Legal Requirements on Access to Elementary and Secondary Public Education for Children of Immigrants

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Although the right to education is not constitutionally guaranteed in the United States, any state that undertakes to provide public primary and secondary education must grant all resident children—*regardless of their immigration status*—equal access to that education.[1] The U.S. Supreme Court announced this principle in the 1982 case *Plyler v. Doe*, holding that the failure to offer to the children of undocumented immigrants educational opportunities equal to those offered to other resident children violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.[2] Therefore, as concerns a state's duty to provide primary and secondary public education, there is no functional legal difference between documented and undocumented immigrants.

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The next, more difficult issue is: To what kind of education does equal access entitle all of a state's resident children? In other words, if the Equal Protection Clause guarantees them the right to go to school, what is the substance of that right, and whence does it come? This article addresses those issues. Clearly, allowing students who do not speak any English into the school, but then making no accommodation for their English-language deficit, is no access at all.

Even before the *Plyler* decision, another Supreme Court case had ordered public elementary and secondary schools to take appropriate action to provide to students with limited English proficiency (LEP) the instruction necessary to overcome language barriers and give them meaningful educational opportunities as compared with English-proficient students. The U.S. Supreme Court enunciated this right in the 1974 case *Lau v. Nichols*.[3] The federal Equal Educational Opportunity Act (EEOA) and Title VI of the Civil Rights Act subsequently codified the right.[4] Under these precedents, no educational entity receiving federal financial assistance may discriminate on the basis of race, national origin, or native language in providing students with a meaningful opportunity to participate in a public educational program.[5]

What is the substance of the Equal Protection Clause's guarantee of the right to go to school?

As is true in the field of education more broadly, the federal government largely has left decisions about what constitutes "appropriate action" in the context of language-learning programs to state and local educators. The fuzziness of the 1974 Supreme Court decision setting the appropriate-action standard led to litigation between LEP students and their families, and school districts. This litigation, combined with the federal government's delegation of educational methodology decisions to state and local officials, culminated in what has become (with some variations) a yardstick for federal courts nationwide in evaluating LEP programs. In *Castañeda v. Pickard*, Mexican-American LEP students challenged (among other things) the appropriateness of the action taken by their school district to help them overcome their language barriers.[6] In finding the subject program legally sufficient, the court created a three-prong framework for assessing LEP programs:

1. A district's LEP plan must be based on a sound educational theory that is supported by some qualified expert.
2. It must have sufficient resources and personnel to be implemented effectively.
3. After a period lengthy enough to give the plan a legitimate trial, the court must find that students are actually learning English and, to some extent, other subject-matter in the curriculum.

As the duty to provide LEP instruction has grown and the number of LEP students in the United States has dramatically increased, some states with relatively high numbers of immigrants have seen a backlash against language-learning programs.[7] Leaders of the backlash have used the *Castañeda* decision and its progeny to justify the passage of "English-only" initiatives.[8] Proponents of such initiatives assert that bilingual or multilingual education has proven a failure and produced a class of immi-

grants and children who are unable to lead successful lives in the United States because they cannot speak the language of the country in which they have chosen to live.[9] Opponents see the initiatives as cynical political attempts to overrule the *Plyler* and *Lau* cases on the ground if not in the courts, and as contrary to years of well-established research on how children learn languages and develop cognitively.[10]

California's Proposition 227, passed in 1998, is probably the most famous example of this recent approach to language learning: it provides for one year of "sheltered" English-immersion classes for LEP students (with some limited exceptions) and then requires all public school courses to be taught in English. Other states, including Arizona and Massachusetts, have passed similar initiatives.[11] Colorado and Oregon voters have rejected them.[12]

Although such initiatives seem to violate federal law requiring appropriate language assistance to LEP students, supporters argue—and some courts have agreed—that studies and expert opinions show that English immersion is a legally sufficient way to satisfy the EEOA.[13] However, just as many critics believe that the *Castañeda* standard has all but eviscerated the requirement that states provide equal educational opportunity to LEP students.[14] They argue that it allows fringe, unscientific, and invalid language-acquisition theories to be implemented with minimal research or expert study to back them up; that courts now operate under a standard of excessive deference to state and local educators; and that the trial-period requirement allows entire grades of students to pass through elementary school without either acquiring English-language skills or developing their cognitive abilities in other core areas such as reading and math.[15]

