect, *Guadalupe v. Organization Inc. v. Tempe Elementary School District* (1978).

As in the *Guadalupe* case, *Castaneda v. Pickard* (1981-1986) represented the new direction of reasoning by the courts to not specifically mandate bilingual education for language minority students. Reputed to be the most significant court decision affecting language minority students after *Lau*, the appellate court in *Castaneda* (1981) formulated a set of basic standards to determine the compliance of school districts with the Equal Educational Opportunities Act. This three-point *Castaneda* test has been applied in other cases and used as the standard in OCR guidelines for compliance with the *Lau* precedent. In 1986, the Fifth Circuit Court again found no violation, including those that the court had remanded for further investigations. The court in *Castaneda* (1986) further stated that...
the Equal Educational Opportunities Act in no way required a state to provide bilingual education. The court interpreted that the way the statute was constructed was meant to provide wide latitude and discretion in choosing a specific language remediation program (Castaneda v. Pickard, 1986).

Federal court cases such as Keys and Gomez relied on the three-point test established in Castaneda (1981). Both cases also demonstrated that there was still considerable support for bilingual programs of instruction. In Keyes v. School District (1983), the court focused on the Equal Educational Opportunities Act and the Castaneda three-point test. The court held that the school system failed to take appropriate action to address language remedies. The court further maintained that the University of California Regents v. Bakke case may have clouded the legal grounding of Lau regarding Title VI violations. However, section 1073 (f) of the Equal Educational Opportunities Act was not dependent on intent, and school systems must show more than a good faith attempt to remedy language deficiencies in their language minority students.

In Idaho Migrant Council v. Board of Education (1981), the State Board of Education was required under federal law and empowered under Idaho state law to ensure that needs of students with limited English language proficiency were addressed. This ruling applies to state education agencies throughout the United States in that they are responsible for ensuring that the needs of students with limited English language proficiency are addressed in local school districts.

As in Idaho Migrant Council v. Board of Education (1981), the appellate court in Gomez v. Illinois (1985) found that state education agencies are responsible for ensuring
that language minority students' educational needs are met, including identification and assessment of language minority students and placement of students in programs designed to provide English language support. The seventh Circuit Court in Gomez relied on the Equal Educational Opportunities Act to reverse the district court's opinion and returned the case to its original court of proceedings to be decided on the basis of the court of appeals decision. Gomez v. Illinois indicated that state departments of education can be held responsible for ensuring that appropriate action and affirmative steps are taken in providing educational programs for language minority students.

In Teresa P. v. Berkeley Unified School District (1989) the district court ruled that the school district's second language program, which emphasized English, did not violate the Lau precedent. The court found that the school district had demonstrated effective implementation of the language program, showed a good faith effort in keeping with available resources, community climate, and a demonstration of student success through achievement scores.

Following Teresa P. v. Berkeley (1989), no federal court cases related to the education of language minority students was decided until 1998. A time period of about ten years between Teresa P. v. Berkeley (1989) and Valeria G. v. Wilson (1998) may be significant in this discussion. It may appear that the Lau precedent and the Castaneda standard for determining appropriate action of educational agencies influenced OCR policy guidance. The 1991 policy guidance may have provided sufficient direction for school officials in policy making with regard to educational programming for language minority students. In the late 1990's however, the English only movement and
Proposition 227 in California led to further challenge of the \textit{Lau} precedent with regard to the types of programs mandated by school districts for educating language minority students. On June 2nd, 1998, California voters passed Proposition 227. Proposition 227 required that all non English-speaking or (LEP) students be taught English through an immersion class, rather than through transitional bilingual education. This measure limited the students' time in the immersion class to one year. In \textit{Valeria G. v. Wilson} (1998) the plaintiffs moved for a preliminary injunction, enjoining defendants from implementing Proposition 227. (\textit{Valeria G. v. Wilson}, 1998).

In \textit{Lau}, the court declared that children who do not speak English are entitled to equal access to the school curriculum. One way of addressing these rights was through implementation of bilingual education programs that provide academic content in their native language while students gain competence in English. Federal court cases following the \textit{Lau} decision have established the requirements for programs for language minority students. This case questioned whether bilingual education was guaranteed by federal law. Relying on the \textit{Castaneda} standard, the court concluded that Structured English Immersion is a valid educational theory. To prove a violation of the Equal Educational Opportunities Act, the plaintiffs needed to establish that implementation of Proposition 227 would not constitute "appropriate action" as required by law. Because neither \textit{Lau} nor the Equal Educational Opportunities Act requires school districts to provide bilingual programs, the near elimination of bilingual education programs in California by Proposition 227 did not \textit{in and of itself} violate the Equal Educational Opportunities Act or \textit{Lau} (\textit{Valeria G. v. Wilson}, 1998).
In *Flores v. Arizona* (2000), the district court determined that states must adequately fund education in order to ensure that school districts can implement approved educational theories for remedying language deficiencies in language minority students. In determining if a violation to the Equal Educational Opportunities Act existed, the district court found the state of Arizona was not taking appropriate action to overcome language barriers as the funding system for language programs was arbitrary and capricious. In utilizing the second point in the *Castaneda* standard, whether programs and practices actually used by a school system are reasonably calculated to implement effectively the adopted educational theory, the court noted that, "the system fails to follow through with practices, resources, and personnel necessary to transform theory into reality." (*Flores v. Arizona*, 2000).

**Summary**

The first research question asked how has the legal precedent established in *Lau v. Nichols* been interpreted and applied by federal court cases involving the education of language minority students. By reviewing the legal cases concerned with the rights of language minority students to an equal educational opportunity, a historical perspective of language minority education as well as themes in the jurisprudence have emerged. Under Title VI of the Civil Rights Act of 1964, agencies receiving federal financial assistance can not discriminate against language minority students. In *Lau v. Nichols* (1974), the Supreme Court ruled that school districts must take affirmative steps to overcome educational barriers faced by non-English speakers. *Lau* did not define ‘affirmative steps’ nor did it recommend a program or model of instruction.
The Equal Educational Opportunities Act in 1974 quickly followed the **Lau** decision. This federal legislation codified the Supreme Court’s holding which required school districts to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs. Like **Lau**, the EEOA also did not recommend a program or model of instruction that would constitute appropriate action for language minority students. Although not prescriptive, the EEOA did require educational agencies to address the education of language minorities. Following its passage, subsequent court cases involving the education of language minorities cited violations to the Equal Educational Opportunities Act in their claims.

In 1975, the HEW announced policy guidelines for school districts’ compliance with the Title VI requirements upheld in the **Lau** decision. The "Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful Under **Lau v. Nichols**," were usually referred to as the **Lau Remedies**. Due to the vagueness of the court’s ruling in **Lau v. Nichols** (1974), the **Lau Remedies** quickly evolved into the de facto standards that the Office for Civil Rights staff applied for determining an education agency’s compliance with Title VI under **Lau**. The Equal Educational Opportunities Act and the **Lau Remedies** provided clarification for the **Lau** decision.

Both the EEOA and the **Lau Remedies** proved to be influential in shaping the direction of cases involving language minorities after **Lau**. While a number of cases supported bilingual education programs, a greater majority of cases did not mandate nor specify a model of instruction. However, the ambiguity of the EEOA eventually led the
courts to develop a powerful analytic framework for determining whether an educational agency was fulfilling its EEOA responsibilities to take appropriate action to overcome the language barriers of language minority students, regardless of the model of instruction.

In 1981, there was a challenge to the Supreme Court’s ruling over Title VI requirements in the Lau decision. Castaneda (1981) raised doubt about the continued vitality of the Supreme Court’s rationale in Lau. In Castaneda (1981) the court noted that Lau was written prior to Washington v. Davis (1976) in which the court held that a discriminatory purpose, and not simply disparate impact, must be shown to establish a violation of the Equal Protection Clause. The Castaneda court further cited that in University of California Regents v. Bakke (1978), a majority of the court interpreted Title VI to be coextensive with the Equal Protection Clause, (Castaneda v. Pickard, 1981, p. 984).

"After the Supreme Court case of University of California Regents v. Bakke, it now appears that Title VI, like the Equal Protection Clause of the Fourteenth Amendment, is violated only by conduct animated by an intent to discriminate and not by conduct which, although benignly motivated, has a differential impact on persons of different races," (Castaneda v. Pickard, 1981, p. 991). While Bakke did not expressly overrule Lau v. Nichols (1974), it rendered the decision obsolete, insofar as it found a violation of Title VI merely on proof of discriminatory impact without any showing of discriminatory intent, (Gomez v. Illinois, 1987).

The 1981 Castaneda decision was also significant in that it provided an analytic framework for identifying violations to section (f) of the 1974 Equal Educational
Opportunities Act. This new framework would aid in determining if educational agencies were fulfilling EEOA responsibilities to language minority students. In Castaneda (1981) the appellate court held that the responsibility of the federal court was three-fold, and thus established a three-pointed test regarding the, (a) soundness of the educational program, (b) effective implementation, and (c) evaluation of program effectiveness. Federal cases in the 1980s such as Keys, Gomez, Teresa P., and more recently Valeria G. in 1998, and Flores in 2000 all cited violations to the EEOA and relied on the Castaneda test to determine if violations of section (f) of the Equal Educational Opportunities Act had occurred.

While the Lau ruling itself followed years of protests, organization and litigation by language minority communities, the Supreme Court guaranteed children an opportunity to a meaningful education regardless of their language background. Lau guaranteed that affirmative steps would be taken by school districts to meet the language needs of students. The vagueness of this precedent was clarified through the subsequent Equal Educational Opportunities Act and the Castaneda standard which provide much more specific direction for the courts regarding the rights of language minority students to an equal educational opportunity.

