The Evolution of Legal Requirements for the Education of Students of Limited English Proficiency

by Alan Jay Rom

I. The Problem

Thousands of students who are not proficient in English are enrolled in school districts throughout the United States. In fact, the United States is the fifth largest Spanish-speaking country in the world[1] and the number of persons whose native language is not English is rapidly increasing. The United States has served as a magnet to millions "pushed by the hardships of their present life and pulled by the promise of opportunities. . . ."[2] Traditionally, immigrants settled in larger metropolitan areas, in older cities, replacing those at the lower end of the economic ladder who preceded them. Urban school systems have had to face the question of how best to educate children whose first, or only, language was not English and whose culture was different from the one in which they found themselves.

EDITOR'S NOTE

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Buried within the debates on the best way to educate students of limited English proficiency, the scope of court orders, and federal or state-mandated legislation in the area, lie different conceptions of what constitutes bilingual education and which in turn are based on different philosophies concerning education and diversity. Most educators would agree that bilingual education is a process whereby students learn the subjects taught by the school system in a language in which they are proficient, while *at the same time* learning English. As students become proficient in English, English is introduced into the process of teaching the other subjects taught. Conflict ensues on what happens when students become proficient in English. Is the native language abandoned, only to be regained, if at all, in foreign language courses, or should it be maintained, nurtured, and even extended so that all students may learn through the medium of more than one language and be exposed to more than one culture? There are many variations between those two models.

While there is nothing in the law prohibiting school systems from becoming bilingual or multilingual, as are many school systems in Europe and other parts of the world, the legal battles in the United States, if successful, can only establish transitional models. Once students are sufficiently proficient in English under a transitional program, bilingual instruction ends and they enter the standard curriculum where instruction is in English only.

II. History of Bilingual Education Until *Lau v. Nichols*

Schools have offered instruction in languages other than English since the days of early colonists. The Dutch settlers in New York, the French in states bordering Canada to Louisiana, the Germans in Pennsylvania and Delaware, the Russians in Alaska to Northern California, the Spanish in Florida and the Southwest, each used their native language as the primary or sole medium of instruction. This carried over to the nineteenth century, when public education began and English was taught as a second language.[3] It was not until the Industrial Revolution and the anti-German sentiment that emerged following World War I that classroom instruction in languages other than English fell into disfavor.[4]

The social consciousness of the civil rights movement that brought about legal and political changes (primarily focused on blacks) in the early and mid-1960s did not treat the problems faced by

linguistic minorities. Although several educational models for bilingual/bicultural educational programs emerged in the early 1960s and federal funding for the implementation of those models was enacted in 1968,[5] the first state law mandating any form of bilingual education was not enacted until 1971.[6] Although discrimination in federally assisted programs was proscribed by Title VI of the Civil Rights Act of 1964 (Title VI),[7] it was not enforced as applied to the denial of equal educational opportunity to children of limited English proficiency until after the United States Supreme Court decision in *Lau v. Nichols* in 1974.[8] The Department of Health, Education and Welfare (HEW) then issued guidelines for minimum compliance with the requirements of the *Lau* decision. More recent court decisions have relied on the Equal Education Opportunities Act of 1974 (EEOA)[9] for the legal underpinning of their remedial orders.

Massachusetts enacted legislation concerning bilingual education over two years before the Supreme Court decision in *Lau v. Nichols*. Known as the Transitional Bilingual Education Act (TBE), TBE requires school districts in Massachusetts to provide instruction in the students' native language until they are proficient in English, requires instruction in the culture of the students' backgrounds, and provides for parental involvement through the creation of parent advisory councils (PACs).

The federal response, developed by HEW in the summer of 1975, and known as the *Lau* Remedies or Guidelines, was used until 1981 and paralleled the transitional model first enacted in Massachusetts. The federal legislation, enacted in 1968, only provides funding for educational models and not for districtwide programs.

Reviewing what A. Bruce Gaarder called the factors affecting collective bilingualism,[10] it can be seen that, in the United States the "melting pot" or assimilation theory prevails over cultural pluralism; that American society somehow is threatened by the coexistence of languages other than English; that for several historical, demographic, and sociological reasons only competency in the English language is considered educationally relevant or significant. "Transitional" programs were designed primarily to respond to Spanish-speaking (Puerto Rican and Chicano) students and the overwhelming litigation in this field has naturally been brought on behalf of these groups. The strength of legislative and court responses to the failure to provide equal educational opportunities for linguistic minorities has been different from comparable responses to intentional segregation by race.

