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Sólo Quiero la Misma Oportunidad: Developing a Model of Appropriate Education for Middle School Immigrants

Dale S. Freeman†

INTRODUCTION

Hay que entender que los escritores de la posguerra tenían que enfrentarse con una censura tremenda. Si un autor hubiera criticado directamente a Franco, se habría encontrado en la cárcel poco después de publicar la obra. Era dentro de este ambiente que aparecieron dos obras importantes de los años cincuenta. Me refiero a La Colmena de José Luis Cela y Nada de Carmen Laforet. Estas dos novelas nos dibujan ilustraciones de la vida cotidiana - social, educativa, económica - de los pilares de cultura española, Madrid y Barcelona. Sus críticas son fuertes y los dos hablan de la pena, desesperanza y pobreza que infiltraban la vida común durante los años del franquismo. Lo importante de estas novelas es la manera e que Cela y Laforet fueron capaces de manejar la censura y presentar la verdadera visión que era la vida española en esta época.

Some readers of this Comment will be able to understand the preceding paragraph without any difficulty (in fact, they may wish to correct the grammar or take issue with the points presented). Others will probably be able to decipher some of the content because of past Spanish exposure or knowledge of another “romance” language. However, no doubt the majority of the readers will merely recognize the paragraph as being written in Spanish and quickly skip down to this one. They may hope for an explanation of the above or figure that the really important “stuff” of this Comment will have to be written in English.

The response of the reader is very similar to what can be expected of the newly arrived immigrant suddenly thrust into an all-English language classroom. Almost any non-English speaking child born in Latin America can identify English. A small number will have received an enriched education with academic exposure to English prior to arrival. They will be able to enter an all-English classroom and flourish after some short period of cultural adjustment. The English language will

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1. While I realize that the immigrant groups in our public schools consist of children from nearly every country and represent nearly every spoken language, the focus of this Comment will be on Spanish-speaking immigrants.
not be a factor in their adjustment to United States schools nor will it be a factor in the schools' adjustment to these new students.

Another group of students will enter such a classroom and, while not understanding all the words used by the teacher or the other students, will be able to pick up some of the lesson's content. They may know that the class is studying fractions or World War II or the cellular make-up of a plant. These children, while figuring out the topic of the lesson, will always be a step behind in truly understanding it because the language barrier will be strong.

By far the largest group will be the one that knows that the language of discussion is English\(^2\) but has no clue what the lesson is about. For this group the language barrier is immense. They will tune out of the lesson (much like the readers who skipped the first paragraph) and hope for an explanation. In an all-English classroom they will never find that explanation. Can a child learn math, history, science and English in such an environment? To put the query another way, could those readers who skipped the first paragraph learn Spanish if there was another paragraph on science or social studies?

The answer seems obvious but instead of justifying at least some bilingual education for new immigrants, bilingual education remains something of a political hot potato. Many people continue to live under the illusion that since “my grandfather came from Russia not speaking English and he died a success,” all kids should learn English now.\(^3\) However, common sense and educational research indicate that placing new immigrants into all-English classrooms is not the best way for them to be educated (including learning English) and become productive members of society.

The educational research does not stand alone in supporting bilingual programs for new immigrants. When a student cannot understand the language of instruction, he is effectively denied access to the education being provided. Abundant case law and various state and federal statutes state unequivocally that a child has the right to an appropriate education, one in a language intelligible to the child. If we consider “appropriate” to mean the education which gives students the best opportunity for success, bilingual and native language instruction emerge as the most appropriate education for immigrant students.

This Comment focuses on one subgroup of all new immigrants that has traditionally been neglected in educational programs and research: those between eleven and fifteen years old. These students normally will be found in the sixth through eighth grades or “middle school.”\(^4\) While the educational needs of

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2. A child who has never even been exposed to English will probably be able to do this. The child can pick up on the abundance of cues available to her, not the least of which is the fact that she is in a school in the United States. Someone will have told her that in the United States, “they speak English.” The use of these cues should not be confused with “knowing English.” As noted, many of those readers who skipped the opening paragraph know that it was written in Spanish but do not know Spanish. They used the cues available to them such as the fact that most articles on bilingual education are concerned with Spanish and the accent marks and tildes look like Spanish.

3. See Kenji Hakuta, Mirror of Language 8, (1986) [hereinafter Hakuta, Mirror].

4. I choose “middle school” as the term for this Comment although “junior high school” and “intermediate school” may often be used interchangeably. “Secondary school” may also be used when referring to both middle and high school.
elementary school immigrants are pressing, those of the intermediate school students are frequently ignored. They are not seen as having an entire educational career to become acculturated and adapt to the American education system nor seen as being additions to the work force in need of "survival skills." They are, to borrow a phrase, "caught in the middle."

Adolescent immigrants find themselves in the most difficult of situations. Uprooted from their homes, they are in a new country where the dominant language is English. The customs, food, and even street atmosphere differ considerably from their past experience and require adjustment time. Schools in their homeland and the United States share the characteristic of being in a large building but often little else. The adolescent suffers this culture-shock with all school-age (and many adult) immigrants. The difference with middle schoolers is that they are also entering or are in the middle of puberty. The physical and emotional changes are enough to burden any adolescent who has grown up living in the same home, going to the same school, and speaking the same language of the school. The adolescent burdens added to the immigrant burdens create a unique situation, one about which society should be most concerned.

The adolescent immigrant's success depends on his ability to develop sufficient "social capital" to be able to negotiate the American educational system and participate in mainstream American society. The social capital emerges from the cumulative effects of a contested identity: (1) from immigrant to American; (2) from non-English speaker to English speaker; and (3) from child to adult. The school's role in building the social capital is to ensure smooth transitions and successful identity development, and thus produce a member of society capable of contributing and participating to the fullest extent of his ability.

Rather than exist linearly and independently, these factors exist triangularly and interdependently. This can be best represented by the following diagram:

5. See Christian J. Faltis, Editor's Introduction, 69 PEABODY J. OF EDUC. 1, 2 (1993) ("Immigrant and bilingual secondary students represent the most underrepresented, understudied group of students in the United States"); Rebecca Constantino & Magaly Lavandenz, Newcomer Schools: First Impressions, 69 PEABODY J. OF EDUC. 82, 82 (1993) ("Although there is ample research on programs, curricula, and instructional practices for elementary bilingual and limited English proficient (LEP) learners, there is little research pertaining to bilingual learners at the secondary level.").

6. This is the title used for a report on middle school prepared by the California Superintendent's office. CALIFORNIA STATE DEPARTMENT OF EDUCATION, CAUGHT IN THE MIDDLE: EDUCATIONAL REFORM FOR YOUNG ADOLESCENTS IN CALIFORNIA PUBLIC SCHOOLS (1987)[hereinafter CAUGHT IN THE MIDDLE]. Although the report is eleven years old, it is still considered the framework and required reading for California middle school teachers. I write this from personal experience and observation.

7. This diagram is intended as an aid to understanding the interconnectedness of issues related to the middle school immigrant. It should be considered as a working model worthy of further development and refinement.
Previous studies have only addressed these factors discretely. One might find books or articles which deal with bilingual education and the non-English speaker or that consider the immigrant's transition into American culture or the adolescent bridge from childhood to adulthood. However, to fully understand the adolescent immigrant situation and needs, the factors must be considered in relation to each other. This Comment aims to unify these factors to produce an appropriate education for middle school immigrants.

This Comment will provide an overview of immigrant, bilingual, and adolescent education and a specific analysis of the confluence of these three areas and the implications for immigrant children of middle school age. Part I describes the general problem of middle school immigrant education. The growing population of immigrant students will be discussed as well as the legal framework that entitles each immigrant to a public school education. Furthermore, this part will consider the general concerns of adolescent and middle school education. Behavioral, social and instructional concerns will be shown to have equal weight in devising an effective curriculum for grades six through eight. Part II discusses the role that bilingual education plays in the education of immigrant students. Much of that section is dedicated to providing a working understanding of the models and history of bilingual education. Additionally, the case law and statutory framework will be presented. Finally, the most current educational research will demonstrate that native language is the most appropriate education for our immigrant students. Part III will examine the movement to eliminate bilingual and immigrant education and expose the movement as xenophobic, illogical and short-sighted. Finally, Part IV presents a model of middle school immigrant education that is appropriate from legal, pedagogical, and policy perspectives.

I.
MIDDLE SCHOOL IMMIGRANT EDUCATION: A PROBLEM OR AN OPPORTUNITY?

Grades six through eight, or "middle school," have developed a presence much like that of a middle child: while attention focuses on the kindergarten through fifth grades (or the "baby" of the family) and the high school years (the first born), middle school is frequently overlooked. When we add two other

8. One publication explains that "[m]iddle school students are not taller versions of
components, new immigrant status and limited English proficiency, we see a situation that should, but does not, command significant attention. This section highlights the unique needs of middle school students who also happen to be new immigrants and limited English proficient (LEP). The findings regarding bilingual education apply equally to new middle school immigrants, but their complex situation merits further consideration.

We will see that immigrants come to this country with a strong desire to learn English and take part in the "American dream." Thus, an essential question emerges: what is the best way to educate our middle school immigrant students? Should we just apply bilingual education theory developed for elementary school? Or, should we just provide them with "survival English?" The difficulty is that we must try to understand a circumstance which encompasses the three distinct factors of the social capital triangle, each of which often stands alone as an area of study: new immigrant status, adolescence, and limited English proficiency.

A. Middle School Education in General

1. The Complexity of the Grade Six Through Eight Experience

What makes middle school so unique is that at no other time do students have to deal with so many personal and academic challenges. In the Foreword to Caught in the Middle, then-Superintendent of Schools for California, Bill Honig, wrote that "no other grade span encompasses such a wide range of intellectual, physical, psychological, and social development." The average middle school student is in the first years of puberty. The turmoil that often accompanies the physical changes makes the "importance of emotional health ... a primary goal of middle grade education." These students tend to be egocentric; to subordinate academic goals to personal-social concerns; to experience accelerated physical development; to face issues related to sexuality before attaining full emotional maturity; to be extremely restless or listless; to be sensitive to criticism of personal shortcomings; to need frequent affirmation; to challenge authority figures; and to confront hard moral and ethical questions which they are unprepared to resolve.

elementary children or shorter versions of high school students. They are a distinct population with their own characteristics and needs." QUALITY EDUCATION FOR MINORITIES PROJECT, EDUCATION THAT WORKS: AN ACTION PLAN FOR THE EDUCATION OF MINORITIES 61 (1990) [hereinafter QUALITY EDUCATION]. While written somewhat tongue and cheek, this statement aptly describes the treatment received by these grades and these students.

9. See infra text accompanying notes 206-29.

10. See infra text accompanying notes 66-77.

11. CAUGHT IN THE MIDDLE, supra note 6, at v.

12. Id. at 73.
This long list of typical characteristics is surely both under- and over-inclusive. Nevertheless, it provides an illustrative starting point with which to view the complexity of the middle school student.

Academically, Middle School provides a bridge to high school and more individualized learning and must be “organized to allow a gradual and successful movement from early elementary education to high school.” Students should leave middle school with a repertoire of skills that allows them to pursue independent study and also succeed in a group setting. In short, they should learn how to learn. This capability will provide students with the life-long access “to the broad background of knowledge shared widely within . . . society.” The challenge for any middle school educator is immense. Perhaps that is why middle school job openings tend to be the most difficult to fill.

2. A Profile of the Middle School Immigrant Situation

Immigrant children of this age bring with them the whole litany of characteristics and then some. The most obvious of these “extra” characteristics is their limited English proficiency. However, these students have needs that extend “beyond language and literacy.” These special characteristics include academic gaps between home country and American schools, adjustment to a new lifestyle, confrontation with racism, discrimination and open hostility to their presence, and family separation or reunification. These and other complex needs will be

13. See id. at 144-48.

14. Id. at 92.

15. Id. at 24.

16. Id. at 9. Without this access, these students will have difficulty throughout their lives in understanding direct and implied meanings, concepts, and ideas that shape how society interacts in the academic, social, political, and personal worlds. Id.

17. Out of 294 applicants for teaching positions in the Redwood City School District in 1995, only 61, or 21%, expressed some interest in teaching in middle school (this does not mean that middle school was their first preference). 263 would only accept a position teaching in elementary school. Telephone Interview with Linda Fernandez, Personnel Office, Redwood City School District (Mar. 28, 1996).


discussed below, but they are essential to keep in mind when looking at specific educational models for this age group. In the scarce literature that exists on middle and high school immigrants, a common theme emerges: “attention needs to be focused on the unique developmental concerns and human relations issues affecting LEP [and immigrant] students at the secondary level.”

The middle school years become a “staging area for intellectual and social maturation,” and while long neglected, “are of immense importance” to minority and immigrant youth.23 The vast majority of the hundreds of thousands of drop-outs leave school during high school but most of the “identifiable potential drop-outs are still in school during the middle grades.” And of those students who drop out, “[n]ational studies have shown drop-out rates appear highest for the newly arrived Hispanic immigrant student who has entered in the late middle school” years.

Undocumented status makes it impossible to know the precise numbers of immigrant students who drop out of school.26 The United States General Accounting Office (GAO) has estimated that between 2.1 and 2.7 million immigrant children reside in the United States.27 Over half of these children come from

20. One of my students had not seen his mother in ten years prior to arriving in the United States. During a conference, I told his mother how well he was progressing. She broke down in tears telling me that she had nothing to do with the type of student he had become. According to her, his success was due to his sister and grandparents who helped him while he was in El Salvador and she was in this country. His adjustment to living with his mother, although successful in the short time I knew him, was also emotionally taxing.

21. See infra, discussion accompanying notes 57-65.

22. Minicucci, supra note 18, at 184.

23. QUALITY EDUCATION, supra note 8, at 60.

24. CAUGHT IN THE MIDDLE, supra note 6, at 65.

25. LAURIE OLSEN, CROSSING THE SCHOOLHOUSE BORDER IMMIGRANT STUDENTS AND THE CALIFORNIA PUBLIC SCHOOLS 90 (1988) (emphasis added). The author explains further:

One national estimate comparing Census data to school enrollment placed the drop-out rate for the foreign born at close to 70%. Children from homes where English is not spoken, and who themselves do not speak English when they enter school drop out at four times the rate of those from English language backgrounds. Among those from non-English backgrounds, Hispanic students drop out at twice the rate of those from other backgrounds.

Id. (citations omitted). See also LORRAINE M. MCDONNEL & PAUL T. HILL, NEWCOMERS IN AMERICAN SCHOOLS, MEETING THE EDUCATIONAL NEEDS OF IMMIGRANT YOUTH 102 (1993); infra discussion accompanying notes 55-56.


27. UNITED STATES DEPARTMENT OF EDUCATION, BIENNIAL REPORT TO CONGRESS ON THE EMERGENCY IMMIGRANT EDUCATION PROGRAM 2 (1994) [hereinafter BIENNIAL REPORT].
Spanish-speaking countries but, due to the U.S. Census’s use of ages five to seventeen as a category, the exact number of adolescent immigrants is unknown. Nevertheless, among LEP middle school students, surely a large number are recent immigrants. Since reclassification of LEP students to fully English proficient typically occurs within three years, we can conclude that a large percentage of middle school students classified as LEP have been in the country less than three years and thus arrived during or just before middle school.

Additionally, undocumented status affects the students directly in their pursuit of an education. Their status:

[b]ring[s] increased instability, fear and insecurity to their lives. It also means living without protections, social services and assistance available to most people in this country. We found high [a] correlation[ ] between undocumented status and dropping out or never enrolling in school, with interference with schoolwork, as well as with physical and mental health problems. Also, undocumented children are more likely than other immigrants to move frequently, hampering their attachment and achievement in school.

The approach advocated here regards documentation status as irrelevant when assessing educational needs. If the students are here, they deserve an appropriate education. However, if students or their families feel threatened due to an unwelcome and intolerant atmosphere, the education process will be disrupted.


29. OLSEN, supra note 25, at 85.

30. Faltis and Arias note that

[although the precise figures for secondary level students with limited English proficiency are unavailable, we do have information about the national, linguistic, and ethnic diversity within this student population. For example, it is clear that the majority of secondary level [LEP] students are foreign born, and that many enter secondary school with little or no experience in U.S. schools.]

