Assessing The Legal Profession’s Contribution to the Education of Bilingual Students

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Over the last two decades the legal profession has been at the forefront in developing the method by which the nation’s schools educate those language-minority students whose dependence on a language other than English inhibits their successful participation in the typical English-speaking classroom. As a result of a variety of legal activities, a national policy of transitional bilingual education (TBE)\(^1\) has developed for the education of limited English-speaking children. The implicit assumption of legal advocates has been that bilingual education is the best pedagogi-

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1. We will be discussing three pedagogical methods for teaching limited-English-proficient students in addition to submersion (the lack of a discrete method). Each is defined as follows:

Submersion. Language-minority children are placed in an ordinary classroom where English is spoken. No special program is provided to help them overcome their language deficiency. Submersion is aptly described as “sink or swim.” The minority home language is not used in the classroom.

English-as-a-Second-Language (ESL). ESL students are placed in regular classrooms for most of the day. During part of the day, however, these students receive extra instruction in English. This extra help is based on a special curriculum designed to teach English. The non-English home language may or may not be used in conjunction with ESL instruction.

Immersion. Instruction is in English, as in the case of submersion, but important differences exist. The immersion teacher understands the non-English home language (L1), and students can address the teacher in the non-English language. The immersion teacher may occasionally use L1 to clarify instruction but, generally, teachers speak only in English (L2). Furthermore, the curriculum is structured so that prior knowledge of L2 is not assumed as subjects are taught. Content is introduced in a way that can be understood by the students. The students, in effect, learn the second language and content simultaneously. Most immersion programs, also, teach the L1 language arts for thirty to sixty minutes a day. Structured immersion differs from transitional bilingual instruction in that the home language is not used by the teacher for formal instruction (except where it is a subject) and subject area instruction is given in the second language from the beginning of the program.

Transitional Bilingual Education (TBE). Reading is taught in both the non-English home language and English. Subject matter is taught in the non-English home language until the students’ second language (English) is good enough for them to participate successfully in a regular classroom. ESL, often, is used to help minimize the time needed to master English. Use of the non-English home language instruction is phased out as regular English instruction is gradually phased in. TBE is differentiated from submersion and ESL by the use of the non-English home language for instruction in nonlanguage subject areas and by teaching literacy in the non-English language as a school subject.
cal method to teach both English and substantive subjects to children with limited English proficiency (LEP).\(^2\)

This paper will assess the contribution of the legal profession in furthering the educational progress of language-minority students. The first section will discuss the impact of the legal process—through legislation, litigation and regulation—upon bilingual education; the actors within this process have institutionalized transitional bilingual education as the only method of educating English deficient students. The second section presents a critique of TBE programs and concludes that the legal advocates' unbounded faith in TBE is not justified on educational grounds. The concluding section details the challenges ahead in bilingual education—challenges which must be met and resolved before the education of students dependent on a non-English language can improve.

I. THE IMPACT OF THE LEGAL PROCESS

A. Legislation

1. Federal

Title VII of the Elementary and Secondary Education Act was enacted in 1968 to provide short-term help to school districts with high

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2. The statutory definition of "limited English proficiency" has undergone slight revisions during the last two decades. However, the substantive definition remains unchanged. In 1968, Congress defined "children of limited English speaking ability" as "children who come from environments where the dominant language is other than English." Bilingual Education Act of 1968, Pub. L. No. 90-247, § 702. In 1974, Congress expanded its definition.

(1) The term "limited English-speaking ability," when used with reference to an individual, means—

(A) individuals who were not born in the United States or whose native language is a language other than English; and

(B) individuals who come from environments where a language other than English is dominant, as further defined by the Commissioner by regulations; and, by reason thereof, have difficulty speaking and understanding instruction in the English language.

Bilingual Education Act of 1974, Pub. L. No. 93-380, § 703(a). The 1984 statutory definition of "limited English proficiency" is almost identical to the 1978 definition although Congress placed an emphasis on the educational aspects of this condition in the later legislation.

(1) The terms "limited English proficiency" and "limited English proficient" when used with reference to individuals means—

(A) individuals who were not born in the United States or whose native language is a language other than English; and

(B) individuals who come from environments where a language other than English is dominant, as further defined by the Secretary by regulation; and who, by reason thereof, have sufficient difficulty speaking, reading, writing, or understanding the English language to deny such individuals the opportunity to learn successfully in classrooms where the language of instruction is English or to participate fully in our society.

20 U.S.C. § 3223(a)(1). Regardless of the precise wording, all three definitions apply to children who come from environments where a language other than English is dominant with a resulting difficulty in communicating in and understanding English.
concentrations of LEP children from low-income homes. The program was designed to help these districts develop their capacity to deliver programs tailored to "the special educational needs" of such children. The legislation encouraged districts to devise "new," "imaginative" and "forward-looking" elementary and secondary school programs for the special educational needs of children "who are educationally disadvantaged because of their inability to speak English." The legislation was proposed to allow districts to develop programs tailored to their individual needs.

Because of the need for extensive research, pilot projects and demonstrations, the proposed legislation does not intend to prescribe the types of programs or projects that are needed. Such matters are left to the discretion and judgment of the local school districts to encourage both varied approaches to the problem and also special solutions for a particular problem of a given school.

In 1974, Congress, in the face of intense pressure from bilingual education advocates, curbed local flexibility over the choice of instructional methods. Funds became available only for programs which met the definition of a "program of bilingual education." This definition required a program of instruction that included, "to the extent necessary to allow a child to progress effectively through the educational system, (instruction in) the native language of the children of limited English proficiency." The Office of the General Counsel in the United States Department of Education determined that this definition of bilingual education programs meant that only programs teaching in the native language could be federally funded; any program that gave special instruction only in English was not eligible for federal support.

The federal government, additionally, moved away from the original concept of temporary federal funding to a policy where local bilingual education programs were yearly supported by federal funds. A number of districts received support for extended periods of time. In 1983, 284 districts—forty-one percent of all Title VII funded districts—had received federal aid for six or more years; 105 districts had received support

5. Id.
7. Id. at 50.
10. Id.
11. In 1974, the Office of the General Counsel in the United States Department of Education circulated through our offices a memorandum to this effect.
for ten or more years.\textsuperscript{12}

In the closing days of its session, the 98th Congress reauthorized the Bilingual Education Act, Title VII of the Elementary and Secondary Education Act.\textsuperscript{13} The requirement that projects funded under this Act use the student’s non-English language in instruction was retained for ninety-six percent of the funds.\textsuperscript{14} This new legislation represents a clear victory for advocacy groups wanting an expanded role for instruction in the home language. It was a clear defeat for those who argue for a minimal federal role and seek to expand local control over the type of bilingual education program utilized.

2. \textit{State}

Following the federal government’s lead, state legislatures enacted legislation mandating bilingual education. By 1979, thirty-three states

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\item \textsuperscript{13} 20 U.S.C. § 3221 et seq.
\item \textsuperscript{14} 20 U.S.C. § 3222(3). In fact, Congress recognized and explicitly stated as one of its policies the use of the native language in bilingual education programs. "[A] primary means by which a child learns is through the use of such child’s native language and cultural heritage... therefore, large numbers of children of limited English proficiency have educational needs which can be met by the use of bilingual educational methods and techniques." 20 U.S.C. § 3222(a). For the first time, Congress utilized the phrase "transitional bilingual education" when it described the educational methods allowed:
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The term “program of transitional bilingual education” means a program of instruction, designed for children of limited English proficiency in elementary or secondary schools, which provides, with respect to the years of study to which such program is applicable, structured English language instruction, and, to the extent necessary to allow a child to achieve competence in the English language, instruction in the child’s native language. Such instruction shall incorporate the cultural heritage of such children and of other children in American society. Such instruction shall, to the extent necessary, be in all courses or subjects of study which will allow a child to meet grade-promotion and graduation standards.
\end{quote}
\textsuperscript{20} U.S.C. § 3223(a)(4)(A). Interestingly, Congress allowed school districts to seek federal funds for programs of "developmental bilingual education." 20 U.S.C. § 3231(a)(2). Such a program is:
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a full-time program of instruction in elementary and secondary schools which provides, with respect to the years of study to which such program is applicable, structured English-language instruction and instruction in a second language. Such programs shall be designed to help children achieve competence in English and a second language, while mastering subject matter skills. Such instruction shall, to the extent necessary, be in all courses or subjects of study which will allow a child to meet grade-promotion and graduation standards.
\end{quote}
\textsuperscript{20} U.S.C. § 3223(a)(3)(A). Congress, lastly, approved of "special alternative instructional programs." 20 U.S.C. § 3223(6). Such programs are to have:
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specially designed curricula and are appropriate for the particular linguistic and instructional needs of the children enrolled. Such programs shall provide, with respect to the years of study to which such program is applicable, structured English language instruction and special instructional services which will allow a child to achieve competence in the English language and to meet grade-promotion and graduation standards.
\end{quote}
\textit{Id.} These last programs are limited to students "in school districts where the establishment of bilingual education programs is not practicable..." 20 U.S.C. § 3222(a). Four percent of the federal funding allocated for bilingual education was earmarked for these programs. 20 U.S.C. § 3231(a).
permitted school districts to offer courses in a language other than English.\textsuperscript{15} Over the past few years, however, rigid bilingual education laws have been overturned in some state legislatures. Local educators have learned through experience that TBE was not the pedagogical panacea it was purported to be. In 1981, Colorado passed the English Language Proficiency Act\textsuperscript{16} which replaced the inflexible Colorado Bilingual Education Act.\textsuperscript{17} The most significant aspect of the new legislation is its emphasis on local option which permits flexibility in choosing the most appropriate educational methods for serving language-minority students. Rhode Island passed similar legislation in May of 1982.\textsuperscript{18} Illinois unsuccessfully attempted to amend its state bilingual law in 1983 by replacing TBE with "transitional language programs."\textsuperscript{19} This proposed legislation would have eliminated the required use of the non-English home language during instructional time. Although the Texas Bilingual Education Act was amended in June of 1981 to provide bilingual education in kindergarten through elementary grades, this state, also, has strengthened its English-as-a-second-language (ESL) requirement to ensure that all English deficient students receive such instruction.\textsuperscript{20}

In every case of legislative reform, states have acknowledged their responsibility to educate language-minority students. These actions, and those of the federal government, cannot be characterized by neglect.

