
RECOGNIZING THE DISABILITY: EXTENDING THE (TENUOUS) RIGHTS OF ENGLISH- LANGUAGE-DEFICIENT STUDENTS IN PUBLIC SCHOOLS

Recently, . . . a specialist in bilingual education discussed with thoughtful concern the way a large school system might develop a bilingual program for children of Mexican migrant workers. Following this he was asked, “What would you do if in your school system you had, not several hundred children, but only four or five children?” His answer was abrupt and startling: “Forget them.”¹

I. INTRODUCTION

Every year, millions of physically and mentally disabled children enroll in public schools under the protection of federal and state disability acts.² In order to comply with these laws, many schools attempt to accommodate disabled children’s special needs by taking

1. Virginia G. Allen, *The Non-English Speaking Child in Your Classroom*, 30 *READING TEACHER* 504, 504 (1977).

2. During the years 1993-1994, 5,318,021 children ranging in age from birth to twenty-one years old benefited from the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1491o (1994), and the Chapter I program of the Improving America’s Schools Act of 1994, 20 U.S.C. §§ 6301-6514. See NATIONAL CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., *DIGEST OF EDUCATION STATISTICS* 65 (1996) [hereinafter *DIGEST OF EDUCATION STATISTICS*]. The IDEA, originally enacted as the Education for All Handicapped Children Act (EAHCA), Pub. L. No. 94-142, 89 Stat. 773 (1975), was the first federal statute securing an equal educational opportunity for disabled children. For examples of state disabilities acts, see MICH. COMP. LAWS ANN. § 380.1701 (West 1996); N.C. GEN. STAT. § 115C-109 (1997); and OHIO REV. CODE ANN. § 3323.02 (West 1997).

measures such as purchasing special equipment,³ hiring special education teachers,⁴ or installing elevator systems.⁵ Every year, however, millions of other disabled students who wish to enter public schools are not afforded such accommodations for their disabilities. These students include English-Language-Deficient (ELD) students,⁶ who, in the last twelve years, almost have doubled in number.⁷ ELD students are able to speak either limited English or no English at all,⁸ yet typically are required by state law to attend school.⁹

3. Responding to the needs of a student who lacked the use of her hands, a high school in the Washington, D.C. area purchased a \$10,000 laptop computer outfitted with a microphone and voice recognition software. See Robert O'Harrow Jr., *Technology Meets Some Special Needs: Devices, Software Help Disabled Students Overcome Obstacles to Learning*, WASH. POST, Feb. 9, 1997, at B1.

4. For example, in the Grand Blanc Community School District near Flint, Michigan, a federal district court ordered a school to provide a full-time instructional aide for an autistic child desiring to attend public school instead of a specialized school for the mentally disabled. See *Showkeir v. Grand Blanc Community Sch.*, No. 91-CV-40357-FL (D. Mich. Sept. 18, 1992) (consent decree and order of dismissal); see also Wendy Wendland, *Autistic Girl to Attend Class in Wake of Legal Agreement*, FLINT J., Sept. 19, 1992, at A1.

5. For example, in response to the enrollment of a student who had osteogenesis imperfecta, or "brittle bones" disease, in Michigan's Davison Community Schools, the school district installed a new elevator at a cost of \$100,000. See Interview with R. Clay Perkins, Assistant Superintendent of Davison Community Schools, in Davison, Mich. (Dec. 21, 1996).

6. Courts and commentators have referred to students with limited or no English proficiency by various designations, including Limited-English-Proficiency (LEP) students and Non-English-Speaking (NES) students. See, e.g., ROSEMARY C. SANDSTONE, EQUAL EDUCATION UNDER LAW 81 (1986). For simplicity, however, this Note will not distinguish between LED and NES students, and instead will reference as an ELD student any student whose primary language is not English.

7. See HOWARD L. FLEISCHMAN & PAUL J. HOPSTOCK, U.S. DEP'T OF EDUCATION, DESCRIPTIVE STUDY OF SERVICES TO LIMITED ENGLISH PROFICIENT STUDENTS 3 (1994) [hereinafter DESCRIPTIVE STUDY OF SERVICES]. The Department of Education's 1991 survey found that there were 2,314,079 ELD students attending public schools, an increase of almost 1,000,000 from a similar study in 1984. See *id.*

8. Some ELD students have been in the United States all of their lives, while others have just arrived. According to one survey, 33% of ELD students in 1992 were born in the United States while approximately 20% had been in the United States for less than one year. See DESCRIPTIVE STUDY OF SERVICES, *supra* note 7, at 12.

9. All fifty states are required by their constitutions to provide free public education for children, typically through the age of sixteen. See ALA. CONST. art. XIV, § 256, amended by ALA. CONST. amend. CXI; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 1; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1; HAW. CONST. art. IX, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, 2nd, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. 5, § 2; MICH. CONST. art. VIII, §§ 1, 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, §§ 201, 205; MO. CONST. art. IX, §

Most ELD students live in major metropolitan areas near families that share their native language.¹⁰ Consequently, public schools in these areas frequently enroll large numbers of ELD students who speak a common foreign language.¹¹ These schools often voluntarily establish language programs for their ELD students.¹² However, many schools cannot provide their ELD students with such programs because their ELD students are either the only children in their school who do not speak English, or because their ELD students' primary language is so unique that they cannot afford to establish a language program that is appropriate for them.¹³

For many ELD students, the inability to speak their school's mandated¹⁴ language of instruction handicaps their ability to participate in the learning process.¹⁵ In this respect, ELD students'

1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. II, § 1; N.H. CONST. pt. 2, art. LXXXIII; N.J. CONST. art. VIII, § 4(1), (2); N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, §§ 1, 2, 4; OHIO CONST. art. VI, § 2; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. 1, § 68; VA. CONST. art. VIII, §§ 1, 2; WASH. CONST. art. IX, § 2; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, §§ 1, 9.

10. See Sandra James, *Foreign Students and Language Demands Soar*, HARTFORD COURANT, Aug. 7, 1995, at A1; see also DESCRIPTIVE STUDY OF SERVICES, *supra* note 7, at 3.

11. See Susan Headden, *Tongue-tied in the Schools*, U.S. NEWS & WORLD REP., Sept. 25, 1995, at 45. Almost 33% of school districts located in large cities contain over 100 ELD students. See DESCRIPTIVE STUDY OF SERVICES, *supra* note 7, at 7. While only 3% of students in rural areas participate in a bilingual education or an English-as-a-Second-Language (ESL) program, over 18% of all students in either a large city or the suburb of a large city are enrolled in either a bilingual education or an ESL program. See DIGEST OF EDUCATION STATISTICS, *supra* note 2, at 70.

12. See, e.g., *Lau v. Nichols*, 414 U.S. 563 (1974); *Serna v. Portales Mun. Schs.*, 499 F.2d 1147 (10th Cir. 1974).

13. See James, *supra* note 10, at A1. While most ELD students speak Spanish (73%), many ELD students speak less common languages such as Armenian (0.5%), Mandarin (0.5%), Farsi (0.4%), Hindi (0.3%), and Polish (0.3%). See DESCRIPTIVE STUDY OF SERVICES, *supra* note 7, at 11.

14. Some states constitutionally or statutorily require that public school teachers speak only English when teaching all classes other than those of a foreign language. See ARIZ. CONST. art. XXVIII, § 1; ARK. CODE ANN. § 6-16-104; N.M. CONST. art. XXI, § 4 (Michie 1997).

15. Significant difficulties arise for older ELD students who either have just arrived in the United States or previously have attended another school where classes were taught in the students' primary language. See DESCRIPTIVE STUDY OF SERVICES, *supra* note 7, at 10. While young children possess a great capacity for learning a new language, children in early adolescence find learning a new language to be relatively difficult. See JOHN W. SANTROCK, LIFE-SPAN

disability is similar to the disabilities of handicapped children who qualify for protection: ELD students' access to public education is restricted by something beyond their immediate control.¹⁶ Despite this similarity, ELD students' disabilities are not protected under any of the disability acts.¹⁷ Congress and the judiciary have not ignored this inconsistent treatment. Over the past twenty-five years, federal legislation,¹⁸ federal regulations,¹⁹ and several court decisions²⁰ have attempted to accommodate ELD students' disability. However, such attempts have resulted in ambiguous standards for determining which ELD students are entitled to special assistance and what level of responsibility must be exercised by public school districts in accommodating these students. This shortcoming is especially disturbing in light of the recently reinvigorated debate over making English the official language of the United States.²¹

DEVELOPMENT 178-81 (4th ed. 1992); *see also* Craig A. Ramsey & E.N. Wright, *Age and Second Language Learning*, 94 J. SOC. PSYCHOL. 115 (1974) (finding a correlation between age and language test scores); David S. Palermo & Dennis L. Molfese, *Language Acquisition from Age Five Onward*, 78 PSYCHOL. BULL. 409 (1972) (finding that younger children learn language faster than older children). Consequently, researchers suggest that simply placing these older ELD students in classrooms where English is the only language spoken may not be the most effective tool for teaching them. *See* SANTROCK, *supra*, at 181.

16. While one may argue that the parents of ELD students have control over whether they reside in a school district incapable of accommodating their children's needs, the same argument applies to children with other disabilities recognized by the IDEA. Children themselves have no control over (1) which language they learn and (2) in which school district they will enroll. The Supreme Court generally addressed this issue in *Plyler v. Doe*, 457 U.S. 202 (1982). In *Plyler*, the Court held that states cannot deny public education to school-aged illegal aliens. *See id.* at 220. The court reasoned that while parents' illegal entry into the United States is a voluntary action, their children's entry is not. *See id.* The Court stressed that children should not be held responsible for the misguided decisions of their parents. *See id.*

17. *See infra* note 33 and accompanying text for a discussion of qualified disabilities under the IDEA.

18. *See* Equal Educational Opportunities Act of 1974 (EEOA), 20 U.S.C. § 1703 (1994); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1994).

19. *See* Identification of Discrimination and Denial of Services on the Basis of National Origin, 34 C.F.R. § 100.1 (1980); 35 Fed. Reg. 11,595 (1970).

20. *See, e.g.*, *Lau v. Nichols*, 414 U.S. 563 (1974); *Serna v. Portales Mun. Schs.*, 499 F.2d 1147 (10th Cir. 1974); *Otero v. Mesa County Valley Sch. Dist. No. 51*, 408 F. Supp. 162 (D. Colo. 1975).