The passage in 2002 of the education reform package No Child Left Behind (NCLB) has somewhat altered the legal landscape for LEP students.[16] Intended to reduce wide and persistent achievement gaps between poor, minority, and LEP students, and high-achieving student groups, NCLB requires the establishment of standards and tests for English-language proficiency.[17] It also requires that LEP students show progress in core academic subjects. Although LEP students may take reading tests in their native languages for the first three years of their schooling, they must take math tests in English within their first year of public schooling and English-proficiency tests by their second year of public schooling, at the latest. Further, after the third year, they must take reading tests in English (with limited exceptions) and be held to the same standards as their English-proficient peers. NCLB requires data on the performance of LEP students (and other disadvantaged groups) to be tracked separately in order to assess how well LEP programs are serving their students. Poor performance by LEP students can lead to sanctions for schools that fail to improve.

Although encouraged by the renewed attention to LEP students and their needs,

some commentators have expressed concerns both about the structure of NCLB's standards and assessment procedures, and about characteristics unique to the LEP population that pose challenges to public school educators operating under NCLB.

Primary among the concerns about NCLB's testing requirements are the tests in English-language proficiency that LEP students must take by their second year in school and the presumption that by their third year of LEP services, these students will be prepared to undertake all their learning in English.[18] After years of research on bilingual education, experts have concluded that achieving academic fluency in a second language usually takes four to eight years.[19] For students whose English-language skills are still very limited, taking such a test can be psychologically harmful, causing anxiety, tears, and feelings of frustration and worthlessness.[20] Another concern is the validity of state tests for assessing English-language proficiency, a concern that even the federal government has voiced.[21]

Beyond practical and policy issues with NCLB itself, there are difficulties caused by the nature of LEP students as a group, or category. First, their sheer number has created an unprecedented demand for LEP programs.[22]

Also, immigrants and their children now are dispersing across the country, rather than remaining in a relatively small number of states (e.g., California, Florida, New York, and Texas) as they have in the past. As a result, many states and localities must create LEP programs but have little or no experience or expertise in developing them.[23]

Further, poverty rates among children of immigrants—especially among LEP children—have grown, and are continuing to grow, significantly.[24] Combined with increased residential segregation, the growth means that the majority of immigrants' children are being educated in high–LEP, low-income, urban schools, schools that are disproportionately failing to meet standards under NCLB and are suffering sanctions.[25]

Another issue that arises in this context is the potential for double- or triple-counting of assessment scores for LEP students because of their likely overlap with other NCLB–mandated reporting categories, including low-income and minority status.[26]

Finally, some fear that LEP students who are not able to make sufficient progress in English acquisition to meet state graduation standards will become discouraged and drop out, increasing the already dismal graduation rates for LEP students.[27] The fear is heightened by a provision in the federal Illegal Immigration Reform and Immigrant Responsibility Act that prohibits states from offering in-state tuition rates to undocumented immigrants seeking postsecondary education, unless the same benefit is provided to all U.S. citizens, regardless of residency.[28] (For more information, see the article on 46.)

Conclusion

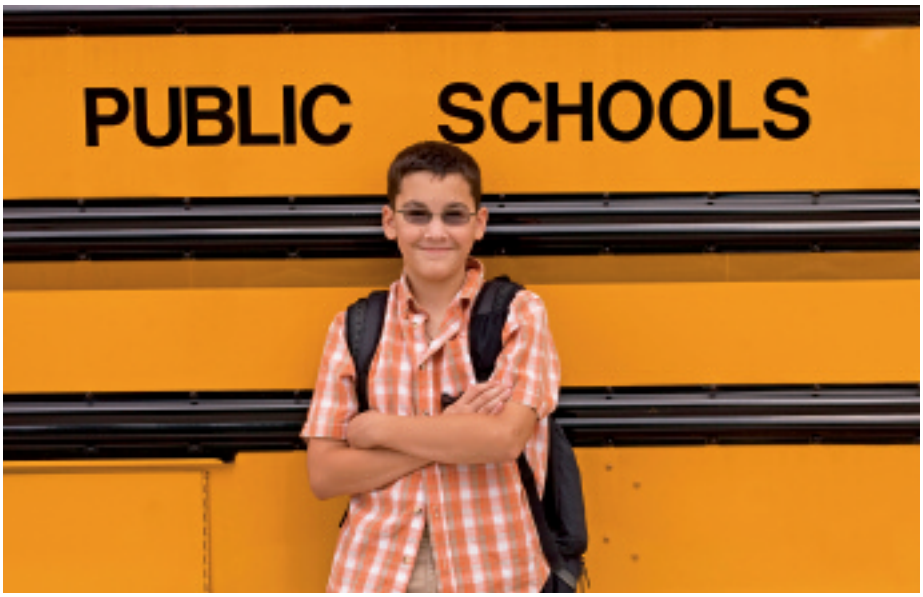
In conclusion, the children of immigrants, documented or undocumented, are entitled to a public elementary and secondary education in the state where they reside. Once inside the schoolhouse door, they are entitled to instruction that will (1) give them an opportunity to obtain the educational benefits available to the rest of the school community and (2) enable them to achieve the same high standards that are required of English-proficient and native students under NCLB. Just what kinds of educational and language-learning programs are legally sufficient to satisfy these rights is still murky.