III. *Lau v. Nichols* and Its Aftermath

While the overwhelming number of students in bilingual/bicultural educational programs are in Spanish-English programs, the watershed case – and the only case concerning instruction to students whose native language is not English decided by the United States Supreme Court – involved the rights of Chinese-speaking students in the San Francisco Unified School District. It was undisputed that "more than 2,800 school children of Chinese ancestry attend[ed] school in the San Francisco Unified School District system even though they did not speak, understand, read, or write the English language, and that as to some 1,800 of these pupils the respondent school authorities did not take any significant steps to deal with this language deficiency."[11]

The lower court's view of the alleged discrimination was stated by the Ninth Circuit Court of Appeals, which reasoned that "every student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school system."[12] The Supreme Court disagreed, stating that "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."[13] The Court further reasoned that:

> Basic English skills are at the very core of what these public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful.[14]

The Supreme Court based its decision on Title VI and not the Constitution.[15] Pursuant to Section 602 of Title VI each federal agency was required to promulgate regulations to enforce the nondiscrimination proscriptions in all programs receiving federal funds. The regulations of the HEW stipulated that recipients may not:

> Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

> Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program.[16]

The discrimination barred by the statute and regulations was clarified by more specific guidelines issued by HEW in 1970,[17] and the Supreme Court held in *Lau v. Nichols* that HEW had authority to require the following of school districts that received federal funds:

> Where 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.
>
> Any ability grouping or tracking system employed by the school system to deal with the special language needs of national origin-minority group children must be designed to meet such language skill needs as soon as possible and must not operate as an educational deadend or permanent track.[18]

The *Lau* decision approved HEW's regulations barring discrimination "which has that *effect* even though no purposeful design is present . . ."[19] (See further discussion at Note 49, *infra*). The Court concluded that the linguistic minority children "receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program . . ."[20]

Following the *Lau v. Nichols* decision, the Office for Civil Rights of HEW (OCR/HEW), now the Department of Education or DE, organized a Task Force, which outlined various methods to open up public school instructional programs to limited or non-English proficient children. The task force produced a report, "Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful under *Lau v. Nichols*" (or as was commonly called, the *Lau* Guidelines or Remedies"), which was issued by OCR/HEW in the summer of 1975.

The *Lau* Guidelines outlined the *minimum* that OCR/HEW regarded as necessary to comply with Title VI and the *Lau v. Nichols* decision. Briefly, the *Lau* Guidelines required that school districts, if found in noncompliance with Title VI submit remedial plans that detail procedures to identify the student's primary or home language, classify each student into one of five "Lau categories"[21] according to language dominance, and assess the student's linguistic proficiency and academic achievement level in order to "prescribe an educational program utilizing the most effective teaching style to satisfy the diagnosed educational needs."[22] Although school districts could design educational programs that were transitional, bilingual/bicultural, or multilingual/multicultural in nature, practically all program designs submitted to the OCR/HEW (or DE) have been transitional in scope and have been tailored to the specific minimum requirements.[23]

The *Lau* Guidelines further required that the course offerings not be culturally biased, i.e., required courses must not "exclude pertinent minority developments which have contributed to or influenced such subjects."[24] Remedial action was required to assure that elective courses or co-curricular activities do not remain "racially ethnically identifiable" unless they can be educationally justifiable.[25]

Teachers and other instructional staff (e.g., aides) were required to be "linguistically/culturally familiar with the background of the students to be affected" and the "student/teacher ratio for such programs" had to be equal or less than the ratio for the district.[26]

To avoid the conflict between bilingual programs and school desegregation, the *Lau* Guidelines stated that "[I]t is not educationally necessary nor legally permissible to create racially/ethnically identifiable schools or classes" to carry out these programs.[27]

Parents of children whose primary or home language is not English were required to be informed of all school programs and activities to the extent that other parents were informed of these programs. Appropriate translation (e.g., in an understandable form) had to be provided in the native language. Specific descriptions had to be given to parents concerning the TBE or other program assistance that the school district offered.[28]

Finally, school districts had to submit periodic reports to OCR/HEW concerning the implementation of their remedial plan and its effectiveness in eliminating language barriers. OCR/HEW reviewed the reports and often met with school district representatives to help them meet their goals and objectives.[29]

Also, following the *Lau* decision, Congress passed the Equal Educational Opportunities Act (EEOA). Largely in reaction to numerous court decisions concerning the transportation of students in school desegregation cases, Congress provided that:

> No state shall deny 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 programs. [emphasis added] 20 U.S.C. §1703(f).

IV. The Early Decisions

Earlier decisions involving the education of students of limited English proficiency were either premised on *Lau* and Title VI or issued in the context of remedial orders in school desegregation cases decided under the Fourteenth Amendment. The more recent cases have been decided under §1703(f) of the EEOA. For the most part, all court imposed remedies provided some form of the transitional model and, where state legislation existed, paralleled the state model.