21. *See, e.g.*, *English as Official Language: Hearings on S. 356 Before the Senate Comm. on Gov't Affairs*, available in 1996 WL 7135845 (Mar. 7, 1996) (statement of Sen. Simon); Note, "Official English": Federal Limits on Efforts to Curtail Bilingual Services in the States, 100 HARV. L. REV. 1345 (1987); Tony Mauro, *English-Only Debate Lost in Legalese*, USA

As this Note will demonstrate, the disabilities suffered by ELD students are substantially similar to the mental and physical disabilities protected by the Individuals with Disabilities Education Act (IDEA); yet Congress has guaranteed equal educational access only to the latter group of students. In response to such disparate treatment, this Note proposes federal legislation that will equalize the educational opportunities for ELD students in much the same way that the IDEA equalized the educational opportunities for physically and mentally disabled students. To establish a foundation for this proposal, Part II of this note examines physically and linguistically challenged students' historical efforts to gain access to equal educational opportunities. Part III then evaluates the efficacy of ELD students' present legal avenues for seeking equal educational opportunities and concludes that an alternative avenue is needed. Finally, Part IV proposes a model for legislation that will extend to ELD students the same educational rights enjoyed by physically and mentally disabled students under the IDEA.

II. PHYSICALLY AND LINGUISTICALLY CHALLENGED STUDENTS' EFFORTS TO GAIN EQUALITY IN EDUCATION

Until the late 1950s, equality in education was not a national priority.²² Prior to that time, disadvantaged students who claimed that schools were providing unequal educational opportunities rarely raised such challenges in federal court. Only in 1954, in the landmark case of *Brown v. Board of Education*,²³ did the Supreme Court finally recognize the importance of equal educational opportunities for all children. The *Brown* Court acknowledged the need for equality not just in the "tangible" factors, such as facilities and supplies, but also in "those qualities which are incapable of objective measurement."²⁴

TODAY, Dec. 5, 1996, at 4A. Some debates center on whether existing bilingual education programs should be abolished altogether. See, e.g., Carlos Munoz, *Bilingual Debate Divides California*, DENVER POST, Aug. 17, 1997, at G6.

22. Indeed, the Supreme Court condoned unequal treatment of blacks in *Plessy v. Ferguson*, 163 U.S. 537 (1896).

23. 347 U.S. 483 (1954).

24. *Id.* at 493 (citing *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)).

Moreover, the *Brown* Court reasoned that if a state endeavors to provide free and compulsory education, the education must be obtainable by all students of proper age, regardless of their physical characteristics.²⁵

A. *Physically Disabled Students*

Twenty years after the Supreme Court's decision in *Brown*, the full force of *Brown's* holding had yet to be realized. Public schools routinely denied disabled students access to education,²⁶ and courts routinely rejected the constitutional claims of parents who sought equal access to education for their disabled children.²⁷ In 1972, however, the concept of equality in education was finally extended to include individuals with disabilities. In *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*,²⁸ a Pennsylvania district court proclaimed that "retarded children who heretofore had been excluded from a public program of education will no longer be so excluded"²⁹ As a result of this decision, courts became more willing to extend equal educational rights to disabled students.³⁰

Three years later, in response to the nearly eight million children in the United States who were excluded from the most important benefits of education due to their physical or mental disabilities, Congress declared that securing an equal educational opportunity for disabled children is a national interest and passed the Education for All Handicapped Children Act,³¹ later amended and renamed the Individuals with Disabilities Education Act.³² By its own terms, the

25. *See id.* at 493.

26. *See* M. LOUISE LANTZY, *INDIVIDUALS WITH DISABILITIES EDUCATION ACT: AN ANNOTATED GUIDE TO ITS LITERATURE AND RESOURCES, 1980-1991* 1-2 (1992).

27. *See, e.g.,* Frederick L. v. Thomas, 408 F. Supp. 832 (E.D. Pa. 1976); Fialkowski v. Shapp, 405 F. Supp. 946 (E.D. Pa. 1975); Harrison v. Michigan, 350 F. Supp. 846 (E.D. Mich. 1972); Mills v. Board of Educ. of D.C., 348 F. Supp. 866 (D.D.C. 1972).

28. 343 F. Supp. 279 (E.D. Pa. 1972).

29. *Id.* at 302.

30. *See, e.g.,* Panitch v. Wisconsin, 390 F. Supp. 611 (E.D. Wis. 1974) (allowing a mentally disabled child to proceed in a class action suit to compel a school district to provide special education services).

31. Pub. L. No. 94-142, 89 Stat. 773 (1975).

32. Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476,

IDEA applies to all disabled children³³ and requires schools to tailor educational programs to disabled students' particular disabilities.³⁴ While there have been mixed reactions to the IDEA's effectiveness, the prevailing perception is that the national commitment to educating all students without regard to disability and the individualized educational programs established for each disabled student have secured the same opportunities for disabled children as those available to other children.³⁵

B. Linguistically Disabled Students

Unfortunately, ELD children have not enjoyed the rights that physically and mentally disabled children have enjoyed under the IDEA. This has resulted from the fact that the IDEA does not include linguistic disabilities within its scope of protected disabilities. By the late 1960s, this disparate treatment culminated in the genesis of a

§ 901(a)(1), 104 Stat. 1103 (codified as amended at 20 U.S.C. §§ 1400-1491o (1994)). The IDEA was spawned in part by the public's concern that disabled children either were totally excluded from the education process or were simply placed in regular classrooms until they were old enough to drop out. *See* Beth v. Carroll, 876 F. Supp. 1415 (E.D. Pa. 1995), *rev'd*, 87 F.3d 80 (3d Cir. 1996).

33. The IDEA defines "children with disabilities" as children "(i) with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, need special education and related services." 20 U.S.C. § 1401(a)(1)(A)(i)-(ii).

34. *See id.* § 1412(2)(A)-(C). Under the IDEA, schools must collaborate with disabled students' parents to devise an individualized education program (IEP). The IEP states what a disabled student's particular needs are, establishes both short- and long-term goals for educating the student and assimilating the student into a regular classroom, and requires yearly progress reports to determine whether the educational procedures established for the student remain adequately aimed toward reaching the goals set by the IEP. *See id.* § 1412(2)(A).

35. *See, e.g.,* Wilbur Hawke, *The Lone Father: Dad Learns Many New Skills, Especially Advocacy*, EXCEPTIONAL PARENT, Nov. 1, 1996, at 28; Kathleen Hillenmeyer, *Educating Everybody: Inclusion Opens New Worlds*, CIN. ENQUIRER, Apr. 15, 1996, at A1; Jennifer Maddox, *Disabled Kids Often Thrive In Regular Classes*, ROCKY MT. NEWS, Oct. 14, 1996, at 42A; Suk Tom, *Special-Needs Students Are Right At Home Among Neighborhood Friends*, DES MOINES REG., Sept. 11, 1996, at 5. *But see* Phil Brinkman, *The Cost of Accommodating: As Special Education Grows, So Does the Expense of Staffing*, WIS. ST. J., Feb. 10, 1997, at 1A; Dante Chinni, *A Bad IDEA*, WASH. MONTHLY, May 1, 1996, at 17; Anna Dubrovsky, *Dover Schools' Head Tells Congress of Rising Costs in Special Education*, YORK DAILY REC., Feb. 5, 1997, at 5; Lisa Gubernick & Michelle Conlin, *The Special Education Scandal*, FORBES, Feb. 10, 1997, at 66.

movement to compel public school districts to afford ELD students the same educational opportunities as other disabled students. ELD students sought such equal educational opportunities under three sources of law: the Equal Protection Clause,³⁶ Title VI of the Civil Rights Act of 1964,³⁷ and the Equal Educational Opportunity Act.³⁸

1. Equal Protection Claims

Most of the early challenges by ELD students asserted that a school's failure to offer special language assistance amounted to a denial of equal protection in violation of the Fourteenth Amendment.³⁹ The plaintiffs in *Lau v. Nichols*⁴⁰ were the first to allege such a claim in federal court. In *Lau*, 2,856 Chinese-speaking students challenged their school district's policy for handling students with English language deficiencies on the ground that their school's special language programs inadequately addressed the needs of ELD

36. U.S. CONST. amend. XIV, § 1.

37. 42 U.S.C. § 2000d (1994).

38. 20 U.S.C. § 1703 (1994).

39. See, e.g., *Lau v. Nichols*, 414 U.S. 563 (1974); *Keyes v. Sch. Dist. No. 1*, 521 F.2d 465 (10th Cir. 1975); *Serna v. Portales Mun. Schs.*, 499 F.2d 1147 (10th Cir. 1974); *Otero v. Mesa County Valley Sch. Dist. No. 51*, 408 F. Supp. 162 (D. Colo. 1975). Most students argued that the school deprived them of their right to an education by providing English-speaking students with the facilities needed for a sufficient education and by not providing comparable facilities for similarly situated non-English-speaking students. See, e.g., *Lau*, 414 U.S. at 563; *Serna*, 499 F.2d at 1147. Some students claimed a specific right to bilingual education, as opposed to a broader right to an education. See, e.g., *Keyes*, 521 F.2d at 482; *Serna*, 499 F.2d at 1149; *Otero*, 408 F. Supp. at 170-71. In *Keyes*, the Tenth Circuit held that there is no Fourteenth Amendment right "to an educational experience tailored to [a student's] unique cultural and developmental needs." *Keyes*, 521 F.2d at 482. Furthermore, the court in *Otero* declared that, for practical and financial reasons, there is no constitutional right to bilingual or bicultural education: "[I]f there were an Equal Protection right to bilingual/bicultural education, the needs of a single student would give rise to that right, and our nation's schools would bankrupt themselves in meeting Equal Protection claims to bilingual education in every conceivable language and dialect." *Otero*, 408 F. Supp. at 169. Many students also have argued that schools unconstitutionally discriminate against ELD students on the basis of race or national origin by not offering special assistance to ELD students. See, e.g., *United States v. School Dist. of Ferndale*, 577 F.2d 1339 (6th Cir. 1978); *Heavy Runner v. Bremner*, 522 F. Supp. 162 (D. Mont. 1981); *Martin Luther King, Jr. Elementary Sch. Children v. Michigan Bd. of Educ.*, 463 F. Supp. 1027 (E.D. Mich. 1978). The students in *Valadez v. Graham*, 474 F. Supp. 149 (M.D. Fla. 1979), asserted both claims.

