# "Appropriate Action," Inappropriately Defined: Amending the Equal Educational Opportunities Act of 1974

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> [E]ducation has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.[1]

## *I. Introduction*

The number of limited English proficient (LEP) students in the nation's public primary and secondary schools is growing:[2] 65% more LEP students enrolled in American schools in 2004 than had in 1994.[3] In the 2001–2002 school year, there were 3,977,819 LEP students in grades K–12, a 71.9% increase from the 1991–1992 estimate.[4] Current numbers of LEP students are three times what they were in the 1980s[5] and LEP students represent approximately 8.4% of all public school students in the United States.[6] All fifty

1. Plyler v. Doe, 457 U.S. 202, 221 (1982).

2. ANNETTE M. ZEHLER ET AL., DESCRIPTIVE STUDY OF SERVICES TO LEP STUDENTS AND LEP STUDENTS WITH DISABILITIES: VOL. I RESEARCH REPORT, at vii–viii (2003), *available at* http://www.ncela.gwu.edu/resabout/research/descriptivestudyfiles/volI_research_fulltxt.pdf (last visited Mar. 17, 2008).

3. Jeanne Batalova, *Spotlight on Limited English Proficient Students in the United States*, MIGRATION INFO. SOURCE, Feb., 2006, http://www.migrationinformation. org/USFocus/display. cfm?ID=373 (last visited Feb. 11, 2008) (on file with the Washington and Lee Law Review).

4. ZEHLER ET AL., *supra* note 2, at vii–viii.

5. *Immigration and Bilingual Education*, 4 MIGRATION NEWS, June 1997, at 4, http://migration.ucdavis.edu/mn/comments.php?id=1245_0_2_0 (last visited Feb. 7, 2008) (on file with the Washington and Lee Law Review).

6. *See* ZEHLER ET AL., *supra* note 2, at vii (basing statistics on 2001–2002 school membership data from the Common Core of Data, U.S. Department of Education).

states enroll LEP students in their schools.[7] This is caused in large part by the recent rise in immigration—over 14 million immigrants entered the United States during the 1990s alone (both legally and illegally),[8] and immigrants are entering states and localities that have never before experienced large-scale immigration.[9] By 2020, more than one of every seven American residents will be foreign born.[10]

Paradoxically, there is a movement to make English the official language of the United States in order to "preserve English and the 'American' way of life from encroachment by a growing number of linguistic minority groups."[11] Such an attitude detrimentally affects LEP students when they are placed in regular English-speaking classes. Without special instruction in learning English, these children are precluded from receiving a meaningful education because they cannot comprehend what they are learning.[12] The ramifications of this trend extend beyond language borders—students who are not properly educated are more likely to drop out of school and commit crimes.[13]

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7. U.S. DEP'T OF EDUC., PROGRAMS FOR ENGLISH LANGUAGE LEARNERS 11 (1999).

8. Michael Fix & Randy Capps, *Immigrant Children, Urban Schools, and the No Child Left Behind Act*, MIGRATION INFO. SOURCE, Nov. 1, 2005, http://www.migrationinformation.org/USfocus/print.cfm?ID=347 (last visited Jan. 14, 2008) (on file with the Washington and Lee Law Review). The share of children of immigrants among the school-age population also increased rapidly, tripling from 6% in 1970 to 19% in 2000. *Id.*

9. Lisa B. Ross, Note, *Learning the Language: An Examination of the Use of Voter Initiatives to Make Language Education Policy*, 82 N.Y.U. L. REV. 1510, 1511 (2007).

10. Sam Roberts, *Study Foresees the Fall of an Immigration Record that has Lasted a Century*, N.Y. TIMES, Feb. 12, 2008, at A11 (describing a Pew Research Center study of the tremendous rise in immigration predicted over the next 40 years). "Sometime from 2020 to 2025, the Center estimates, the foreign-born will account for 15 percent of the nation's people. Immigrants were about 12 percent of the population in 2005 . . . ." *Id.*

11. Rachel F. Moran, *Bilingual Education as a Status Conflict*, 75 CALIF. L. REV. 321, 349 (1987).

12. *See, e.g.*, Guadalupe Org. v. Tempe Elem. Sch. Dist., 587 F.2d 1022, 1025 n.1 (9th Cir. 1978) (citing the Bilingual Education Act, Pub. L. No. 90-247, § 701, tit. VII (1968)). The court stated:

> The Congress hereby finds that one of the most acute educational problems in the United States is that which involves millions of children of limited English-speaking ability . . . and that the urgent need is . . . to develop forwardlooking approaches to meet the serious learning difficulties faced by this substantial segment of the Nation's schoolage population.

