

**Legal and Pedagogical Contexts of English Learners:  
Defining “Appropriate Action” under the Equal Educational Opportunity Act**

© Douglas S. Reed  
Associate Professor, Department of Government  
Director, Program in Education, Inquiry and Justice  
Georgetown University

© Sabrina Wesley-Nero  
Visiting Assistant Professor  
Program in Education, Inquiry and Justice  
Georgetown University

© Edom Tesfa  
School of Foreign Service  
Georgetown University

## **Introduction**

Much criticism has been directed at educational reform advocates who rely primarily on litigation to pursue large-scale institutional reforms in order to achieve better outcomes for children who are receiving unequal or inadequate educations. That criticism is typically not aimed at the motivations of litigator/activists, but rather on the policy consequences of relying on judicial mechanisms to achieve these ends. Courts, many have argued, are a poor tool by which to design educational policy and the lengthy and unpredictable processes of reform that litigation generates do not always create flexible and workable solutions to difficult policy problems. As Martha Derthick and Joshua Dunn recently wrote, litigation is “time-consuming, costly, subject to political manipulation, and prone to prompting unpredictable policy reforms that even plaintiffs may not wish for” (Dunn & Derthick, 2014).

The language of rights, injunctions, decrees, and rulings may impose legalist and rule-based scripts that rob administrators of the discretion to ensure every child receives a quality and appropriate education. These criticisms have come from both the left and the right and cut across a number of policy domains: school desegregation, school finance litigation, special education (See, eg, (Armour, 1995; Bell, 1976; Hanushek & Lindseth, 2009; Kelman & Lester, 1997)). These critiques assume, however, that educational administrators will, without external pressure, exercise discretion in good faith and see to it that students whose education might be more logistically challenging or more expensive receive the same standard of quality that the “average” student receives.

This assumption is probably unwarranted. Past history shows that students with special needs, of all types, where the pedagogical approach required is novel or

unconventional, do not fare well without external demands to attend to the needs of these students. Even with the goodwill of administrators, bureaucratic and institutional imperatives and structures frequently push to the margins the needs and concerns of students who need services and resources outside the typical or expected delivery of education. And when administrators are explicitly biased against these students, the challenges are even more daunting.

Such has been the case for English learners. Confronted with the tasks of navigating an unfamiliar and even hostile new culture, English learners historically have faced exclusion, segregation, tracking, educational neglect and denigration of existing language skills. A long history of school and district officials conflating inability to speak English with an inability to learn has been a national hallmark of English learner educational policy in the U.S. Prior to the enactment of federal law requiring school officials to adopt strategies to help English learners overcome “language barriers” to full inclusion in school programs, litigation was the only option available to English learners. Through suits that sought to block the wholesale assignment of Mexican-Americans in Juan Crow schools in Los Angeles (Strum, 2010) to litigation in San Francisco that required district officials to provide curricular materials to students in a language they could understand (*Lau v. Nichols*, 1974), activists have sought to achieve greater educational equality and justice for English learners and immigrant students, more broadly.

Favorable judicial outcomes, however, do not always ensure realization of rights on the ground. Both bureaucratic resistance to the expansion of programs for English learners at the local level as well as state-wide popular mobilizations to limit programs to

provide quality education to English learners have undermined legal strategies. Moreover, the relatively weak and tepid federal enforcement of existing rights have plagued these efforts. When combined with the limited ability of immigrant groups to mobilize politically to advance their interests – particularly within communities that have high percentages of undocumented immigrants – all these factors help disempower English learner and immigrant communities.

For reasons both internal to the legal processes (the kinds of criticisms levied by Dunn and Derthick) and reasons external to the legal process (political resistance to English learner programs) litigation efforts have been plagued with difficulties and have not always provided the kind of institutional outcomes that would consistently assure English learners of access to high quality education. In short, litigation to ensure an equal and high quality education for English learners has had only partial success in U.S. courts. Moreover, recent trends in doctrine at the Supreme Court level – particularly the *Horne v. Flores* decision in 2009 – have given very broad deference to state and local officials to determine what kind of education is most appropriate for English learners.

We are left, then, with something of a conundrum: Educational policies that are court-ordered, or emerge through litigation, are typically rigid and unwieldy and may produce outcomes that neither plaintiffs nor respondents desire. At the same time, without these exogenous shocks to the political structures that design and implement educational policies, the interests of English learners are frequently neglected and they often find themselves relegated to inferior classrooms and programs, unable to secure the education guaranteed to them by law. The question, in other words, is how should

judicial officials prompt local, district and state officials to engage the needs of English learners without creating cumbersome and dysfunctional policies?

In light of the recent trends in legal and constitutional doctrines concerning English learners and the contrasting pressures that legal processes create, it might seem foolhardy to contend that courts can play a useful role in creating better educational opportunities for English learners, yet that is exactly what this paper argues. The rationale for such an argument hinges on two factors. First, the federal statutory language that most directly advances the interests of English learners ostensibly privileges social science findings about the best environments for these students. Moreover, the social science findings about what those best environments are have, in the past decade and a half, come into much clearer view, particularly for students who enter into U.S. schools in middle school or later. In short, the explicit federal language for the protection of the rights of English learners provides strong anchors for the development of policies that are rooted in the social science of language acquisition.