40. 483 F.2d 791 (9th Cir. 1973), *rev'd*, 414 U.S. 563 (1974).

students.⁴¹ In addition to asserting state constitutional and statutory claims, the students alleged violations of the Equal Protection Clause and Title VI of the Civil Rights Act of 1964.⁴² After the district court ruled that the school district had not violated the students' equal protection rights,⁴³ the students contended on appeal that the district court had based its ruling on a misinterpretation of the Supreme Court's holding in *Brown*.⁴⁴ Specifically, the students claimed that the school district's policies had the effect of segregating the students on the basis of national origin—a practice forbidden by *Brown*—and that the school was offering facilities that were useful only to non-minorities.⁴⁵

The Ninth Circuit Court of Appeals affirmed the district court, holding that the school district had not violated the Equal Protection Clause. The court emphasized that under the Supreme Court's mandate in *Brown*, a school district is compelled only to offer the same "facilities, textbooks, teachers and curriculum as is [sic] provided to other children in the district."⁴⁶ Because the court could

41. *See id.* at 792-93. The students maintained that although the school district was accommodating to a limited degree the needs of some of the students, the school nevertheless was "abridg[ing] their rights to an education and to bilingual education, and disregard[ing] their rights to equal educational opportunity among themselves and with English-speaking students." *Id.* at 793.

42. *See id.* at 793.

43. *See Lau v. Nichols*, No. 70-627 (N.D. Cal. 1970).

44. *See Lau*, 483 F.2d at 794. The appellants also premised part of their equal protection claim on the fact that the school district offered part- and full-time bilingual education to some Chinese students with English-language deficiencies, but did not provide such education to other students. *See id.* at 793-94. The Ninth Circuit rejected the claim that this procedure violated the Equal Protection Clause. The court reasoned that a school district should not only be free to establish its curriculum without undue interference from the legislature, *see id.* at 799, but also should be allowed to develop remedial programs "one step at a time," *id.* at 800 (citing *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955)). In support of this notion, the court pointed to the San Francisco Unified School District, which began its bilingual and ESL program as a pilot program with just a few students, increasing size and budget allotments each year. *See id.*

45. *See id.* at 794. The students claimed that the *Brown* Court held that education "is a right which must be made available to all on equal terms." *Id.* (citing *Brown v. Board of Educ. of Topeka*, 347 U.S. 483, 493 (1954)). The students contended that, in other words, schools had a duty under *Brown* to provide the same textbooks, facilities, and teachers to all students. *See id.* They further argued that, "[I]f [a] student is disadvantaged with respect to his classmates, the school has an affirmative duty [under *Brown*] to provide him special assistance to overcome his disabilities, whatever the origin of those disabilities may be." *Id.*

46. *Id.* at 799. The *Lau* majority explained that the *Brown* decision declared unconstitutional

find no evidence that the school district did not provide equal facilities, textbooks, teachers, and curriculum,⁴⁷ the court held that the school district was in fact treating its ELD students similarly to its English-proficient students.⁴⁸ Although the Supreme Court subsequently reversed the Ninth Circuit's *Lau* decision, the Supreme Court chose not to address the Ninth Circuit's equal protection analysis.⁴⁹

Lau left unclear whether establishing that a school district's practices had a discriminatory impact on students' educational opportunities would suffice to prove an equal protection violation.⁵⁰

only de jure discrimination, not de facto discrimination, *see id.* at 794, and cited numerous examples of situations in which courts have found de jure discrimination by school districts. The majority noted that the "[a]ppellants have neither alleged nor shown any such [de jure] discriminatory actions" by the school district. *See id.* at 796. The dissent in *Lau* argued that there need only be a showing of discriminatory effect. *See id.* at 803. The dissent stated that the district's failure to provide equal accessibility to educational resources had a clear discriminatory effect, an effect which the school district itself admitted in an official publication. *See id.* at 801-02. The publication stated: "For [the Chinese-speaking students], the lack of English means poor performance in school. . . . The student is almost inevitably doomed to be a dropout and become another unemployable in the ghetto." *Id.* at 801 (quoting *San Francisco Unified School District, Pilot Program: Chinese Bilingual*, May 5, 1969, at 3a, 6a, cited in Appellant's Opening Brief at 11, *Lau v. Nichols*, 483 F.2d 791 (9th Cir. 1993) (No. 26155)).

The *Lau* court also rejected the students' claim that the court's decision was controlled by decisions finding de facto discrimination unconstitutional where "states' actions [have] perpetuated the ill effects of past *de jure* segregation . . ." *Id.* at 796-97. The court found no connection between the appellants' language deficiencies and any past de jure discrimination despite an amicus curiae's assertion that the appellants were "members of an identifiable racial minority which has historically been discriminated against by state action in the area of education." *Id.* at 797 (quoting Harvard University Amicus Curiae Brief at 28).

47. *See id.* at 799.

48. *See id.* The dissent would have considered the school district's failure to provide special assistance to the ELD students a prima facie violation of the Equal Protection Clause. In fact, the dissent stated, "[T]he [school district] withholds from a readily identifiable segment of an ethnic minority the minimum English language instruction necessary for that segment to participate in the educational process with any chance of success." *Id.* at 801. (Hill, C.J., dissenting). The dissent argued that when a student cannot speak the only language spoken in the classroom and written in the textbooks, the student is receiving no educational opportunity, much less an equal educational opportunity. *See id.*

49. *See Lau v. Nichols*, 414 U.S. 563 (1974).

50. *See, e.g.*, Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 39 (1977) ("[T]here is a conflicting mass of precedent on the proper role of impact in constitutional adjudication."); Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1194 (1991) ("Pre-Davis race-based equal protection law was in a state of confusion. After announcing in several opinions that disparate effects could establish violations of the equal protection clause, the Court discarded effects and demanded a showing of illicit

Three years later, however, in *Washington v. Davis*,⁵¹ the Supreme Court held that an equal protection violation would be sustained only upon a showing that individuals had been subjected to purposeful, invidious discrimination.⁵² Consequently, after *Davis*, courts consistently rejected equal protection challenges by ELD students on the grounds that there was no indication that school districts had intentionally discriminated against a specific class of students based on race or national origin.⁵³ However, courts did signal their willingness to consider discriminatory effects as an element in determining whether a school district possessed an underlying discriminatory purpose.⁵⁴

Some ELD students asserted that courts should apply a strict-scrutiny standard of review⁵⁵ to these claims, arguing that (1)

motive.”); Eric Buermann, Casenote, *Greene v. City of Memphis: Is Intent the Sine Qua Non of Discrimination Claims?*, 35 U. MIAMI L. REV. 131, 136 (1980) (discussing the Supreme Court’s mixed messages regarding the intent requirement); Julie Edwards, Comment, *The Right to Vote and Reapportionment in the Texas Legislature*, 41 BAYLOR L. REV. 689, 700 (1989) (noting ambiguity of requirements for proving an equal protection violation).

51. 426 U.S. 229 (1976).

52. *See id.* at 238-39. In other words, if a policy is fair on its face but has the effect of segregating individuals, the assumption is that the policy is valid. *See id.* at 241-42. In contrast, Justice Powell in *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), suggested that upon a showing of discriminatory effect, the burden should shift to the defendant to validate the policy by showing that the same decisions or segregational effect would have occurred had there not been a discriminatory purpose. *See id.* at 270.

53. *See, e.g., Valadez v. Graham*, 474 F. Supp. 149, 156 (M.D. Fla. 1979); *Deerfield Hutterian Ass’n v. Ipswich Bd. of Educ.*, 468 F. Supp. 1219, 1230-31 (D.S.D. 1979).

Because none of the cases that have asserted a Fourteenth Amendment equal protection claim have been found to support either a fundamental right or purposeful discrimination, ELD students’ equal protection challenges have been evaluated by courts under the “mere rationality” test. The court’s analysis in *Deerfield* exemplifies the standard analysis used by other courts in evaluating ELD students’ equal protection claims. The *Deerfield* court stated that, “In this case, [the state has a legitimate interest] in providing maximum discretion to locally autonomous governmental boards . . . [and] education . . . is something which can best be implemented and administered on a local level.” *Id.* at 1231.

54. For example, the court in *Valadez* held that the systematic application of a policy or procedure is just one of many considerations that courts may use in determining whether an alleged incident of discrimination was intentional. *See Valadez*, 474 F. Supp. at 155.

55. Courts apply a heightened standard of review to governmental regulations that affect a fundamental right or that make distinctions based on race or national origin. In such situations, the regulation is valid only if it is necessary to further a compelling governmental interest. *See, e.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW* §§ 16-7 to -13, at 1454-65 (2d ed. 1988).

education is a fundamental right,⁵⁶ (2) they were being denied such a fundamental right,⁵⁷ and (3) such denial was based on classifications of race or national origin.⁵⁸ Before the Supreme Court could consider such a constitutional challenge by ELD students, it preempted the claim in *San Antonio Independent School District v. Rodriguez*.⁵⁹ In *Rodriguez*, the Court, while admitting the “grave significance of education both to the individual and to our society,”⁶⁰ held that there is neither an explicit nor an implicit guarantee of education in the Constitution, and that, therefore, there is no guarantee of absolute equality in education.⁶¹ The Court did suggest, however, that a complete deprivation of education might violate an individual’s fundamental rights.⁶²

56. See, e.g., *Valadez*, 474 F. Supp. at 156.

57. See, e.g., *id.*

58. See, e.g., *Deerfield Hutterian Ass’n v. Ipswich Bd. of Educ.*, 468 F. Supp. 1219, 1230 (D.S.D. 1979).

59. 411 U.S. 1 (1973). In *Rodriguez*, the Court considered a challenge to Texas’s system of financing public education. See *id.* Parents who lived in areas with a low tax base argued that the disparate expenditures per pupil among different school districts that resulted from Texas’s reliance upon property taxes to fund the schools amounted to a deprivation of equal educational opportunity. See *id.* at 17-18. The plaintiffs further argued that education is a fundamental right because it is necessary for the exercise of explicit constitutional rights, such as the right of free speech: “[T]he right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently” *Id.* at 35.