*Id.*

13. *See, e.g.*, Terri Lynn Newman, Comment, *Proposal: Bilingual Education Guidelines for the Courts and the Schools*, 33 EMORY L.J. 577, 577 (1984) ("High dropout rates and increased crime rates among children limited in English proficiency have been attributed to their inability to understand instruction in the English-only classroom."); Andrew Sum et al., *The Hidden Crisis in the High School Dropout Problems of Young Adults in the U.S.: Recent Trends in Overall School Dropout Rates and Gender Differences in Dropout Behavior* 3, 17

However, the Equal Educational Opportunities Act[14] (EEOA) can protect the right of LEP students to an equal education. Although this Note argues that the language of the EEOA is currently too vague to protect sufficiently the rights of LEP students, the statute is clearly capable of assisting these students. For example, the Yonkers, New York Board of Education recently reached a settlement with the U.S. Department of Justice (DOJ) in which it agreed to pay $300 million over five years to fund remedial educational programs.[15] Some of these programs will improve Yonkers's inadequate services for LEP students.[16] The Yonkers settlement, arising under the EEOA, is an example of the potential inherent in the thirty-four-year-old statute. To promote settlements such as this one, this Note argues that the EEOA must be amended in order to assure equality of education for language minority students.

Proposing additional statutory language necessitates an understanding of the nature of the EEOA, the law on education generally, and the problems surrounding the statute that have arisen in the courts. Thus, Part II of this Note discusses the social and political framework from which the EEOA was born. Part III disproves concerns that the EEOA does not validly abrogate state sovereign immunity under the Eleventh Amendment to the Constitution. Part IV traces the definition of "appropriate action" as it has appeared in the courts over the last three decades, and Part V proposes new statutory language that will clarify the responsibilities of the educational agencies so as to assure compliance with the EEOA, protect the rights of LEP students, and reduce litigation over the issue in the courts.

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(2003), http://www.businessroundtable.org/pdf/914.pdf (last visited Mar. 13, 2008) (providing data on immigrant dropout rates as well as tracing the link between failure to receive a high school diploma and serving time in jail or becoming homeless). For more information on current education issues, including the positions of the 2008 Presidential candidates, see http://www.edin08.org.

14. 20 U.S.C. §§ 1701–1721 (2000).

15. U.S. Dep't of Justice, Civil Rights Division, Educational Opportunities Section, Overview, http://www.usdoj.gov/crt/edo/overview.htm (last visited Jan. 14, 2008) [hereinafter Overview] (setting forth the responsibilities of the Educational Opportunities Section to investigate possible violations of the EEOA) (on file with the Washington and Lee Law Review).

16. *Id.*; *see also* United States v. Yonkers Bd. of Educ., 123 F. Supp. 2d 694, 714 (S.D.N.Y. 2000) (finding that vestiges of segregation existed in the Yonkers Public School system in part because the school provided inadequate services for LEP students).

### *II. Background on the Equal Educational Opportunities Act*

In 1974, Congress passed the EEOA.[17] The act states: "No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."[18] This Part explores education law and the history of the EEOA language in order to shed light on the congressional purpose of the act and also to determine whether such congressional intent has been fulfilled.

#### *A. Education Law Generally*

Education has been recognized as "perhaps the most important function of state and local governments."[19] The Supreme Court has linked success in life to a child's educational opportunity,[20] declaring: "In sum, education has a fundamental role in maintaining the fabric of our society."[21] However, education is not a fundamental right guaranteed under the Constitution.[22] Instead, the opportunity of education, "*where the state has undertaken to provide it*, is a right which must be made available to all on equal terms."[23]

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17. 20 U.S.C. §§ 1701–1721. Today the Educational Opportunities Section of the Civil Rights Division of the DOJ enforces the EEOA. *See* Overview, *supra* note 15 (setting forth the responsibilities of the Educational Opportunities Section). The Section has the right to intervene in private suits alleging violations of education-related anti-discrimination statutes and also represents the Department of Education in lawsuits. *Id.*

18. 20 U.S.C. § 1703. It should be noted that the EEOA only applies to the activities of state and local educational agencies at the elementary and secondary levels. "The EEOA does not impose any obligation on state higher education systems or authorities." United States v. Texas, 793 F.2d 636, 649 (5th Cir. 1986).

19. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954), *aff'd* 349 U.S. 294 (1955); *see also* Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) ("Providing public schools ranks at the very apex of the function of a State.").

20. *Brown*, 347 U.S. at 493 ("[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.").

21. Plyler v. Doe, 457 U.S. 202, 221 (1982); *see also* Mariela Nuñez-Janes, *Bilingual Education and Identity Debates in New Mexico: Constructing and Contesting Nationalism and Ethnicity*, 44 J. SW. 61, 75 (2002) ("Education in the United States is perceived as the great equalizing force: a good education provides hope and power.").

22. *See* Nat'l Conference of State Legislatures, Education Program, Compulsory Education, http://www.ncsl.org/programs/educ/CompulsoryEd.htm (last visited Jan. 20, 2007) (providing a background on state compulsory education as well as information on individual state policies) (on file with the Washington and Lee Law Review).

23. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 30 (1973) (holding that the

Further, despite the importance of education to society, the Court has never recognized a constitutional right of LEP students to be taught in their native language. Instead, the Court has held that under federal law a school district must provide non-English-speaking students with foreign language instruction or, alternatively, teach them to speak English.[24]

### *B. The Equal Educational Opportunities Act*

Civil Rights era controversies on desegregation, busing, language rights, and the nebulous ideal of "equal education" helped shape the legislation that became the EEOA.[25] On March 16, 1972, in his address to the nation, President Nixon discussed two companion proposals: one which would call for a moratorium on new busing, and one which would be entitled the Equal

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Equal Protection Clause does not require absolute equality or precisely equal advantages and that education is not a fundamental right or liberty) (emphasis added) (citing *Brown*, 347 U.S. at 493). Yet, all fifty states make mention of free, public education for children, typically through the age of twenty-one, in their constitutions. ALA. CONST. art. XIV, § 256, *amended by* ALA. CONST. amend. CXI; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1, *amended by* ARK. CONST. amend. 53; CAL. CONST. art. IX, § 5; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, 2d, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, Part 1, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. Part 2d, ch. V, § II; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. pt. 2d, art. LXXXIII; N.J. CONST. art. VIII, § 4(1); N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, §§ 1; OHIO CONST. art. VI, § 2; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. II, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 2; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1.

24. *See* Lau v. Nichols, 414 U.S. 563, 568 (1974) ("[T]he district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students." (citing the Office of Civil Rights's 1970 guidelines)). *But see* Wisconsin v. Yoder, 406 U.S. 205, 226 n.13 (1972) ("[Jefferson] proposed that state citizenship be conditioned on the ability to 'read readily in *some tongue, native or acquired*.'" (emphasis added) (quoting Letter from Thomas Jefferson to Joseph Cabell (Sept. 9, 1817), *in* WRITINGS OF THOMAS JEFFERSON 417, 423–24 (Andrew A. Lipscomb & Albert Elleny Bergh eds., 1904))). For historical data on the history of language rights during the country's formation, see SANDRA DEL VALLE, LANGUAGE RIGHTS AND THE LAW IN THE UNITED STATES: FINDING OUR VOICES 9–22 (2003).

25. The Equal Educational Opportunities Act, Pub. L. No. 93-380, § 204, 88 Stat. 484, 515 (1974).

Educational Opportunities Act.[26] Although the EEOA would not be passed until 1974, in his proposal, Nixon stated that "[t]his act would require that every State or locality grant equal educational opportunity to every person, regardless of race, color, or national origin."[27] Nixon affirmed that the Act would establish "an educational bill of rights for . . . [those] who start their education under language handicaps . . . ."[28] The next day, in a Special Message to Congress, Nixon described the EEOA as "plac[ing] the emphasis where it belongs: on better education for all of our children."[29] Nixon's entire message expressed a desire to clarify and direct the courts in the wake of the many education-related rulings and regulations. He declared that the EEOA would create a uniform set of standards for all the federal courts by "establish[ing] criteria for determining what constitutes a denial of equal opportunity."[30] It would be a way for Congress, drawing on its experience, to direct the courts.[31]