A. School Desegregation Cases

U.S. v. State of Texas[30] is the only school desegregation case in which the court detailed the content of a bilingual/bicultural educational program as a court-imposed remedy. This case was decided well before *Lau v. Nichols* and the *Lau* Guidelines, and even before the enactment of the Transitional Bilingual Education Act in Massachusetts. A comparison between that plan, based on the educational research of Dr. Jose A. Cardenas (and discussed *infra* at Note 32) as ordered by the court, and state laws (such as Massachusetts) or even the *Lau* Guidelines, outlined, *supra*, shows many parallels; suffice it to say here that even though it went somewhat beyond the limits of the transitional models, it was not adopted by any other court.

The consideration given to Mexican-American students by the court-ordered plan resulted from liability findings that, because of their English language deficiencies and cultural incompatibilities, they could not function in the standard curriculum. Therefore, the bilingual/bicultural educational program was the quickest way to desegregate the school district.[31]

Whether for pedagogical reasons or otherwise, those seeking court relief of more than a transitional bilingual/bicultural educational model through the courts should consider the fate of Dr. Cardenas's theory of incompatibilities in the Denver school desegregation case, *Keyes v. School District No. 1.* The Tenth Circuit Court of Appeals rejected Dr. Cardenas's plan and the theory upon which it was premised.[32] The court remanded the case "for a determination of what relief, if any, [was] necessary to ensure that Hispano and other minority children will have the opportunity to acquire proficiency in the English language."[33]

B. Title VI Cases

A scorecard of cases filed pursuant to Title VI also supports the thesis that, while there are variations of the theme, relief through litigation includes the ordering of transitional bilingual educational programs in most cases.[34] The courts have interpreted the statutory mandates "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."[35] Perhaps the best understanding of the underlying psychological and educational reasons for these decisions was expressed in *Serna v. Portales Municipal Schools:*

> that when Spanish surnamed children come to school and find that their language and culture are totally rejected and that only English is acceptable, feelings of inadequacy and lowered self-esteem develop . . . If a child can be made to feel worthwhile in school then he will learn even with a poor English program. . . . [C]hildren who are not achieving often demonstrate both academic and emotional disor-

ders. They are frustrated and they express their frustration in lack of attendance, lack of school involvement and lack of community involvement. Their frustrations are reflected in hostile behavior, discipline problems and eventually, dropping out of school.[36]

Two courts have denied relief altogether under Title VI. In *Otero v. Mesa County Valley School District No. 51,* the court viewed plaintiffs claims concerning the Grand Junction, Colorado Public School System this way:

> District 51 has made and is making a real effort, an all out effort, which in no circumstances can be said to be a mere token effort. I could do no better, and I do not believe that a federal judge should step in where the school board and the school officials are doing their best and are doing a good job. The only injunction order I could, in good faith, enter, would be one which ordered the school board to "keep up the good work."[37]

In 1978, the Ninth Circuit, which five years earlier had denied relief in *Lau v. Nichols,* rejected claims by Mexican-American and Yaqui Indian schoolchildren that they were entitled to bilingual/bicultural educational programs. The Court rejected the constitutional claims stating:

> The decision of the [school district] to provide a predominantly monocultural and monolingual educational system was a rational response to a quintessentially "legitimate" state interest. The same, perforce, would be said were the [school district] to adopt the [plaintiff's] demands and be challenged by an English-speaking child and his parents whose ancestors were pilgrims.[38]

Even where courts are willing to become involved and issue remedies for violations, they have been unwilling to become embroiled in pedagogical debates.

In neither *Serna, Cintron,* nor *Rios,* (See *supra* Note 34), did the court detail the specific contents of acceptable bilingual educational programs.

In *Serna, supra,* the district court first dismissed the defenses offered by the school district for failure to provide adequate programs; i.e., difficulty of teacher recruitment, budget constraints, and provision of programs in some schools.[39] The school district's plan, which was thereafter submitted to the court was challenged as inadequate by the plaintiffs, who thereafter submitted their own to the court. The district court then made its final orders, which expanded its earlier orders concerning the provision of a minimum bilingual program, recruitment and hiring, and funding of the program. Its orders were affirmed on appeal.