\textbf{B. Litigation}

Educational policy has been, and continues to be, influenced and changed through court cases. The plaintiff in one of the earliest of these cases—\textit{Serna v. Portales Municipal Schools}\textsuperscript{21}—successfully argued that bilingual services in the schools should be expanded because Spanish-surnamed students were being denied due process and equal protection of their statutory rights under Title VI of the Civil Rights Act.\textsuperscript{22} The differential IQ test scores of children attending the predominately Hispanic elementary schools and predominately Anglo elementary schools were admitted as evidence in the case.\textsuperscript{23} The cause of the lower IQ scores of the Hispanic children, however, was not proven to be the failure to pro-

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\item \textsuperscript{15} \textsc{Department of Education, Condition of Bilingual Education in the Nation} 69 (1982) (available from the offices of the National Clearinghouse for Bilingual Education, 4334 Farragut St., Hyattsville, MD 20781, phone number: 1-800-647-0123) [hereinafter cited as \texttt{CONDITION OF BILINGUAL EDUCATION}].
\item \textsuperscript{16} \textsc{Colo. Rev. Stat.} § 22-24 (1985).
\item \textsuperscript{17} 1975 \textsc{Colo. Sess. Laws} ch. 182.
\item \textsuperscript{18} \textsc{R.I. Gen. Laws} § 16-54 (1985).
\item \textsuperscript{19} \textsc{Ill. Ann. Stat.} ch. 122, § 18.2 (Smith-Hurd 1984).
\item \textsuperscript{20} \textsc{Tex. Educ. Code Ann.} § 24,451 et seq. (Vernon 1986).
\item \textsuperscript{21} 499 F.2d 1147 (10th Cir. 1974).
\item \textsuperscript{22} \textit{Id.} at 1153-54. \textit{See} discussion of Title VI \textit{infra} text accompanying notes 73-93.
\item \textsuperscript{23} \textit{Id.} at 1149-50.
\end{itemize}
vide bilingual education. Nevertheless, the Tenth Circuit Court of Appeals affirmed the trial court and ordered an expansion of the bilingual education program in the district.

The landmark case in bilingual education litigation, *Lau v. Nichols*, was decided soon thereafter. Legal services attorneys sued the San Francisco school system on behalf of 1,800 Chinese-speaking students, who had not received any special services despite their English language deficiencies, claiming a violation of their Fourteenth Amendment rights. Both the federal district court and the Ninth Circuit Court of Appeals rejected the contention that these Chinese youth had a constitutional right to any special instruction. The Supreme Court declined to rule on the constitutionality of the school district's program but found, instead, that the San Francisco Public School District was discriminating on the basis of national origin as prohibited by Title VI of the Civil Rights Act of 1964. The Court did not prescribe any specific program that would provide equal educational benefits.

The Supreme Court's failure to recommend any particular program in *Lau* has been followed by considerable litigation aimed at specifying such a program. However, plaintiffs and school districts continue to be at odds over the means by which the various interests—the student's and the federal government's—can be accommodated. These cases have done little to give substance to the *Lau* holding. One trend that can be discerned from these decisions is that the courts believe that students must be effectively educated in various subjects including English. This goal, however, is no less ambiguous than the *Lau* decision itself.

In the 1975 decision of *Aspira of New York, Inc. v. Board of Educa-

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24. In fact, this causal relationship could not be established since the bilingual education program at the predominantly Spanish-surnamed elementary school was not established until the 1971-1972 school year. *Id.* at 1150.
25. *Id.* at 1153-54.
27. *Id.* at 564.
28. *Id.* at 565.
29. The Department of Health, Education and Welfare (DHEW) regulations required any recipient of federal funds under its jurisdiction "to rectify the language deficiency in order to open" the instruction to students who had "linguistic deficiencies." *Id.* at 567. However, in order to avoid conflicting with the Civil Rights Act, the DHEW forbade the providing of services to any individual "which is different, or is provided in a different manner, from that provided to others under the program." *Id.* Justice Douglas, writing for the majority, held that the school district's failure to provide extra services to linguistic minorities was in violation of the Civil Rights Act as interpreted by the DHEW. *Id.* at 568. He wrote, "[i]t seems obvious that the Chinese-speaking minority receives fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program—all earmarks of the discrimination banned by the regulations." *Id.* (footnote omitted).
30. The Court remanded for "the fashioning of appropriate relief." *Id.* at 569.
31. See, e.g., text accompanying notes 32-72.
tion of City of New York, the plaintiffs argued that the school official’s commitment to bilingual education programs remained unfulfilled. Some Spanish-speaking students were receiving only ESL instruction and others had not received any instruction to meet their special needs. The court ordered Hispanic students to be assessed in both English and Spanish in order to identify those students with English language difficulties. No statistical evidence of the effects of bilingual education was introduced by educational experts. The court concluded, therefore, that educating language-minority children through bilingual education appeared to be speculative in nature. Nevertheless, a consent decree specified a bilingual maintenance program for children identified as Spanish dominant. The court specifically rejected “immersion” as a technique of second language acquisition and forbade pullout programs.

A 1977 decision—Rios v. Read—reiterated the Lau holding and ruled that not only must a school board take steps to begin bilingual instruction but that the program must, also, reasonably ensure that language-minority children will progress in English. The board was providing bilingual instruction but the court found that the program operated as an educational dead end and permanent track. As a result, discovery was allowed to determine whether the program provided by the school board was in compliance with Lau since the quantity of bilingual programs would be “meaningless without a concomitant emphasis on the quality of instruction.” The bilingual program, subsequently, was held to be inadequate.

Rios was the first case in which social science research was presented in a systematic fashion. A multiple regression analysis of the achievement of Hispanic students who had been in the bilingual program demonstrated that those children were behind in achievement compared

33. Id. at 1163.
34. Id. at 1162-63.
35. Id. at 1164-66.
36. Id. at 1163.
37. Id. at 1165.
38. Id.
40. Id. at 593-96.
41. Id. at 595-96. This court, like the Supreme Court in Lau, analyzed the DHEW regulations interpreting Title VI of the Civil Rights Act of 1964 and held that “[t]he HEW guidelines, which emphasize that special programs to rectify language disabilities must not operate as an ‘educational deadend,’ clearly require a school or school district receiving federal funds to develop effective programs.” Id. at 595. The court, then, ruled that the plaintiff’s complaint alleged “serious deficiencies” in the school board’s action and, accordingly, discovery would be allowed as to the bilingual practices of the school district. Id. at 596.
42. Id. at 596.
with other Hispanic students who were not in the program.44

One year later, a federal district court ordered the Brentwood Union Free School District in New York to implement a plan that would ensure non-English speaking children meaningful participation in the educational system.45 The court rejected the school district's proposal because the underlying theory of the plan was submersion in the English language and culture.46 This plan would subordinate the Spanish and Hispanic culture of the children since all substantive courses would be taught in English and the students might not sufficiently comprehend the principles taught.47 The court's plan required the school district to:
(1) develop specific methods for identifying children deficient in English;
(2) provide training for bilingual education teachers; (3) institute a bilingual and bicultural program; and (4) develop a mechanism for transferring students out of the program.48

In the 1980's, the use of desegregation plans to facilitate the effectiveness of bilingual programs was urged. In one of the first cases to argue this position, United States v. State of Texas,49 the G. I. Forum and the League of United Latin American Citizens argued that Texas was denying equal educational opportunity for national-origin-minority children with English language deficiencies.50 As part of a desegregation order, the district court imposed the most comprehensive bilingual/bicultural plan ever required by a court.51 The district court concluded that "bilingual instruction is uniquely suited, as a vehicle for compensating Mexican-American children in Texas for learning difficulties engendered by

44. 73 F.R.D. at 592. It was the discoverability of these statistics that was at issue in this appeal. The plaintiff moved to compel answers to interrogatories. Id. at 591. The plaintiff was seeking information concerning, inter alia:
(8) the test results for all Hispanic students, who, between 1972-1976, were administered the Inter American Series Test of Comprehension of Oral Language. . . ;
(10) a document referred to as "The Stanford Results," which reflects the results of the Stanford Achievement Test administered to each Spanish surnamed child in the school district from September 1974 to present. . . .