Although Lau has been cited in recent cases affecting the education of language minorities, the Lau precedent requiring school districts to take affirmative steps has become a secondary resource. While the Lau v. Nichols case serves as a landmark, its role appears to have become parenthetical, both qualifying and explaining past historical significance.
Question 2: What role has the Office for Civil Rights played in securing compliance with the Lau precedent?

The second research question addressed in this dissertation asked what role has the Office for Civil Rights played in securing compliance with the Lau precedent. In the United States Department of Education, the Office for Civil Rights (OCR) is responsible for ensuring that school systems do not engage in discriminatory actions that violate Title VI of the Civil Rights Act of 1964. The Office for Civil Rights has authority to enforce Title VI in all programs and activities that receive federal financial assistance. The headquarters office issues policy clarifications to help recipients of federal funds meet their civil rights obligations when new issues emerge, or when new legislation or court decisions take place. The Office for Civil Rights investigates complaints involving discrimination because of race, color, national origin, sex, disability or age.

When individuals or parties suspect that discrimination is present in an organization or they have been discriminated against, a formal complaint may best be registered online. A complaint form may be completed at the U.S. Office for Civil Rights web site. OCR will actively work with complainants as well as examine other sources of information to ensure that the agency has sufficient information to evaluate the complaint appropriately. OCR staff members will provide appropriate assistance to complainants, including persons who speak a language other than English, in providing the information required by OCR to investigate a complaint.

The complaint process provides a forum for resolution of alleged discrimination against individuals protected by civil rights laws. The primary objective of the OCR is to
resolve complaint allegations promptly, fairly, and appropriately. Over six thousand complaints were filed in 2000. A variety of techniques were used to resolve these six thousand complaints. The techniques vary from facilitating voluntary resolutions between parties to negotiating agreements with recipients for voluntary compliance. If these methods fail, the OCR issues violation letters and enters into negotiations to correct any violations. As a last resort, the OCR may seek enforcement though the administrative hearing process or refer cases to the Department of Justice, (Office for Civil Rights, 2000).

The OCR also initiates compliance reviews of recipient institutions and agencies, and monitors progress made by institutions in eliminating discriminatory practices. Compliance reviews, which benefit large numbers of students though policy or program changes by recipients of federal funds to secure equal educational opportunity, are selected based on various sources of information such as survey data, or information provided by parents, students, education groups, media, community organizations or the public. In 2000, the OCR initiated forty-seven compliance reviews and brought seventy-one previous reviews to successful resolution.

The Office for Civil Rights relies upon three policy documents in interpreting Title VI requirements regarding the equal educational opportunities of language minority students. The May 25, 1970 memorandum, affirmed by the court in the Lau v. Nichols decision, required schools to take affirmative steps to rectify language deficiencies in national origin minority students in order to open their instructional programs for these students. The 1970 Office of Civil Rights Memorandum and the Lau v. Nichols decision led to the 1975 Lau Remedies which were developed to provide OCR guidelines for
compliance (Appendix D). These 1975 guidelines outlined educational approaches found to be affirmative steps toward opening the instructional program for language minority students.

OCR's Title VI Language Minority Compliance Procedures issued in December 3, 1985 provided further clarification. The December 3, 1985 policy entitled Office for Civil Right's Title VI Language Minority Compliance Procedures emphasized a more flexible approach to programs for language minority students (Appendix E). The 1985 policy set forth three key elements. The first element clarified under what circumstances school systems were required to submit compliance agreements or corrective action plans to OCR regarding deficiencies in programs for language minorities. OCR did not require the submission of a written compliance agreement unless a violation of Title VI had been established. The second element defined which students were covered by the May 25, 1970 Title VI guideline. It included national origin minority students who are learning English as a language, or whose ability to learn English has been substantially diminished through lack of exposure to the language.

The 1985 policy guidance also emphasized OCR's post-Lau Remedies policy of providing substantial flexibility to school districts in determining programs for language minority students. This document did not require schools to follow any particular educational approach. The test for legal adequacy was whether the strategy adopted by a school district worked, or promised to work, on the basis of past practice or in the judgment of experts in the field.
A September 27, 1991 Policy Update on School’s Obligations toward National Origin Minority Students with Limited-English Proficiency adopted the standard applied in the Fifth Circuit decision in Castaneda v. Pickard (1981) to determine whether school systems were in compliance with Title VI. In determining the soundness of the educational approach, the 1991 policy update named transitional bilingual education, bilingual/bicultural education, structured immersion, developmental bilingual education, and English as a second language instruction as acceptable methods. A district using any of these approaches complied with the first requirement of Castaneda.

The 1991 document established exit criteria for language minority students. The 1991 policy update indicated that once students have been placed in an alternative language program, they must be provided with services until they are proficient enough in English to participate meaningfully in the regular educational program (Appendix F).

In 1999, the OCR issued a guide for school districts to use in developing and evaluating their programs for language minority students. Based on legal requirements, the guide is intended to serve as a resource for school district to develop comprehensive programs for English learners.

*Question 3: What are the implications for school administrators in providing programs for language minority students resulting from the jurisprudence and compliance activities?*

The third research question asked what are the legal implications for school administrators. In developing programs for language minority students, school districts or
program administrators have the prerogative to select a specific educational approach to meet the needs of its particular language minority student population. A district may use any educational approach that is recognized as sound by some experts in the field, or an approach that is recognized as a legitimate educational strategy. It is not required by law that school districts provide bilingual education programs for their students.

Regardless of the educational approaches selected by a district in assessing compliance with Title VI, a twofold inquiry applies. This includes whether the approach provides for English language development, and whether the approach provides for meaningful participation of ELL students in the district's educational program. According to the Resource Materials for Planning and Self Assessments developed by the Office for Civil Rights in 1999, key components of a comprehensive ELL plan should include:

1. The district’s educational theory and goals for its program of services;
2. The district’s methods for identifying and assessing the students to be included in the district’s ELL program;
3. The specific components of the district’s program of English language development and academic services for ELL students;
4. The specific staffing and other resources to be provided to ELL students under the district’s ELL program;
5. The district’s method and procedures for transitioning and/or exiting students from its ELL program, and for monitoring their success afterward; and
6. the district's method for evaluating the effectiveness of its program for ELL students, (p.8).

Once a district has selected its educational approach for educating language minority students, the process for developing goals should flow from this approach. Goal development should relate back to what experts in the field have identified as successful results under the approach the district has selected. Effective goals for ELL students address both English language development and subject matter instruction. The fundamental Title VI requirement for second language students is that they have meaningful access to the district's educational program. School district goals should relate to the goals maintained for all students throughout the district, (United States Department of Education, 1999).

Program administrators should develop comprehensive plans for meeting the linguistic needs of their students. Plans should address each aspect of the district's program for all ELL students, at all grade levels, and at all schools in the district. School districts should describe and document program goals and the educational approaches utilized in a written plan so that staff, administrators, and parents understand how the language program works, (United States Department of Education, 1999).

Once a district has selected an educational approach, it needs to provide the necessary resources through staffing and materials to successfully implement the program. Districts should identify the number and categories of instructional staff determined appropriate to implement the district's second language program. The qualifications for instructional staff should also be identified. Books, materials, and resources to meet the
academic and linguistic needs of language minority students should be provided,(United States Department of Education, 1999).

A central element of satisfying Title VI requirements regarding services for ELL students is an ongoing evaluation of a district's ELL program. Since federal law does not prescribe a particular program model or evaluation approach, the approach to and design of an effective program evaluation will vary from district to district. In developing an evaluation approach, administrators should consider whether district goals address expected progress in English language development and subject matter instruction. Administrators should also consider proper implementation practices such as identification and initial assessment of students, serving all eligible students, providing appropriate resources and materials consistent with program design, transition and reevaluation of students.

Recipients of federal funding must periodically evaluate their programs. In general, school districts should measure success in terms of whether program goals are met. If a program is not working effectively, school district are responsible for making appropriate program adjustments or changes, (United States Department of Education, 1999).

Further Research

This legal analysis explored the rights of language minority students to an equal educational opportunity from Lau v. Nichols (1974) the landmark Supreme court case through Flores v. Arizona (2000). Through its analysis of Lau, subsequent legal decisions,
and a review of Title VI enforcement, this study provides a reference for administrators responsible for policy making regarding the education of language minority students. Due to the growth of this population and the limited scope of research into legal implications, it is recommended that further research be conducted. Below are recommendations for areas of further research related to the rights of language minority students to an equal educational opportunity.

1. In Castaneda (1981), the appellate court established a three-part test to determine whether educational agencies have met the “appropriate action” requirement established in the Equal Educational Opportunities Act of 1974. Further research tracing the interpretation and application of this test and its adoption by OCR as a legal standard may be beneficial for school administrators.

2. In Valeria G. v. Wilson (1998) the near elimination of bilingual education programs in California by Proposition 227 did not in and of itself violate the Equal Educational Opportunities Act. A review of state initiatives affecting the education of language minorities including an analysis of California’s implementation of Proposition 227 and similar initiatives in other western states would benefit school leaders in determining programming options.

3. A significant body of law has emerged establishing the rights of language minorities and defining the responsibilities of school districts. The Office for Civil Rights has provided policy guidance for school administrators in developing programs for language minority students. An area for further research may examine; What are the perceptions of school administrators regarding the education of language minority
students. Are school districts indeed meeting their needs, and if not, how effective is OCR enforcement of Title VI requirements?