31. OLSEN, supra note 25, at 27.

32. The threat need only be perceived, as evidenced by the following tragedy. In spite of the fact that most hospitals and schools refused to comply with Proposition 187’s reporting provision, the fear of exposure led to the death of at least one person shortly after the initiative was passed. In Anaheim, California, a twelve-year-old boy, Julio Cano, died after his parents “delayed seeking medical treatment for their son at a local hospital because of fear that they would be reported to authorities.” Frank Trejo, Proposition 187 Likely to Spur Protracted Fight, Both Sides Say Measure Already Having Big Effect, DALLAS MORNING NEWS, Jan. 30, 1995, at A1.

Faltis & Arias, supra note 18, at 10.
Educational parity for middle school immigrants cannot be achieved "until the ambivalence and resistance about the foreign-born [regardless of documentation] are overcome." These students have traditionally been regarded as the "problem" of the school's bilingual or English as a Second Language ("ESL") department and "as latecomer competitors for attention and scarce resources." This view must change if these students hope to succeed. They must be included, rather than excluded, and must be seen within the school community as belonging to all teachers and all programs.

3. The Social Capital Triangle and the Role of Bilingual Education in the Education of Middle School Immigrants

The social capital triangle aids in visualizing the relationship between the three factors that affect the adolescent immigrant's contested identity. The "non-English speaker to English speaker" factor implicates the role of bilingual education for the immigrant student. The ability to speak English becomes a key to the other components and thus merits a more detailed discussion. Furthermore, recent research in the form of the most comprehensive and far reaching study of bilingual education to date requires a working understanding of the theory that forms the basis of bilingual education. The complex issue of the role of bilingual education and the middle school immigrant will be addressed in Part II.

B. Immigrant Education - From Immigrant to "American"

1. Background

Immigrants come to this country for a variety of reasons. Some come due to war, political violence or oppression in their home countries. Others come for economic reasons. Still others come in order to join family members. Whatever the reason, the United States continues to be a land of immigrants, and yet the country still struggles with issues related to immigration: jobs, welfare, health care, crime, and education. While a student's ability to learn is certainly affected by the availability of social programs that promote a sense of economic and personal security, education deserves individual attention and consideration. Education

33. OLSEN & DOWELL, supra note 19, at 7.

34. Id.

35. See supra note 7.

36. OLSEN, supra note 25, at 20.

37. Id.

38. Id.
remains one of the most significant means of socializing immigrants and ensuring their successful integration in American society. Thus, education becomes another key, and a second factor in the social capital triangle, in the development by the immigrant adolescent of her social capital.

Immigrant education should be analyzed separately from immigration policy. Even if one believes that current immigration laws should be strictly enforced, that restrictive laws should be enacted, or that a wall should be erected at our southern border, that debate should be distinct from the education of those already here (and continuing to arrive). Lorraine McDonnel and Paul Hill suggest two reasons for the different treatment: the "humane reason" and the "utilitarian reason." In denying access to education, we inhumanely punish these students for the actions of their parents in immigrating in violation of United States law. In terms of social utility, we also ignore a substantial number of people who, in the future, will participate and contribute to society in one form or another. Additionally, while immigrant education of the type discussed here may include bilingual education, general educational needs must be separately addressed.

The United States Supreme Court has been able to separate immigration policy from immigrant education. In Plyler v. Doe, the Court had to decide whether undocumented immigrant children had the right to a free public education in spite of their unlawful presence in this country. The case arose over a Texas law that denied the use of state funds to educate children not legally admitted into the United States and authorized local districts to deny enrollment to these same students. In citing Matthew v. Diaz for the proposition that the Fifth Amendment


41. McDonnel & Hill, supra note 25, at x.

42. "... that these are innocent children who are in this country because of adult action over which they have little control." McDonnel & Hill, supra note 25, at x. See Trimble v. Gordon, 430 U.S. 762, 770 (1977) (discussing how punishment of children who cannot affect their parents' conduct or their own status "does not comport with fundamental conceptions of justice"); see generally Matthews v. Diaz, 426 U.S. 67 (1976).

43. "... that these children are literally the nation's future. Many of them will remain here as adults, and the quality of education they receive will shape the quality of life all Americans enjoy over the next several decades." McDonnel & Hill, supra note 25, at x.

44. For a discussion of why the "logic of necessity" requires bilingual education for non-English speaking immigrant students, see McDonnel & Hill, supra note 25, at xii.


47. 426 U.S. 67 (1976).
protects even illegal aliens from invidious discrimination\textsuperscript{48} and \textit{Yick Wo v. Hopkins}\textsuperscript{49} for the proposition that the Fourteenth Amendment includes those who may not be citizens,\textsuperscript{50} the Court rejected all attempts to show that denying undocumented immigrant children an education somehow furthers a substantial state interest.\textsuperscript{51}

While in education circles \textit{Plyler} has come to stand for the proposition that \textit{all} immigrant children are entitled to a public school education, the Supreme Court has never held education to be a fundamental right. If it were a fundamental right, any effort to restrict access to education would be subject to the strictest level of constitutional scrutiny. So, while the \textit{Plyler} Court rejected Texas's justification, the opinion fell short of declaring \textit{any} restriction constitutionally infirm.

2. The Numbers

In evaluating the educational needs of immigrant students, it is important to know the numbers of immigrants in the public schools who are likely to require bilingual education. Over seventy percent of young immigrants live in five states: California (41%), New York (12%), Texas (9%), Florida (7%), and Illinois (4%).\textsuperscript{52} The proportions in California and New York increase even more when one looks at those immigrant students in the country for three years or less.\textsuperscript{53} A 1994 report by the United States Department of Education identified approximately 700,000 immigrant children in over 4,500 school districts in the United States.\textsuperscript{54}

The enormity of these numbers commands attention but ample evidence indicates that the United States has failed to provide these newcomers with an appropriate education. Indicative of this failing is the fact that "the dropout rate for Latino youth is twice what it is for Anglos, and research has found that recent immigrants are more likely to drop out of school than other students."\textsuperscript{55} Middle

\begin{itemize}
\item \textsuperscript{48} 457 U.S. at 210.
\item \textsuperscript{49} 118 U.S. 356 (1896).
\item \textsuperscript{50} 457 U.S. at 212.
\item \textsuperscript{51} Id. at 226-30.
\item \textsuperscript{52} MCDONNEL & HILL supra note 25, at 2,3 (citing 1990 Census of Population and Housing, U.S. Census Bureau).
\item \textsuperscript{53} Id. at 4 (citing the U.S. Dept. of Education (1991)). The absolute numbers are an underestimation of the actual number of students by about fifteen percent. The Department of Education generated the numbers based on the allocation of federal funds. Since funding is restricted to those districts with at least a minimal concentration of recent immigrants, those immigrants that live in less concentrated areas are not included in these numbers. Id.
\item \textsuperscript{54} BIENNIAL REPORT, supra note 27, at 4.
\end{itemize}
school turns out to be a crucial time because even though "students tend to leave school in the early high school years, the process of dropping out begins much earlier."\(^{56}\)

3. **Educational Needs**

Recently arrived immigrant students have unique educational needs. When immigrant families decide to come to the United States they make a "compromise between their cultural norms and those of the new lands . . . [creating the] basis for the conflict in which their children are born and raised."\(^{57}\) This conflict begins when the children observe their parents trying to negotiate a new and confusing educational system "in which parental involvement can make an enormous contribution to a child's academic progress."\(^{58}\) The frustration of the parents, during the initial introduction to American schools, contributes to difficulties faced by the students.

Immigrant students face additional difficulties that go beyond language barriers. These include cultural differences, physical health problems, mental health problems, academic gaps, and poverty.\(^{59}\) Of these, perhaps the most overlooked involves academic gaps. Age or English proficiency often contributes to erroneous academic placement. A classroom may have two students with vastly different educational backgrounds placed together only because they share a temporary inability to speak English or are the same age.\(^{60}\) These differences are most pronounced among older immigrant children. Since many of these students immigrate due to economic desperation, war, or revolution, their education in the home country often has been disrupted.\(^{61}\) Thus, schools must adequately assess the students' educational shortcomings.\(^{62}\)

This academic needs assessment will count for very little if other needs are not addressed. For example, an adolescent immigrant child may have worked his

\(^{55}\) MCDONNEL & HILL, supra note 25, at 102 (emphasis added). Of course, not all Latinos are immigrants nor are they all LEP students. Many other factors help to explain the unacceptably high rate of attrition such as poverty, racism, and low expectations placed on these students.

\(^{56}\) CONCHA DELGADO-GAITAN & HENRY TRUEBA, CROSSING CULTURAL BORDERS: EDUCATION FOR IMMIGRANT FAMILIES IN AMERICA 33 (1991) (suggesting that affirmative steps taken during middle school will help to identify and assist students at-risk for dropping out).

\(^{57}\) Id. at 21.

\(^{58}\) OLSEN & DOWELL, supra note 19, at 102.

\(^{59}\) Id. at 4. See also MCDONNEL & HILL, supra note 25, at 5.

\(^{60}\) OLSEN, supra note 25, at 50-51.

\(^{61}\) MCDONNEL & HILL, supra note 25, at 61.

\(^{62}\) OLSEN, supra note 25, at 50.
whole life in his home country. Another may have endured a rigorous trip over land from Guatemala. Yet another may have watched a sibling fight in the guerilla army of El Salvador. And while any one immigrant child may have little in common with another, 

"[m]ost . . . endure family separations in the course of immigration."63 Often a child will wait in the home country while his parents are in the United States, or she may come to the United States while her parents stay at home.64

Immigrant students begin school at a severe disadvantage. Their lack of prior experience with English and American culture and their other unique needs act to deny them meaningful access to the school environment and student activities taking place all around them. Unless the school addresses all the problems that they bring, they cannot grasp the "hidden curriculum" of the school: the lessons inherent in the relationships among students, the accepted social attitudes, and the rules, policies and practices supported by teachers.65 This process of socialization also holds the key to their success in school and their adjustment to their new country and the building of social capital.

4. Assimilation

Many Americans harbor the mistaken impression that immigrant groups have no intention to assimilate into the dominant, mainstream culture.66 They think that immigrants settle into their ethnic enclaves, maintain their language and culture, and in some way constitute a threat to "American culture" (whatever that may mean).67

Many immigrants do live together when they arrive in the United States. They do so, however, not as a refusal to integrate, but rather "out of comfort or

63. MCDONNEL & HILL, supra note 25, at 63.

64. Id.

65. OLSEN & DOWELL, supra note 19, at 48. See also OLSEN, supra note 25, at 35.

66. See Bill Ong Hing, Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in a Multiracial Society, 81 CAL. L. REV. 863, 874-75 (1993); JAMES CRAWFORD, BILINGUAL EDUCATION: HISTORY POLITICS THEORY AND PRACTICE 59-60 (2d ed. 1991) (discussing English Only supporters' belief that "today's immigrants, unlike their predecessors, are resisting assimilation, preserving non-English-speaking enclaves, and seeking recognition for their own languages"); see generally Juan F. Perea, Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English, 77 MINN. L. REV. 269 (1992). Some misguided politicians think that measures such as the elimination of bilingual ballots will provide the much needed incentive to learn English. See Antonio Califa, Declaring English the Official Language: Prejudice Spoken Here, 24 HARV. C.R.-C.L. L. REV. 293, 312 note 135 (1989) (citing a letter from Rep. Norman D. Shumway to fellow members of Congress in support of English only legislation which stated, "[p]lease join me in the effort to encourage linguistic minorities to gain a new knowledge of English . . . ". (Nov. 18, 1985)).

67. See Hing, supra note 66, at 887.
affordability, or as a result of housing and employment discrimination. And even though they live in homogenous groups, these immigrants almost uniformly agree on the importance of learning English. Their reasons for acquiring English may be economic, social, or educational, but strong incentives exist all around them. In fact, immigrants have ample motivation for learning English regardless of the absence or presence of bilingual education programs.

Critics of bilingual education argue that it impedes assimilation, citing recent arrivals' failure to learn English. The truth is that immigrants today learn English "at the same rate as other immigrant groups before them." Professor Bill Ong Hing writes that "study after study demonstrates . . . that the vast majority of immigrants take on cultural traits of the host community." He explains that the familiar "three-generation model of language acquisition" continues to apply to the current waves of immigrants:

First generation immigrants tend to learn English and pass it along

68. Id. at 891.

69. I refer to the homogeneity in the way in which members of the dominant culture would see these groups. While linguistic differences may help to create different living enclaves, a common language does not ensure homogeneity. For example, in San Francisco's Mission District, you have groups of people that share a language (Spanish), but hail from Mexico, El Salvador, Guatemala, the Dominican Republic, and just about every other country where people speak Spanish. To say that this constitutes a homogenous group, given the different living styles between countries (and even within countries like Mexico), would be a gross overgeneralization.

70. See NATIONAL COALITION OF ADVOCATES FOR STUDENTS, NEW VOICES, IMMIGRANT STUDENTS IN U.S. PUBLIC SCHOOLS 108 (1988) [hereinafter NEW VOICES] ("During two years of research, every immigrant student and parent in the Project . . . acknowledged the importance of learning English"); Hing, supra note 66, at 877 ("about ninety-three percent of all Mexican immigrants agree that residents of the United States should learn English") (citing Robert Suro, Hispanic Pragmatism Seen In Survey, N.Y. TIMES, Dec. 15, 1992, at A20); CRAWFORD, supra note 66, at 60 (citing a 1985 survey "in which 98 percent of Hispanics respondents in Miami said it was 'essential for their children to read and write English perfectly,' as compared with 94 percent of Anglo respondents").

71. See HAKUTA, MIRROR, supra note 3, at 167 (discussing the many incentives non-English speakers have for learning English), Califa, supra note 66, at 321.


73. Hing, supra note 66, at 877 (emphasis in original).

74. Id. at 877.

75. See Califa, supra note 66, at 312 (explaining that the first generation is usually monolingual (speaking the language of the native country), the second generation bilingual and the third generation monolingual (speaking primarily English)).
to their children, who become bilingual. Immigrants want and encourage their children to learn English. By the third generation, the original language is often lost. Throughout the United States, the demand for English as a Second Language training far outstrips supply.  

One would have to concede that immigrants do influence the dominant culture, but no evidence exists to suggest that it is in peril. Immigrants today merely continue a tradition of helping to “develop a distinctly new and constantly evolving and expanding U.S. culture.” The United States would be far less rich without the contributions of the various immigrant groups who have come and continue to come to this country.

Immigrant education must be based on clear goals and objectives. This question must be posed and answered: “If adolescent immigrants will eventually learn English, do we really need to provide them with special educational programs?” If one is satisfied with allowing most immigrants only a narrow range of adult job possibilities under the assumption that their English ability and level of technical skills are not crucial for their participation in society, then the answer would be “no.” However, if the objective is to grant all of our students the full range of opportunities when they enter adulthood, and thus not just assure participation in but also contribution to society, then the answer is “yes.”

5. Inappropriate Education

The next question then becomes “What are effective ways to educate our immigrant students?” This question can be answered after surveying the legal rights of immigrant and LEP students, considering research on language acquisition and academic success, and separating out the unique needs of middle school students

76. Hing, supra note 66, at 877 (citations omitted). Professor Hing continues, in a statement particularly relevant to the topic of this Comment: “The Latino community, in particular, is frequently accused of not assimilating and not learning English. Yet Spanish-speaking immigrants who have been in the country for fifteen years regularly speak English. They usually read English fluently within ten years.” Id. (citations omitted). CRAWFORD, supra note 66, at 61, cites a 1988 study which states that Spanish speakers are “fast approaching a two-generation patter of language loss . . . as compared with the three-generation model typical of immigrant groups in the past.”

77. Hing, supra note 66, at 879.

78. See Brown v. Board of Education, 347 U.S. 483, 494 (1954) (asserting that today “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”).

79. The distinction with which I use “participation” and “contribution” is subtle but important. Everyone who lives in our society (with the possible exception of those who live separate from other human populations) participates by working, buying groceries, paying taxes, receiving welfare, etc. Contribution, however, involves more active participation to the point of influencing society, affecting the political debate, and speaking up for the issues that interest each individual.
generally and immigrant middle school students in particular. Currently, the "most notable characteristic of immigrant education policy at the state level is its total absence, aside from programs for LEP students."80

Given the political and perceived economic climate, "it is no surprise that the federal government and most state governments are reluctant to mount large-scale programs tailored specifically to the needs of immigrant students."81 Yet, McDonnel and Hill warn, "these students cannot be ignored. They represent an increasing proportion of the students enrolled in urban schools, and they will constitute a key segment of the future labor force."82 If education policy continues to ignore immigrant students and even cut back on the programs in existence, the "social dislocation . . . is almost incalculable."83 What, then, is the appropriate response? What will provide an "appropriate education?"