Id. at 592.

46. Id. at 63.
47. Id. In the upper grades, a child may not receive remedial assistance if the substantive courses are taught in English. The court wrote:
For if a child cannot comprehend principles of math or science taught in the English classroom, he will not be able to explain his or her problem to the bilingual teacher in the Spanish basic skills (the bilingual program) room who is expected to provide remedial help. Moreover, children continually in need of remedial assistance, who might spend more time in the basic skills room than they are scheduled for, run the risk of missing planned instruction thus further retarding their educational progress.

Id.
48. Id. at 64.
50. 506 F. Supp. at 410.
51. Id. at 439-41.
pervasive discrimination." Texas, which had been offering a bilingual program in kindergarten through third grade, did not dispute the efficacy of bilingual education. Accordingly, the court ordered that bilingual education be provided to all LEP Mexican-American children in all Texas public schools.

The petitioners in *United States v. Texas*, also, claimed protection under the Equal Educational Opportunity Act (EEOA). The EEOA, passed in 1974 to clarify and limit federal busing requirements, contains a little-known provision requiring an education agency to take "appropriate action to overcome language barriers that impede equal participation by its students in its instructional program." The district court held that this section requires school districts to take affirmative action to prevent the denial of educational opportunities to linguistic minorities. The court did not require the petitioners to show proof of prior discrimination. In passing, however, the court noted that Congress did not specify that a state must provide bilingual education to all LEP students but, rather, that state and local authorities have discretion in selecting the programs they may use.

Another recent federal court decision involving a school district in Texas, *Castaneda v. Pickard*, provided a new standard for corrective action. The federal court rejected a specification that school districts adopt a particular type of language remediation program. Instead, a three-part test was proposed as the standard by which school districts could succeed in creating or enforcing effective bilingual education programs only if they show a discriminatory intent on the part of the school district in its failure to create or enforce successful programs.

52. *Id.* at 420. The court accepted the plaintiff's claim of *de jure* discrimination. A claim of *de facto* discrimination in Title VI litigation is no longer a viable argument since the Supreme Court's decision in *Washington v. Davis*, 426 U.S. 229 (1976). In *Washington*, the court implicitly limited its prior ruling of *Lau* (which had allowed a Title VI claim without a showing of discriminatory intent). *Id.* at 238-48. In fact, in *University of Cal. Regents v. Bakke*, 438 U.S. 265 (1978), the Court stated that it had "serious doubts concerning the correctness of what appears to be the *Lau* decision." *Id.* at 352. Thus, plaintiffs can succeed in creating or enforcing effective bilingual education programs only if they show a discriminatory intent on the part of the school district in its failure to create or enforce successful programs.

53. *Id.* at 420. In reversing, the Ninth Circuit Court of Appeals held that the "factual underpinning of the judgment below" was in grave doubt since the attorney for the state of Texas did not quarrel with the petitioners' stipulations concerning the effectiveness of bilingual education. 680 F.2d at 368.

54. 506 F. Supp. at 439.

55. *Id.* at 431-34.


57. 506 F. Supp. at 433-34.

58. *Id.* at 431-33.

59. *Id.* at 433. Our research (DEPARTMENT OF EDUCATION, EFFECTIVENESS OF BILINGUAL EDUCATION: A REVIEW OF THE LITERATURE (Final Draft Report) (1981) (available on Educational Resources Information Center, hereinafter referred to as ERIC, Ed No. 215-010) [hereinafter cited as EFFECTIVENESS] on the effectiveness of bilingual education was introduced at the appeal by the state of Texas.

60. 648 F.2d 989 (5th Cir. 1981).

61. *Id.* at 1009.
could be judged to determine if they are making an effective effort at remediation:

(1) **Reasonable Theory**—The school system is pursuing a program based on an educational theory recognized as sound by some experts in the field or at least deemed to be a legitimate experimental strategy;

(2) **Sound Implementation**—Programs and practices actually used by the school system are reasonably calculated to effectively implement the educational theory adopted by the school; and

(3) **Evidence of Results**—If a school's program fails to produce results indicating that language barriers confronting students are actually being overcome, that program may no longer constitute appropriate action.\(^6\)

The court applied these standards to evaluate the adequacy of the defendant's special language program. The court rejected the plaintiffs' claims that the current special language program in the school district was deficient because it overemphasized the development of English language skills to the detriment of education in other areas such as math or science.\(^6\) The plaintiffs wanted more bilingual education in non-language subject areas.\(^6\) In rejecting the plaintiffs' claim, the court determined that because of limited hours in the school day, it is not necessarily disadvantageous to emphasize English literacy during the early years of a child's schooling.\(^6\) Later in the child's education, special assistance can be provided in other basic skills if needed.\(^6\) The court, however, did uphold the plaintiffs' claims of poor program implementation because of teacher incompetency in the children's home language; the court cited specific deficiencies in the content and proficiency standards of the teacher preparedness program for teachers of LEP children.\(^6\)

Recently, in the case of *Keyes v. School District No. 1, Denver, Colorado*,\(^6\) an out-of-court settlement was reached between the Denver School District and the Congress of Hispanic Educators and the Mexican-American Legal Defense and Education Fund intervenors. The school system agreed to offer bilingual education services to LEP children. This case, like *United States v. Texas*,\(^6\) had been in litigation for years. Despite submitted evidence that bilingual education was no more effective than other pedagogical methods, the Denver School District, apparently, decided that it was less costly to acquiesce to the plaintiff's

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62. *Id.* at 1009-10.
63. *Id.* at 1011.
64. *Id.* at 1010-11.
65. *Id.* at 1011.
66. *Id.*
67. *Id.* at 1012-13.
69. See *supra* text accompanying notes 49-59.
demands rather than to continue litigation. This view is the only plausible explanation for this action given the school district’s knowledge that Denver’s Indochinese students, the vast majority of whom infrequently or never received TBE or had bilingual education teachers, had half the dropout rate of Hispanic students upon whom the bilingual program had been concentrated.

As the above discussion indicates, courts have contributed to the institutionalization of transitional bilingual education. Whether through court rulings or out-of-court settlements, litigation is a significant cause of the school districts’ reliance upon transitional bilingual education. However, a re-evaluation of the federal government’s exclusive reliance on TBE has begun. In *United States v. Texas* and *Castaneda v. Pickard*, the courts moved away from a blanket mandate of TBE. In fact, in *Castaneda*, the court held that Congress “did not specify that a state must provide a program of ‘bilingual education’ to all limited English-speaking children... Congress intended to leave state and local educational authorities a substantial amount of latitude...” Nevertheless, however important these changes may be, they are but a first step toward restoring the responsibility for educational programs to the educators.

C. Regulation

In recognition of the special educational problems of language-minority children, Title VI of the 1964 Civil Rights Act prohibited school districts from discriminating against non-English speaking children in providing educational services. Between 1970 and 1975, the Office of Civil Rights (OCR) within the Department of Education and Welfare (DHEW) changed its interpretation of a school district’s obligation under Title VI from requiring districts to provide unspecified language assistance to requiring transitional bilingual education. This shift in policy is detailed below.

On May 25, 1970, a DHEW/OCR memorandum informed school superintendents and state education officials that school systems, in which more than five percent of the population was made up of children in national origin minority groups, were obligated under Title VI of the Civil Rights Act to take “affirmative steps” to correct their students’ English-language deficiency. This requirement was later affirmed in *Lau v. Nichols*. Neither the 1970 OCR memorandum nor the *Lau* deci-
sion, however, mandated a specific approach to meet the needs of language-minority children.76

The same year of the Lau decision, the United States Commission on Civil Rights reported that:

The range of programs which facilitate the education of non-English speaking students is broad. The appropriateness of any particular program will depend on numerous factors, such as the concentration of language-minority students in the community, their English language ability level, and the attitudes of the language minority group and the English speaking cultural majority toward one another and the desire on the part of the minority community for nurturing minority language and culture.77

Local flexibility, thus, was seen as a critical part of civil rights policy for language minorities.

The DHEW, however, viewed the Lau decision as an opportunity to move more strongly in the area of developing federal language policy. The OCR was ordered to establish criteria for deciding if schools were in or out of compliance with Title VI.78 A task force primarily composed of bilingual education proponents rather than representatives from the education community at large established criteria for complying with Title VI.79 Known as the "Lau Remedies," these narrowly defined guidelines were issued by the federal government in 1975.80

Between 1975 and 1982, OCR negotiated more than 500 compliance agreements on the basis of the Lau Remedies.81 The Lau Remedies allowed for a limited set of options for elementary and intermediate schools: transitional bilingual education programs, bilingual/bicultural education programs or multilingual/multicultural education programs.82 The major characteristic of these requirements was the use of a language other than English to teach subject matter. Most language-minority children covered by the Lau Remedies were in the elementary school grades.83

In 1978, an Alaskan school district filed a lawsuit against the federal

76. The plaintiffs in Lau did not urge the adoption of one specific remedy, noting that, "[t]eaching English to students of Chinese ancestry is one choice. Giving instruction to this group in Chinese is another. There may be others." Lau, supra note 26, at 565.