More guidance may be coming soon on two fronts, however. First, the U.S. Supreme Court has accepted, as a consolidated case, two related cases from Arizona, *Horne v. Flores* and *Speaker of the Arizona House of Representatives v. Flores*, on an expedited schedule.[29] The issue in the case is whether the EEOA trumps NCLB. The case, originated in 1992, challenged the adequacy of the LEP program in an Arizona school under the EEOA. In 2000 a federal court found that Arizona was not meeting its obligation to eliminate language barriers for LEP students and ordered the state to do so. In 2005 the state governor, believing that the legislature was not taking action adequate to address the federal court order, took the case back to court, and the court found that the legislature still had not met its obligations under the EEOA. However, by this time, NCLB had been passed, and the legislature argued that it had satisfied its LEP duties under this statute. Neither the federal trial court nor the Ninth Circuit Court of Appeals found the legislature's argument persuasive. However, some commentators (including the attorney for the LEP students and families) think that the U.S. Supreme Court would not have accepted the case for review unless it was going to overturn these lower court rulings.[30]

Second, NCLB is up for reauthorization. With a new president and a Democratic majority in the Congress, the likelihood of change is great. Given the other issues with which the new administration must deal, though, change is not likely to come before 2010. Forecasters predict that change will include beefed-up preschool education programs, increased federal funding, and more flexibility in how school and student performance are assessed.[31]

Notes

1. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).
2. Plyler v. Doe, 457 U.S. 202 (1982).
3. Lau v. Nichols, 414 U.S. 563 (1974).
4. 20 U.S.C. § 1703 (1974); 42 U.S.C. §§ 2000d *et seq*. (2009).
5. The cases of Washington v. Davis, 426 U.S. 229 (1976), and University of California Regents v. Bakke, 438 U.S. 265 (1978), may have changed this standard. Although the language in the *Lau* opinion indicated that a showing of discriminatory effect was sufficient to establish a Title VI violation, language in the *Washington* and *Bakke* cases appears to have attached an intent requirement to a successful discrimination claim under Title VI.
6. Castañeda v. Pickard, 648 F.2d 989 (5th Cir. 1981).
7. Providing children of immigrants with equal access to public education is a much larger duty for public school systems today than it was in 1982, when the *Plyler* case was decided: In 1980 the number of immigrants (both legal and illegal) in the United States was estimated to be 14.1 million. In 2007 the number was estimated to be 37.9 million. Current estimates place the number of school-age children of immigrants at 10.8 million; this accounts for 20.2 percent of the nation's school-age population. (However, less than a quarter of these students are themselves



immigrants. Native-born children of immigrants are U.S. citizens.) Steven A. Camarota, *Immigrants in the United States, 2007: A Profile of America's Foreign-Born Population* (Washington, DC: Center for Immigration Studies, 2007), www.cis.org/articles/2007/back1007.html.

8. *See, e.g.,* Valeria G. v. Wilson, 12 F. Supp. 2d 1007 (1998); Teresa P. v. Berkeley Unified School Dist., 724 F. Supp. 698 (1989); Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030 (1987).

9. *See, e.g.,* Roselia Salinas, "All Children Can Learn to Speak English," *National Forum of Educational Administration and Supervision Journal* 23, no. 2, pp. 20–24 (2006–7).

10. *See, e.g.,* James Crawford, "The Decline of Bilingual Education: How to Reverse a Troubling Trend?" *International Multilingual Research Journal* 1, no. 1, pp. 33–37 (March 2007); Kevin R. Johnson and George A. Martinez, "Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education," *University of California at Davis Law Review* 3: 1247–63 (Summer 2000).

