

**Evolution of Federal Policy  
and Implications of No Child Left Behind  
For Language Minority Students**

**Policy Brief**

**by**

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**January 2005**

**EPSL** | EDUCATION POLICY STUDIES LABORATORY  
Language Policy Research Unit

EPSL-0501-101-LPRU  
<http://edpolicylab.org>

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## **Executive Summary**

This brief details the history of the federal government's stance with language minority students, and analyzes the implications of changes to its guiding principles made by the No Child Left Behind (NCLB) Act of 2001. With every federal re-authorization of the Elementary and Secondary Education Act prior to 2001, the importance of bilingual education had progressively appreciated. It had evolved into a program that, while giving schools greater flexibility in terms of types of programs offered, provided greater recognition of the societal benefits of bilingualism for all students, and increased support for developmental bilingual and dual-language immersion programs. The act also increasingly recognized the need to impart knowledge of the history and culture associated with the languages of language minority students. The word "bilingual" was removed entirely from NCLB, marking a dramatic shift in the guiding principles of the federal government toward these students, which they labeled, "limited English proficient," or LEP.

Under NCLB, test scores are the indicator by which schools are held accountable. To avoid sanctions and potential state or corporate takeover, schools are expected to make adequate yearly progress in their test scores with regard to all subgroups, including students labeled LEP. NCLB allows for exceptions and accommodations, but the number of students whose scores can be excluded is minimal, and acceptable accommodations are neither defined nor spelled out. Schools that have neglected LEP students can no longer afford to do so, which is the sole positive outcome of these changes, but it is overshadowed by the fact that the majority of LEP students will be forced to take an exam in a language they are not yet proficient in.

Other troubling issues with NCLB this brief brings to light are:

- The goals for LEP programs are simply to mainstream the students as soon as possible and to teach them the content of the state standardized exams. Schools are under immense pressure to raise test scores, so instruction narrowly focuses on the test, and discourages instruction focusing on the true needs of LEP students.
- Funding for LEP students nearly doubled, however, these federal funds are now spread more thinly, resulting in less dollars per eligible LEP student.
- NCLB no longer makes a distinction between bilingual programs or special alternative instructional programs. The federal law now only requires that LEP students be placed in “language instruction education programs.” The use of teaching the student’s native language is “optional.”
- While LEP students must be tested, states are finding creative ways to exclude their scores, thus helping many schools avoid being held accountable for a

LEP subgroup. This may create an illusion of success while the real needs of LEP students are being ignored.

Bilingual education programs based on the original principles of the Elementary and Secondary Education Act are still allowed under NCLB, but only if state education leaders deem them as “scientifically based” and are willing to fund them. Anti-bilingual education measures in some states make it extremely difficult for schools in those states to offer quality bilingual education programs. This is a recipe for leaving LEP students behind.

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## **Introduction**

Throughout the United States, school districts are faced with the reality of a rapidly growing population of students who come from homes with a primary language other than English.<sup>1</sup> Concurrent with these changing demographics is the largest federal school reform effort to date—the No Child Left Behind (NCLB) Act of 2001. NCLB includes specific mandates related to language minority students, and marks a dramatic shift in language and educational policies, particularly for students classified as limited English proficient (LEP).<sup>2</sup> The purpose of this policy brief is to provide an analysis of these changes and their implications for the education of language minority students. The first section of this brief will describe the evolution of federal policy, with a specific focus on changes in the definitions of the population to be served, the programs to serve this population, and the stated purposes of the law. The next section will provide an overview of current requirements and mandates of No Child Left Behind as they relate to LEP students. The implications of these changes will be discussed in the final section.

## **Evolution of Federal Policy for Language Minority Student**

Prior to 1968, federal educational language policies regarding language minority students in need of English language development were non-existent. In most cases, schools ignored the needs of language minority students and simply placed them in English immersion or “sink-or-swim” programs.<sup>3</sup> In the wake of the Civil Rights Movement culminating in the passage of the 1964 Civil Rights Act (Title VI), and the War on Poverty, educators and policy makers became more sensitive to the needs of their rapidly growing language minority student population.<sup>4</sup> Census data from 1960 revealed large disparities in the average number of years of schooling between Whites (14 years) and Mexican Americans (4.7 years), thus revealing a high drop-out rate of Mexican American students.<sup>5</sup> A conference on the education of Spanish-speaking children, sponsored by the National Education Association<sup>6</sup> in 1966, led to a study and report on innovative education programs in Southwestern states which made use of the students’ native language. The report made several recommendations, including: “Instruction in pre-school and throughout the early grades should be in both Spanish and English” and “English should be taught as a second language.”<sup>7</sup> The report also called for the repeal of state laws which specify English as the language of instruction. In addition to these programs, the success of a two-way bilingual program for Cuban refugee students at Coral Way Elementary School in Florida also garnered attention.

It was against this backdrop that Senator Ralph Yarborough (D, Texas) introduced a bill to provide federal funding for school districts to support bilingual education programs. His bill eventually became the 1968 Bilingual Education Act (BEA) and entered into federal law as Title VII of the Elementary and Secondary Education Act

(ESEA).<sup>8</sup> The BEA provided grants to school districts and other eligible entities through a competitive grant process. Therefore, most of the regulations associated with Title VII only applied to those programs who were awarded funding.

Yarborough's original bill only focused on Spanish-surnamed students, but 37 similar proposals introduced by other legislators were ultimately merged into one bill and called for the inclusion of "all children whose native tongue was not English."<sup>9</sup> The official designation of the target population became "children of limited-English speaking ability" (LESA), defined as "children who come from environments where the dominant language is other than English." A poverty criterion was also added in determining the target population.<sup>10</sup> While these changes led to the inclusion of a broader population of students, they "fundamentally transformed the focus into a remedial or compensatory program."<sup>11</sup> The original proposal simply identified students by the language they spoke at home, while the LESA label stressed that the population to be served was "limited" or "deficient" in English, and thus required remediation.

This deficit view is apparent in the findings section of the 1968 BEA, which described the presence of "millions of children of limited English-speaking ability" as "one of the most acute educational problems in the United States" and as a "unique and perplexing educational situation."<sup>12</sup> In terms of solutions to this "problem" the law was quite vague, noting the need for "adequate and constructive solutions" and calling for "forward-looking approaches" and "new and imaginative elementary and secondary school programs" designed to meet the "special needs" of LESA students. It then provided a brief list of "activities," including: (a) bilingual education programs, "programs which impart knowledge of the history and culture associated with their

languages,” home-school collaborations, adult education for parents of children in the Title VII programs, and dropout prevention programs for “students having need of bilingual education.”<sup>13</sup>

No definition of “bilingual education” was provided in the law. This omission resulted in a lack of consensus about the purpose and goals of Title VII and “the question of what beneficial effects instruction in the native language would have.”<sup>14</sup>

Disagreement arose as to whether Title VII was meant to be an antidiscrimination measure or an anti-poverty measure and the extent to which Title VII programs initially were supposed to assist students to become proficient bilinguals, or simply transition them to English literacy instruction as quickly as possible.<sup>15</sup> While most programs receiving Title VII funds were called “bilingual education” programs, there was great variation in terms of the use of the students’ native languages across these programs.<sup>16</sup>

The passage of the Bilingual Education Act led to the adoption of similar policies in several states. By 1999, 30 states had statutes allowing native language instruction, nine states mandated it, and seven others stopped enforcing their laws which prohibited native language instruction. At the federal level, however, the ambiguity of the original BEA led to many debates, and the political climate of each reauthorization period led to many changes to the law. Since 1968, the ESEA has undergone six reauthorizations (1974, 1978, 1984, 1988, 1994, and 2001). Each reauthorization resulted in numerous changes to the Bilingual Education Act, including changes in the target population, definitions and types of programs to serve this population, and views of the purposes and goals of the programs. The biggest change however came in 2001 when Title VII (The Bilingual Education Act) was eliminated and replaced with new regulations listed under



Title III (Language Instruction for Limited English Proficient and Immigrant Students). These changes at each reauthorization period are detailed below.