President Nixon emphasized his desire to shift control of educational decisions from the judicial branch to the legislative branch when he concluded that his proposals would address "the inherent inability of the courts, acting alone, to deal effectively and acceptably with the new magnitude of educational and social problems generated by the desegregation process."[32] He viewed the judiciary as the branch least capable of handling educational issues. Despite the law's intentions, however, the EEOA's vague language ultimately leaves it to the courts to shape the concept of equality in education for LEP students. In fact, the EEOA embodies the Supreme Court's decision in *Lau v. Nichols.*[33]

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26. Address to the Nation on Equal Educational Opportunities and School Busing, 90 PUB. PAPERS 425, 426 (Mar. 16, 1972) [hereinafter Address to the Nation]. Also, for a cogent discussion of the EEOA's origin, see *Martin Luther King Jr. Elementary School Children v. Michigan Board of Education*, 451 F. Supp. 1324, 1330–31 (E.D. Mich. 1978).

27. Address to the Nation, *supra* note 26, at 426.

28. *Id.* (emphasis added).

29. Special Message to the Congress on Equal Educational Opportunities and School Busing, 91 PUB. PAPERS 429, 435 (Mar. 17, 1972) [hereinafter Special Message].

30. *Id.* at 430.

31. *Id.* at 436.

32. *Id.* at 442–43. Similarly, the next year, in 1973, the Supreme Court reiterated this sentiment when it stated that "educational policy, [is] another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973).

33. *See* Lau v. Nichols, 414 U.S. 563, 569 (1974) (holding that, under Title VI of the Civil Rights Act of 1964, a school district must take affirmative steps to rectify the language deficiencies of its students in order to provide for their effective participation in educational programs). In *Lau*, the Supreme Court considered whether an alleged failure by the Board of

In *Lau*, a seminal decision for language minorities, the Court recognized the unfairness of teaching all students alike, without regard to their language abilities.[34] The Court stated that "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."[35] The Court, in one of its first interpretations of what sort of "appropriate action" a school should legally take, suggested that the school at issue teach English to the non-English speaking Chinese students or give instructions in the students' native language.[36] The Court's finding in *Lau* that LEP students were deprived "a meaningful opportunity to participate in the educational program"[37] reignited Nixon's 1972 EEOA proposal.

Congress passed the EEOA in 1974 as a House bill that amended the Elementary and Secondary Education Act of 1965.[38] The only legislative history available comes from an identical bill in 1972.[39] The House Committee on Education and Labor, which approved the legislation in 1972, stated that:

> [T]he committee bill for the first time in Federal Law contains an illustrative definition of a denial of equal educational opportunity. It is the purpose of that definition . . . to provide school and governmental

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Education to assure that plaintiffs achieved English proficiency violated either the Fourteenth Amendment or Title VI. *Id.* at 564–66. Plaintiffs were non-English-speaking Chinese students seeking relief against the unequal educational opportunities in their schools. *Id.* at 564. Relying on administrative interpretations of Title VI by the Department of Health, Education and Welfare (HEW), as well as the Office of Civil Rights Guidelines, the *Lau* Court found that the failure of a school district to take swift and effective action to aid language minority students denied them equal educational opportunity under Title VI. *Id.* at 568. The Court reasoned that equality of treatment for language minority students must go beyond merely providing students with the same facilities, textbooks, teachers, and curriculum because "students who do not understand English are effectively foreclosed from any meaningful education." *Id.* at 566. Accordingly, the Court stated that a system to deal with the special language needs of national origin minority group children should quickly be designed to meet such needs. *Id.* at 568; *see also* Rachel F. Moran, *Undone by Law: The Uncertain Legacy of* Lau v. Nichols, 16 LA RAZA L.J. 1, 6 (2005) (explaining that the EEOA was "[e]nacted by Congress to codify the *Lau* decision").

34. *Lau*, 414 U.S. at 566.

35. *Id*.

36. *Id.* at 565 (explaining the school's remedial options).

37. *Id.* at 568.

38. Equal Educational Opportunities Act, Pub. L. No. 93-380, § 204, 88 Stat. 484, 515 (1974).

39. *See* Jonathan D. Haft, *Assuring Equal Educational Opportunity for Language-Minority Students: Bilingual Education and the Equal Educational Opportunity Act of 1974*, 18 COLUM. J.L. & SOC. PROBS. 209, 233 (1983) (describing the limited legislative history of the EEOA) (citing 120 CONG. REC. 8262 (1974)).