Virtually all immigrant students acknowledge the need to learn English.84 Problems occur when schools act on that need while ignoring the general academic requirements and social needs of these students. Too often, special ESL classes form the extent of the "appropriate action" taken by middle schools to provide access to immigrant students.85 The immigrant students spend the rest of the school day in mainstream classes taught in English amounting to "a 'sink or swim' experience taught by teachers with no ESL training and no time to provide special attention to the limited English speaking student."86 Such an approach, however, is

80. MCDONNEL & HILL, supra note 25, at 24. For a discussion of the Federal involvement in immigrant education, see id. at 19 ("The federal government plays a narrowly circumscribed role in the schooling of immigrant students, similar to its function in elementary and secondary education generally.").

81. MCDONNEL & HILL, supra note 25, at 102.

82. Id.

83. Id. at 102.

84. See NEW VOICES, supra note 70, at 108. See also OLSEN, supra note 25.

85. See OLSEN, supra note 25, at 61-62 (discussing the academic effects of a program using only ESL classes to address language barriers). Usually these ESL classes stand alone in terms of content and subject matter which makes the transition to the core subject classes difficult for the immigrant student. Id. The ESL topics will often be completely irrelevant to the students' academic needs.

86. Id. at 62. This publication includes a particularly poignant testimonial by a ninth grade Mexican girl who immigrated at age thirteen:

I just sat in my classes and didn't understand anything. Sometimes I would try to look like I knew what was going on, sometimes I would try to think about a happy time when I didn't feel stupid. My teachers never called on me or talked to me. I think they either forgot I was there or else wish I wasn't. I waited and waited, thinking someday I will know English.
doomed to failure as "newcomers to the English speaking world cannot wait for years before they learn the materials covered in the curricula of the districts but must absorb their new language and the subject matter simultaneously." Furthermore, such slow progress fails to provide immigrant students with the ability to interact socially with students from the dominant or mainstream culture. The drop-out statistics indicate that such students are not absorbing the subject matter, nor are they mastering the social or "hidden curriculum." After the realization that they have been shut-out of the district curriculum, many students turn away from that which is offered. The students realize that the education that they receive is obviously different than that received by the "mainstream," that what they received is both literally and symbolically "second class." Clearly such exclusionary practices do not constitute appropriate education.

C. The Adolescent Years - Making the Transition From Child to Adult

This Comment has previously mentioned the unique characteristics of adolescents. An effective middle school immigrant program must reflect an acknowledgement and understanding of adolescent needs. The program will fail if it takes the myopic view of middle school immigrants as merely needing language services or as only being concerned with the immigrant-American transition. The adolescent needs of the immigrant child are an essential factor in the development of social capital and must not be ignored.

Effective instructional practices for adolescent students can be seen as the third stage of a continuum. First, the common behavior characteristics of adolescents must be noted, including physical, emotional and intellectual. From those, the social needs of the adolescent become apparent. Only with the characteristics and the social needs in mind can effective instructional practices be designed. The middle school years "serve as a vital link between childhood and older adolescence, which tapers into young adulthood" and as such the educational program must "deal with the complex interrelationships between intellect and

Id. See also Constantino & Lavandenz, supra note 5, at 82-83 ("Since the majority of bilingual and English as a Second language (ESL) programs are directed toward elementary LEP students, the secondary population has fallen by the wayside and been left to 'sink or swim.'") (citations omitted).


88. See OLSEN & DOWELL, supra note 19, at 48; OLSEN, supra note 25, at 35.

89. For a discussion of why "sink or swim" is legally inappropriate, see Gomez v. Illinois State Board of Education, 811 F.2d 1030, 1043 (7th Cir. 1987) and infra text accompanying notes 186-201.

90. See supra text accompanying notes 11-17.
emotions." It is educationally essential to distinguish "middle grade education as a distinctly unique contribution to the intellectual, emotional, and social development of youth in our society."

Like the "mainstream" adolescent, none of the these components exists in a vacuum when applied to the immigrant student. Success in one depends on success in another; overall success requires the confluence of all. This three-step continuum (behavioral, social, instructional) results in a middle school student prepared for social and academic success. In the case of the immigrant child, the addition of a language focus and the transitional cultural exposure combine with general instructional practices to provide the best opportunity for success.

1. Behavioral Characteristics Typical of the Middle School Student

Typically, "early adolescents may suffer more age-based prejudice than any other group in society," with the exception of "old people." This prejudice has resulted in middle school education being "shackled by denigrating views of young people." The reason for this view and result centers on the adolescents themselves: these eleven to fifteen-year-olds are impossible to pigeon-hole; although certain identifiable stages exist, each individual adolescent is different. The fact that the changing individual is part of a group undergoing similar (though not necessarily identical) changes, produces "the most diverse student body of any school division." The youngsters often appear, to themselves and those outside the group, "to be caught in the no-man's land between their chronological age and their physical age, trying to keep their social age, their academic age, their personality age, and their psychosexual age in conformity with their chronological age."

Nevertheless, certain generalizations do apply to adolescents as a group.

91. CAUGHT IN THE MIDDLE, supra note 6, at 91.

92. Id.


94. John Arnold, A Curriculum to Empower Young Adolescents, Nov. 1992, at 2 (available in the ERIC microfiche collection, ED361913).

95. FINKS, supra note 93, at 2.

96. Id. (quoting JOHN MONEY, THE CONTROL OF THE ONSET OF PUBERTY (1974)).

97. For an age-by-age discussion of the developmental characteristics of early adolescents, see Wanda Johnson and Terry Kottman, Developmental Needs of Middle School Students: Implications for Counselors, 27 ELEMENTARY SCHOOL GUIDANCE & COUNSELING 3 (1992). See also CAUGHT IN THE MIDDLE, supra note 6, 144-48 (providing a detailed list of the typical characteristics of a middle school student).
For example, most experience a “marked increase in body growth . . . [and typically] faster development in girls than in boys.”\textsuperscript{98} This creates a need in all students of this age to master physical skills and develop an understanding of issues related to health, fitness and nutrition.\textsuperscript{99} Emotionally, “young adolescents are often said to be mainly cranky, rebellious, turbulent, self-indulgent, incapable of learning anything serious.”\textsuperscript{100} At the same time, they can be described as “full of curiosity, energy, imagination, and emerging idealism.”\textsuperscript{101} And, contrary to conventional beliefs, “cognitive developmental studies show that early adolescence is a time of heightened intellectual activity.”\textsuperscript{102} These intellectual characteristics include “increased abilities to think hypothetically, abstractly, reflectively and critically and to make reasoned and ethical choices.”\textsuperscript{103}

2. \textit{Social Needs}

The new intellectual capabilities found in early adolescents must be balanced with the intense social needs that also characterize the age. The cognitive ability and natural curiosity should be allowed to flourish both independently and in groups.\textsuperscript{104} Students should be allowed to make their own decisions concerning their friends, clubs, study groups and elective classes but structure must continue to be provided and limits must be set.\textsuperscript{105} The social needs of adolescents must be taken into consideration prior to the formulation of any instructional plan. If the social needs are ignored, a cognitively appropriate task risks almost certain failure if it places students in socially objectionable (in their eyes) situations.

Among the most important issues to adolescents are self-esteem, peer relationships and sexual activity.\textsuperscript{106} And while “[i]t is impossible to separate young

\begin{itemize}
\item \textsuperscript{98} M. Lee Manning, \textit{Developmentally Appropriate Middle Level Schools}, 68 \textit{Childhood Education} 305, 306 (1992).
\item \textsuperscript{99} \textit{Id.}
\item \textsuperscript{100} DAVID A. HAMBURG, \textit{EARLY ADOLESCENCE: A CRITICAL TIME FOR INTERVENTIONS IN EDUCATION AND HEALTH} 4 (1989).
\item \textsuperscript{101} \textit{Id.} See also \textit{CAUGHT IN THE MIDDLE}, supra note 6, at 35.
\item \textsuperscript{102} Arnold, supra note 94, at 4 (emphasis in original).
\item \textsuperscript{103} Manning, supra note 98, at 306.
\item \textsuperscript{104} See \textit{CAUGHT IN THE MIDDLE}, supra note 6, at 25.
\item \textsuperscript{105} See \textit{FINKS}, supra note 93, at 3.
\end{itemize}
adolescents' psychosocial well-being from their educational achievement, schools frequently ignore the social issues in designing the curriculum. In identifying seven needs for healthy development, some writers have recognized five that are inherently social: diversity, participation in school and community, social interaction with peers and adults, physical activity and structure and limits.

Students of this age yearn to belong to a group, to be accepted by their peers and yet often need to just "be by themselves." They want to "be accepted as they are" and to be considered "valued members of their school" before investing the time in academic challenges. As peer relationships become more important, connections to family and school may be weakened. And yet, the successful middle school allows the student to make the important connections and develop the important relationships within the school context. California has recognized this to such a degree that in formulating the state curriculum it aims to create a positive environment for "early adolescent personal and social development, not only because such environments contribute to academic achievement but also because they are intrinsically valued. California's approach is similar to that undertaken with regards to language minority students: the provision to all students of equal access to advanced curriculum and the realization of the need to formulate educational policies and practices which make the access possible.

3. Instructional Practices

A middle school educational program that compelled all students to sit in rows of desks, prohibited them from getting up and moving around, and required only individual work would only succeed in educating a small number of its adolescent students. For the others, access to the curriculum, no matter how cognitively appropriate, would be effectively denied. Instructional practices for young adolescents must account for all aspects of their beings: intellectual, emotional, social, and physical, as previously noted. The program must emphasize


107. Id.


110. CAUGHT IN THE MIDDLE, supra note 6, at 72.

111. Id. at 55.
academics and personal growth and development while avoiding the unsuccessful practices of “repetitious activities and routinization of classrooms that characterize schooling at the middle level.” The effective instructional practices materialize as a logical outgrowth of the prior considerations. Middle school is a bridge between elementary and high school and effective practices maintain characteristics of the former while exposing students to characteristics of the latter. Education at the middle level “should lead children through the initial physical, intellectual and social transformations to adulthood and equip them with capacities for thought and action that will be fully compatible with a productive adult life.” The curriculum should be responsive to the adolescents’ developmental needs; it should be rich in meaning; and it should deal with societal issues. The curriculum must be honest with the students about obstacles, social and emotional, intellectual and physical, and linguistic and political, that they must face. Students need to able to experience a wide array of learning activities and a variety of educational and exploratory materials in both structured and unstructured and individual and group situations. Successful instructional practices:

[j]oin young adolescents to the core, elective, and exploratory curriculum. In order to be successful, instructional practices must be appropriate to the structure and substance of varied subjects and the developmental characteristics of students. These two conditions must be met. When either is missing, the connection is broken between students and the curricula.

The most successful instructional practices are characterized by their simplicity. An effective method of providing meaning to students is for selected core subjects to be taught in extended blocks of time. This opens the possibility for a deeper treatment of the subject, demonstrates relationship with other subjects (especially if core subjects, such as math and science, are combined), and allows students to establish meaningful relationships with one or more teachers. Teaching subject matter across disciplines meets cognitive needs of complex instruction and the larger blocks enables teachers to create communities of

113. HAMBURG, supra note 100, at 5.
116. CAUGHT IN THE MIDDLE, supra note 6, at 35.
117. Id. at 66.
learning. This setting recognizes the social need of peer interaction in its ability to allow small group tasks, projects and discussions. It also recognizes the physical needs by encouraging hands-on activities which enable students to move around the classroom and avoid long periods of sedentary work.

Another important characteristic that works particularly well in a new immigrant program is the use of “houses,” or a “school-within-a-school” wherein a core group of teachers share students and the students share teachers. The teachers can create curricular programs together with their students in mind; each classroom does not exist in a vacuum. Caught in the Middle suggests that such an approach “allow[s] a sense of closeness to develop between students and staff which enhances the development of intellectual growth, academic achievement, and emotional and social maturity.” The bridge between elementary and high school is nowhere more apparent in a school that combines the “house” idea with that of extended blocks of interdisciplinary core teaching. The students gain the experience of multiple teachers and changing rooms and some subject-matter independence while still being able to maintain the community and academic atmosphere of having fewer teachers, staying with the same classmates, and studying the interrelationship of subjects. The team approach promotes “active engagement in academics . . . a sense of bonding with the school, with teachers, and with peers.”

II. THE ROLE OF BILINGUAL EDUCATION IN THE EDUCATION OF IMMIGRANT STUDENTS

The cultural barrier that every immigrant child faces coexists with an equally imposing linguistic barrier. This linguistic barrier acts as a bar to the advanced academic curriculum and as a bar to the advanced “cultural or hidden curriculum” taught on the playgrounds and hallways of American schools. The transition from immigrant to American and child to adult cannot occur without the simultaneous transition from non-English speaker to English speaker.

A. Different Models for Bilingual Education in Today’s Public Schools

While bilingual education today generates much discussion and

118. Manning, supra note 98, at 306.


120. Id.

121. CAUGHT IN THE MIDDLE, supra note 6 at 101; see also HAMBURG, supra note 100, at 6.

122. Arhar & Kromrey, supra note 109, at 15.
controversy, it is the key that unlocks the door to success for the immigrant child. To appreciate its logic and efficacy, one must have a basic understanding of bilingual education.

Many different models exist for educating LEP students. Some use the students’ primary language extensively during the instructional day, while others prohibit any language other than English, much in the way the Nebraska, Iowa, and Ohio post-World War I statutes did. Ironically, even the programs that do not use two languages often will be referred to as bilingual.

A common instructional method used with LEP students is the “submersion” or “sink or swim” method. In a classroom using the submersion method, the teacher expects the LEP students to learn English by being integrated with native speakers of English, by hearing the teacher speak English to English-speaking students, and by occasionally receiving small amounts of “comprehensible second language input.” A school wide program that uses the submersion method has been described as “an organized curriculum designed for native speakers of a language but often used with language minority students. No special instructional activities focus upon the needs of language minority students.”

The submersion program intends “not to retain the students’ first language but to promote the mastery of English.” Students in a submersion program are “expected to perform like their monolingual peers” but without the same cognitive development in English. To put it another way, the native English learners only need to concentrate on the academic curriculum. Since their education has been in English, their cognitive level and their linguistic ability coincide. The LEP student must learn English and try to stay at grade level in the content areas. Thus, if a middle school immigrant student attends a mainstream social studies class (a highly

123. See infra text accompanying notes 257-58; see also Rachel F. Moran, The Politics of Discretion: Federal Intervention in Bilingual Education, 76 CAL. L. REV. 1249, 1336 (discussing the use of “punitive ‘no Spanish’ rule[s] forbidding children from using” Spanish) [hereinafter Moran, Politics].

124. SANDRA H. FRADD & WILLIAM J. TIKUNOFF, BILINGUAL EDUCATION AND BILINGUAL SPECIAL EDUCATION: A GUIDE FOR ADMINISTRATORS 5 (1987). I presume this is because the students may eventually be able to speak in two languages or because the teacher is able to speak one language and the students are able to speak another.

125. CALIFORNIA STATE DEPARTMENT OF EDUCATION, OFFICE OF BILINGUAL EDUCATION, SCHOOLING AND LANGUAGE MINORITY STUDENTS: A THEORETICAL FRAMEWORK 217 (1982) [hereinafter SCHOOLING AND LANGUAGE]. See also CRAWFORD, supra note 66, at 33, 92, 122.

126. SCHOOLING AND LANGUAGE, supra note 125, at 217.

127. FRADD & TIKUNOFF, supra note 124, at 38. Fradd and Tikunoff use the term “structured immersion” for essentially the same method as submersion.

128. Id.
content imbedded subject), she will only understand the lesson after she understands the language. Thus, she potentially misses the entire content of her first several years as she struggles to learn academic English. She (and society) is then faced with a dilemma: does she return to seventh and eighth grade to learn the curriculum and then graduate from middle school at eighteen or does she continue through high school ignorant or severely behind her mainstream peers in terms of experience and knowledge base.

Additionally, students who participate in a submersion program often experience "subtractive bilingualism, usually limited bilingualism." Essentially, the student stops developing her first language once the submersion program begins since she no longer receives native language instruction at the level of her cognitive development. She then enters the "catch up" mode in an attempt to learn English, at the expense of the learning of the academic subject matter.