Second, developments in education policies beyond the domains of English learner policies, particularly the consolidation of standards-based education reform, provide a useful “judicial metric” by which judges can ascertain whether policies advance the kind of classroom and school-level pedagogical settings that promote the rights of English learners. In addition, this judicial metric helps judges rethink the developmental progression of language acquisition and, accordingly, can help them to understand better what, until now, has been the unitary category of English learners. In other words, the metric of educational standards can help scholars (and judges) isolate the kinds of harms that educational policies might impose on English learners at different stages of their

linguistic development and, conversely, see how different kinds of English learners might benefit from different kinds of policies. The result, then, would be the kind of judicial flexibility that avoids the rigid, legalistic outcomes that create dysfunctional policies that Dunn and Derthick cite, but at the same time provide a clear, judicially-enforceable standard that provide the external pressure that is, seemingly, necessary for English learners to receive the kind of education that federal law mandates.

This paper will make this argument in three parts. The first part reviews the federal statutory language that imposes obligations on schools, school districts and states to provide educational opportunity to English learners and how that language has been interpreted by the courts over the past 40 years. The second part of the article reviews the nature of social science findings on both the contexts of English learners (the obstacles they confront, the impacts of policies on their development, etc) and the nature of language acquisition. We draw particular attention to the key social science finding of the differences between younger children and students who arrive in the U.S. in middle school or later. Central to this discussion is the nature of the first language literacy skills of students, and the need for schools to provide rich content instruction in a student's first language in order to ensure sufficient progress toward a high school diploma and enrollment in college-preparatory courses.

Part III of the article turns to the intersection between standards for rich academic instruction and linguistic integration or isolation, and how courts might evaluate the "appropriate action" of states and school districts to promote educational opportunity, in light of the developmental stage of the English learner. Courts, for good reason, have been suspicious of linguistic isolation, but recent policy developments, such as creation

of the International Academy model, suggest that at the secondary level, effective English learner models that embrace rich academic content may also depend on segregation of English learners. At the same time, elementary programs that similarly utilize such segregation may be wholly inappropriate under federal law. Part IV concludes the paper.

### **I. The Legal and Judicial Framing of the Educational Rights of English Learners**

The long history of English learners in U.S. schools shows a highly variable pattern of local engagement with the existing language skills and academic needs of English learners. In the 19th century, many Midwestern cities in the U.S. relied on bilingual schools in Swedish or German to acculturate new immigrants (Ramsey, 2009). At the same time, Carlos Blanton found that public funds paid for bilingual education for *tejanos* in Texas schools in “from the advent of the public school system until the nativist hysteria of World War I” (Blanton, 2004). The political status of immigrants within these communities seemingly drove much of the inclination to develop programs that would be successful for students whose first language was not English. When that political status was undermined, as it was during World War I, support for these programs dropped (Ramsey, 2009; Reed, 2014).

The physical segregation of non-English speaking students – particularly those who were regarded as non-white – was another central element of early to mid-20th century English learner policies. In California, increasing hostility against Mexican-Americans in the 1920s led many communities to segregate schools Mexican-American students, whatever their English speaking abilities, from Anglo students (Alvarez, 1986). While a few communities resisted, others had little capacity to do so, often because of

political exclusion or the economic and political dominance of Anglos within the local political order.

One prominent case of resistance emerged in Orange County, California. In the 1940s, the Westminster School District, along with three other school districts within Orange County, began segregating Mexican-American students regardless of English proficiency. Students of Mexican descent were automatically assigned to separate schools under the assumption that none of them could use English well enough to succeed at a racially and linguistically integrated school. As the districts failed to administer screening assessments, even students who were fluent in English were placed in these schools, which were often under-resourced and in a state of disrepair. Parents sued to reverse the practice, winning at trial in Federal District Court and prevailing on appeal to the Ninth Circuit Court of Appeals. (*Mendez v. Westminster*, 1947).

In *Mendez*, school boards' and superintendents' reasoning for segregating Mexican-American and Anglo-Saxon students varied. Some separated students on the grounds that English learners would not be able to do well in majority-Anglo students because of the language barrier. Others used scientific racism to rationalize the practice of segregation, arguing that people of Mexican descent were unfit to study the curriculum offered to Anglo students. Still others recommended segregation for the sake of the Mexican students, so that they would not be unfairly compared with Anglo students. Despite the recommendations and mandates to segregate schools, most rural high schools in Southern California were integrated because their districts could not afford to open new schools. However, only a handful of Mexican-American students earned high school diplomas. A majority of Mexican-American students were often misidentified as

“retarded” (a designation that prevented them from being promoted to the next grade) and school authorities often pressured them to drop out of school, a practice prevalent throughout the Southwest and Texas (Blanton, 2004). Regardless of reasoning, it is clear that students were being segregated on the basis of race and national origin, not language. Although *Mendez* may not have changed the within-school instructional practices for Mexican-Americans and English learners, it formally asserted that the segregation of Mexican-Americans from white students by school violated both California law and the 14th Amendment’s equal protection clause.