60. *Id.* at 30 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 337 F. Supp 280, 283 (W.D. Tex. 1971)).

61. See *id.* at 35.

62. See *id.* at 36-37 (“Even if it were conceded that some identifiable quantum of education is a constitutionally protected [right], . . . we have no indication that the present levels of educational expenditures in Texas provide an education that falls short.”) Because the *Rodriguez* Court found that education is not a fundamental right, the school financing system only needed to be rationally related to a legitimate state interest. See *id.* at 40.

Almost ten years after the Court decided *Rodriguez*, the Court gave further validity to the argument that all students have a right to some minimal amount of education. In *Plyler v. Doe*, 457 U.S. 202 (1982), the Court deemed unconstitutional a Texas statute that denied state funds to public school districts enrolling illegal alien children. See *id.* at 205. The Court held that withholding funds for the education of illegal-alien children is a violation of the Equal Protection Clause. See *id.* at 220-22. Although the Court in *Plyler* did not go so far as to hold that the complete denial of education would violate a fundamental right, it did find that education is more than just a social welfare benefit and determined that the cost to our nation would be “significant” if groups of individuals were denied education:

[E]ducation has a fundamental role in maintaining the fabric of our society. . . . [The] denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting

The *Rodriguez* Court's suggestion that a complete deprivation of education might violate an individual's fundamental rights enabled ELD students to articulate an alternate basis for their constitutional claim to special language assistance: ELD students' inability to understand the language of their teachers completely deprives them of education. However, to date, no ELD student has successfully litigated an equal protection claim based on complete deprivation of education. Perhaps due to the rigorous legal standards that ELD students must meet for a court to find a school in violation of the Equal Protection Clause, recent ELD discrimination suits have not alleged equal protection violations.⁶³ Instead, such discrimination suits have been based on one of two federal anti-discrimination statutes.⁶⁴ Title VI of the Civil Rights Act of 1964,⁶⁵ the broader of the two statutes, has been the primary focus of most of the ELD litigation since *Lau*.

2. Title VI of the Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964 conditions public institutions' receipt of federal funds on their agreement not to discriminate on the basis of race, color, or national origin.⁶⁶ Almost

unreasonable obstacles to advancement on the basis of individual merit.

Id. at 221-22. However, it is unclear whether students who cannot speak any English actually are deprived completely of an education, thereby invoking a strict scrutiny review. In a concurring opinion in *Plyler*, Justice Blackmun argued that the complete denial of education is similar to the complete denial of the right to vote in that both place undue disadvantages on the individual. *See id.* at 234. Moreover, he asserted that "when the State provides an education to some and denies it to others, it immediately and inevitably creates class distinctions of a type fundamentally inconsistent with [equal protection]." *Id.*

63. *See, e.g.*, *Teresa P. v. Berkeley Unified Sch. Dist.*, 724 F. Supp. 698 (N.D. Cal. 1989).

64. *See, e.g.*, *Heavy Runner v. Bremner*, 522 F. Supp. 162 (D. Mont. 1981).

65. 42 U.S.C. § 2000d (1994).

66. *See id.* Section 2000d states:

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.

Id. Title VI also requires the individual federal funding agencies to promulgate rules to enforce Title VI. *See id.* § 2000d-1. Section 2000d-1 provides:

Each federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the

from the time of its enactment, ELD students have used Title VI as a vehicle for asserting their entitlement to an equal educational opportunity. Generally, ELD students have focused their arguments on their public schools' alleged neglect of the unique needs of foreign students, as manifested by their schools' inattention to language barriers.⁶⁷

In order to prove a Title VI claim, a party must demonstrate that the federally funded program in question maintains a practice of discriminating on the basis of race, color, or national origin.⁶⁸ It remains unclear, however, exactly how many individuals must be affected by the discriminatory practice to sustain a violation of Title VI. Moreover, it is not clear whether a party must prove intent to discriminate on the part of a Title VI defendant.

a. Requisite Number of Affected Students: Blackmun's Warning

In *Lau v. Nichols*,⁶⁹ the Supreme Court refused to consider the equal protection claim of the 2,800 Chinese ELD students enrolled in

provisions of [§ 2000d] with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

Id. Both the Department of Education and the Department of Health and Human Services have enacted guidelines that specifically apply Title VI's standards to schools that receive federal funds. See Office for Civil Rights Regulation, 34 C.F.R. § 100.3(b)(2) (1996) (forbidding discrimination having "the effect of subjecting individuals to discrimination because of their race, color, or national origin, or [having] the effect of defeating or substantially impairing accomplishment of the objectives of the program" (emphasis added)); Department of Health and Human Services Regulation, 45 C.F.R. § 80.3(b)(2) (1996) (same).

67. See Karen McBeth Chopra, Comment, *A Forgotten Minority, An American Perspective: Historical and Current Discrimination Against Asians from the Indian Subcontinent*, 1995 DET. C.L. REV. 1269, 1308 (1995) (discussing the relationship between English-language deficiency and national origin); Sonja Diaz-Granados, Note, *How Can We Take Away A Right That We Never Protected: Public Education and Immigrant Children*, 9 GEO. IMMIGR. L.J. 827, 851 (1995) ("Failure to provide special programs to overcome the language barriers faced by LEP children has the effect of denying these immigrant children the level of quality education being provided their American-born contemporaries."); Cecilia Wong, Note, *Language is Speech: The Illegitimacy of Official English After Yniguez v. Arizonans For Official English*, 30 U.C. DAVIS L. REV. 277, 306 (1996) (noting the functional correlation between language and national origin).

68. See 42 U.S.C. § 2000d.

69. 414 U.S. 563 (1974).

the San Francisco Unified School District and instead based its decision solely on the students' Title VI claim.⁷⁰ Applying the federal regulations implementing Title VI⁷¹ to the facts in *Lau*, and invoking the reasoning of the Ninth Circuit's dissenting opinion,⁷² the Court held that the disparity in educational opportunities between English-speaking and Chinese-speaking students was discriminatory under Title VI.⁷³ As a result, *Lau* set a clear precedent for school districts like the San Francisco Unified School District: When a school contains a large number of ELD students, Title VI requires that the school provide special educational assistance to those students. *Lau* did not set such a clear precedent, however, for smaller school districts. Emphasizing that the group of students seeking relief in *Lau* was very large, and fearing that the majority's decision might be interpreted too broadly, Justice Blackmun⁷⁴ cautioned in his concurring opinion:

[I]n another case, [if] we are concerned with a very few youngsters, or with just a single child who speaks only German or Polish or Spanish or any language other than English, I would not regard today's decision, or the separate concurrence, as conclusive upon the issue whether the statute and the guidelines require the funded school district to provide special instruction. For me, numbers are at the heart of this case.⁷⁵

Courts, echoing Justice Blackmun's concern, have pointed out that if Title VI required bilingual education in all circumstances, schools

70. *See id.* at 566. Because the San Francisco Unified School District received federal funds, the Court held that the District was obligated to abide by the directives promulgated by the Department of Health, Education and Welfare (HEW) in Title VI regulations. *See id.*

71. In Title VI's application guidelines, HEW required federally funded school districts to "take affirmative steps to rectify the language deficiency in order to open [their] instructional program[s]" to students who are English-language deficient. *See* Identification of Discrimination and Denial of Services on the Basis of Natural Origin, 35 Fed. Reg. 11,595 (1970).

72. *See supra* notes 46-48.

73. *See Lau*, 414 U.S. at 568. Pursuant to its holding, the *Lau* Court ordered the Board of Education to consider two possible remedies to its discrimination: (1) implementing special classes in which English would be taught to children of Chinese ancestry, and (2) implementing special classes in which subjects would be taught in Chinese. *See id.* at 565.

74. Chief Justice Burger joined in Justice Blackmun's concurring opinion. *See id.* at 571.

75. *See id.* at 572 (Blackmun, J., concurring).

would bankrupt themselves in trying to meet the needs of every language represented in the school.⁷⁶ Thus, as a result of the holding in *Lau*, the text of Title VI, and Justice Blackmun's discomfort with the possible implications of the *Lau* decision, courts and school districts have been left with the responsibility of determining whether Title VI and *Lau* implicitly require that a school district enroll a minimum number of students before a court may find a Title VI violation.⁷⁷

76. See, e.g., *Otero v. Mesa County Valley Sch. Dist. No. 51*, 408 F. Supp. 162 (D. Colo. 1975).

77. The first case invoking Justice Blackmun's concurring opinion in *Lau* was *Serna v. Portales Municipal Schools*, 499 F.2d 1147 (10th Cir. 1974). The facts in *Serna* were similar to those in *Lau*: a considerable number of students in the Portales Municipal School District spoke little or no English, and the District had not instituted a satisfactory program to assist its ELD students. See *id.* at 1149. After finding the Portales School District in violation of Title VI, the *Serna* court expressed concern that future courts would construe its holding to require bilingual education for even a single ELD student. See *id.* at 1154. The *Serna* court cautioned, "[a]s Mr. Justice Blackmun pointed out in his concurring opinion in *Lau*, numbers are at the heart of this case and only when a substantial group is being deprived of a meaningful education will a Title VI violation exist." *Id.*

Serna's adoption of Justice Blackmun's "numbers approach" paved the way for school districts with only one or a few ELD students to be exempt from instituting special language or curricular programs. To date, federal courts generally have followed Justice Blackmun's recommendation in *Lau* and the reasoning of the *Serna* court in finding a Title VI violation only when there exists a substantial number of ELD students in a given school district. See, e.g., *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277, 1284 (7th Cir. 1977) (holding that a potential class of hundreds of thousands of physically disabled citizens satisfies Justice Blackmun's caveat of finding a Title VI violation only when the interests of a substantial number of students are involved); *Keyes v. School Dist. No. 1*, 521 F.2d 465, 483 (10th Cir. 1975) (holding that despite having similar facts, neither *Lau* nor *Serna* controlled because both of those cases involved large numbers of students); *Phelps v. Washburn Univ.*, 632 F. Supp. 455, 459-60 (D. Kan. 1986) (holding that "only when a substantial group is being deprived of a meaningful education will a Title VI violation exist"); *Valadez v. Graham*, 474 F. Supp. 149, 160 (M.D. Fla. 1979) (stating in dictum that because a Title VI violation requires a substantial number of affected students, and because the number of students affected "does not even approach [the number of] disadvantaged students" in *Lau* or *Serna*, plaintiff's claim would have been denied); *Pabon v. Levine*, 70 F.R.D. 674 (S.D.N.Y. 1976) (denying defendant's motion for summary judgment because a Title VI violation required a substantial number of victims, which plaintiff could prove at trial); *Otero v. Mesa County Valley Sch. Dist. No. 51*, 408 F. Supp. 162, 170-72 (D. Colo. 1975) (finding no violation of Title VI where there were "very few" ELD students).