> authorities with a clear delineation of their responsibilities to their students and employees and to provide the students and employees with the means to achieve enforcement of their rights.[40]

A committee report further indicated that the purpose of the EEOA was to provide equal education to LEP students: "As President Nixon has stated, these children will not have true equality of educational opportunity until these language and cultural barriers are removed."[41]

Responses to the EEOA were varied, although most concentrated on the advantages and disadvantages of bilingual education in schools.[42] The LEP community showed its strength by boycotting schools, for instance, when bilingual programs were threatened.[43] (Interestingly, while the language of § 1703(f) does not mention bilingual education, but instead uses the nebulous term "appropriate action," the legislative history indicates that bilingual education may have been expected as the means to provide the students with equal participation.[44] However, bilingual education is not required by the EEOA.[45]) One particularly strong editorial pointed out that even after *Lau*,

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40. H.R. REP. NO. 92-1335, at 3 (1972); *see also* United States v. State, 506 F. Supp. 405, 431–32 (E.D. Tex. 1981) (looking at the legislative history of the EEOA), *rev'd* United States v. Texas, 680 F.2d 356 (5th Cir. 1982).

41. H.R. REP. NO. 92-1335, at 6 (1972).

42. *See, e.g.*, *id.* ("It should not be necessary for [an LEP student] to sacrifice his rich native language and culture to achieve such participation . . . rather, we should utilize available language skills and thought processes to foster intellectual development while developing English language proficiency."); Alfonso A. Narvaez, *Educators Back a Bilingual Plan*, N.Y. TIMES, Mar. 24, 1973, at 21 ("One of the problems the United States has long had in the old theory of the melting pot is that English is the only language . . . . We favor bilingual education for every child in this state who needs it, not just Puerto Ricans, but Greeks, Italians, Chinese, whatever." (quoting New York State Senator Robert Garcia)). *But see* Simon H. Rifkind, Letter to the Editor, *Bilingualism in New York City Schools*, N.Y. TIMES, Sept. 2, 1972, at 20 ("I discern in the bilingual movement a serious threat to the tranquility of our city . . . to divide the city into two separate societies, one English-speaking and one Spanish speaking . . . . Bilingual schooling will, for the rest of their lives, make them sound like aliens.").

43. *See* Joan Cook, *2,000 Hispanic Children Boycott Newark Classes*, N.Y. TIMES, Oct. 9, 1974, at 92 ("More than 2,000 Hispanic children stayed away from nine elementary schools here today in protest against an impending cutback in bilingual classes."); Alfonso A. Narvaez, *800 Demonstrate for School Plan*, N.Y. TIMES, Oct. 15, 1974, at 83 (describing a demonstration in New York to maintain a bilingual program).

44. *See Equal Educational Opportunities Act: Hearing on H.R. 13915 Before the H. Comm. on Educ. and Labor*, 92d Cong. 140–41 (1972) (statement of Elliot Richardson, Secretary, Department of Health, Education, and Welfare [now Health and Human Services]) ("This would be the first time that Congress ever affirmatively declared that there is a right to receive bilingual education. It would mean, therefore, that in the future any refusal to provide it would be a violation of law.").

45. *See, e.g.*, Keyes v. Sch. Dist. No. 1, 576 F. Supp. 1503, 1510 (D. Colo. 1983) (stating that the EEOA "did not specify that a State must provide a program of bilingual education to all

some school boards were slow to initiate LEP programs and waited for a court order before taking any action.[46] In light of educational agencies' potential hesitancy to act and the fact that LEP children "will not have true equality of educational opportunity until these language and cultural barriers are removed"[47] it is imperative to clarify the EEOA.

Clarifying the statutory requirements would enable localities to maintain discretion and control over the specifics of the educational program chosen,[48] while ensuring that LEP students have a baseline of protections that would suitably provide them with equal educational opportunities. Before tracing the courts' treatment of § 1703(f) over the last three decades, and before proposing an amendment to the statute itself, Part III of this Note argues that the current statute validly abrogates state sovereign immunity. Thus, the EEOA serves as a viable tool by which LEP plaintiffs can sue states or state educational agencies in federal courts.

## *III. Eleventh Amendment Abrogation*

The value of a proposed amendment to the EEOA is diminished if, as academic scholars have recently claimed,[49] the EEOA does not validly abrogate a state's sovereign immunity. If this is true, no plaintiff can bring suit against a state or its educational agency in federal court.[50] Such a limitation reduces the flexibility of a plaintiff's choice of action[51] and his ability to timely file a

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limited English speaking students").