Although *Brown v. Board of Education* did not cite the *Mendez* case eight years later, the two cases stand for a similar proposition: the state may not segregate students formally on the basis of race or national origin. The passage of the 1965 Civil Rights Act further federalized the right to be free of discrimination in any program that receives federal funds, thereby opening up discriminatory practices throughout the country to federal investigation and prosecution. In 1974, the U.S. Supreme Court broadened the scope of the Civil Rights Act by ruling that the City of San Francisco had violated the civil rights of some 1,800 students who spoke only Chinese by failing to provide them with a mode of instruction (whether English language courses or bilingual instruction) that they could understand. As Justice Douglas wrote, “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.” (*Lau v. Nichols*, 1974 at 566). The Court explicitly declined to decide that San Francisco’s practices violated the 14th Amendment’s Equal Protection Clause, but instead declared the school district to be in violation of the 1964 Civil Rights

Act for engaging in discrimination based "on the ground of race, color, or national origin" (*Lau v. Nichols*, 1974 at 566).

Congress codified this judicial expansion of the Civil Rights Act eight months later when it enacted the Equal Educational Opportunity Act. For English learners, the key element of this wide-ranging law was its mandate that "No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by ... the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." (Pub. L. 93-380, title II, § 204, Aug. 21, 1974, 88 Stat. 515.)

This statutory language has provided the basis for most, if not all, of the litigation aimed to advance the rights of English learners in U.S. schools since the mid-1970s. The challenge for litigators is that the definition of what constitutes "appropriate action" has been variously interpreted by courts and has, in general, been exceedingly deferential to state and local authorities as they design educational programs for English learners. Moreover, in many instances, the courts have shied away from engaging social science findings about both the nature of language acquisition and how best to evaluate a student's progress.

Earlier federal statutes, most prominently the Bilingual Education Act of 1968, had established funding mechanisms that enabled school districts to create programs for English learners, if district officials desired, but the federal government imposed no obligation to do so.<sup>1</sup> This changed, however, with the EEOA, which extended the *Lau* ruling to all schools, requiring every school district to provide English learner services regardless of whether or not the district received federal funds. The question of what

constituted “appropriate action,” however still had to be hammered out by federal courts. Over time, federal courts have changed their understanding of the term, partly in response to political struggles over bilingual education and English-only ballot initiatives.

In *Castañeda v. Pickard* (1981), the Mexican-American plaintiffs claimed that the Raymondville Independent School District (RISD) of Texas was discriminating against them based on race. This alleged discrimination came in the form of tracking, as well as failure to implement appropriate programs for ELs. In response, RISD asserted its tracking was based on the legitimate educational practice of ability grouping, in which students were placed into “ability groups” based on standardized test scores, grades, and teacher evaluations. The standardized tests were administered entirely in English, so all English learners were placed in the “low-ability” group for the simple reason that they could not understand the tests well enough to earn a passing score. Despite the predictable failure of English learners on the standardized test, the United States District Court for the Southern District of Texas nonetheless ruled in favor of RISD in 1978, stating that none of the district’s actions violated the plaintiffs’ constitutional rights (*Castañeda v. Pickard*, 648 F.2d 989).

On appeal, however, the Fifth Circuit Court of Appeal held that Section 1703(f) of the EEOA meant that school districts may not neglect the needs of ELs. Despite the reversal of the lower court, however, the Fifth Circuit did not interpret Section 1703(f) as requiring states to adopt any specific model of EL instruction. Indeed, the Fifth Circuit explicitly declared that Congress’s intent was to allow local and state authorities broad discretion in the design of English learner programs: “Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the

programs and techniques they would use to meet their obligations under the EEOA.”  
(*Castaneda v. Pickard* 648 F.2d 989, at 1009 (5th Cir. 1981).

Despite this latitude, the Fifth Circuit nonetheless concluded that the federal statute required the court to arrive at a judicial decision as to what constituted an “appropriate” effort to enable students to overcome barriers to participation in a district’s educational offering. After determining that Congress did not mandate bilingual education, the Fifth Circuit devised a three-part test -- a standard known as the *Castañeda* test-- to assess the appropriateness of a district’s program for English learners. Under the test, the plan must meet three criteria: (1) the district’s chosen program must be based on an educational theory “recognized as sound by some experts in the field, or at least deemed a legitimate educational strategy”; (2) the program must be reasonably calculated to implement that theory effectively; and (3) the district must prove that its program leads to gains in English language acquisition among its students (Wiese and Garcia 2001). If a state, district, or school fails to meet all of these criteria, it may be in violation of Section 1703(f) of the EEOA. Although the Fifth District Court ruled language grouping to be an acceptable practice, it found the use of language ability to determine a student’s general academic aptitude “highly suspect,” a matter made worse by the district’s long history of discriminating against people of Mexican descent. The court did not find RISD to be in violation of Section 1703(f) or Title VI of the Civil Rights Act, though it partially reversed the ruling handed down by the District Court for the Southern District of Texas (*Castañeda v. Pickard*, 648 F.2d 989).