Only one court has refused to adopt Justice Blackmun's warning in *Lau*, holding instead that Title VI requires special educational assistance for ELD students regardless of the number of affected students. See *Heavy Runner v. Bremner*, 522 F. Supp. 162, 164 (D. Mont. 1981). The *Heavy Runner* court relied on *United States v. School District of Ferndale*, 577 F.2d 1339, 1345 (6th Cir. 1978), and *Deerfield Hutterian Ass'n v. Ipswich Board of Education*, 468 F. Supp. 1219 (D.S.D. 1979), in reaching its conclusion that the presence of one ELD student will suffice to establish a Title VI claim, see *Heavy Runner*, 522 F. Supp. at 164-65, even though the courts in

b. Discriminatory Intent vs. Discriminatory Effect

Establishing that a sufficient number of ELD students has suffered discrimination is only part of the struggle courts have had when interpreting Title VI. Courts also have had to address the issue of whether a Title VI violation requires proof of intent to discriminate, or whether a mere discriminatory effect will suffice. In 1974, the Supreme Court in *Lau* stated that a procedure or policy violates Title VI if it has a discriminatory effect on members of a particular race, color, or national origin.⁷⁸ However, subsequent Supreme Court decisions seem to have altered this interpretation of Title VI⁷⁹ and, as a result, have caused confusion for some courts.⁸⁰

In 1978, a plurality of the Court in *Regents of the University of California v. Bakke*⁸¹ held that Title VI was coextensive with the Fourteenth Amendment and, thus, carries an intent requirement.⁸² A year later, in *Board of Education v. Harris*,⁸³ three dissenting justices

Ferndale and *Deerfield* relied not on Title VI, but, rather, on EEOA section 1703. See *Ferndale*, 577 F.2d at 1345; *Deerfield*, 468 F. Supp. at 1231.

Although no court has attempted to demarcate the point at which the number of ELD students in any district becomes "substantial," courts have made such determinations on a case-by-case basis according to the proportion of ELD students in a given school. See *Lau v. Nichols*, 414 U.S. 563 (1974) (finding a violation when 2,800 students were involved); *Serna v. Portales Mun. Schs.*, 499 F.2d 1147 (10th Cir. 1974) (finding a violation when over 100 students were involved); *Phelps v. Washburn Univ.*, 632 F. Supp. 455 (D. Kan. 1986) (finding no violation where few students were involved); *Valadez v. Graham*, 474 F. Supp. 149 (M.D. Fla. 1979) (finding no violation when 35 students were involved); *Otero v. Mesa County Valley Sch. Dist. No. 51*, 408 F. Supp. 162, 171 (D. Colo. 1975) (finding no violation when "few, if any, students" were involved).

78. See *Lau*, 414 U.S. at 568 ("Discrimination is barred which has that effect even though no purposeful design is present.")

79. See *Guardians Ass'n v. Civil Serv. Comm.*, 463 U.S. 582 (1983); *Board of Educ. v. Harris*, 444 U.S. 130 (1979); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

80. See, e.g., *Larry P. v. Riles*, 793 F.2d 969, 981 n.7 (9th Cir. 1984) (outlining the Supreme Court's conflicting holdings in cases since *Lau*); *Graham v. Tennessee Secondary Sch. Athletic Ass'n*, No. 1:95-CU-044, 1995 WL 115890, at *12 (E.D. Tenn. Feb. 20, 1995) (noting that the Supreme Court "has not been entirely clear as to whether Title VI requires proof of" discriminatory intent or merely of discriminatory effect); *Association of Mexican-American Educators v. California*, 836 F. Supp. 1534, 1545 (N.D. Cal. 1993) (indicating that the Court's decisions regarding Title VI claims have not been "clear-cut").

81. 438 U.S. 265 (1978) (Powell, J., plurality opinion) (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part).

82. See *id.* at 287.

83. 444 U.S. 130 (1979).

questioned the validity of the *Lau* Court's holding that a discriminatory effect would suffice for the purpose of establishing a Title VI violation.⁸⁴ Finally, in *Guardians Ass'n v. Civil Service Commission*,⁸⁵ the Court settled the conflict by holding that even though Title VI forbids only intentional discrimination, plaintiffs may seek relief against actions that have discriminatory effects by bringing suits based on federal regulations implementing Title VI.⁸⁶ Thus, while a school will not violate Title VI by merely maintaining a policy that has discriminatory effects on one of Title VI's protected classes, it can still be liable for redressing such effects under regulations promulgated by federal agencies.⁸⁷

C. The Equal Educational Opportunity Act

In 1974, Congress enacted the Equal Educational Opportunity Act⁸⁸ (EEOA) to prohibit states from denying students an equal educational experience on the basis of race, color, sex, or national origin.⁸⁹ The EEOA specifies six actions that constitute unlawful discrimination.⁹⁰ The last of these, 20 U.S.C. § 1703(f), directly

84. *See id.* at 159-60 (Stewart, Powell, Rehnquist, JJ., dissenting) (“[Title VI] has been construed to contain not a mere disparate-impact standard, but a standard of intentional discrimination.”).

85. 463 U.S. 582 (1983).

86. *See id.* at 610-12; *see also* *Alexander v. Choate*, 469 U.S. 287, 292-93 (1985). While the Court in *Guardians* did not expressly overrule *Lau*, some courts have speculated that the Supreme Court would decide *Lau* differently today in light of *Guardians*. *See, e.g.,* *Castaneda v. Pickard*, 648 F.2d 989, 1007 (5th Cir. 1981) (“We must confess to serious doubts . . . about the continuing vitality of the rationale of the Supreme Court’s opinion in *Lau v. Nichols* . . .”); *Bryan v. Koch*, 492 F. Supp. 212, 230 (S.D.N.Y. 1980) (“[T]he [Supreme Court’s] opinions in [*Regents v. Bakke*] and [*Board of Education v. Harris*] strongly indicate that, were the issue squarely presented today, a majority of the Justices would hold that *Lau* no longer controls . . .”).

87. ELD students asserting claims based on Title VI regulations may not be able to prove that a school’s practices either intentionally or unintentionally discriminate on the basis of race or national origin when there are only a few ELD students in the school district. In these cases, the aggrieved students must show that the school’s practices do in fact discriminate on the basis of race or national origin by relying on the number of aggrieved students.

88. Equal Education Opportunity Act, Pub. L. No. 93-380, 88 Stat. 514 (1974) (codified as amended at 20 U.S.C. §§ 1701-1721 (1994)).

89. *See* 20 U.S.C. § 1703.

90. *See id.* § 1703(a)-(f). The EEOA proscribes the denial of equal educational opportunities to an individual on the basis of the individual’s race, color, sex, or national origin by: (1) the deliberate segregation of students by an educational agency, *see id.* § 1703(a); (2) an educational

relates to the claims of ELD students.⁹¹ Unfortunately, § 1703(f) was added as a floor amendment late in the legislative process of enacting the EEOA, so little is known about Congress's impetus for enacting § 1703(f). As a result, courts have had to rely almost exclusively on case law interpreting and applying § 1703(f) when evaluating their own § 1703(f) claims.⁹² While these interpretations are useful in determining general violations of § 1703(f), it is still unclear whether the statute requires a showing of intentional discrimination and exactly how many ELD students must be the subject of discrimination for their to be a statutory violation.

1. Requisite Number of Affected Students

Unlike Title VI litigation, § 1703(f) litigation has been sparse. Consequently, it is too early to determine whether courts will interpret § 1703(f) consistent with Title VI's apparent requirement that a significant number of students have suffered discrimination. In fact, only two cases have addressed directly the issue of how many students must have suffered discrimination for a court to find a § 1703(f) violation.⁹³ The courts in *United States v. School District of Ferndale*⁹⁴ and *Heavy Runner v. Bremner*⁹⁵ held that a § 1703(f)

agency's failure to take affirmative steps to counter the effects of a previously segregated school system, *see id.* § 1703(b); (3) the assignment of a student to a school other than the one closest to the student's home if such assignment perpetuates a segregating effect, *see id.* § 1703(c); (4) the discrimination of an educational agency in employment practices, *see id.* § 1703(d); (5) the transfer of a student from one school to another if the purpose or effect of the transfer is to segregate students, *see id.* § 1703(e); and (6) the failure of an educational agency to take affirmative steps to overcome language barriers, *see id.* § 1703(f).

91. At least one court has speculated that the Supreme Court's decision in *Lau* inspired § 1703(f)'s inclusion in the EEOA. *See Cintron v. Brentwood Union Free Sch. Dist.*, 455 F. Supp. 57, 61 (E.D.N.Y. 1978).

92. One such decision was *Martin Luther King, Jr. Elementary Sch. Children v. Michigan Bd. of Educ.*, 451 F. Supp. 1324 (E.D. Mich. 1978), which held that to establish a violation of § 1703(f), a plaintiff must show (1) that there has been a denial of an educational opportunity based on race, color, sex, or national origin and (2) that the school failed to take appropriate action to overcome language barriers that are sufficiently severe so as to impede the student's equal participation in instructional programs. *See id.* at 1332.

93. *See United States v. School Dist. of Ferndale*, 577 F.2d 1339, 1345 (6th Cir. 1978); *Heavy Runner v. Bremner*, 522 F. Supp. 162, 164-65 (D. Mont. 1981).

94. 577 F.2d 1339 (6th Cir. 1978).

