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**ABSTRACT**

This teacher training monograph examines education and policy issues as they relate to the education of limited English proficient (LEP) students. Federal involvement in educational policy on behalf of both handicapped and linguistically different children is traced from the 1960s to the present. Litigation influencing legislation on behalf of these students and issues of educational services is examined, and four cases involving the rights of LEP students are discussed. Major legislation covering LEP, minority, and handicapped students is described. The responsibilities of school districts with LEP students are outlined. These include: (1) taking steps to locate the students; (2) testing for special education placement in students' native language; (3) using placement teams with persons coversant in the students' native language; (4) meeting the language needs of LEP parents; (5) altering programs to meet LEP student needs. (CG)

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# **MEETING THE EDUCATIONAL NEEDS OF LIMITED ENGLISH PROFICIENT STUDENTS: POLICY ISSUES AND PERSPECTIVES**

Federal and state legislation on behalf of handicapped and linguistically different school children in the United States have had a similar legislative history. The presence of special populations of handicapped and linguistically different students in the nation's schools has raised parallel and at times similar pedagogical concerns and responses from advocates of programs to meet the needs of both groups of students. Major legislative initiatives for educational change on behalf of both groups of learners have occurred at the federal level of government. Laws which were enacted in the latter half of the 1960s contributed to similar legislative initiatives in more than 25 states.

In this monograph we examine education and policy issues as they relate to the education of limited English proficient students. We trace the recent history of federal involvement in educational policy on behalf of both handicapped and linguistically different children. We review litigation influencing legislation on behalf of these students and examine issues of educational services. We conclude with a look at state legislation relevant to teacher training and program development for limited English proficient students.

## **Bilingual Education Legislation and Litigation**

Learning to speak English while maintaining a first language appears to be a simple and natural phenomenon. Yet a complex set of political, social, and educational forces influences second language learning. Within the United States no other single educational issue has become more controversial than bilingual education (Tikunoff, 1985).

Even before the Civil Rights Movement of the 1960s, various ethnic groups viewed education as a way to obtain economic and social parity with people in the culture (Trueba, Guthrie & Au, 1981). Initiatives for educational equity began with the founding of our nation. The Declaration of Independence asserts, "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights" (Morris, 1975, p. 66). The Fourteenth Amendment affirms, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" (Douglas, 1975, p.143).

During the 60s ethnic minorities organized politically to address what they viewed as inequitable distribution of social, economic, and educational opportunities. The first federal bilingual legislation was an outgrowth of these efforts. Because of its association with the Civil Rights movement and its origin as Title VII of the 1965 Elementary and Secondary Education Act (ESEA), bilingual education in the United States has been seen as a remedial program for helping deficient children. For

this reason children entering school with limited proficiency in English are often viewed as having a handicapping condition.

Although bilingual education policy originated primarily as part of compensatory, social movement, other social and political forces were also at work to forge this legislation. Changing attitudes of many educators and school administrators regarding the multiethnic and multicultural composition of society focused attention on the educational needs of minority school children. Closely tied to this new interest and appreciation of cultural diversity was a renewed interest in foreign language education. This interest was encouraged by National Defense Education Act of 1953 ( P.L. 85-864) (U.S. Department of Health, Education and Welfare, 1958) and by the increased importance of international travel and trade. However, the strongest impetus for bilingual education came from the Great Society Movement fostered by President Johnson to cure the problems of poverty and economic discrimination (Vega, 1983).

Prior to 1964, federal policy was not involved in educational issues related to economic opportunities of minority language students. The 1965 Elementary and Secondary Education Act (ESEA) changed the role of the federal government in this respect. As part of the Great Society plan to eliminate poverty by equalizing educational opportunity, funds and resources were provided for schools in areas having substantial numbers of school children with family incomes below the poverty level. Three years after the original ESEA Act, Congress passed the Bilingual Education Act of 1968 (P.L. 90-247) as Title VII of the 1965 ESEA legislation.

By definition, bilingual education policy resulting from this legislation has focused almost exclusively on educating children for whom English is not the first language: minority language children. Until recently the public has never considered the potential contribution of bilingual education to the intellectual and linguistic resources of the nation's school children (Fradd, 1985).

### **Clarification of Terminology**

Over the past two decades the development of bilingual education programs in Canada and the United States has resulted in some confusion in terminology. For example, in the United States the term "bilingual education" is often misapplied to mean English instruction to non-native English speakers. In terms of federal legislative policy, bilingual education means the use of two languages in subject matter instruction (United States Commission on Civil Rights, 1975). However, the term is not infrequently applied to programs of English only instruction for students whose first language is not English. "Bilingual" is another frequently misused term. Children who only speak a language other than English are sometimes referred to as "bilingual," when, in fact, they are "monolinguals" in their first language. Federal policy defines these students as "non-English speakers" (NES) and "limited English proficient" (LEP). The terminology used to refer to English instruction for these students varies by region. In some areas this type of instruction is called "English as a second language" (ESL). In others it is "English to speakers of other languages" (ESOL).



The term "transitional" is another important word which has been defined in previous and current bilingual education policy. Prior to 1984, bilingual education in the United States had always been designed to be transitional, students' first language used as a temporary vehicle for meaningful instruction. First language instruction has been paired with English instruction until students develop sufficient English to function successfully in regular education. All transitional programs have an ESOL instructional component to develop the English skills necessary for academic success. Current legislation defines transitional bilingual education as

**... a program of instruction, designed for children of limited English proficiency in elementary and secondary schools, which provides, with respect to the years of study to which such program is applicable, structured English language instruction, and to the extent necessary to allow a child to achieve competence in the English language. [emphasis added] instruction in the child's native language. Such instruction shall incorporate the cultural heritage of such children and of other children in American society. Such instruction shall, to the extent necessary, be in all courses or subjects of study which will allow a child to meet grade-promotion and graduation standards, (United States Department of Education, 1985, p. D3).**

During the two decades following the original ESEA legislation, the basic orientation of federal policy for minority language students has remained the same: to provide educational programs which enable students to function proficiently in English. **It must be emphasized that national and state bilingual education policy has always been and continues to be the teaching of English language skills**

to minority language students so that they become successful participants and contributors within the socioeconomic system of the United States. Emphasis on the intent of bilingual education as a means for enfranchising students to participate successfully and to contribute within the social and economic system of the nation is important. Clarification of this point is frequently required because the public view of bilingual education, as often portrayed by the media, is erroneous.