The Fifth Circuit’s ruling in *Castañeda* largely viewed the issue of “appropriate” legislation through the lens of democratic authority to establish policy. Because

Congress gave the court, “almost no guidance, in the form of text or legislative history, to assist us in determining whether a school district's language remediation efforts are ‘appropriate,’ the Fifth Circuit’s challenge was to devise a rubric by which it would evaluate the appropriateness of RISD’s program to assist English learners. At the same time, the court felt this evaluation was “a type of task which federal courts are ill-equipped to perform and which we are often criticized for undertaking” (*Castaneda v. Pickard* 648 F.2d 989, at 1009 (5th Cir. 1981)). Indeed the court expressed the view that governance of schools and the proscribing of particular educational policies is “properly reserved to other levels and branches of our government ( *i. e.*, state and local educational agencies).” The three-point test that the Court devised, as a result, was designed to walk the line between substituting judicial opinion about the best educational program for English learners and a wholesale delegation of authority to democratic officials. The court’s test rested, therefore, on the assumption that there was a legitimate and healthy debate among educational professionals about the best strategies to pursue and that it was not at all the court’s role to choose “between sound but competing theories” the implementation of which is “properly left to the educators and public officials charged with responsibility for directing the educational policy of a school system.” (*Castaneda v. Pickard* 648 F.2d 989, at 1009 (5th Cir. 1981))

The key assumption of the opinion, for our purposes, is the notion that rival, divergent and yet legitimate educational theories actually exist under which a locality or school district might design an educational program, after a healthy and vigorous democratic debate. While that assumption may have been valid at the time of the *Casteñda* decision, social science of learning and language acquisition has made

substantial gains since then and we can affirmatively *exclude* certain policies and programs as not being in line with a sound pedagogical theory. In short, the problem with the *Casteñeda* test is that any policy initiative that is democratically supported by voters or politically supported by officeholders is assumed to be democratically valid, even if it lacks any pedagogical merit. The decision’s reliance on democratic validity – and its suspicions of its own judicial invalidity – means that even the most marginal of pedagogical approaches are validated by the test.

Despite its flaws, the *Casteñeda* test provided some teeth to lower court decisions about the appropriateness of district and state-wide programs for English learners. *Flores v. Arizona*, (later litigated as *Horne v. Flores*) was an important, long-running litigation effort that led to the current limitations on judicial perceptions of “appropriate” actions on behalf of English learners. In 1992, student Miriam Flores filed a claim against the state of Arizona on behalf of fellow English learners and their parents. The plaintiffs contended that Arizona failed to provide English learners with an education that would enable them to study both English and the “standard academic curriculum as required of all students.” Eight years and several pre-trial motions later, the District Court for the District of Arizona ruled that the state violated the EEOA and failed the *Casteñeda* test by providing insufficient funding to EL programs. The state of Arizona was ordered to select a standard English proficiency assessment and prepare a study evaluating the funding required to implement legitimate EL services (Asturias 2012). Furthermore, the state was required to fulfill the following requirements:

- [provide] daily instruction in English Language Development appropriate to the level of English proficiency of the student including listening and speaking, reading and writing skills, and cognitive and academic development in English;
- [provide] daily instruction in basic subject areas that is understandable and appropriate to the level of academic achievement of the LEP student, and is in conformity with accepted strategies for teaching LEP students; and
- [incorporate] the state Board's Academic Standards curriculum into all bilingual education and ESL programs;
- Moreover, those programs "shall be comparable in amount, scope, and quality to that provided to English proficient students" (Flores v. Arizona, 172 F. Supp. 2d 1225. D. Ariz. 2000).

However, in the wake of the district court's decision, the state refused for several years to comply with the ruling, despite being held in contempt and accumulating millions of dollars in fines (Asturias 2012). In 2006, Arizona's state legislator passed House Bill 2064, which established an ELL task force as well as a set of basic guidelines surrounding ELL placement, assessments, programs, and funding. The bill also required all Arizona schools to adopt the Structured English Immersion (SEI) model unless given a waiver from the state. Under HB 2064, all students were required to take at least four hours of daily English language instruction, akin to English as a Foreign Language classes (HB 2064).

In 2009, the Supreme Court, after the Ninth Circuit upheld the District Court, overturned the Ninth Circuit's ruling. Because of the procedural complexities of the

case, the issue before the Supreme Court was not merely whether Arizona's actions constituted "appropriate actions" to be considered in compliance with the EEOA, but also whether both the District and Ninth Circuit had properly interpreted Federal Rule of Civil Procedure Rule 60(b)(5) which allows a party under an existing court order to have the existing order vacated and obtain relief from its obligations, if "a significant change either in factual conditions or in law" renders continued enforcement of the court order "detrimental to the public interest." The Supreme Court ruled that both the District Court and the Ninth Circuit had focused predominantly on the failure of the state of Arizona to boost its expenditures on English learner programs to the level required by District Court's order. In so doing, according to the Supreme Court, they focused on the wrong element of the case and, as a result, their denials of the State of Arizona's Rule 60(b)(5) motion were unwarranted. The Supreme Court then ordered the District Court to re-evaluate its denial of the motion for relief, based on the Supreme Court's clarification of the relevant criteria of the changed factors to be considered.