Similarly, in *Cintron, supra,* the court reviewed the Brentwood School District's bilingual education program and found it to be inadequate. It found the school district deficient in its identification procedures, student assignment procedures and the overall administration of appropriate programs. The school district was ordered to submit a plan that complied with the *Lau* Guidlines and outlined several elements to be included in the plan.[40]

In *Rios, supra,* the court likewise reviewed the school district's bilingual/bicultural educational program and found it to be wanting. It ordered the school district to submit an acceptable plan and gave the plaintiffs time in which to comment on the proposed plan. The plan would be measured against the standard that its "affirmative action for language-deficient students [includes] establishing an ESL and bilingual program and to keep them in such a program until they have attained sufficient proficiency in English to be instructed along with English-speaking students of comparable intelligence."[41]

The cases settled by consent decrees have provided (at least) for transitional bilingual educational programs – and sometimes more (maintenance). The most difficult school system to address was the nation's largest school system – New York City. It is therefore remarkable that all parties agreed to a consent decree that provided bilingual/bicultural educational programs for Hispanic children, whose "English language deficiency prevents them from effectively participating in the learning process and who can more effectively participate in Spanish."[42] The consent decree also provided that such children would "receive a program including intensive training in English language skills, instruction in substantive courses in Spanish, and reinforcement of Spanish language skills. . . ."[43]

Using the *Aspira* consent decree for guidance, plaintiffs in *Ramos v. Gaines*[44] sought to implement bilingual/bicultural educational programs in the Hartford, Connecticut, Public Schools (H.P.S.), a school system where thirty percent of all students are Hispanic. Two months after the lawsuit was filed in Federal court, OCR/HEW found the H.P.S. out of compliance with Title VI regarding bilingual/bicultural education, special education, and discipline. The parties finally agreed to suspend the litigation and negotiate a settlement based on the proposed OCR/HEW compliance plans. The

parties negotiated three compliance plans which were incorporated in the final consent decree. The consent decree also included a Philosophy and Policy of the school system concerning its recognition that "the ability to function in more than one language and culture is . . . desirable . . ." and that bilingual/bicultural education is "based upon the need to incorporate multicultural strengths with respect to the students' home or native heritage . . ." and that "all children in its public schools have a right to share these strengths. . . ." Most significantly, the H.P.S. affirmed that "all students, regardless of native linguistic and cultural heritages, must be guaranteed equal and effective career and employment opportunities, and that bilingual/bicultural facility enhances those opportunities."[45] The consent decree also provides mechanisms to minimize layoffs of bilingual personnel (e.g., last hired, first fired) and to increase bilingual personnel.[46]

More recently, the District Court approved a comprehensive consent decree governing bilingual education programs in the Worcester, Massachusetts, Public Schools (W.P.S.). After two preliminary injunctions were issued (the second requiring compensatory programs for certain students) the parties in *Latin Association for Progress and Action (ALPA) v. Durkin* negotiated a detailed plan governing every aspect of the bilingual education program and the method of W.P.S. guarantee of ancillary services.[47]

In early 1979, parents promised the Boston School Committee that if the issue of effective bilingual education programs was not addressed, they would raise the issue as a "related matter" to the school desegregation case. Eight months later, on November 30, 1979, the Boston School Committee unanimously approved what is known as the Voluntary *Lau* Compliance Plan ("*Lau* Plan"). Negotiation of the Boston *Lau* Plan involved the expertise of school officials and teachers at every level. The plan was considered to be the "state of the art."[48]

C. Later Cases

One of the first acts of the Reagan Administration upon assuming office in January 1981 was to revoke the *Lau* Guidelines. Largely because the *Lau* Guidelines served as the basis for OCR's *Lau* Plans, the three latest reported cases on bilingual education have redefined the legal standard to be applied and have based that standard on the EEOA and not Title VI analysis.[49]

The first court decision interpreting the EEOA was *Castaneda v. Pickard*.[50] There the court addressed what was required by school districts and the degree of flexibility to be accorded school officials in designing educational programs for students of limited English proficiency. Unlike *Lau*, which challenged the lack of any program, the plaintiff here challenged the sufficiency of the bilingual program adopted by the Raymondville, Texas, Independant School District. The court recognized that the *Lau* Guidelines had never been published and observed that "we do not think that these guidelines are the sort of administrative document to which we customarily give great deference in our determinations of compliance with a statute."[51] Recognizing the confusion about the standard of proof required following post-*Lau* Title VI decisions the court recognized that Congress, "acting pursuant to its power to enforce the fourteenth amendment," enacted §1703(f) in recognition 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 of [a] district.[52] The court, "confronted reluctantly" with the need to prescribe "substantive standards and policies" for educational institutions, developed a three-part test for meeting the requirements of §1703(f):

First the court must examine carefully the evidence the record contains concerning the soundness of the educational theory upon which the challenged program is based. . . . The court's responsibility, insofar as educational theory is concerned, is only to ascertain that a school system is pursuing a program informed by an educational theory recognized as sound by some experts in the field, or, at least, deemed a legitimate experimental strategy. 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. We do not believe that it may fairly be said that a school system is taking appropriate action to remedy language barriers if, despite the adoption of a promising theory, the system fails to follow through with practices, resources and personnel necessary to transform the theory into reality.