Concluding Statements

The education of language minority students will continue to challenge school systems throughout the country as the numbers of these students continue to increase. As part of a national effort to secure equal educational opportunities for all students, the Federal government has acted over the past few decades to protect the rights of language minority students limited in their English proficiency. A substantial body of Federal law has developed establishing the rights of language minority students and defining the responsibilities of school districts serving them. Policy makers and school administrators should turn to this body of law and implementing regulations for guidance and direction as they seek to ensure that the growing population of language minority students in America is provided with the equal educational opportunities guaranteed by our society.
APPENDIX A

LEXIS-NEXIS PRINTOUT

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U.S. SUPREME COURT

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<=18-2> 79 L. Ed. 2d 516 p.543
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Followed by, Cited in Dissenting Opinion at
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Cited by
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Cited by
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3RD CIRCUIT - COURT OF APPEALS
Cited in Dissenting Opinion at
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Cited by
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Cited by
Cited by
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167

Distinguished by
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4TH CIRCUIT - U.S. DISTRICT COURTS

Cited by

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Cited by
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Cited by

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Distinguished by
Distinguished by

Cited by
Cited by
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Cited by
Cited by
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5TH CIRCUIT - COURT OF APPEALS

Cited by
Cited by
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Cited by
Cited by
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Cited by
Cited by

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Cited by
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Cited by
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Cited by
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5TH CIRCUIT - U.S. DISTRICT COURTS
Cited by
Cited by
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Cited by
Cited by
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170

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Criticized by
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Cited by

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Cited by
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Cited by
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Cited by
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Cited by
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Cited by
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Cited by
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Cited by
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Followed by
Followed by
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7TH CIRCUIT - COURT OF APPEALS

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Cited by
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Questioned by
Questioned by
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Followed by
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Distinguished by
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7TH CIRCUIT - U.S. DISTRICT COURTS

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Questioned by
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Cited by
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Cited by
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Cited by
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Cited by
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Cited by
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9TH CIRCUIT - COURT OF APPEALS

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9TH CIRCUIT - U.S. DISTRICT COURTS

Cited by

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Cited by

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Cited by
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Explained by
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11TH CIRCUIT - COURT OF APPEALS

Followed by
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Cited by
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11TH CIRCUIT - U.S. DISTRICT COURTS

Followed by
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Cited by
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D.C. CIRCUIT - COURT OF APPEALS

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D.C. CIRCUIT - U.S. DISTRICT COURT

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APPENDIX B

MAY 1970 MEMORANDUM
MEMORANDUM

TO: School Districts With More Than Five-Percent National Origin-Minority Group Children

FROM: J. Stanley Pottinger, Director, Office for Civil Rights

SUBJECT: Identification of Discrimination and Denial of Services on the Basis of National Origin

Title VI of the Civil Rights Act of 1964 and the Departmental Regulation (45 CFR Part 80) promulgated thereunder require that there be no discrimination on the basis of race, color or national origin in the operation of any federally assisted programs.

Title VI compliance reviews conducted in school districts with large Spanish-surnamed student populations by the Office for Civil Rights have revealed a number of common practices which have the effect of denying equality of educational opportunity to Spanish-surnamed pupils. Similar practices which have the effect of discrimination on the basis of national origin exist in other locations.
with respect to disadvantaged pupils from other national origin-minority groups, for example, Chinese or Portuguese.

The purpose of this memorandum is to clarify D/HEW policy on issues concerning the responsibility of school districts to provide equal educational opportunity to national origin minority group children deficient in English language skills. The following are some of the major areas of concern that relate to compliance with Title VI:

1. Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.

2. School districts must not assign national origin—minority group students to classes for the mentally retarded on the basis of criteria which essentially measure or evaluate English language skills; nor may school districts deny national origin-minority group children access to college preparatory courses on a basis directly related to the failure of the school system to inculcate English language skills.

3. Any ability grouping or tracking system employed by the school system to deal with the special language skill needs of national origin-minority group
children must be designed to meet such language skill needs as soon as possible and must not operate as an educational dead-end or permanent track.

4. School districts have the responsibility to adequately notify national origin-minority group parents of school activities which are called to the attention of other parents. Such notice in order to be adequate may have to be provided in a language other than English.

School districts should examine current practices which exist in their districts in order to assess compliance with the matters set forth in this memorandum. A school district which determines that compliance problems currently exist in that district should immediately communicate in writing with the Office for Civil Rights and indicate what steps are being taken to remedy the situation. Where compliance questions arise as to the sufficiency of programs designed to meet the language skill needs of national origin-minority group children already operating in a particular area, full information regarding such programs should be provided. In the area of special language assistance, the scope of the program and the process for identifying need and the extent to which the need is fulfilled should be set forth.

School districts which receive this memorandum will be contacted shortly regarding the availability of technical assistance and will be provided with any additional information that may be needed to assist districts in achieving compliance with the law.
and equal educational opportunity for all children. Effective as of this date the
aforementioned areas of concern will be regarded by regional Office for Civil Rights
personnel as a part of their compliance responsibilities.

OCR Lau Memoranda

Last modified 12/28/00 (sbd)
APPENDIX C

EQUAL EDUCATIONAL OPPORTUNITY ACT
TITLE 20 - EDUCATION

CHAPTER 39 - EQUAL EDUCATIONAL OPPORTUNITIES

SUBCHAPTER I - EQUAL EDUCATIONAL OPPORTUNITIES

Part 2 - Unlawful Practices

Section 1703. Denial of equal educational opportunity prohibited

No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by -

(a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;

(b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps, consistent with part 4 of this subchapter, to remove the vestiges of a dual school system;
(c) the assignment by an educational agency of a student to a school, other
than the one closest to his or her place of residence within the school
district in which he or she resides, if the assignment results in a greater
degree of segregation of students on the basis of race, color, sex, or
national origin among the schools of such agency than would result if
such student were assigned to the school closest to his or her place of
residence within the school district of such agency providing the
appropriate grade level and type of education for such student;

(d) discrimination by an educational agency on the basis of race, color, or
national origin in the employment, employment conditions, or assignment
to schools of its faculty or staff, except to fulfill the purposes of
subsection (f) below;

(e) the transfer by an educational agency, whether voluntary or otherwise, of
a student from one school to another if the purpose and effect of such
transfer is to increase segregation of students on the basis of race, color,
or national origin among the schools of such agency; or

(f) the failure by an educational agency to take appropriate action to
overcome language barriers that impede equal participation by its
students in its instructional programs.
APPENDIX D

LAU REMEDIES
Task-Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful under Lau v. Nichols

Office for Civil Rights

I. Identification of Student's Primary or Home Language

The first step to be included in a plan submitted by a district found to be in noncompliance with Title VI under Lau is the method by which the district will identify the student's primary or home language. A student's primary or home language, for the purpose of this report, is other than English if it meets at least one of the following descriptions:

A. The student's first acquired language is other than English.

B. The language most often spoken by the student is other than English.

C. The language most often spoken in the student's home is other than English, regardless of the language spoken by the student.
These assessments (A-C, above) must be made by persons who can speak and understand the necessary language(s). Then the district must assess the degree of linguistic function or ability of the student(s) so as to place the student(s) in one of the following categories by language.

A. Monolingual speaker of the language other than English (speaks the language other than English exclusively).

B. Predominantly speaks the language other than English (speaks mostly the language other than English, but speaks some English).

C. Bilingual (speaks both the language other than English and English with equal ease).

D. Predominantly speaks English (speaks mostly English, but some of the language other than English).

E. Monolingual speaker of English (speaks English exclusively).

In the event that the student is multilingual (is functional in more than two languages in addition to English), such assessment must be made in all the necessary languages.
In order to make the aforementioned assessments the district must, at a minimum, determine the language most often spoken in the student’s home, regardless of the language spoken by the student, the language most often spoken by the student in the home and the language spoken by the student in the social setting (by observation).

These assessments must be made by persons who can speak and understand the necessary language(s). An example of the latter would be to determine by observation the language used by the student to communicate with peers between classes or in informal situations. These assessments must cross-validate one another (Example: student speaks Spanish at home and Spanish with classmates at lunch). Observers must estimate the frequency of use of each language spoken by the student in these situations.

In the event that the language determinations conflict (Example: student speaks Spanish at home, but English with classmates at lunch), an additional method must be employed by the district to make such a determination (for example the district may wish to employ a test of language dominance as a third criterion). In other words, two of the three criteria will cross-validate or the majority of criteria will cross-validate (yield the same language).

Due to staff limitations and priorities, we will require a plan under Lau during this initial stage of investigation when the district has 20 or more students of the same
language group identified as having a primary or home language other than English. However, a district does have an obligation to serve any student whose primary or home language is other than English.

II. Diagnostic/Prescriptive Approach

The second part of a plan must describe the diagnostic/prescriptive measures to be used to identify the nature and extent of each student’s educational needs and then prescribe an educational program utilizing the most effective teaching style to satisfy the diagnosed educational needs. The determination of which teaching style(s) are to be used will be based on a careful review of both the cognitive and affective domains and should include an assessment of the responsiveness of students to different types of cognitive learning styles and incentive motivational styles—e.g., competitive v. cooperative learning patterns. The diagnostic measures must include diagnoses of problems related to areas or subjects required of other students in the school program and prescriptive measures must serve to bring the linguistically/culturally different student(s) to the educational performance level that is expected by the Local Education Agency (LEA) and State of non-minority students. A program designed for students of limited English-speaking ability must not be operated in a manner so as to solely satisfy a set of objectives divorced or isolated from those educational objectives established for students in the regular school program.
III. Educational Program Selection

In the third step the district must implement the appropriate type(s) of educational program(s) listed in this Section (III, 1-5), dependent upon the degree of linguistic proficiency of the students in question. If none seem applicable check with your Lau coordinator for further action.