Throughout the majority opinion, written by Justice Alito, the Supreme Court was focused less on the kinds of programs made available to English learners and more on the fact that changed policy circumstances at the federal level – particularly the passage of No Child Left Behind and the enactment of standards-based reforms in Arizona – constituted changed circumstances that warranted providing Rule 60(b)(5) relief. Indeed when it considered what actual effects Arizona's English learner programs had achieved, the Supreme Court was exceedingly unconcerned about programmatic outcomes and engaged in some rather loosely argued causal claims about the nature of the obstacles to English learners' equal participation in Arizona's educational offerings. For example, the

Court assumed that the achievement gap between ELLs and their English-proficient peers could be partially attributed to “the difficulty of teaching English to older students.” The High Court also argued that by the time a student reached high school, it was too late for them to make any gains in English proficiency (when, in reality, older students may actually be more efficient language learners, if they have greater linguistic knowledge and literacy in their first language that they can use to develop skills in a new language). The Court even highlighted in a footnote that high levels of gang activity and drug use could explain the achievement gap between ELL and English-proficient students. This sentiment, rooted in cultural bias and xenophobia, does not consider the inequalities that arise from structural racism (Asturias 2012), nor does it consider that gang violence or drug use -- or global warming or hunger in India -- are distinct social injustices that are immaterial to Arizona’s obligation to provide programs and resources to overcome language-based barriers equal educational opportunity. By blaming the victim of poorly designed educational programs and by noting that NCLB was now requiring standards-based reforms in Arizona schools, the Supreme Court instructed the lower courts, in effect, to lift the court order against Arizona requiring it to comply with the EEOA.<sup>2</sup>

In short, *Horne* dramatically altered the legal landscape for English learners and their advocates. As a result of *Horne*, plaintiffs are now required to prove that an educational authority’s failure to provide equal educational opportunity is not caused by external factors (such as poverty, de facto segregation, etc.) Under the logic of the Supreme Court’s decision in *Horne*, the existence such external causes of low educational performance implies that state, district or school programs cannot be shown to be inadequate. Seemingly, the rhetorical stance of the Supreme Court toward English

learners seems to be one of exasperation that some students have the audacity to grow up not speaking English and in poverty, or both. (After all, what program could possibly be effective in these circumstances?) More substantively, the burden of proof of effectiveness of English learner programs has essentially been shifted from the schools to the students and their families, weakening the already modest standards articulated in *Lau v. Nichols* and *Castañeda v. Pickard*.

So, what is to be done? Luckily *Horne v. Flores* was, at base, a decision more concerned with the factors that courts have to consider in a motion for Rule 60(b)(5) relief (which covers an enormous range of administrative circumstances) and less concerned with defining what constitutes “appropriate actions” for English learners under the Equal Educational Opportunity Act. Thus, the statute’s core commitment – and the *Casteñeda* three part test – remain intact. The challenge is to reposition the judicial inquiry away from what is democratically or politically sustainable and to identify a set of practices and actions that are anchored in the social science of language acquisition and English learners. This process of identification can work both positively and negatively -- identifying practices that work and the circumstances under which they work and identifying practices that are harmful and destructive. Just as we know that starvation is not an “appropriate” remedy for lung cancer, we can begin to build an inventory of practices that produce harmful outcomes for English learners and also identify promising strategies that work in some contexts. The next section turns to this task, seeking to locate the legally relevant social contexts of English learners (which go far beyond the Supreme Court’s judicial notice of the existence of drugs and gangs) and

to link these contexts to the tasks of learning a language while simultaneously learning substantive academic content.

## **II. Legally Relevant Social Contexts of English Learners**

Despite judges' reluctance to second-guess policymaker views on how best to satisfy the "appropriate action" standard for English learners, there are a number of assertions that researchers can, and have made, about both the circumstances of English learners in the U.S. and best (and worst) modes of instruction for students who are learning another language. The most obvious finding is that the effective education of ELs has been a persistent challenge for decades, due, in part, to the social contexts of their education and, in part, to the programs schools and districts have developed (or not developed) for them.

English learners are about twice as likely as their English proficient peers to drop out of high school (Callahan, 2013) and they consistently perform at lower levels of academic achievement when compared to their English proficient peers. For example, data on the 8th grade NAEP assessments in math and English show a more than 40-point gap between the percentage of ELs scoring at or above basic when compared to their white peers (Kena, et al, 2015). In addition, ELs also have lower rates of achievement when compared to their African-American and Hispanic peers (Fry, 2007). When compared with English proficient students, ELs are more likely to live in poverty and more likely to have parents who did not graduate from high school (Batalova, Fix, and Murray, 2007).

At the same time, trends indicate that the EL population, while highly concentrated, is growing and spreading to geographic areas that previously were not

considered to be linguistically diverse or traditional port of entries. From 2002 to 2012, the percentage of ELs increased in all but 11 states (National Center for Education Statistics, 2015). From 1997 to 2007, the overall number of ELs in Pk-12 schools increased by over 53%. The increase was especially evident in states with previously low numbers of ELs. For example, South Carolina experienced an 800% increase in its EL student population during this period, and Indiana's EL student population increased by 400,000 (Batalova and McHugh, 2010). The growth and spread of ELs throughout America's schools establishes the effective education of ELs at the heart of the national conversation around education reform.