Finally, a determination that a school system has adopted a sound program for alleviating the language barriers impeding the educational progress of some of its students and made bona fide efforts to make the program work does not necessarily end the court's inquiry into the appropriateness of the system's actions. If 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. We do not believe that Congress intended that under §1703(f) a school would be free to persist in a policy which, although it may have been "appropriate" when adopted, in the sense that there were sound expectations for success and bona fide efforts to make the program work, has in practice, proved a failure.[53]

The Fifth Circuit again faced this issue in *U.S. v. Texas*,[54] a statewide school desegregation case with decisions dating to the early 1970s. The court, in a remand to the district court, summarized and reaffirmed the *Castaneda* test to evaluate a program under §1703(f):

> Is the program based on an educational theory recognized as sound or at least as a legitimate experimental strategy by some of the experts in the field? Is it reasonably calculated to implement that theory? Has it, after being used for a time sufficient to afford it a legitimate trial, produced satisfactory results?[55]

Finally, on remand in *Keyes v. School District No. 1*,[56] the court analyzed Denver's bilingual program under the *Castaneda* tripartite test and found that the school district failed "to take reasonable action to implement the bilingual education policy which it adopted."[57] Denver was ordered to develop an appropriate remedial plan.[58]

Conclusion

The most recent decisions, *Keyes, U.S. v. Texas* and *Castaneda* before it, recognized the internal conflict within cases involving equal educational opportunity. As the court observed:

> It is beyond the competence of the courts to determine appropriate measurements of academic achievement and there is damage to the fabric of federalism when national courts dictate the use of any component of the educational process in schools governed by elected officers of local government.[59]

This reluctance may well explain why *Otero, supra,* and *Guadalupe, supra,* were unsuccessful.[60] But these recent decisions are putting school districts on notice; while they are being given the responsibility, flexibility, and authority they long for, they will be held accountable for producing results – students who have equal access to a meaningful opportunity to participate in the educational program without regard to the fact that their first language is not English.

NOTES

1. 15 ENCYCLOPAEDIA BRITANNICA 1031 (1983) (Mexico, 1st; Spain, 2nd; Argentina, 3rd; Colombia, 4th; United States, including Puerto Rico, 5th).
2. Morgan v. Kerrigan, 401 F. Supp. 216 at 222 (D. Mass. 1975).
3. Maria Estela Brisk, *Language Policies in American Education: An Historical Overview,* LANGUAGE AND CULTURAL CONSIDERATIONS OF BILINGUAL EDUCATION, National Dissemination and Assessment Center, Cambridge, MA (1979).
4. *See* Meyer v. Nebraska, 262 U.S. 390 (1923), Bartels v. Iowa, 262 U.S. 404 (1923), Farrington v. Tokushige, 273 U.S. 284 (1927), and Mo Hock ke Loc Po v. Stainback, 74 F. Supp. 852 (D. Hawaii 1947).
5. Title VII of the Elementary and Secondary Education Act of 1968, 20 U.S.C. §§3221 *et seq.*
6. Massachusetts General Laws (M.G.L.) Chapter 71A.
7. 42 U.S.C. §§2000d *et seq.* (1970).

8. 414 U.S. 563 (1974).
9. 20 U.S.C. §§1703 *et seq.*
10. A. Bruce Gaarder, *Bilingual Education: Central Questions and Concerns,* NEW YORK UNIVERSITY EDUCATION QUARTERLY, (Summer 1975).
11. 414 U.S. at 569 (Stewart, J. concurring).
12. 483 F.2d 791 at 797 (9th Cir. 1973).
13. 414 U.S. at 566.
14. *Id.*
15. "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied benefits of or be subject to discrimination under any program or actively receiving Federal financial assistance."
16. 45 C.F.R. §80.3(b)(1).
17. 35 Fed. Reg. 11595.
18. *Id.*, 414 U.S. at 568.
19. *Id.*
20. *Id.*
21. The Lau categories were:
    A. – Monolingual speaker of the language other than English
    B. – Predominantly speaks the language other than English
    C. – Bilingual
    D. – Predominantly speaks English
    E. – Monolingual speaker of English
22. Lau Guidelines II Diagnostic/Prescriptive Approach.
23. Even the TBE approach was not fully required for *Lau* category "A" children at the secondary level; a High Intensive Language Training (HILT) program was an acceptable option for these students. But the HILT or other similar program would not be acceptable unless the school district could demonstrate that this method of instruction would not "result in a substantial delay in providing those students with the necessary English language skills needed by or required of other students at the time of graduation." *Lau* Guidelines, III-1b Educational Program Selection. While at least a TBE program (not just English As a Second Language or ESL) is prescribed at the elementary level for *Lau* category "B" students, the school district was not required to provide any native language instruction for these students at the intermediate and high school levels if students have been in the school system for less than a year and "were achieving at grade level or better." *Lau* Guidelines, III-2b Educational Program Selection. Such students in the school system for a year or more who were not at grade level must get some form of service. *Id.*