Another common method of instruction for LEP students has been called "submersion + ESL" or just "ESL." Students in this type of program usually attend mainstream classes for part or most of the school day and spend some period of time in a "pull-out" program. During the hour or so of pull-out, students attend separate classes to receive more individualized English instruction structured to their level of understanding. The submersion and submersion + ESL programs appeal to many people. They offer their support for the program on the grounds that "it provides more English; more time spent exposed to English; the motivation to learn, since the subject matter is taught in English; and the advantages of formal instruction." Because the students are surrounded by English, "[i]ntuitively, the idea appears sound." Nevertheless, it has sparked debate across the country among school teachers and researchers because of "counter-intuitive" research showing that the amount of English does not matter as much as the comprehensibility of the English provided. Thus, six hours of mainstream English

129. SCHOOLING AND LANGUAGE, supra note 125, at 217. Subtractive bilingualism means that as proficiency in the second language increases, proficiency in the first language decreases. See FRADD & TIKUNOFF, supra note 124, at 12-14. "Limited bilingualism" occurs when mastery of English is incomplete and the native language is similarly not developed. Most LEP students do all they can to learn the language of instruction despite being unable to follow the content of the lesson. Because of that, the cognitive level of English is stunted and the student, while having achieved some level of English, is considered limited because the cognitive level is so far below that of his peers. Few students can close this gap and it is one explanation for the high drop-out rate of Latinos generally and immigrant Latinos in particular. See supra text accompanying notes 23-26.

130. See SCHOOLING AND LANGUAGE, supra note 125, at 51, 53. "ESL" means "English as a Second Language."

131. Id.

132. Id. at 53.

133. FRADD & TIKUNOFF, supra note 124, at 38.
frequently does not result in either English acquisition or grade level content learning. Whereas one hour of comprehensible English plus five hours of grade level Spanish (or native language) instruction has been shown to result in higher levels of both English and academic achievement.135

The next model can truly be called “bilingual education” and is known as the “transitional model” or “transitional bilingual education” (TBE). TBE uses the primary language as a bridge for the acquisition of English.136 Typically, the student’s primary language becomes the language of instruction for a short period, usually one to three years.137 During that time, teachers will use ever increasing levels of English so that the student can transfer to an English-only classroom at the earliest time possible.

The curriculum combines some primary language development with English acquisition and subject matter development, first in the primary and later in the English language.138 The exit, or transition, time for the student depends on whether the program is an “early” or “late” transitional model. The early model transitions students to submersion programs once they have acquired “basic interpersonal communicative skills” (BICS).139 The late model does not transition its students until they have attained both a BICS level of English and a level of “Cognitive/Academic Language Proficiency sufficient to sustain academic achievement through successful completion of secondary school.”140 Logically, only after arriving at CALP can an LEP student be expected to succeed in a mainstream classroom. He will then understand not only the language of instruction but also the subtle meaning of the lesson.

Finally, the maintenance model causes the most controversy and yet arguably yields the best results. The controversy centers on the fact that students in this model remain fully bilingual rather than simply use their native language to the extent necessary to stay at grade level while acquiring English.141 Instruction in the

134. Id.

135. See infra text accompanying notes 143-45; text accompanying notes 216-29.

136. Id. at 26.

137. Id.

138. SCHOOLING AND LANGUAGE, supra note 125, at 218.

139. BICS is a term used to describe the “everyday” language that students use informally. This includes simple greetings, “playground talk,” and other informal conversation. See SCHOOLING AND LANGUAGE, supra note 125, at 17 n.11.

140. Id. at 17, 218. “Cognitive/Academic Language Proficiency” is known by the acronym, CALP.

141. FRADD & TIKUNOFF, supra note 124, at 26.
two languages continues throughout the students’ schooling, a characteristic unique to the maintenance approach. This approach focuses on the beneficial effects of maintaining and promoting dual cultural and linguistic competencies; it treats the student’s native language and culture as an asset, rather than a handicap.\textsuperscript{142} English predominates as the language of instruction once the student attains the level of CALP in English. The essential characteristic of the maintenance model, however, allows the student to continue, even after reaching CALP and participating in a mainstream classroom, to receive some instruction in his native language. It may be in a class on Spanish language literature, Latin American studies, or art history. The student’s native language development does not cease upon learning English but rather continues at pace with his intellectual and cognitive development. The end result is not subtractive bilingualism but a bilingual and biliterate student.

The research suggests an inverse relationship between the time students spend in structured English instruction (submersion, ESL, early transitional) and their English language proficiency.\textsuperscript{143} Fradd and Tikunoff note that students “in maintenance programs showed the greatest gains in English, followed by students in transitional bilingual programs. The students making the least progress were those in the [submersion] programs.”\textsuperscript{144} Perhaps the inverse relationship should be stated another way: the time that the students spend continuing to learn and develop their own language is positively related to their English language proficiency.\textsuperscript{145}

B. Bilingual Education as a Political and Legal Hot Potato

\textit{In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.}

\textit{ - Brown v. Board of Education}\textsuperscript{146}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{142} Id.
\item \textsuperscript{143} Id.
\item \textsuperscript{144} Id.
\item \textsuperscript{145} For further discussion on the empirical evidence of the success of native language instruction, see infra text accompanying notes 216-29.
\item \textsuperscript{146} 347 U.S. 483, 493 (1954).
\end{itemize}
\end{footnotesize}
Education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.

-- Plyler v. Doe

No one educational issue has been the subject of such contentious debate over the last thirty years as bilingual education. Everyone has an opinion, whether or not they are knowledgeable about the law, the research, or the pedagogy. The gut reaction of many is, "my ancestors learned English, so should everybody." The political response of others is to end bilingual education and "return this country to greatness." And the response of educators ranges from concerns about "confusion or delay resulting from bilingual education" to a belief in the "efficacy of native language instruction on the acquisition of English and the academic success of students." No authoritative case nor statutory law creates the right of LEP students to a single form of bilingual education. The right which does exist is that of an "appropriate education." This sub-section will construct a framework for "appropriate education" for immigrant middle school students. First, the legal rights which grant that access will be addressed. Next, the research findings on bilingual education and English language acquisition will show that native language instruction is the "appropriate education" for the students considered here.

147. 457 U.S. at 221. This is not to suggest that education is a fundamental right. See San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).


149. See, e.g., SCHOOLING AND LANGUAGE, supra note 125, at 22-23 (explaining the arguments opposing bilingual education).

150. See, e.g., SCHOOLING AND LANGUAGE, supra note 125, at 67 (discussing the idea that the better way to ensure English acquisition and overall academic success is comprehensible input in English and core subject instruction in the native language of the student).

151. See Alberto T. Fernandez & Sarah W.J. Pell, The Right to Receive Bilingual Special Education, 53 ED. LAW REP. 1067, 1068 (1989) ("The courts have held consistently that denial of bilingual education is not in violation of the equal protection clause"); see id. at 1081 ("Claiming the right for bilingual education under the Constitution, however, would be quite difficult since education is not a fundamental right.").

1. The Right to an "Appropriate Education"

a. The Bilingual Teacher's Best Friend: Lau v. Nichols

The United States Supreme Court case around which all bilingual teachers rally is still *Lau v. Nichols*. In bilingual education circles *Lau* carries great symbolic importance as the Supreme Court decision prompted the development of special protections for LEP students. Classroom teachers still believe that *Lau* guarantees the right to bilingual education when in fact the case never granted such a right and much of the Court's reasoning was undercut by *Regents of the University of California v. Bakke*.

*Lau* involved a suit by Chinese-speaking students who sought relief against the San Francisco Unified School District for failing to provide equal educational opportunities. The Court chose not to rule on the Equal Protection claim under the Fourteenth Amendment to the United States Constitution, and instead decided the case under the Civil Rights Act of 1964. The Court stated that since the District received federal funds, it "contractually agreed to comply" with the Civil Rights Act of 1964. The Act states that "[n]o person in the United States shall, on the ground of race, color or national origin . . . be subjected to discrimination under any program or activity receiving Federal financial assistance." The Court relied almost exclusively on the clarifying guidelines issued in 1970 by the Office for Civil Rights (OCR): "Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program . . . the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."

The Court stated that "those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way


156. 414 U.S. at 564.


158. 414 U.S. at 569.


Thus, it concluded that in this case the educational program was effectively closed to the Chinese-speaking plaintiffs. The Court refused to mandate any specific relief that would constitute "affirmative steps." Instead, it wrote that "[t]eaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instruction to this group in Chinese is another. There may be others." \[6\]

*Lau* has taken on almost mythic significance to those on the frontlines of bilingual education: the classroom teachers. Perhaps the combination of the Court's citation of the OCR guidelines which mandated districts to take steps "to rectify the language deficiency" \[6\] of their students and the Court's recognition that teaching students in their native language is one of the possible "affirmative steps" \[\] created a false belief that *Lau* guaranteed the right to bilingual or native language education. In lunchroom discussions and departmental meetings, teacher-proponents of bilingual education continue to rely on the *Lau* Court to justify their arguments. Nevertheless, the true limit to *Lau* must be understood by teachers so that they can see how sturdy or precarious their position is. The mandate focused on "affirmative steps"; the justifying arguments should center on how bilingual or native language education is the most effective, most appropriate, affirmative step to be taken.

b. *The Bakke Effect (or rather, intent)*

The Court in *Lau* seemed to use the "effects test" of the OCR guidelines to rule that actions (or inactions) of school districts which prevent students from "effective participation" in its educational program, violate the Civil Rights Act. Without overruling the holding of *Lau*, the Court in *Regents of the University of California v. Bakke* \[6\] seemed to depart from an effects-test analysis and require the proof of intent as part of the prima facie case for a Title VI violation. Thus, while *Bakke* had nothing to do directly with bilingual education, the case affected it significantly.

A majority of the divided *Bakke* Court seemed to equate Title VI analysis with that of the Equal Protection Clause. \[6\] Thus, under an Equal Protection

\[161. \] 414 U.S. at 566.

\[162. \] Id. at 565.

\[163. \] Id. at 567 (citing 35 Fed. Reg. 11595).

\[164. \] Id. at 565.


\[166. \] See id. at 284-87, ("[S]upporters of Title VI repeatedly declared that the bill enacted constitutional principles. . . . Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause.") (opinion of Powell, J.), 325 ("Title VI goes no further . . .


approach, discriminatory intent must be demonstrated as well as adverse effects in order to establish a civil rights violation under Title VI. Thus, even in the face of evidence (or "effects") such as low test scores, high drop out rates, and unintelligible instruction for non-English speaking students, without proof of an intent to deprive such students of a meaningful education, a Title VI violation cannot be established. Such intent could possibly be inferred from explicit language in a school district's policy or pattern of district or school-based behavior designed to deny a meaningful education to language minority students; intent would not be established by the effects of a poor program or the effects of no program.

Although the Court did not overrule Lau and it technically remained good law, the possibility that a more burdensome intent test would be applied under Title VI led bilingual education advocates to turn to other legislation.

c. Equal Educational Opportunity Act

The enactment of the Equal Educational Opportunity Act (EEOA) in 1974 codified Lau and, after Bakke, gave litigants a statutory basis for relying on an "effects" test to establish that LEP students were entitled to special instructional programs. The relevant provision made unlawful the denial of "equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional program." The effects test under the EEOA "examines whether an educational curriculum effectively excludes [non-English-proficient] NEP and LEP students from meaningful participation in the curriculum." Evidence of such exclusion may include "lower scores on achievement tests and higher drop-out rates than the Equal Protection Clause of the Fourteenth Amendment"), 328-40 ("Congress' equating of Title VI's prohibition with the commands of the Fifth and Fourteenth Amendments . . . compel the conclusion that Congress intended the meaning of the statute's prohibition to evolve with the interpretation of the commands of the Constitution.") (opinion of Brennan, J., joined by White, Marshall, and Blackmun, JJ.).

167. See Stuart Biegel, The Parameters of the Bilingual Education Debate in California Twenty Years after Lau v. Nichols, 14 CHICANO-LATINO L. REV. 48, 50 (1994); Moran, Politics, supra note 123, at 1292. Four justices in Lau explicitly suggest that an effects test no longer applies to Title VI: "[T]hat impact alone is in some contexts sufficient to establish a prima facie violation of Title VI [is] contrary to our review that Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's." 438 U.S. 265, 352 (opinion of Brennan, J., joined by White, Marshall, and Blackmun, JJ.). A fifth justice, Powell, later wrote that he considered Lau and its effects test to be overruled by Bakke. Guardians Association v. Civil Service Commission, 463 U.S. 582, 610-11 (1983) (opinion of Powell, J.).

168. See Biegel, supra note 167, at 51-52.


170. Moran, Politics, supra note 123, at 1317.
than their English-speaking peers." The less burdensome effects test led advocates to turn "increasingly to the Equal Educational Opportunity Act as the basis for their legal challenges." 

d. Castaneda v. Pickard Clarifies the Issue

Shortly after Lau, the Office of Civil Rights issued the "Lau Guidelines" which "outlined procedures to be followed by school districts that enrolled 20 or more LEP students." These guidelines generated much controversy, litigation, proposals, and, ultimately, their own withdrawal, clearly establishing that they had no force of law. Without much legislative guidance, educators, students and policy makers looked to the courts for help.

After the demise of the Lau Guidelines, the Fifth Circuit issued what has become the authoritative interpretation of § 1703(f) in Castaneda v. Pickard. The court was called on to determine the meaning of "appropriate action" and, in a blow to bilingual education advocates, it concluded that "the phrase was not intended to be synonymous with 'bilingual education.'" Since § 1703(f) was added to the EEOA as a floor amendment and thus had "very little legislative history from which to glean the Congressional intent behind the EEOA's provisions" the court had to "adhere closely to the plain language of § 1703(f) in defining the meaning of this

171. Id.


173. Biegel, supra note 167, at 50 n.8.

174. Id. at 50 n.7. A discussion on the rise and fall of the Lau Guidelines is beyond the scope and not really relevant to this Comment. For a detailed presentation, see Moran, Politics, supra note 123, at 1280-98.

175. 648 F.2d 989 (5th Cir. 1981).

176. Biegel, supra note 167, at 50 (citing Castaneda, 648 F.2d at 1009). See also Guadalupe v. Tempe Elementary School Dist. No. 3, 587 F.2d 1022, 1030 (9th Cir. 1978) ("... the issue is whether 'appropriate action' must include the bilingual-bicultural education the appellants seek. We hold that it does not."). But see Rios v. Read, 480 F.Supp. 14 (E.D.N.Y. 1978). In Rios, the court stated that:

[t]he purpose of the statutes ... is to assure the language-deficient child that he or she will be afforded the same opportunity to learn as that offered his or her English speaking counterpart. Taken together, the statutes ... mandate teaching such children subject matter in their native tongue (when required) by competent teachers.

480 F.Supp. at 21-22.
The court of appeals believed that Congress sought to protect the essential holding of Lau, that "schools are not free to ignore the need of limited English speaking children for language assistance to enable them to participate in the instructional program."\footnote{177} At the same time, the court thought that the use of "appropriate action," and not "bilingual education," indicated a congressional intent to defer to state and local officials' decision making capacity.\footnote{179} By adding a private right of action to enforce the EEOA provisions, Congress must have intended that the schools make a "genuine and good faith effort" in "choosing the programs and techniques they would use to meet their obligations under the EEOA."\footnote{180} The court saw itself confronted with the task of defining "appropriate action" and thus establishing a standard for state and local officials to follow.

The result was a "three-prong analysis that federal courts continue to follow today when evaluating a school district's language remediation program."\footnote{181} First, the court must assess whether the district program is based on a sound educational theory or on a legitimate experimental strategy.\footnote{182} Next, the court must decide if the school district has adopted programs and practices that are reasonably likely to effectively implement the educational theory.\footnote{183} Finally, the chosen theory and manner of implementation must produce results to indicate success in overcoming the language difficulties within a legitimate period of time.\footnote{184} Thus, the focus is on

\begin{itemize}
  \item \footnote{177} 648 F.2d at 1007.
  \item \footnote{178} Id. at 1008.
  \item \footnote{180} 648 F.2d at 1009.
  \item \footnote{181} Biegel, supra note 167, at 53.
  \item \footnote{182} 648 F.2d at 1009.
  \item \footnote{183} Id. at 1010.
  \item \footnote{184} Id. The Castaneda court stated the full test as follows:

  First, the court must examine careful the evidence the record contains concerning the soundness of the educational theory or principles upon which the challenged program is based . . . .