77. UNITED STATES COMMISSION ON CIVIL RIGHTS, A BETTER CHANCE TO LEARN: BILINGUAL/BICULTURAL EDUCATION 167 (1975) (footnote omitted).

78. See EFFECTIVENESS, supra note 59, ch. 1, pp. 3-4.

79. Id. at 3.


81. EFFECTIVENESS, supra note 59, at 3-4.

82. BILINGUAL EDUCATION, supra note 80, at 215-16.

83. This fact has been gathered from conversations with statisticians within the Department of Education.
government challenging the legal basis of the *Lau* Remedies.\(^4\) This school district reacted negatively to the federal government’s insistence that the proper means of implementing bilingual education required the school district to develop a written curriculum for an Eskimo language which had no prior written form.\(^5\) The school argued that since the *Lau* Remedies were never formally published as a regulation (and, thus, never subjected to public comment and review), they did not have the force of law.\(^6\) In an out-of-court settlement, the government agreed to form the *Lau* Remedies into proper regulations.\(^7\)

The Carter administration, thereafter, issued proposed regulations in August of 1980 that would have formalized the use of TBE as the principal approach for school districts to meet Title VI requirements.\(^8\) Subsequently, as one of the Reagan administration’s first acts, the Department of Education (Department) withdrew these proposed rules.\(^9\) Ironically, Terrel Bell, the United States Commissioner of Education who in 1975 put the *Lau* Remedies into effect, was in 1982, the United States Secretary of Education who terminated OCR’s efforts at turning the *Lau* Remedies into formal regulations. A few months later, and with little publicity, Secretary Bell, also, withdrew the *Lau* Remedies, thus, returning federal civil rights compliance policy to the earlier 1970 DHEW memorandum.\(^10\) This withdrawal was the federal government’s acknowledgement that the *Lau* Remedies were too prescriptive. Martin H. Gerry, the former director of DHEW’s Office for Civil Rights at the time the *Lau* Remedies were formulated, recently stated:

In retrospect it would have been much better to develop an individual plan for each student along the line of the special education model. Bilingual instruction is not right for every kid. You can’t as OCR tried to do, reduce the process to a set of rules that put kids in categories.\(^11\)

While current civil rights enforcement policy is guided by the 1970 DHEW memorandum, the more than five hundred compliance agree-

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84. This information was received from discussions with staff of the Department of Education, Office of Civil Rights.
85. See *Effectiveness*, supra note 59, ch. 1, p. 4.
86. This information was received from discussions with staff of the Department of Education, Office of Civil Rights.
ments based on the *Lau* Remedies continue to guide school district practice and to limit programs to TBE.\(^{92}\) Because of the controversial nature of transitional bilingual education, school districts are unlikely to request a change from their current compliance agreements to an alternative approach such as an all-English program unless such a change is accompanied by a federal guarantee that the district will not be found out of compliance with Title VI of the Civil Rights Act.\(^{93}\) OCR has not issued a statement that establishes civil rights compatibility between transitional bilingual education and all-English approaches.

The Department's current policy recognizes that language-minority children clearly have special educational needs warranting a continuing civil rights obligation supported with program assistance. However, fulfillment of this obligation does not necessarily require the use of transitional bilingual education as the exclusive method of remediation. By abandoning the overly prescriptive *Lau* Remedies, the federal government has moved toward a policy more consistent with the flexibility of the *Lau* decision and the civil rights obligation.

**D. The Lawyer's Accomplishments**

In reviewing the development of bilingual education policy over the last decade, the legal profession—as litigants, legislators and regulators—has played a central role in determining the course of education for language-minority children. This legal activity has resulted in two achievements. First, it has been generally accepted that students who do not speak English are at a disadvantage in English-speaking schools. Secondly, transitional bilingual education has been institutionalized as virtually the only instructional approach for meeting the special needs of language-minority students.

Schools have recognized their responsibility to help these language-minority students overcome the educational consequences of not speaking English. The magnitude of this first achievement can be appreciated by the extent to which services are now provided. Approximately 1.2 to 1.5 million language-minority students need special language services.\(^{94}\) In 1984, ninety-four percent of the language-minority students covered by *Lau* in kindergarten through fifth grade were in a special program;\(^{95}\)

\(^{92}\) [Effectiveness, *supra* note 59, ch. 1, p. 5.]

\(^{93}\) *Id.*


in fact, services are available to more than 1.7 million LEP students throughout the United States.\(^9\) The current level of available services, thus, is greater than the size of the student population in need of special language help.\(^9\)

Providing special help to students with a language barrier is certainly a major accomplishment. Its general acceptance as an unquestioned responsibility of the schools is a major change in American social policy. We do not intend to detract in any way from this achievement when we criticize the courts, legislators and regulators for their second accomplishment in educating language-minority children—institutionalizing transitional bilingual education. Through Title VII, the Lau Remedies and various state laws, TBE became the sole instructional method the schools could use from 1975 to 1982. The legal system erred. Exclusive reliance on TBE was, and is, bad educational policy.

II.

POLICY CONSIDERATIONS AND TRANSITIONAL BILINGUAL EDUCATION: THE EFFECTIVENESS OF TRANSITIONAL BILINGUAL EDUCATION

The first major study to question the effectiveness of bilingual education was a 1978 American Institutes of Research evaluation of Title VII, the federal bilingual education program.\(^9\) The results indicated that participation in a Title VII bilingual project had no effect on the bilingual child's mathematical achievement and a negative effect on the student's English achievement. That is, bilingual students who were enrolled in a program specially designed to help them improve their English learned less English than if they had not been given any special assistance at all.

We, also, raised questions about the effectiveness of TBE in a literature review.\(^9\) We undertook this review at the time when the Department of Education's proposed Lau regulations were under development.\(^10\) As part of the regulatory review process, the Depart-

\(^9\) Condition of Bilingual Education, supra note 15, at 36.

\(^9\) Not all eligible students are served because of errors made in identifying students for participation in special language programs.


\(^10\) Effectiveness, supra note 59, ch. 1, p. 1.
ment was asked to answer several questions posed by the White House Regulatory Analysis and Review Group (RARG):101 How many children were eligible for bilingual services? Where were the eligible children to be found? What was the relationship between socioeconomic background and academic achievement? What was the cost of bilingual services compared to other instructional methods for meeting the special education needs of bilingual children? How many qualified teachers were available to teach bilingual education? What evidence was there to justify sole reliance on one instructional method (TBE)? Were there any workable alternatives to TBE?

The Department undertook an extensive research program in bilingual education to answer the questions posed by RARG. Our review of the literature on the effectiveness of bilingual education was one of the studies conducted. We examined the two assumptions that underlie federal policy for language-minority students:

1. Does transitional bilingual education lead to better performance in English?
2. Does transitional bilingual education lead to better performance in nonlanguage subject areas?102

Each study we reviewed was assessed to determine if it addressed these questions through a methodologically sound design. The following factors led to the rejection of a study:103

(1) The study did not address the issue;
(2) The study used nonrandom assignment with no effort to control for possible initial differences between comparison and program groups;104
(3) The study did not apply appropriate statistical tests;105

101. Id.
102. Id. at ch. 4, p. 1. Although a number of other goals are often stated for bilingual education (e.g., reduced dropout rates, improved self-image and attitude toward school, preservation of the primary language and culture and lower absenteeism), our review was limited to these two overriding questions of federal policy. Id. at ch. 1, p. 8. Parenthetically, few of the studies reviewed addressed the other goals and, therefore, a systematic assessment of the accomplishments of those goals has been impossible.

Following OCR and Title VII practice, three instructional alternatives were identified—English-as-a-second language, immersion and transitional bilingual education—in addition to doing nothing for the language-minority child (submersion) which was found to be illegal in Lau. See supra, text accompanying notes 26-30. These first three instructional types sometimes shade into one another; for example, most TBE programs include an ESL component. In addition, there is a considerable range of activities within each type. Moreover, experts in the field differ in their definitions of bilingual education. Nevertheless, the typology is useful. These instructional approaches represent different philosophies for addressing the needs of students with limited English proficiency, which lead to very different classroom practices in actual settings. The most important feature of these definitions, however, is that they define the types of programs permitted by the 1980 proposed Lau regulations, OCR enforcement policy and Title VII policy (TBE). Eefffectiveness, supra note 59, ch. 1, pp. 6-7.