### ***1974 Reauthorization***

The 1974 Reauthorization ended some of the ambiguity inherent in the original act by providing a clearer set of definitions and driving principles. The act included a list of five official recognitions. These recognitions stressed the large size of the LESA population, and noted cultural differences between LESA and “English-speaking persons.” The law stated that “a primary means by which a child learns is through the use of such child’s language and cultural heritage,” that LESA students “have educational needs which can be met by the use of bilingual educational methods and techniques” and that they “benefit through the fullest utilization of multiple language and cultural resources.”<sup>17</sup> These recognitions avoided describing the presence of LESA students as a problem, and instead stressed “differences” and approaches to meet needs. In addition, the poverty criterion was dropped. The “limited-English Speaking ability” (LESA) label remained, but with a clearer and narrower definition:

Limited English-speaking ability . . . means (a) individuals were not born in the United States or whose native language is a language other than English, and (b) individuals who come from environments where a language other than English is dominant . . . and by reason thereof, have difficulty speaking and understanding instruction in the English language.<sup>18</sup>

The additions to this definition changed the focus from the dominant language of the home, to the actual English-speaking ability of the students and their ability to understand

instruction in English. The addition of the criteria “not born in the United States” established Title VII as a program serving immigrant students. This change in definition also opened up the need for language proficiency assessments to identify students eligible for Title VII programs.

The 1974 reauthorization also provided, for the first time, a clear definition of “bilingual education.” This definition reflects the debates over the purpose of bilingual education, and makes the federal government’s view of the goals of the program clear:

There is 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.<sup>19</sup>

Thus, the federal government took the official position that the purpose of bilingual education is to teach English and help students “progress effectively through the educational system.” The role of native language instruction is downplayed, only to be used “to the extent necessary” to accomplish these goals.<sup>20</sup> Programs which use students’ home language in this manner are commonly referred to as transitional bilingual education programs, which have the goal of transitioning students to English-only instruction as quickly as possible, typically after two to three years of instruction. This stands in contrast to “developmental” or “maintenance” bilingual programs, which have the goal of developing high levels of proficiency and literacy in both English and the

home language. Another mandate declared that English-only students in Title VII classrooms could not learn the language of the non-English language background students, proving that this version of Title VII was not to be used to promote bilingualism.<sup>21</sup> This provision ruled out what is known as dual-immersion, two-way immersion, or dual-language programs.

### *1978 Reauthorization*

The most significant change in the definition of the population to be served by Title VII came in the 1978 reauthorization. The term “limited English proficient” (LEP) replaced “limited English speaking ability” and included proficiency in reading and writing English in addition to speaking and understanding the language.<sup>22</sup> Despite the broader definition, the new LEP label still represented a deficit view of students. The inclusion of English literacy skills increased the number of eligible students, as many students might have developed proficiency in speaking English but still struggled with reading and writing tasks in the language. This change also led to the need for English proficiency tests which included literacy assessments, or other procedures to measure students’ abilities in reading and writing English. The new label and definition also included an explicit reference to “American Indian and Alaskan native students who come from environments where a language other than English has had a significant impact on their level of English language proficiency.”<sup>23</sup>

The definition of bilingual education also changed slightly. New wording was added to emphasize that the purpose of providing native language instruction was to “allow a child to achieve competence in the English language.”<sup>24</sup> Furthermore, the

definition added that such instruction not only be given “with appreciation for the cultural heritage” of the LEP students, but also for the cultural heritage of “other children in American society.”<sup>25</sup>

An important change was the removal of the prohibition of English-speaking students in Title VII classrooms learning the language of the LEP students, thus making dual-immersion programs eligible for Title VII funding. One of the official recognitions in the act was modified to accommodate dual-immersion programs by declaring “children of limited English proficiency *and children whose primary language is English* benefit through the fullest utilization of multiple language and cultural resources” (emphasis added).<sup>26</sup> However, the definition required that inclusion of English-speaking students be limited to 40 percent, and that their participation in the program had to contribute to the purpose of assisting LEP students “improve their English language skills.”<sup>27</sup> Two official recognitions were added, one noting the “high dropout rate” and “low median years of education” for LEP students, and one calling for the “research and evaluation capabilities in the field” to be strengthened.<sup>28</sup>

Despite the lift of the ban on dual-immersion programs, an increasingly hostile political environment towards maintaining students’ native language led to an increased focus on transitional bilingual education models, and the need to exit students to English-only mainstream programs as quickly as possible.<sup>29</sup>

### ***Lau v. Nichols and the Lau Remedies***

Before describing changes in the subsequent reauthorizations of Title VII, it is important to understand some important legal and political changes which took place

prior the 1984 reauthorization. The 1974 Supreme Court case *Lau v. Nichols*<sup>30</sup> resulted in perhaps the most important court decision regarding the education of language minority students. This case was brought forward by Chinese American students in the San Francisco Unified School District who were simply placed in mainstream classrooms, despite their lack of proficiency in English, and left to “sink-or-swim.” The district had argued that it had done nothing wrong, and that the Chinese American students were treated equally as other students. Justice William Douglass, in writing the court’s opinion, stated:

Under these state-imposed standards 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. . . . We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful.<sup>31</sup>

The court required that the school district do something to meet the language and educational needs of limited English proficient (LEP) students, and mentioned bilingual education as one possible solution. The influence of *Lau* on federal policy, however, was substantial. Following the court’s decision, the U.S. Department of Education’s Office of Civil Rights (OCR) created the *Lau Remedies*. While Title VII regulations only applied to funded programs, the *Lau Remedies* were applicable to all school districts, and functioned as *de-facto* compliance standards.<sup>32</sup> The OCR used the *Lau* decision to go after districts that, like San Francisco, were essentially ignoring the needs of its LEP students. Going beyond the court decision which did not mandate any particular

instructional approach,<sup>33</sup> the *Lau Remedies* essentially required districts to implement bilingual education programs for LEP students. Lyons explains that:

The *Lau Remedies* specified proper approaches, methods and procedures for (1) identifying and evaluating national-origin-minority students' English-language skills; (2) determining appropriate instructional treatments; (3) deciding when LEP students were ready for mainstream classes; and (4) determining the professional standards to be met by teachers of language-minority children. Under the *Lau Remedies*, elementary schools were generally required to provide LEP students special English-as-a-second-language instruction as well as academic subject-matter instruction through the students' strongest language until the student achieved proficiency in English sufficient to learn effectively in a monolingual English classroom.<sup>34</sup>

Numerous complaints and a lawsuit from Alaska held that the *Lau Remedies* were not formal regulations, and thus were not binding. A settlement led to an agreement to turn the remedies into official regulations, but the proposed new rules also proved to be controversial. Ronald Reagan grabbed hold of the issue three months before the presidential election and used them as an example of the need to get the "government off the back of the American people."<sup>35</sup> After Reagan's election, the efforts to formalize the remedies faded away. Without formal rules, OCR reviews had to be conducted on a case-by-case basis, which still resulted in finding many districts failing to meet the basic needs of LEP students. However, the total number of compliance reviews decreased substantially, and few follow-ups were conducted with the districts found to be out of compliance.<sup>36</sup>

In addition to *Lau*, there were also several court cases at the local, state, and federal district level which essentially mandated bilingual instruction (*Serna v. Portales Municipal Schools*, 1972; *Aspira v. New York*, 1974; *Rios v. Read*, 1977; and *U.S. v. Texas*, 1981).<sup>37</sup> There is some debate about the landmark affirmative action case *University of California Regents v. Bakke* in 1978 undoing the basis of the *Lau* decision. *Lau* was based on the fact that the district policy had a “disparate impact” on English language learner (ELL) students, and thus was unconstitutional. The *Bakke* decision, however, declared that disparate impact was not enough, and that a governmental action had to be shown as having a “discriminatory purpose” in order to be found unconstitutional. A decision in the 1981 case *Castenada v. Pickard*, a case brought forward Mexican American parents in Texas, made note of this issue.<sup>38</sup> However, the court outlined a set of criteria which is generally used today as a test of whether or not a school is taking “appropriate actions” to “overcome language barriers” of LEP students: The prescribed remedy must (a) be based on sound educational theory, (b) have a reasonable plan for implementation, including the hiring of appropriate personnel, and (c) produce positive educational results.<sup>39</sup>

The flurry of court activity, the *Lau Remedies*, and a growing English-only (or Official English) movement represented by groups such as U.S. English contributed to the political backlash against bilingual education programs. The result of this backlash is apparent in subsequent reauthorizations of Title VII.

