NOTES

SUPPLEMENTAL LANGUAGE INSTRUCTION FOR STUDENTS WITH LIMITED ENGLISH-SPEAKING ABILITY: THE RELATIONSHIP BETWEEN THE RIGHT AND THE REMEDY

In *Lau v. Nichols*,[1] decided in 1974, the United States Supreme Court recognized that students with limited understanding of the English language[2] possessed a right under Title VI of the Civil Rights Act[3] to receive supplemental language instruction.[4] State and local educational agencies implemented remedial programs in response to the Court's mandate.[5] Responsibility for review of instructional programs devel-

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

2. Congress has categorized children possessing a limited ability to speak and understand English as:

> (A) individuals who were not born in the United States or whose native language is a language other than English, and
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> (B) individuals who come from environments where a language other than English is dominant . . . , and, by reason thereof, have difficulty speaking and understanding the English language.

The Bilingual Education Act of 1974, § 703(a)(1)(A)—(B), 20 U.S.C. § 880b-1(a)(1) (A)—(B) (1976).

There are approximately 3.5 million school children with limited English-speaking ability throughout the United States. Note, *Sink or Swim?—Is Bilingual Education a Way Into the Mainstream?*, 2 CHILD. LEGAL RTS J. 4, 5 (1981). In Texas, about 843,000 Mexican-American children attended public schools in the 1981-82 school year. United States v. Texas, 506 F. Supp. 405, 416 (E.D. Tex. 1981), *rev'd*, 680 F.2d 356 (5th Cir. 1982). In New York City, more than 100,000 foreign children, representing between 30 and 40 different languages, attend the public schools. *See* Board of Educ. v. Nyquist, 94 Misc. 2d 466, 515, 408 N.Y.S.2d 606, 632 (1978).

3. The *Lau* Court based its decision on The Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000(d) (1976). The Act provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance.

4. The phrase "supplemental language instruction" will be used throughout this Note to refer generally to any program implemented pursuant to the discretion of a local educational agency to meet the needs of students with limited English-speaking ability. *See infra* note 5.

5. Experts have developed two basic types of programs. The first is commonly referred to as the "English as a Second Language" program. Students in this program engage in regular classroom study during a portion of the day and spend the remainder of the day in special English classes. *See* United States v. Texas, 506 F. Supp. 405, 419 (E.D. Tex. 1981), *rev'd*, 680 F.2d 356 (5th Cir. 1982). The second type of program is frequently termed "bilingual" or "bilingual-bicul-

oped by local educational authorities was vested in the lower federal courts.

In response to *Lau*,[6] Congress passed the Equal Educational Opportunities Act,[7] which created a second statutory source for the right to receive supplemental language instruction. Moreover, the equal protection clause of the fourteenth amendment provides a possible constitutional basis for the right to receive supplemental language instruction.[8]

Thus, reviewing courts recognize three potential bases for the right to supplemental language instruction: Title VI, the Equal Educational

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tural" education. Bilingual education consists minimally of three elements. First, the students are taught in both English and their native language in all subject areas. Second, students are given special instruction in the English language. Third, students are taught their native history and culture. *See* T. ANDERSON & M. BOYER, 1 BILINGUAL SCHOOLING IN THE UNITED STATES app. B (1970). *See also* Bilingual Education Act of 1974, § 703(4), 20 U.S.C. § 880b-7 (1976).

Proponents of full-scale bilingual education argue that the problems a child of limited English-speaking ability faces in an English dominated society are two-fold. As a practical matter, the child has a meaningless academic experience, falling quickly and perhaps permanently behind his peers in school. Bilingual education thus ensures that the child learns to perform academically in American public schools. Grubb, *Breaking the Language Barrier: The Right to Bilingual Education,* 9 HARV. C.R.-C.L. L. REV. 52, 54 (1974). In addition, the child loses important social experiences by not being able to communicate with his peers, and often suffers a consequential loss of a sense of dignity and self-worth. Thus, bilingual education is beneficial psychologically to the foreign language speaking child. *See* T. ANDERSON & M. BOYER, *supra*, at 49; Comment, *Bilingual Education and Desegregation,* 127 U. PA. L. REV. 1564, 1581 (1979).

The Court's mandate in *Lau v. Nichols* left complete discretion to the local school boards to establish supplemental English language programs. 414 U.S. at 564, 565. For examples of recent plans developed by experts to meet judicial and congressional mandates, see *Detroit Public Schools Dep't of Bilingual Education, Detroit Public Schools Three Year Bilingual Education Plan 1979-1982* (available in ERIC documents, ED 193354); Carsud, *Education of Achievement Outcomes: Justin's Experience* 1980 (available in ERIC documents, ED 193006).

A number of states also developed bilingual education programs at the state level. *See* ALASKA STAT. § 14.30.100 (1981); ARIZ. REV. STAT. ANN. § 15-1098 (1981); COLO. REV. STAT. § 22-24-101 (1980); CONN. GEN. STAT. ANN. § 10-17 (West 1981); ILL. ANN. STAT. ch. 122, § 14C (Smith-Hurd 1981; IND. CODE ANN. § 20-10.1-5.5-1 to -5.5-9 (Burns Supp. 1982); KAN. STAT. ANN. § 72-9501 (1981); MASS. ANN. LAWS ch. 71A, § 2 (Michie/Law Co-op 1982); MINN. STAT. ANN. § 126.261 (West 1981); N.M. STAT. ANN. § 22-23-1 (1978); N.Y. EDUC. LAW § 3204-2-a (McKinney 1981); TEX. EDUC. CODE ANN. tit. 2, § 21.451 (Vernon 1982).

6. 414 U.S. 563 (1974). *See supra* notes 1-4 and accompanying text.

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

. . .

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

The Equal Educational Opportunity Act of 1974, § 204(f), 20 U.S.C. § 1703(f) (1976).

8. "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

Opportunities Act, and the fourteenth amendment. Each evinces a separate standard for the courts to apply in reviewing remedial programs.[9] Consequently, inconsistencies have developed among federal courts regarding the types of supplemental language programs local authorities must implement and the role of the judiciary in reviewing the programs.[10]

This Note analyzes lower courts' treatment of the right to supplemental language instruction. Part I explores the historical development of an individual's right to receive instruction in his native language. Part II examines lower federal court review of specific instructional programs. Part III analyzes the relationship between the legal basis of the right to supplemental language instruction and the standards of review employed by federal courts in examining instructional programs.