104. Id. at p. 11-12.
105. Id. at p. 14.
(4) The study used a norm-referenced design where growth in English for bilingual children was compared to norms for a monolingual English-speaking population.\textsuperscript{106}

(5) The study examined gains over the school year without a control group;\textsuperscript{107} or

(6) The study used only grade-equivalent scores.\textsuperscript{108}

Following these criteria, acceptable studies were:

(1) True experiments in which students were randomly assigned to treatment and control groups; or

(2) Studies using nonrandom assignment which controlled for possible pre-existing differences between the groups either by matching students in the treatment and comparison groups or through statistical procedures.\textsuperscript{109}

Thirty-nine studies met the criteria.\textsuperscript{110} In these studies, the most frequent home language was Spanish. Most of the studies dealing with Spanish speakers looked at Mexican-American children.\textsuperscript{111} Not surprisingly, most studies had been conducted in the Southwest or West, but the Northeast was well represented as well. Most of the study designs were neither longitudinal nor true experiments.\textsuperscript{112} Several studies included very large numbers of students.\textsuperscript{113}

With respect to TBE, positive outcomes pertaining to English language performance were reported in nine studies.\textsuperscript{114} However, many more studies (twenty-three) found no difference in second-language performance between the treatment and comparison groups.\textsuperscript{115} Moreover, some studies found TBE to be less effective than either immersion or ESL and some found TBE to have negative effects when compared to submersion.\textsuperscript{116} Results are mixed, also, as to whether TBE affects the learning of substantive courses. Two analyses found that TBE improved the acquisition of math skills,\textsuperscript{117} but three studies reached the opposite conclu-
sion; thirteen studies found no impact upon math skills.

The effectiveness of programs other than transitional bilingual education, also, varies. An immersion program seemed to succeed in teaching both a second language and math. However, no data was available on other subject areas more dependent than math on verbal skills. Evidence of the effectiveness for other alternatives—submersion and ESL—was inconclusive.

Although these study results appear confusing at first, the message is simple: schools can do a lot through a variety of instructional practices to help children who do not speak English. Transitional bilingual education is one of several approaches that the schools could use. There is no reason to conclude TBE is uniquely effective in meeting the needs of LEP students.

These results are not unique. Others have reached the same conclusions. The most recent analysis of the effectiveness of TBE was per-

118. Id.
119. Id.
120. At the time of our 1980 review information was available from only one English immersion program for language-minority children in the United States. See id. at ch. 2, pp. 71-72 for a discussion of E. Pena-Hughes & J. Solis, ABCs (1980). According to analysts within the Department of Education, English immersion programs for language-minority students are now underway in approximately fifteen school districts in Texas, California, Florida and New Jersey. Significant progress in second-language learning was reported in Canada. W. LAMBERT & R. TUCKER, BILINGUAL EDUCATION OF CHILDREN: THE ST. LAMBERT EXPERIENCE (1972); Barik & Swain, Three Year Evaluation of a Large Scale Early Grade French Immersion Program: The Ottawa Study, 25 LANGUAGE LEARNING 1 (1975). In one Texas school, immersion has been found to be more effective in teaching English to Spanish-speaking children than TBE. Pena-Hughes & Solis, supra. Similar findings nationwide have been concluded concerning the acquisition of math skills. LAMBERT & TUCKER, supra; Barik & Swain, supra; M. Ramos, J. Aguilar, B. Sibayan, The Determination and Implementation of Language Policy (1967) discussed in EFFECTIVENESS, supra note 59, ch. 2, pp. 24-28; and E. MALHERBE, THE BILINGUAL SCHOOL: A STUDY OF BILINGUALISM IN SOUTH AFRICA (1978).
121. EFFECTIVENESS, supra note 59, ch. 4, p. 2.
122. Id. at ch. 2, pp. 62-72.
123. Id. at ch. 4, p. 2. Evaluators disagree as to the validity of non-experimental alternatives to true experimental designs. In order to determine if our results were sensitive to the study methodology we employed, we repeated the analysis: (1) only for true experiments; (2) excluding Analysis of Co-Variance ("ANCOVA") studies that did not include statistical adjustments for the shortcomings of ANCOVA; and (3) including studies using grade equivalent scores. The same pattern of mixed effects for TBE found by using our criteria was found in these three variations. Therefore, our findings were not affected by the screening criteria we used.
124. Id. at 5.
125. In 1975, Patricia Lee Engle, of the Instituto de Nutricion de Centro America y Panama, reviewed literature relating to the possible advantages of teaching initial reading and subject matter in the child's native language. P. Engle, The Use of Vernacular Language in Education: Language Medium in Early School Years for Minority Language Groups (1975) (hereinafter referred to as Engle). Engle found the research literature did not confirm the supposed superiority of instruction in the native language. In 1976, Morris Peterson of Kirshner Associates, Inc., in reviewing the literature on the effectiveness of bilingual instruction, concluded that "[d]espite the continued and widespread support for conducting instruction in the vernacular or mother tongue, there is little
formed at the request of the Denver school system which sought information concerning the effectiveness of TBE for the Keyes case.126 After a review of the research literature supporting claims of effectiveness for TBE the researchers concluded that "[t]he emperor has no clothes."127 "Despite the widespread notion that submersion, or doing nothing has failed, it (submersion) fares no worse than transitional bilingual education."128

Our findings have direct implications for other studies which have looked at how Hispanic adults fare in the job market.129 These studies conclude that there is little economic discrimination against Hispanics once education and ability in English are taken into account.130 That is to say, Hispanics earn less and have lower status jobs than the Anglo population. Hispanics also have less education and do not speak English as well as the Anglo population. But, if we compare Hispanics to Anglos
of the same educational level and of the same level of English-speaking ability, the labor market success of Hispanics and of comparable Anglos is the same.

This research suggests that two factors are critical to improving the economic standing of the Hispanic population in the United States: higher levels of educational attainment and better English. There is little or no empirical evidence that almost two decades of transitional bilingual education has led to gains in either of these areas.

An important point has been raised about the legal profession's advocacy of TBE during court cases and negotiations despite research evidence that showed TBE was no more effective than other instructional methods. These activities "have been characterized by the mutual belief on the part of the plaintiffs and defendants that TBE is the best method of solving the English language achievement problems of LEP children." For whatever reason, the lawyers representing the schools have accepted the claims of the bilingual advocates that transitional bilingual education is good educational practice. What is surprising is that these defendants, generally, have never questioned the effectiveness of bilingual education. Surely it is in the best interests of the court and the students whose futures will be affected to understand that the plaintiffs have proposed an educational program of unproven value.

What, then, can we conclude about the lawyers' second accomplishment, the institutionalization of transitional bilingual education? Basically, that the schools now spend approximately $500,000,000 a year more on the education of language-minority students than they did before Lau. Despite this considerable expenditure, there is little evidence to demonstrate that limited-English-proficient students have made significant gains in achievement. Just as we must declare the lawyers' first accomplishment—bringing about general acceptance of the idea that the schools have a responsibility to meet the special educational needs of their bilingual students—as a major achievement, we must declare their second "accomplishment"—a decade or more of nearly exclusive reliance on transitional bilingual education—a major educational error.

An ironic parallel exists between these two accomplishments of the legal profession. At the same time the lawyers were succeeding in eliminating institutionalized racism and discrimination against language-minority children, they, also, were creating a system that institutionalized an instructional method which was clearly no better than the alternatives. The activities of the lawyers—through court cases, state laws and

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131. Rossell & Ross, supra note 126.
132. Id. at 35.
133. Troike, Research Evidence for the Effectiveness of Bilingual Education. BILINGUAl. EDUCATION PAPER SERIES, Dec. 1978.
five hundred Lau agreements—have institutionalized an educational pro-
gram of mixed effectiveness at best. Considerable effort will be needed in
the future to improve the education of LEP children and to make the
present system more flexible.

III.
THE ROLE OF BILINGUAL EDUCATION RESEARCH

The legal profession is not solely to blame for effecting an educa-
tional policy of dubious value. They had help. Simply put, the scientific
quality of bilingual education evaluation research is poor and bilingual
researchers have allowed their ideological biases to mislead the public as
to what the research revealed.134 Three earlier reviews of the bilingual
evaluation literature found only five, three and sixteen percent of the
studies to be methodologically acceptable.135 We found only twenty-two
percent of the evaluations we reviewed to be acceptable136 and, in the
most recent review, Masahito Okata, of the National Center for Bilingual
Research, found only ten percent of 725 studies to be methodologically
adequate.137 The distortion of research, the cover-up of ideologically un-
acceptable data and other examples of the politicization of bilingual re-
search are “business as usual” in bilingual education research:

[E]ven when it (bilingual education research) is relatively good, those
who conduct it often cannot be trusted to objectively summarize their
own research. . . . They have rushed to provide “evidence” for the educa-
tional benefits of their philosophical position, either to convince them-
selves that they are not advocating a policy which is educationally
harmful, or perhaps to stimulate support. . . . [F]ailure to adhere to the
ethical and evidentiary standards of scientific research is evident in the
testimony introduced into bilingual education court cases and in the Fed-
eral policymaking process.138

Next, we will examine some examples illustrating the problems of ideo-
logical bias in bilingual education research. We selected these examples
from a variety of areas within bilingual education research to illustrate

of the LA RAZA LAW JOURNAL, supra note 90) wherein the author details the evidence that shows
how many bilingual education researchers have sacrificed objectivity for ideology.
a detailed examination of bilingual education noted:

[i]t]here are also deeper problems, and one in particular which has been troubling me for
some time. This is the tendency of some scholars, in their eagerness to influence public
policy, to confuse rhetoric and research, to blur one of the critical distinctions between
their scholarship and their ideologies, between what they know and what they believe.

