

Author: Benjamin Hillner
Villanova University School of Law
Bhillner@law.villanova.edu
901 Montgomery Avenue
Bryn Mawr, PA 19010
JD Expected: 2006
Final Paper for Education Law Seminar

Professor: Assistant Dean Sheila Vance
Vance@law.villanova.edu
Villanova University School of Law
299 North Spring Mill Road
Villanova, PA 19085-1682

“Bad Policy and Bad Law”: The Shortcomings of the No Child Left Behind Act in Bilingual Educational Policy and its Frustration of the Equal Protection Clause

ABSTRACT

The No Child Left Behind Act constitutes bad policy and bad law. Its problems in terms of policy are evident from the fact that it has diverted from Supreme Court decisions, Congressional and state legislation, and circuit court decisions. Its problems in terms of legality are evident from its conflict with the Equal Protection clause. That is, it treats school districts with high percentages of minority students as a suspect class and it denies students in those districts equal access to education based on that classification. Thus, while the Act’s intentions are good, it must be reevaluated.

INTRODUCTION

The No Child Left Behind Act, although ambitious and well intentioned, is a step backwards for bilingual education.¹ This much is evident from the fact that it conflicts with the three areas of law that were most influential in shaping bilingual education: (1) the statutory law governing bilingual education; (2) the relevant case law; and, (3) the Supreme Court’s jurisprudence concerning the Equal Protection Clause.² These three areas of law have combined to outline a policy towards bilingual education that has addressed the issue by responding to developments in the field. That policy has kept a watchful eye on the problem and has encouraged intervention when necessary, while favoring a hands off approach with respect to

¹ 20 U.S.C. § 6301 (2001).

² U.S. Const. amend XIV.

implementing policy. In short, it has been a policy that spelled out *what* must be accomplished while remaining silent as to *how* to accomplish it. To that end, it has supported bilingual education initiatives through legislation and case law. NCLB breaks with this policy in three ways. First, it has rejected the Supreme Court's decisions in this area, specifically *Lau v. Nichols*.³ Second, it has rejected Congress's attempts to solve bilingual education, particularly the Equal Education Opportunities Act of 1974, a bill that codified the Supreme Court's decision in *Lau*.^{4 5} Third, it has rejected the relevant circuit court decisions that have addressed the issue, a series of decisions dominated by the Fifth Circuit's decision in *Castaneda v. Pickard*.⁶ In light of these conclusions, NCLB is in need of reevaluation and adjustment insofar as it impacts bilingual education.

A BRIEF HISTORY OF BILINGUAL EDUCATION IN AMERICA

NCLB has come into existence at a dangerous time for students benefiting from bilingual education. America's schools are responsible for educating an increasing number of non-English speaking students while policy makers are ill-informed as to what is required to do so. This is due in large part to the fact that many parents with students in need of bilingual education do not vote.^{7 8} As a result, states with large immigrant populations have passed legislation to roll back bilingual education initiatives.⁹ On one hand, the passage of these initiatives represents the purest form of the democratic process. On the other, it confirms that educational policy is being

³ *Lau v. Nichols*, 414 U.S. 56 (1974).

⁴ 20 U.S.C. § 1703(f) (1974).

⁵ *Supra* n.3

⁶ *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981).

⁷ Even in states as progressive in the field of bilingual education as Massachusetts, a state with a large Latino population, the state voted 'yes' on the Question 2 Unz initiative – named for Silicon Valley millionaire and former CA gubernatorial candidate Ron Unz – a proposal to limit bilingual programs to a one year, sheltered English immersion program that would do away with the 1971 Massachusetts Bilingual Education Law, a law that ultimately surpassed federal bilingual requirements. Question 2 was passed by a vote of 68 to 32 percent, despite the fact that 92 percent of the Latino community voted against it. Yet, this 92 percent represented only a fraction of the Latino community. These statistics make clear that the voices of those with children need of bilingual education go unheard in light of those with children who do not. Chandrasekhar, *24 Chicano-Latino L. Rev.* 43, Spring 2003, p.52.

⁸ See also, Anand Vaishnav, *Dissecting Bilingual Education's Poll Defeat: Movement Lacked Money*, *Message*, Boston Globe, Nov.10, 2002.

⁹ Propositions 203 and 227, also forwarded by Mr. Unz, were approved in California and Arizona, respectively, despite large immigrant populations in each state. Chandrasekhar, *Id.* at 43.

adjusted at the will of the majority.¹⁰ This is an undesirable result. Education is a field where the actual victims of misplaced funding have no voice and where the voices of their parents speak only as loud as their votes. To ensure that those voices are heard, courts and legislatures have traditionally been quick to lend assistance when access to education is jeopardized.

For bilingual education, that assistance was first provided in 1964 with the passage of the Civil Rights Act.¹¹ Title VI of the Act mandated that no person shall be denied the benefits of any program receiving federal funding based on color or race.¹² Although the Act did not mention linguistic barriers specifically, the Supreme Court interpreted it to say as much in *Lau*, where a group of Chinese speaking students brought a class action suit against the San Francisco public school system.¹³ They claimed that they had been denied equal access to education by their school's refusal to help them overcome linguistic barriers.¹⁴ The Court agreed, and Congress responded by codifying the decision in Section 1703(f) of the EEOA of 1974, requiring school districts to take "appropriate action" to overcome any language barriers that may be impeding student progress.¹⁵ However, the EEOA did not define "appropriate action".¹⁶ By not offering a definition, Congress maintained its position of staying as "hands off" as possible with respect to primary and secondary education. This approach allowed state legislatures and lower courts to develop their own strategies for grappling with the problems of bilingual education. The approach culminated in *Castenada*, a Fifth Circuit decision that framed a three-pronged method to implement bilingual programs.¹⁷ That method stressed research prior to implementation, evaluation after implementation, and change when necessary.