95. 522 F. Supp. 162 (D. Mont. 1981).

violation may exist even if only one individual has suffered from discrimination.⁹⁶ In reaching its decision, the *Ferndale* court relied on its conclusion that Congress must have intended a broad reading of the statute.⁹⁷ Noting that the Attorney General has the authority under the EEOA to institute an action on behalf of an individual who is denied equal educational opportunity⁹⁸ and that nothing in the EEOA requires the Attorney General to identify every potential member of the discriminated class, the court reasoned that a violation of the statute may exist even if there has been only one victim of discrimination.⁹⁹

2. Discriminatory Intent vs. Discriminatory Effect

As in the Title VI and Fourteenth Amendment cases, few courts have considered whether § 1703(f) requires a showing of intentional discrimination for a statutory violation. However, all courts that have considered the argument that § 1703(f) is just a restatement of the principles of the Fourteenth Amendment and Title VI, and that it, thus, includes an intent requirement, have rejected this argument. These courts instead have held that § 1703(f) creates rights beyond those protected by the Constitution or Title VI.¹⁰⁰ In *Castaneda v. Pickard*,¹⁰¹ for example, the Fifth Circuit Court of Appeals held that while Congress intended most of the provisions in § 1703 to require discriminatory intent, the language of § 1703(f) distinguishes this

96. See *Ferndale*, 577 F.2d at 1345; *Bremner*, 522 F. Supp. at 164-65.

97. See *Ferndale*, 577 F.2d at 1345.

98. See *id.* A § 1703 claim may be brought either by the aggrieved individual or by the attorney general on behalf of the individual. See *id.* § 1706.

99. See *Ferndale*, 577 F.2d at 1345. (“[The EEOA] does not require identification of all actual or potential victims of [equal opportunity] denials.”). *But cf.* *Otera v. Mesa County Valley Sch. Dist. No. 51*, 408 F. Supp. 162, 171-72 (D. Colo. 1975) (suggesting that a § 1703(f) violation requires a significant number of ELD students as in Title VI cases).

100. See, e.g., *United States v. Hinds County Sch. Bd.*, 560 F.2d 619, 624 (5th Cir. 1997) (holding that the EEOA “guarantee[s] additional rights to public school children” beyond the Constitution and previous statutes); *United States v. Texas*, 506 F. Supp. 405, 432 (E.D. Tex. 1981) (“The evolution of the E.E.O.A. makes it clear that the statute was intended to create new substantive rights for victims of discrimination, beyond that subject to challenge on constitutional grounds.”), *rev’d*, 680 F.2d 356 (5th Cir. 1982); *Martin Luther King, Jr. Elementary Sch. Children v. Michigan Bd. of Educ.*, 463 F. Supp. 1027, 1032 (E.D. Mich. 1978).

101. 648 F.2d 989 (5th Cir. Unit A June 1981).

subsection from the rest of § 1703 and indicates Congress's intent to impose only a discriminatory effect standard.¹⁰² For example, the court noted that while § 1703(a) makes several references to intentional acts,¹⁰³ § 1703(f) "does not contain language that explicitly incorporates an intent requirement nor . . . does this subsection employ words such as 'discrimination' whose legal definition has been understood to incorporate an intent requirement."¹⁰⁴

Although there have been few judicial interpretations of the requirements of § 1703(f), the courts that have considered the scope of § 1703(f) have consistently given it a broader interpretation than that given to Title VI and the Fourteenth Amendment.¹⁰⁵ Whereas courts have interpreted Title VI to require a showing of intentional discrimination against a large number of individuals,¹⁰⁶ they have interpreted § 1703(f) to require merely a showing of discriminatory effect on a single individual.

102. *See id.* at 1000-01.

103. *See id.* For example, § 1703(a) forbids "'deliberate segregation . . . on the basis of race, color, or national origin . . .'" and § 1703(e) bars transfers of students which have the 'purpose and effect' of increasing segregation." *Id.* at 1001 (quoting 20 U.S.C. § 1703(a), (e)).

104. *Id.* at 1007-08; *see also Texas*, 506 F. Supp. at 432 ("The question of whether or not discriminatory intent is a necessary element of a § 1703(f) violation must . . . be resolved, not by reference to constitutional doctrine, but by the text of the statute itself."). Congress's goal in enacting § 1703(f) was "to provide school and governmental authorities with a clear delineation of their responsibilities to their students and employees and to provide the students and employees with the means to achieve enforcement of their rights." HOUSE COMM. ON EDUCATION AND LABOR, H.R. REP. No. 92-1335, at 3 (1972). The proposal for the EEOA came from President Nixon in 1972 and specifically outlined the creation of enforceable rights for ELD students:

School authorities must take appropriate action to overcome whatever language barriers might exist, in order to enable all students to participate equally in educational programs. This would establish, in effect, an educational bill of rights for Mexican-Americans, Puerto Ricans, Indians and others who start under language handicaps, and ensure at last that they too would have equal opportunity.

118 CONG. REC. 8931 (1972) (statement of President Nixon).

Indeed, the legislative history of the EEOA supports *Castaneda's* holding and indicates that Congress intended for § 1703(f) to embody both an intent requirement and an additional set of rights for students.

105. *See, e.g., Castaneda v. Pickard*, 648 F.2d 989, 1007-08 (5th Cir. Unit A 1981); *United States v. School Dist. of Ferndale*, 577 F.2d 1339, 1345 (6th Cir. 1978); *Heavy Runner v. Bremner*, 522 F. Supp. 162, 164-65 (D. Mont. 1981).

106. *See supra* notes 69-77 and accompanying text.

III. AN EVALUATION OF THE PRESENT ALTERNATIVES FOR PURSUING THE EDUCATIONAL RIGHTS OF ELD STUDENTS

A. The Inadequacy of the Present Alternatives

Courts, Congress, and commentators agree that the education of ELD students is an important and worthwhile objective.¹⁰⁷ Despite their agreement on this point, they have failed to advance clear, consistent directives as to the means by which ELD student can secure access to an education that effectively accounts for their disability. Specifically, the judiciary has applied inconsistent standards for determining the number of ELD students that must be enrolled in a particular school before the school may be found in violation of Title VI or the EEOA.¹⁰⁸ Moreover, while Congress has enacted legislation that requires schools to help ELD students overcome their language barriers, it nonetheless has failed to articulate the statutes' coverage.¹⁰⁹ Finally, neither the courts nor Congress have established standardized procedures to guide schools on how to overcome these language barriers.

1. Inconsistent Judicial Standards

Beginning with *Lau v. Nichols*,¹¹⁰ courts have consistently required that schools with large numbers of ELD students provide special language assistance to those students.¹¹¹ However, courts have been

107. See, e.g., 20 U.S.C. §§ 1703, 7402; *Lau v. Nichols*, 414 U.S. 563 (1974); *Serna v. Portales Mun. Schs.*, 351 F. Supp. 1279 (D.N.M. 1972); Rachel F. Moran, *Bilingual Education as a Status Conflict*, 75 CAL. L. REV. 321 (1987); Rachel F. Moran, *Foreword—The Lessons of Keyes: How Do You Translate “The American Dream”?*, 1 LA RAZA L.J. 195 (1986); Note, “Official English”: Federal Limits on Efforts to Curtail Bilingual Services in the United States, 100 HARV. L. REV. 1345 (1987); *Let DPS Do Its Job*, DENVER POST, Aug. 12, 1997, at B6; *Rising Up Against Bilingual Education*, WASH. TIMES, Aug. 11, 1997, at A16.

108. See *supra* notes 66-106 and accompanying text.

109. See *supra* notes 66-106 and accompanying text. Specifically, the statutes do not specify whether they cover ELD students individually or only in groups.

110. 414 U.S. 563 (1974).

111. See, e.g., *Castaneda v. Pickard*, 648 F.2d 989 (5th. Cir. Unit A June 1981) (over 1000 students); *Guadalupe Org. Inc. v. Tempe Elementary Sch. Dist. No. 3*, 587 F.2d 1022 (9th. Cir.

reluctant to require special language assistance in schools that have few ELD students. Courts' disparate treatment of these two groups does not appear to stem from a notion that ELD students in large groups are more disadvantaged than those in small groups. Rather, the source of this disparity appears to be courts' recognition of the administrative difficulties of providing special assistance to small groups of ELD students.¹¹² Courts seem to have taken Justice Blackmun's concurring opinion in *Lau* as a justification for engaging in a cost-benefit analysis in order to address only the most significant population of ELD students. Thus, in effect, courts have adopted a rule requiring only those schools with the greatest number of ELD students to assist ELD students.

2. Inadequate Sources of Legal Protection

Because courts have ruled that a Title VI violation requires the presence of a large number of ELD students within a given school district,¹¹³ and because of the uncertainty of a similar requirement for a § 1703 violation, the Fourteenth Amendment is presently the best

1978) (over 1000 students); *Morales v. Shannon*, 516 F.2d 411 (5th. Cir. 1975) (over 100 students); *Serna v. Portales Mun. Schs.*, 499 F.2d 1147 (10th. Cir. 1974) (over 100 students); *Rios v. Read*, 480 F. Supp. 14, 17 (E.D.N.Y. 1978) (186 students); *Cintron v. Brentwood Union Free Sch. Dist.*, 455 F. Supp. 57, 59 (E.D.N.Y. 1978) (460 students); *Armstrong v. O'Connell*, 74 F.R.D. 429, 430 (E.D. Wis. 1977) (5% of entire Milwaukee school system).

112. See, e.g., *Otero v. Mesa County Valley Sch. Dist. No. 51*, 408 F. Supp. 162 (D. Colo. 1975). The *Otero* court partly based its decision that there is no right to bilingual education on its concern over the financial effect that such a right would have on schools:

[A]s I have said on occasion in the course of hearings in this case, if there were an Equal Protection right to bilingual/bicultural education, the needs of a single student would give rise to that right, and our nation's schools would bankrupt themselves in meeting Equal Protection claims to bilingual educations in every conceivable language and dialect.

Id. at 169.

113. See, e.g., *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277, 1280 n.13 (7th Cir. 1977) (noting "perceived importance in the number of discriminatees seeking relief"); *Serna*, 499 F.2d at 1154 (adopting Justice Blackmun's concurrence in *Lau*); *Phelps v. Washburn Univ.*, 632 F. Supp. 455, 460 (D. Kan. 1986) (adopting *Serna's* requirement of substantial numbers); *Valadez v. Graham*, 474 F. Supp. 149, 159 (M.D. Fla. 1979) (adopting *Serna's* requirement of substantial numbers); *Pabon v. Levine*, 70 F.R.D. 674, 677 (S.D.N.Y. 1976) (same); *Otero*, 408 F. Supp. at 171 (adopting Justice Blackmun's concurrence in *Lau*). For a discussion of courts that have required many students for a finding of a Title VI violation, see *supra* notes 69-77 and accompanying text.

source of law on which small groups of ELD students might base a claim for more appropriate educational conditions. The courts that have rejected students' equal protection challenges to the suitability of their access to education have done so on the grounds that education is not a fundamental right unless a student is being completely deprived of an education.¹¹⁴ Thus, it appears that courts might grant relief under the Fourteenth Amendment to the individual or small numbers of ELD students who, in fact, typically are completely denied any meaningful educational opportunity.