Epstein, Bilingual and Bicultural Education: The Role of the Scholar in INTERNATIONAL DIMEN-
the scope of the problem.\textsuperscript{139}

\textit{A. Literature Reviews}

Following the \textit{Lau} decision, the San Francisco School District commissioned research guidance from the Center for Applied Linguistics (CAL).\textsuperscript{140} The schools’ task force told CAL not to report “any studies which raised doubts about the effectiveness of bilingual-bicultural education in improving student achievement.”\textsuperscript{141} As Dr. Roger Shuy, the associate director of CAL, stated: “Our instructions from the task force were to give them positive instances. We told them that in terms of reading, there wasn’t much evidence to show that bilingual education helped. But they didn’t want us to say anything like that; they had a political job to do.”\textsuperscript{142} Accordingly, the researchers at CAL did not provide a balanced discussion of the research literature. They selectively provided research studies that pointed toward a conclusion that bilingual education was effective.\textsuperscript{143}

In 1978, the National Clearinghouse for Bilingual Education published a monograph entitled, “Research Evidence for the Effectiveness of Bilingual Education.”\textsuperscript{144} Again, this report did not even purport to be a balanced assessment of the research evidence. Instead, the author described it as a collection of “evidence from twelve programs attesting to the effectiveness of bilingual education.”\textsuperscript{145} To the extent we were able to locate these twelve studies in the literature, only one met our minimal standards of scientific validity.\textsuperscript{146}

Two reviews, publishing what seems to be the same analysis, concluded that bilingual education is effective.\textsuperscript{147} Even bilingual education supporters had trouble accepting the methods used in these reviews:

[I]t is evident that “objectivity” was often made the handmaiden of this need to prove that (BBE) Bilingual/Bicultural Education works. . . . There are many good reasons for BBE programs to continue to gain support from all of us, but none of them is supported by the research findings presented here. The effects of bilingual programs on children of limited-

\textsuperscript{139} \textit{See also} \textit{Effectiveness, supra} note 59; \textit{Baker, supra} note 134.
\textsuperscript{140} \textit{Epstein, supra} note 138, at 671.
\textsuperscript{141} \textit{Id.}
\textsuperscript{142} \textit{Id.}
\textsuperscript{143} \textit{Id.} at 671-72.
\textsuperscript{144} \textit{Troike, 1978, supra} note 133.
\textsuperscript{145} \textit{Id.} at i.
\textsuperscript{146} \textit{Baker & de Kanter, supra} note 99; \textit{Effectiveness, supra} note 59.
\textsuperscript{147} \textit{L. Zappert & B. Cruz, Bilingual Education: An Appraisal of Empirical Research} (1977) (available on ERIC, \textit{supra} note 59, Ed No. 153-758); \textit{Dulay & Burt, Aspects of Bilingual Education for LES/NES Students, BILINGUAL PROGRAM, POLICY, AND ASSESSMENT ISSUES} (Convocation on Bilingual Program, Policy, and Assessment Issues ed. 1980). For discussion of these literature reviews, see \textit{Effectiveness, supra} note 59, ch. 2.
English-speaking ability remain inconclusive, in spite of the many forceful claims of the authors to the contrary. A conclusive report on the positive educational effects of BBE remains a "consummation devoutly to be wished"—and a report such as this one, which uses dubious reasoning to make flimsy and insufficient data appear strongly supportive harms rather than helps the efforts of bilingual teachers.148

A final example of misused research can be found in a 1983 analysis where four evaluation studies of bilingual programs were examined and the following conclusions reached:

(1) Bilingual programs have demonstrated that they can raise achievement scores in English to or above national norms; and
(2) The greatest growth in achievement is likely to be made in the fourth, fifth, and sixth years, indicating that bilingual programs should continue through at least the sixth grade, if fullest returns on investment are to be realized.149

The author cited four studies in support of these conclusions. The first study, an analysis of a Chinese bilingual program in San Francisco, appears not to exist except as a two-sentence statement in an earlier article by the same author.150 The second study cited, in fact, contradicts the second conclusion above and provides no valid evidence in support of the first conclusion.151 The third study's methodology is poor.152 The fourth, the Rock Point study, provides no valid evidence in support of the author's claims as discussed below.153

In addition to these compilations of "research evidence," Masahito


149. Troike, Bilingual, SIL, PRINCIPAL, Jan. 1983, 8 (hereinafter referred to as Troike, 1983). The author based his conclusions on the allegedly positive results of four studies. The author summarized these results as:

In San Francisco, students in the Chinese-English bilingual program scored at or above district and national norms on the California Test of Basic Skills in English and math in three out of six grades, and only one month below in others.

In Santa Fe, New Mexico, students in the Spanish-English bilingual program exceeded the national norm on the Metropolitan Achievement Test, and approximated the norm in English in grades five and six.

In St. John Valley, Maine, bilingually (French-English) instructed students outscored students in matched all-English schools in both English and math by the end of the fifth year of the program.

At Rock Point Community school on the Navaho reservation in Arizona, students were reading above grade level in English on the Stanford Achievement Test in the fourth through sixth grades.

Id. at 47.

150. Id. at 50 n. 2.

151. Baker, supra note 134. According to Troike's second conclusion, academic growth is at its greatest in grades four through six. Examination of this data in the Santa Fe study shows that gains over a school year for the bilingually educated students were greatest in grade three and got progressively worse over grades four through six. Obviously, the result contradicts the conclusion.

152. EFFECTIVENESS, supra note 59, ch. 3; Baker, supra note 134.

153. See text accompanying notes 174-78.
Okata's review of approximately one thousand evaluation studies of bilingual programs found only ten percent meet minimum standards of scientific validity. The bilingual education research community has made a wealth of methodologically unsound studies available to be used and misused in the political and legal process. Next, we discuss some of these studies that have been widely, but incorrectly, cited as evidence of the effectiveness of TBE.

B. International Research

A study of Finnish immigrant children in two Swedish school systems is one of the studies most widely cited in support of the use of the native language (L1) in the schools. Written comprehension in the second language (L2-Swedish) was reported to be better for students who attended school in Finland (L1-Finnish) for three or more years before immigrating than it was for students who had only one to two years of schooling in L1. Additional data on L2 oral comprehension showed the same pattern of superior L2 performance for students with three or more years of L1 (prior to immigrating) over those students with only one to two years of schooling in Finland. These studies, it is argued, show that the more schooling in L1 children had before beginning instruction in L2, the better their ultimate performance in L2. From these findings, it is inferred that the extensive use of L1 in American schools for children from non-English-speaking backgrounds would be an effective means of educating these students.

The Finnish studies, however, provide absolutely no support for the effectiveness of bilingual education. Having a large Swedish minority, Finland is officially a bilingual country—Finnish and Swedish are both official languages of Finland. At the time the studies were conducted, all Finnish-speaking children in Finland were required to learn Swedish

156. The convention of designating the child’s first (or native) language as L1 and his second language as L2 is followed. In general, L1 can be used as a non-English language and L2 as English. EFFECTIVENESS, supra note 59, ch. 1, p. 6.
starting in grade three. Not surprisingly, the older Finnish immigrants, who had received systematic instruction in Swedish, performed better than those (the younger immigrants) who had not. Thus, interpretations of this data in support of bilingual education$^{158}$ are without foundation.

In addition to this fundamental flaw in interpreting the factors operating in the Finnish study, other reasons for rejecting the study findings exist. The researchers did not have random assignment and they did not try to match the comparison and experimental groups or to control statistically for pre-existing differences.$^{159}$ Further, a high (eighty percent) attrition rate occurred in the sample.$^{160}$ The critical analysis, however, in the Finnish study is a table showing the L2 (Swedish) performance level of Finnish immigrants with varying amounts of schooling in Finnish (L1) before immigrating. The researchers presented no statistical analysis of the data but we carried one out.$^{161}$ Forty-nine tests were performed based on varying assumptions about the data. The pattern of results was overwhelmingly one of no relationship between schooling in L1 and later L2 performance.$^{162}$ In short, the Finnish data provides no support for the pro-bilingual education implications that have been drawn from them.

C. A State Evaluation

A statewide assessment of bilingual programs in Colorado for the 1979-1980 school year was published in 1981.$^{163}$ Data from all available school districts in the state where gains in normal curve equivalents
(NCEs) could be determined for grades K through 4 were used. The researchers argued that since language-minority children would be expected to show a loss against the norm in the absence of treatment, program success would be evidenced by classes showing either no change or an increase in performance. "No change" was defined as a post-test score within one-third a standard deviation (SD) of the pretest score. Therefore, a "successful" program was defined as one showing either no change (for example, a loss of up to one-third SD) or an increase. The study concluded that "overall, eighty-seven percent of the programs reported gains or maintenance of academic achievement. . . ."