¹⁰ The Court of Appeals for the Ninth Circuit rejected an equal protection challenge to California's Proposition 227 in *Valeria v. Gary Davis*, 307 F.3d 1036, (9th Cir. 2002), on the basis that Proposition 227 did not constitute a corruption of the political structure by barring minorities or minority localities from exercising their political power. However, the equal protection challenge raised in this article is rooted in the fact that LEPs constitute a discrete and insular minority, and therefore any classification based on their status as such is subject to strict scrutiny.

¹¹ 42 U.S.C. § 2000 (1964).

¹² *Id.*

¹³ *Supra* n.3

¹⁴ *Id.*

¹⁵ 20 U.S.C. § 1703(f) (1974).

¹⁶ *Id.*

¹⁷ 648 F.2d 989 (5th Cir. 1981).

Given both Congress's and the Court's progressive approach towards bilingual education, and the push since the 1960's in favor of breaking down linguistic barriers, any changes in the field would be expected to be forward ones that picked up where Title VI, *Lau*, the EEOA, and *Castenada* left off.¹⁸ This has not been the case.

NCLB has done less, not more, than was required under Title VI, *Lau*, the EEOA, and *Castenada*. Part I of this note discusses this policy shift, focusing on why it represents negative progress. Part II raises an equal protection challenge to NCLB on the grounds that it amounts to a denial of access to public education.

I. NO CHILD LEFT BEHIND AS A BAD EDUCATIONAL POLICY

No Child Left Behind has frustrated the policy behind Title VI of the Civil Rights Act of 1964,¹⁹ the Equal Educational Opportunities Act of 1974,²⁰ and the relevant circuit court decisions surrounding bilingual education, particularly *Castenada*.²¹ It has rejected the activist approach championed by the legislation and case law of the 1960's and 1970's, an approach that was progressive in policy but discrete in application.²² In the process, it has threatened years of experience in bilingual education with new policies that are both untested and unsound.²³

The result is a high stakes testing system that jeopardizes access to education for students in districts with greater numbers of English language learners (hereinafter ELLs) It does this by subjecting them to critical assessments without adequate preparation. These assessments determine not only the future of ELLs, but the future of their entire schools, as NCLB has designated ELLs as one of many subgroups that must make adequate yearly progress in order for their schools to avoid a "failing" label.²⁴ This underscores the first of two conclusions proposed by this note, that NCLB is bad policy – it rests the future of entire schools on the yearly progress of ELLs, and it does so without giving those students adequate preparation.

¹⁸ *Id.*

¹⁹ 42 U.S.C. § 2000 (1964).

²⁰ 20 U.S.C. § 1703 (1974).

²¹ 648 F.2d 989 (5th Cir. 1981).

²² *Id.*

²³ Commentators have suggested that the Bush administration was "result oriented" in its attempts to get NCLB through Congress, that the White House had orders not to get bogged down in details. See Paul E. Peterson, *No Child Left Behind? The Politics and Practice of Accountability* (2003). Forthcoming from the Brookings Institute Press.

²⁴ *Supra* n. 1

A. NCLB's Break with Title VI of the Civil Rights Act of 1964

NCLB breaks with Title VI of the Civil Rights Act of 1964 by subjecting ELLs to high stakes tests that determine their school's future. It does this despite the fact that bilingual programs are under-funded and unregulated.²⁵ Thus, by allowing ELL test results to determine whether or not a school "fails", NCLB has made access to public education dependent on whether or not minority subgroups make adequate yearly progress. This turns the question of whether or not a school receives a failing label into a question of how many ELLs attend. This is in direct conflict with Title VI's mandate that no one be denied access to a federally funded program based on their skin color or race.²⁶ While NCLB does not distinguish one ELL subgroup from the next, its practical effect is clear; students who do not comprise the white majority are a deciding factor in whether or not a school "fails".

However, the denial of access to education does not come about simply because a school "fails". When a school receives a failing label, the result is not a default closure. Although school closure is a potential consequence, it is more likely that students will be encouraged to attend another district school that has not received the same label.²⁷ Nevertheless, this amounts to a denial of access to a traditional neighborhood school, one where parental involvement can be fostered and community relations can be strengthened. More importantly, it is a direct result of a school being labeled as "failing" in response to a linguistic barrier, and it conflicts with the principles articulated in Title VI.²⁸ The equation is simple: the greater the number of ELLs in a given school, and the fewer the resources with which to instruct them the more likely that they will fail to make *any* progress. In turn, they "fail" as a subgroup, and with them the school.

²⁵ Crawford, *No Child Left Behind: A Misguided Approach to School Accountability for English Language Learners*, Forum on Ideas To Improve the NCLB Accountability Provisions for Students with Disabilities and English Language Learners, Center for Education Policy, 14 September 2004,

²⁶ 42 U.S.C. § 2000 (1964).