Language maintenance programs differ from transitional bilingual education programs in that they are designed to continue the development of the first language even after English language skills are well developed. Few publically funded programs exist in the United States which support language maintenance. The 1984 Bilingual Education Act provides limited funding for developmental programs. The concept of developmental programs is similar to that of language maintenance programs; both programs are intended to continue and expand the use of English. The difference between the two is that language maintenance programs have traditionally been provided only for students whose first language is not English. Developmental programs are designed to include both students whose first language is English and those whose first language is not English. Through academic instruction and interaction with native speakers of another language, second language learners acquire the academic and social language skills and cultural understanding of both languages. Federally funded developmental bilingual education legislation is an innovation which somewhat parallels Canadian bilingual language

programs. Within the most recent federal bilingual education legislation a small amount of funding has been allocated for structured English only instruction. This innovation is referred to as "special alternative instructional programs" and is defined in the statute as

**...programs of instruction designed for children of limited English proficiency in elementary and secondary schools. Such programs are not transitional or developmental bilingual education programs, but have specially designed curricula and are appropriate for the particular linguistic and instructional needs of the children enrolled. Such programs shall provide, with respect to the years of study to which such program is applicable, structured English language instruction and special instructional services which will allow a child to achieve competence in the English language and to meet grade-promotion and graduation standards (United States Department of Education, 1985, p. D4).**

This movement in federal bilingual education policy toward including children whose first language is English indicates that political forces continue to organize to meet perceived educational needs. This shift also indicates a change of the national attitude toward bilingualism which is discussed in greater detail in the following section.

### **Landmark Legislation**

The following is a brief overview of legislation shaping bilingual education policy in the United States.

#### **The Civil Rights Act of 1964**

The Civil Rights Act of 1964 (P.L. 88-352) was one of the triumphs

of the Civil Rights Movement. As such it was the first major federal legislation requiring school districts receiving federal funds to guarantee that students would not be discriminated against because of race, religion, or national origin. Prior to the enactment of this legislation, Civil Rights issues focused primarily on the needs of Afro-Americans. As the result of efforts for equal economic and educational opportunities for Hispanic and other language and ethnic minorities, Civil Rights legislation initiatives gathered momentum in the 60s and 70s (United States Commission on Civil Rights, 1975).

### **The Elementary and Secondary Act of 1965**

ESEA legislation became a major source of funding for educational improvement, in school districts with substantial numbers of low income families. Migrant and other low socioeconomic (SES) status students were the primary benefactors of this legislation. Compensatory programs were designed to supplement but not supplant local school efforts to meet the educational needs of these students. Titles I through IV of the original legislation were especially important to migrant education. The Migrant Amendment established the National Migrant Program and identified guidelines and goals for migrant programs. Instructional services included programs to improve communication and vocational skills and to provide early childhood education for preschool and kindergarten aged students. The establishment of Title VII of ESEA in 1968 enabled programs for migrant students to utilize bilingual resources in working with students from non-English speaking families (King-Stoops, 1980; United States Commission on Civil Rights, 1975).

### **The Bilingual Education Act of 1968**

This legislation, the Bilingual Education Act of 1968, (P.L. 90-247), was also known as Title VII of the Elementary and Secondary Education Act of 1965. It provided state and local educational agencies with financial assistance to carry out new and imaginative elementary and secondary school programs designed to meet the special educational needs of "children of limited English-speaking ability (LESA)" (Sec. 702 of the Act, United States Commission on Civil Rights, 1975, p. 180). These funds were targeted for schools with high concentrations of children from families with an annual income below \$3,000. Schools could use the funds to develop bilingual programs, purchase or develop special instructional materials, and provide inservice training for teachers and other personnel working with these children. As with all ESEA legislation, funds were to be used to supplement but not supplant existing programs. In addition to assisting children to learn English, programs were intended to teach children about the cultural heritage of their first language, to establish a closer relationship between the home and the school, to provide adult education programs for parents of participating children, to assist potential dropouts with limited English-speaking ability, and to offer trade, vocational and technical school training for identified students. The establishment of a 15 member Advisory Committee on the Education of Bilingual Children was intended to insure national visibility. A minimum of 7 members were required to be experienced educators with a background in bilingual education (Anderson & Boyer, 1975; Leibowitz, 1980; United States Commission on Civil Rights, 1975).

A major weakness of this legislation was its failure to require a systematic evaluation of the programs. After five years of funding little was known about the outcomes of bilingual programs. The first evaluation of Title VII programs was conducted in 1973 and focused primarily on adherence to specified program guidelines (United States Commission on Civil Rights, 1975).

### **The May 25th Memorandum.**

On May 25, 1970, the federal Director of Civil Rights issued a memorandum to the nation's school districts with more than 5% national origin minority children informing them of the following requirements as specified in Title VI of the Civil Rights Act of 1964:

1. Schools must take affirmative action to assist national origin minority children to overcome English language deficiencies in order to participate successfully in regular programs.

2. School districts cannot assign national origin minority students to classes for the mentally handicapped based on assessments that are primarily tests of English language skills.

3. Tracking systems which do not enable national origin minority students to have access to all the benefits of the school system and keep these students in dead end programs must be terminated.

4. School districts must notify parents of all school activities which are called to the attention of other parents. If national origin parents do not speak English, then notices must be provided in the language of the parents (United States Commission on Civil Rights, 1975)

### **The Bilingual Education Act of 1974**

The reauthorization of the 1968 BEA occurred in 1974. This

legislation (P.L.93-380) provided a definition of the term "bilingual education" as

**... instruction given in, and study of, English and, to the extent necessary to allow a child to progress effectively through the educational system, the native language of the children of limited English-speaking ability, and such instruction is given with appreciation for the cultural heritage of such children, and with respect to elementary school instruction, such instruction shall, to the extent necessary, be in all courses or subjects of study which will allow a child to progress effectively through the educational system (United States Commission on Civil Rights, 1975, p. 186-187).**

The purpose of the Act is specified as the provision of financial assistance to programs designed to enable limited English-speaking ability (LESA) students to use their native language while achieving competence in English. For LESA students, instruction in courses such as art, music, and physical education should be within the regular school program. The low income limitation for participation was removed. School districts were encouraged to involve parents and other interested community members in local program planning and development.