## *1984 Reauthorization*

The change in the political climate is apparent in the list of official recognitions in the text of the 1984 reauthorization of the Bilingual Education Act (BEA). The number of recognitions doubled from 7 to 14. The new recognitions stressed the obligation of the federal government to provide equal educational opportunities for limited English proficient (LEP) students, and to “assist language minority students to acquire the English language proficiency that will enable them to become full and productive members of society.”<sup>40</sup> One recognition declared that bilingual education programs “may be administratively impractical” in some districts due to small numbers of LEP students who speak the same language, and shortages of qualified bilingual teachers.”<sup>41</sup> Another declared that states and local schools should “be encouraged to determine appropriate curricula” and “instructional programs,” thus stressing flexibility rather than prescribed programs.<sup>42</sup> An additional resolution, however, declared that both LEP and native English-speakers “can benefit from bilingual education programs, and that such programs help develop our national linguistic resources.”<sup>43</sup> The remaining recognitions stressed the need for research, parent and community participation, and the needs of LEP adults and parents. This reauthorization clarified the overall purpose of all Title VII programs to “enable students to achieve full competence in English.”<sup>44</sup> However, the law also stated that “programs may additionally provide for the development of student competence in a second language.”<sup>45</sup>

The definition of LEP was expanded slightly to indicate that limited English proficiency could deny individuals opportunities to “participate fully in our society.”<sup>46</sup>



This addition moved beyond difficulties just in the classroom, and thus could justify Title VII support for programs serving LEP adults, especially parents.

Significant changes were made not only in the definition of bilingual education, but also in the types of programs which were eligible for funding. In addition to encouraging the establishment of bilingual programs, this version of the law also encouraged “the establishment of special alternative instructional programs” (SAIPs) where “establishment of bilingual education programs is not practicable or for other appropriate reasons.”<sup>47</sup> Thus, for the first time, Title VII funds could officially be used to fund a limited number of English-only programs. Special alternative instructional programs (SAIPs) were defined as non-bilingual programs which “have specially designed curricula” appropriate for the “linguistic and instructional needs” of LEP students, and provide “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.”<sup>48</sup>

Through a series of compromises, support was also made available for a limited number of developmental bilingual programs. The definition of bilingual education was changed substantially by providing separate definitions for transitional and developmental bilingual programs. The definition for transitional programs was similar to previous definitions, but it stressed that this program must provide “structured English language instruction” and clarified that the purpose was to “allow a child to meet grade promotion and graduation standards”<sup>49</sup> The definition of developmental bilingual education programs was essentially the same, except that these programs “shall be designed to help children achieve competence in English *and* a second language, while

mastering subject matter skills”<sup>50</sup> (emphasis added). This version of Title VII also called for the creation of “family English literacy programs” designed to help LEP “adults and out-of-school youth achieve competence in the English language.”<sup>51</sup>

Compromises between those pushing English-only programs and those pushing for developmental bilingual education programs is apparent in this reauthorization. Crawford<sup>52</sup> notes that bilingual advocates who successfully negotiated for the inclusion of developmental programs were trying to break Title VII out of the deficit/compensatory mode, however, the allowances for SAIPs opened the way for more English-only programs to be funded in future authorizations.

### ***1988 Reauthorization***

No significant changes were made to the definition of limited English proficient (LEP) students in the 1988 reauthorization, and the distinctions between and definitions of transitional and developmental bilingual education and special alternative instruction programs (SAIPs) remained the same. The biggest political battles were fought over the amount of funding which could be given to the English-only SAIPs. The Reagan administration tried to remove all restrictions on SAIP, but a compromise limited funding for these types of programs to a maximum of 25 percent. Several additions were made to the act’s official recognitions, one of which stressed that regardless of program type, all Title VII programs had “the equal goals of development of academic achievement and English proficiency.”<sup>53</sup> Clarification was also added about the role of native language instruction: “instructional use and development of a child’s non-English native language promotes self-esteem, subject matter achievement, and English-language acquisition.”<sup>54</sup>

A phrase was added to the recognition of the benefits of bilingual education programs for both LEP and native English-speaking students, stating that such programs “promote our international competitiveness.”<sup>55</sup> Other additions recognized the problems of disproportionate representation of LEP students in special education and programs for gifted and talented students, and that “many schools fail to meet the full instructional needs” of LEP students “who may be handicapped or gifted and talented.”<sup>56</sup> This problem was blamed on “reliance on student evaluation procedures which are inappropriate” for LEP students.<sup>57</sup> Another resolution was added noting the “serious shortage of teachers and educational personnel who are professionally trained and qualified to serve” LEP students.<sup>58</sup>

### ***1994 Reauthorization – Improving America’s School Act***

Title VII was reauthorized for the final time in 1994 as part of the Improving America’s Schools Act (IASA) under the Clinton administration. Many significant changes were made to the law. The definition of LEP was reworded slightly but essentially remained the same. It was expanded to include individuals who are “migratory” and whose native language is other than English and come from an environment where a language other than English is dominant.”<sup>59</sup> This addition allowed for Title VII funding for programs targeting migrant students and families.

The distinction between transitional and developmental bilingual education was dropped and replaced with a single but much broader definition of bilingual education as a program which:

- (A) makes instructional use of both English and a student's native language;

- (B) enables limited English proficient students to achieve English proficiency and academic mastery of subject matter content and higher order skills, including critical thinking, so as to meet age-appropriate grade-promotion and graduation standards in concert with the National Education Goals;
- (C) may also develop the native language skills of limited English proficient students, or ancestral languages of American Indians, Alaska Natives, Native Hawaiians and native residents of the outlying areas; and
- (D) may include the participation of English-proficient students if such program is designed to enable all enrolled students to become proficient in English and a second language.<sup>60</sup>

This broader definition encompassed most if not all types of bilingual education programs. The SAIP distinction remained, but the definition was clarified:

- (A) utilizes specially designed English-language curricula and services but does not use the student's native language for instructional purposes;
- (B) enables limited English proficient students to achieve English proficiency and academic mastery of subject matter content and higher order skills, including critical thinking so as to meet age-appropriate grade-promotion and graduation standards in concert with the National Education Goals; and
- (C) is particularly appropriate for schools where the diversity of the limited English proficient students' native languages and the small number of students speaking each respective language make bilingual education impractical and where there is a critical shortage in bilingual education teachers.<sup>61</sup>

The list of recognitions which had grown longer with each reauthorization was completely re-written and set forth as “findings.” This list of findings, while still noting the “challenges” faced by LEP students (e.g., segregation, improper placement in special education, parent’s lack of English, shortage of teachers, etc.), nonetheless represented an overall positive view of the linguistic resources of LEP students and the benefits of bilingual education and bilingualism. The following findings represent this view:

(1) language-minority Americans speak virtually all world languages plus many that are indigenous to the United States; . . . .

(9) quality bilingual education programs enable children and youth to learn English and meet high academic standards including proficiency in more than one language;

(10) as the world becomes increasingly interdependent and as international communication becomes a daily occurrence in government, business, commerce, and family life, multilingual skills constitute an important national resource which deserves protection and development; . . . .