The individual ELD students or ELD students in small groups who are most often completely denied access to a meaningful educational opportunity typically attend small schools¹¹⁵ in rural areas or speak obscure languages¹¹⁶ not common to the community. At best, these students receive an independent education in which they are removed from the classroom to work alone without the instruction of a teacher or aide.¹¹⁷ More typically though, these ELD students receive a "total immersion" education, in which they attend class but understand nothing that their teachers say.¹¹⁸ In both of these situations, the students persuasively could claim that they receive no meaningful instruction at all. Single and small-group ELD students whose educational experiences mirror those described above would seem to have endured the educational conditions that the Supreme Court in *San*

114. *See, e.g.*, *Guadalupe Org. v. Tempe Elementary Sch. Dist. No. 3*, 587 F.2d 1022, 1026 (9th Cir. 1978); *Deerfield Hutterian Ass'n v. Ipswich Bd. of Educ.*, 468 F. Supp. 1219, 1230 (D.S.D. 1979); *Otero*, 408 F. Supp. at 169-70. The students in these cases were still involved in the educational process, such as those in *Deerfield*, 468 F. Supp. at 1221, 1226, and some were even benefiting from a bilingual education program, such as those in *Otero*, 408 F. Supp. at 169-70.

115. *See supra* note 10 and accompanying text. Most ELD students attend school in large groups. The rest are spread throughout the country in small groups. *See id.*

116. The range of languages spoken by ELD students is diverse. While Spanish is spoken by 73% of all ELD students, no other language is represented by more than 4% of ELD students, with most languages represented by only 1% of ELD students. *See* DESCRIPTIVE STUDY OF SERVICES, *supra* note 7, at 11.

117. *See* interview with Richard Buell, superintendent of Kearsley Community Schools, in Flint, Mich. (Dec. 21, 1996).

118. One writer has likened this practice to "throw[ing] these kids into the swimming pool before they've learned to swim." Carlos Munoz, *Bilingual Debate Divides California*, DENVER POST, Aug. 17, 1997, at G6.

*Antonio Independent School District v. Rodriguez*¹¹⁹ addressed when it suggested that there may be a fundamental right to at least “some quantum” of education.¹²⁰ Accordingly, a court faced with a challenge by such ELD students alleging a complete educational deprivation may be inclined to find that the student was being denied a fundamental right, and, therefore, that the school’s failure to provide a minimal education could be sustained only if it was necessary to accomplish a compelling interest.

Indeed, if courts apply the dicta in *Rodriguez* and find that a fundamental right is being violated when a student effectively is receiving no education, all ELD students will have the potential to be guaranteed an equal educational opportunity. Thus, access to equal education would not be limited to those ELD students who happen to attend school with other ELD students or who speak common foreign languages. However, this guarantee requires that schools be advised of effective measures by which they can provide ELD students with a minimally acceptable education. Such effective measures heretofore have not been advanced by Title VI, the EEOA, the regulations implementing these statutes, or any court decision requiring schools to provide special language assistance. The absence of such a clear mandate has frustrated many schools that have attempted to implement language assistance programs.¹²¹ Therefore, a national model for

119. 411 U.S. 1 (1973).

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

121. *See* interview with Richard M. Buell, Superintendent of Kearsley Community Schools, in Flint, Mich. (Dec. 21, 1996); Interview with R. Clay Perkins, Assistant Superintendent of Davison Community Schools, in Davison, Mich. (Dec. 21, 1996).

Many school districts, particularly those with small numbers of ELD students, simply refuse to offer any assistance program either because school administrators are unsure of what types of programs to offer or because the programs they have considered were cost prohibitive. For most schools, qualifying for federal assistance through the Bilingual Education Act, 20 U.S.C. §§ 7402-7491 (1994), can help to resolve the cost-related issues associated with meeting the needs of ELD students. *See infra* note 183. However, even when schools can afford to offer language programs, such programs often are so varied in content that there is no way for courts to establish a standard by which to measure efficacy. *See, e.g.,* *Lau v. Nichols*, 414 U.S. 563, 564 (1974) (involving a comprehensive bilingual program for two thousand students); *Otero v. Mesa County Valley Sch. Dist. No. 51*, 408 F. Supp. 162, 163-67 (D. Colo. 1975) (involving a remedial language program, but not bilingual education). This results in a system of ELD assistance that many believe is ineffective. *See, e.g.,* Linda Chavez, *Is Bilingual Education Failing to Help America's Schoolchildren?*, INSIGHT MAGAZINE, June 3, 1996, at 24; Margot Hornblower, *Putting Tongues*

educating ELD students is imperative in order to ensure that language assistance programs are accomplishing the goal of helping ELD students overcome their language barriers and thereby protecting these students' rights to an equal educational opportunity.

B. A Prospective Alternative by Analogy

Based on Congress's findings underlying its passage of the IDEA, a strong analogy can be drawn between the special educational needs of the students protected by the IDEA and the special educational needs of ELD students. The disabilities suffered both by ELD children and children covered by the IDEA hinder or prohibit a student's ability to participate in the traditional classroom learning environment. In addition, both types of disabilities are beyond the students' immediate control¹²² and both types of disabilities can be overcome, thus allowing the student to assimilate into a regular classroom.¹²³ Moreover, the procedures established by the IDEA are similar to the procedures that would be necessary to help ELD students overcome their language barriers.¹²⁴ Given the similarities between these two classes of

in Check, TIME, Oct. 9, 1995, at 40; John Iwasaki & Gordy Holt, *Schools Chief Candidate Says Spanish Is For Menial Laborers*, SEATTLE POST-INT., June 27, 1996, at A1; Ana Menendez, *Judgment Day for Bilingual Education*, ORANGE COUNTY REG., Feb. 8, 1996, at A1; Rosalind Rossi & Jorge Oclander, *Chicago's Bilingual Program*, CHICAGO SUN-TIMES, May 12, 1996, at 14; Venise Wagner, *S.F. to Dump Its Bilingual Classroom Integration; Superintendent Says Policy Hurt More Than It Helped*, SAN FRANCISCO EXAMINER, Apr. 6, 1995, at A2.

122. See *supra* note 17.

123. For less severe physical or mental disability cases, the IDEA requires that schools provide each disabled student with the least-restrictive atmosphere and strive to incorporate each disabled student into the general student population. See 20 U.S.C. § 1412(5); see also *Honig v. Doe*, 484 U.S. 305 (1988). Such a goal is equally feasible for ELD students: under this Note's proposed legislation, each school would also be encouraged to incorporate each ELD student into the general student population. See *infra* Part IV.

124. Currently, some ELD students, particularly those that are a part of a large ELD class, are taken out of the general classroom environment based solely on the students' surname, see, e.g., *Serna v. Portales Mun. Schs.*, 499 F.2d 1147 (10th Cir. 1974), and placed into separate classes with a bilingual teacher and taught in the students' primary languages. See DESCRIPTIVE STUDY OF SERVICES, *supra* note 7, at 24. This practice poses the same assimilation issues that are addressed by the IDEA. See *supra* notes 32-35. For example, a high school principal in New York once testified that "once a child was in a bilingual program, he remained in such a program and was never mainstreamed into English-speaking classes. Even when students themselves asked to withdraw from the bilingual program, the assistant principal [for] foreign languages did not grant their request." Chavez, *supra* note 121, at 24. Moreover, the mother of an ELD student in a New

students, Congress should enact legislation on behalf of ELD students based on the goals and procedures of the IDEA. Such legislation should require a careful evaluation of ELD students' abilities, a carefully prepared education plan, a yearly monitoring process, and a goal of assimilation into the traditional classroom learning environment. Mandating such measures would establish a concise and comprehensive program for educating ELD children and, thus, secure an equal educational opportunity for ELD children.¹²⁵

IV. A MODEL APPROACH TO EDUCATING ELD STUDENTS

There are three major facets of the IDEA that should be considered when developing standardized procedures for educating ELD students: (1) "identification," or the process of determining whether a student's disability is covered by the act; (2) "accommodation," or the

York school testified: "My son has been in bilingual education for five years and in special education since 1994. [He] cannot read or write in English or Spanish." *Id.*

125. Some commentators have suggested more fundamental and far less comprehensive methods of educating ELD students. *See, e.g.,* Allen, *supra* note 1. Professor Allen suggests that teachers who have only a few ELD students in their classroom should approach the challenge by combining basic language-teaching techniques with attention to the students' unique cultural backgrounds. This teaching method, however, requires the teacher to spend extra instructional time with these few students. Moreover, this method, while potentially effective for younger children, would not necessarily be as effective for high school students. *See supra* notes 15-16 and accompanying text.

Alternatively, Congress could simply include "English language deficient" as one of the qualified disabilities in the IDEA. The IDEA also defines "children with specific learning disabilities" as

those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include . . . learning problems which are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of *environmental, cultural, or economic disadvantage.*

20 U.S.C. § 1401(a)(15) (emphasis added). However, the inclusion of ELD students in the IDEA's protected class may cause confusion for school districts when determining the scope of their responsibilities to ELD students. This may occur because the needs of many of the physically and severely mentally disabled children are greater than those of ELD students. Additionally, protection under the IDEA may also foster confusion for parents of ELD students in developing their expectations of the school district for educating their children.

establishment of an individualized education program (IEP), the implementation of the IEP's goals through the student's educational program, and the eventual assimilation (if feasible) of the student into the standard classroom; and (3) "funding," or the sources from which schools may receive financial assistance in the execution of an IEP.