I. THE RIGHT TO SUPPLEMENTAL LANGUAGE INSTRUCTION

A. Lau v. Nichols

In *Lau v. Nichols*,[11] non-English speaking students in San Francisco brought a class action suit against the local school system,[12] alleging that it had not provided special instruction in English[13] to approximately sixty-one percent of the non-English speaking children of Chinese ancestry in the district.[14] Although they sought no specific remedy,[15] the plaintiffs urged that the school system's failure to offer supplemental language instruction violated both Title VI of the Civil Rights Act and the equal protection clause of the fourteenth amendment.[16]

The United States Supreme Court unanimously held that the San Francisco school system's lack of attention to the special language problems of the Chinese students violated Title VI.[17] In reaching its holding, the Court relied not only on the specific language of the Civil Rights Act,[18] but also on the guidelines enacted by the former Depart-

9. *See infra* notes 43-56 and accompanying text.
10. *See infra* note 58.
11. 414 U.S. 563 (1974).
12. *Id.* at 564.
13. *Id.*
14. *Id.*
15. *Id.* at 566.
16. *Id.* The Court specifically refrained from reaching the constitutional issue. *Id.*
17. *Id.* at 564-65.
18. 42 U.S.C. § 2000d (1976). *See supra* note 3.

ment of Health, Education, and Welfare to enforce the Act.[19]

While Title VI itself provides only a general proscription of discriminatory conduct in any local program receiving federal financial assistance,[20] HEW regulations applicable at the time of *Lau* directly addressed the problem of supplemental language instruction.[21] The particular clarifying guideline that the *Lau* Court relied on mandated affirmative action by a school district when a child's "inability to speak and understand the English language" excluded him from "effective participation in the educational program."[22]

The Court in *Lau* applied an effect test under Title VI to the school system. The Court reasoned that a child's inability to understand what transpires in class effectively deprives him of a meaningful education.[23]

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19. *See* 45 C.F.R. § 80.3(b)(1), 80.3(b)(3) (1980). *See infra* note 21.

20. *See supra* note 3.

21. The Court relied on a clarifying guideline and two regulations promulgated by the Department of Health, Education, and Welfare (now Department of Health and Human Services) for the definition and standard of discrimination under Title VI. The regulations were promulgated under the authority granted by section 602 of the Civil Rights Act, which provides in relevant part: "Each Federal department and agency which is empowered to extend financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions . . . of this title . . . by issuing rules, regulations, or orders. . . ." The Civil Rights Act of 1964, § 602, 42 U.S.C. § 2000d-1 (1976). The HEW regulations relied upon by the Court provide that those receiving Federal aid may not "restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or benefit under the program." 45 C.F.R. § 80.3(b)(1) (1980). *See* 414 U.S. at 567. The regulations provide further that "a recipient, in determining the types of services . . . which will be provided . . . may not . . . utilize criteria or methods of administration which . . . have the effect of defeating or substantially impairing accomplishment of the objectives of the program. . . ." 45 C.F.R. § 80.3(2) (1980). *See* 414 U.S. at 567, 568.

22. The HEW clarifying guideline that the Court relied on states in relevant part:

> Where inability to speak and understand the English language excludes . . . children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency. . . Any . . . system employed by the school system to deal with the special language skill needs . . . must be designed to meet such . . . needs as soon as possible and must not operate as an educational deadend or permanent track.

35 Fed. Reg., 11, 595 (1970).

In his concurrence, Justice Stewart expressed concern over the Court's heavy reliance on the relevant HEW guidelines in finding a violation of Title VI. 414 U.S. at 570. Justice Stewart emphasized the necessity of applying a test of reasonableness to the regulations to determine if they exceeded the language and intent of Title VI. He concluded that the regulations were reasonable. *Id.* at 571.

23. 414 U.S. at 566. The Court observed that "[b]asic English skills are at the very core of what these public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education." *Id.*

The Court reasoned that this deprivation met the Title VI discrimination standard as explained by the HEW clarifying guidelines.[24] Finding a Title VI violation, the Court ordered the San Francisco School District to provide a remedy.[25] The Court, however, left the fashioning and implementation of such relief to local authorities.[26]

Lau left open several questions that continue to plague lower federal courts reviewing local instructional programs. First, the *Lau* Court failed to enunciate a standard by which reviewing courts may judge whether a local program is acceptable under Title VI.[27] Second, the Court did not prescribe a threshhold number of non-English speaking students necessary to precipitate a school district's statutory obligation to develop an instructional program.[28] Finally, the majority failed to reach the constitutional question, leaving ambiguous the precise scope of the duty of local educational agencies to remedy the language problem.[29]

B. Congressional Response to the Supreme Court Mandate

The Supreme Court's mandate in *Lau*[30] for educational agencies to provide supplemental English instruction elicited immediate congres-

24. *Id.* at 568. The Court specifically noted that the test under Title VI, as promulgated in the regulations, was an *effect* test. Consequently, there was no need to prove discriminatory intent to establish a Title VI violation. *Id.* Subsequent Supreme Court decisions have cast doubt on the continued validity of the effect test. *See infra* notes 50-52 and accompanying text.

25. 414 U.S. at 569.

26. The Court clearly intended to leave the remedy to local educational agencies. *Id.* at 564-65.

27. The Court addressed only the situation in which the school district had not adopted any type of supplemental instructional program. *Id.* at 566. Thus, the Court failed to enunciate any standard by which future courts could review individual programs.

28. *Id.* at 572. Most statutes passed subsequent to *Lau* have established twenty as the requisite number of students who must be affected before a statutory obligation arises. *See, e.g.,* MASS. ANN. LAWS ch. 71A, § 2 (Michie/Law Co-op 1982); TEX. EDUC. CODE ANN. tit. 2, § 21.453(c) (Vernon 1982).

29. *See supra* note 16. Although the majority did not reach the constitutional question, Justice Blackmun, in his concurrence, impliedly rejected the existence of a constitutional right by seeking to limit application of Title VI to school districts having a substantial number of non-English speaking students. 414 U.S. at 572. If a substantial number of children must be affected before a duty arises under Title VI to provide bilingual education, then there can be no constitutional basis for the right. Constitutional rights are personal; the infringement of a right does not depend upon the number of persons affected. McCabe v. Atchison, Topeka & Santa Fe R.R., 235 U.S. 151, 161-62 (1914). *See also* Rose v. Mitchell, 443 U.S. 545, 562 (1979); Shelley v. Kraemer, 334 U.S. 1, 22 (1947); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 351 (1938).

30. 414 U.S 563 (1974).

sional response.[31] In 1974, Congress adopted the Equal Educational Opportunities Act (EEOA) as an amendment to the Elementary and Secondary Education Act of 1965.[32] EEOA has become the central

31. The Supreme Court decided *Lau* on January 21, 1974. *Id.* H.R. 69 and H.J. RES. 1104, the Education Amendments of 1974, were reported out of the House Committee on Education and Labor on February 21, 1974.