  The court's second inquiry would be whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school . . . .
\end{itemize}
the program and its effects: is the theory sound and are the practices likely to lead to demonstrated results (effects) which show the success of the program over time. This three-part effects test provides the framework under which most bilingual education litigation is decided.  

e. Other Cases

Castaneda's three-prong test has become the governing standard that courts use to decide whether a district's educational program constitutes "appropriate action" under § 1703(f). In Gomez v. Illinois State Board of Education, the Seventh Circuit considered the test to be "the proper accommodation of the competing concerns" and followed Castaneda. The Gomez plaintiffs had no quarrel with the bilingual program in Illinois but rather objected to the state's failure to "provide local school districts with adequate and uniform guidelines" and to "monitor and enforce implementation of the program chosen by the state's legislature." The court rejected the state's claim that the district had the responsibility to take "appropriate action" and instead followed Idaho Migrant Council v. Board of Education by requiring that the state, in addition to local officials, "ensure that the needs of LEP children are met." The court concluded that the plaintiffs had demonstrated a colorable claim that the second prong of the Castaneda test had been violated because "appropriate action" means "something

Finally . . . [i]f a school's program, although premised on a legitimate educational theory and implemented through the use of adequate techniques, fails after being employed for a period of time sufficient to give the plan a legitimate trial to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned.

Id. at 1009-10.

185. Biegel, supra note 167, at 50. See also Moran, Status, supra note 172, at 331 (explaining that the test requires the courts to look "only at whether a program as the effect of excluding NEP and LEP students from the educational program and does not require proof of discriminatory intent.") (Citing Haft, at 211-15). Professor Moran explains in another article that, in contrast to the Lau Guidelines, the EEOA grants schools and districts considerable flexibility in devising remedies. Moran, Politics, supra note 123, at 1298. She explains that "the EEOA has proved consistent with efforts in the late 1970s and early 1980s to enhance state and local discretion in designing and implementing curricula for linguistic minority students." Id. She seems to suggest that the EEOA's appearance of protection of the LEP child may be illusory or at least less strong than commonly believed. The alternative, Title VI with an intent test, would definitely prove to be a higher threshold to cross, however.

186. 811 F.2d 1030, 1041 (7th Cir. 1987).

187. Id. at 1042.

188. 647 F.2d 69 (9th Cir. 1981).

189. 811 F.2d at 1043.
more than 'no action.' Nevertheless, the court did not prescribe a remedy of bilingual education but merely reversed a 12(b)(6) dismissal and remanded the case for further proceedings.

In Teresa P. v. Berkeley Unified School District, the district court also followed what it called Castaneda's "useful criteria to be used in review of appropriate action issues." The district's program withstood a § 1703(f) challenge since the plaintiffs could not introduce sufficient evidence to show that the efficacy of native language instruction rendered Berkeley's program pedagogically unsound. Furthermore, the program passed prongs two and three, and the court commented on the effectiveness of the implementation noting that the district's "LEP students are learning at rates equal to or higher than their counterparts in California."

The Berkeley Unified program had two components: a Spanish bilingual program and an ESL program (in three distinct forms). The plaintiffs claimed that the program insufficiently fulfilled the appropriate action necessary under § 1703(f) and as interpreted by Castaneda. The parents who brought the action on behalf of their children claimed that an increase in native language instruction and better English language development would satisfy the mandate of appropriate action. From the evidence presented in the case the court did not rule that any particular method of instructing LEP students is plainly superior to others. Instead the court

190. Id.

191. Fed.R.Civ.P. 12(b)(6) ("failure to state a claim upon which relief can be granted").


193. Id. at 713.

194. Id. at 714.

195. Id. at 715-16.

196. The District's bilingual program followed an early-exit transitional model. Id. at 703. The first ESL form served kindergarten through sixth grades and consisted of mainstream education and "English language instruction from ESL resource teachers on a 'pull-out' basis." Id. at 704. Next was an ESL program with a Chinese cultural theme and open to all students in the kindergarten through third grades. Id. at 704-05. The final ESL program was at the middle and high school levels at essentially consisted of various forms of mainstream instruction, ESL enrichment, back-up reading, tutorials and slower paced content classes. The variety of schools and abilities made this third ESL form the most complex. Id. at 705-06.

197. Id. at 700.

198. Id.
deferred to local educators' expertise absent evidence of a clear violation of the EEOA.\textsuperscript{199}

In sum, the courts essentially require that appropriate action be taken to ensure that LEP students have access to the educational program. An education program would not be appropriate if LEP students' participation has been impeded.\textsuperscript{200} Unfortunately, the \textit{Castaneda} court and the other courts have failed to define adequately the "equal participation" phrase of § 1703(f). I suggest that a program reaches "appropriate education" once participation in the program is equal. By equal I mean a program which, despite the language barrier, provides equal access to the academic curriculum and to extra curricular activities; provides equal opportunity to be prepared for college or a challenging post-secondary vocation; and results in equal outcomes\textsuperscript{201} when the students leave the public schools. Once participation in an educational program has become equal between LEP and English speaking students, the program then provides "appropriate education."

\textbf{f. The Bilingual Education Act}

The Bilingual Education Act\textsuperscript{202} will not be discussed in detail as it conveys no substantive rights to a bilingual or "appropriate" education. The Act's initial recognition of LEP students' educational needs "did not impinge seriously on state and local decisionmaking because of its structure as a grant-in-aid program and Congress' failure to fund the Act properly."\textsuperscript{203} The Act is designed to promote research and experimentation rather than to create an entitlement on behalf of LEP students.\textsuperscript{204} Even the Act's expressed commitment to meeting LEP students' needs was uncertain. The Act never even "defined bilingual education . . . because of an unresolved ambiguity about the programs' proper objectives."\textsuperscript{205}

\begin{flushright}
199. \textit{See Moran, Politics, supra} note 123, at 1298 and discussed at \textit{supra} note 171.


201. Equal outcomes would be measured by such factors as test scores, grade point average, attendance rates, drop-out rates, and college attendance.


204. Moran, \textit{Status, supra} note 172, at 327.

205. \textit{Id.}\
\end{flushright}
2. Native Language Instruction Is Appropriate Education

   a. The Research Supports the Theory

   California has recognized that the ultimate goal for both mainstream and bilingual education is to produce “contributors to the economy, responsible citizens of our democracy, and morally alert and fulfilled individuals.”206 The core curriculum provides the means to achieve that goal. The responsibility of the bilingual program becomes one of helping LEP students become fluent in English while assisting them in achieving “academic parity”207 with native English speakers.208 California further recognizes that “[m]odem research has found that the fastest and most effective way” for most LEP students to learn English and achieve parity is through native language instruction supplemented by ESL classes.209

   Substantial debate has focused on the merit of California’s assertion. One of the first studies on the efficacy of bilingual education seemed to indicate grave shortcomings.210 However, researchers, educators and other advocates attacked the AIR study for its faulty methodology and irrelevant focus. Kenji Hakuta noted several of the common methodological criticisms: “the reliability and validity of measures, subject selection, confounding of the treatment variable (Title VII with non-Title VII) with other factors such as the socioeconomic status of the students.”211 During the hearings at which the AIR study was presented, one witness


207. As used in this Comment, “academic parity” refers to the stage at which new immigrant and non-English speaking students are performing at the same academic level as their English speaking peers. The ultimate goal of the model program, see infra Part IV, is for the students to achieve academic parity while attending classes in which the language of instruction is English.

208. Id. at v-vi; see also infra text accompanying notes 216-29.

209. Id. at vi.

210. AMERICAN INSTITUTES FOR RESEARCH (AIR), EVALUATION OF THE IMPACT OF ESEA TITLE VII SPANISH/ENGLISH BILINGUAL PROGRAM (1977-78) [hereinafter AIR STUDY]. The study was commissioned by the federal government as an examination of LEP students’ acquisition of English as they progressed through the schools. Among other findings, the study concluded that students in bilingual education programs scored lower on English tests than similar students in regular education programs, that students in bilingual programs scored slightly better on mathematics tests than similarly situated students in regular education programs, that the attitudes toward school of the respective groups did not differ significantly, that students in bilingual programs did improve their ability to read Spanish, and that fewer than one third of students in the bilingual were in fact LEP. Id. at II-2 to -7. The study indicated that over 85 percent of the programs surveyed retained students after reaching sufficient English proficiency to function in a regular classroom. Id. at VIII-1 to -2. See Moran, Politics, supra note 123, at 1285-87 (discussing the AIR study and the congressional reaction to it).
noted that bilingual education has been subjected to a "double standard" since it had been "evaluated, scrutinized and criticized much more harshly than . . . any other educational program" which received federal funds.\footnote{211. HAKUTA, MIRROR, supra note 3, at 220. \textit{See also}, Moran, Politics, supra note 123, at 1286.}

The stronger criticism of the study, however, relates to its focus: it took "bilingual education to mean a homogenous intervention," considering any program funded by Title VII as "bilingual education" while ignoring the "different manifestations of the program[s]."\footnote{212. \textit{Bilingual Education: Hearings on H.R. 15 Before the Subcomm. on Elementary, Secondary, and Vocational Educ. of the House Comm. on Educ. & Labor, 95th Cong., 1st Sess. 294 (remarks of Ruben Valdez, Vice Chairman of the National Council of La Raza) (1977).} \textit{See also}, CRAWFORD, supra note 66, at 88.} In lumping all bilingual programs together, the study ignored the successes of well-designed programs. Additionally, in basing its conclusions on student achievement in English and math, the study ignored other outcome measures that may be more indicative of a program's success such as employment figures, drop-out rates, and drug and alcohol addiction.\footnote{213. HAKUTA, MIRROR, supra note 3, at 221. \textit{Other commentators have noted this "homogenization" as a crucial weakness of the study. \textit{See, e.g.}, HAKUTA, supra note 3, at 221. For a detailed discussion of the consistently replicated flaws in studies showing the shortcomings of bilingual education, see Stephen D. Krashen, \textit{Bilingual Education: A Focus on Current Research}, NCBE Focus: Occasional Papers in Bilingual Education, Number 3 (Spring, 1991) [hereinafter Krashen, Focus].} \textit{The AIR study's criticisms of bilingual education did and still do point out the fact that some programs, bilingual in name, may not be effectively educating students. But, the study should not be taken as a general indictment of the concept of bilingual education.} Much of the pedagogical debate centers on the researchers' choice of measures of success. Where the research has focused on the learning of English, the success of bilingual programs seems dubious. However, such studies tend to look only at short-term (less than four years) results.\footnote{214. \textit{See} HAKUTA, MIRROR, supra note 3, at 221. \textit{Another study, by de Kanter and Baker, supported the AIR study. KEITH A. BAKER \& ADRIANA A. DE KANTER, BILINGUAL EDUCATION: A REAPPRAISAL OF FEDERAL POLICY (1983). It, too, used achievement in English and math as criteria, and was also attacked for being selective with regard to the groups considered. \textit{See, e.g.}, HAKUTA, MIRROR, supra note 3, at 221. \textit{For a detailed discussion of the consistently replicated flaws in studies showing the shortcomings of bilingual education, see Stephen D. Krashen, Bilingual Education: A Focus on Current Research, NCBE Focus: Occasional Papers in Bilingual Education, Number 3 (Spring, 1991) [hereinafter Krashen, Focus].}} When the focus shifts to overall academic and English achievement over the long term (more than four years), the efficacy of native language instruction becomes apparent.

Two studies specifically set out to assess the long-term effect of native language instruction on LEP students.\footnote{215. The AIR study observed students over a period of time ranging from five months to two years. HAKUTA, MIRROR, supra note 3, at 220.} \textit{The results confirm what educational}
theorists have predicted: students who received long-term native language instruction with increasing amounts of English tend to approach grade level norms faster than students who received short-term native language instruction or had been immersed in English with little or no native language support.217 David Ramirez had conducted an eight year study (and four year data collection) which assessed the "relative effectiveness of two alternative programs (structured English immersion ... and late-exit transitional bilingual education) with that of ... the early-exit transitional bilingual program."218 Virginia Collier and Wayne Thomas incorporated data gathered by Ramirez in their programmatic evaluation but went further.219 The Collier and Thomas study looked at the student records of approximately 42,000 LEP students per year over a twelve year period.220 And while Ramirez limited his findings to Spanish speaking learners of English in limited settings,221 the Collier and Thomas study looked at and applied its findings to all LEP students "regardless of the particular home language that students speak, country of origin, socioeconomic status, and other student background variables."222

The Collier and Thomas study confirms the often repeated claim that the more methodologically rigorous the study, the more apparent the benefits of bilingualism on academic achievement become.223 The study uses a theoretical

217. See e.g., Cummins, in SCHOOLING AND LANGUAGE, supra note 125; Krashen, in SCHOOLING AND LANGUAGE, supra note 125; Krashen, Focus, supra note 214.


219. Id. at 1.

220. Collier & Thomas, supra note 216, at 1. The data used included "language minority student background variables and student academic achievement as measured by standardized tests, performance assessment measures, grade point average, and high school courses in which enrolled." Id.

221. Id. at 4. There is some evidence that Ramirez tried to limit the results of the study due to the fact that his findings showed a positive correlation between native language instruction and academic success. See CRAWFORD, supra note 66, at 206-09. It should be kept in mind that the Report was commissioned by the U.S. Department of Education under a Republican (Bush) Presidential administration known to be somewhat hostile to bilingual education. Id. at 205-06.

222. Virginia P. Collier, Acquiring a Second Language for School, 1 (No. 4) DIRECTIONS IN LANGUAGE & EDUCATION 1, 5 (Fall, 1995).
model with four major components seen as essential for academic success: social and cultural processes, combined with native and second language linguistic, cognitive, and academic development. After studying 42,000 LEP students over eight to twelve years, the study concludes that students “in well-taught bilingual classes that continue through at least the sixth grade, with substantial cognitive and academic development of first language” reach national norms (50th percentile, as measured in standardized tests) and maintain their their academic level throughout high school in academic classes taught all in English. More important to the discussion here is the conclusion that the preferred method for ensuring “academic achievement for English language learners entering U.S. schools at the secondary level” incorporates first language instruction. To be able to compete academically with native English speakers, immigrant students need between four and twelve years of English development in an effectively designed and implemented program. Only after such an extended amount of time will the students have developed sufficient academic proficiency to compete in all-English classes. For immigrant students who enter at the middle school level, the study indicates that academic parity upon graduation from high school is an attainable goal. The study demonstrates the clear success of quality programs: acquisition of English to the level of CALP as demonstrated by academic parity at the end of high school.

These two studies affirm the rationale behind the “quality” bilingual program espoused by such theorists and researchers as Stephen Krashen, James Cummins, Dorothy Legarreta, and others. If the goal of educational programs for 223. See, e.g., Gustavo Gonzalez & Lento F. Maez, Advances in Research in Bilingual Education, 1 DIRECTIONS IN LANGUAGE & EDUCATION, No. 5, at 2 (1995); K.J. Lindholm & Z. Aclan, Bilingual Proficiency as a Bridge to Academic Achievement: Results from Bilingual/Immersion Programs, 173 JOURNAL OF EDUCATION, 99 (1991); CRAWFORD, supra note 66; A. Willig, Reply to Baker, 57 REVIEW OF EDUCATIONAL RESEARCH, 363 (1987); A. Willig, A Meta-analysis of Selected Studies on the Effectiveness of Bilingual Education, 55 REVIEW OF EDUCATIONAL RESEARCH 269 (1985).

224. Collier & Thomas, supra note 216, at 2. See also Collier, supra note 222, at 2.

225. Collier & Thomas, supra note 216, at 1-2.


227. Id. at 9.

228. See infra text accompanying notes 239-43. I do not claim that such students will reach that level only with native language instruction. They will need to work extremely hard. The goal, however, should be to provide them with the forum that grants them the best opportunity to turn their hard work into success.