11. Ariz. Rev. Stat. §§ 15-751 *et seq.* (2009); Mass. Gen. Laws Ann. pt. I, tit. XII, ch. 71A (2009).

12. Colorado Amendment 3, or "English for the Children of Colorado" Initiative, 2002; Oregon Ballot Measure 58, 2008.

13. *See, e.g., Valeria G.*, 12 F. Supp. 2d at 1007; Michael Bazeley, "English-Only Test Scores Up: Proposition 227: Teachers and Parents Debate Why Achievement Results Improved in the Wake of New Limits on Bilingual Education," *San Jose Mercury News,* December 26, 1999, p. 1.

14. *See, e.g.,* Stephen Krashen, "Skyrocketing Scores: An Urban Legend," *Educational Leadership* 62, no. 4, 37–39 (December 2004/January 2005); Kellie Rolstad, "Weighing the Evidence: A Meta-Analysis of Bilingual Education in Arizona," *Bilingual Research Journal* 29, no. 1, pp. 43–67 (Spring 2005).

15. *See, e.g.,* Eric Haas, "The Equal Educational Opportunity Act 30 Years Later: Time to Revisit 'Appropriate Action' for Assisting English Language Learners," *Journal of Law and Education* 34: 361–87 (2005).

16. 20 U.S.C. §§ 6301 *et seq.* (2009).

17. 20 U.S.C. at § 6301(1), (3).

18. 20 U.S.C. § 1111(b)(7) (2009).

19. *See, e.g.,* Salinas, "All Children Can Learn"; Mikyung Kim Wolf et al., "Issues in Assessing English Language Learners: English Language Proficiency Measures and Accommodation Uses," Report no. 731 (Los Angeles: National Center for Research on Evaluation, Standards, and Student Testing, 2008).

20. Wayne E. Wright and Daniel Choi, "The Impact of Language and High-Stakes Testing Policies on Elementary School English Language Learners in Arizona," *Education Policy Analysis Archives* 14, no. 13, pp. 1–75 (May 2006).

21. Cornelia M. Ashby, *No Child Left Behind Act: Education Assistance Could Help States Better Measure Progress of Students with Limited English Proficiency*, Testimony before the Subcommittee on Early Childhood, Elementary and Secondary Education, Committee on Education and Labor, House of Representatives (Washington, DC: U.S. Government Accountability Office, 2007), http://eric.ed.gov:80/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/28/06/72.pdf.

22. Randolph Capps et al., *The New Demography of America's Schools: Immigration and the No Child Left Behind Act* (Washington, DC: Urban Institute, 2008), www.urban.org/publications/311230.html.

23. Ibid.

24. Lorraine M. McDonnell and Paul T. Hill, *Newcomers in American Schools: Meeting the Educational Needs of Immigrant Youth* (Santa Monica, CA: Rand Program for Research on Immigration Policy, 1993), www.rand.org/pubs/monograph_reports/MR103/.

25. Capps et al., *New Demography*; McDonnell and Hill, *Newcomers*.

26. Capps et al., *New Demography*.

27. Ibid.

28. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-28, 110 Stat. 3009–546 (1996). Currently, ten states, including California and Texas, have nonetheless enacted laws offering undocumented immigrants in-state tuition rates under certain conditions. These provisions are legal, state officials argue, because immigration status is not a part of the in-state residency determination. Rather, in most cases, if a student has graduated from an in-state high school after a certain number of years in attendance, he or she qualifies as a state resident. Dawn Konet, *Unauthorized Youths and Higher Education: The Ongoing Debate* (Washington, DC: Migration Information Source, 2007), www.migrationinformation.org/Feature/display.cfm?ID=642.

The proposed Development, Relief, and Education for Alien Minors (DREAM) Act (S 2205, 110th Cong., 1st sess.) could change this state of affairs and provide these students with the opportunity to legalize their status in the United States (for more information about this act, see the article on page 46).

29. Horne v. Flores, No. 08-289 (U.S. filed August 29, 2008); Speaker of the Ariz. House of Representatives v. Flores, No. 08-294 (U.S. filed September 2, 2008). Brief synopses of the questions presented by these consolidated cases are available at www.abanet.org/publiced/preview/briefs/unscheduled.html#08294.

30. *See, e.g.,* Pat Kossan, "English Learning Case Hits High Court," *Arizona Republic,* January 10, 2009, www.azcentral.com/arizonarepublic/news/articles/2009/01/10/20090110ell0110.html.

31. Sara Mead, "It's Obama," Early Ed Watch Blog, November 5, 2008, www.newamerica.net/blog/early-ed-watch/2008/its-obama-8181.