    The school district was not required to provide any form of native language instruction for students who were in *Lau* categories "C" and "D". But if the student was not achieving at grade level, the school district was required to provide whatever supportive services to them that were provided to other students in the school district. Presumably, this could involve (native) language assistance if this was the reason for the underachievement.
24. Lau Guidelines, IV-A Required Courses.
25. *Id.*, Elective Courses and Co-curricular Activities. School Districts must likewise encourage minority students to enroll in elective where traditionally they have not been enrolled. E.g., occupational/vocational education.
26. *Id.* V-Instructional Personnel Requirements. School districts also had to provide the necessary training to all personnel (by qualified persons) involved with the students in these programs, and outline methods for recruiting and hiring personnel.
27. *Id.* VI-Racial/Ethnic Isolation and/or Identifiability of Schools and Classes.
28. *Id.* VII-Notification to Parents of Students Whose Primary or Home Language Is Other Than English.
29. Nine regional assistance centers, now known as National Origin Discrimination Assistance Centers, were created. Their purpose was to provide technical assistance to school districts in complying with Title VI, its regulations and guidelines, and several of these centers assisted school districts draft Voluntary *Lau* Compliance Plans to comply with the *Lau* Guidelines.
30. 342 F. Supp. 24 (E.D. Texas 1971), *affirmed per curiam* 466 F. 2d 518 (5th Cir. 1972). The plan's Curriculum Design and Content and Instructional Methodology recognized "the cultural and linguistic pluralism to provide for the characteristics of the child's immediate environment and the characteristics of the larger environment in which he shall function in the future." 342 F. Supp. at 30.
31. *Id.* at 25-26.
32. 521 F. 2d 465 at 480-483 (10th Cir. 1975). The Tenth Circuit Court of Appeals described Mr. Cardena's theory of incompatibilities as being:

> premised on the theory that the poor performance of minority children in public schools results from "incompatibilities" between cultural and developmental characteristics of minority children on the one hand, and the methods and expectations of the school system on the other. Because most school systems are operated to meet the needs of middle-class Anglo children . . . they inevitably fail to meet the different needs of poor minority children. Conflicts between the Anglo system and the needs of

minorities are pervasive." 521 F. 2d at 480.

Implementation of the Cardenas Plan would require "an overhaul of the system's entire approach to education of minorities . . . matters of educational philosophy, governance, instructional scope and sequence, curriculum, student evaluation, staffing, non-instructional service . . . community involvement . . . [and a] mechanism for comprehensive monitoring." *Id.* at 480-481.

33. *Id.* at 483. School desegregation cases in which some form of transitional bilingual education program has been ordered include: Milliken v. Bradley, 402 F. Supp. 1096, 1144 (E.D. Mich. 1975), *aff'd* 540 F. 2d 229 (6th Cir. 1976), *aff'd* 433 U.S. 267, (1977) and Morgan v. Kerrigan, 401 F. Supp. 216, 242 (D. Mass. 1975), *aff'd* 530 F. 2d 401 (1st Cir. 1976), *cert. denied sub. nom* White v. Morgan, 426 U.S. 935 (1976) (remedy); Evans v. Buchanan, 416 F. Supp. 328 (D. Del. 1976), *modified and affirmed*, 555 F. 2d 373 (3d Cir. 1977) (en banc), *appeal dismissed*, 429 U.S. 973, (1977) (remedy); Arvisu v. Waco Independent School District, 373 F. Supp. 1264 (W.D. Tex. 1973), *aff'd in part, rev'd in part on other grounds*, 495 F. 2d 499 (5th Cir. 1974); U. S. v. Texas Education Agency, 532 F. 2d 380 (5th Cir. 1976), *vacated on other grounds sub. nom* Austin Independent School District v. United States, 429 U.S. 266, (1976); Morales v. Shannon, 516 F. 2d 411 (5th Cir. 1975); and U.S. v. Board of Education of Waterbury, Civil Action No. 73-465 (D. Conn. 1975).

34. Favorable Title VI decisions include: Serna v. Portales Municipal Schools, 351 F. Supp. 1279 (D.N.M. 1972), *aff'd*, 499 F. 2d 1147 (10th Cir. 1974), Cintron, et al. v. Brentwood Union Free School District, 455 F. Supp. 57 (E.D.N.Y. 1978), Rios v. Read, 480 F. Supp. 14 (E.D.N.Y. 1978).