32. 20 U.S.C. § 1703—1706 (1976). In addition to passing EEOA, Congress amended the Bilingual Education Act to provide financial incentives to local school boards to implement full-scale bilingual educational programs. *Id.* at 880b-7(1) to (4). Subsections (1)—(4) of section 880b-7 provide funds for the maintenance of bilingual educational programs, community activities to promote bilingual education, teacher training, and technical assistance to develop programs. *Id.* In the statute's statement of policies, Congress made clear that it wholeheartedly encouraged local boards to develop such programs. *Id.* § 880b(a) (1976). The statute sets forth the following policies:

> The Congress declares it to be the policy of the United States, in order to establish equal educational opportunity for all children (A) to encourage the establishment and operation, where appropriate, of educational programs using bilingual educational practices, techniques, and methods, and (B) for that purpose, to provide financial assistance to local educational agencies . . . in order to enable such local educational agencies to develop and carry out such programs . . . which are designed to meet the educational needs of such children. . . ."

Id. The Bilingual Education Act also enumerates possible elements of a bilingual educational program. *Id.* at § 880b-14 (A) to (E). This enumeration includes provisions for instruction in English, course instruction in the native language, voluntary enrollment for English-speaking children who wish to participate, integrated classroom instruction in art, music, and physical education, and maintenance of graded classrooms to the extent possible. *Id.* Both the Act and its legislative history indicate that Congress designed the amendments only to affirm the positive aspects of bilingual education.

The Bilingual Education Act contains no language which would make its provisions mandatory upon the states. *See* 20 U.S.C. § 880b-1 to -6 (1976). In addition, congressional debate on the bill indicates that the provisions are not mandatory. *See* S. REP. No. 1026, 93d Cong., 2d Sess. 140 (1974) (Congress recognizes the importance of bilingual education); H. REP. No. 1211, 93d Cong., 2d Sess. 149 (1974) (same); 120 CONG. REC. 6280 (remarks by Rep. Perkins) (Congress extends Act and amends it to broaden the class of schools eligible for funding); 120 CONG. REC. 6301 (1974) (remarks of Rep. Biaggi) (Congress recognizes "obligation of society to help these children integrate into the mainstream of American education"); 120 CONG. REC. 6319, 6320 (1974) (remarks by Rep. Bingham) (Nation has responsibility to provide bilingual help).

The Joint Explanatory Statement of the Conference Committee for the Education Amendments illustrates Congress' view of bilingual education. In that report, the Committee stated:

> The Senate Amendment, . . . substitutes a new text for the existing text of such Act. The statement of policy of the Senate Amendment recognizes the importance of bilingual educational methods and techniques. . . . [T]he House bill contains no comparable provision. The House recedes, with an amendment clarifying that it is children of limited English-speaking ability who benefit through the fullest utilization of multiple language and cultural resources.

S. REP. No. 1026, 93d Cong., 2d Sess. 147, 148 (1974).

Thus, courts and commentators frequently criticize the Bilingual Education Act as being merely a policy statement rather than a substantive congressional mandate to local school systems. *See, e.g.,* Castaneda v. Pickard, 648 F.2d 989, 1008-09 (5th Cir. 1981). In *Castaneda*, the court specifically stated that "although the [Bilingual Education] Act empowered the U.S. Office of Education

focus in bilingual education litigation.[33] Section 204(f)[34] creates a private right of action against local educational agencies for failure to take "appropriate action to overcome language barriers" faced by students within a particular school district.[35] Because the Act does not define "appropriate action,"[36] reviewing federal courts seek to give content to the standard by attempting to ascertain the legislative intent.[37]

The legislative history of EEOA, however, offers no substantive guidance regarding the meaning of "appropriate action."[38] Representative Esch of Michigan had introduced the bill on the floor of the House in response to concerns voiced by a group of Michigan Congressmen about busing across district lines to achieve court-ordered desegrega-

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to develop model programs, Congress expressly directed that the state and local agencies receiving funds under the Act were not required to adopt one of these model programs but were free to develop their own." *Id.* at 1009. *See generally* Leibowitz, *English Literacy: Legal Sanction for Discrimination,* 45 NOTRE DAME LAW. 7, 15 (1969).

33. Most recent cases have relied on EEOA to review bilingual educational programs. *See infra* notes 58-95 and accompanying text.

34. *See supra* note 7.

35. 20 U.S.C. § 1706 (1976). The statute provides: "An individual denied an equal educational opportunity, as defined by this subchapter may institute a civil action in an appropriate district court . . . against such parties, and for such relief, as may be appropriate."

36. When suit is brought under the statute by an individual claiming denial of an equal educational opportunity, the court must examine the school district's action in light of the statute to determine its "appropriateness." *See* Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981); Guadalupe Org. v. Tempe Elem. School Dist., 587 F.2d 1022 (9th Cir. 1978); United States v. Texas, 506 F. Supp. 405 (E.D. Tex. 1981), *rev'd,* 680 F.2d 356 (5th Cir. 1982).

37. Courts continually struggle to define what Congress would consider "appropriate action." *See* Castaneda v. Pickard, 648 F.2d 989, 1009 (5th Cir. 1981) (Congress purposely left language ambiguous to leave considerable discretion to the local agencies); Guadalupe Org. v. Tempe Elem. School Dist., 587 F.2d 1022 (9th Cir. 1978) (same); United States v. Texas, 506 F. Supp. 405 (E.D. Tex. 1981) (Congress intended to impose bilingual education per se), *rev'd,* 680 F.2d 356 (5th Cir. 1982). The task of defining and applying a standard of review on the basis of the phrase "appropriate action" was particularly troublesome to the Fifth Circuit in *Castaneda*. The court stated:

> Congress has provided us with almost no guidance, in the form of text or legislative history to assist us in determining whether a school district's language remediation efforts are "appropriate." Thus we find ourselves confronted with a type of task which federal courts are ill-equipped to perform and which we are often criticized for undertaking—prescribing substantive standards and policies for institutions whose governance is properly reserved to other levels and branches of our government . . . which are better able to assimilate and assess the knowledge of professionals in the field.

648 F.2d at 1009.

38. Because the Act was an amendment to the Education Act and was proposed on the floor of the House, the only legislative history available on the particular provision would come from House debates and from the Conference Report on the entire Education Bill. The debates on the amendment, however, provide no guidance. *See* 120 CONG. REC. 8264-8281 (1974); S. REP. NO. 1026, 93d Cong. 2d Sess. 1-185 (1974).

tion in the Detroit schools.[39] The bill sought to contain busing within district lines.[40] The bulk of the debate on the House floor, therefore, dealt with the controversial interdistrict busing issue,[41] rather than with the merits of section 204(f) or the precise meaning of "appropriate action".[42] In effect, the provision passed unnoticed.