The statistical analysis does not support the conclusion. Some of the classes counted as "successful" could have experienced declining performance. Since these students were initially very low-scoring, a decline of one-third SD toward the end of the distribution would cover a considerable range of scores. Technical readers will appreciate that the norm-referenced procedure leading to an eighty-seven percent success rate cannot be taken as evidence of program success, given the regression-toward-the-mean artifact in low-achieving populations and the researchers' inclusion of a loss of up to one-third SD as success.

The problem can be illustrated by using test data from a national sample of students from the Sustaining Effects Study. We divided the percentile score distribution into twenty parts—categories of five percentile points each and counted the movement of students from fall to spring percentile categories. Since the researchers in the Colorado study dealt with low-achieving students, we limited the example to the first through twentieth percentiles in the fall. Because the researchers counted losses of up to seven NCEs as no change, we counted a drop of one category (five percentiles) from fall to spring as no change. When we apply their logic to our data for ordinary students not in any special program, we find basically the same pattern they erroneously interpreted as a program effect. This is shown in Table 1.

164. "NCEs" are a type of standardized percentile score. EFFECTIVENESS, supra note 59, ch. 3, p. 16.
165. Id.
166. Id.
167. Id.
168. EFFECTIVENESS, supra note 59, ch. 3, p. 17.
169. Id.
170. Id.
171. Id.
Applying the researchers’ logic to students not in special programs would lead to the conclusion that regular schooling produces impressive gains in low-achieving students—one hundred percent of those below the eleventh percentile were successful by the Colorado criteria. Since this table is based on regular students not in any special program, it illustrates how the measurement error component of test scores could have accounted for the Colorado results.

Finally, the reporting, especially in the executive summary, of the Colorado results is highly selective. For example, the Colorado report states, “In 1979, 79 percent of . . . kindergarten data . . . showed substantial gains in excess of seven NCEs.” This happens to be the most extreme positive cell in the data. The corresponding figure for second grade of the same year was only thirty-five percent.

D. Local Evaluations

A study comparing Rock Point bilingual program students with students from other Navajo schools was published in 1980. The adequacy of the comparison between Rock Point and other schools depends on making a good match between the Rock Point and comparison schools. The Rock Point school has historically out-performed other Navajo schools. Since the control schools scored higher than other Indian schools, the superiority of Rock Point was interpreted as positive evidence of program success. But, such an interpretation is not justified unless it is shown that Rock Point and the comparison schools were comparable before Rock Point began the bilingual program. The authors did not do this.

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172. *Id. at 18.*
173. *Id.*
175. *Id.; E. Willink, A Comparison of Two Methods of Teaching English to Navaho Children (1968)* (unpublished PhD Dissertation, University of Arizona) (available through University Microfilms, International, 300 North Zeeb Road, Ann Arbor, Michigan, 48106, order No. 6814910); *Effectiveness, supra* note 59, ch 3, p. 5.
Much of the case for the effectiveness of the Rock Point program relied on an analysis that showed that although second grade Rock Point students were behind the comparison schools in English, the Rock Point sixth graders had moved ahead. This is interpreted as the expected pattern for bilingual education since reading was taught in L1 for the first two years. Therefore, the bilingual students should not do as well in English at first, but then, as the facilitating effect of L1 literacy comes into play, they should surpass students taught exclusively in English.\textsuperscript{176}

The major problem with the researchers' conclusion is that their data reveals that the same pattern of inferior second-grade to superior sixth-grade performance for Rock Point students occurred in 1970, the year before the bilingual program began.\textsuperscript{177} Rather than a program effect, all that seems to be happening is the continuation of an historic trend.

Moreover, most of the Rock Point sixth graders entered school before the bilingual program began. Sixth grade data were gathered and pooled for three years, 1975 through 1977. Students entering the first grade in the first year of the bilingual program, 1971, would reach the sixth grade spring testing in 1977. Therefore, the sixth graders tested in 1975 and 1976 entered grade 1 before the bilingual program was implemented. Thus, any sixth grade differences cannot be interpreted as a result of bilingual education.

A comparison between two groups of fourth graders, also, was undertaken to show the results of continuous versus interrupted bilingual instruction.\textsuperscript{178} The students receiving continuous bilingual education, apparently, began the program in kindergarten. The interrupted group began school (apparently, also, in kindergarten) with Navajo reading readiness instruction, but then entered the pre-bilingual, all-English first-grade program. In the third grade they returned to the newly expanded bilingual program. The researchers attributed the higher scores of the “continuous” bilingual education students to their having learned initial literacy in their home language. But there is another, more plausible, interpretation. There should be little wonder that children who, within a four-year period, began schooling in one language, were arbitrarily changed to a second language and, then, changed again to a mixture of

\textsuperscript{176} Effectiveness, supra note 59, ch. 3. Bilingual education advocates hypothesize that there is a facilitating effect from first learning L1 literacy, then later learning English literacy. Because of this facilitating effect, the student will ultimately come out ahead in English if English literacy is delayed so that L1 literacy is learned first. There is a lack of empirical support for this proposition.

\textsuperscript{177} The bilingual program began in 1971. Rosier & Farella, Bilingual Education at Rock Point—Some Early Results, 10 TESOL Q. 379.

\textsuperscript{178} Rosier & Holm, supra note 174.
both languages, did not do as well as students who had a coordinated exposure to the two languages.

The Director of the New York City bilingual education program has developed similarly unpersuasive evidence concerning the effectiveness of the New York City bilingual program. The data shown in Table 2 was presented to Congress as showing that transitional bilingual education is very effective since the longer students remained in the program, the better they performed (that is, more of them met the promotional criteria). Based upon this data, the director testified before Congress that TBE was an effective means of educating non-English speaking children.

Table 2: Length of Time New York City's Bilingual Education Program Positively Affects Student Achievement

<table>
<thead>
<tr>
<th></th>
<th>Fourth Grade</th>
<th>Seventh Grade</th>
</tr>
</thead>
<tbody>
<tr>
<td>One year program participation</td>
<td>26.6 percent met the promotional criteria;</td>
<td>12.5 percent met the promotional criteria;</td>
</tr>
<tr>
<td>Two years' program participation</td>
<td>35.4 percent met the promotional criteria; and</td>
<td>15.7 percent met the promotional criteria;</td>
</tr>
<tr>
<td>Three years' program participation</td>
<td>39.7 percent met the promotional criteria.</td>
<td>23.3 percent met the promotional criteria;</td>
</tr>
<tr>
<td>Four years' program participation</td>
<td>44.3 percent met the promotional criteria.</td>
<td>26.3 percent met the promotional criteria.</td>
</tr>
</tbody>
</table>

The conclusions about the effectiveness of bilingual instruction are based on an increasing proportion of students satisfying a "promotional criteria," New York City's minimum competency tests. For all of New York City, eighty-six percent of all students passed the seventh grade (entry into grade 8) test. That twenty-six percent of students who had four years of transitional bilingual education pass a test where the norm is an eighty-six percent pass rate seems more to suggest a program in trouble than a desirable educational model.

IV. THE CHALLENGES AHEAD IN BILINGUAL EDUCATION

As we have discussed, the legal profession is largely responsible for the way the nation currently seeks to meet the special educational needs of language-minority children whose dependence on a language other than English puts them at an educational disadvantage in the typical American school. Lawyers have accomplished two major achievements over the last fifteen years through legislation, regulation and litigation.

First, social policy and public opinion have changed to recognize that schools have a responsibility to meet the special educational needs of language-minority children. Second, transitional bilingual education became institutionalized as virtually the only instructional method for meeting these needs.

These achievements are a mixed blessing. Creating a generally accepted social awareness of public responsibility to help language-minority students who need special English language services is a major and important gain in social policy. The institutionalization of TBE, however, is more problematic. This institutionalization will force lawyers and bilingual educators to face six challenges if the education of students dependent on a non-English language is to improve.

(1) **Correct the unjustified emphasis on Transitional Bilingual Education.** The research and evaluation literature clearly shows that transitional bilingual education is not a uniquely effective way of meeting the special educational needs of language-minority children who are limited English proficient (LEP). But the courts and regulators have helped make one particular instructional method, transitional bilingual education, a goal in itself rather than the means to the goal—a better education for limited-English-proficient students. The displacement of the goal for a better education for bilingual children by the goal of transitional bilingual education, itself, at whatever the cost, may create a “lost” generation of language-minority adults. Their educational loss is the failure of the promised opportunity of the *Lau* decision. The challenge is to focus on the educational needs of all limited-English-proficient students and not on advocating one ideologically appealing method of instruction.

(2) **Improve the process for identifying which students need bilingual education.** The essence of the procedures used to determine which students need bilingual instruction can be summarized in two steps:

1. **Does the student come from a home where somebody (but not just the student) speaks a non-English language some of the time?**
2. **If so, does the student do poorly in school?**

If the answer to both questions is “yes,” the student is targeted for bilingual education; it is believed the student needs to be taught at least some of the time in a language other than English.

Reflect a moment on these procedures. The answer can be “yes” to both questions for a monolingual English-speaking child. The absurdity

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181. See Baker, *Selecting Students for Bilingual Education under the Keyes Agreement*, 1 *La Raza* L.J. 330 (Fall 1986) [hereinafter cited as Baker] for an extended discussion of the failure of the current processes of identifying students in need of bilingual education.
of teaching a monolingual English-speaking student math in a language other than English needs no further elaboration.