This increasingly extensive spread of English learners to new locales also means that many schools, districts and states are experiencing a surge in English learners, but have little experience or capacity to deliver the kind of education English learners need. Many schools, districts and indeed states are unfamiliar with the policies and actions that constitute the "appropriate action" needed to ensure the success of English learners, whose pedagogical needs may be significantly different from the rest of the student pool. These districts and communities are increasingly in need of assistance in identifying "appropriate action" for their particular English learner student body and in designing programs that can deliver those services.

Importantly, the diversity among English learners makes the determination of what constitutes "appropriate" state action different from one group of ELs to the other. In particular, evidence suggests that policy needs to engage the different developmental stages of English learners, taking into account both their age of entry into the U.S. and their literacy skills in their first language. In addition, the social science of language

acquisition show that the differing educational tasks of elementary and secondary schooling may require different – even contradictory policies – to be deemed “appropriate actions” necessary to ensure that ELs receive an equitable education.

### **Characteristics of English Learners at the Secondary Level**

Let’s focus first on the differences between ELs in secondary and elementary school. Students who have not mastered basic academic proficiency in English by 8th grade are likely to enter high school as ELs. English learners at the secondary level present a particularly dire situation. Secondary ELs are often considered as a monolithic group although there is a myriad of within-group diversity. Broadly speaking, secondary ELs are either considered to be long-term ELs (i.e. students who have had 5 or more years of schooling in the US) or students who have recently arrived to the US and have less than 2 years of education in US schools (often termed ‘newcomers’).

As a subset of secondary ELs, students who are recent arrivals to the US are an extremely heterogeneous group. They vary in terms of their native language literacy skills, previous schooling experiences, English proficiency and the conditions under which they immigrated to the US. Some secondary ELs who are newcomers may have limited literacy skills in their native languages as a result of limited or interrupted formal schooling in their country of origins (Calderon, Slavin and Sanchez, 2011). Secondary students with limited or interrupted formal schooling have a short time to address content area gaps while simultaneously learning English and adapting to US culture and the culture, processes, and expectations of consistent, formal schooling.

Others ELs who arrive in the US after the sixth grade may have literacy skills and content area knowledge comparable to their English proficient age peers as a result of

consistent formal schooling in their countries of origin. These students often benefit from accelerated, intensive English development programs and move quickly to rigorous, mainstream curricular programs (Calderon, Slavin, and Sanchez, 2011). Both groups may have experienced trauma preceding their arrival to the US and, subsequently, may need social, emotional, and mental health support as well as academic and literacy support as they make a transition to life in the US.

Although long standing research indicate that it takes 4-7 years for an EL with high quality schooling to reach full English proficiency in a manner that indicates academic parity with native English speaking peers (Collier, 1987; Collier, 1995; Hakuta, Butler, and Witt, 2000), ELs who arrive in the US as adolescents have a considerably shorter time line to master academic content and the English language prior to the end of their K-12 schooling. Although for both subgroups of secondary ELs the goal is to equip students with the content, literacy and English skills to be successful in mainstream classes that prepare the students for post-secondary college and career readiness, when examining the most effective approach to successfully educating secondary ELs the division between long-term ELs and newcomers is pivotal.

### **Programmatic Needs of Secondary-Level Newcomer English Learners**

Because of the differing contexts of newcomer and longer term ELs, districts are increasingly designing specialized English learner programs for newcomers, programs different from traditional English as a second language (ESL) or high intensity language training (HILT) programs. These newcomer programs, often housed separately from existing secondary schools or as separate facilities, aim to address the multiple needs of newcomers that extend beyond developing English language proficiency to a level that

would make mainstream courses comprehensible. Most newcomer programs are seen as temporary pathways to mainstream schooling with many programs limiting enrollment to less than two years (Short and Boyson, 2012). Others, such as the International Academy model, exist as either distinctive longer-term, optional arrangements that provide additional support for newcomers, or as “schools within schools.” Typically, successful newcomer programs have a number of key elements: They typically begin with a comprehensive assessment of students’ language, literacy, and content knowledge and skills in their native language (when possible) and in English. They provide specific instruction in the culture of American secondary schools and often operate with extended hours in the evenings and weekend to provide a large degree of flexibility for their adolescent learners who also may be wage earners helping to support their families and to increase the amount of instruction students have to transition them quickly to mainstream programs. They also provide instruction designed to identify and address content knowledge gaps that have resulted from students’ lack of or interrupted prior schooling.

If students have experienced interrupted formal schooling, in addition to needing to develop English language and literacy proficiency, they may not have the grade level content knowledge required of their age peers. Effective newcomer programs also have explicit articulation with advanced English language development programs and advanced academic coursework in mainstream schools. Again, the ultimate goal is to equip ELs with the language, literacy, *and* academic content knowledge and skills that would enable them to be successful in academic coursework that will prepare them for a post-secondary career or education. Finally, many newcomer programs also include programs and courses for students’ families that focus on the nature and culture of

American high schools, integrating into American communities along with information about social, economic, and education resources available to them.