(14) the use of a child or youth's native language and culture in classroom instruction can—

(A) promote self-esteem and contribute to academic achievement and learning English by limited English proficient children and youth;

(B) benefit English-proficient children and youth who also participate in such programs; and

(C) develop our Nation's national language resources, thus promoting our Nation's competitiveness in the global economy.<sup>62</sup>

An official list of purposes included “developing bilingual skills and multicultural understanding.”<sup>63</sup> The act still made it clear, however, that the overall purpose of Title VII was “to help ensure that limited English proficient students master English” and “meet the same rigorous standards for academic performance expected of all children and youth, including meeting challenging State content standards and challenging State student performance standards in academic areas.”<sup>64</sup>

Thus, by 1994, after five reauthorizations of the original legislation, and after numerous debates and many compromises between advocates and opponents of bilingual education, the goals of Title VII, the definition of the population, and the purposes and benefits of bilingual education, bilingualism, and multicultural understanding were expanded, and clarified. While the focus on helping LEP students achieve fluency in English remained constant, support for flexibility grew in terms of the types of programs eligible for Title VII funding. While English-only programs remained the most common, and transitional bilingual education programs the most likely to receive Title VII funding, the way had been paved for more support for developmental and two-way immersion bilingual education programs which many saw as key to getting bilingual education out of the deficit/compensatory model.

### *English for the Children State Initiatives*

Before describing the most recent reauthorization of the Elementary and Secondary Education Act (ESEA), it is important to understand the influence that state voter initiatives related to LEP student instruction have had on the No Child Left Behind Act. In 1998 California voters approved (by 61 percent) Proposition 227, the so called

“English for the Children initiative,” also known as the “Unz” initiative named after its author and chief financial backer.<sup>65</sup> This initiative placed restrictions on bilingual education programs, and mandated that LEP students “be taught English by being taught in English,” be placed in “English language classrooms” and “be educated through sheltered English immersion.”<sup>66</sup> Unz sponsored similar but more restrictive versions of his initiatives in Arizona in 2001 (Proposition 203), and in Massachusetts (Question 2) and Colorado (Amendment 31) in 2002. While the initiative was defeated in Colorado,<sup>67</sup> it passed by wide margins in both Arizona and Massachusetts.

Proposition 227 and 203 had already passed by the time President’s Bush’s No Child Left Behind Act was being debated over and revised by Congress, and the campaigns in Colorado and Massachusetts were in full gear and continued to fuel the national debate over bilingual education. While these were state initiatives, a legislative analyst for the National Association for Bilingual Education (NABE) who worked on the NCLB legislation reported that these initiatives nonetheless had a profound impact on the federal education law.<sup>68</sup> Representatives from Arizona and Colorado who were strong supporters of the Unz initiatives in their states were members of the Education and Workforce Committee of Congress. NABE also found waning support from former supporters of bilingual education in the house and senate in the aftermath of the Unz initiatives. While NABE’s efforts succeeded in some areas, as will be apparent in the description below, many compromises and concessions were made in terms of requirements and support for programs for LEP students.

## ***2001 Reauthorization – The No Child Left Behind Act***

Federal policy for language minority students learning English changed dramatically with the passage the No Child Left Behind (NCLB) Act of 2001.<sup>69</sup> The Title VII Bilingual Education Act was eliminated and replaced with Title III, “Language Instruction for Limited English Proficient and Immigrant Students.” The word “bilingual” was completely expunged from the legislation as well as from the names of offices previously connected with Title VII. The name of the “Office for Bilingual Education and Minority Language Affairs” was changed to the “Office of English Language Acquisition, Language Enhancement, and Academic Achievement for Limited English Proficient Students,” and the “National Clearinghouse for Bilingual Education” was changed to the “National Clearinghouse for English Language Acquisition and Language Instruction Educational Programs.” LEP student issues are also featured prominently in changes to Title I which addresses issues of accountability and high-stakes testing.

### **Title III - Language Instruction for Limited English Proficient and Immigrant Students**

Unlike the competitive grant structure of Title VII, Title III provides formula grants to state education agencies (SEA).<sup>70</sup> The SEAs, in turn, make subgrants to eligible local education agencies (LEAs; i.e., school districts and charter schools) that apply to the state for the funds. Funding for LEP students nearly doubled, and for the first time federal funds for LEP students would go to nearly all eligible schools. However, these



federal funds are now spread more thinly, resulting in less dollars per eligible LEP student.<sup>71</sup>

The definition of LEP changed slightly once again.<sup>72</sup> While most of the original wording remained intact, new additions stipulated that students must be between the ages of 3 and 21, and be enrolled (or preparing to enroll) in an elementary or secondary school.<sup>73</sup> This narrower definition likely serves to keep funding targeted on in-school youth, though Title III does allow some use of funding which specifically targets the parents of LEP students with the explicit purpose to help parents help their children learn English and achieve academic success. The difficulties faced by LEP students are more clearly delineated as follows:

(D) whose difficulties in speaking, reading, writing, or understanding the English language may be sufficient to deny the individual —

- (i) the ability to meet the State's proficient level of achievement on State assessments described in [Title I];
- (ii) the ability to successfully achieve in classrooms where the language of instruction is English; or
- (iii) the opportunity to participate fully in society.<sup>74</sup>

Title III no longer makes any distinctions between bilingual programs or special alternative instructional programs. The federal law now only requires that LEP students be placed in “language instruction education programs,” defined simply as an instructional course:

(A) in which a limited English proficient child is placed for the purpose of developing and attaining English proficiency, while meeting challenging State academic content and student academic achievement standards; and

(B) that may make instructional use of both English and a child's native language to enable the child to develop and attain English proficiency, and may include the participation of English proficient children if such course is designed to enable all participating children to become proficient in English and a second language.<sup>75</sup>

Thus any program type for LEP students must only meet two requirements (a) teach English, and (b) teach the state content standards. Instruction in the native language is optional. This option, without referring to transitional bilingual education or dual-immersion programs by name, nonetheless makes allowances for these types of programs. What remains unclear is whether developmental bilingual programs are allowed, as this definition appears to stress that LEP students only have the right to develop and maintain proficiency in their native language if English proficient students are also learning their language.

This issue may be moot. Title III essentially gives the ultimate authority to SEAs in terms of what types of programs they will and will not support. LEAs must submit plans to the SEAs, which in turn must submit plans to the U.S. Department of Education in order to receive Title III funds. In these plans, LEAs and SEAs must describe how they are “using a language instruction curriculum that is tied to scientifically based research on teaching LEP children and that has been demonstrated to be effective . . . in the manner the eligible entities determine to be the most effective.”<sup>76</sup> Further regulations reinforce that Title III does not “require a State or a local educational agency to establish,

continue, or eliminate any particular type of instructional program” for LEP students;<sup>77</sup> in addition the law states, “the [U.S.] Secretary [of Education] shall neither mandate nor preclude the use of a particular curricular or pedagogical approach to educating limited English proficient children.”<sup>78</sup>

Thus, each SEA determines which programs qualify as “scientifically based” and eligible for Title III funds. There is also a stipulation that none of the requirements of Title III “shall be construed to negate or supersede State law.”<sup>79</sup> As a result, in states with laws restricting bilingual education (e.g., California, Arizona, and Massachusetts) schools can not use the allowances for bilingual education in Title III to offer such programs (unless they meet their state law’s waiver requirements).