Between 1968 and 1973 the majority of the funding went to support demonstration projects. There were few teacher preparation or research efforts. The new law allocated funds for special training programs to encourage reform, innovation, and improvement in graduate programs for preparing teachers to work with LEP students. Masters and doctoral programs in teacher education were strongly supported.

Other new features included the establishment of a 15 member National Advisory Council for Bilingual Education. The Council was required

to work together with the Commissioner of Education to provide Congress with an annual report on the state of bilingual education in the nation. While program evaluation was required, the specifications were never clear.

### **The Equal Educational Opportunities Act of 1974**

This act (P.L.93-380) continued the efforts initiated in the earlier Civil Rights legislation. It codified the guarantee that minority language students have equal educational rights. Even school districts not receiving federal funds were required to comply with this legislation.

### **The Bilingual Education Act of 1978**

This reauthorization of the 1968 amendment continued the use of transitional bilingual education as a means for providing an equal educational opportunity for culturally and linguistically different students. It changed the instructional focus of transitional programs from oral language instruction, denoted in the term "limited English speaking ability" (LESA), to total English proficiency, by using the term, "limited English proficient" (LEP). Programs were expected to develop all English academic language skills: reading, writing, understanding and speaking. Local education agencies were required to establish exit and entry criteria for program participation. Students who were exited from bilingual programs were expected to function successfully in regular classrooms with their age peers. To enhance the development of English language proficiency and to prevent segregation, native English speakers could comprise up to 40% of bilingual programs. This inclusion was justified on the basis that monolingual English speakers would benefit from exposure to



a differing language and cultural group. For the first time the Commonwealth of Puerto Rico was permitted to apply for Title VII funds for programs in which both English and Spanish could be taught.

The statute required minority language persons to be hired to work in bilingual programs. Since there were only a limited number of personnel trained and qualified to work in bilingual program, this act required that 15% of the total allocation be given to training. Fellowships and traineeships under this reauthorization carried the stipulation that after completion of their training, recipients make repayment by working in bilingual education programs for a period equivalent to the time during which financial assistance was received.

The Office of Bilingual Education and Minority Language Affairs (OBEMLA) and a National Clearinghouse for Bilingual Education (NCBE) were established. Congress also mandated a series of studies on the need for teacher training and on the effectiveness of bilingual education in the United States. This research component of the Act is known as the Part C Research, the first major thrust for the comprehensive evaluation and research on bilingual education in the United States (Leibowitz, 1980).

### **The Department of Education Organization Act, 1979**

The Department of Education was formed from the previous Department of Health, Education, and Welfare (HEW) as a result of this legislation, P.L. 96-88 (School Law Register, 1983).

### **Education Consolidation and Improvement Act (ECIA) of 1981**

A broad range of educational functions formally performed within the Department of Health, Education and Welfare (HEW) and the Office of Civil

Rights (OCR) were consolidated as Title 34 through this act. Title I of the ESEA legislation of 1965 became known as Chapter I of the ECIA Title 34 legislation (School Law Register, 1983). . In 1981 the Office of Special Education and Rehabilitative Services (OSERS) and the Office of Migrant Education issued a memorandum indicating an intent to work cooperatively to meet the special educational needs of migrant students

### **The Bilingual Education Act of 1984**

This latest reauthorization of bilingual education, P.L. 98-511, is also referred to as Title II of the Education Amendments Act of 1984. As part of this omnibus education bill, the latest legislation has several important new features. It provides funding for five types of instructional programs: (a) transitional bilingual education, (b) special alternative programs, (c) programs of academic excellence, (d) developmental bilingual education, and (e) family English literacy programs. Funds for pre- and inservice training continue to be allocated. Institutions of higher education are encouraged to work directly with school districts to develop and implement programs. Program proposals must be reviewed by parent groups and must document parent input. State education agencies (SEAs) are required to collect statistics on LEP and non-English language background (NELB) persons within the state and within each school district.

The Office of Bilingual Education and Minority Language Affairs (OBEMLA) continues to operate within the Department of Education, with director reporting directly to the Secretary of Education. The functions of the previous advisory council have been changed and the organization renamed the National Advisory and Coordinating Council on Bilingual

Education. The new duties include responsibility for coordinating activities in the regulation and operation of bilingual education programs at the national level. The composition of the Council has been increased to 20 members, to include a representative cross section of persons who are affected by bilingual education policy.

**A Shift in Second Language Education Policy.** Political forces continue to organize concerning the perceived educational needs of the children of the United States. As a result of recent political events there has been a shift in federal bilingual education policy. This shift appears to indicate a polarization of national attitudes toward bilingualism. Three significant policy modifications occurred within the 1984 legislation: (a) the latitude which local school districts were given in developing their own educational programs, including alternatives to transitional bilingual instruction; (b) the recognition of the needs of handicapped and gifted LEP students; and (c) the acknowledgment of minority language students as a national linguistic resource.

Encouraging local education agencies to develop alternative ways to respond to the unique needs of LEP populations within their jurisdictions is a substantial change from the intent of previous bilingual legislation. Transitional bilingual education, central to previous bilingual education policy, is no longer considered as the only means for providing students with an equal educational opportunity. Local education agencies are given, under current policy, a great deal of latitude in developing alternative programs and curricula. "Structured immersion" is a popular alternative widely reported in the press. It is, as yet, an unclearly

defined programmatic concept associated with successful Canadian immersion programs. Assumptions about the similarity of the proposed United States immersion programs to the existing Canadian programs Canadian should be made with caution, since a number of factors contribute to major differences in the two types of programs (Fradd, 1985; Santiago, 1985; Tucker, 1980). Three significant differences, as described in recent publications (Gersten & Woodward, 1985; Gorney, 1985), are: (a) Canadian programs stress the acquisition of literacy and oral proficiency in two languages; (b) Canadian programs are designed to accommodate students whose home language is either English or French; (c) Canadian immersion teachers are themselves bilingual (Fradd, 1985). The Canadian immersion programs lead to an additive type of language acquisition where students become proficient in two or more languages. Structured immersion is intended only for students whose first language is not English. It is not intended to develop second language skills for English speaking students or to maintain first language skills for LEP students. It appears to result in a type of subtractive process where students lose proficiency in their first language as they gain English proficiency. The structured immersion proposal is reminiscent of the educational treatment which LEP students received prior to the initiation bilingual education legislation in the 60s.