1. In the case of the monolingual speaker of the language other than English (speaks the language other than English exclusively).

   A. At the Elementary and Intermediate Levels:

   Any one or combination of the following programs is acceptable.

   1. Transitional Bilingual Education Program (TBE).
   2. Bilingual/Bicultural Program.
   3. Multilingual/Multicultural Program.

   In the case of a TBE, the district must provide predictive data which show that such student(s) are ready to make the transition into English and will succeed educationally in content areas and in the educational program(s) in which he/she is to be placed. This is necessary so the district will not prematurely place the linguistically/culturally different student who is not ready to participate effectively
in an English language curriculum in the regular school program (conducted exclusively in English).

Because an ESL program does not consider the affective nor cognitive development of students in this category and time and maturation variables are different here than for students at the secondary level, an ESL program is not appropriate.

B. At the Secondary Level:

Option 1. Such students may receive instruction in subject matter (example: math, science) in the native language(s) and receive English as a Second Language (ESL) as a class component.

Option 2. Such students may receive required and elective subject matter (examples: math, science, industrial arts) in the native language(s) and bridge into English while combining English with the native language as appropriate (learning English as a first language, in a natural setting). Option 3. Such students may receive ESL or High Intensive Language Training (HILT) . . . in English until they are fully functional in English (can operate equally successfully in school in English) then bridge into the school program for all other students.

A district may wish to utilize a TBE, Bilingual/Bicultural or Multilingual/Multicultural program in lieu of the three options presented in this section (III.1.B.). This is permissible. However, if the necessary prerequisite skills in
the native language(s) have not been taught to these students, some form of compensatory education in the native language must be provided.

In any case, students in this category (111.1.B.) must receive such instruction in a manner that is expeditiously carried out so that the student in question will be able to participate to the greatest extent possible in the regular school program as soon as possible. At no time can a program be selected in this category (III.1.B.) to place the students in situations where the method of instruction will result in a substantial delay in providing these students with the necessary English language skills needed by or required of other students at the time of graduation.

NOTE: You will generally find that students in this category are recent immigrants.

2. In the case of the predominant speaker of the language other than English (speaks mostly the language other than English, but speaks some English):

A. At the Elementary Level:

Any one or combination of the following programs is acceptable.

1. TBE
2. Bilingual/Bicultural Program
3. Multilingual/Multicultural Program
In the case of a TBE, the district must provide predictive data which show that such student(s) are ready to make the transition into English and will educationally succeed in content areas and the educational program in which he/she is to be placed.

Since an ESL program does not consider the affective nor cognitive development of the students in this category and the time and maturation variables are different here than for students at the secondary level, an ESL program is not appropriate.

B. At the Intermediate and High School Levels:

The district must provide data relative to the student's academic achievement and identify those students who have been in the school system for less than a year. If the student(s) who have been in the school system for less than a year are achieving at grade level or better, the district is not required to provide additional educational programs. If, however, the students who have been in the school system for a year or more are underachieving (not achieving at grade level) . . . the district must submit a plan to remedy the situation. This may include smaller class size, enrichment materials, etc. In either this case or the case of students who are underachieving and have been in the school system for less than a year, the remedy must include any one or combination of the following (1) an ESL, (2) a TBE, (3) a Bilingual/Bicultural Program (4) a Multilingual/Multicultural Program. But such students may not be placed in situations where all instruction is conducted in the native language as may be prescribed for the monolingual speaker of a language.
other than English, if the necessary prerequisite skills in the native language have not been taught. In this case some form of compensatory education in the native language must be provided.

NOTE: You will generally find that students in this category are not recent immigrants.

3. In the case of the bilingual speaker (speaks both the language other than English and English with equal ease) the district must provide data relative to the student(s) academic achievement.

In this case the treatment is the same at the elementary, intermediate and secondary levels and differs only in terms of underachievers and those students achieving at grade level or better.

A. For the students in this category who are underachieving, treatment corresponds to the regular program requirements for all racially/ethnically identifiable classes or tracks composed of students who are underachieving, regardless of their language background.

B. For the students in this category who are achieving at grade level or better, the district is not required to provide additional educational programs.
4. In the case of the predominant speaker of English (speaks mostly English, but some of a language other than English) treatment for these students is the same as III, 3 above.

5. In the case of the monolingual speaker of English (speaks English exclusively) treat the same as III, 3 above.

NOTE: ESL is a necessary component of all the aforementioned programs. However, an ESL program may not be sufficient as the only program operated by a district to respond to the educational needs of all the types of students described in this document.

IV. Required and Elective Courses

In the fourth step of such plan the district must show that the required and elective courses are not designed to have a discriminatory effect

A. Required courses. Required courses (example: American History) must not be designed to exclude pertinent minority developments which have contributed to or influenced such subjects.

B. Elective Courses and Co-curricular Activities. Where a district has been found out of compliance and operates racially/ethnically
identifiable elective courses or co-curricular activities, the plan must address this area by either educationally justifying the racial/ethnic identifiability of these courses or activities, eliminating them, or guaranteeing that these courses or co-curricular activities will not remain racially/ethnically identifiable.

There is a prima facie case of discrimination if courses are racially/ethnically identifiable.

Schools must develop strong incentives and encouragement for minority students to enroll in electives where minorities have not traditionally enrolled. In this regard, counselors, principals and teachers have a most important role. Title VI compliance questions are raised by any analysis of counseling practices which indicates that minorities are being advised in a manner which results in their being disproportionately channeled into certain subject areas or courses. The school district must see that all of its students are encouraged to fully participate and take advantage of all educational benefits.

Close monitoring is necessary to evaluate to what degree minorities are in essence being discouraged from taking certain electives and encouraged to take other elective courses and insist that to eliminate discrimination and to provide equal educational opportunities, districts must take affirmative duties to see that minority students are not excluded from any elective courses and over included in others.
All newly established elective courses cannot be designed to have a discriminatory effect. This means that a district cannot, for example, initiate a course in Spanish literature designed exclusively for Spanish-speaking students so that enrollment in that subject is designed to result in the exclusion of students whose native language is English but who could equally benefit from such a course and/or be designed to result in the removal of the minority students in question from a general literature course which should be designed to be relevant for all the students served by the district.

V. Instructional Personnel Requirements

Instructional personnel teaching the students in question must be linguistically/culturally familiar with the background of the students to be affected.

The student/teacher ratio for such programs should equal or be less than (fewer students per teacher) the student/teacher ratio for the district. However, we will not require corrective action by the district if the number of students in such programs are no more than five greater per teacher than the student/teacher ratio for the district.

If instructional staffing is inadequate to implement program requirements, in-service training, directly related to improving student performance is acceptable as
an immediate and temporary response. Plans for providing this training must include at least the following:

1. Objectives of training (must be directly related to ultimately improving student performance)

2. Methods by which the objective(s) will be achieved

3. Method for selection of teachers to receive training

4. Names of personnel doing the training and location of training

5. Content of training

6. Evaluation design of training and performance criteria for individuals receiving the training

7. Proposed timetables

This temporary in-service training must continue until staff performance criteria has been met.

Another temporary alternative is utilizing para-professional persons with the necessary language(s) and cultural background(s). Specific instructional roles of such personnel must be included in the plan. Such plan must show that this personnel will aid in teaching and not be restricted to those areas unrelated to the teaching process (checking roll, issuing tardy cards, etc.)

In addition, the district must include a plan for securing the number of qualified teachers necessary to fully implement the instructional program. Development and
training of para-professionals may be an important source for the development of bilingual/bicultural teachers.

VI. Racial/Ethnic Isolation and/or Identifiability of Schools and Classes

A. Racially/Ethnically Isolated and/or Identifiable Schools—

It is not educationally necessary nor legally permissible to create racially/ethnically identifiable schools in order to respond to student language characteristics as specified in the programs described herein.

B. Racially/Ethnically Isolated and/or Identifiable Classes—

The implementation of the aforementioned educational models do not justify the existence of racially/ethnically isolated or identifiable classes, per se. Since there is no conflict in this area as related to the application of the Emergency School Aid Act (ESAA) and existing Title VI regulations, standard application of those regulations is effective.
VII. Notification to Parents of Students Whose Primary or Home Language Is Other Than English

A. School districts have the responsibility to effectively notify the parents of the students identified as having a primary or home language other than English of all school activities or notices which are called to the attention of other parents. Such notice, in order to be adequate, must be provided in English and the necessary language(s) comprehensively paralleling the exact content in English. Be aware that a literal translation may not be sufficient.

B. The district must inform all minority and non-minority parents of all aspects of the programs designed for students of limited English-speaking ability and that these programs constitute an integral part of the total school program.

VIII. Evaluation

A "Product and Process" evaluation is to be submitted in the plan. This type of evaluation, in addition to stating the "product" (end result), must include "process evaluation" (periodic evaluation throughout the implementation stage). A description of the evaluation design is required. Time-lines (target for completion of steps) is an essential component.
For the first three years, following the implementation of a plan, the district must submit to the OCR Regional Office at the close of sixty days after school starts, a "progress report" which will show the steps which have been completed. For those steps which have not been completed, a narrative from the district is necessary to explain why the targeted completion dates were not met. Another "progress report" is also due at the close of 30 days after the last day of the school year in question.