II. LOWER COURT INTERPRETATION OF SUPREME COURT AND CONGRESSIONAL MANDATE

A. The Legal Basis of the Right

Since the Supreme Court decision in *Lau v. Nichols*,[43] lower federal courts have consistently upheld the right of individuals with limited English-speaking ability to receive supplemental language instruction in public schools. The lower courts' interpretations of the legal basis of

39. 120 CONG. REC. 6877 (1974). Representatives Esch, Ford (Wm.), O'Hara, and Huber, all of Michigan, cosponsored the amendment. *Id.*

40. It is clear from the remarks of the sponsor on the floor of the House that the central concern of the Representatives was interdistrict busing, an important political issue in Detroit, Michigan in 1974. Representive Esch stated: "The purpose of the amendment is to clearly indicate that the intent of the House of Representatives is to disapprove cross-district busing such as that which has created a great deal of unrest and uncertainty in the Greater Detroit area." 120 CONG. REC. 8264 (1974).

41. The bulk of EEOA deals with limitations on cross-district busing. The congressional declaration of policy and the congressional findings are particularly enlightening. The official congressional policy is: "The neighborhood is the appropriate basis for determining public school assignments." The Bilingual Education Act of 1974, § 201(a)(2), 20 U.S.C. § 170(a)(2) (1976). The congressional findings elaborate further:

> (a) the Congress finds that—
> (3) the implementation of desegregation plans that require extensive student transportation has, in many cases, required local educational agencies to expend large amounts of funds, thereby depleting their financial resources . . .;
> (4) transportation of students which creates serious risks to their health and safety, disrupts the educational process carried out with respect to such students, and impinges significantly on their educational opportunity is excessive.

Id. § 202(a)(3)—(4), 20 U.S.C. § 1702(a)(3)—(4) (1976).

42. Representative O'Hara, a cosponsor of the bill, made sole mention of the bilingual education provision in a statement defending the bill during the floor debate. Opponents of the Amendment and its busing provisions tried to employ parliamentary procedure to remove it from consideration by arguing that the Amendment was not germane to the other sections of the Education Bill. In response, Representative O'Hara remarked:

> [I]t [the statute] deals with educationally deprived children, with libraries, with learning results from educational innovation, with support and assistance to federally impacted school districts, with adult education . . . education for the handicapped, *bilingual education*, the study of Rate funding, . . . , that is, methods by which equal educational opportunities may be obtained.

120 CONG. REC. 8270 (1974) (emphasis added).

43. 414 U.S. 563 (1974).

the right, however, vary significantly from jurisdiction to jurisdiction.[44] To date, no court has held the right to be constitutionally based. Instead, courts have consistently relied on the relevant federal statutes. An examination of the constitutional question, nevertheless, is critical to an adequate analysis of the judiciary's role in protecting a non-English speaking child's right to receive supplementary language instruction.[45]

Initially, courts followed *Lau's* lead and relied exclusively on Title VI as the basis of the right.[46] In response to the passage of EEOA, however, courts began to shift their focus from Title VI to the substantive standard articulated in the Act.[47] Moreover, these courts attacked the continued applicability of Title VI to supplemental language instruction.[48]

Post-*Lau* Supreme Court decisions have adopted a stricter standard for proving discrimination under Title VI than that imposed in *Lau*. Rather than requiring only a showing of discriminatory effect, as in *Lau*,[49] the Court presently requires an additional showing of discriminatory intent.[50] Although the Court has refrained from directly over-

44. *See, e.g.,* Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981) (right based on EEOA); Idaho Migrant Council v. Board of Educ., 647 F.2d 69 (9th Cir. 1981) (recognition of statutory basis of right without specifying whether the basis is Title VI or EEOA); Guadalupe Org. v. Tempe Elem. School Dist., 587 F.2d 1022 (9th Cir. 1978) (the right falls specifically under EEOA); Serna v. Portales Mun. Schools, 499 F.2d 1147 (10th Cir. 1974) (the right is based on Title VI); United States v. Texas, 506 F. Supp. 405 (E.D. Tex. 1981) (legal basis possibly constitutional with heavy reliance on EEOA), *rev'd,* 680 F.2d 356 (5th Cir. 1982); Rios v. Read, 480 F. Supp. 14 (E.D.N.Y. 1978) (same); Cintron v. Brentwood Union Free School Dist., 455 F. Supp. 57 (E.D.N.Y. 1978) (legal basis of right is EEOA in conjunction with HEW regulations).

45. *See infra* notes 103-13 and accompanying text.

46. *See* Serna v. Portales Mun. Schools, 499 F.2d 1147 (10th Cir. 1974); Rios v. Read, 480 F. Supp. 14 (E.D.N.Y. 1978); Cintron v. Brentwood Free Union School Dist., 455 F. Supp. 57 (E.D.N.Y. 1978).

47. *See, e.g.,* United States v. Texas, 680 F.2d 356 (5th Cir. 1982); Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981); Guadalupe Org. v. Tempe Elem. School Dist., 587 F.2d 1022 (9th Cir. 1978).

48. The Fifth Circuit in *Castaneda v. Pickard* attacked the viability of the Title VI rationale. The court stated: "We must confess serious doubts . . . about the continuing vitality of the rationale of the Supreme Court's opinion in Lau v. Nichols. . . ." 648 F.2d at 1007. *See* Comment, *Bilingual Education and Desegregation,* 127 U. PA. L. REV. 1564, 1578 n.82 (1979).

49. 414 U.S. at 568. *Lau* found discriminatory effect in the lack of a supplemental language instructional program. *Id.*

50. The Court first applied a test of discriminatory intent as opposed to effect as a basis for a constitutional violation in Washington v. Davis, 426 U.S. 229 (1976). Subsequently, in University of Cal. Regents v. Bakke, 438 U.S. 265 286, 328 (Brennan, J., concurring and dissenting)

ruling *Lau*,[51] the development of the stringent intent test effectively undermines the applicability of Title VI in a majority of bilingual education cases. Proof of discriminatory intent requires evidence that the lack of a supplemental language instruction program resulted from the discriminatory motive of local educational authorities.[52] In most areas of the country, however, the lack of bilingual education results from the historic notion of America as a "melting pot," rather than from a discriminatory motive.[53] Thus, in many cases, discriminatory intent is difficult, if not impossible, to prove.[54]

Notwithstanding the questionable continued vitality of Title VI in the area of bilingual education, EEOA provides ample support for the proposition that state educational agencies possess a duty to provide supplemental language instruction to non-English speaking children.[55] This continued duty is grounded not only in the Act's affirmative directive for local educational agencies to take "appropriate action" to overcome language barriers, but also in the Act's provision for a private right of action against educational agencies for their failure to comply with this directive.[56]

B. Judicial Review of Instructional Programs

Because lower federal courts draw from three possible sources in reviewing supplemental language instruction programs,[57] they necessarily differ in their treatment of the programs when faced with a legal challenge. Recent decisions exemplify the current confusion that in-

(1978), the Court read Title VI as coextensive with the equal protection clause, thereby adopting the discriminatory intent standard for Title VI.