There is no list of recognitions or findings related to LEP students as in past legislation, only a long list of “purposes.” Absent from Title III are any recognitions of the benefits of bilingual education and bilingualism, issues of cultural differences and the needs for multicultural understanding, and acknowledgement of factors which have negatively impacted the education of LEP students (e.g., segregation, improper placement in special education, under-representation in gifted and talented education, shortages of bilingual teachers, etc.). Title III’s focus is exclusively on English. The list of purposes stresses (repeatedly) that Title III funds and programs are to “ensure that LEP students attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging State academic content and student academic achievement standards as all children are expected to meet” and to assist state and local education agencies in creating “high quality instructional programs” which prepare LEP students to “enter all-English instruction settings.”<sup>80</sup> Another stated purpose of Title III is “to hold

State educational agencies, local educational agencies, and schools accountable for increases in English proficiency and core academic content knowledge” of LEP students by requiring “demonstrated improvements in the English proficiency” and “adequate yearly progress” on state academic achievement tests.<sup>81</sup>

Prior to NCLB, each state set its own policies in terms of how to identify LEP students. In most states, schools would administer, at the time of initial school enrollment, a home language survey to determine if students come from a household with a “primary home language other than English” (PHLOTE). School districts were then required to assess PHLOTE students with an English language proficiency test to identify LEP students. There are a number of such tests on the market, and decisions regarding which test to use were frequently made at the district level. There is great variability across these different tests, across practices from one district to the next, and across each state in terms of assessments used and procedures followed to identify and report the number of LEP students. Even at the national level, attempts to accurately measure the national LEP student population proved problematic given the lack of data and inconsistencies between various data sets.<sup>82</sup>

With the change to a formula grant process in Title III, a standardized procedure was needed to identify the size of the LEP (and immigrant) student population in each state. Title III stipulated that during the first two years of NCLB (2002 – 2003) the U.S. Secretary of Education would utilize data from the U.S. Census. After 2003, the Secretary is directed to use data from the American Community Survey administered by the Department of Commerce.<sup>83</sup>

Alternatively (and most likely preferably) the Secretary may determine the size of the LEP student population based on the number of students assessed in each state on new statewide English language proficiency assessments.<sup>84</sup> NCLB requires each state to develop English language proficiency standards and English language proficiency assessments designed to measure LEP students' progress in attaining those standards.<sup>85</sup> The standards and assessments must be based on "the four domains of speaking, reading, listening, and writing," and assessments must also include the domain of "comprehension" as exhibited through listening and reading.<sup>86</sup> Most of the language proficiency assessments states and school districts had been using did not meet these requirements, and thus new statewide English-language proficiency standards and assessments had to be developed.<sup>87</sup> As of this writing, many states are not yet in full compliance with this requirement.<sup>88</sup> The English language proficiency assessments must be given annually to all LEP students enrolled in schools in the state.

Local education agencies (LEAs) receiving Title III funds are required to submit an evaluation of their programs for LEP students every two years to the state. The evaluation must include: (a) progress of students in attaining English language proficiency, including their level of comprehension, speaking, listening, reading, and writing in English; (b) percentage of students attaining English language proficiency, and progress of students in attaining English language proficiency; (c) percentage of students transitioned into non-LEP instructional settings who have a "sufficient level of English language proficiency to achieve in English and make that transition"; and (d) percentage of students who made progress in meeting State academic achievement standards, as measured by the State content achievement test.<sup>89</sup>

Results of the English language proficiency assessments are a part of the state's accountability system. As with the content achievement tests (see below), the states must set annual measurable achievement objectives (AMAOs) to hold school districts (and charter schools) accountable for the progress of LEP students in attaining proficiency in English. School districts' adequate yearly progress in achieving Title III AMAOs is determined by "annual increases in the number or percentage of children making progress in learning English" and "annual increases in the number or percentage of children attaining English proficiency by the end of each school year."<sup>90</sup> In addition, AMAOs under Title III includes LEP students meeting the annual yearly progress (AYP) requirements under Title I (see below).

There are serious consequences for failing to make AYP related to LEP student's attainment of English language proficiency. If a school district (or charter school) fails to make AYP for two consecutive years, it must develop and submit an "improvement plan" to the state. The state is required to provide technical assistance to the school. If the district fails to make AYP after four consecutive years, the state may: (a) require the school to modify its curriculum program and/or method of instruction; (b) withhold Title III funds, or (c) replace educational personnel in the school.<sup>91</sup>

Each state must submit detailed consolidated performance reports every year, and an evaluation report every two years to the U.S. Department of Education, utilizing the evaluations from the LEAs. The results of English language proficiency assessments will also be used to determine state-level AYP designations.

## **Title I – Improving the Achievement of the Economically**

### **Disadvantaged**

The stated purpose of Title I, “Improving the Academic Achievement of the Disadvantaged,” is “to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and State academic assessments.”<sup>92</sup> To achieve this purpose, Title I mandates annual student testing of all students in grades 3 through 8, and once in high school. Rather than create a national test, Title I requires each state to create its own academic content and achievement standards and assessments to measure those standards, and use the results to hold schools, districts, and the state itself, accountable. Assessments must include math and reading/language arts annually, and science must be tested three times between grades 3 and 12. The state must issue individual student reports, and also school and district “report cards” annually beginning in the 2002-2003 school year, and these report cards must include the results of the student achievement assessments.

All students are expected to meet or exceed the state’s academic standards by 2014. In other words, by 2014, it is expected that 100 percent of students will pass their state’s test. Test score data must be disaggregated into different subgroups, including gender, each major racial and ethnic group, migrant status, students with disabilities, students with limited English proficiency, and economically disadvantaged students.<sup>93</sup> States must establish baseline data and then set annual measurable achievement objectives (AMAOs) relative to ensuring that all subgroups will pass the state content achievement test by 2014. A subgroup is deemed as making adequate yearly progress

(AYP) if it meets or exceeds that year's AMAO. In addition, to be deemed as making AYP, at least 95 percent of the students in the subgroup must be tested each year, and each subgroup must meet the criteria of one other achievement indicator (typically attendance or graduation rates). Thus, if a subgroup does not reach its AMAO or if less than 95 percent of the students in that group take the test, that subgroup is deemed as "failing" to make AYP. Furthermore, schools and school districts are held accountable for ensuring that each subgroup reaches its AMAO. If any one of its subgroups does not, then the entire school or district is deemed as not making adequate yearly progress. When a list of these schools is published in newspapers, they typically are described as schools "failing to meet federal standards" or simply as "failing schools." AYP designations are also made at the district and state level.

Once a school has been deemed as "failing" to make AYP for two consecutive years, it is identified by the state for "school improvement," and is designated as a "targeted assistance school." The school must notify parents of the designation, and must provide students the opportunity to transfer to another public school (or charter school) which is not "failing" and cover any necessary transportation costs.<sup>94</sup> Within three months, the "failing" school must develop and implement a two-year school improvement plan. If the school fails to make AYP the following year the school must provide "supplemental educational services" to students from an outside provider. The district must also take "corrective action" which could include appointing outside experts to advise the school, decreasing the authority of the school's management, or even replacing school staff.<sup>95</sup> If the school fails to make AYP the following year, it is subject



to state take-over, which could entail replacing the entire staff, converting the school into a charter school, or turning it over to a private company.<sup>96</sup>

Prior to 2002, states and school districts were given flexibility in terms of statewide testing and how and when to include LEP students. Title I of NCLB, in contrast, requires LEP students to take the state content achievement test regardless of their English-language proficiency or how long they have attended school in the United States. However, states are required to assess LEP students “in a valid and reliable manner” and must also provide “reasonable accommodations.” Guidelines issued by the U.S. Department of Education<sup>97</sup> suggest that these accommodations might include extra time, small group administration, flexible scheduling, simplified instructions, audio-taped instructions in the native language or English, or providing additional clarifying information.