Almost 80% of US born children of immigrants are classified as ELs when they reach secondary school (Calderon, Slavin, and Sanchez, 2011). Long-term ELs most likely demonstrate oral conversational English. However, they lack the academic English proficiency needed to exit specialized programs that provide support and instruction in English language development (ELD) (Faltis and Coulter, 2008). Furthermore, the secondary ELD programs may not meet the necessary requirement for higher education beyond high school (Freeman, Freeman, and Mercuri, 2003). The persistence of students as ELs throughout elementary schooling into secondary education is evidence of inadequate schooling. Although long-term ELs have more likely been enrolled in US public schools since kindergarten, their education has not resulted in English and academic proficiency on par with native English speakers or in reclassification of these students as English proficient (Calderon, Slavin, and Sanchez, 2011). Callahan (2008) found that secondary ESL classes, classes specifically designed for ELs, did not reflect the content knowledge of mainstream, college preparatory classes and did not afford students with the courses need to successfully matriculate into post-secondary education. In rigor, pace and content content area courses designed for ELs may not be “college preparatory” (Callahan, 2008). Such English language development programs may represent a “hyper segregation” for ELs as they attend schools with a high concentration of ELs and of poverty and participate in a separate curricular track limiting their opportunity to learn with English proficient peers (Faltis and Aria, 2013).

## **Contrasting Long-Term and Newcomer Secondary English Learners**

Long-term ELs by definition are accustomed to the culture of American schools. However, many long-term ELs did not experience consistent, research-based instruction in high quality English language development programs at the primary level (Olsen, 2014). In their study of long-term ELs in New York, Menken and Kleyn (2010) demonstrate that long-term ELs were below grade level by multiple years in assessments of literacy in both English and students' native language. Despite demonstrating oral proficiency in English, these students did not have the academic language skills to successfully access secondary content curricula. Although some students had experience primary support as an instructional tool, it was inconsistent at best. The students did not have consistent access to high quality dual language or bilingual programs. Instead English language development was emphasized to the detriment of native language literacy. Research continues to support primary language literacy development as a strong means of ensuring ELs' linguistic, literacy, and content areas skills and knowledge in English. However, there has been a decrease in programs that develop ELs' native language and a rise in district policies that limit students' enrollment in specialized English language program often to only one year.

Furthermore, teachers are the most important school-based factor in determining student academic success. However, given the difficulty in maintaining a consistent source of high quality bilingual and ESL teacher, many of the programs have been plagued by inconsistent teacher quality. In the 2011-2012 school year, 56% of public school teachers taught at least one ELs while only 3% of public school teachers had a degree in the education of ELs (National Center for Education Statistics, 2012). In fact,

although the EL population continues to rise, most teachers do not feel prepared to effectively teach ELs. High quality elementary education for ELs could decrease the number of long-term ELs by developing students' English proficiency, literacy skills, and content knowledge needed to be successful in secondary schools. For the remaining secondary ELs, specialized curricular programs that effectively simultaneously develop the academic vocabulary, content knowledge and literacy skills necessary for career and college readiness are essential. In addition, all curricular programs for ELs must combat the curricular and physical isolation that characterizes the current experiences of many secondary ELs (Faltis and Aria, 2013).

### **III. Standards-Based Reforms and English Learners**

Increasing public attention towards universal standards and accountability, attention to performance of student subgroups, and increasing linguistic and ethnicity diversity of student populations have occurred in the U.S. simultaneously. Arriving in the US as an adolescent, secondary ELs who are newcomers often have a limited time before they are included in states' accountability plans. Many states require content area assessments in English after just one year of school enrollment. On the other hand, long-term ELs may have experienced years of inadequate education and the dis-identification with schooling that often accompanies such sustained educational experiences (Olsen, 2014). The demographic shifts in the US student population, the increased focus on universal standards and accountability of student subgroups, and the high correlation with successful schooling and lifelong outcomes come to a head when examining the academic achievement of ELs in secondary schools.

At first glance, it may appear that a number of elements of standards-based reform are hostile to the pedagogical needs of English learners. Rigid and inflexible assessment requirements have mandated that English learners take proficiency exams in English, long before they are ready. Also, NCLB has imposed an escalating array of accountability consequences on schools and school districts in which English learners and minority students are disproportionately represented, producing higher than average teacher turnover and persistent “reform churn” in those schools. Finally, in schools in which attaining proficiency targets is hopelessly beyond their reach, students and staff alike may internalize the “failing” status moniker, producing a “reform fatigue” that settles for lowered expectations for schools and students alike (Brown & Clift, 2010). At the same time, schools on the bubble of achieving proficiency standards have incentives to force out or encourage drop outs among English learners in order to boost the likelihood of hitting those performance standards (Ryan, 2004, 934).

At the same time, however, standards have the virtue of articulating the curriculum which native English speakers are being exposed to. Because they make explicit the learning goals for statewide systems of education, they are exceptionally value tools to identify the kinds of steps that are “appropriate” to ensure the educational rights of English learners. In short, with the advent of standards-based reform, we now have an explicit yardstick by which we can measure the barriers that confront English learners, and, by extension, what is needed to overcome those barriers.