51. In *Bakke*, 438 U.S. 265 (1978), six justices embraced the intent standard as the proper standard of discrimination under Title VI. The *Bakke* Court, however, refused squarely to overrule *Lau*, 438 U.S. 265, 286, 328 (Brennan, J., concurring and dissenting).

52. *Cf.* Mobile v. Bolden, 446 U.S. 55 (1980).

53. The availability of monolingual language instruction conducted in English is a historical fact of life in American public schools. One commentator suggests that this is a consequence of the general "wish to create a unitary Americanism both political and social." Roos, *Bilingual Education: This Hispanic Response to Unequal Educational Opportunity,* 42 LAW & CONTEMP. PROBS. 111, 113 (1978).

54. To prove discriminatory intent, a court must inquire into the subjective intent of the responsible governmental body or official. For criticism of this type of inquiry, see G. GUNTHER, CONSTITUTIONAL LAW CASES AND MATERIALS 710 (10th ed. 1980).

55. *See supra* notes 33-42 and accompanying text.

56. *See supra* note 35 and accompanying text.

57. *See supra* notes 43-56 and accompanying text.

heres in judicial review of instructional programs.[58]

In *Guadalupe Organization, Inc. v. Tempe Elementary School District*,[59] the Ninth Circuit adopted a limited role in overseeing the implementation of bilingual educational programs. The *Guadalupe* court, applying EEOA to reach its holding in favor of the school district, deemed it inappropriate to review and to rule on the adequacy of programs already implemented by local school boards.[60] The court emphasized the importance of leaving specific decisions concerning the type of remedial language instruction to be adopted to local educational agencies, especially when the agencies could employ the expertise of specialists to design programs best suited to the peculiar needs of the students.[61]

In *Guadalupe*, Mexican-American and Yaqui Indian children brought suit against the Tempe Arizona School District[62] alleging that the "English as a Second Language" program adopted by the school district to overcome language barriers was ineffective.[63] The plaintiffs urged primarily that the school district's program of language instruction did not meet the statutory or constitutional standards.[64] The plaintiffs argued that only full scale bilingual education could fulfill the statutory and constitutional mandates.[65] Moreover, the plaintiffs claimed that the school district maintained an inadequate teaching staff for the language program.[66] Finally, the plaintiffs alleged that the school district's failure to institute a program of bicultural education that focused on the historical contribution of the minority children's

58. *See, e.g.*, Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981) (intermediate standard of review adopted); Guadalupe Org. v. Tempe Elem. School Dist., 587 F.2d 1022 (9th Cir. 1978) (discretionary standard of review adopted); United States v. Texas, 506 F. Supp. 405 (E.D. Tex. 1981) (interventionist standard of review adopted), *rev'd*, 680 F.2d 356 (5th Cir. 1982).

59. 587 F.2d 1022 (9th Cir. 1978).

60. *Id.* at 1030. The court, however, did not close its doors to future suits challenging the effectiveness of an instructional program. The court noted that "[I]n this case plans were made and implemented and the effectiveness of these is not challenged." *Id.*

61. Extensive judicial involvement in substantive educational policy decisions may create judicial management problems. *See infra* notes 106 & 107 and accompanying text.

62. *Id.* at 1024.

63. *Id.* The "English as a Second Language" program places children in the regular classroom for a portion of the day and in an intensive English class with a bilingual instructor for the remainder of the day. *See supra* note 5.

64. 587 F.2d at 1024.

65. *Id.*

66. *Id.*

ancestors violated the statutory and constitutional requirements.[67]

In its decision, the Ninth Circuit analyzed the three possible legal bases for imposing a duty upon the school district to provide bilingual education. The court concluded first that the Constitution did not impose such a duty.[68] Second, the court determined that Title VI had not been violated, because the policies implemented did not totally foreclose the students from obtaining meaningful education.[69] Finally, the court concluded that the local educational agency's implementation of remedial English instruction met the requirements of EEOA.[70]

In reaching its holding, the *Guadalupe* court reasoned that neither the Supreme Court's imposition of the duty to provide remedial language instruction in *Lau*,[71] nor the subsequent congressional mandate in EEOA,[72] imposed upon the school district an absolute substantive mandate to provide full-scale bilingual-bicultural education programs.[73] By instituting a remedial language instruction program, therefore, the local school board had met its statutory obligation to overcome language barriers through "appropriate action."[74]

In contrast to the Ninth Circuit in *Guadalupe*,[75] the Fifth Circuit has assumed a more active role in safeguarding the rights of students hav-

67. *Id.* The plaintiffs alleged that the mandate of providing appropriate education necessarily included bicultural education. *Id.*

68. *Id.* at 1026-27. The Ninth Circuit adopted the lower tier equal protection analysis employed by the Supreme Court in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). *See infra* note 104. The court agreed with the *Rodriguez* holding that the right to education is not fundamental. 587 F.2d at 1026. The *Guadalupe* court applied lower scrutiny equal protection analysis to the program, and concluded that "the decision of the [school system] to offer the education program attacked . . . bears a rational relationship to legitimate state interests." *Id.* at 1027. The court, however, did not explain the reasons for its holding.

69. 587 F.2d at 1029. The court stated that "[p]roviding the appellants [children] with remedial instruction in English which appellants appear to admit complies with *Lau's* mandate makes available the meaningful education and equality of educational opportunity that Section 601 requires." *Id.*

70. *Id.* at 1030. The court interpreted EEOA narrowly. *Id.*

71. 414 U.S. 563 (1974).

72. *See* The Equal Educational Opportunities Act of 1974, § 204(f), 20 U.S.C. § 1703(f) (1976).

73. 587 F.2d at 1030.

74. *Id.* at 1024. Because the court granted summary judgment for the defendant school district, it never reviewed the allegations of the petitioners. Three of the allegations arguably went to the substantive educational policies employed by the school district. The fourth allegation, however, that the teaching staff was inadequate, arguably went to the effectiveness of the program. The Ninth Circuit's unwillingness to review this allegation illustrates the great degree of deference it granted the local educational agency.