²⁷ Amy M. Reibach, *The Power Behind the Promise: Enforcing No Child Left Behind to Improve Education* 45 B.C. L.Rev. 667 (2004).

²⁸ Daniel J. Losen, *Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act's Race Conscious Accountability* 47 How. L.J. 243, Winter, (2004). Despite the fact that NCLB is race conscious, it has allowed for the persistent failure of any one minority group to disadvantage an entire school. This is yet further proof that the law is not ill-intentioned, just ill-guided.

This problem is not unavoidable. NCLB's assessments would not amount to a denial of access to education if ELLs were given a meaningful opportunity to succeed. Yet, under NCLB, not only is funding for bilingual programs capped at half of what it was in fiscal year 2001, but requirements that bilingual educational programs undergo regular evaluation have been eliminated.²⁹ Thus, students in bilingual programs are put in a compromising position, one where they are in danger of being denied access to a traditional public education because of their failure to progress as English speakers, while their failure to progress as English speakers is a result of the very initiative demanding they do so.

Typically, a student's failure to make progress would not amount to a denial of access to education – students are routinely held back in school or expelled when the problem is one that either the student can correct but chooses not to or when the problem is organic in nature and is therefore beyond anyone's control. But when the failure to succeed carries with it dire consequences, and moreover when those consequences are visited on the student despite the fact that she has not been provided the preparation required to learn English, then the student has effectively been denied access to public education by virtue of her inability to speak, read, and write the English language. This conclusion was the same one that the Supreme Court arrived at in *Lau*.³⁰

B. NCLB's Break with *Lau v. Nichols* and the EEOA of 1974

NCLB rejects the position adopted by the Supreme Court in *Lau* and codified by Congress in the EEOA of 1974 by prematurely penalizing ELL programs.^{31 32} Both *Lau* and the EEOA stood for the proposition that schools need to take appropriate measures to ensure that students overcome language barriers.^{33 34} While neither the Court nor Congress went so far as to articulate what was implicated in "appropriate action", there was an unmistakable message that schools could not stand idly by while ELLs lagged behind.

²⁹ *Supra* n. 25

³⁰ 414 U.S. 56 (1974).

³¹ *Id.*

³² *Supra* n.4

³³ 414 U.S. 56 (1974).

³⁴ 20 U.S.C. § 1703(f) (1974).

Instead of adopting this approach, NCLB embraces a design that courts and legislatures have discouraged. That design is a sink or swim philosophy that punishes failure. Even more important, it requires success at pre-determined intervals. By adhering to a timeline, NCLB ignores the fact that bilingual education programs may not yield results immediately. It therefore undermines the notion of taking appropriate measures to help students overcome linguistic barriers.³⁵

This approach would not be a problem if NCLB were rooted in reliable studies. However, it is not. Instead, it takes a position that has not been supported by any research in the area of bilingual education. What research is available shows that where funding is properly allocated and where trained and qualified teachers are involved, that bilingual education is effective not only in teaching English but in keeping ELLs up to speed in core subjects.³⁶ By setting a two year “probationary” period, after which time schools are labeled as failing should they fail to show adequate yearly progress, NCLB has overlooked all of the empirical evidence suggesting that two years is not long enough for ELLs to glean a working knowledge of the English language.³⁷ While theories of language acquisition vary, the bulk of the available research indicates that it takes from three to seven years to become proficient enough in English to learn in an English-only classroom.³⁸ Thus, by limiting the funds available for the development of bilingual programs while simultaneously capping the effective life-span of those programs at two years, NCLB has targeted bilingual education for failure. Furthermore, by eliminating requirements that bilingual programs undergo any type of evaluation, NCLB all but guarantees that those programs which do avoid failure will not maximize their potential.³⁹ These measures are hardly “appropriate” for purposes of helping students to overcome linguistic barriers. They are therefore in direct conflict with the Supreme Court’s holding in *Lau*⁴⁰ and the principles of the EEOA.⁴¹

C. No Child Left Behind’s Rejection of the *Castenada* Test

³⁵ 20 U.S.C. § 6301 (2001).

³⁶ Marilyn Farquharson, *Proposition 227: A Burning Issue for California’s Bilingual Students* 8 B.U. Pub. Int. L.J. 333, 352, n. 185

³⁷ 20 U.S.C. § 6301 (2001).

³⁸ *Supra* n. 36. at n. 180

³⁹ 20 U.S.C. § 6301 (2001).

⁴⁰ 414 U.S. 56 (1974).

⁴¹ *Supra* n.4

Not only does NCLB's elimination of evaluation requirements signify a break from *Lau*,⁴² but it highlights its shortcomings in terms of policy – its rejection of *Castenada v. Pickard*.⁴³ There, the Fifth Circuit offered a framework for complying with the EEOA. That framework required educators to: (1) base bilingual education policies on available research; (2) implement those policies in a manner reasonably calculated to succeed and evaluate them regularly, and; (3) adjust those policies when necessary.⁴⁴ NCLB fails all three prongs of this test.

It fails the first prong because it offers no guidance as to what type of bilingual programs should be implemented. It takes an even greater step back by not requiring that ELL programs undergo regular evaluation. This is of particular importance considering that, under NCLB, bilingual programs are now potentially responsible for the success or failure of an entire school. Moreover, with more and more students from different countries entering America's schools, funding, training, and evaluation of bilingual programs should be increased, not curtailed. Yet, NCLB takes no consideration of these factors. It pushes forth blindly, barely cognizant of the children and the schools left by the wayside, both destined for failure.