229. See, e.g., Krashen, Focus, supra note 214, at 3. Such a program consists of “[c]omprehensible input in English, in the form of high quality ESL classes, and sheltered subject matter teaching ... [s]ubject matter teaching in the first language, without translation. ... [and]iteracy development in the first language.” Id. at 4. “Sheltered English” and “sheltered instruction” are used
LEP students is the rapid acquisition of English, the research presented is not compelling. However, if the goal, as stated earlier in this Comment, is the long-term academic success of all students, allowing them access to the full array of career and post-secondary educational choices, the studies merit closer consideration. Upon close scrutiny, the long-term benefit of native language instruction is clear.

b. Appropriate Education for Middle School Immigrants

Generally, middle school immigrant students suffer from a lack of access to core academic subjects to a greater extent than other LEP students. A primary reason is the extent to which research findings related to LEP students in elementary school are applied to secondary school, ignoring differences in intellectual and personal development. Other reasons for the focus on elementary, to the detriment of middle and high school, include the vision that bilingual education assists the young members of Spanish-speaking families, the fact that virtually all the litigation has involved primary school children, and the perception that “there was little need to continue primary instruction into the middle or high school grades.” Without use of the “primary language . . . by the teacher in an extended manner to engage students in an exchange of ideas,” middle school students become mere passive recipient of an unintelligible barrage of noise.

The promising alternative, of course, consists of offering “the majority of the curriculum in the students’ primary language.” Effective middle and high school programs “with high numbers of immigrant and bilingual students who are learning English typically make certain that these students are provided with ample and appropriate opportunities to develop their native language and English proficiency.” As the Collier and Thomas study has shown, programs that use native language instruction have resulted in students making the greatest gains in both English and the core academic subjects.

For the better part of this century the conventional wisdom has held that

for a type of instruction which uses English as the medium of instruction of the core subjects. The teacher breaks down the English by delivering it slower, with more description, to make the language more “comprehensible.”

230. See Minicucci, supra note 19, at 180-81.

231. See id. at 181. See also Faltis & Arias, supra note 18, at 8.

232. Faltis & Arias, supra note 18, at 7-8.


234. Minicucci, supra note 18, at 178.


236. See Collier & Thomas, supra note 216, at 1-2.
only small children can truly learn a second (or third) language. However, recently researchers have begun to make known the absence of "clear evidence for a biologically determined critical period near puberty before which second language happens easily, and after which it happens with difficulty." This misconception has contributed to the educational neglect of middle school. After all, if these students will never really learn the language, why put in any effort in providing an education when such an effort will be wasted? In fact, Hakuta notes that "there is good evidence that older learners are better [at learning language] due to their greater cognitive maturity." While some research has shown that learning a second language between the ages of eight and twelve years is the optimal way to avoid accented speech, the research shows that "age does not limit the acquisition of a second language."

According to Collier and Thomas, students with at least two to three years of native language schooling in their home country will take between five and seven years to reach academic parity (that is, 50th percentile in academic subjects assessed in English). That means that a student who enters as late as eighth grade (the final year of middle school), still has a tremendous opportunity to graduate from high school with a full complement of choices ahead of her. Of course, that assumes two things: one, that she has been enrolled in school for three years; and two, that her United States academic program consists of ESL and native language instruction. While there is a segment of the middle school immigrant population that has received little or no formal schooling (and would take up to ten years to reach academic parity), the large majority has attended school. On the other hand, if that prior schooling exceeds three years, the academic parity possibility will logically occur sooner. Thus, if a middle school immigrant enters with grade level academic skills (that is with six, seven or eight years of schooling in the home

237. See, e.g., Kobrick, A Model Act Providing for Transitional Bilingual Education Programs in Public Schools, 9 HARV. J. ON LEGIS. 260, 294 (1972); Newman, supra note 172, at 625.

238. Kenji Hakuta, Bilingualism and Bilingual Education: A Research Perspective, 1 NCBE FOCUS: OCCASIONAL PAPERS IN BILINGUAL EDUCATION 1, 4 (Spring, 1990) [hereinafter Hakuta, Bilingualism].

239. Id. at 4.

240. Id. at 4. I am an example of someone who began to study a second language (Spanish) during middle school. After many years of study, time spent in Spanish-speaking countries, and several years as a bilingual school teacher, I continue to speak with an accent but also with native-like fluency.


242. See id. at 2.

243. In one school district with a new immigrant native language program, approximately ten percent of the 150 students had attended school less than three years in their home countries. McKinley Middle School, Redwood City School District, Language and Literacy Academy, (1995) (on file with author) [hereinafter Academy].
country), a native language program of the type advocated here should result in high level of English acquisition, core subject academic parity and continuous development of the student's native language.

Although bilingual education should be seen as separate from immigrant education, they are intimately linked at the middle school level. The growing number of LEP students in middle school are also immigrants. An educational program that addresses the unique needs of immigrant students and follows the suggestions of the most recent research showing the efficacy of native language instruction will go far in achieving the goal of appropriate education. While the success of the students who enter in middle school cannot be assured, they certainly have a much greater opportunity than if they continue the typical program of ESL and mainstream classes. The key to such success is to have those opponents of bilingual education take note of the successes of well-designed programs, to look at the research and to think of the benefits to society if "equal participation" and educational parity can be attained.

People need to realize that immigrant students are here to stay here and that "bilingual education is simply a vehicle for maximizing a student's educational experience in a new land by providing opportunities to study at least some of the course material in his or her primary language while s/he is in the process of learning English." There is no "official Spanish" conspiracy. Immigrants want to learn English. We need all people in this country to be as educated and to contribute as fully to society as possible. A person who attains fluency but cannot read or write has only limited possibilities. The person who can speak, read, and write in two languages is an asset who will contribute to society in multiple ways.

C. American History: A Marriage of Immigrant Education and Bilingual Education

Ironically and logically, bilingual education pre-dates the United States' existence as a country. The irony is that the English only movement would like the public to believe that bilingual education is some new creation designed to Balkanize American society. In fact, multilingualism, a topic that generates much controversy today, was a logical and natural outgrowth of an immigrant nation of thirteen disparate colonies. Although the framers did not completely agree on the benefits and burdens of multilingualism, the Articles of Confederation were

244. Biegel, supra note 167, at 56.


246. Perea, supra note 66, at 279; Califa, supra note 66, at 312-30.

247. See Kloss, supra note 245; FRANCISCO CORDASCO, BILINGUAL SCHOOLING IN THE UNITED STATES (1976); Perea, supra note 66, at 273-74.

248. Benjamin Franklin and Thomas Jefferson held diametrically opposite views on the role
published officially in both English and German.\textsuperscript{249} The federal government never went further in terms of recognizing other languages, but many states and territories published constitutions, session laws, and the like in official non-English versions throughout the nineteenth century.\textsuperscript{250} One state, New Mexico, continued to publish Spanish versions of its statutes until 1952.\textsuperscript{251} Bilingual schooling existed from the time of the colonists unabated until the anti-immigrant feelings of the post-World War I era.\textsuperscript{252} Although these schools taught languages such as Dutch, Czech, Swedish, Finnish, Spanish, Chinese, Japanese, and Hawaiian, the most established schools were German.\textsuperscript{253}

Nineteenth century German immigrants established some of the first bilingual schools in the United States.\textsuperscript{254} These schools originally functioned at a time before compulsory public schooling\textsuperscript{255} so the schools typically were operated in conjunction with a community church or by the town without federal or state oversight. Since the first immigrants tended to settle in homogenous groups, establishing communities for those that would follow, the church or community school tended to be inseparable from the local population. For the better part of a century the schools functioned without any interference.\textsuperscript{256}

However, in addition to being the first to establish consistent bilingual education (for native and immigrant children), the German schools were also the first to become embroiled in the controversy that surrounds bilingual education today. Towards the end of World War I, many states began to take notice of schools that aimed to teach languages other than English. A series of laws were passed that non-English languages should play in the birthing country. Franklin believed that only harm could come from granting German and other languages official status. Perea, supra note 66, at 288. On the other hand, Jefferson, himself committed to the bilingual education of his children, id. at 290, believed in the importance of recognition of other languages and in a populace that could interact in many languages. Id. at 289-90. For a discussion on other views of the framers, and the “bridge” position taken by Chief Justice Marshall, see id. at 297-303.

\begin{thebibliography}{100}
\bibitem{249} Kloss, supra note 245, at 27.
\bibitem{250} See id. at 107-92; Perea, supra note 66, at 309-27.
\bibitem{251} Perea, supra note 66, at 323 (citing Act of Apr. 9, 1943, ch. 31, 1943 N.M. Laws 34).
\bibitem{252} See Cordasco, supra note 247, at 2-5.
\bibitem{253} Id. Native American bilingual schools also existed during the last century. The Cherokees succeeded in establishing a literacy rate (90\%) far higher than the general populace of the United States. Crawford, supra note 66, at 25.
\bibitem{254} KLOSS, supra note 245, at 29.
\bibitem{255} Compulsory school attendance did not become the law in all the states until 1918. Ingraham v. Wright, 430 U.S. 651, 661 n.14 (1977).
\bibitem{256} See generally KLOSS, supra note 245; LANGUAGE IN THE U.S.A. (Charles A. Ferguson & Shirley B. Heath eds., 1981).
\end{thebibliography}
which explicitly prohibited the teaching of foreign languages and the use of languages other than English as a medium of instruction.\textsuperscript{257} These laws made it a criminal offense for a teacher to use German (or any other language) to teach children.\textsuperscript{258} Whether parents wanted their children to learn or preserve German language skills because it was the spoken language at home did not matter.

The United States Supreme Court had occasion to consider these laws in two cases decided on the same day in 1923.\textsuperscript{259} In \textit{Meyer v. Nebraska}, the Court had to assess the constitutionality of the conviction of Robert T. Meyer.\textsuperscript{260} Mr. Meyer taught at the Zion Parochial School in Hamilton County, Nebraska. He was charged, and later convicted, of unlawfully teaching "the subject of reading in the German language to Raymond Parpart, a child of ten years, who had not attained and successfully passed the eighth grade."\textsuperscript{261} The Nebraska statute prohibited any person, "individually or as a teacher . . . in any private, demoninational, parochial or public school" from teaching in "any language other than the English language."\textsuperscript{262} In affirming Mr. Meyer's conviction, the Nebraska Supreme Court explained that the statute was justified since the legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result . . . was found to be inimical to our own safety . . . It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country.\textsuperscript{263}

The Supreme Court did not agree with this justification and overturned the conviction, holding that "the statute as construed and applied unreasonably infringes the liberty guaranteed . . . by the Fourteenth Amendment."\textsuperscript{264}

\textsuperscript{257. See, e.g., 1919 Iowa Acts § 198; 1921 Neb. Laws § 61; 1919 Neb. Laws § 249; and 1919 Ohio Laws § 108.}

\textsuperscript{258. Id.}

\textsuperscript{259. Meyer v. Nebraska, 262 U.S. 390 (1923); Bartels v. Iowa, 262 U.S. 404 (1923).}

\textsuperscript{260. The reasoning of the \textit{Meyer} opinion applies equally to the \textit{Bartels} case, a case which ruled on several similar convictions. The Court in \textit{Bartels} began its opinion stating that the "several judgments entered in these causes by the Supreme Courts of Iowa, Ohio, and Nebraska, respectively, must be reversed upon authority of Meyer v. Nebraska, 262 U.S. 390 . . . decided to-day." 262 U.S. at 409. The very short opinion discusses some other matters not relevant here.}

\textsuperscript{261. Id. at 396-97.}

\textsuperscript{262.1919 Neb. Laws § 249, sub. l.}

\textsuperscript{263. 262 U.S. at 397-98 (quoting Meyer v. State, 107 Neb. 657 (1922)).}

\textsuperscript{264. Id. at 399.}
Given that this decision came shortly after World War I, a war that saw Germany as the enemy, the Court used strong language. In rejecting the state court's explanation, the Court wrote that "this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state." The teaching and subsequent knowledge of German did not constitute a reasonable harm that Nebraska, or any state, could seek to combat. Instead, the right "to teach and the right of parents to engage [Mr. Meyer] so to instruct their children, we think, are within the liberty of the amendment." Thus, the German schools were able to continue in the face of anti-foreign feelings and laws not unlike those that exist today.

III.
BACKLASH: THE MOVEMENT TO ELIMINATE BILINGUAL AND IMMIGRANT EDUCATION

Opponents of bilingual and immigrant education attack native language instruction on both pedagogical and ideological grounds. The clearest ideological opposition comes from the movement to make English the official language of the United States. If English were the official language, time, effort and money would go into increasing the English ability of LEP students, not in educating them in the content areas if that required use of their native language. This movement has effectively used the ballot initiative to achieve its goals. In California, the state with the largest proportion of immigrant students, English only supporters and those opposed to the education of immigrants have used ballot initiatives in attempts to restrict access to educational programs. Another avenue of attack takes place in

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265. Id. at 399-400.

266. Id. at 400.

267. Id. The Court extended constitutional protection to those who spoke English and those who did not. Id. at 401. It should be noted that the Court's ruling dealt more with an individual's liberty interest in earning a living and a parent's interest in deciding the most appropriate education for his or her child. It did not hold that bilingual education is a right. See also Pierce v. Society of Sisters, 268 U.S. 510 (1925) (holding that a state law outlawing private schooling violates the constitutional guarantee of substantive due process).


269. The most notable California "successes" of the English only supporters have been Proposition 63 in 1986 (establishing English as the official language of the state), Proposition 187
the legislature. New bills restricting access or limiting funding to programs designed to assist immigrant students are constantly being introduced. Whether at the state or federal level, the decisions from this front have the most sweeping effect on immigrant and bilingual education.

Regardless of the avenue of attack, opponents of immigrant and bilingual education have much in common. They all choose to ignore the research showing that well-designed programs which use native language instruction contribute to the learning of English. And they all choose to ignore the consequences which result from the failure to provide appropriate education to LEP and immigrant students.

A. American Nativism: If You Don’t Speak English, You Don’t Belong

American nativism has been a recurring theme in the nation’s history. Anti-foreign sentiments have boosted nativist movements at the country’s founding, during the nineteenth century and at various points in this century. The most recent wave of nativism began in the 1980s with the founding of U.S. English by Senator S.I. Hayakawa. Although the movement may be based on what has been called “a series of myths,” its effect has been anything but mythical. Since its inception, no fewer than fifteen states have passed laws or constitutional amendments declaring English the official language of the state.

1994 (prohibiting, among other things, access to public education for undocumented immigrant children and access to other social services for all undocumented immigrants) and most recently, Prop 227 (prohibiting native language and bilingual education).


271. See Perea, supra note 66, at 328-40 (discussing the post-World War I nativism, anti-foreign sentiments through the 1950s and immigrant English literacy requirements); supra note 113 and text accompanying notes 129-33.

272. Perea, supra note 66, at 279. Perea writes that the myths and motivations render its legislative results “constitutionally suspect.” Id. In discussing the myths he explains

[t]he first myth is that our national unity somehow depends solely on the English language, therefore we must protect the language through constitutional amendment or legislation. A corollary of this myth is that the only language of true American identity is the English language. Another myth is that multilingual election ballots, the elimination of which is a cherished goal of the movement, somehow threaten our society. A final myth is the movement’s proposition that bilingual education is a new threat to our society, introduced by self-interested Hispanic leaders seeking to secure employment for bilingual teachers.

Id. at 278-79 (citations omitted).

U.S. English views bilingual education as a program which encourages “cultural Balkanization.” Further, proponents of English-only assert that bilingual education “obstructs students from learning English and confuses parents about the role of English in the United States.” English-only instruction would eliminate such confusion and unify, rather than divide, the school culture. However, when presented with evidence of the success of bilingual education, those in the movement balk and reveal their true concerns: “not that bilingual education adversely affects English acquisition; what actually concerns them is the length of the transition period.”

Antonio Califa, then legislative counsel for the American Civil Liberties Union, explained in 1989 that the “advocates of English-Only laws are willing to sacrifice educational concerns” to calm their fears that bilingual education threatens the nation’s unity.

However, the aim of U.S. English seems to be deeper. In 1988, Congress appropriated monies to fund adult ESL programs, which were and are in high demand. Such programs would go far to help further U.S. English’s goal that all persons in this country learn English and their popularity dispels the myth that immigrants are not trying to learn English. Nevertheless, U.S. English declined to support the bill. Could it be that there is an active desire to keep the non-English speaking immigrants from learning English and participating fully in society? The position seems more likely to be that educational success, including the acquisition of English, is unimportant if transitions take more than one year and if the learning of English occurs at public expense. This position has led many commentators to conclude that the official English movement’s cause is not the English language per se, but rather “the large, and largely unwelcome, immigration of many Hispanics and Southeast Asians during recent decades.”

In fact, the level of xenophobia


274. CRAWFORD, supra note 66, at 54.

275. Califa, supra note 66, at 317 (citing Gerda Bikales, Testimony on F.Y. 1984 Appropriations for Bilingual Education). Among the testimony were statements such as “[b]ilingual education retards the acquisition of English language skills.” Id. at 317, note 162.