A. Identification

Under the IDEA, if a school becomes aware that a student has a disability that may qualify for statutory protection,¹²⁶ the school must convene an IEP team,¹²⁷ composed of school personnel and the child's parents, to determine whether the student's disability indeed qualifies for protection.¹²⁸ The identification of ELD students should follow a similar procedure. States should require schools to establish testing criteria for students at each grade level to be administered upon the recommendation of a student's teacher, parent, or school. States should also establish procedures to enable a child's parents to challenge a school's testing policies or decision to place their child in a special language program.¹²⁹ Due to the difference in severity between the disabilities of ELD students and the disabilities of students covered by the IDEA, and the commensurate difference between the level of

126. There are numerous ways in which a school might become aware of a disability, including recommendations from teachers, special aides, or psychologists, competency testing, or a parent's request for his or her child's placement in special education. *See generally* DOUGLAS BIKLEN, *SCHOOLING WITHOUT LABELS: PARENTS, EDUCATORS, AND INCLUSIVE EDUCATION* (1992); JAMES C. CHALFANT & MARGARET VAN DUSEN PYSH, *THE COMPLIANCE MANUAL: A GUIDE TO THE RULES AND REGULATIONS OF THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT* (1980); DONALD L. MACMILLAN, *MENTAL RETARDATION IN SCHOOL AND SOCIETY* (2d ed. 1982); *see also* *Parents in Action on Special Educ. v. Hannon*, 506 F. Supp. 831 (N.D. Ill. 1980) (validating a school's use of IQ testing for placement purposes).

127. *See* 20 U.S.C. § 1415(b).

128. *See id.* § 1415(b). Parents are entitled to prior written notice of a school's decision to place their child in special education and the opportunity to appeal such a decision. *See id.* § 1415(b)(1)(C)-(E).

129. The IDEA contains such a provision. *See id.* § 1415(b)(2). Section 1415(b)(2) provides:

Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate unit, as determined by State law or by the State educational agency.

Id.

services needed to provide the necessary level of education for these two groups of students, the identification, testing, and appellate procedures under the proposed legislation likely will not be as extensive as those provided under the IDEA.

B. Accommodation

Under the IDEA, if a school finds that a student has a qualified disability, the school must first develop the student's IEP.¹³⁰ The school must then evaluate the student's progress at least once a year¹³¹ and, if necessary, alter the IEP's goals or educational services to reflect changes in the student's performance level.¹³² As the ultimate goal of the IDEA is the complete assimilation of disabled students into the regular educational environment, the school must also strive to move the student to a less-restrictive environment each year.¹³³ In consideration of these accommodation procedures under the IDEA, this Note proposes the following statutory language governing the appropriate accommodation of ELD students.

(1) ELD students shall be classified as either Level 1, Level 2, or Level 3 English language deficient depending on the severity of their disability. Students who speak very limited English shall be classified as Level 1 ELD. Level 2 ELD students shall consist of those students with an intermediate proficiency in English.¹³⁴ Level 3 ELD students shall include

130. *See id.* § 1401(a)(20). The IEP includes: (1) a statement of the student's current educational performance level; (2) a statement of the annual goals for the student, including a list of short-term goals for daily instruction; (3) a description of the educational services that will be provided for the student, including a statement describing the extent to which the student will be participating in regular educational activities; (4) a statement of the necessary transition services for the student; (5) a timeline explaining the duration of the special educational services; and (6) evaluation procedures for measuring on at least an annual basis the achievement of the goals established in the IEP. *See id.*

131. *See id.* § 1401(a)(20)(F).

132. *See generally id.* § 1415.

133. *See id.* § 1407(b); *see also* *Kruelle v. New Castle County Sch. Dist.*, 642 F.2d 687, 695 (3d Cir. 1981) (emphasizing the IDEA's ultimate goal of assimilating disabled students into the general student body).

134. For example, Level 2 ELD would include students who may understand some words and phrases but who are generally unable to engage in extended conversation.

those students whose difficulties lie primarily in understanding advanced language concepts, grammar, and vocabulary.

(2) Every ELD student shall be entitled to an IEP. However, a school district shall be permitted to develop a collective educational plan (CEP) for every member of a group of similar ELD students in the following circumstances:

(a) if there are ten or more students in the same language class and each student is at the same ELD Level; or

(b) if there are ten or more ELD students in various language classes and each student is at the same ELD Level, not including Level 1.¹³⁵

(c) The above two exceptions shall not apply to any student beyond the eighth grade.

(3) The IEP team shall consist of school personnel, the ELD student's parents or guardian, and, if available, the school's director of special language instruction. The CEP team shall consist of school personnel, the school's director of special language instruction, and a representative of the parents of the ELD students.¹³⁶

(4) IEPs and CEPs shall contain the following information:

(a) a statement of the student's current English comprehension level, including assessments of both spoken and written English;

(b) a statement of annual goals upon which the student's curriculum will be based;

(c) a statement of short-term goals for the student's weekly progress;

(d) a method for providing the student with a "free appropriate education"¹³⁷ geared to the development of the

135. In other words, if there are ten or more ELD students at Level 2 who speak different languages, or if there are ten or more ELD students at Level 3 who speak different languages, the school may elect to design a CEP instead of an IEP.

136. Group sizes and competing interests preclude the inclusion of all parents. The IDEA avoids this problem by requiring individualized plans for every student. See 20 U.S.C. § 1401(a)(20). However, as the disabilities of ELD students are less diverse than those of students covered by the IDEA, a representative would be sufficient for a collective educational program.

137. This Note's proposal adopts the IDEA's definition of "free appropriate education." The

*particular student's English proficiency;*¹³⁸

(e) a timeline indicating the duration of the services; and

(f) an evaluation procedure for the period after services have been terminated.

(5) IEPs and CEPs shall be designed to allow an ELD student to progress from one Level to the next Level until the student is prepared to enter the regular educational environment on a full-time basis.

(6) The IEP and CEP teams shall convene at least yearly to evaluate the student's performance level and the continued feasibility of the established goals. If a student's performance level is lower than that anticipated by the IEP or CEP, or has regressed from the previous assessment, the IEP or CEP team may reconvene to discuss alternative educational methods, possible ELD-Level demotion, a new individualized plan, or testing for learning disabilities that may be hindering the student's language development.

(7) A student's IEP or CEP shall be terminated only upon the student's progression from Level 3 to the regular educational environment. Additionally, the student's language proficiency shall be tested one year following the termination of the IEP or CEP to determine the student's adjustment to the regular educational environment. If the school district determines that the student's proficiency has regressed, the IEP or CEP team shall reconvene to determine an appropriate course of action, including the development of another IEP or CEP.

IDEA defines "free appropriate education" as "special education and related services" that are provided at public expense, meet the state's educational standards, and are "provided in conformity with the individualized education program . . ." *Id.* § 1401(a)(18).

138. Courts have interpreted a similar provision under the IDEA, *see id.* § 1412(1), as an assurance that students acquire at least some educational benefit, but not necessarily realize the full potential of their abilities. *See, e.g.,* Angevine v. Jenkins, 752 F. Supp 24 (D.D.C. 1990); Max M. v. Thompson, 592 F. Supp. 1437 (N.D. Ill. 1984); Lang v. Braintree Sch. Comm., 545 F. Supp. 1221 (D. Mass. 1982). As with the IDEA, this section does not require that the ELD student realize his or her full potential as a student. Rather, the focus of this legislation would be to overcome the student's English-language deficiency, enabling the student to participate at least minimally in the educational process.

C. Funding

Under the IDEA, schools and state educational agencies may apply for grants from the Secretary of Education.¹³⁹ In contrast, most funding for ELD programs comes directly from the individual states.¹⁴⁰ However, these funds are supplemented by federal allocations obtained under the Bilingual Education Act.¹⁴¹ At least one bill has been introduced in Congress that would eliminate such federal funding for ELD programs.¹⁴² This Note proposes that any ELD legislation should maintain the current methods of state and federal funding. Aside from providing much needed funding, the current national system of financing helps maintain a broader focus on the problems of language barriers. In essence, such a system acknowledges that language barriers impede the abilities of ELD students to attain an equal educational experience in all parts of the country, not just in those areas heavily populated with ELD students.¹⁴³

V. CONCLUSION

Today there are over two million school-aged children who have deficiencies in the English language.¹⁴⁴ Some of these children receive an intensive specialized education to help equalize their academic

139. See 20 U.S.C. § 1406(a). The amount of funding for which a school or agency is eligible is determined by a formula set out in the IDEA and is proportionate to the number of disabled children in the school or state. See *id.* § 1411.

140. State funding sources accounted for 72.7% of the expenses associated with educating ELD students while federal ELD funding accounted for only 9.6% of such expenses. See DESCRIPTIVE STUDY OF SERVICES, *supra* note 7, at 30.

141. 20 U.S.C. § 7402 (1994).

142. See H.R. Res. 3898, 105th Cong. (1997). This bill would establish English as the official language of the United States, repeal laws requiring bilingual ballots, and rescind federal bilingual education funding. See *id.* The House of Representatives passed the bill on August 1, 1996 by a vote of 259-169. See *English Language Bill Introduced in U.S. Senate*, U.S. NEWSWIRE, Feb. 13, 1997, available in 1997 WL 5710858. The Senate has not yet acted upon it.

143. See ROSEMARY C. SALOMONE, EQUAL EDUCATION UNDER LAW 78-111 (1986).

144. See DESCRIPTIVE STUDY OF SERVICES, *supra* note 7, at 3.

potential.¹⁴⁵ These students typically live in large cities and attend school with many other ELD students.¹⁴⁶ To an extent, the law is on their side. Title VI of the Civil Rights Act and the Equal Educational Opportunity Act can provide ELD students with necessary educational resources when the interests of a large number of ELD students are involved. However, the benefits of these laws have not been extended to ELD students who attend schools with few other ELD students. As a result of this inconsistency, this country lacks a reliable, rigid standard by which it may evaluate the needs of, and implement educational programs for, its ELD students.

In contrast, school-aged children who suffer from mental or physical disabilities are afforded comprehensive and consistent protection under the IDEA.¹⁴⁷ Adopting an educational approach for ELD students similar to that prescribed under the IDEA would provide ELD students with the same educational benefits enjoyed by students who are similarly disabled. ELD students who are either “stuck” in language assistance programs at schools that have thousands of ELD students or neglected by schools that have neither the resources to implement language assistance programs nor the pressure to do so finally will be granted an equal educational opportunity and a chance to overcome their language barrier—a true disability.

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145. *See id.* at 21-27.

146. *See id.* at 3-6.

147. *See* 20 U.S.C. § 1400 (1994).

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