With respect to the second prong of *Castenada*,⁴⁵ NCLB does not pass muster. Instead of promoting a system with which to evaluate bilingual programs it has done away with the requirement that they undergo any sort of assessment.⁴⁶ Again, the implications of this policy change are far reaching, as schools are required to get their students to produce more with less preparation. Schools need every available opportunity to focus their resources through training and evaluation.⁴⁷ Under NCLB, not only are the funds to do so not available, but the encouragement to do so is nonexistent.⁴⁸

As a by product of having failed the first two prongs of *Castenada*,⁴⁹ it is impossible for NCLB to satisfy the third prong. *Castenada*'s third prong requires the restructuring of bilingual programs if they fail to meet their purported goals. NCLB is too vague to capitalize on this

⁴² 411 U.S. 563 (1974).

⁴³ *Supra* n. 6

⁴⁴ *Id.* at 1009, 1010

⁴⁵ *Id.*

⁴⁶ Crawford, *Supra* n. 25 p. 8.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

requirement.⁵⁰ That is, it leaves each school the freedom to decide what should qualify as adequate yearly progress.⁵¹ Therefore, any requirement of research and evaluation under *Castenada* are undermined.⁵² This results in one of two things, neither of which is desirable. First, it may encourage schools to set their standards too low, in a blatant attempt to ensure a high passage rate amongst their students at the expense of a quality education. Second, it may leave schools without direction as to how to gauge yearly progress. In this second scenario, schools would be left to experiment with various methods to determine what works. The obvious downside to this practice is that it could take years to develop a pointed rubric that is both demanding and attainable. As such, it would put schools at a disadvantage in their attempts to stay on the NCLB timeline that measures success in terms of achievement on standardized tests in academic year 2013-2014.⁵³

This conscious move towards a new policy of bilingual education that does not resemble *Castenada* suggests a lack of due diligence on the part of those supporting NCLB.⁵⁴ While *Castenada*⁵⁵ is a Fifth Circuit decision that is not binding on other courts, the Seventh Circuit adopted the same test in *Gomez v. Illinois*,⁵⁶ as did the Northern District of California in *Teresa v. Berkeley Unified School District*.⁵⁷ Also, Massachusetts had in place, until the passage of Question 2, a bilingual education law that surpassed federal standards under the EEOA and *Lau*.⁵⁸

Nonetheless, the passage of NCLB signals a digression from the aggressive bilingual policies articulated in *Castenada* that are echoed in one way or another through other parts of the country.⁵⁹ Logic dictates that any policy initiative that was to replace the existing policies would be more progressive, not less. At the very least, any new initiatives should be based on new policies that are the result of developments in the field. Yet, NCLB fails to justify any of the

⁵⁰ *Id.*

⁵¹ *See generally* Crawford, *supra* n. 25

⁵² *Supra* at n.6

⁵³ *Supra* n. 1

⁵⁴ 648 F.2d 989 (5th Cir. 1981).

⁵⁵ *Id.*

⁵⁶ 811 F.2d 1030 (7th Cir. 1987).

⁵⁷ 724 F.Supp. 698 (N.D. Cal. 1989).

⁵⁸ *Supra* n.3, n.4

⁵⁹ 648 F.2d 989 (5th Cir. 1981).

changes it calls for. It is less progressive than any one of the policies mentioned above, and while its rejection of *Castenada* signals an unsound break with pervasive trends in bilingual education, NCLB's shortcomings go beyond superficial conflicts that arise out of new policies.⁶⁰ They are tangible problems that touch the lives of students and they are the direct results of NCLB's failure to fund and assess bilingual programs.

D. The Shortcomings of No Child Left Behind in Practice

NCLB's shortcomings are symptoms of it being overambitious in scope and unguided in structure. This much is clear from studying: (1) the Act's broadest features, namely, its delegation of authority; and, (2) its implementation of testing. With respect to the delegation of authority, the Act is riddled with inconsistencies. It simultaneously empowers government, local schools, and parents. This creates confusion for the child and frustrates educators and administrators in their efforts to maintain any type of consistency in their curriculum and any hope of staying on the predetermined timeline for success set forth by NCLB.⁶¹ With respect to testing, it paints with a broad brush in terms of the procedures it aims to implement. Specifically, it leaves school districts significant latitude in deciding which language to test ELLs. Yet, without the expertise required to assess ELL progress, this latitude leads to inaccurate results for school districts that must produce specific results but are given no guidance in terms of how to achieve them.⁶²

1. The Delegation of Authority

The confusion that flows from NCLB's delegation of authority between schools, parents, and the government is traceable to the plain language of the statute.⁶³ Although the Act requires parental consent for children with limited English proficiency, and although it requires that parents select from the types of programs offered within the limited English curriculum, it also gives parents the absolute right to remove their children from the program upon request.⁶⁴ This begs the question – how are parents to know when their child has excelled to a degree of English

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² For an overview of the choices afforded to parents under NCLB, *see generally* Reibach, 45 B.C. L.Rev. 667 (2004).

⁶³ 20 U.S.C. §6301 (2001), Sec. 3103(b)(2).