75. *See supra* notes 59-74 and accompanying text.

ing limited ability to understand English.[76] In *Castaneda v. Pickard*,[77] the Fifth Circuit articulated a workable approach to federal court review of instructional programs based on EEOA.[78]

In *Castaneda*, Mexican-American children instituted a class action suit against the Raymondville, Texas school district.[79] The students alleged that certain policies and practices of the school district,[80] including its failure to provide an effective bilingual educational program, resulted in unconstitutional discrimination against the children.[81] In addition, they alleged violations of Title VI and EEOA.[82] The *Castaneda* court established a framework for review of the school district's action, which provided for a determination of the soundness of the educational policy upon which the program was based,[83] the reasonableness of the program as instituted,[84] and the school district's good faith effort in effectuating the program.[85]

Applying this framework, the Fifth Circuit analyzed the plaintiffs' specific allegations. First, the court considered the allegation that the Raymondville program[86] concentrated too heavily on the development of proficiency in English, allowing students to fall behind in other areas of study.[87] The court found that the program did not violate EEOA in this respect,[88] reasoning that the statute contemplated a program that concentrated on development of proficiency in English, rather than a full bilingual-bicultural curriculum.[89] In addition, the court refused to

76. *See* Castaneda v. Pickard, 648 F.2d 989, 1007 (5th Cir. 1981).

77. *Id.*

78. *See infra* notes 83-85 and accompanying text.

79. 648 F.2d at 992.

80. *Id.* The policies complained of included an ability grouping program, which petitioners claimed resulted in classroom segregation of whites and Mexican-Americans. *Id.* Furthermore, the petitioners claimed that the school district had discriminated against Mexican-Americans in its hiring practices. *Id.*

81. 648 F.2d at 992.

82. *Id.*

83. *Id.* at 1009.

84. *Id.* at 1010.

85. *Id.*

86. *Id.* The court did not explore the specific details of the Raymondville program, which was an "English as a Second Language" program. *See supra* note 5.

87. *Id.* at 1011.

88. *Id.* In refusing to overturn the local district's specific policy decision to adopt an "English as a Second Language" program rather than a bilingual educational program, the Fifth Circuit was consistent with the Ninth Circuit decision in *Guadalupe*. *See supra* notes 59-74 and accompanying text.

89. 648 F.2d at 1011.

examine alternative programs for their relative effectiveness, leaving the task of program choice to the local school districts.[90]

The *Castaneda* court next examined the plaintiffs' allegation that the school district had inadequately prepared teachers for participation in the program.[91] The court, reviewing both lay and expert testimony, determined that the instructors' training program did not constitute a good faith effort to effectuate the language program.[92]

Finally, the court considered the plaintiffs' allegation that the district achievement tests, composed in standardized English, inadequately measured the progress of non-English speaking students.[93] While the court summarily deemed the testing inadequate,[94] it did not base its review of the testing procedures specifically on any of the three criteria enumerated in its framework for review. Instead, the court substituted its judgment regarding the adequacy of this substantive portion of the instructional program for that of the local school board.[95]

Thus, in applying EEOA, the *Castaneda* court assumed a degree of authority over local school district implementation of bilingual education programs while simultaneously leaving control over basic policy decisions within the local school boards.[96] Although the Ninth Circuit

90. *Id.* The Fifth Circuit's concern with its role in reviewing substantive programs adopted by the local educational agency was appropriate. The court reluctantly reviewed the program, adding the following caveat:

> 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 education.

Id. at 1009.

91. *Id.* at 1012. The Fifth Circuit's review of the adequacy of the teaching staff is in complete contrast with the deference shown by the Ninth Circuit in *Guadalupe* to the school district in its employment of teachers. *See supra* notes 59-74 and accompanying text.

92. 648 F.2d at 1012.

93. *Id.* at 1013.

94. *Id.*

95. *Id.* The *Castaneda* court asserted that, based on common sense, the testing was inadequate because it measured a student's academic progress in English and not in a foreign language. *Id.* If the goal of the system is to mainstream limited-English speaking children into English society, however, measuring a child's progress in the English language by administering a test in English is not improper. 648 F.2d at 1013.

96. *See supra* notes 75-95 and accompanying text. In a subsequent decision, the Fifth Circuit reaffirmed its initial approach to review of supplemental language instructional programs. United States v. Texas, 680 F.2d 356, 371 (5th Cir. 1982), *rev'g,* 506 F. Supp. 405 (E.D. Tex. 1981). In *United States v. Texas*, the Fifth Circuit reversed a district court decision that had ordered full scale bilingual-bicultural education for kindergarten through twelfth grade throughout the state of Texas. *Id.* at 372. *See* United States v. Texas, 506 F. Supp. 405, 418-19 (E.D. Tex. 1981), *rev'd,*

in *Guadalupe*[97] also applied EEOA, it deferred substantially to the local school district's power regarding both implementation procedures and policy decisions.[98]

III. THE CURRENT STATUS OF BILINGUAL EDUCATION

Two principle problems exist that confuse the role of the federal judiciary in overseeing the implementation of supplemental language instructional programs. First, the uncertain status of the source of the legal right to receive remedial language instruction renders the extent of the right equally uncertain.[99] Second, the absence of a Supreme Court interpretation of the phrase "appropriate action" used in EEOA leaves the lower federal courts free to interfere improperly with state and local educational policy decisions, or alternatively to defer too greatly to those decisions.[100]

A. The Interrelation of the Constitutional Right and the Remedy

The direct relationship between the legal basis of a right to supplemental language instruction and the type of relief a local educational agency must provide warrants serious consideration. If the right to receive remedial language instruction rests on the fourteenth amendment, the local school board as well as the reviewing court must perform certain duties pursuant to the Constitution. Because a constitutional right is personal, judicial determination that the right is founded in the fourteenth amendment would require a school district to provide supplemental language instruction regardless of the number of children involved.[101] Currently, a majority of states require a school district to provide special language only if there are at least twenty in-

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680 F.2d 356 (5th Cir. 1982). In disagreeing with the district court's imposition of bilingual education, the Fifth Circuit stated:

> At stake here are the educational policies of an entire state, matters traditionally, in our federal system, viewed as primarily state concerns. The issue is essentially a pedagogic one: how best to teach comprehension of a language. Neither we nor the trial court possess special competence in such matters. It follows that in such thin ice both tribunals should tread warily, doing no more than correcting clear inequities and leaving positive programming to those more expert in educational matters than are we.

680 F.2d at 370.

97. 587 F.2d 1022 (9th Cir. 1978).

98. *See supra* notes 59-74 and accompanying text.

99. *See supra* notes 43-56 and accompanying text.

100. *See supra* notes 59-98 and accompanying text.