46. Editorial, *Dragged Into Progress*, N.Y. TIMES, Sept. 9, 1974, at 14 ("The board's reluctance to lead, instead of being dragged, onto the path of progress is particularly troubling . . . .").

47. H.R. REP. NO. 92-1335, at 6 (1972).

48. *See* Special Message, *supra* note 29, at 439, 442 ("Given our highly decentralized national educational system and the relatively minor role one Federal program usually plays . . . [the EEOA] will create more local choice and more options to choose from.").

49. *See* Moran, *supra* note 33, at 7 (stating that the EEOA may not abrogate state sovereign immunity because the statute does not expressly abrogate immunity and because the purported abrogation might not be "congruent and proportional" to documented constitutional misconduct); Geoffrey Landward, Note and Comments, Board of Trustees of the University of Alabama v. Garrett *and the Equal Education Opportunity Act: Another Act Bites the Dust*, 2002 BYU EDUC. & L.J. 313, 323 (2002) (arguing that because the EEOA lacks language that specifically abrogates state immunity, it will fail to meet the requirements for congressional abrogation of state immunity as outlined in *Garrett*).

50. *See* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by citizens or Subjects of any Foreign State.").

51. *See* Eden Davis, *Unhappy Parents of Limited English Proficiency Students: What Can*

case.[52] This Part argues that, contrary to recent claims, the EEOA does in fact validly abrogate a state's sovereign immunity, thereby enabling plaintiffs to bring claims in federal court.

### *A. Governing Standards of the Eleventh Amendment*

The Eleventh Amendment to the Constitution renders the states immune from "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[53] The Supreme Court consistently finds that immunity extends to suits brought by any nonconsenting state's own citizens.[54] Still, Congress can abrogate this immunity pursuant to Section 5 of the Fourteenth Amendment.[55] Determining whether Congress validly abrogates state immunity requires the resolution of two preliminary questions: "first, whether Congress unequivocally expressed its intent to abrogate that immunity; and second, if it did, whether Congress acted pursuant to a valid grant of constitutional authority."[56] To answer the second question, a court must

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*They Really Do?*, 35 J.L. & EDUC. 277, 278–81 (2006) (explaining that suing a state under the EEOA is one of only three options available to parents unsatisfied with the methods employed in teaching limited English proficient students); *see also* Moran, *supra* note 33, at 8 ("If the Eleventh Amendment challenge to the EEOA holds up, plaintiffs would have to abandon a disparate impact theory under this statute as well as Title VI [of the Civil Rights Act].").

52. *See* Moran, *supra* note 33, at 8 ("[L]itigators would be forced to bring suits district by district, a time-consuming and burdensome task. As a result, some actions would be entirely beyond the reach of private lawsuits under federal law.").

53. U.S. CONST. amend. XI.

54. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001). The Court stated:

> Although by its terms the Amendment applies only to suits against a State by citizens of another State, our cases have extended the Amendment's applicability to suits by citizens against their own States. The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court.

*Id.* (citations omitted); *see also* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 726 (2003) (stating that the Eleventh Amendment "does not provide for federal jurisdiction over suits against nonconsenting States"); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000) ("Accordingly, for over a century now, we have made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States.").

55. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), which allowed Congress to abrogate state immunity pursuant to its power under the Interstate Commerce Clause, leaving Section 5 of the Fourteenth Amendment as the sole basis under which Congress can abrogate Eleventh Amendment immunity).

56. Tennessee v. Lane, 541 U.S. 509, 517 (2004).

determine whether the law is "congruent and proportional"[57] to the injury it seeks to remedy.[58]

### *B. Congress Unequivocally Expressed Its Intent to Abrogate State Immunity*

Whether the EEOA validly abrogates a state's sovereign immunity has never been doubted by the courts.[59] Congress, in writing the EEOA, did unequivocally express its intent to abrogate the states' immunity.[60] Section 1703 provides that: "No State shall deny equal educational opportunity to an individual on account of . . . national origin, by (a) the deliberate segregation by an *educational agency* of students on the basis of race, color, or national origin among or within schools; . . . ."[61] For the purposes of § 1703, an "educational agency" is "a local educational agency or a 'State educational agency' as defined by [20 U.S.C. § 3381(k)]."[62] Section 3381(k) explains that the "term 'State educational agency' means the state board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law."[63] Section 1706 permits an "individual denied an equal educational opportunity . . . [to] institute a civil

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57. *Id.* at 531.