⁶⁴ *Id.*

proficiency so that they may be placed in a mainstream English instruction program? Despite the fact that a child may have progressed to a degree of proficiency in spoken English, she may lag far behind her fellow classmates in terms of academic English or her abilities in reading and English composition. Research indicates that although a child may have achieved oral proficiency relatively early, that proficiency in reading and writing may not be realized for another two years.⁶⁵

These facts underscore the dilemma: if parents have the authority to remove their children from bilingual programs without being able to observe their children in an academic environment, their decisions will be based on nothing more than their oral interactions with their children. As a result, they may mistake their child's verbal abilities as an indication that their child has 'mastered' the English language. As such, they may demand that their children be placed in English only classrooms earlier than they should.

However not only are their decisions ill-informed because they are made without the benefit of observing the child in an academic setting, but most ELLs do not come from homes where English is spoken as a first language. Accordingly, even if parents could observe their child in an academic setting, it is unlikely that they would be able to make an informed assessment of their capabilities. The unfortunate result is that children are moved into English only classrooms too early. When they do, they become part of the general student population, where they will almost certainly fail to make adequate yearly progress. This results in one of two negative consequences. The first is that the entire class is dragged down by a significant number of such students, leaving the school in a worse position than if the ELL subgroup had remained intact, where the problem was both identified and dealt with. The second is that their failure to make

⁶⁵ 8 B.U. Pub. Int. L.J. 333, 353, note 176, Interview by Margaret Warner with Ron Unz and James Lyons, executive director of the National Association of Bilingual Education, in Newshour, *Double Talk?* (Sept. 21, 1997); *See also*, Office of Bilingual Education and Minority Language Affairs, *General Questions on Bilingual Education*, (citing a study 1998 study being conducted at George Mason University, which found that students "typically reach and surpass native English speakers' performance across all subject area after 4-7 years in a quality bilingual program").

adequate yearly progress will be overlooked as their poor performances are diluted, and they receive no meaningful education.⁶⁶

Once a school has been labeled failing, the solutions offered to parents whose children attend those schools are self-defeating.⁶⁷ These parents have the option of sending their child to a district school that *is* making adequate yearly progress. If a school fails to make adequate yearly progress for three consecutive years, Title I funds may be allocated to provide students with supplemental services.⁶⁸

However, these options address the symptoms that plague bilingual education, not the disease. They do nothing to correct the practices of schools that fail to make adequate yearly progress. Instead, they ignore this problem, electing to siphon money from schools that need it and to spend it on transportation costs and supplemental education.

2. The Implementation of Testing

Furthermore, because NCLB leaves the means of how to test to the discretion of individual school districts, there is nothing to indicate that the testing measures used to evaluate ELLs accurately reflect their abilities. This speaks to the heart of the bill – high stakes achievement tests are meaningless unless designed with a specific goal in mind. They must undergo regular evaluation to ensure that that goal is met. While *Castenada* requires this, NCLB does not.⁶⁹ Instead, it leaves that to the discretion of each school district.

This has two negative side effects. First, because the Act gives no guidance as to what constitutes adequate yearly progress, schools are tempted to lower their standards in order to show adequate yearly progress in the interim, that is, until the year 2013-2014.⁷⁰ Along the way, teachers are tempted to ‘teach to the test,’ sacrificing quality education for test taking proficiency. Second, because localities have the discretion to decide the language in which a given student

⁶⁶ *Supra* n.45, p.339 The premise of *Lau* was that public education must be meaningful. This was reaffirmed in *Rios v. Read*, 480 F.Supp. 14 (E.D.N.Y 1978), where the Eastern District of New York rejected the idea of mainstreaming students if it meant that their progress would be stunted in the interim.

⁶⁷ Schools that do not make adequate yearly progress for two consecutive years are labeled as “failing”. Once that label attaches for two consecutive years, parents have the opportunity to send their children to other district schools. A third consecutive year of “failure” entitles parents to supplemental education.

⁶⁸ *Id.*

⁶⁹ 648 F.2d 989 (5th Cir. 1981).

⁷⁰ Reibach, 45 B.C. L.Rev. 667 (2004).

will be tested, it is possible that students will be evaluated as failing to make adequate yearly progress because of a language barrier in the testing process. That is, even if ELLs are tested in their native tongue, the results may be skewed because they have not been receiving academic instruction in that language.⁷¹ Their faculties in their native language go only as far as their academic instruction. As a result, students may fail to make adequate yearly progress through no fault of their own and no fault of their instructors. Rather, they fail because their unique situation as ELLs does not lend itself to a mandate that *all* students make adequate yearly progress. Their progress cannot be measured until they are endowed with the linguistic tools to be evaluated through standardized tests.⁷² This is the problem the Court identified in *Lau*.⁷³ It is the same problem Congress targeted with the EEOA, and it is the same problem that the Fifth Circuit outlined a solution to in *Castenada*.^{74 75} It is also a problem that has been aggravated by NCLB.

IV. NO CHILD LEFT BEHIND'S CONFLICT WITH EQUAL PROTECTION

Beyond establishing bad policy, NCLB pushes the boundaries of the Equal Protection clause.⁷⁶ As a general proposition, when 14th Amendment equal protection is at issue, the Court evaluates legislation through one of two lenses: rational basis review or strict scrutiny.⁷⁷ In the former, a law must be “rationally related” to the furtherance of a “legitimate government interest”, while in the latter a law must be “narrowly tailored” towards furthering a “compelling government interest”.⁷⁸ The Court has recognized that laws jeopardizing the right to education receive a brand of intermediate scrutiny that falls somewhere between strict scrutiny and rational basis review while laws that classify people based on race receive strict scrutiny are subject to strict scrutiny.