“Reasonable accommodations” for LEP students also includes, “to the extent practicable, assessments in the language and form most likely to yield accurate data on what such students know and can do in academic content areas, until such students have achieved English language proficiency.”<sup>98</sup> In fact, Title I requires each state to

identify the languages other than English that are present in the participating student population and indicate the languages for which yearly student academic assessments are not available and are needed. The State shall make every effort to develop such assessments and may request assistance from the Secretary if linguistically accessible academic assessment measures are needed.<sup>99</sup>

After the first three years LEP students are enrolled in a U.S. school, they must take the state content achievement test in English. However, a local education agency (LEA) may

extend testing in the students' native language for two additional years on an individual case-by-case basis, if they determine that this would "yield more accurate and reliable information on what the student knows and can do on tests (written in English) of reading or language arts."<sup>100</sup> However, U.S. Department of Education guidelines make it clear that native language assessments are only required "to the extent practicable," but otherwise states must offer appropriate accommodations

If the administration of native language assessments is not practicable, for example, when only a small percentage of limited-English students in the State speak a particular language, States must offer students of limited English proficiency other appropriate accommodations in order to yield accurate and reliable information on what those students know and can do in subjects other than English.<sup>101</sup>

## **Implications for Language Minority Students**

### ***Positive Aspects of NCLB for LEP Students***

Critics and proponents of No Child Left Behind (NCLB) agree that it has brought renewed attention to the needs of LEP students. Districts and schools which have long neglected their LEP students can no longer afford to do so as they are now held accountable for both the attainment in English language proficiency and the academic achievement of these students. Indeed, an entire school or district could be deemed as "failing" to make adequate yearly progress and subject to state sanctions based on the test

scores of the LEP subgroup alone. There have been reports from the field that educators with experience and expertise in teaching LEP students are now finding their knowledge and skills in demand from their colleagues in their schools and districts as never before.<sup>102</sup> Many researchers are excited about the unprecedented amounts data that will be generated by the requirements for disaggregated LEP achievement data, English language proficiency data, and the mandates for public reporting of these data.

The flexibility in terms of language instruction educational programs could also be viewed as a positive, as potentially Title III funds could be used without restrictions in terms of supporting larger numbers of dual-immersion programs and other developmental bilingual education programs than ever before. Unfortunately, this is unlikely, and the positives described here are overshadowed by serious psychometric and other programs related to NCLB requirements for LEP students, as detailed below.

### *Exclusive Focus on English*

Unlike its predecessor Title VII, Title III has an exclusive focus on English, and makes it clear that “language instruction educational programs” are to teach LEP students English and move them into mainstream English-only classrooms as quickly as possible. While allowances are made for bilingual education programs, the fact that the act avoids the term “bilingual” altogether demonstrates developing and promoting bilingualism is no longer a goal. The recognitions of the linguistic resources LEP students bring to school, and the benefits of bilingualism to society so apparent in the 1994 reauthorization of Title VII have been stripped from the federal law.

While the flexibility afforded state and local education agencies to define their own approaches to teaching LEP students potentially creates the opportunity for funding for bilingual programs, this is unlikely to happen for several reasons. First, state education agencies have been given unprecedented power in terms of deciding which types of programs they deem to be “scientifically based” and thus eligible for funding. In Arizona, for example, bilingual programs are still possible through the waiver provisions. Nevertheless, Arizona’s Superintendent of Public Instruction has withheld or threatened to withhold Title III funds from schools that do not adhere to his strict interpretation of the waiver provisions (which make it impossible for LEP students under 10-years old to qualify), and even from charter schools and schools on Indian Reservations deemed by the state’s Attorney General as exempt from Proposition 203.<sup>103</sup> That superintendent’s use of a single study<sup>104</sup> he deems as “scientific evidence” that bilingual education does not work represents the potential to abuse the flexibility which Title III affords to state education officials.

In addition, the testing requirements of Title III for English Proficiency and Title I for academic content are likely to discourage the use of bilingual education programs. Despite the allowances for testing in the native language, the vast majority of LEP students will be required to take their state’s achievement test in English (see below). Schools with large LEP populations will be under immense pressure to ensure that the LEP subgroup makes adequate yearly progress at the risk of the entire school being labeled as failing. Research from California has shown that pressure to raise LEP student scores on an English-only test were more influential in ending bilingual education programs than even Proposition 227.<sup>105</sup> The pressure schools and districts will be under

to also prepare their students for the state English language proficiency test will only exacerbate this pressure.

## ***Psychometric Problems in Testing the LEP Subgroup***

### **Inconsistencies in Defining the LEP Population**

As described above, the federal definition of the language minority students targeted by federal policy changed with each reauthorization. Even with the broader but more precise definition now in place in NCLB, the definition has never been operationalized at the federal level. Title III's mandate for states to create their own statewide English language proficiency tests might resolve this problem at the state level, but could exacerbate it at the national level. Currently there are only a handful of commercially produced English-proficiency assessments used by schools. With the new requirement, technically there could be 50 different assessments as each state has to develop their own.<sup>106</sup> In addition, each state may have different procedures to determine who must take the test in the first place in order to be identified. There will likely be little consistency across these tests, just as there is little consistency across the states academic achievement tests. Thus, a language minority student identified as fluent in English by one state's test, could be deemed as LEP on another state's test if the student happened to move out of state. This also prevents any meaningful comparisons of LEP student achievement across the states, and makes adequate yearly progress (AYP) designations for the LEP subgroup problematic.<sup>107</sup>

Furthermore, the requirements of Title III to use English language assessments for the first time for accountability purposes now makes these tests high stakes for schools

and districts. As with any high-stakes tests, there is pressure to teach to them. Language proficiency is vastly complex, and language assessments are very limited and can never fully capture the true linguistic competence of bilingual students.<sup>108</sup> As teachers become familiar with the content of the English language proficiency assessments, they will narrowly teach the vocabulary, grammatical structures, and other skills covered by the test, and thus create a false picture of the students' attainment of English. In addition, to avoid large numbers of school districts being deemed as failing to make AYP, states might be tempted to make its English language proficiency tests as easy as possible. In Arizona, for example, over half (58 percent) the school districts receiving Title III funds failed to make AYP under that Title in 2004. Most failed due to the limited progress of LEP students in reaching the achievement objectives set by the state for the English language proficiency assessment, or because not enough students achieved scores high enough to be redesignated as fluent English proficient. This has already led to speculation among state education leaders about the needs to make adjustments.<sup>109</sup>

## **Inclusion of LEP Students in Statewide Tests**

Many scholars and researchers within the fields of language minority education and psychometrics have raised several issues of concern regarding the inclusion of LEP students in statewide large-scale assessments. There is tension between maintaining rigorous psychometric standards on the one hand and including all students on the other.<sup>110</sup> NCLB requires that LEP students be tested in a valid and reliable manner, yet test validity is nearly impossible when students are not proficient in the language of the test. Research has demonstrated that when LEP students take English-language tests,

their lack of English language proficiency is a source of measurement error.<sup>111</sup> This fact is widely recognized in the psychometric field,<sup>112</sup> and has also been acknowledged by the Office of Civil Rights.<sup>113</sup>

In addition, the construct of language proficiency is highly complex and cannot simply be reduced to the binary distinction of proficiency versus non-proficiency.<sup>114</sup> Other potential sources of measurement error which affect the performance of LEP students on assessments in English include diversity of their language background, prior education experience, amount of time in the United States, and type of instructional programs.<sup>115</sup>

A key issue affecting valid score interpretations of LEP students is the fact that most (if not all) tests currently utilized by states were developed for native English speakers.<sup>116</sup> LEP students are not represented within the norming population,<sup>117</sup> nor were considerations given to LEP students during the conceptualization and pilot testing of these assessments.<sup>118</sup> LaCelle-Peterson and Rivera<sup>119</sup> note that assessing students who “speak English as a second or other language with instruments written in English and normed on monolingual English-speaking students inevitably yields data of unknown validity” and point out that “a test is valid . . . only for populations for which it has been validated.” This serious problem has generated a great deal of concern within the field, as evident by reports from the Office of Civil Rights,<sup>120</sup> the Council of Chief State School Officers,<sup>121</sup> and the Committee on Appropriate Test Use of the Nation Research Council.<sup>122</sup>

Title I requires that state assessments be “consistent with widely accepted professional testing standards.”<sup>123</sup> The American Education Research Association, the

American Psychological Association, and the National Council on Measurement in Education have collaborated to establish *Standards for Educational and Psychological Testing*.<sup>124</sup> Standards 9.2 and 9.6 directly address the issues described above:

Standard 9.2

When credible research evidence reports that test scores differ in meaning across subgroups of linguistically diverse test takers, then to the extent feasible, test developers should collect for each linguistic subgroup studied the same form of validity evidence collected for the examinee population as a whole.<sup>125</sup>

Standard 9.6

When a test is recommended for use with linguistically diverse test takers, test developers and publishers should provide the information necessary for appropriate test use and interpretation.<sup>126</sup>

Few, if any state assessment programs have met these standards.