IX. Definition of Terms:

1. Bilingual/Bicultural Program

A program which utilizes the student's native language (example: Navajo) and cultural factors in instructing, maintaining and further developing all the necessary skills in the student's native language and culture while introducing, maintaining, and developing all the necessary skills in the second language and culture (example: English). The end result is a student who can function, totally, in both language and cultures.

2. English as a Second Language (ESL)

A structured language acquisition program designed to teach English to students whose native language is not English.
3. High Intensive Language Training (HILT)

A total immersion program designed to teach students a new language.

4. Multilingual/Multicultural Program

A program operated under the same principles as a Bilingual/Bicultural Program (X, 1) except that more than one language and culture, in addition to English language and culture is treated. The end result is a student who can function, totally, in more than two languages and cultures.

5. Transitional Bilingual Education Program (TBE)

A program operated in the same manner as a Bilingual/Bicultural Program, except that once the student is fully functional in the second language (English), further instruction in the native language is no longer required.

6. Underachievement

Underachievement is defined as performance in each subject area (e.g. reading, problem solving) at one or more standard deviations below district norms as determined by some objective measures for non-ethnic/racial minority students. Mental ability scores cannot be utilized for determining grade expectancy.
7. Instructional Personnel

Persons involved in teaching activities. Such personnel includes, but is not limited to, certified, credentialized teachers, para-professionals, teacher aides, parents, community volunteers, youth tutors, etc.

Source:

APPENDIX E

OCR 1985
TO: OCR Senior Staff

FROM: William L. Smith, Acting Assistant Secretary for Civil Rights


I have recently received a number of inquiries regarding the Office for Civil Rights' (OCR) policy related to making determinations of compliance under Title VI of the Civil Rights Act of 1964 as regards the treatment of national origin minority students who are limited English proficient (language minority students). In responding to these inquiries, I am aware that our existing policy and procedures were issued several years ago and may be in need of updating. In fact, the Policy and Enforcement Service (PES) will issue such an update during the third quarter of FY 1990.
Until that document is available, you can, of course, continue to follow our current policy documents available to you. The May 25th Memorandum, as affirmed by the Supreme Court in the Lau v. Nichols decision, 44 U.S. 653 (1974), provides the legal standard for the Education Department's Title VI policy concerning discrimination on the basis of national origin. The procedures OCR follows in applying this legal standard on a case-by-case basis are set forth in a document issued to OCR staff on December 3, 1985, entitled, OCR's Title VI Language Minority Compliance Procedures (copy attached).

In developing its policy update, PES staff will review the cases we have investigated over the past few years, in addition to examining the case law, to determine where additional guidance may be needed. It will be helpful for PES attorneys to discuss various aspects of these cases with some regional staff who have had substantial recent experience in applying our case-by-case approach. I understand that there have been some excellent investigations carried out under this policy. You will be consulted prior to any discussions on these matters with members of your staff. In the meantime, I urge you to continue to investigate complaints of discrimination against national origin minority students and to conduct compliance reviews on this issue where appropriate.

If you have questions about the application of current policy, or if you have suggestions for policy modifications, you may call Cathy Lewis at 732-1635, or send your information to me in writing.
ISSUE

This discussion provides a description of the procedures followed by the office for Civil Rights (OCR) in making determinations of compliance with Title VI of the Civil Rights Act of 1964, as regards the treatment of national origin minority students with limited-English proficiency (language minority students) enrolled in educational programs that receive Federal financial assistance from the Department of Education.

BACKGROUND

As part of the Civil Rights Act of 1964, Congress enacted Title VI, prohibiting discrimination on the grounds of race, color or national origin in programs or activities that receive Federal financial assistance. In May 1970, the former Department of Health, Education and Welfare (DHEW), published a memorandum to school districts on the Identification of Discrimination and Denial of Services on the Basis of National Origin (the May 25th Memorandum, 35 Fed. Reg.11595 - Tab
A). The purpose of the May 25th Memorandum was to clarify OCR's Title VI policy on issues concerning the responsibility of school districts to provide equal educational opportunity to language minority students. The May 25th Memorandum stated in part:

Where inability to speak and understand the English language excludes national origin minority-group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.

In 1974, the Supreme Court upheld this requirement to take affirmative steps in the Lau v. Nichols decision, 414 U.S. 653 (1974). The May 25th Memorandum, as affirmed by Lau, continues to provide the legal standard for the Education Department's Title VI policy concerning discrimination on the basis of national origin. The Lau decision did not require school districts to use any particular program or teaching method. The opinion of the Court states:

No specific remedy is urged upon us. Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instruction to this group in Chinese is another. There may be others. Id. at 565.
In 1975, the former DHEW promulgated a document designed to describe appropriate educational steps that would satisfy the Supreme Court's Lau mandate (Task Force Findings Specifying Remedies Available For Eliminating Past Educational Practices Ruled Unlawful Under Lau v. Nichols.) These "Lau Remedies" evolved into de facto compliance standards, which allowed undue Federal influence over educational judgments that could and should be made by local and state educational authorities.

In August 1980, the newly formed Department of Education published a Notice of Proposed Rulemaking (NPRM) that sought to replace the unofficial "Lau Remedies" with a document that would have set forth requirements for all schools enrolling language minority students. The 1980 NPRM proposed bilingual education as the required method of instruction in schools with sufficient numbers of language minority students of one language group.

Subsequently, the Department determined that the proposed regulations were intrusive and burdensome. They were withdrawn on February 2, 1981, and OCR put into effect non-prescriptive interim procedures pertaining to the effective participation of language minority students in the educational program offered by a school district. Under these procedures, OCR reviews the compliance of school districts on a case-by-case basis. Any educational approach that ensures the effective participation of language minority students in the district's educational program is accepted as a means of complying with the Title VI requirements.
Since this compliance approach has been successful, OCR has determined that these procedures provide sufficient guidance for OCR staff and school districts. Accordingly, OCR will continue to follow procedures which allow for a case-by-case determination of a district's compliance status. Set forth below is an updated statement of OCR's current procedures, and a discussion of the analysis applied by OCR in assessing a district's efforts to meet the requirements of Title VI and the May 25th Memorandum.

OCR'S CURRENT PROCEDURES

OCR conducts investigations of the educational services provided for language minority students either as a result of a complaint allegation or through a compliance review. Although the May 25th Memorandum and Lau v. Nichols decision require school districts to "take affirmative steps" to open their instructional programs to language minority students, OCR does not require the submission of a written compliance agreement (plan) unless a violation of Title VI has been established.

The affirmative steps required by the May 25th Memorandum have been interpreted to apply to national origin minority students who are learning English as a language, or whose ability to learn English has been substantially diminished through lack of exposure to the language. The May 25th Memorandum does not generally cover national origin minority students whose only language is English,
and who may be in difficulty academically, or who have language skills that are less than adequate.

In providing educational services to language minority students, school districts may use any method or program that has proven successful, or may implement any sound educational program that promises to be successful. Districts are expected to carry out their programs, evaluate the results to make sure the programs are working as anticipated, and modify programs that do not meet these expectations.

OCR considers two general areas in determining whether a school district that enrolls language minority students is in compliance with Title VI. These are:

a) whether there is a need for the district to provide an alternative program designed to meet the educational needs of all language minority students; and

b) whether the district's alternative program is likely to be effective in meeting the educational needs of its language minority students.

The question of need for an alternative program is resolved by determining whether language minority students are able to participate effectively in the regular instructional program. When they are not, the school district must provide an alternative program. In cases where the number of these students is small, the alternative program may be informal (i.e., no formal program description is required.)
The second major area of consideration is whether the district's alternative program is likely to be effective in meeting the educational needs of its language minority students. There is considerable debate among educators about the most effective way to meet the educational needs of language minority students in particular circumstances. A variety of factors influence the success of any approach or pedagogy. These factors include not only individual student characteristics, such as age and previous education, but also school characteristics, such as the number and the concentration of different language groups. OCR staff is not in the position to make programmatic determinations and does not presume to make those decisions.

OCR's deliberations are appropriately directed to determining whether the district has addressed these problems, and has developed and implemented an educational program designed to ensure the effective participation of language minority students. The following sets forth an analytical framework used by OCR in determining whether a school district's program is in compliance with Title VI in this area.

I. Whether there is a Need for an Alternative Program?

The determination of whether all language minority students in need have been served may be made in a number of ways. For example, a district may establish cut-off criteria for the placement of language minority students in either the regular or alternative programs based on the English language proficiency levels required for
effective participation in their regular instructional programs. Alternately, past academic records of language minority students may be used to predict, for example, which new students are likely to require the assistance provided by the alternative program.

Many school districts screen students using information such as a language assessment test, information from parents, or structured interviews, to determine which language minority students may need further assessment and possible placement into an alternative program. The appropriateness of assessment methods and procedures depends upon several variables, such as the number of language minority students in each language group, the ages of these students, the size of the school district, and the availability of reliable assessment instruments in the different languages.

The district may show that the academic performance of language minority students in the regular instructional program indicates that these students do not require the assistance provided by the alternative program. The district may also show that language minority students who need assistance can readily transfer from the regular to the alternative program for the portion of the school day during which assistance is needed.