⁷¹ *Id.*

⁷² *Rios v. Read*, 480 F.Supp 14 (1978).

⁷³ *Suprat* n.3

⁷⁴ *Supra* n.6.

⁷⁵ *Supra* n.4.

⁷⁶ *Supra* n. 2.

⁷⁷ The Court's 14th Amendment jurisprudence varies with respect to the approach it takes. In situations where a “fundamental interest” is at stake, or where the legislature is classifying a “suspect class” of persons, the Court employs strict scrutiny. *Washington v. Davis*, 226 U.S. 229 (1976); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

⁷⁸ *Id.*

NCLB is potentially subject to both tests. Yet regardless of which test it is reviewed under, it fails. It is subject to, and fails, rational basis review because: (a) it impacts access to education, and; (b) it is not rationally related to helping students make “adequate yearly progress”. It is potentially subject to, and fails, strict scrutiny because: (a) it makes a race based classification in the form of school districts with high percentages of ELLs, and; (b) although it strives to further a compelling governmental interest, the means it uses to do so (high stakes testing for ELLs despite inadequate preparation) are not narrowly tailored accordingly. Thus, even when NCLB is subjected to the most rigid scrutiny, it violates equal protection.

A. The Court’s Jurisprudence on Education and Equal Protection

In *Brown v. Board of Education*, the seminal case for both education and equal protection, a unanimous Court announced that education is the foundation of effective citizenship.⁷⁹ Since then, the Court has distinguished different rights as receiving different degrees of protection under the law.⁸⁰ It addressed the issue of education as a “right” in *San Antonio v. Rodriguez*, where it held that while education is not a fundamental right for purposes of the Constitution, it is so essential to building a foundation for effective citizenship that it cannot be denied absent a legitimate state interest.⁸¹ In its decision, it recognized that education receives a degree of scrutiny beyond rational basis but not rising to the level of strict scrutiny.⁸² Instead, it is subject to “intermediate scrutiny”.⁸³ Intermediate scrutiny requires something more than a rational basis between a law’s purported ends and the means used to achieve them.

NCLB fails scrutiny under this analysis because the means used to implement it are not rationally related to its purported goals. While it is possible to argue that the penalties NCLB visits upon failing schools would motivate those schools to better themselves, the same cannot be argued with respect to NCLB in the context of bilingual education. The fact that NCLB does

⁷⁹ 347 U.S. 483 (1954).

⁸⁰ The Court initially decided that race based classifications are reviewed under strict scrutiny in *Carolene Products Co. v. United States*, 304 U.S. 144 (1938). It was in that case in a footnote that the Court established what would be the backbone of its equal protection jurisprudence for the rest of the century. In other cases, the Court has held that rights such as the right to vote and the right to property ownership receive strict scrutiny as they are fundamental rights that can be found either expressly or impliedly in the Constitution.

⁸¹ *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

⁸² *Id.*

⁸³ *Kadrmas v. Dickerson School District*, 487 U.S. 450 (1988).

less than most state courts had previously required in terms of bilingual programs suggests that it imposes the penalties it does with little regard for what has transpired in the classroom. This is confirmed both by the fact that funding for the development of bilingual programs is reduced and by the fact that requirements for bilingual programs to undergo regular evaluation are eliminated.⁸⁴ Therefore the bilingual programs forwarded under NCLB cannot be classified as narrowly tailored to bringing all students up to an objective standard of academic proficiency. As such, NCLB fails rational basis review.

B. NCLB Treats School Districts with High Percentages of ELLs As a Suspect Class.

Even if NCLB is examined for constitutionality under strict scrutiny, it fails. It does so because it treats school districts with large numbers of ELLs dissimilarly than other districts based on race. It does this in two ways. First, it classifies ELLs as a subgroup that must make adequate yearly progress independent of their classmates. Second, it jeopardizes access to education for students in those districts based on that classification. In short, because ELLs are required to make adequate yearly progress as a subgroup, schools with larger percentages of ELLs are in greater jeopardy of being labeled as failing. If a school is labeled failing, its students are left without access to a traditional neighborhood school.⁸⁵ These students are left with four options. They may either continue to attend the failing school, attend a private school, receive home schooling, or get bused to another district school that *is* making adequate yearly progress.⁸⁶ The shortcomings of these solutions need little explanation. First, if a failing label is as bad as NCLB proclaims, then no student should have to attend such a school. Second, many parents simply cannot afford to send their children to private schools, particularly those parents living in the type of low income areas where failing schools are most prevalent. Third, those same parents are often without the time or qualifications to home school their children. Fourth, relegating children to a busing option drastically changes access to public education along racial lines; school districts with high percentages of ELLs are treated differently under NCLB by as a result of their racial composition.