35. Rios, *supra*, 480 F. Supp. at 21-22.

36. 499 F. 2d at 1147. *See also*, Cintron, *supra*, 455 F. Supp. at 62.

37. 408 F. Supp. 162, 171 (D. Colo. 1975).

38. Guadalupe Organization, Inc. v. Tempe Elementary School District No. 3, et al., 587 F. 2d 1022 (9th Cir. 1978). The court similarly rejected plaintiffs' claims under Title VI holding that "[P]roviding [plaintiffs] with remedial instruction in English . . . makes available the meaningful education and the equality of educational opportunity that [Title VI] requires." *Id.* at 1027.

39. The district court ordered the school district to:

> reassess and enlarge its program directed to the specialized needs of its Spanish surnamed students at Lindsay and also to establish and operate in adequate manner programs at the other elementary schools where no bilingual/bicultural program now exists.
>
> Defendant school district is directed to investigate and utilize whenever possible the sources of available funds to provide equality of educational opportunity for its Spanish-surnamed students.
>
> It is incumbent upon the school district to increase its recruiting efforts and, if those recruiting efforts are unsuccessful, to obtain sufficient certification of Spanish-speaking teachers to allow them to teach in the district.

40. The court described the goal of instruction as being accomplished:

> by competent bilingual teachers in the subject matter of the curriculum while at the same time teaching non-English-speaking children in the English language. The time limitation of the school day is an obstacle that may be overcome by supplementary programs designed to achieve both goals. Extracurricular activities conducted after the school day or during the summer period involving both English and non-English-speaking children comes to mind. Educating the parents of non-English-speaking children of the need to acquire proficiency in the English language is a program that might be incorporated into the plan. (footnotes omitted).

455 F. Supp. at 64.

41. 480 F. Supp. at 23.

42. Aspira of New York v. Board of Education of the City of New York, Civil Action No. 72-Civ. 4002 (S.D.N.Y. August 29, 1974) (consent decree). *See also*, 58 F.R.D. 62 (S.D.N.Y. 1973) (stating valid claim for relief), 65 F.R.D. 541 (S.D.N.Y. 1975) (attorneys fees), 394 F. Supp. 1161 (S.D.N.Y. 1975) (testing issues), and 423 F. Supp. 647 (S.D.N.Y. 1976) (contempt of court). See e.g. 394 F. Supp. at 1161.

The litigation in *Aspira* preceded the decision by the Supreme Court in *Lau v. Nichols*. It was the first case to define the procedures for identifying the children who would participate in the program (including testing) and decide the scope of the bilingual/bicultural educational program. The consent decree was agreed to approximately seven months after the *Lau* decision and was achieved after much persistence by the *Aspira* plaintiffs, community pressure, and legal prowess of lawyers from the Puerto Rican Legal Defense & Education Fund, Inc.

Despite their collective efforts, and despite the consent decree, the school system reneged on the implementation of the consent decree and were found to be in contempt of court. *See* 423 F. Supp. 647.

43. 394 F. Supp. at 1161. This case marks the first open clash between the parties on educational methodology in these programs. The parties disputed the testing procedures, including the norming process. For example, the defendants insisted that only those Hispanic students who scored below the tenth percentile on the English version of the Language Assessment Battery (LAB) to take the Spanish version of the LAB. Plaintiffs insisted that all Hispanic students take both versions of the LAB. The court, asked to resolve this dispute, held that all students whose scores on the English version of the LAB fell below the twentieth percentile would be eligible for the Spanish LAB, or otherwise stated, that, as a prima facie matter, students who fell below the twentieth percentile on the English version of the LAB were those "whose English language deficiency prevents them from effectively participating in the learning process . . ."

44. Civil Action No. H-76-38 (D. Conn. June 5, 1978, Consent Decree).

45. *Id.*

46. *Id.* The consent decree provides that:

> [M]onolingual applicants for permanent positions shall be hired when it is documented and certified in writing by the appropriate Assistant Superintendent that (1) there were no qualified bilingual applicants available after [an] active, efficient, and complete search . . . is completed, (2) the hiring of the monolingual applicant will not inhibit the implementation of the bilingual/bicultural educational program, (3) the monolingual applicant is willing to take all reasonable steps necessary to become bilingual over a reasonable period of time, and (4) the permanent hiring of the monolingual applicant is essential to and in the best interest of the Hartford Public School System.

47. Civil Action No. 78-1150-K (D. Mass. August 23,

1983, Consent Decree). This Consent Decree details all aspects of bilingual programs including Identification, Assessment, Program Placement, Transfer from bilingual programs; prescribes the content of the program, including English As A Second Language (ESL) instruction, provision of textbooks and materials, location of bilingual programs, parent involvement, funding, including state and federal programs to be offered to bilingual program students, programs of special education, gifted and talented, and, vocational/occupational training, teachers, aides and staff training, transportation, detailed recordkeeping requirements, and a timetable for implementation.