OCR will find a violation of Title VI if language minority students in need of an alternative program are not being provided such a program. However, the mere
absence of formal identification and assessment procedures and of a formal
program does not, per se, constitute a violation of Title VI. Regional staff are
cautions to review carefully the school district’s reasons for not having such
procedures, and the effectiveness of any informal methods that may be used. For
example, a school district that has received a recent influx of language minority
students may not be reasonably expected to have in place the type of procedures
and programs that other districts with more predictable language minority student
populations should have. Similarly, a school district with only a small number of
language minority students, may not need the formal procedures and programs
necessary in districts with much larger numbers of such students. In the past, OCR
has worked with such districts, in conjunction with State education agencies, to
provide technical assistance in an effort to prevent future Title VI problems.

II. Whether the Alternative Program is likely to be Effective?

A. Is the alternative program based on a sound design?

School districts must demonstrate that the alternative program designed to ensure
the effective participation of language minority students in the educational program
is based on a sound educational approach.

OCR avoids making educational judgments or second-guessing decisions made by
local education officials. Instead, OCR looks at all the available evidence describing
the steps taken to ensure that sound and appropriate programs are in place. Example of factors that would be considered are:

Whether the program has been determined to be a sound educational program by at least some experts in the field.

An expert in the field can be defined as someone whose experience and training expressly qualifies him or her to render such judgments and whose objectivity is not at issue.

Whether there is an explanation of how the program meets the needs of language minority students.

Such an explanation would normally include a description of the program components and activities, along with a rationale that explains how the program activities can be reasonably expected to meet the educational needs of language minority students.

Whether the district is operating under an approved state plan or other accepted plans.

Plans that have previously been accepted by OCR as being in compliance with Title VI continue to be acceptable. These plans may be modified by school districts at any time. When comprehensive programs are mandated by state law, OCR will
approve such plans, upon request, where it can be demonstrated that the plans provide a sound educational program that will meet the educational needs of language minority students. When a plan applies only to certain grade levels, the acceptance memorandum is limited to those grades covered under the state plan.

B. Is the alternative program being carried out in such a way as to ensure the effective participation of the language minority students as soon as reasonably possible?

Districts are expected to carry out their programs effectively, with appropriate staff (teachers and aides), and with adequate resources (instructional materials and equipment).

Appropriateness of staff

The appropriateness of Staff is indicated by whether their training, qualifications, and experience are consonant with the requirements of the program. For example, their appropriateness would be questioned if a district has established an English-as-a-Second-Language (ESL) program, but the staff had no ESL training and there was no provision for ESL teacher training.
Adequacy of resources

The adequacy of resources is determined by the timely availability of required equipment and instructional materials. Limited financial resources do not justify failure to remedy a Title VI violation. However, OCR considers the extent to which a particular remedy would require a district to divert resources from other necessary educational resources and services.

Similarly, districts faced with a shortage of trained teachers, or with a multiplicity of languages, may not be able to meet certain staffing requirements, such as those needed for an intensive ESL program or a bilingual program. OCR does not require a program that places unrealistic expectations on a district.

C. Is the alternative program being evaluated by the district and are modifications being made in the program when the district's evaluation indicates they are needed?

A district will be in compliance with Title VI when it has adopted an alternative educational program that, when viewed in its entirety, effectively teaches language minority students English, and moves them into the regular educational program within a reasonable period of time.
A more difficult compliance determination arises when a district implements an educational approach which, by all available objective measures, does not provide language minority students with the opportunity for effective participation.

For the reasons discussed earlier in this document, OCR approaches this compliance issue with great caution. Since OCR does not presume to know which educational strategy is most appropriate in a given situation, the failure of any particular strategy or program employed by a school district is more properly addressed by school officials. OCR looks to local school officials to monitor the effectiveness of their programs, to determine what modifications may be needed when the programs are not successful after a reasonable trial period, and to implement such modifications. A school district's continued or consistent failure to improve an ineffective alternative program for language minority students may lead to a finding of noncompliance with Title VI.

There are no specific regulatory requirements regarding the data a district must keep on its alternative programs for language minority students. OCR's current approach to determining compliance with Title VI on this issue does not require that new, additional, or specifically designed records be kept. It is expected that a sound educational program will include the maintenance of reasonably accurate and complete data regarding its implementation and the progress of students who move through it.
CONCLUSION

In viewing a school district's compliance with Title VI regarding effective participation of language minority students in the educational program, OCR does not require schools to follow any particular educational approach. The test for legal adequacy is whether the strategy adopted works -- or promises to work -- on the basis of past practice or in the judgment of experts in the field. OCR examines all the available evidence within the analytical framework described, and determines whether the preponderance of evidence supports the conclusion that the district is implementing a sound educational program that ensures the effective participation of its language minority students.

ISSUED INITIALLY ON DECEMBER 3, 1985

REISSUED WITHOUT CHANGE ON APRIL 6, 1990

William L. Smith

Acting Assistant Secretary for Civil Rights

Attachment
MEMORANDUM

SEP 27 1991

TO : OCR Senior Staff

FROM : Michael L. Williams, Assistant Secretary for Civil Rights

SUBJECT : Policy Update on Schools' Obligations Toward National Origin Minority Students With Limited-English Proficiency (LEP students)

This policy update is primarily designed for use in conducting Lau[1] compliance reviews -- that is, compliance reviews designed to determine whether schools are complying with their obligation under the regulation implementing Title VI of the Civil Rights Act of 1964 to provide any alternative language programs necessary to ensure that national origin minority students with limited-English proficiency (LEP students) have meaningful access to the schools' programs. The policy update
adheres to OCR's past determination that Title VI does not mandate any particular program of instruction for LEP students. In determining whether the recipient is operating a program for LEP students that meets Title VI requirements, OCR will consider whether: (1) the program the recipient chooses is recognized as sound by some experts in the field or is considered a legitimate experimental strategy; (2) the programs and practices used by the school system are reasonably calculated to implement effectively the educational theory adopted by the school; and (3) the program succeeds, after a legitimate trial, in producing results indicating that students' language barriers are actually being overcome. The policy update also discusses some difficult issues that frequently arise in Lau investigations. An appendix to the policy discusses the continuing validity of OCR's use of the Castaneda[2] standard to determine compliance with the Title VI regulation.


Part I of the policy update provides additional guidance for applying the May 1970 and December 1985 memoranda that describe OCR's Title VI Lau policy. In Part I,
more specific standards are enunciated for staffing requirements, exit criteria and program evaluation. Policy issues related to special education programs, gifted/talented programs, and other special programs are also discussed. Part II of the policy update describes OCR's policy with regard to segregation of LEP students.

The appendix to this policy update discusses the use of the Castaneda standard and the way in which Federal courts have viewed the relationship between Title VI and the Equal Educational Opportunities Act of 1974.

With the possible exception of Castaneda, which provides a common sense analytical framework for analyzing a district's program for LEP students that has been adopted by OCR, and Keyes v. School District No. 1, which applied the Castaneda principles to the Denver Public Schools, most court decisions in this area stop short of providing OCR and recipient institutions with specific guidance. The policy standards enunciated in this document attempt to combine the most definitive court guidance with OCR's practical legal and policy experience in the field. In that regard, the issues discussed herein, and the policy decisions reached, reflect a careful and thorough examination of Lau case investigations carried out by OCR's regional offices over the past few years, comments from the regional offices on a draft version of the policy, and lengthy discussions on the issues with some of OCR's most experienced investigators. Specific recommendations from
participants at the Investigative Strategies Workshop have also been considered and incorporated where appropriate.

I. Additional guidance for applying the May 1970 and December 1985 memoranda.

The December 1985 memorandum listed two areas to be examined in determining whether a recipient was in compliance with Title VI: (1) the need for an alternative language program for LEP students; and (2) the adequacy of the program chosen by the recipient. Issues related to the adequacy of the program chosen by the recipient will be discussed first, as they arise more often in Lau investigations. Of course, the determination of whether a recipient is in violation of Title VI will require a finding that language minority students are in need of an alternative language program in order to participate effectively in the recipient's educational program.

A. Adequacy of Program

This section of the memorandum provides additional guidance for applying the three-pronged Castaneda approach as a standard for determining the adequacy of a recipient's efforts to provide equal educational opportunities for LEP students.
1. Soundness of educational approach

Castaneda requires districts to use educational theories that are recognized as sound by some experts in the field, or at least theories that are recognized as legitimate educational strategies. 648 F. 2d at 1009. Some approaches that fall under this category include transitional bilingual education, bilingual/bicultural education, structured immersion, developmental bilingual education, and English as a Second Language (ESL). A district that is using any of these approaches has complied with the first requirement of Castaneda. If a district is using a different approach, it is in compliance with Castaneda if it can show that the approach is considered sound by some experts in the field or that it is considered a legitimate experimental strategy.

2. Proper Implementation

Castaneda requires that "the programs and practices actually used by a school system [be] reasonably calculated to implement effectively the educational theory adopted by the school." 648 F. 2d at 1010. Some problematic implementation issues have included staffing requirements for programs, exit criteria, and access to programs such as gifted/talented programs. These issues are discussed below.

Staffing requirements:
Districts have an obligation to provide the staff necessary to implement their chosen program properly within a reasonable period of time. Many states and school
districts have established formal qualifications for teachers working in a program for limited-English-proficient students. When formal qualifications have been established, and when a district generally requires its teachers in other subjects to meet formal requirements, a recipient must either hire formally qualified teachers for LEP students or require that teachers already on staff work toward attaining those formal qualifications. See Castaneda, 648 F. 2d at 1013. A recipient may not in effect relegate LEP students to second-class status by indefinitely allowing teachers without formal qualifications to teach them while requiring teachers of non-LEP students to meet formal qualifications. See 34 C.F.R. § 100.3(b)(ii).[4]

Whether the district's teachers have met any applicable qualifications established by the state or district does not conclusively show that they are qualified to teach in an alternative language program. Some states have no requirements beyond requiring that a teacher generally be certified, and some states have established requirements that are not rigorous enough to ensure that their teachers have the skills necessary to carry out the district's chosen educational program.[5] Discussed below are some minimum qualifications for teachers in alternative language programs.