⁸⁴ *Supra* n. 25

⁸⁵ *Supra* n. 27

⁸⁶ *Id.*

This is the essence of an equal protection violation, treating similarly situated persons dissimilarly. When that unequal treatment is race based, its legitimacy is subjected to strict scrutiny.⁸⁷ Strict scrutiny asks first, whether the state has a legitimate interest it is attempting to further, and second, whether the law in question is narrowly tailored towards that interest. NCLB fails this test. By labeling ELLs as a subgroup that must make adequate yearly progress independent of the rest of the student body, NCLB isolates out those school districts with high ELL populations on the basis of race. Moreover, while the interest at stake is a valid one, the means used to achieve that goal are not narrowly tailored accordingly. They are penalty oriented testing mechanisms that focus on results rather than instruction. They do less, not more, to assess the progress of students and teachers involved in bilingual programs than is required under most state laws and certainly less than is required under *Castenada*.⁸⁸ They also do less in terms of funding, as they have capped funding for bilingual programs at half of what it was in fiscal year 2001.⁸⁹

Furthermore, the solutions offered by NCLB are temporary ones at best. Schools within the district that are making adequate yearly progress become inundated with students from failing schools, as well as students with limited English proficiency and who have not received meaningful instruction. As a result, schools in a district with a large number of ELLs have to compensate for failing schools. In the process, the quality of education at district schools that were previously making adequate yearly progress will suffer. These solutions are neither narrowly tailored nor are they effective.

C. Counterpoints

There are two ready counterpoints to this position. The first is that the Court has consistently held that a law is not a violation of equal protection simply because it is imperfect or unwise.⁹⁰⁹¹ The second is that the Court has held that the right to an education does not mean

⁸⁷ *Washington v. Davis*, 426 U.S. 229 (1976); *Arlington Heights v. Metropolitan Housing*, 429 U.S. 252 (1977).

⁸⁸ 648 F.2d 989 (5th Cir. 1981).

⁸⁹ *Supra* n. 25

⁹⁰ The majority opinion in *Rodriguez* echoed the sentiment that simply because an interest is protected does not mean that it is entitled to the utmost protection, especially when that right is directly tied to finite government resources.

that every child is entitled to the same caliber of instruction.⁹² Even in light of these arguments, the claim that NCLB violates the equal protection remains intact.

1. NCLB Constitutes *De Facto* Discrimination.

The issue of equal protection and NCLB is not a question of distributing resources equitably. Rather, the issue is one of *effect*. NCLB constitutes de facto discrimination by targeting ELL dense school districts for failure. Starting with *Brown* and ending in *Dowell ex rel Dowell v. Board of Education*, the Court has developed a body of case law supporting the notion that when the Court is hearing cases under a de facto umbrella, that the claimant has only to show discriminatory effect.⁹³ ⁹⁴ By contrast, when the Court is hearing cases under a de jure umbrella, the claimant must show discriminatory intent.

The equal protection challenge in this note falls under the de facto umbrella. NCLB effectively draws race based lines and jeopardizes access to education based on those distinctions. This is the essence of de facto discrimination. In such situations, the Court looks not to animus, but to effect.⁹⁵ While the intent behind NCLB is genuine, the effect that is detrimental. Entire school districts are put in jeopardy of being labeled as failing because a select group of students fail to make adequate yearly progress. Therefore, NCLB has the effect of disadvantaging those school districts with higher percentages of minority students.

⁹¹ *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989). In *DeShaney*, the Court confirmed a principle of Constitutional construction – that the 14th Amendment is a limit on the Federal Government, not an affirmative grant of basic rights to the states. In that case, the question was whether the state had an affirmative duty to remove a child from the custody of his abusive father. The Court held that their failure to remove the child was not subject the same test as would a questionable removal proceeding by the state.

⁹² In *Rodriguez*, the Court stated that “[W]hile it is no doubt true that reliance on local property taxation for school revenues provides less freedom of choice with respect to expenditures for some districts than for others, the existence of “some inequality” in the manner in which the State’s rationale is achieved is not alone sufficient a basis for striking down the entire system.” It went on to note that to uphold the challenge in that case would signal an upheaval in public education in Texas and elsewhere. Unlike that case, upholding the challenge proposed in this note would not require any such upheaval. Moreover, the challenge in this case rests not on the shaky ground of wealth distribution, but rather on an inherent classification flowing from national origin. This is a forward step both in the areas of educational policy and equal protection, but not a drastic one.

⁹³ 347 U.S. 483 (1954).

⁹⁴ *Dowell ex rel Dowell v. Board of Education*, 8 F.3d 1501 (10th Cir. 1993).

⁹⁵ *Id.*

2. NCLB Constitutes an Outright Denial of Education and Is Therefore Distinguishable from *Rodriguez*.

Furthermore, the penalties imposed by the NCLB are factually distinguishable from *Rodriguez*.⁹⁶ There the issue was the propriety of a traditional system of financing public schools through property taxes.⁹⁷ The argument was that because some neighborhoods are poorer than others that the traditional system of school finance treated similarly situated students dissimilarly based on wealth.⁹⁸ The Court concluded that children from lower income neighborhoods were not being denied the right to attend school based on the fact that they lived in low income neighborhoods. They were still afforded an opportunity to public education.

By contrast, NCLB has the practical effect of denying access to public education. The question is not one of equality in substance, as it was in *Rodriguez*, but of equality in access.⁹⁹ By intervening in public schools based on the performance of an ill-prepared subgroup, NCLB makes access to public education inherently unequal through a design that is neither narrowly tailored, nor rationally related, to the government's interest.