A second significant change within the current bilingual legislation is that for the first time the educational needs of LEP students with physical, mental handicaps as well as those of students with intellectual advantages are recognized. This change portends that during the next

decade greater attention is likely to be focused on the educational needs of exceptional LEP populations. Recognition of the needs of LEP and bilingual special education students suggests that cooperation must be fostered between educators in both special and bilingual fields of education.

The third important change in national bilingual education policy is the acceptance of both LEP and monolingual English speaking students into bilingual programs that develop language proficiency in a non-English language as well as in English. Although it has received little media attention, it is this aspect of the 1984 Bilingual Education Act that proposes programs most similar to the Canadian immersion experience. Participation of English speaking students is encouraged not simply to gain an appreciation for the culture of LEP students, as in previous legislation, but to enable both groups of students to develop bilingual academic and social proficiency. The wording of this part of the legislation is innovative and if carried out, suggests a radical change in bilingual programs. Previous bilingual education efforts have always concentrated on developing English skills as rapidly as possible with little consideration given to the use of the first language other than as a tool for English instruction. A full time program of developmental bilingual instruction would enable both intellectually handicapped and advantaged students to benefit from bilingual learning environments without penalty. Research in Canadian immersion programs indicates that both learning disabled and students with below average IQs can participate successfully in programs of bilingual language development (Swain, 1984).

The latter two changes in the 1984 statute came about as the result

of efforts of two groups of proponents: ethnic minorities and middle class citizens interested in second language learning for all students. Ethnic minorities have continued to seek legislation to address the needs of high risk minority language students by providing them with academic programs which build on their first language strengths while enabling them to acquire English in a supportive educational environment which values cultural and linguistic pluralism. Support for foreign language education has enjoyed an unparalleled interest (Fradd, 1985; Simon, 1983). For example, a recent report cites five national studies strongly emphasizing the need for early and continued second language development (Curriculum Report, 1985).

As innovative as this movement may be, the 1985 Bilingual Education Appropriation for developmental education illustrates the limited support which this movement has gained within Congress to date. Of the \$142,951,000 (Forum, 1985) appropriated for all federal bilingual education expenditures in FY 1985, \$250,000 was allocated to fund developmental bilingual education programs (Wells, 1985). This level of funding is scarcely enough to establish programs in more than one or two school districts in the nation. Nevertheless, the inclusion of the developmental component within the statute indicates a renewed interest in enabling all students to benefit from the advantages of additive bilingualism (Fradd, 1982).

### **Litigation Involving the Rights of LEP Learners**

A substantial case has been built for the use of the student's primary

language and culture in assessment and instruction. In this section we examine court cases reflecting the strong and continuing position which the courts have taken in affirming the rights of minority and handicapped students.

**Brown v. Board of Education of Topeka** (Supreme Court of the United States, 1954, 347 U.S. 483, 74 S.Ct.686).

Although the Brown case is commonly thought to be a suit on behalf of Negro students in Kansas, it represents, in fact, four cases with differing local circumstances, but with a common legal question which justified a consolidated opinion. In each of the cases Negro students sought admission on a nonsegregated basis to the public schools attended by white students of their community.

The Brown case is the cornerstone of legislation and litigation for both minority language and handicapped students. The doctrine of separate but equal was found to be unacceptable because separate educational facilities are inherently unequal. Separate facilities deprive learners of equal protection of the law guaranteed by the Fourteenth Amendment (Alexander, Corns, & McCann, 1969).

**Aspira v. Board of Education of the City of New York** (58 FRD 62 SDNY [1973])

A class action suit was brought to federal district court on behalf of Spanish speaking Puerto Rican students who, their attorneys argued, were not able to benefit from regular English instruction. The court directed the School Board to provide bilingual education for all LEP students and to desist from offering any course work in which LEP students were unable to

participate because of their lack of fluency in English. A 1975 continuation of this decision provided the impetus for the development of one of the first widely used bilingual language assessment instruments, the Language Assessment Battery (LAB). The LAB continues to be available nationally for grades k -12. The development and use of this test was one of the first major efforts for establishing students' dominance and proficiency in two languages. It paved the way for further refinement in the process of assessing students' academic language proficiency (Keller & Van Hooff, 1982).

**Lau v. Nichols** (Supreme Court of the United States, [1974], 72-6520)

The San Francisco school district was integrated in 1971 as the result of a federal court decree. Of the 2,856 students of Chinese ancestry who did not speak English at that time, only 1,000 were given supplemental courses in the English language. This was the first case involving the language education rights of minority students to reach the Supreme Court. The Court held that basic English skills are at the center of all public education. To require that a student acquire English before effectively participating in the benefits of public education is to make a mockery of the intent of public education. The Court found that the school district's treatment of the Chinese students was discriminatory and affirmed the need for a program which would enable the students to acquire English skills and the benefits of a basic education. The decision was based solely on the Civil Rights Act of 1964 which banned discrimination in the use of academic or other facilities normally available to other students (Leibowitz, 1982).



**Lau Remedies.** In order to implement the Supreme Court decision in the *Lau v Nichols* case, the Office of Civil Rights developed compliance guidelines for school districts. These guidelines came to be known as the Lau Remedies. They required school districts to: (a) identify all students whose first or home language is not English, (b) assess the language proficiency of these students, (c) determine students' academic level, (d) place these students in appropriate instructional programs. Five categories of language proficiency were established ranking from non-English-speaker to proficient-English-speaker (Tik. unoff, 1985).

**Doe v. Plyler** (Section 21.031 [1975], 628 F. 2d 448[1980], 102 S. Ct. 2382 [1982])

National immigration policy is in a state of flux. Recent attempts by Congress to develop acceptable and effective measures to resolve the problem of unauthorized aliens in the United States have not been successful. States along the United States-Mexico border have borne the major responsibility for enforcing immigration policy. Consequently, public and private concerns for a strict and manageable immigration and naturalization policy have originated primarily from these states. Public officials have maintained that the presence of undocumented cohorts of persons places an undue strain on the availability and quality of public services to citizens and authorized aliens. The presence of a large number of undocumented persons within the United States has raised some serious legal, economic and social questions. Of prime importance to educators is the question of whether the children of illegal aliens are entitled to a free public education.