58. *See id.* ("Section 5 legislation is valid if it exhibits a 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" (quoting City of Boerne v. Flores, 521 U.S. 507, 520 (1997))); *see also Hibbs*, 538 U.S. at 728 ("We distinguish appropriate prophylactic legislation from 'substantive redefinition of the Fourteenth Amendment right at issue,' by applying the test set forth in *City of Boerne*." (quoting *Kimel*, 528 U.S. at 81)).

59. *See* United States v. Texas, No. CIVA 6:71CR5281 WWJ, 2006 WL 2350013, at *7 (E.D. Tex. Aug. 11, 2006) ("Here, there is no question, and Defendants concede, that Congress clearly intended to abrogate sovereign immunity in enacting the EEOA."); *see also* Gomez v. Ill. State Bd. of Educ., 811 F.2d 1030, 1037 (7th Cir. 1987) ("Congress abrogated the states' Eleventh Amendment immunity to the extent necessary to effectuate the purposes of the [EEOA]."); L.A. Branch NAACP v. L.A. Unified Sch. Dist., 714 F.2d 946, 951 (9th Cir. 1983) (explaining that the EEOA abrogates a state's sovereign immunity and thus "clearly authorizes desegregation suits against state educational agencies"); Castaneda v. Pickard, 648 F.2d 989, 1008 n.9 (5th Cir. 1981) ("[I]t is undisputed in this case, and indeed indisputable, that in enacting the EEOA Congress acted pursuant to the powers given it in § 5 of the [F]ourteenth [A]mendment.").

60. *Lane*, 541 U.S. at 517.

61. 20 U.S.C. § 1703 (2000) (emphasis added).

62. *Id.* § 1720.

63. *Id.* § 3381(k). This includes every state "agency or officer" empowered by state law to enforce compliance with the Act in the public schools. Idaho Migrant Council v. Bd. of Educ., 647 F.2d 69, 71 (9th Cir. 1981).

action in an appropriate district court of the United States against such parties . . . ."[64] By specifying the responsibilities of the educational agencies and by specifically granting individuals the power to file federal suit when those agencies do not meet their obligations, the EEOA authorizes suits against state educational agencies.[65]

Despite the EEOA's language, scholars still question whether abrogation is present. One scholar recently noted that "the EEOA does not *expressly* abrogate state immunity."[66] However, a literal declaration has never been the Supreme Court's test for congressional abrogation.[67] Surely if language to the effect of "a State shall not be immune under the Eleventh Amendment to the Constitution from an action in federal court" was necessary for Eleventh Amendment abrogation, at least one of the many cases in which the Supreme Court has looked at immunity[68] would have so stated. Another scholar argues that "[t]he authorization for federal suits makes no mention of suits against the state."[69] Yet, by repeatedly specifying that "educational agenc[ies],"[70] which include "*State* educational agenc[ies],"[71] are responsible for protecting equal educational opportunities, and by allowing a private right of action in federal court for violations of this mandate,[72] Congress speaks of suits against the state. Even though § 1706 does not expressly refer to the states, "it is clear from the language set forth above that the obligations of § 1703(f) are imposed on the

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64. 20 U.S.C. § 1706.

65. *See, e.g.*, L.A. Branch NAACP v. L.A. Unified Sch. Dist., 714 F.2d 946, 951 (9th Cir. 1983) (holding that because the California Board of Education and the California Department of Education fell within the Act's definition of state educational agency and because Congress, acting under the Fourteenth Amendment, explicitly provided for desegregation suits against this type of agency, the California agency's immunity was abrogated).

66. Moran, *supra* note 33, at 7 (emphasis added); *see also* Landward, *supra* note 49, at 324 ("[W]ithout an *express* declaration of congressional intent, the Court will not infer that Congress meant to abrogate state immunity." (emphasis added)).

67. This is true even in the case on which the scholar critical of the abrogation idea bases his Comment. Landward, *supra* note 49, at 323; *see* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001) (stating that Congress may abrogate the States' Eleventh Amendment immunity when it "unequivocally intends to do so").

68. *See generally* Tennessee v. Lane, 541 U.S. 509 (2004); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); *Garrett*, 531 U.S. 356 (2001); City of Boerne v. Flores, 521 U.S. 507 (1997); Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

69. Landward, *supra* note 49, at 324.

70. 20 U.S.C. § 1703 (2000).

71. *Id.* § 1720 (emphasis added).