In order to see how standards can directly benefit English learners, we need to cut the connection between the learning of English and the instruction needed to meet statewide curricular standards. According to the Equal Educational Opportunity Act,

schools, districts and states are under an obligation to ensure that students who do not speak English have the same opportunities to participate in the educational program that all students participate in, particularly the curriculum. In other words, educational participation is distinct from learning English. The statutory obligation is to ensure participation in educational program. Participation in the curriculum – not learning English – is what Congress requires of schools. Therefore, not knowing English cannot be a barrier to accessing the education based on statewide educational standards.

This insight provides scholars (and judges) with a useful way to evaluate the nature of “appropriate action” of states. To the extent that the English learner program exposes English learners to the same curricular standards as the student body at large, then it meets the appropriate action test. This also provides us with an administrative tool by which we can apply the lessons of social science for English learners. To the extent that a student has sufficient time within her or his school career to both master English and receive an education that will satisfy the curricular standards to allow her to graduate from high school, then both tasks should be undertaken simultaneously. However, if a student arrives in the U.S. during high school years, she will not be able to master academic English sufficiently well to be exposed to the same curricular standards that her native English speaking peers are exposed to. In that case, the appropriate action would be to provide her with a rich, academic instruction that meets statewide curricular standards in her first or strongest language.

In short, if “curricular time” exists for students to learn English in order to access the curriculum, then learning English is an “appropriate action.” If sufficient “curricular time” does not exist, then school districts would be under an obligation to provide that

curriculum in such a language and in such a way that she or he can access it. In short, the obligation is on the state (and district) to instruct in such a way that all students are exposed to rich content that provides them with a meaningful opportunity to earn degree.

#### **IV. Conclusion**

Federal courts' statutory construction of the Equal Educational Opportunity Act have given broad deference to states and localities and not substantively engaged the varied experiences and exclusions confronted by English learners. This paper is an effort to bring together the empirical social science about the "barriers that impede equal participation" for English learners with the legal criteria for what constitutes "appropriate action." Both the barriers and the appropriate responses are highly variable because of the diverse nature of English learners. As a result, what might be appropriate for one group of English learners is wholly inappropriate for another group. Variables such as age of arrival to the U.S., length of time in the U.S., the level of literacy of a student and the extent to which the student's schooling has been interrupted all potentially constitute enormous barriers to equal participation in instructional programs.

As a result, there is no one magic formula – legal or pedagogical -- for achieving educational rights for English learners. However, the shift to standards-based education over the past 20 years provides a far clearer definition of what full and equal participation in an instructional program looks like for English learners, no matter what their particular demographics or biographical or educational history may be. By employing a educational standards-based referent for judging "appropriate action," we can come closer to ensuring responsive and equitable state-level programs for English learners.

In addition, the recent enactment of ESSA provides states and localities with greater flexibility in the accountability regimes for ELs. This flexibility – in some contexts – runs the risk of yielding worse instructional contexts for English learners. While in some states this flexibility will be used to achieve greater justice for English learners, in other states, past practices strongly suggest that the flexibility will be used to denigrate or ignore the rights of ELs. Our hope is that this paper will help provide clearer guideposts to schools, districts, and states about social science findings concerning what is needed to overcome language barriers to receive an education.

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<sup>1</sup> The Bilingual Education Act (BEA) of 1968, also known as Title VII of the Elementary and Secondary Education Act (ESEA) of 1965, was intended to provide English learners with equitable access to their school’s curriculum. It did not require all schools to establish the same language policy or English language acquisition model; that authority was left given to states and school districts. Under the BEA, the federal government awarded grants to school districts in order to assist in the development and implementation of ELL services such as bilingual education, early childhood education, adult education, counseling, and teacher training (Sec. 7112(c)). In its original incarnation, the BEA targeted low-income ELLs, but did not provide a clear definition of bilingual education. The act was reauthorized in 1974, 1978, 1984, 1988, and 1994 before being replaced by the No Child Left Behind Act of 2001 (NCLB).

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The 1978 reauthorization added more specific language to the definition of bilingual education, and required grant recipients to prove that their program could be sustained following the withdrawal of federal funds. In 1984, the BEA was reauthorized and edited to permit the use of English-only programs, such as Structured English Immersion (SEI). It established the purpose of native language or bilingual instruction to be a transition to English-only instruction, as opposed to a long-term educational model (Wiese and Garcia 2001). Grant categories included special alternative instructional programs (SAIPs), which were intended for school districts in which “establishment of bilingual education programs may be administratively impractical” (1984, Sec. 702(a)(7)). In 1988, the funding cap for SAIPs was increased, and students were limited to three years of participation in bilingual programs (1988, Sec. 7021(d)(3)(A)). As part of the Improving America’s Schools Act, the 1994 reauthorization prioritized bilingual programs while allowing school districts to exceed the SAIP funding cap in the event that implementing a bilingual education program would be impractical (1994, Sec. 7116(i)(3)).

<sup>2</sup> Technically, the Supreme Court decision instructed the District Court to re-evaluate its denial of the motion for Rule 60(b)(5) relief, using the Supreme Court’s guidelines about when such relief is appropriate. Upon remand, the District Court ruled in favor of the relief motion and the Ninth Circuit upheld that motion on appeal.