Gotlieb makes the case that by nature of being identified as LEP, these students cannot be expected to participate in traditional English large-scale assessments in any meaningful way:

The identification of linguistically and culturally diverse students as English language learners is tantamount to the de facto admission that English language proficiency levels of these students precludes them from meeting state academic content standards, measured in English, using traditional testing techniques. To then include these learners in unaltered, large-scale assessment of academic achievement, crafted for native English speakers, serves no purpose other than to



increase the overall participation rate and, more often than not, results in penalties for these students and their schools.<sup>127</sup>

LaCelle-Peterson and Rivera likewise argue that the inclusion of English language learning (ELL) students in large-scale assessments without regard to their language proficiency status is harmful and unethical:

Unless test publishers can provide evidence that ELLs' scores are valid and comparable to scores of monolingual students, such testing and data reporting result in bad experiences for the students and inaccurate information about schools or school systems. This option is neither ethically nor educationally defensible.<sup>128</sup>

### **Problems with Testing Accommodations for LEP Students**

As a solution to the above problems, NCLB requires that LEP students be provided with “reasonable accommodations.” While this recommendation appears to be “reasonable,” in reality it is not. First, the law does not define accommodations, nor does it define what constitutes “reasonable.” Second, there are no monitoring mechanisms to ensure that LEP students receive these accommodations to which they are entitled. In practice, there is little agreement on what constitutes an accommodation, and state and district accommodation policies vary substantially. Some accommodations provide students with unfair advantages, while some states and school districts provide no accommodations whatsoever. When accommodations are provided, most often they do little to accommodate the linguistic needs of the students.<sup>129</sup> As a result, the

standardization process of the test has been violated and scores cannot be considered as valid.

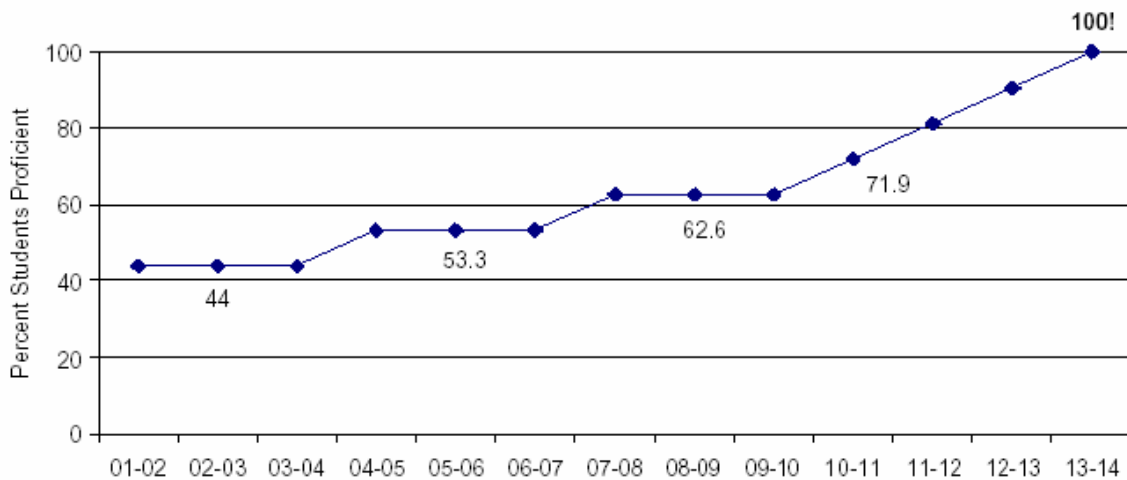
Even more problematic is the fact that there is little empirical research on testing accommodations for LEP students, and that which does exist is inconclusive. Thus NCLB mandates a practice for which there is no research base. In other words, we currently have no idea how to include LEP students on English-only academic achievement tests and obtain valid and reliable results.

Testing LEP students in their native language appears to be the best possible accommodation, and as described above, NCLB encourages this and allows it for up three to five years. However, as states are only required to do this “to the extent practicable” it is unlikely that many will choose to do so. It is essentially impossible to simply translate a state assessment into another language and produce a valid and reliable instrument which covers the same content and preserves the same level of difficulty. Thus, rather than translate a test, states would be required to develop tests in the native languages following procedures which are parallel with the development of the English language test. This is a very expensive and time consuming process that few states would be willing undertake. Native language assessments are unlikely in California, Arizona, and Massachusetts due to the anti-bilingual education initiatives in those states. While the vast majority of LEP students are Spanish-speakers, the remaining students in the LEP population speak over a hundred different languages. Even if states were willing to produce Spanish-language versions of their tests, few if any, would find it practicable to produce tests in languages such as Chinese, Khmer, Arabic, Vietnamese, Pashto, Navajo, Hindi, or Urdu. In addition, native language assessments are only beneficial to LEP

students if they are literate in the language and also are receiving instruction in that language. Even before the restrictions on bilingual education, less than 30 percent of LEP students in the country were receiving instruction in their native language. Thus, despite allowances for academic achievement assessments in the native language, the vast majority of LEP students will be required to take and pass their state test in English.

### ***Flaws in Determining Adequate Yearly Progress for the LEP Subgroup***

There are at least two major flaws in NCLB that will have devastating effects on all schools with LEP students.<sup>130</sup> The first is related to the annual measurable achievement objectives (AMAOs) set by the states. Figure 1 below an illustration of the AMAOs set for the third-grade reading test in Arizona.



**Figure 1: Annual Measurable Achievement Objectives for grade 3 reading.**<sup>131</sup>

Schools with large numbers of LEP students will likely be well below the AMAOs, and thus have farther to go to catch up than other schools. For example, in Figure 1, in 2003, at least 44 percent of students in each subgroup were required to pass the reading test to be deemed as making AYP. In a school with a high LEP population, it

is possible that only 12 percent of LEP students had passed the reading test the year before, and thus would have to make much more improvement than a school where 40 percent had passed the test. Many states (including Arizona as shown in Figure 1) set their AMAOs in tiers so that they initially stay constant for three years before moving to the next intermediate goal. The idea is that this provides LEP and other students time to catch up before the AMAO increases. However, the assumption is that the LEP students are in school from the beginning. This system does not account for newly arrived LEP students who would be expected to make the same dramatic increases, without the benefit of the instruction (or fluency in English). For example, according to Figure 1, in 2006 over 50 percent of third-grade LEP students will need to pass the third-grade test, in 2008 over 60 percent will be expected to do so, and by 2014, 100 percent will be expected to pass. In essence, the ever increasing AMAOs set up a moving target that LEP students cannot reasonably be expected to catch up to, particularly if they just arrived in the country.

The other flaw is even more fatal, and potentially could deem every school with LEP students as failing and subject to state takeover. Title I treats the LEP subgroup as it does all other subgroups. The problem is that, unlike the other subgroups (e.g., gender, ethnicity) the LEP subgroup is not static. Few students who enter school LEP are still LEP by the end of 12<sup>th</sup> grade. Thus, each year, the top students in the LEP subgroup redesignate as fluent English proficient and are no longer members of the subgroup. They are replaced by newly arrived ELLs with the lowest levels of English proficiency. Given this movement in and out of the group, it will be impossible to for the LEP subgroup to meet the AMAOs set by the state. As a result, the LEP subgroup will

continually appear as if no progress is being made, will fail to make AYP, and thus will lead to the entire school being labeled as failing and ultimately subject to state or private takeover.