The scanty research on this issue suggests that mistakes in classification are made. For example, using a specially developed test for identifying LEP students, the National Center for Bilingual Research found that forty-eight percent of all monolingual English-speaking Cherokee students were LEP and, presumably, in need of being taught in Cherokee, a language none of them could neither speak nor understand.\textsuperscript{182} The United States Census Bureau administered this test to a nationally representative sample of all school-age children and found that forty-two percent of the entire monolingual English-speaking population was classified as LEP by the test.\textsuperscript{183}

This analysis has been confirmed in other studies.\textsuperscript{184} An analysis of the procedures specified in the proposed \textit{Lau} regulations for identifying students in need of bilingual education was recently performed.\textsuperscript{185} The researchers found that those procedures selected students mainly on the basis of their coming from a poverty home background; speaking a language other than English had very little to do with their selection for bilingual education under the proposed regulation. Similarly, the Inspector General audited several Title VII bilingual education projects in Texas that used the two-step identification procedure described above.\textsuperscript{186} He found the \textit{majority} of the identified LEP students were English speaking.

Simply put, no valid language proficiency tests exist. Nevertheless, states use language proficiency tests to identify students in need of bilingual education. The ineffectiveness of many bilingual projects on the students' learning, therefore, may be a result of these programs providing bilingual education to students who do not need it. English-speaking children taught in a non-English language \textit{should} have trouble in school.

The problem raises both legal and educational challenges. Is it possible to identify students who need bilingual education? The bilingual education community has not succeeded in doing so despite years of trying. What if it cannot be done? What if the courts have defined a class


\textsuperscript{183} This information is part of an ongoing study yet to be published by the Department of Education.

\textsuperscript{184} See, e.g., Baker, 1986, \textit{supra} note 181.


\textsuperscript{186} \textit{Department of Education, Review of Federal Bilingual Education Programs in Texas} (1982).
with a protected right\textsuperscript{187} and that class cannot be identified? How much more time and money should be spent trying to figure out how to identify LEP students before changing the law to include a workable definition of who needs bilingual education?

(3) \textbf{Realize that the most effective programs for teaching English to language-minority students may require the segregation of language-minority students from English-speaking students.} Placing English proficient students in a classroom of limited English proficient pupils may not aid the LEP student in learning but, in fact, may stymie the process. At one point in the well-known St. Lambert immersion experiment for teaching French to English-speaking students, some native French-speaking students were put in the classroom to serve as role models for the French-learning, English-speaking students.\textsuperscript{188} When the French skills of the English-speaking French learners were compared to other French learners in classes without any native French speakers, the latter had learned more French. Rather than serving as role models, the native French-speaking students came to disproportionately dominate the teachers’ attention because they could communicate more easily.

The emerging linguistic theory of second language acquisition, with its emphasis on comprehensible input\textsuperscript{189} suggests that a second language is best learned when the learner and teacher engage in conversations where the teacher pitches the speech at a level just beyond the learner’s skills; that is, the instructor pushes the student but does not get so far over the student’s head that the message is lost. Introducing native speakers of the second language into the classroom can destroy this effective learning environment because they would communicate with the teacher at a level beyond what the language learners could understand.

Effective programs for teaching English to language-minority students may well require that they be segregated from the English-speaking majority. This concept is in opposition to current state and federal laws which allow up to forty percent monolingual English speakers in the bilingual education classroom.\textsuperscript{190} In fact, the new Bilingual Education Act of 1984 allows for a fifty-fifty ratio of limited-English-proficient speakers and monolingual English-speaking students in the developmental bilingual education programs.\textsuperscript{191}

What best protects the language-minority student’s rights? It may be necessary to temporarily segregate them in order to speed up their full

\textsuperscript{187} Lau, supra note 26, at 28.
\textsuperscript{188} Lambert & Tucker, supra note 120, at 239.
\textsuperscript{190} Pub. L. 98-511, tit. II, § 703(4)(B).
\textsuperscript{191} Id. at § 703(5)(B).
integration. Or should their learning be allowed to be retarded through full integration for desegregation purposes?

(4) Change requirements which impede the development of effective bilingual education policy. The development of effective educational programs for language-minority students only will occur through research. Yet, the quality of the current bilingual education research is appalling. Effective research requires comparing students who receive treatment to those who do not. But civil rights laws are interpreted as requiring treatment for all students with limited English proficiency. Therefore, it becomes difficult and, perhaps, impossible to show that the civil rights requirements have improved the education of LEP students. The challenge here is to develop evidence of program effectiveness that avoids the civil rights "catch-22."

(5) Decide on program goals. The purpose of special educational services for language-minority students must be clarified. At times, the goal is described as maximizing the learning of English by students from non-English-speaking homes. At other times the goal is described as developing both English and the non-English native language. These goals reflect weighty and fundamental issues of social philosophy posing the question of whether the school should reflect an America which is the melting-pot or an America of ethnic pluralism. Whichever it is to be, the issue needs to be settled. The current schizophrenic state of trying to have both at the same time, or seesawing between first one and then the other, is bad educational policy.

The school day has a finite length of time. Certain subject areas are required to be covered during the school day. The language-minority child, on top of learning these required subjects, must also learn a second language (or two languages if the student is not proficient in the home language) and, perhaps, ethnic history. When is there time to learn all that is required of the LEP student? The goal of mastering English alone creates a major instructional problem within a fixed school day. This is an inescapable problem. If learning English and maintaining a non-English language is added to the curriculum, something else has to go.

Bilingual education theorists have attempted to finesse this problem by arguing that learning to read first in the non-English language saves time because it is easier than learning to read in a second language and it

192. Effectiveness, supra note 59, ch. 4, p. 6.
194. In fact, the United States Congress has recognized this as one of its goals in the Bilingual Education Act of 1974, Pub. L. No. 93-380, § 702(a), and maintained this as one of its purposes for continuing the funding of bilingual education programs. 20 U.S.C. § 3222(a)(4).
195. This goal is manifested in the recent Congressional approval of "developmental bilingual education" programs which provide instruction in English and the native language in such a way that students achieve competence in both languages. 20 U.S.C. § 3223(a)(5)(A).
facilitates the later learning of a second language.\textsuperscript{196} There are several problems with this theory. First, there is no good evidence that it works.\textsuperscript{197} Second, very few school systems structure their program so that first-language literacy is taught first with subsequent progression into English literacy.\textsuperscript{198} Local policy and state laws often thwart structuring the program correctly. Moreover, many bilingual education teachers feel uncomfortable teaching in this manner.\textsuperscript{199} Most important, however, is that this program model assumes starting with monolingual non-English-speaking students and there are few such students in the LEP population. The LEP population is overwhelmingly constituted of English-dominant bilingual students.\textsuperscript{200}

We must recognize that special language services for language-minority students impose additional learning tasks on these students. Because more is demanded of them while they are at school than is demanded of majority culture students, it may not be possible to teach them the standard curriculum, English, a non-English language and ethnic history within the confines of the school day. There must either be a re-ordering of priorities or a longer school day for LEP students.

(6) \textit{Fulfill the promise of Lau}. The challenges detailed above show how we have fallen short of accomplishing the goals of \textit{Lau}. Despite considerable effort—the passing of laws, the issuing of regulations, the deciding of court cases and the spending of large amounts of money—little progress has been made in meeting the special educational needs of language-minority children. Before progress can be made, those who are concerned with the education of language-minority children must face up to some unpleasant decisions. Many of the comfortable assumptions of the past may have to be rejected. But if these challenges are not faced, the \textit{Lau} decision will continue as an unfulfilled dream, not as a guarantee of a better future for the language-minority student.

It is past time for the nation to re-examine its policies on educating limited English-proficient children. Ineffective programs must be condemned by all who are concerned about the education of language-minority students. We must continue the search for better ways of meeting

\begin{itemize}
  \item \textsuperscript{196} See, e.g., Cummins, \textit{The Construct of Language Proficiency in Bilingual Education}, \textit{Current Issues in Bilingual Education} (J. Alatis ed. 1980); Dulay & Burt, \textit{supra} note 147; Engle, \textit{supra} note 125.
  \item \textsuperscript{197} \textit{Effectiveness}, \textit{supra} note 59.
  \item \textsuperscript{198} Development Associates, for example, developed a classification scheme for programs for LEP students. \textit{Development Associates, supra} note 95. Structuring a program so that first-language literacy is taught before literacy in English was so rare that Development Associates did not even use this as a characteristic for defining program types. \textit{Id.} at 165-91. The two program types defined by Development Associates that possibly could have included such programs accounted for only thirty-two percent of the programs studied. \textit{Id.}
  \item \textsuperscript{199} This is information gathered from authorities within the Department of Education.
  \item \textsuperscript{200} Barnes, \textit{supra} note 94.
\end{itemize}
the educational needs of America's language-minority students. Only then will we provide the educational opportunity needed for participation in the mainstream of American society. Only then will the promise of the *Lau* decision be translated into a better future for limited English proficient students.