If a recipient selects a bilingual program for its LEP students, at a minimum, teachers of bilingual classes should be able to speak, read, and write both languages, and should have received adequate instruction in the methods of bilingual education. In addition, the recipient should be able to show that it has determined that its bilingual teachers have these skills. See Keyes, 576 F. Supp. at
1516-17 (criticizing district for designating teachers as bilingual based on an oral interview and for not using standardized tests to determine whether bilingual teachers could speak and write both languages); cf. Castaneda, 648 F. 2d at 1013 ("A bilingual education program, however sound in theory, is clearly unlikely to have a significant impact on the language barriers confronting limited English speaking school children, if the teachers charged with the day-to-day responsibility for educating these children are termed 'qualified' despite the fact that they operate in the classroom under their own unremedied language disability"). In addition, bilingual teachers should be fully qualified to teach their subject.

If a recipient uses a method other than bilingual education (such as ESL or structured immersion), the recipient should have ascertained that teachers who use those methods have been adequately trained in them. This training can take the form of in-service training, formal college coursework, or a combination of the two. In addition, as with bilingual teachers, a recipient should be able to show that it has determined that its teachers have mastered the skills necessary to teach effectively in a program for LEP students. In making this determination, the recipient should use validated evaluative instruments -- that is, tests that have been shown to accurately measure the skills in question. The recipient should also have the teacher's classroom performance evaluated by someone familiar with the method being used.
ESL teachers need not be bilingual if the evidence shows that they can teach effectively without bilingual skills. Compare Teresa P., 724 F. Supp. at 709 (finding that LEP students can be taught English effectively by monolingual teachers), with Keyes, 576 F. Supp. at 1517 ("The record shows that in the secondary schools there are designated ESL teachers who have no second language capability. There is no basis for assuming that the policy objectives of the [transitional bilingual education] program are being met in such schools").

To the extent that the recipient's chosen educational theory requires native language support, and if the program relies on bilingual aides to provide such support, the recipient should be able to demonstrate that it has determined that its aides have the appropriate level of skill in speaking, reading, and writing both languages.[6] In addition, the bilingual aides should be working under the direct supervision of certificated classroom teachers. Students should not be getting instruction from aides rather than teachers. 34 C.F.R. § 100.3(b)(1)(ii); see Castaneda, 648 F.2d at 1013 ("The use of Spanish speaking aides may be an appropriate interim measure, but such aides cannot. . .take the place of qualified bilingual teachers").

Recipients frequently assert that their teachers are unqualified because qualified teachers are not available. If a recipient has shown that it has unsuccessfully tried to hire qualified teachers, it must provide adequate training to teachers already on staff to comply with the Title VI regulation. See Castaneda, 648 F. 2d at 1013. Such training must take place as soon as possible. For example, recipients sometimes
require teachers to work toward obtaining a credential as a condition of employment in a program for limited-English-proficient students. This requirement is not, in itself, sufficient to meet the recipient's obligations under the Title VI regulation. To ensure that LEP students have access to the recipient's programs while teachers are completing their formal training, the recipient must ensure that those teachers receive sufficient interim training to enable them to function adequately in the classroom, as well as any assistance from bilingual aides that may be necessary to carry out the recipient's interim program.

Exit Criteria for Language Minority LEP Students

Once students have been placed in an alternative language program, they must be provided with services until they are proficient enough in English to participate meaningfully in the regular educational program. Some factors to examine in determining whether formerly LEP students are able to participate meaningfully in the regular educational program include: (1) whether they are able to keep up with their non-LEP peers in the regular educational program; (2) whether they are able to participate successfully in essentially all aspects of the school's curriculum without the use of simplified English materials; and (3) whether their retention in-grade and dropout rates are similar to those of their non-LEP peers.

Generally, a recipient will have wide latitude in determining criteria for exiting students from an alternative language program, but there are a few basic standards
that should be met. First, exit criteria should be based on objective standards, such as standardized test scores, and the district should be able to explain why it has decided that students meeting those standards will be able to participate meaningfully in the regular classroom. Second, students should not be exited from the LEP program unless they can read, write, and comprehend English well enough to participate meaningfully in the recipient's program. Exit criteria that simply test a student's oral language skills are inadequate. Keyes, 576 F. Supp. at 1518 (noting importance of testing reading and writing skills as well as oral language skills). Finally, alternative programs cannot be "dead end" tracks to segregate national origin minority students.

Many districts design their LEP programs to temporarily emphasize English over other subjects. While schools with such programs may discontinue special instruction in English once LEP students become English-proficient, schools retain an obligation to provide assistance necessary to remedy academic deficits that may have occurred in other subjects while the student was focusing on learning English. Castaneda, 648 F. 2d at 1011.

Special Education Programs

OCR's overall policy on this issue, as initially announced in the May 1970 memorandum, is that school systems may not assign students to special education programs on the basis of criteria that essentially measure and evaluate English language skills. The additional legal requirements imposed by Section 504 also
must be considered when conducting investigations on this issue. This policy update does not purport to address the numerous Title VI and Section 504 issues related to the placement of limited English-proficient students in special education programs. Although OCR staff are very familiar with Section 504 requirements, additional guidance on the relationship between Section 504 and Lau issues that arise under Title VI may be helpful. A separate policy update will be prepared on those issues.

Pending completion of that policy update, Lau compliance reviews should continue to include an inquiry into the placement of limited-English-proficient students into special education programs where there are indications that LEP students may be inappropriately placed in such programs, or where special education programs provided for LEP students do not address their inability to speak or understand English. In addition, compliance reviews should find out whether recipients have policies of "no double services": that is, refusing to provide both alternative language services and Special education to students who need them. Such inquiries would entail obtaining basic data and information during the course of a Lau compliance review regarding placement of LEP students into special education programs. If data obtained during the inquiry indicates a potential problem regarding placement of LEP students into special education, the regional office may want to consult headquarters about expanding the time frames for the review to ensure that it can devote the time and staff resources to conduct a thorough investigation of these issues. Alternatively, the region could schedule a compliance
review of the special education program at a later date. In small to medium-sized
school districts, regional offices may be able to gather sufficient data to make a
finding regarding the special education program as part of the overall Lau review.

Gifted/Talented Programs and Other Specialized Programs

The exclusion of LEP students from specialized programs such as gifted/talented
programs may have the effect of excluding students from a recipient's programs on
the basis of national origin, in violation of 34 C.F.R. § 100.3(b)(2), unless the
exclusion is educationally justified by the needs of the particular student or by the
nature of the specialized program.

LEP students cannot be categorically excluded from gifted/talented or other
specialized programs. If a recipient has a process for locating and identifying
gifted/talented students, it must also locate and identify gifted/talented LEP students
who could benefit from the program.

In determining whether a recipient has improperly excluded LEP students from its
gifted/talented or other specialized programs, OCR will carefully examine the
recipient's explanation for the lack of participation by LEP students. OCR will also
consider whether the recipient has conveyed these reasons to students and parents.
Educational justifications for excluding a particular LEP student from a specialized program should be comparable to those used in excluding a non-LEP peer and include: (1) that time for the program would unduly hinder his/her participation in an alternative language program; and (2) that the specialized program itself requires proficiency in English language skills for meaningful participation.

Unless the particular gifted/talented program or program component requires proficiency in English language skills for meaningful participation, the recipient must ensure that evaluation and testing procedures do not screen out LEP students because of their limited-English proficiency. To the extent feasible, tests used to place students in specialized programs should not be of a type that the student's limited proficiency in English will prevent him/her from qualifying for a program for which they would otherwise be qualified.

3. Program Evaluation

In return for allowing schools flexibility in choosing and implementing an alternative language program, Castaneda requires recipients to modify their programs if they prove to be unsuccessful after a legitimate trial. As a practical matter, recipients cannot comply with this requirement without periodically evaluating their programs. If a recipient does not periodically evaluate or modify its programs, as appropriate, it is in violation of the Title VI regulation unless its program is successful. Cf. Keyes, 576 F. Supp. at 1518 ("The defendant's program
is also flawed by the failure to adopt adequate tests to measure the results of what
the district is doing. . . . The lack of an adequate measurement of the effects of such
service [to LEP students] is a failure to take reasonable action to implement the
transitional bilingual policy").

Generally, "success" is measured in terms of whether the program is achieving the
particular goals the recipient has established for the program. If the recipient has
established no particular goals, the program is successful if its participants are over­
coming their language barriers sufficiently well and sufficiently promptly to
participate meaningfully in the recipient's programs.

B. Need for a formal program

Recipients should have procedures in place for identifying and assessing LEP
students. As the December 1985 memorandum stated, if language minority students
in need of an alternative language program are not being served, the recipient is in
violation of Title VI.

The type of program necessary to adequately identify students in need of services
will vary widely depending on the demographics of the recipients' schools. In
districts with few LEP students, at a minimum, school teachers and administrators
should be informed of their obligations to provide necessary alternative language
services to students in need of such services, and of their obligation to seek any
assistance necessary to comply with this requirement. Schools with a relatively
large number of LEP students would be expected to have in place a more formal
program.