The *Doe v. Plyler* case was initiated against the Tyler, Texas, Independent School District by the parents of Mexican children. The suit alleged that the children's rights to equal protection were violated because they were excluded from attending, free of charge, the local public schools of the district. The suit in effect challenged the 1975 Texas statute requiring school districts to charge tuition fees to parents of undocumented children.

The Supreme Court decision clarified several important questions which had been raised by the litigants. Limited economic resources have not been accepted by the courts as an argument for excluding or denying educational services to any population. Federal law has demonstrated consistent support for the education of disadvantaged and limited English proficient school children. The court ruled that children of illegal aliens have a fundamental right to protection in any state. Of importance to all school districts with illegal aliens is the Supreme Court's emphasis that school systems are not agents for enforcing immigration law. All children are entitled to a free public education, no matter what their circumstances in the United States. It further emphasized that failure to provide alien children with an adequate education places an undue burden on society. This burden falls most heavily on the regions of the country where concentrations of these persons are greatest (Weintraub & Cardenas, 1984).

While the trend for the past five years has been toward English only instruction and away from the use of the student's first language, previous federal legislation and litigation have established and affirmed that

educational opportunity is the right of all students. The law and the courts have been more specific where the rights of handicapped or language minority students at high risk of failure are concerned (McCarthy & Deignan, 1982). The legislative history of special education at the federal level has implications for meeting the educational needs of limited English proficient students who do not experience success in regular education programs.

### **Special Education Legislation and Litigation**

Federal interest and involvement in the area of special education was gradual and incremental. Prior to 1966 the federal government exercised no leadership in the area, preferring to leave such matters in the hands of state education agencies. As with bilingual education, shortly after the enactment of original ESEA legislation, the federal government became concerned with the educational difficulties which handicapped students experienced in public programs across the nation. The landmark ESEA and Civil Rights legislation encouraged many groups to turn to the federal government for solutions to educational programs which state governments were unwilling or unable to address (Meranto, 1967).

#### **Federal Legislation**

In 1970 Congress enacted new legislation in response to concerns raised by special education advocates. The Education of the Handicapped

Act (P.L. 91-230) firmly established the handicapped student as a category meriting the close attention of federal and state education agencies. Like the bilingual education policy enacted two years earlier, it provided grants to institutions of higher education and to local and state education agencies to begin to resolve inequities.

### **The Vocational Rehabilitation Act of 1973**

Policy affirming students' educational rights was strengthened through the enactment of this legislation (P.L. 93-112). Section 504 is often referred to in discussions concerning specific educational requirements. The Act specifies: (a) students must be furnished with individualized educational plans (IEPs), (b) student's parents or representatives are entitled to be included in the development of the IEP, (c) the student's parents or representatives are entitled to participate in and be given notice of school actions affecting the student's educational program, (d) the student is entitled to a due process hearing if educational appropriateness of programs is in doubt, (e) the student is entitled to instruction provided by appropriately and adequately trained teachers, (f) the student or the student's representatives are entitled to review school records (Baca, 1984; Vega 1985). Using the criteria specified in this and subsequent special education legislation, a case for bilingual special education can be strongly argued on behalf of minority language students experiencing serious learning difficulties in regular education programs.

### **The Education for All Handicapped Children Act (P.L. 94-142)**

This legislation, best known as P.L. 94-142, was enacted in 1975 to address the educational needs of handicapped learners. Just as the Civil

Rights of minority language students were gaining public attention, so too was there increasing concern for the needs of physically and mentally handicapped persons. The confluence of legislative directives occurs when students are both handicapped and limited in English proficiency. P.L. 94-142 encourages school systems to integrate or mainstream handicapped students into regular education programs where they may interact with their age peers and develop socially and intellectually within the least restrictive environment.

Definitions and specifications contained in this act are important for the LEP handicapped student because they provide a framework for programs designed to meet the unique needs of handicapped learners. Special instructional services may be required to include not only classroom training, but also adaptive physical education and music programs, as well as instruction at home, in hospitals or other institutions. Related services which may be required include transportation, developmental, corrective, and supportive services, psychological assessment and counseling, physical and occupational therapy, recreation, and other needed assistance.

Sec. 612 ( 5) (C) requires that all testing and evaluation materials and procedures used to assess and determine placement for handicapped learners be selected and administered so that there is no racial or cultural bias. All materials and procedures must be provided and administered in the child's native language or mode of communication, unless it is clearly not feasible to do so. The process for assessment and the determination of educational placement cannot be made on the basis of one sole criterion.

Sec. 615 requires that states establish a system of procedural safeguards with regard to the Civil Rights of the handicapped learner and the parents or guardian. These safeguards include the right to examine all relevant records of identification, evaluation, and educational placement of the learner. Parents must be advised in writing of all changes in the learner's educational plan and must be afforded an opportunity to discuss this plan and present complaints about existing or planned programs (United States Code Congressional and Administrative News, 1975).

Combining the directives of the 94-142 legislation with the Civil Rights Acts and May 1970 Memorandum, a strong case can be built for parental involvement in every aspect of the assessment and instruction process. This involvement would require school/parent communication be carried out in what ever language or means of communication appropriate and meaningful for both the parents and the student (Baca, 1984).

Federal law is supreme and has precedence over state and local legislation. State law has precedence only in instances where it is more specific in its intent to provide effective services or specifies more comprehensive educational guidelines than those found in federal legislation. Both P.L. 94-142 and the Equal Educational Opportunity Act specify that affirmative action must be taken to locate students in need of special educational services. All students have the right to a free public education. School districts are charged with the responsibility for using culturally and linguistically appropriate methods for locating students with handicapping conditions ( Baca, 1984; Vega, 1985).

### **Litigation Involving the Rights of Handicapped Learners**

A major victory occurred when the requirement that states provide free public education to all school aged children including handicapped learners was affirmed through the courts. The rights of handicapped were affirmed and interpreted through court litigation is discussed below.

*P.A.R.C. v Pennsylvania* (334 F. Supp. 1257 [1971]; 343 F., Supp 279 [1972] ) and *Mills v Board of Education, District of Columbia* 348F. Supp. 866 [1971] are examples of court decisions where the rights of handicapped students were upheld.