276. Califa, supra note 66, at 318. Gerda Bikales has insisted that U.S. English does not advocate an outright ban on bilingual education: “[i]f this were a one-year program, we would have no objection.” CRAWFORD, supra note 66, at 62.

277. CRAWFORD, supra note 66, at 62.

278. Id. at 59.

reached new depths after the publication of a memorandum written by John Tanton, one of U.S. English's founders, which "warned of a Hispanic political takeover in the United States through immigration and high birthrates." \(^{280}\)

U.S. English and its supporters have had uncommon success at passing their initiatives and influencing the legislative debate. While no federal official English legislation has ever made it past the House or the Senate, "state official English laws have usually been enacted by direct popular votes on referenda by overwhelming margins." \(^{281}\) The referendum or initiative process appeals to English-only supporters because the votes are seen as protecting the existing status order whereas advocates of bilingual education seek to change the order. \(^{282}\) Arizona's official English law, of doubtful constitutionality, imposes a draconian policy: the "state and all political subdivisions of this state shall act in English and no other language." \(^{283}\)

Until the passage of Prop. 227 in June, 1998, most attempts to implement English only initiatives in California had been unsuccessful. \(^{284}\) The ambiguous effects of the successful initiatives and legislation do not trouble English-only supporters, notes Professor Moran, since the movement aims for "highly salient symbolic victories" \(^{285}\) but are "less pressed to enforce their symbolic triumphs." \(^{286}\)

With the passage of Prop. 227, the track record of merely symbolic

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280. Crawford, supra note 66, at 57. Tanton warned of the political power of a group "that is simply more fertile;" of this being "the first instance in which those with their pants up are going to get caught with their pants down;" of the "tradition of the mordida (bribe);" and of the low educability and high drop-out rates of these immigrants. John Tanton, Witan IV Paper 2,4 (1986), quoted in Crawford, supra note 66, at 57.

281. Perea, supra note 66, at 342. Professor Moran cautions that the message sent by these measures is often clouded by the need to generate widespread sympathy for the proposals and the opportunity for broad-ranging participation in the referendum process. In California, for example, one survey found that few voters had any clear idea of what the official language proposal meant. Some even simultaneously supported the English only amendment and bilingual education or bilingual ballots. Moran, Status, supra note 172, at 354 (citing Trombley, Latino Backing of 'English-Only' a Puzzle, L.A. Times, Oct. 25, 1986, § II, at 21, col. 1).

282. Moran, Status, supra note 172, at 352.

283. Ariz. Const. art. XXVIII, § 3, cl. 1, pt. a. This law has been held unconstitutional by the Ninth Circuit Federal Court of Appeals but has recently been granted review by the Supreme Court. See Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995), cert. granted, 64 U.S.L.W. 3635 (U.S., Mar. 25, 1996) (No. 95-974) Crawford notes that this constitutional amendment has been hailed "as a model for a federal English Language Amendment." Crawford, supra note 66, at 59.

284. See Crawford, supra note 66, at 58 (discussing California's attorney general's rejection of U.S. English's demand to ban bilingual election materials and the attempt by the mayor of Monterey Park to block the donation of thousands of Chinese-language books to the city's public library while arguing that "English is the language of the land.").


286. Id. at 355.
victories may change. This initiative, proposed by Ron Unz and Gloria Matta Tuchman, was named "English for the Children." Unz and Tuchman claimed that their proposal supported the interests of immigrant children. They characterized the issue as one of "sanity versus insanity" and argued that bilingualism "has failed a whole generation of Hispanic children." They cited a low transition rate of 5% from bilingual programs to mainstream and the high drop out rates of Latinos. Yet, nothing indicates that they have considered the long-term success of quality programs as demonstrated by Collier and Thomas and the Ramirez Report, that the 5% relates to short term transitions and that the high drop out rates reflects a current practice bilingual in name but more like submersion in practice. Furthermore, the proposal contained a waiver provision which would exempt the prohibition to children aged ten or older, or new immigrants, which would suggest that their "findings" are not entirely correct. The provision also allows parents to opt their children out of submersion instruction after they have been given a "full description" of the program and "all the educational opportunities to the child." The reality is that few new immigrant parents are likely to question a program in place at their children's school.

Unz and Tuchman and their supporters also like to claim that Latino parents overwhelmingly support English language instruction over native language instruction. However, when one looks at the question asked in the survey done by the Center for Equal Opportunity and to which Unz and Tuchman refer, it becomes clear that the parents were never asked if they would prefer initial native language instruction if it is shown to learn to better English acquisition and better overall academic performance. This is a clear case of framing a question to get a desired result.

287. English for the Children, <http://www.onenation.org/fulltext.html>. This initiative contains “findings” and “declarations” by the people of California that “the public schools of California currently do a poor job of educating immigrant children....[and that] young immigrant children can easily acquire full fluency in a new language, such as English, if they are heavily exposed to that language at an early age,” and resolves that “all children in California public schools shall be taught English as rapidly and effectively as possible.” Id. at § 1, Article 1, Part 300(d)-(f). Many would not dispute the fact that public schools could do a better job (in fact, the purpose of this Comment is for schools to use the model to improve the education of immigrant students) and that public schools should be teaching English to immigrant students “as rapidly and effectively as possible.” One must go beyond the first part of the initiative and listen to the rhetoric to see the true purpose of One Nation/One California.


289. Id.


291. Id.

292. Question fifteen of the poll asks:

"In general, which of the following comes closest to your opinion? (1.) My child should be taught his/her academic courses in Spanish, even if it means they will spend less time learning English. (2.) My child should be taught his/her academic courses in English, because they will spend more time..."
answer; it is not necessarily indicative of the informed wishes of the polled parents.

Maria Hernández, a diversity consultant and KQED-FM (a San Francisco National Public Radio affiliate) radio commentator, herself a product of submersion teaching, calls this initiative nothing more than another way of making "California less inviting to people who speak Spanish, Vietnamese, or Cantonese, just to name a few," and wishes that One Nation/One California and other similar organizations would stop hiding behind such smokescreens of dubious research and admit their true "anti-immigrant" agendas. She has likened the desired result as "a lot like throwing a child into a pool when they haven't learned how to swim. Some will surprisingly make it but many won't." Passage of such an initiative "will widen the gap in our understanding of culture, race, and economic opportunity."

Carlos Muñoz has written that:

[i]t's understandable that some parents may be disenchanted if the bilingual program their children are enrolled in is not doing its job. But abolishing bilingual education will not solve the problem. It will only make it more difficult for their children to learn English. . . . Instead of ending bilingual education, California should get better-qualified teachers and provide the resources necessary to make the program viable.

The English for the Children Initiative is ill-conceived, short sighted and runs opposite the most current research. While not completely decimating bilingual and native language education, based on its parental exceptions and waiver provisions, it creates barriers and effectuates an anti-immigrant attitude. Its passage would relegate most non-English speaking immigrants to a limited chance of academic success and a narrow range of future career choices. The tremendous social and economic costs

learning English." Center for Equal Opportunity, The Importance of Learning English: A National Opinion Survey of Hispanic Parents, August, 1996, <http://www.ceousa.org/poll.html>. Not surprisingly, 12.2% chose option one and 81.3% chose option two. Id. Perhaps the results would have been different if the options had more completely been worded as follows: (1.) My child should be taught his/her academic courses in Spanish, even if it means they will spend less time learning English but will end up learning more English and progressing further academically. (2.) My child should be taught his/her academic courses in English, because they will spend more time learning English even if it results in less English acquired and restricted academic progress.

293. Maria Hernández, Perspective (KQED-FM radio broadcast, August 15, 1997).


295. Hernández, Perspective, supra note 293.

296. Id.

suffered by California after the initiative's implementation are staggering.  

B. The Related Agenda: Keeping the Immigrants Out

More recently, the official English rhetoric has given way to anti-immigrant sentiments resembling those directed towards Asians in the nineteenth century.  

Sometimes the discussion focuses generally on restricting immigration and sometimes the debate is taken to the next step: denying some immigrant children access to education. In March of 1996, the House voted overwhelmingly to grant the states the right to deny education to undocumented immigrant children. As part of a sweeping immigration reform bill which, among other actions, provides for the construction of a fourteen mile triple fence near the California-Mexico border and the withholding of certain welfare benefits, the House granted the states license to “throw kids on the streets,” as Representative Sam Farr of California stated. Although this provision flies in the face of the spirit of Plyler v. Doe, and the Court’s concern for a permanent underclass,

298. See infra text accompanying notes 312-22.

299. Anti-Asian feelings have arisen again in 1997 in the wake of the controversy surrounding campaign financing and contributions to the Democratic National Committee. Rather than focus narrowly on the issue of suspected violations and the need for reform, former representative Norman Mineta claims that the media and political arena “are treating the race of those accused of wrongdoing as the central feature of the scandal . . . . It seems what ‘sticks out’ for many people about the story is not so much that campaign irregularities occurred, but that some of the those who may have been involved are Asians and Asian Pacific Americans.” Norman V. Mineta, A Campaign Against Asians, Officials, Media Scandalously Play up Ethnic Angle More than the Funding Irregularities - and Like All Racism, Such Bias Must Be Fought, S.F. CHRON., Aug., 25, 1997, at A22.


301. This is far smaller than the two hundred mile security fence that Pat Buchanan has called, “not that extreme.” S.F. CHRON., Mar. 21, 1996, at A3.


Representative Bill Baker of California echoed the feelings of many of his Republican colleagues when he explained the "ignorance" of the Supreme Court: "[i]f the Supreme Court is saying we have an obligation to provide illegal immigrants with an education, the Court needs to look up the meaning of the word illegal." President Clinton has not supported educational restrictions in immigration bills. In turn, Senator Dole, in his bid for the White House, accused President Clinton of being soft on immigration and insensitive to the states' needs. Each time the controversy enters into political campaigns, the enactment of restrictive legislation appears to be closer.

Anti-immigrant rhetoric surfaces in non-election years as well. August of 1995 was a particularly fertile time for anti-bilingual education and anti-immigrant sentiments. Senator Dole led the charge repeatedly by affirming his allegiance to English as the official language and his belief in the primacy of European history. Bilingual education only gets in the way, he seems to be saying. Representative Newt Gingrich remarked, "[i]f you believe people are totally coming to America with no knowledge of the free tax-paid goods they are going to get, then I think you are living in a fantasy land." In 1997, Brian Bilbray introduced a bill in the House of Representatives that attempted to deny citizenship to offspring of undocumented immigrants born in the United States. Ignoring the language of the Fourteenth Amendment which states that "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States," Bilbray claimed that the "custom [of granting citizenship] has no legal basis." While such legislation is unlikely to pass the House and Senate and become law, the boards of supervisors of two of California's largest counties, San Diego and Orange, have passed resolutions endorsing the bill. The pervasiveness of anti-immigrant sentiments continues.

Whether the push is for English-only or the denial of access to the schools, the current political landscape threatens to undermine the educational needs of immigrant students. The extreme rhetoric of John Tanton has made it to the mainstream. Pat Buchanan ran for president and stood at the border with a rifle and

305. Freedberg, House, supra note 284, at A11.

306. A recently proposed bill would grant states authority to completely deny educational access to undocumented immigrant children. See H.R. 4134, 104th Cong., 2d Sess. (1996). This bill overwhelmingly passed the house in September, 1996 but remains tabled in the Senate.

307. See Shogan, supra note 136.

308. Freedberg, House, supra note 284, at A11.


311. Id.
discussed immigration. Newt Gingrich implored the House to deny education to immigrant children and not overrule the people of California. Bob Dole has vouched for the need to have English as the official language. Even President Clinton brags of his achievement of sending more guards to patrol the nation’s southern border (I wonder how many more are at the Canadian border?). Of course, the political debate commits one of the errors that Tikunoff and Fradd discuss and was mentioned earlier: immigration policy and education of immigrants are distinct. In framing one within the discussion of the other, the politicians have created a completely unworkable situation.

C. Societal Costs of English Only and Failure to Address the Needs of Immigrants

Although I may not agree with the policy, policing our borders may have some rationality. But what will be accomplished by denying those already here access to education? What are the potential consequences? Will the states really save any money?

If schools follow the wishes of the English-only proponents, dire consequences will result. First, the student will learn English but at the expense of other academic subjects. If not provided academic instruction in her native language, the LEP or immigrant student will need to focus all her energies on acquiring English. The subject of the ESL lesson is not as relevant as the learning of language. Academic parity and long-term success will be unattainable.312

Second, the long-term social and financial costs will be staggering. Many commentators assert that a “bilingual education program is far more costly than a regular English-only program because of the special materials and special teachers that are required.” I submit that while the short-term costs borne by the schools may be higher, the long-term costs borne by society are actually less. An appropriate education, as used in this Comment, produces an adult who will contribute to society. He will pay taxes, earn more than minimum wage, be less likely to go on welfare or commit crimes, and will begin an upward spiral for his

312. Virginia Collier explains that an approach that focuses solely on the learning of English would have us to return to an earlier time. In a paper describing her most recent findings, she writes that in past years we emphasized teaching the second language as the first step, and postponed the teaching of academics. Research has shown us that postponing or interrupting academic development is likely to promote academic failure. In an information driven society that demands more knowledge processing with each succeeding year, students cannot afford the lost time. Collier, supra note 222, at 3. When that student is transitioned early, does she ever really catch up? She will be placed in either a remedial academic program in which case she will not be studying courses that will ensure the full range of career choices upon high school graduation. Or, she will be placed in a mainstream classroom where the language is beyond her level, given her early transition, and thus the lesson becomes beyond her reach. Equal participation? The answer is clearly no. Diego Castellanos calls these students “half-lingual children: stutterers in thought, stammerers in spirit.” Diego Castellanos, quoted in CRAWFORD, supra note 66, at 27. He explains that ESL’s emphasis on replacing Spanish with English, when considered from a “strictly academic standpoint,” produces students who learn “English too slowly to keep up in . . . content areas” and demonstrates “little improvement in their long-term outcomes.” Id.

progeny. If bilingual programs are cut (or severely restricted), society bears the likely welfare cost, the smaller tax revenue, and the possibility of progeny who will continue a downward spiral. Michael Krist, professor of education at Stanford University, explains that the economic health of society will reflect the performance of Latinos in our public schools. He states that due to the “growing gap between wages paid to those with high school degrees and those with post-secondary degrees, unless Hispanics start going on to college, they will fall way behind in wages.”

Peter Morrison, a researcher for the RAND Corporation, explains further: “[t]hese kids are either going to be turned into productive, taxpaying adults, or they’re going to be a very expensive problem that requires an enormous amount of public expenditure down the line. It’s a lot more efficient to get them educated, get them speaking English, and get them into jobs.” Thus, the long-term goal should be academic success, high school graduation and admittance to college.

Finally, the most dire of all the consequences would be the denial of any (not just appropriate) education to immigrant children already in the country. A recent editorial suggests that such legislation will “sentence [the children] to a life on the streets and to a future of mischief or crime.” What will these children do if they are turned away at the schoolhouse gate? The Plyler Court described a “shadow population” allowed to remain here “as a source of cheap labor, but nevertheless denied the benefits” available in our society. The Court signaled the children as “special members of this underclass” and decried policies which prohibit their education as against “fundamental conceptions of justice.” It is hard to imagine this underclass decreasing in size. Border control measures have not succeeded in prohibiting entry. The more recent legislation still fails to provide significant disincentives for the employment of illegal immigrants. The consequences fall on the immigrants themselves and they have shown themselves to be a group willing to take such a chance. Denying their children the appropriate education, denies them “the basic tools by which individuals might lead economically productive lives to the benefit of us all.”

Society is different today and consequently the “basic tools” are as well. Stanford education professor David Tyack states that immigrant students “just can’t get a few years of education and then go out and work in a factory they way they did


315. Id. at A-20 (emphasis added).


318. Id. at 219.

319. Id. at 220.

320. Id. at 221 (emphasis added).
Norm Gold, bilingual compliance manager for the California Department of Education, explains why: today’s labor market contains “increasingly competitive jobs, requiring high levels of literacy, computational ability and technological ability.” Without the basic tools, full contribution is barred and the societal cost is great.