101. *See supra* note 29.

terested children.[102]

Moreover, the method by which courts recognize the constitutional right creates specific problems. Courts can afford the right to remedial language instruction constitutional status in either of two ways. First, the judiciary could find the right to bilingual education implicit in a fundamental right to education.[103] The Supreme Court, however, has consistently refused to recognize education as a fundamental right.[104] Alternatively, courts could find that non-English speaking persons constitute a suspect class.[105]

If the courts were to hold that bilingual education is a per se fundamental right, school districts across the nation would be required to

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102. *See supra* note 28.

103. The establishment of a fundamental right triggers strict scrutiny of the classification. *See, e.g.,* Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Williams v. Rhodes, 393 U.S. 23 (1968) (access to the ballot); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (right to vote); Douglas v. California, 372 U.S. 353 (1963) (access to courts for criminal defendants).

104. *See, e.g.,* Plyler v. Doe, 102 S. Ct. 2382 (1982); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

In *Plyler*, the Supreme Court held that requiring undocumented alien children to pay tuition for a public school education violated the equal protection clause of the fourteenth amendment. 102 S. Ct. at 2400. In holding the deprivation of education for undocumented alien children unconstitutional, the *Plyler* Court maintained its position that education is not a fundamental right. *Id.* at 2398. The Court, however, undertook an extensive discussion of the importance of education and the stigma of illiteracy resulting from a total denial of a public education. *Id.* The Court stated: "By denying these children a basic education, we deny them the ability to live within the structure of our civil institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation." *Id.* Thus, in *Plyler*, though the Court refused to find a fundamental right to education, the Court effectively increased its scrutiny under the rational basis theory by emphasizing the extreme importance of education. *Id.*

The total denial argument posited by the Court in *Plyler* is also applicable to supplemental language instruction. In Lau v. Nichols, 414 U.S. 563 (1974), the Court held that denial of supplemental language instruction deprived the students of any meaningful education. *Id.* at 566. *See supra* note 23 and accompanying text.

Whether the Court will accept such an extension of *Plyler*, however, remains unclear. In examining the constitutionality of the statute that denied education to the undocumented alien children, the *Plyler* Court failed to articulate a standard of review to be applied in future cases. 102 S. Ct. at 2398. *See also* G. GUNTHER, *supra* note 54, at 909 (notes that Burger Court has refused to expand fundamental rights strand of equal protection beyond areas recognized by Warren Court).

105. In Hernandez v. Texas, 347 U.S. 475 (1954), the Court held that Mexican-Americans constituted a racially identifiable class for equal protection analysis in a particular Texas county. *Id.* at 479. The Court reserved the question of whether Mexican-Americans constituted a separate class nationwide.

In Plyler v. Doe, 102 S. Ct. 2382 (1982), the Supreme Court refused to recognize illegal alien children as a suspect class. *Id.* at 2397-98. *See also* Comment, *Project Report: De Jure Segregation of Chicanos in Texas Schools,* 7 HARV. C.R.-C.L. L. REV. 307, 348 (1972).

implement full scale bilingual education programs.[106] Local educational agencies would consequently lose their discretionary power to adopt experimental programs or to confront particular student needs without first obtaining court approval. In addition, although all students would be assured full scale bilingual education, the fiscal burden on state and local governments might be devastating.[107]

Similarly, judicial elevation of non-English speaking persons to a suspect class would prove problematic. Not only would federal courts bear the responsibility of determining whether school districts have intentionally discriminated against non-English speaking students, but they would also have to develop a remedy to counteract the discrimina-

106. If a fundamental right or suspect class were established, then strict scrutiny requires that the classification be narrowly drawn to achieve a compelling state interest. *See* G. GUNTHER, *supra* note 54, at 671. In bilingual education, however, there is no classification. In a school district affording no supplemental English instructional program, both limited-English speaking children and nonlimited-English speaking children are treated equally. *See* Grubb, *Breaking the Language Barrier: The Right to Bilingual Education,* 9 HARV. C.R.-C.L. L. REV. 52, 71 (1974). Thus, discriminatory intent or purpose must be shown. *See* Personnel Admin. of Mass. v. Feeney, 442 U.S. 256 (1979); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976). The district court in United States v. Texas, 506 F. Supp. 405 (E.D. Tex. 1981), *rev'd,* 680 F.2d 356 (5th Cir. 1982), found an equal protection violation based on proof of discriminatory intent. The Fifth Circuit, however, reversed the district court opinion without reaching the constitutional question. 680 F.2d at 361.

If the right is based in the constitution, the court has a duty to protect it by imposing relief tailored to the constitutional violation. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (scope of remedy is determined by nature and extent of constitutional violation); Brown v. Board of Educ., 349 U.S. 294 (1955) (relief of segregation to be developed by lower courts). In Keyes v. School Dist. No. 1, 521 F.2d 465 (10th Cir. 1975), *cert. denied,* 423 U.S. 1066 (1976), the Tenth Circuit refused to order bilingual education as a remedy to eliminate the consequences of de jure segregation. For a succinct analysis of the constitutional argument, see Note, *The Constitutional Right of Bilingual Children to an Equal Educational Opportunity,* 47 S. CAL. L. REV. 943 (1973-74). *See also* Kutner, Keyes v. School Dist. No. 1: *A Constitutional Right to Equal Educational Opportunity?,* 8 J.L. & EDUC. 1 (1979).

107. The expense of bilingual education is often overlooked. In Cintron v. Brentwood Union Free School Dist., 455 F. Supp. 57 (E.D.N.Y. 1978), the district court refused to accept the local school board's explanation for having an inadequate bilingual teaching staff. The school district had been forced to lay off teachers in the face of declining enrollment. Recognizing the need to retain the bilingual staff, the school district dismissed teachers having greater seniority than most of the bilingual teachers by creating a separate tenure system for bilingual teachers. A New York state court immediately struck down the separate tenure system. Morris v. Brentwood Union Free School Dist., 52 A.D.2d 584, 383 N.Y.S. 2d 542 (1976). *See supra* Roos, note 53, at 132-33. To comply with the *Morris* ruling, the school district revamped its tenure system and in view of budgetary constraints dismissed nontenured faculty members, many of whom were bilingual teachers. The *Brentwood* court subsequently struck this action down, completely ignoring the fiscal constraints on the local school system. 455 F. Supp. 57, 58.

tion.[108] Thus, federal courts would find themselves in substantially the same position as they presently are with respect to desegregation. A flood of litigation would result, and courts would be forced to usurp the roles of local educational agencies despite their inferior expertise.[109]

Furthermore, a holding of intentional discrimination would foreclose segregation of non-English speaking students districtwide for purposes of economy. Instead, under the mandate of the desegregation cases,[110] school boards would have to disperse non-English speaking students throughout the district, and would have to institute bilingual educational programs as well as special instructors at each school within the district.[111]

The cost to the taxpayers for such elaborate programs would be devastating.[112] In addition, locating enough properly educated bilingual instructors to maintain the program would prove impossible.[113] The overall result would be inadequate, low quality education for all students.