Plaintiffs in these class action suits argued against the exclusion of retarded children from public education on the basis of existing state statutes. The courts found in this and subsequent cases that handicapped students' rights to equal protection under the Fourteenth Amendment cannot be abridged. All school-aged children are entitled to a free appropriate public education (Baca & Cervantes, 1984; Vega, 1985). The courts further stated that the argument of lack of funding cannot be used as an excuse for not providing services to students.

The position of equal protection and rights to educational opportunity has continued to be affirmed in most recent litigation. However, Supreme Court rulings deny parents the right to recover attorney fees incurred in the pursuit of equal opportunity for education. This denial will likely serve as a substantial deterrent to the pursuit of equal educational opportunity (Flygare, 1984 a ; Flygare, 1984 b).

One of the most perplexing problems involving special education students is the issue of discipline, especially in cases involving suspension

and expulsion. If the punishment is considered a change in educational placement, then a new individualized educational plan (IEP) must be developed. Elaborate educational safeguards including parent involvement are required in the the development of any IEP. Additionally, the conduct which is being punished may be interpreted as a manifestation of the handicapping condition. The position most frequently taken is that special education students cannot be punished for their handicapping condition or for behavior resulting from that handicap.

Current court decisions such as *S-I v Turlington* (49 U.S.L.W.2504 [1981]) indicate that several important principles are emerging in the treatment of handicapped students' disruptive behavior. First, short term emergency suspensions can be imposed on special education students. Cases of this type of suspension involve behavior where the student is a danger to himself or herself or to other members of the school body. The length of suspension is usually brief, two to three days. Students can be suspended for longer periods of time if the behavior can be determined to be unrelated to the handicapping condition. Expulsion should only be carried out after all procedural safeguards have been met and special education personnel have determined that the behavior is not related to the handicapping condition. Wisdom and compassion must be used to balance the rights of individual students against the interests of the larger school community (Flygare, 1981).

### **Litigation Regarding Education for LEP Handicapped Students**

The overrepresentation of minorities in special education programs



continues to be a pressing issue (Heller, Holtzman & Messick, 1982). A great deal of discussion has focused on the assessment and placement of linguistically and culturally different students in special education programs. In the early 70s three California cases, *Arreola v Board of Education*, *Diana v State Board of Education* and *Covarrubias v San Diego Unified School District*, looked at similar assessment issues involving the measurement of mental ability or intelligence (Baca & Cervantes, 1984). Overrepresentation of minorities in special education continues to be a problem in some regions (Figeroa, 1982; Heller, et al., 1982)

Several court cases in New York have underscored the need for continued training and preparation of school personnel to meet the educational needs of linguistically and culturally different students. The *Lora P v Board of Education of the City of New York* 456 F.1. supp. 1211(1975) case charged that the referral and assignment practices which placed a high percentage of Afro-American and Hispanic school children in special day schools for the emotionally disturbed had the effect of being racially and culturally discriminatory because: (a) students had been placed there without an opportunity for a hearing, and (b) school personnel failed to provide for periodic reevaluation of students. The courts decided not to insist on a comprehensive remedy for this discriminatory situation, but to retain the case under its jurisdiction and to allow school officials to continue efforts to correct practices which led to the law suit. In 1979 the Federal District Court ordered the Board of Education to initiate an in-service program for all school personnel. Training was required in the

following areas:

1. Information on relevant federal, state, and administrative laws and regulations as they apply to special education students;
2. Methods and approaches for supporting students' successful adjustment as they are transferred from special to regular school programs;
3. Due process and other procedural safeguards involved in each step of the referral, assessment and placement process,
4. Methods for recognizing disproportionate placement of minority students in special education;
5. Procedures for preventing discriminatory actions and referrals for minority language students on the basis of racial, ethnic, bias;
6. Cross-cultural understanding and communication to minimize judgments about the academic potential of minority students solely on the basis of isolated bits of behavior or language (Vega, 1985).

While these in-service training procedures were appropriate for rectifying previous problems, they did not prevent continued initiation of other class action suits on behalf of minority language students in New York City. In the *Jose P. v Ambach* (79 Civ. 270 [1979]) case plaintiffs argued that school officials' failure to provide speedy evaluation and placement of handicapped minority language students in appropriate special education programs violated minority students' rights to free appropriate education. The *United Cerebral Palsy of New York v Board*

*of Education* (79 Civ. 560) and *Dyrcia S. v Board of Education* (79 Civ. 2562) sought to convince the court that handicapped LEP students were entitled to receive educational services in their first language. Attorneys for *Jose P.* contended that the *Aspira* decision of 1974 clearly included handicapped students who could benefit from bilingual instructional programs. Decisions and remedies for the other cases were subsumed within the *Jose P.* case because all complaints focused on similar issues. The City of New York Board of Education is currently under court order to expend all possible efforts to hire specially trained school personnel who are proficient in the first languages of the special education students in the district. Additionally, special education programs serving these students are required to use a variety of assessment procedures in both English and the first language of the student. Special education programs must develop specific curricula incorporating the first language and culture of the enrolled students. The court continues to provide periodic reviews of assessment procedures, curriculum development, and procedural safeguards including written communication with parents (Benardo, 1984; Moreno, 1984).

### **Implications of Legislation and Litigation for LEP Students**

One of the results of legislation and litigation efforts has been a reluctance on the part of many school districts to assess minority language students for potential special education placement. For example, studies conducted in both Florida (Brawer & Fradd, 1983) and Texas (Ortiz,

1984 a; Ortiz & Yates, 1984) indicate widespread underrepresentation of Hispanic students in all categories of exceptionalities except specific learning disabilities. A second example is found in the disproportionate number of minority students in classes for the educable mentally retarded (EMR) across the nation (Heller, Holtzman & Messick, 1982). This evidence raises a question of whether the disproportions are problematic or symptomatic of larger issues. Heller et al. (1982) suggest that efforts to address inequities of minority students in a piecemeal fashion have resulted in increased disproportions elsewhere within the system: other special education placements, disciplinary actions, dropout rates, and most importantly, the functional level at which students are able to perform upon leaving school. Disproportions should be considered problematic when the following circumstances occur: (a) if students are invalidly placed in special education programs, (b) if their placement in special education is the result of having received poor-quality regular education instruction, (c) the quality and academic relevance of special education programs blocks students academic progress and generally precludes their return to regular programs (Heller et al., 1982).