The intuitive appeal of “let them learn English” should now be exposed as being counter-productive when the goal is the total education of the immigrant or LEP student. First, an all English program, without any special program to eradicate the language barrier and provide access to the curriculum violates federal law and the interpretation of § 1703(f) by the Castaneda court. Second, the most recent research demonstrates the long-term success of providing native language instruction while students develop their proficiency in English. This does take a number of years but the effort is clearly worthwhile when the product is a person capable of fully contributing to an ever growing complex society. Finally, new immigrants have needs that go beyond language. When they come to this country, their success depends on a smooth adjustment to school and society. A native language program provides the atmosphere within which these new students feel the most comfortable and, as the research shows, make the greatest academic gains. And, as their academic gains increase, so does the economic and social benefit gained by society.

IV. A MODEL OF APPROPRIATE EDUCATION

This suggested model program has a lofty goal: the education of immigrant students so that they are able to graduate from high school with the full array of career and educational choices. Middle school is the starting point. For full success, these students will need the help of their high school so that the progress made during middle school continues. Nevertheless, I start with middle school because those are such crucial years in terms of social maturation, intellectual development, emotional adjustment and physical change. The model that I propose follows to a large extent the program design of McKinley Middle School in Redwood City, California. They have based their model in part on the “Case studies” or “Eastman Model” for bilingual elementary school success. In assessing the legal


322. Julian Guthrie, When Language Hinders Learning, Immigrant Children a Unique Challenge to State, S.F. EXAMINER, May 11, 1997, at A-1, A-13. Gold adds that he does not “care what your political view is - we’ll have an economy that won’t move ahead [if we fail to address these students]. We won’t have a salary base paying into Social Security; we won’t have a competitive work force. It’s in everyone’s best interest to have every child in California well educated.” Id.

323. See Multi-year Program Design for English Language Learners, McKinley Middle School, Redwood City School District (on file with the author).

324. See Los Angeles Unified School District, Project M.O.R.E. (Model Organization
mandates of § 1703(f), the interpretation of Castaneda, and the most recent data on native language instruction, I suggest an even more aggressive approach that will start middle school immigrant students on a path to success. The students will need to put forth an intense effort but, instead of being left to their own devices as they have been in the past, they will follow the pro-active lead of schools interested in true academic parity and successful equal participation.

I must first make some assumptions clear. One is that the academic day consists of seven class periods. Another is that these students, like all those interviewed by Laurie Olsen in Crossing the School House Border, want to learn English and want to succeed in school. And finally, this program applies to the vast majority of Spanish-speaking immigrant students who come from Mexico and Central America. These students have had school experience although, like any mainstream American classroom, their academic level and intellectual capabilities vary significantly. The program does not apply to those who have never attended school.

A. A Program of Success for Middle School and Beyond

The immigrant students should be served primarily by a core team of teachers using interdisciplinary content design. These teachers will be bilingual in English and Spanish and knowledgeable about language acquisition theory and

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Results of Eastman) (1994) (on file with author). James Crawford has written extensively about the success of the “Case Studies” schools generally and Eastman in particular. He explains how Eastman differs from the typical bilingual program and shows the academic gains achieved by Eastman’s students. See, e.g., CRAWFORD, supra note 66, 126-41. It is ironic that after criticizing the over-application of elementary school approaches to middle school situations, I am suggesting a model that is partly based on Eastman. I use the view of middle school as a bridge between elementary and high school to justify importing practices that make sense in the middle school context. A wholesale application of the Eastman Model, even with its successes, would be inappropriate for a middle school to undertake.

325. See supra text accompanying notes 72-76.

326. The test for any classroom teacher is formulating a curriculum relevant to her entire class. As “academic tracking” (the placement of students according to perceived capabilities) has become more and more disfavored, the middle school classroom resembles the elementary classroom to the extent that all types of learners and all ability levels are represented.

327. A small number of immigrant students have had limited or no exposure to formal schooling but these are beyond the scope of the suggested program. As these students arrive at ages twelve to fifteen with virtually no academic skills (such as literacy, ability to do mathematical computation), their needs are deeper than the students targeted by this model. McKinley Middle School has developed a program for such students but it is in its infancy and no long-term data exists to show its success. Success for these students will be measured quite differently than those served by the model. While drop-out statistics will be valuable for both groups, high school graduation, test scores, and college attendance is unrealistic for the inexperienced groups. Their assessment will be more modest (but just as challenging) and focus on literacy and basic math. See Academy, supra note 243.

328. See CAUGHT IN THE MIDDLE, supra note 6, at 94.
bilingual methodology. These teachers become responsible for the primary academic (core) education of the students. They will teach science, math, language arts and social studies. These courses will be taught in the students' native language. Depending on staffing and the philosophy of the school, core subjects should be considered. The students thus will be able to progress academically at grade level as they learn English. Additionally, these same teachers will teach a structured ESL class. Thus, for five of the seven periods, the students will be within the "family."

Some may object to the perceived segregation of these students. However, the overall goal of full contribution to society justifies what may be perceived as temporary and partial segregation. By placing the students in mainstream classrooms, the integration achieved is merely illusory. Students who speak different languages and come from different backgrounds will tend not to interact. This is especially true during the middle school years when peer acceptance is supremely valued and risk taking occurs infrequently.

The goal of this suggested model is to give the immigrant students the tools to be able to fully interact when they are able. Also, the general adolescent needs and the many unique needs of immigrant students will best be handled within a "family" structure. The students will feel more comfortable and the teachers will be more familiar with the problems faced by their students. The connection to school, to teachers and to peers is more readily achievable within a "family" context. The temporary segregation, if it can be termed as such, will lead to a more full and real integration in the future.

The ESL component of this program takes on three dimensions. First, within the "family," the students will attend a formalized ESL class which focuses on basic language development, relevant linguistic needs, and emerging academic English. The subject content may vary from basic survival skills to sheltered subject matter. English literacy and expression are major goals of this class.

A second component will be another period of English development but rather than a fully contained class with other immigrant students, the students will be in class with native and fully proficient English speakers. The teachers and the students with whom the target students interact must be handpicked. They should provide good models, be sensitive to differing circumstances and be willing to learn about and help others. The curriculum of this class will differ depending on the teacher and the interest of the students. The content will be structured like an exploratory or elective class. The class may study drama, art, computers, human cultures or any other field which consists of high levels of interaction, content embedded language, and, most importantly, strong student interest.

The third dimension of the ESL program will be an after-school program. The program will provide one-to-one peer tutoring, homework assistance, and sheltered academic enrichment. Additionally, special attention will be paid to the

329. A teacher then would teach math-science over two periods and another would teach language arts-social studies. This maximizes staffing (a school would only need two bilingual teachers to serve upwards of sixty students), increases the comfort level of students (by not having to adjust to as many teachers) and follows California's recommended three-years curriculum for middle school. See CAUGHT IN THE MIDDLE, supra note 6, at 92-95, 106-08. At the same time, some classroom changes prepares the students for transitioning to the routine they will find in high school.
ongoing adjustment needs of the immigrant students. The participants will include teachers, high school and middle school students (English speakers), and the target group. If possible, attendance should be mandatory. However, target students who choose to participate in an extracurricular activity may opt out during those days when they might have practice, rehearsal and the like.

The final class is physical education (P.E.). Frequently, middle school students have a phobia, aversion, fear or general hatred of P.E. Nevertheless, this class should take place every day and should be fully integrated. The teachers should be trained in the needs of LEP and immigrant students so that the class could be structured to maximize the opportunity to develop team skills, language ability and knowledge of two important aspects of the American culture: health and sports.

The suggested model might appear as follows:

Table 1. Suggested Middle School Program for Non-English Speaking Immigrant Students

<table>
<thead>
<tr>
<th>A</th>
<th>B</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>C</th>
</tr>
</thead>
<tbody>
<tr>
<td>6</td>
<td>1</td>
<td>ESL</td>
<td>Math-Science</td>
<td>P.E.</td>
<td>Language Arts / Social Studies</td>
<td>Elective</td>
<td>Tutoring</td>
<td></td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>2</td>
<td>ESL</td>
<td>Language Arts / Social Studies</td>
<td>Elective</td>
<td>Math-Sciences</td>
<td>P.E.</td>
<td>Tutoring</td>
<td></td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>1</td>
<td>Math-Science</td>
<td>Elective</td>
<td>Language Arts / Social Studies</td>
<td>P.E.</td>
<td>ESL</td>
<td>Tutoring</td>
<td></td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>2</td>
<td>Language Arts-Social Studies</td>
<td>P.E.</td>
<td>Math-Science</td>
<td>Elective</td>
<td>ESL</td>
<td>Tutoring</td>
<td></td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>1</td>
<td>Elective</td>
<td>Language Arts / Social Studies</td>
<td>ESL</td>
<td>P.E.</td>
<td>Math-Science</td>
<td>Tutoring</td>
<td></td>
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</tr>
<tr>
<td>8</td>
<td>2</td>
<td>P.E.</td>
<td>Math-Science</td>
<td>ESL</td>
<td>Elective</td>
<td>Language Arts Social Studies</td>
<td>Tutoring</td>
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</tbody>
</table>

**KEY**

A = Grade
B = Group
C = After-school
Numbers correspond to class periods.

The flexibility of this program allows for adjustment according to the language abilities of the students. For example, the sixth grade group might have a small group with high English proficiency. One period of their math-science core could be

330. This might include informal discussions, visits by health experts, gang intervention and generalized sharing of the common and unique experiences faced by each individual immigrant child.

331. I do not suggest that other countries do not share the same interests. What will be new to the immigrants students will be applying what they know and what they learn in a new environment and in a new language.
conducted in English and their ESL class would be appropriately tailored to their level. As drawn, this program could serve up to one hundred eighty immigrant students. Depending on the school’s staffing and the number of students, the scheme could be easily adjusted. When these students graduate on to high school, they may receive one period of ESL per day, at best. The students who have entered in sixth grade will have completed three years of the program and will be on their way to achieving parity according to Collier and Thomas. Those who entered in the seventh and eighth grades will have a greater challenge ahead of them. This proposed model will give them a first step. Their continued success will ultimately depend on our commitment to developing a similar model at the high school and the students’ commitment to maximizing their success. I am much more optimistic with regard to the latter than with the former.

Some schools and other agencies exist which provide a part of what is being advocated here. A curriculum may be constructed in the native language of the new students. A newcomer center may help ease the transition. Extra-educational centers may help immigrant students and their families negotiate their new country. What is unique about this proposal is that the recognized need exists beyond the one-year limit of most newcomer centers. The immigrant needs are discussed and addressed within the school. And the curriculum is designed to be cognitively appropriate and challenging for middle school students. All facets of the middle school immigrants’ needs are taken into consideration by the school. Not one exists independent of another. Success depends on the schools’ abilities to make the connections between the interrelated components.

B. Theoretical Soundness

This proposal falls somewhere between a TBE and a maintenance approach. It is transitional in its use of the primary language as a bridge to the learning of English. While the student learns English, the core subjects are presented in his native language. The program is also within the maintenance model such that the native language is always part of the curriculum. Whether the model ultimately results in a late-transition or maintenance program depends on the willingness of the high schools attended by the graduating middle school students to adopt the ideas presented here and supported by the new findings. The model provides a theoretically sound first step or steps for the new immigrant; steps that keep the student on the “success” track leading to college and a productive adult life.

The model addresses the four components recognized by Collier and Thomas as being essential to future success of non-English speakers: socio-cultural processes, linguistic development, cognitive development, and academic development in the native and second language. With capable teachers, the model becomes a “quality” program described by the major bilingual theorists and identified by Collier and Thomas and even Ramirez as giving the students the greatest possibility of success.

C. Legal Compliance under § 1703, Castaneda, and Plyler

Furthermore, this model easily complies with the first two prongs of the Castaneda interpretation of §1703(f). First, the program is based on educational
theories that are sound, based on the research of Cummins and Krashen and others, and have been demonstrated to be successful by the research of Ramirez, Collier and Thomas.\textsuperscript{332}

Second, given the needs of middle school immigrant students, the breadth of the proposed model are "reasonably calculated to implement effectively the educational theory adopted by the school."\textsuperscript{333} Time and effort on the part of the participating districts will determine whether or not the model complies with the third prong, the resulting success of the students in overcoming language barriers, of Castaneda.

\textit{Plyler} grants immigrants, documented and undocumented alike, the right to a free public school education. This program temporarily, and only partially, segregates the immigrant students as a means of providing the appropriate education required by § 1703(f). The model does not implicate the prohibitions against racial preferences or racial segregation as violative of the Equal Protection Clause of the Fourteenth Amendment\textsuperscript{334} for three reasons. First, as the participants in this program receive the identical education as the "mainstream" students, from academic subjects to electives, no preference is created in favor of the new immigrant students and against the non-immigrants. Second, the classification of the program is based on language and immigrant status, neither of which is subject to strict scrutiny. \textit{Plyler} suggests that denial of education to immigrant students is subject to intermediate scrutiny but says nothing about programs designed to assist those students in overcoming the obstacles attendant to their status. Finally, the segregation of the students in the program is only temporary, designed to disappear as the students' capabilities in English increase, and partial, as they will be in contact with "mainstream" students during the elective, P.E. and after-school strands.

\section*{D. The Social Capital Triangle, Revisited}

If we return to the triangle diagram presented at beginning of this Comment, we see that each component has been accounted for in the development of the students' social capital. The "family" structure creates an environment where individual and group attention can be paid to the on-going transition from immigrant to American. The students will not feel isolated as their peers will be experiencing the same transition. After-school activities that focus on this transition (the visits by health experts and prevention of gang activity, to name two) help to redefine the school as a community center where many questions and concerns of the new immigrant can be answered.

That same structure creates the caring and cooperative environment so

\textsuperscript{332} See 648 F.2d at 1009; see generally Cummins, in \textit{SCHOOLING AND LANGUAGE}, supra note 125; Krashen, in \textit{SCHOOLING AND LANGUAGE}, supra note 125; Krashen, \textit{Focus}, supra note 214; Ramirez, supra note 216; Collier and Thomas, supra note 216.

\textsuperscript{333} 648 F.2d at 1009.

crucial to academic success in any middle school. Large blocks of time for varied and in-depth learning have been designed into the program. A core group of teachers provide the individual attention needed by adolescents and yet the students will be changing classes in a rhythm similar to what they will encounter in high school.

Finally, the expertise of the teachers and the help of their English-speaking peers will provide the optimum chance for a successful and high-level transition from non-English speaker to English speaker. Experiencing American schools plus learning every day and academic English plus participating in an environment supportive of the biological, social and emotional changes from child to adult result in the development of the social capital necessary to succeed. These students will not be ready to fully participate in society, as the ultimate goal of this Comment has been stated, upon graduation from eighth grade. They will, however, be on their way.

CONCLUSION

Section 1703(f) of the EEOA mandates that states take "appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."335 We have seen that Castaneda's three-part explanation of appropriate action does not guarantee bilingual education. However, unless the program, based on sound educational theory and implemented in an effective manner, leads to "equal participation" in the school's curriculum, it has failed.

I have argued that "appropriate education" is the more important goal. This goal considers the long-term success of the individual student, the choices available to him upon graduating from high school, and his life-time contribution to society. The most recent research shows that equal participation, or appropriate education, or academic parity occurs when LEP students receive instruction in their native language. Of course, academic parity does not occur after one, two, or even three years of native language instruction and English development. The studies have shown that "students schooled in bilingual education programs for more than three years demonstrate that such students outperform their comparison group and begin to reduce the distance between their performance and norm-group performance."336 The key, however, is to follow these students as they progress through the various levels.

Clearly, native language instruction, developmentally appropriate curriculum and attention to their unique needs are the essential factors for appropriate immigrant education. Politically, the issue continues to smolder.


336. Gonzalez & Maez, supra note 223, at 5. It follows logically that if students stay in these programs longer than three years, they do more than "reduce the distance" but actually achieve parity. The logical conclusion has now been shown empirically. See Collier & Thomas, supra note 216.

337. Gonzalez & Maez, supra note 223, at 5-6 ("Monolingually-schooled children appear to do well in the early grades, but the gains are reduced as they reach the upper elementary and secondary grades.").
However, at some point the policy makers must take notice of the fact that providing an appropriate education in the short- and medium-term is far better for society in the long-term. It makes little sense to deny immigrants an education or to provide them with an inappropriate one if they are going to continue to live, work, and have families in the United States. Society will benefit most not from a restrictive policy which only educates some of its children. Rather, the largest benefit comes from an expansive policy which provides an appropriate education to all its children. Such a policy, as proposed here, will ensure equal access, equal participation, equal contribution and equal opportunity to and for the middle school immigrant child.