Admittedly, there is little precedent to in making this kind of an equal protection challenge. The Court has yet to give an authoritative opinion in the area of bilingual education and equal protection. In *Lau*, the issued was raised, but the Court decided the case on § 601 of the Civil Rights Act of 1964.¹⁰⁰ ¹⁰¹ Writing for the Court, Justice DOUGLAS asserted that any denial of a meaningful opportunity to participate in an educational program constitutes discrimination, as does receiving fewer benefits than the English speaking majority. He went on to write that “[W]here inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.”¹⁰² In light of those remarks, the fact that *Lau*

⁹⁶ 411 U.S. 1 (1973).

⁹⁷ 8 F.3d 1501 (10th Cir. 1993).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ 411 U.S. 563 (1974).

¹⁰¹ 20 U.S.C. § 6301 (1964).

¹⁰² *Supra* n. 3 at 56.

was decided on statutory grounds and not Constitutional ones is irrelevant.¹⁰³ The thrust of the argument remains the same – educational programs that deny non-English speaking students an equal opportunity to take full advantage of educational opportunities amounts to discrimination.

Requiring that ELLs make adequate yearly progress under penalty of having their school labeled as failing denies them this opportunity. It constitutes a discriminatory effect not only for those students who do not speak English as a first language, but for all of those students living in school districts with large percentages of minority students. These school districts run the risk that all of their students will be denied an equal opportunity to education strictly because a sizeable number of their classmates do not speak English. The suspect class, therefore, is not ELLs alone, but school districts with large minority populations. The fact that all of the students affected are not ELLs is inconsequential as the standards of what constitutes discrimination are satisfied – students in these school districts are treated dissimilarly than students in other school districts based on a racial demographic.

V. CONCLUSION

No Child Left Behind's ambition exceeds its ability. While its intentions are good and the means it implements to achieve them are aggressive, its energies are misdirected into a myriad of testing devices and penalty oriented policies that fail to target the problems they proclaim to resolve. In short, while bilingual education has failed to bring English Language Learners into the realm of academic proficiency, NCLB presupposes that that shortcoming is a by-product of the policies that had previously been in place. This is not the case. If anything, it is the result of those policies not having had adequate time to prosper. Regardless, NCLB not only deviates from past policies, it detracts from them. Moreover, because it has the effect of classifying those school districts that have high percentages of ELLs as a de facto suspect class, it runs afoul of the Supreme Court's guidelines with respect to what is acceptable in terms of equal protection. Therefore, NCLB is, at the very least, a break with the policies and case law that have been developed in response to the changing face of bilingual education. At the very most, it is a violation of the Equal Protection clause. In either scenario, NCLB should be re-examined in light

¹⁰³ 411 U.S. 563 (1974).

of *Castenada* so that the policies that have been outlined to date can be allowed the time they need to make a positive impact without the threat of punitive actions for failure to reach arbitrary achievement standards.

BIBLIOGRAPHY

Supreme Court Cases

Arlington Heights v. Metropolitan Housing, 429 U.S. 252 (1977).

Brown v. Board of Education, 347 U.S. 483 (1954).

Carolene Products Co. v. United States, 304 U.S. 144 (1938).

DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189 (1989).

Dowell ex rel Dowell v. Board of Education, 8 F.3d 1501 (10th Cir. 1993).

Kadmas v. Dickerson School District, 487 U.S. 450 (1988).

Lau v. Nichols, 414 U.S. 56 (1974).

San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

Washington v. Davis, 226 U.S. 229 (1976).

District Court Cases

Castenada v. Pickard, 648 F.2d 989 (5th Cir. 1981).

Gomez v. Illinois, 811 F.2d 1030 (7th Cir. 1987).

Valeria v. Gary Davis, 307 F.3d 1036 (9th Cir. 2002).

State Court Cases

Rios v. Read, 480 F.Supp. 14 (E.D.N.Y. 1978).

Teresa v. Berkeley Unified School District, 724 F.Supp. 698 (N.D. Cal. 1989).

Constitutional Provisions

U.S. Const. amend. XIV.

Statutes

20 U.S.C. § 1703 (1974).

20 U.S.C. § 6301 (2001).

42 U.S.C. § 2000 (1964).

Law Review Articles

Chandrasekhar, Charu A., *Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act's Race-Conscious Accountability*. 24 Chicano-Latino L. Rev. 43, Spring 2003

Farquharson, Marilyn. *Proposition 227: A Burning Issue for California's Bilingual Students*. 8 B.U. Pub. Int. L.J. 333, Winter, 1999.

Losen, Daniel J., *Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act's Race Conscious Accountability*. 47 How. L.J. 243, Winter, 2004.

Reibach, Amy C., *The Power Behind the Promise: Enforcing No Child Left Behind to Improve Education*. 45 B.C. L.Rev. 667, May, 2004

Periodicals

Crawford, James. *No Child Left Behind: A Misguided Approach to School Accountability for English Language Learners*, Forum on Ideas To Improve the NCLB Accountability Provisions for Students with Disabilities and English Language Learners, Center for Education Policy, 14 September 2004.

Peterson, Paul E. *No Child Left Behind? The Politics and Practice of Accountability* (2003). Forthcoming from the Brookings Institute Press.

Vaishnav, Anand. *Dissecting Bilingual Education's Poll Defeat: Movement Lacked Money, Message*, Boston Globe, Nov.10, 2002.