### **Responsibilities of School Districts with LEP Students**

The legislation and litigation which we have reviewed indicate that school districts have specific obligations for meeting the educational needs of LEP students. These obligations, which have been highlighted in a document prepared by Roos (nd), and disseminated to directors of special education programs in all Florida school districts (Thomas, 1984) are reviewed here.

**Local school districts must take special steps to locate handicapped LEP students as part of its child find obligations**

Both P.L. 94-142 and the Vocational Rehabilitation Act of 1973 require that affirmative steps be taken to locate and identify all handicapped children, including minority language students. Roos suggests that to fulfill this obligation, districts with concentrations of minority language persons use the minority language in door-to-door canvassing of ethnic neighborhoods, radio and newspaper announcements and other interpersonal procedures involving minority language persons and the use of the minority languages spoken within the district. The decision involving *Jose P. v. Ambach* affirmed the need for such measures.

**Tests and students assessment for the purpose of special education placement must be conducted in the student's primary language**

P.L. 94-142 is clear in indicating the need for assessment in the student's primary language or mode of communication so that evaluation procedures are not racially or culturally discriminatory. No single procedure can be used as the sole criterion for determining the appropriate program for a student. Local and state school agencies will have a heavy burden proving that such assessment is clearly not feasible. Testing and evaluation practices must be done by personnel fluent in the child's language, and trained in the assessment of linguistically and culturally different students.

**Placement teams must include persons who are fluent in the child's language and culture**

The law emphasizes that a variety of persons who are skilled in interpreting the meanings of assessment results must be included in the assessment and placement team. The impact of the student's social and cultural background must be addressed by persons with expertise in relating that background and experience to the decision to be made. Additionally, parents must be involved in the decision making process. If parents are not fluent in English, then clearly a member of the team must be fluent in the language of the parents.

**There are specific steps which involve the language needs of non-English speaking parents that must be taken at the assessment and placement process**

Parents are entitled to notification prior to assessment or to planned changes in educational placement. Actual consent must be received from a parent before any steps in the assessment or placement procedures can be undertaken. Naturally, when the parent is not fluent in English this consent must be obtained in the parent's primary language. Parents must be kept informed throughout the assessment and placement process. Communication with parents must include all information relevant to the activities for which consent is sought.

**Accommodations must also be made in the development of the IEP for the student of a non-English speaking parent**

P.L. 94-142 requires that school districts take whatever measures necessary to insure parent understanding and involvement in the

3. Provide all appropriate resources to assure the success of a program designed to meet the student's educational needs;
4. Assess the student regularly to substantiate the success of the program as it is currently being implemented;
5. Alter the program in a pedagogically sound manner, if the assessment indicates a need for adjustment or change.

The courts have said that for non-handicapped LEP learners bilingual education was only one alternative which school districts could use to meet the needs of their students. A much more compelling case is made for bilingual instruction and support services where students are experiencing failure or are at high risk of experiencing failure in programs with English only instruction (see *Castaneda v Pickard*, 648 F.2d 989 [1981], and *United Cerebral Palsy of N.Y. v Board of Education* 79 C. 560 [1980], Roos, nd).

### **State Legislation**

Since its inception as a nation, the United States has experienced movements for the use of more than one language for official communication and educational instruction. However, after World War I the isolationist perspective prevailed. In 1903 fourteen states had statutes forbidding the use of languages other than English in school classrooms, except for foreign language instruction. By 1923 the number of states with this type of legislation had increased to 34. Events during and after World War II solidified the nation's desire for monolingualism.

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Concurrently English became the lingua franca of the western world.

Global conflicts and the increasing emergence of the United States as an international leader encouraged many Americans to advocate second language learning for all school children (Grosjean, 1982; Rafferty, 1963). In the late 50s and 60s bilingual programs began to develop in regions, such as Miami, Florida, with high concentrations of refugees, and in states, such as in Texas, Arizona, New Mexico, and California, which were highly populated by linguistic minorities. Many of these programs included both monolingual English speakers as well as LEP students (Ambert & Melendez, 1985).

As of 1982, local school districts in 42 of the 50 states have federally funded bilingual education programs (McGuire, 1982). Although federal legislation of the 70s set the trend within the states for minority language legislation, approximately 90% of all bilingual education programs are funded by state and local school districts. State programs are often initiated through federal grants and then continued through state and local funds (Ambert & Melendez, 1985).

With regard to current legislation, 21 states have permissive statutes allowing bilingual education. Nine have mandatory legislation requiring bilingual programs, if more than a specified number of students in a district are LEP (McGuire, 1982). Some states have detailed statutes describing aspects of the programs such as student identification, curricula content, teacher training and certification, and program length. Other states have outlined broad goals and objectives to be used in implementing individual programs. Most state laws are similar in that they

include assurances for equal educational opportunities for LEP students. Statutes in most states do not include participation of native English speakers (McGuire, 1982).

Nine states restrict the length of time students may participate in bilingual programs. Three years is the maximum in most states. With parental consent extensions are generally approved if students require additional time. Because attainment of proficiency in English is the main goal of most state programs, educational need is a critical factor for determining the length of participation (McGuire, 1982). Eleven states have requirements of parental notification of child placement. Twelve states have established requirements for parent or citizen advisory councils. Fourteen states have established teacher certification requirements for bilingual and ESOL education. Seven have requirements for bilingual certification only and ten for only ESOL certification.

Across the states there is divergence on the purpose of bilingual education. Within this diversity there is a strong and continuing view of bilingual education as a remedial program. A national survey asked the directors of bilingual projects to rank on a scale from 1 to 10, in terms of director's perceived importance, a list of 57 bilingual objectives generated from the literature on bilingual education. Six of the top 10 objectives dealt with the remedial topics. The most frequently selected objective was "to develop and maintain the child's self-esteem in both cultures." These results appear to be consistent with the view of bilingual education as a remedial vehicle for assisting LEP students to adjust to life in the United States. They do not indicate that directors

perceived their programs as a method of maintaining the students' first language or for perpetuating ethnic values (Tilley, 1982).