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108. *See supra* note 106 & 107.

109. For criticism of the judiciary's usurpation of the legislative role in the desegregation area, see, for example, Yudof, *Implementation Theories and Desegregation Realities,* 32 ALA. L. REV. 441 (1981).

110. *See, e.g.,* Brown v. Board of Educ., 347 U.S. 483 (1954). The *Brown* desegregation mandate may conflict with the separation of limited-English speaking children for educational purposes. *See* Comment, *supra* note 48, at 1565. Segregation of students for purposes of bilingual education may in itself constitute a violation of the fourteenth amendment. *Id.* at 1593.

Brown's incompatibility with the concept of bilingual education assumes particular significance in light of the recent decision of Martin Luther King Jr. Elem. School Children v. Ann Arbor School Dist. Bd., 473 F. Supp. 1371 (E.D. Mich. 1979). In the *King* case, the district court held that the school district had a duty to provide black students in the district an education in "black English". *Id.* at 1383. Effectuation of the district court mandate clearly requires segregation of black and white children for instructional purposes. *Id. See generally* 26 WAYNE L. REV. 1091 (1980).

111. *See* Bradley v. Millikin, 620 F.2d 1141 (6th Cir. 1980). In *Bradley*, the Legal Defense Fund attempted by motion to intervene in the desegregation case on behalf of minority limited-English speaking children. Under a court order of desegregation, Mexican-American children would be dispersed throughout the school district. In the Detroit school district, bilingual educational programs were limited to certain schools in the district. The attempted intervenors alleged that dispersing Mexican-American children throughout the district would ruin the existing programs and the quality of education for the students. The district court denied the motion to intervene. *See also* Baez, *Desegregation and Hispanic Students: A Community Perspective* (1980) (available in ERIC documents, ED 191646) (discussion of Milwaukee's Hispanic community's attempt through the political process to exempt itself from court-ordered desegregation in order to protect bilingual programs).

112. *See supra* note 107.

113. *Id.*

B. The Statutory Basis and the Remedy

In the absence of a Supreme Court decision finding a constitutional right to remedial language instruction, lower federal courts must confront the difficult task of providing substance to EEOA.

A fair reading of the statute indicates that Congress intended to leave substantial discretion for the development of appropriate relief to the local educational agencies. While section 240(f) of the Act directs local educational agencies to "overcome language barriers,"[114] the Act does not require the implementation of any particular instructional program. In the absence of congressional mandate, the judiciary cannot impose its will on local educational agencies.[115]

The Ninth Circuit in *Guadalupe*[116] implicitly adopted a narrow reading of the statute.[117] By leaving absolute discretion regarding implementation of instructional programs to local educators, the Ninth Circuit left no room for judicial protection of the individuals' rights under EEOA. In contrast, the Fifth Circuit in *Castaneda*[118] offered a workable approach to the review of instructional programs.[119] The Fifth Circuit's three-pronged test, which analyzes the soundness of the educational policy, the reasonableness of the program adopted, and the good faith effort of the school district,[120] has two major advantages. First, by inquiring only into the soundness of the policy adopted and the reasonableness of the program, reviewing courts leave considerable discretion to local educational agencies to deal with both their students'

114. 20 U.S.C. § 1703(f) (1976).

115. The view that Congress intended to leave discretion in developing supplemental language instructional programs to the local educational agencies is supported by the Supreme Court's recent interpretation of the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (Disabled Act), §§ 101-207, 42 U.S.C. §§ 6001-6081 (1976) [hereinafter cited as Disabled Act]. The Disabled Act provides in relevant part: "(1) Persons with developmental disabilities have a right to *appropriate* treatment, services, and rehabilitation for such disabilities." *Id.* § 6001 (1976) (emphasis added). In Pennhurst State School v. Halderman, 451 U.S. 1 (1981), the Court interpreted the Disabled Act as leaving discretion to the states to develop alternative appropriate treatment programs for mentally retarded citizens. *Id.* at 18. *See* 3 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 6102, at 159 (3d ed. 1943) (Interpretation of analogous statutory language is an often used method of statutory interpretation).

116. 587 F.2d 1022 (9th Cir. 1978).

117. *See supra* notes 59-74 and accompanying text.

118. 648 F.2d 989 (5th Cir. 1981).

119. *See supra* notes 77-96 and accompanying text.

120. 648 F.2d at 1009-10. *See supra* notes 83-85.

needs and their own fiscal constraints.[121] Second, by requiring local educators to make a good faith effort, reviewing courts retain the ability to safeguard an individual's statutory rights.[122] The good faith test avoids the result reached by the Ninth Circuit in *Guadalupe* of leaving unfettered discretion to state and local educational agencies.

IV. CONCLUSION

The legal basis of the right to receive supplemental English language instruction in public schools remains uncertain. Until the Supreme Court rules on this issue, lower courts reviewing instructional programs should adopt the test articulated by the Fifth Circuit in *Castaneda v. Pickard*.[123] The Fifth Circuit test retains a balance between protection of the statutory right under EEOA and discretion of local educational agencies in the development of remedial language instructional programs.

Kathi Lynne Chestnut

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121. The advantages of leaving bilingual educational policy choices to the local legislature has been described by one commentator as follows:

> Legislative action in the area of bilingual education is preferable to affirmative action plans by the courts. . . . It is not only the greater perspicacity of the legislature for the problems involved which favors action by that body, but also its wide range of resources for developing bilingual education. It can plan on the basis of the needs for the entire state, unlike the courts which merely respond to the factual setting presented.

Note, *Bilingual Education:* Serna v. Portales Municipal Schools, 5 N.M.L. REV. 321, 333 (1975).

Traditionally, commentators criticize courts for engaging in judicial legislation. One commentator recently suggested that "[l]egislation is a kind of lawmaking, but it is not the kind in which courts should engage. Indeed, . . . when courts legislate they act beyond the scope of their proper functions and capacities." Fernandez, *Custom and the Common Law: Judicial Restraint and Lawmaking by Courts,* 11 SW. U.L. REV. 1237, 1237 (1979).

122. For an argument that the standard of review should be more searching in bilingual education cases, see Comment, *The Legal Status of Bilingual Education in America's Public Schools: Testing Ground for a Statutory and Constitutional Interpretation of Equal Protection,* 17 DUQ. L. REV. 473, 505 (1979).

123. 648 F.2d 989, 1009-10 (5th Cir. 1981). *See supra* notes 77-96 and accompanying text.