Title VI does not require an alternative program if, without such a program, LEP
students have equal and meaningful access to the district's programs. It is
extremely rare for an alternative program that is inadequate under Castaneda to
provide LEP students with such access. If a recipient contends that its LEP students
have meaningful access to the district's programs, despite the lack of an alternative
program or the presence of a program that is inadequate under Castaneda, some
factors to consider in evaluating this claim are: (1) whether LEP students are
performing as well as their non-LEP peers in the district, unless some other
comparison seems more appropriate;[7] (2) whether LEP students are successfully
participating in essentially all aspects of the school's curriculum without the use of
simplified English materials; and (3) whether their dropout and retention-in-grade
rates are comparable to those of their non-LEP peers. Cf. Keyes, 576 F. Supp. at
1519 (high dropout rates and use of "leveled English" materials indicate that district
is not providing equal educational opportunity for LEP students). If LEP students
have equal access to the district's programs under the above standards, the recipient
is not in violation of Title VI even if it has no program or its program does not meet
the Castaneda standard. If application of the above standards shows that LEP
students do not have equal access to the district's programs, and the district has no
alternative language program, the district is in violation of Title VI. If the district is
implementing an alternative program, it then will be necessary to apply the three-pronged Castaneda approach to determine whether the program complies with Title VI.

II. Segregation of LEP students

Providing special services to LEP students will usually have the effect of segregating students by national origin during at least part of the school day. Castaneda states that this segregation is permissible because "the benefits which would accrue to [LEP] students by remedying the language barriers which impede their ability to realize their academic potential in an English language educational institution may outweigh the adverse effects of such segregation." 648 F. 2d at 998.

OCR's inquiry in this area should focus on whether the district has carried out its chosen program in the least segregative manner consistent with achieving its stated goals. In other words, OCR will not examine whether ESL, transitional bilingual education, developmental bilingual education, bilingual/bicultural education, structured immersion, or any other theory adopted by the district is the least segregative program for providing alternative language services to LEP students. Instead, OCR will examine whether the degree of segregation in the program is necessary to achieve the program's educational goals.
The following practices could violate the anti-segregation provisions of the Title VI regulation: (1) segregating LEP students for both academic and nonacademic subjects, such as recess, physical education, art and music; [8] and (2) maintaining students in an alternative language program longer than necessary to achieve the district's goals for the program.

APPENDIX: Use of the Castaneda standard to determine compliance with Title VI.

In determining whether a recipient's program for LEP students complies with Title VI of the Civil Rights Act of 1964, OCR has used the standard set forth in Castaneda v. Pickard, 648 F. 2d 989 (5th Cir. 1981). Under this standard, a program for LEP students is acceptable if: (1) "[the] school system is pursuing a program informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy;" (2) "the programs and practices actually used by [the] school system are reasonably calculated to implement effectively the educational theory adopted by the school;" and (3) the school's program succeeds, after a legitimate trial, in producing results indicating that the language barriers confronting students are actually being overcome." Id. at 1009-10.


In view of the similarity between the EEOA and the policy established in the 1970 OCR memorandum, in 1985 OCR adopted the Castaneda standard for determining whether recipients' programs for LEP students complied with the Title VI regulation. Several courts have also treated Title VI and the EEOA as imposing the same requirements regarding limited-English-proficient students. See Heavy Runner v. Bremner, 522 F. Supp. 162, 165 (D. Mont. 1981); Rios v. Read, 480 F. Supp. 14, 21-24 (E.D.N.Y. 1978)(considered Title VI, § 1703(f), and Bilingual Education Act of 1974 claims together; used 1975 Lau Remedies[10] to determine compliance); Cintron v. Brentwood Union Free School Dist., 455 F. Supp. 57, 63-64 (E.D.N.Y. 1978) (same); see also Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030 (7th Cir. 1987) (used Castaneda standard for § 1703(f) claim; remanded claim under Title VI regulation without specifying standard to be used in resolving it, except to note that proof of discriminatory intent was not necessary to establish a claim under the Title VI regulation); Idaho Migrant Council v. Board of Education, 647 F.2d 69 (9th Cir. 1981) (Idaho state education agency had an obligation under § 1703(f) and Title VI to ensure that needs of LEP students were addressed; did not discuss any differences in obligations under Title VI and § 1703(f)).
Castaneda itself did not treat Title VI and the EEOA interchangeably, however. Instead, it distinguished between them on the ground that a showing of intentional discrimination was required for a Title VI violation, while such a showing was not required for a § 1703(f) violation. Castaneda, 648 F.2d at 1007. See also Keyes v. School Dist. No. 1, 576 F. Supp. 1503, 1519 (D. Colo. 1983) (court found that alternative language program violated § 1703(f) and elected not to determine whether it also violated Title VI; questioned continuing validity of Lau in light of Bakke and noted that remedying § 1703(f) violation would necessarily remedy any Title VI violation).

Castaneda and Keyes were decided before Guardians Association v. Civil Service Commission of New York, 463 U.S. 582, 607 n.27, 103 S. Ct. 3221, 3235 n.27 (1983). In Guardians, a majority of the Supreme Court upheld the validity of administrative regulations incorporating a discriminatory effect standard for determining a Title VI violation).[11] Thus, Castaneda and Keyes do not undermine the validity of OCR's decision to apply § 1703(f) standards to determine compliance with the Title VI regulation.

A recent California case, however, distinguished § 1703(f) and the Title VI regulation on other grounds. Teresa P. v. Berkeley Unified School Dist., 724 F. Supp. 698 (N.D. Cal. 1989). In analyzing the § 1703(f) claim in Teresa P., the court used the three-part Castaneda standard and determined that the district's program was adequate under that standard. Id. at 712-16. In addressing the claim brought
under the Title VI regulation, however, the court stated that plaintiffs had failed to make a prima facie case because they had not alleged discriminatory intent on the part of the defendants, nor had they "offered any evidence, statistical or otherwise," that the alternative language program had a discriminatory effect on the district's LEP students. Id. at 716-17.

In Teresa P., the district court found that the district's LEP students were participating successfully in the district's curriculum, were competing favorably with native English speakers, and were learning at rates equal to, and in some cases greater than, other LEP students countywide and statewide. 724 F. Supp. at 711. The court also found that, in general, the district's LEP students scored higher than the county and state-wide average on academic achievement tests. Id. at 712. Given these findings, the dismissal of the Title VI claim in Teresa P. can be regarded as consistent with OCR's May 1970 and December 1985 memoranda, both of which require proof of an adverse impact on national origin minority LEP students to establish a violation of the Title VI regulation.[12]

Neither Teresa P. nor any other post-Castaneda case undermines OCR's decision to use the Castaneda standard to evaluate the legality of a recipient's alternative language program. OCR will continue to use the Castaneda standard, and if a recipient's alternative language program complies with this standard the recipient will have met its obligation under the Title VI regulation to open its program to LEP students.
Attachments

As Stated


[3] These and other applicable policy documents can be located through OCR's automated Policy Codification System (PCS) by selecting "current" policy and the keywords "Limited-English Proficient (LEP) Student" (F054). Documents not listed as "current" policy in the PCS should not be used.

[4] But cf. Teresa P. v. Berkeley Unified School District, 724 F. Supp. 698, 714 (N.D. Cal. 1989) (finding that district had adequately implemented its language remediation program even though many of its bilingual and ESL teachers did not hold applicable credentials; court noted that district probably could not have obtained fully credentialed teachers in all language groups, district was requiring teachers to work toward completion of credential requirements as a condition of employment, record showed no differences between achievement of students taught by credentialed teachers and achievement of students taught by uncredentialed teachers, and district's financial resources were severely limited).
determination as to whether deficiencies in teaching skills were due to
inadequate training program (100-hour program designed to provide 700-word
Spanish vocabulary) or whether failure to master program caused teaching
deficiencies).

[6] Aides at the kindergarten and first grade levels need not demonstrate reading
and writing proficiency.

[7] For example, when an overwhelming majority of students in a district are
LEP students, it may be more appropriate to compare their performance with
their non-LEP peers county- or state-wide.

[8] For an example of a program exclusively for newly-arrived immigrants
consistent with Title VI, see OCR's Letter of Findings in Sacramento City
Unified School District, Compliance Review Number 09-89-5003, February 21,

[9] Section 1703(f) of the EEOA states, in pertinent part, "No State shall deny
equal educational opportunity to an individual on account of his or her race,
color, sex, or national origin, by . . . the failure by an educational agency to take
appropriate action to overcome language barriers that impede equal participation
by its students in its instructional programs." The pertinent section of the OCR
1970 memorandum states, "Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."


[11] The applicable Department of Education regulation is 34 C.F.R. § 100.3(b)(2).

[12] A Ninth Circuit case also treated § 1703(f) and Title VI claims differently, but in such a terse fashion that it cannot be determined whether these differences would ever have a practical effect. See Guadalupe Org. v. Tempe Elementary School Dist. No. 3, 587 F. 2d 1022, 1029 -30 (9th Cir. 1978) (court found that maintenance bilingual/bicultural education was not necessary to provide students with the "meaningful education and the equality of educational opportunity that [Title VI] requires"; court also found that districts did not have to provide maintenance bilingual/bicultural education to be deemed to have taken "'appropriate action to overcome language barriers that impede equal participation by its students in its instructional program'" (quoting § 1703(f)).
OCR Lau Memoranda

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Legal and Research Aids


Constitution of the United States, Fourteenth Amendment, July 1868.


*Shepard's United States citations: Supreme court reporter*, 3.10 (Supplement 1998) Colorado Springs, CO.

Court Cases


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