Similar results are found in a report on a comprehensive study of Title VII Spanish-English bilingual programs across the nation. Halcon (1983) noted that most programs were neither bilingual nor bicultural. The majority of the programs he observed did not address the first language needs of the students. Neither did they develop basic language skills in a first language. In the majority of the Title VII programs, English was the only language used. Beyond the elementary grades, few children were given the opportunity to continue to use and develop first language academic skills (Halcon, 1983).

#### **Teacher Experience and Preparation**

Halcon (1983) found Title VII program staff relatively inexperienced in bilingual education. Although most administrators had over seven years experience working in education, few had bilingual training or experience. Relatively few teachers had as much as 7 years teaching experience; even fewer had extended experience in bilingual programs. The most experienced staff members were instructional paraprofessionals.

Large scale federally funded programs for teacher training began in 1976. Results of a national study comparing 1976-77 and 1980-81 statistics on teacher preparation provide the following information:

1. The number of teachers reporting that they taught in a non-English language or used English as a second language increased by about one-third;

2. The number of teachers reporting basic academic training in bilingual education preparation and possessing self-reported language skills necessary to teach bilingually has doubled;
3. Teachers working in Title VII funded programs were three times more likely to report having academic skills than teachers in non-Title VII programs (O'Malley, 1985).

In the 1980-81 school year, the period when the research was conducted, approximately 504,000 teachers reported having LEP students in their classes. This figure represents nearly one quarter of the teachers working in public schools. Of this total, 345,000 reported having received no training in ESOL or bilingual methodology. Data indicate that a shortage of well trained teachers who can effectively work with LEP students will continue for an extended period of time, especially in states with high percentages of LEP students (Waggoner & O'Malley, 1985).

There is even a greater shortage of teachers who can effectively teach LEP handicapped students. The implementation of new and innovative educational programs has always preceded the demand for additional personnel. There is frequently a lag period of about five years between the existing teacher needs and the capacity of teacher training institutions to graduate qualified teachers. After the implementation of federally sponsored bilingual and special education programs in the 60s and 70s, the need for specialized teachers in both areas increased considerably. Currently the educational needs of LEP handicapped students has increased

the demand for teaching personnel who can effectively work with this rapidly increasing school age population.

State education departments and teacher training institutions play a significant role in recognizing and legitimizing any new areas of educational expertise. Authorizing a new certification area would be a first step toward increasing the pool of available teachers. State authorization would encourage colleges and universities to offer courses, programs leading to certification, and in-service training for local school districts. Another approach to the problem would be the requirement of a bilingual multicultural component to existing special education programs. These policy decisions can have a decisive impact on the effective delivery of services to LEP children.

A nation-wide survey on certification and training program requirements for bilingual special education demonstrated the need which currently exists (Salend & Fradd, a, in press). The results of the survey are particularly important for those states with large numbers of LEP students. The District of Columbia and 49 states reported having certification in special education. Twenty-two states reported having bilingual certification. However, only one state, California, reported that it had created a certification area for bilingual special education. New Mexico was the only state that required bilingual education as part of the special education program. Sixteen states reported the existence of some type of bilingual special education programs at the postsecondary level. Twenty-six states responded that they offered inservice training programs in bilingual special education.

On the question of language proficiency requirements for bilingual certification, twelve states had requirements for oral and written language proficiency in a non-English language. Thirteen states also required oral and written language proficiency in English. Results of this study suggest that a great deal still needs to be done to create a qualified cadre of bilingual special education teachers. The implementation of a workable model for bilingual special education teacher training can serve as a means for meeting the immediate training needs of local school districts (Salend & Fradd, b. in press).

### **Summary**

The federal government has consistently recognized the educational needs of economically and culturally different minority language students. In 1965, with the enactment of the Elementary and Secondary Education Act (ESEA), Congress provided funds for the education of economically and socially disadvantaged minority language children. Considerable attention was given to the educational problems of Afro-Americans. To many educators, limited English language proficiency was considered a handicapping condition. Not until the enactment of the Bilingual Education Act (Title VII of ESEA) in 1968 was there a major focus on the needs of linguistically and culturally different learners.

The need for collaborative effort between bilingual and special education personnel was not seriously addressed until the 1980s. Federal and state court cases have influenced the passage of legislation and administrative policies on behalf of linguistically and culturally different handicapped students. The *Diana* and *Lau* cases are important. Through the

court decisions based on the *Diana* case, educators became aware of the need for systematic guidelines for the identification of students in need of special education services. Once students were identified, the law called for an appropriate evaluation process which would seriously consider language and culture factors in evaluating students' learning needs. The *Lau* case emphasized the need for providing minority language students with appropriate educational programs. Equity of educational opportunity was interpreted to mean the implementation of different teaching approaches for populations who were dissimilar from the majority of students in the school district. Other rigorous guidelines and legal provisions are found in P.L. 94-142 and the Vocational Rehabilitation Act of 1973. The *Doe v Plyler* case affirmed the right of all school-aged children to due process protection under the Constitution. Throughout the nation, school districts are required to provide education and educational support services to school children without regard to race, creed, religion, language origin or citizenship status. Under existing federal and state Civil Rights provisions, school authorities are required to observe due process procedures for both students and parents.

Until recently, few educators recognized the natural link between school children with little or no proficiency in the English language, learning problems, and failure to make acceptable academic progress in school (Ortiz, 1984, b). Educators are realizing that language difference per se is not a contributory factor to a particular learning disability (Hammill, Leigh, McNutt & Larsen, 1981). Linguistically and culturally different students have educational requirements which may differ from

those of regular monolingual learners. Consideration of the linguistic and cultural norms of the family and society in which the student functions outside of the school is important in making educationally appropriate decisions.

Several steps have been taken to increase the pool of competent bilingual educators. The federal government has funded projects to train regular bilingual and ESOL teachers, special education personnel, and school psychologists. At the state level, a number of states have developed teacher training programs for personnel working with LEP students. States are also providing both pre and in-service training for special education personnel working in this field. Local school districts are required by court order to provide bilingual special education training to teachers and support staff working with handicapped and potentially handicapped linguistically different students. There is a precedent as well as a growing need for competently trained bilingual educators. As the school-age minority language population increases, so the need for knowledgeable professionals who can meet the educational needs of these students continues to grow.



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