In partial recognition of this flaw, former U.S. Secretary of Education Rod Paige announced changes to the way the LEP subgroup is treated for AYP purposes.<sup>132</sup> Secretary Paige announced that LEP students could be excluded from the reading test in English for the first year (allowing the English proficiency test to serve as substitute, though results are not counted for AYP purposes), and that scores of redesignated LEP students would be counted for two years after redesignation as fluent English proficient. Unfortunately, these changes are insufficient, and at best delay the problem rather than solve it. LEP students still must be tested in math, and their scores do count. The assumption is the math tests pose less of a challenge to newly arrived LEP students. This ignores the fact that there is a great deal of language in math tests. In Arizona, for example, third-grade LEP students score lower on the math test than on the reading and writing tests.<sup>133</sup> Also, it is not reasonable to assume that a LEP student can learn enough English in one year to pass the same state reading test as English-fluent children.

While the second change allows some relief, it does not solve the basic problem of the highest students being replaced the lowest students in terms of English language proficiency. Thus, this is mainly a cosmetic fix, and is insufficient to ensure that the LEP subgroup will be able to make AYP.

By NCLB's own definition, a LEP student's difficulties with the English language "may be sufficient to deny the individual the ability to meet the State's proficient level of achievement on State assessments." Nonetheless, the law mandates that they do just that.

To identify a group of students who, by definition cannot meet the standards, treat that group as static, and then require that group to attain 100 percent proficiency in those standards, is not reasonable.

## **Strategies Used to Minimize the Impact of LEP Scores on AYP**

### **Determinations**

State and local educational agencies are fully aware of the issues outlined above. Given the near impossibility of getting large numbers of LEP students to pass a test in a language in which they are not yet proficient, and the threat this group poses on deeming entire schools and districts as “failing” to make adequate yearly progress (AYP), strong incentives have been created to minimize the impact of LEP student test scores on AYP determinations. One escape hatch for schools with LEP students is a provision in Title I which states that schools or districts are not required to establish a subgroup “in a case in which the number of students in a category is insufficient to yield statistically reliable information.”<sup>134</sup> As the law did not specify a specific number, states are allowed to create their own minimum group sizes. In Arizona for example, the minimum group size has been set at 30.<sup>135</sup> Thus, schools with less than 30 LEP students at a given grade level would not be required to have a LEP subgroup, and thus avoid many of the problems described above. In reality, this practice could exclude the majority of LEP students in a school. For example, as Table 1 below demonstrates, a school where 50 percent of the students in grades K-6 are LEP can nonetheless avoid having to have a LEP subgroup if there are only 29 LEP students in grades 3-6 (School A). School B, on the other hand,

despite the fact that it had the exact same number and percentage of LEP students, was required to have LEP subgroups because there were 30 LEP students each in grades 3-6.

**Table 1: Effect of Minimum Subgroup Size (n=30) on Requirement for LEP Subgroup.**

	<b>School A</b> (Total students = 500)	<b>School B</b> (Total students = 500)
<b>Grade</b>	<b># LEP</b>	<b># LEP</b>
<b>K</b>	52	50
<b>1</b>	46	45
<b>2</b>	36	35
<b>3</b>	29	30
<b>4</b>	29	30
<b>5</b>	29	30
<b>6</b>	29	30
<b>Total</b>	250	250
	No LEP Subgroups Required	LEP Subgroups Required

Some states have set their minimum group size limits for AYP subgroups at an even higher number. This means that only those schools with the largest LEP student populations will likely be held accountable for the academic achievement of their LEP students.

Another strategy in use by states is negotiated agreements with the U.S. Department of Education to exclude LEP student test scores from AYP determinations. For example, in Arizona, a negotiated agreement allows schools that fail to make AYP on

the basis of LEP student test scores to appeal to exclude the scores of LEP students who have been enrolled in school for less than three years. The *Arizona Republic* reported that these exclusions helped around 680 Arizona schools avoid the “failing to make AYP” designation.<sup>136</sup>

Other, less ethical strategies can also minimize the impact of LEP student scores. These strategies include: retaining low students in non-tested grades; assigning newly arrived LEP students to lower (non-tested) grades inconsistent with their age or previous grade completed in the home country; suspending or expelling students on the dates of the test; and encouraging older LEP students to drop out of school (or not discouraging them from doing so). All these strategies have the effect of removing the lowest scoring students from the testing pool and thus making it easier for the school to make AYP.<sup>137</sup>

## Conclusion

Federal policy for language minority students began with the Bilingual Education Act in 1968. The BEA was created out of recognition of the dismal educational attainment of limited English proficient students, and the failure of schools to address the linguistic, cultural and educational needs of this rapidly growing student population. While the initial goals and purposes were ambiguous, a constant theme throughout five reauthorizations recognized the importance of providing instruction to LEP students in the language they understood the most, and that bilingual education programs and techniques help students both learn English and attain academic success. As the act progressed, the need for flexibility was recognized, but so too were the needs for developmental and two-way immersion programs which promoted bilingualism and



biliteracy for both LEP and native English speakers. There was also recognition that bilingual programs serve societal and national interests.

By 2002, these principles were no longer present in federal educational law. In retrospect of the demise of the Bilingual Education Act, Gonzalez, one of the first directors of the Office of Bilingual Education and Language Minority Affairs, concluded:

Title III is a hollow version of the hopeful legislative step taken in 1968 with the enactment of Title VII. . . . Title III is a highly negotiated piece of legislation. It no longer has a core of principles on which to build substantive programs with a real chance for success. Above all, we should resist the idea of having the federal government define what constitutes high quality programs. That can only come from practitioners and researchers in the field; it cannot be negotiated in the back offices of Congressmen and Senators.<sup>138</sup>

Nevertheless, programs based on the original principles are still allowed under NCLB, but only if state education leaders deem them as “scientifically based” and are willing to fund them. Anti-bilingual education measures in California, Arizona, and Massachusetts make it extremely difficult for schools in those states to offer quality developmental and two-way immersion programs.

The testing requirements under both Title I and Title III will further encourage English-only programs. Most states will find it impracticable to offer achievement tests in the native languages of LEP students or to provide “reasonable accommodations” which address students’ linguistic needs. As the vast majority of LEP students will be required to take their state’s test in English, and given the high stakes associated with

these tests, school districts might feel pressure to ensure that instruction in the classroom matches the language of the test. Furthermore, the pressure to meet AYP requirements on the English language proficiency tests might lead to districts favoring English-only instruction.

Teachers are under immense pressure to raise the test scores of their LEP students. As a result they could feel pressured to narrow their instruction to the content on the tests, rather than providing the kind of instruction which focuses on the linguistic, cultural, and education needs of LEP students. Many schools are adopting scripted one-size-fits-all curricular programs (often with federal support) which take up large amounts of instructional time, leaving less time for English as second language instruction and content area instruction tailored to the English language proficiency and literacy levels of individual LEP students. The irony here is that while teachers are giving up what they recognize as good instruction for LEP students in the name of preparing them for high-stakes tests, many of these students' test scores will end up being excluded anyway from school AYP designations, using the minimum group size rule and negotiated exclusions with the U.S. Department of Education.

In summary, LEP students are being forced to take a test in a language they are not yet proficient in, which in turn encourages English-only instruction. Schools are under immense pressure to raise test scores, so instruction narrowly focuses on the test, and discourages instruction focusing on the true needs of LEP students. Nonetheless the scores of many LEP students end up being excluded through psychometric gimmicks designed to prevent as many schools as possible from being deemed as failing to make adequate yearly progress. This is a recipe for leaving LEP students behind.

## Notes & References

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- <sup>24</sup> *Ibid.*, Sec. 703(4).
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