48. The *Lau* Plan is a flexible one and changes are made on a mutual basis. Administrative changes were negotiated in April 1981 as the Boston Public Schools moved from a decentralized system to a centralized one. And, on April 30, 1985, the Boston School Committee unanimously approved comprehensive revisions based on increased knowledge of the "state of the art." While many problems continue to remain in the *Lau* Plan's implementation, at least the standards of performance have been set.

49. The Title VI analysis under *Lau* became clouded following the decisions in *Washington v. Davis*, 426 U.S. 289 (1976), *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and several lower court decisions interpreting those two cases centering on the question of whether discriminatory intent was required to prove a Title VI violation. The Supreme Court in *Lau* had based its decision on the validity of HEW's regulations, under which the standard of proof was "effect," not "intent." By the time the Supreme Court finally addressed the issue and upheld the validity of federal regulations, which adopt the "effects test" standard of proof, *Guardians Association v. Civil Service Commission of the City of New York*, 463 U.S. 582 (1983), decisions based on EEOA became the preferred legal basis. As was stated in *Keyes v. School District No. 1*, 576 F. Supp. 1503 at 1519 (on remand):

> The inquiry is not necessary here because it is clear from the plain language of [EEOA] and from the opinion in *Castaneda* . . . that the affirmative obligation to take appropriate action to remove language barriers imposed by 20 U.S.C. §1703(f) does not depend upon the finding of discriminatory intent, and a failure to act is not excused by any amount of good faith.

It should be added that under §1703(f) state boards of education have a duty to ensure that students' language needs are addressed. See, *Idaho Migrant Council v. Board of Education*, 647 F.2d 69 (9th Cir. 1981). *Lynn Hispanic Parent Advisory Council v. Lawson, et al.* Civil Action No. 85-2475-K (D. Mass.) has raised similar questions in Massachusetts.

Section 1703(f) has also been construed to require school systems to teach standard English to speakers of "Black English." In *Martin Luther King Junior Elementary School Children, et al. v. Ann Arbor School District Board*, 473 F. Supp. 1371 (E.D. Mich. 1979) the court required pursuant to §1703(f) the school district to submit a plan:

> defining the exact steps to be taken (1) to help the teachers of the plaintiff children at King School to identify children speaking "Black English" and the language spoken as a home or community language, and (2) to use that knowledge in teaching such students how to read standard English.

Id. at 1383.

50. 648 F.2d 989 (5th Cir. 1981), F. Supp. (S.D. Texas 1984) (on remand).

51. 648 F.2d at 1007. The court was as yet unaware that the *Lau* Guidelines had been revoked by the Department of Education.

52. *Id.* at 1008.

53. *Id.* at 1009-1010.

54. 680 F.2d 356 (5th Cir. 1982).

55. *Id.* at 371.

56. 576 F. Supp. 1503 (D. Colo. 1983).

57. *Id.* at 1518. The court did not reach a conclusion whether the Denver plan did not produce results as required by the third leg of the *Castaneda* test because the second stage had not been met.

58. *Id.* at 1521. After this court decision the parties developed "A Program for Limited English Proficient Students," which provides procedures for identification and assessment of students of limited English proficiency, establishes standards for teachers and aides, and establishes detailed programmatic standards. The case was thus settled out of court, with no further appeals.

59. *Id.* at 1518.

60. Teitelbaum and Hiller, *Bilingual Education: The Legal Mandate*, 47 HARVARD EDUCATIONAL REVIEW 138 at 150 (1977). The authors explain that plaintiffs' claims for bilingual programs were centered around Dr. Cardenas's theory of Incompatibilities, which was rejected by the Tenth Circuit in *Keyes* during the prosecution of their case. The rationale for the rejection of the Cardenas plan was explained in the earlier *Keyes* decision as follows:

> Direct local control over decisions vitally affecting the education of children "has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process" . . . Local control permits citizen participation in the formulation of school policy and encourages innovation to meet particular local needs. Educational policy, moreover, is an area in which the courts' lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at state and local levels. . . . (citations omitted)

Keyes, 521 F.2d at 482.

The *Otero* court, relying heavily on *Keyes*, added its own observation that the Cardenas Plan was "illogical, unbelievable and unacceptable." 408 F. Supp. at 170. They further stressed that plaintiffs had not produced numbers of children with "real language deficienc[ies]." *Id.* at 171. However, there is no "numbers" requirement to invoke §1703(f). Keyes, *supra*, 576 F. Supp. at 1518.