72. *Id.* § 1706.

states and their agencies."[73] Any other interpretation "would render that enactment a dead letter *ab initio*"[74] because plaintiffs would not be able to bring actions in federal court against the very actors who could violate the EEOA—the states and educational agencies. There would be no sense to the statute. Additionally, a critic has posited that "abrogation of Eleventh Amendment immunity is objective, and does not rely on congressional intent."[75] Yet, the governing Supreme Court tests for abrogation are peppered with the word "intent."[76] Finally, even the defendants in EEOA cases rarely challenge the question of whether Congress unequivocally intended to abrogate immunity.[77] Thus, when Congress wrote the EEOA, it sufficiently expressed its unequivocal intent to abrogate state sovereign immunity.

### *C. Congress Acted Pursuant to a Valid Grant of Constitutional Authority*

Congress, in writing the EEOA, acted pursuant to a valid grant of constitutional authority. "Eleventh Amendment immunity can be waived by the state, or by Congress acting pursuant to its enforcement powers under [S]ection 5 of the Fourteenth Amendment."[78] That Section gives Congress the power to ensure that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."[79] The EEOA, in § 1702, states:

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73. Gomez v. Ill. State Bd. of Educ., 811 F.2d 1030, 1037 (7th Cir. 1987).

74. *Id.* "Any action under § 1706 to enforce § 1703(f) can only be maintained against entities that would ordinarily be immune under the Eleventh Amendment . . . [because] without the abrogation of sovereign immunity, state agencies would, in practice, vanish from that definition." *Id.* at 1037–38.

75. Landward, *supra* note 49, at 324.

76. A critic has admitted the need to search for congressional intent to abrogate as he states that a "[c]ongressional act that purports to abrogate a state's Eleventh Amendment immunity must contain an unequivocal expression of Congress's *intent* to abrogate." *Id.* (emphasis added).

77. *See* Tennessee v. Lane, 541 U.S. 509, 518 (2004) ("As in *Garrett*, no party disputes the adequacy of that expression of Congress' intent to abrogate the States' Eleventh Amendment immunity." (citation omitted)); L.A. Branch NAACP v. L.A. Unified Sch. Dist., 714 F.2d 946, 951 (9th Cir. 1983) ("[W]e hold that the Eleventh Amendment immunity of the California agency defendants has been abrogated. The state defendants do not dispute our reading of the Equal Educational Opportunities Act."); United States v. Texas, No. CIVA 6:71CR5281 WWJ, 2006 WL 2350013, at *6 (E.D. Tex. Aug. 11, 2006) ("Here, there is no question, and Defendants concede, that Congress clearly intended to abrogate sovereign immunity in enacting the EEOA.").

78. *L.A. Branch*, 714 F.2d at 950 (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976)).

79. U.S. CONST. amend XIV § 1.

> For the foregoing reasons, it is necessary and proper that the Congress, pursuant to the powers granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of the vestiges of dual school systems, except that the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States.[80]

Although Section 5 is not specifically mentioned,[81] there is little argument[82] that Congress passed the EEOA pursuant to anything but the enforcement authority of Section 5 of the Fourteenth Amendment.[83]

### *D. The Congruence and Proportionality Test*

Although Congress has a "wide berth [under the Fourteenth Amendment] in devising appropriate remedial and preventative measures for unconstitutional actions, those measures may not work a 'substantive change in the governing law.'"[84] Thus, to determine whether Congress's legislation is appropriate, the courts must determine whether the legislation is "congruent and proportional"[85]

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80. 20 U.S.C. § 1702(b) (2000).

81. *See* EEOC v. Wyoming 460 U.S. 226, 243 n.18 (1983) (finding that a statute need not expressly refer to Section 5 or to the Fourteenth Amendment as long as congressional intent to act pursuant to those powers is otherwise clear).

82. *See* Moran, *supra* note 33, at 7 ("[T]he EEOA does invoke congressional powers granted pursuant to the Constitution as authority for enacting the statute. This general statement will likely suffice, even though section 5 is not specifically mentioned."); *see also* Landward, *supra* note 49, at 324–25 ("Although the EEOA only makes reference to congressional powers in the Constitution, it seems unlikely that the Court would determine that the EEOA is based on anything but the Fourteenth Amendment.").

83. U.S. CONST. amend XIV § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); *see* Gomez v. Ill. State Bd. of Educ., 811 F.2d 1030, 1037 (7th Cir. 1987) ("There can be no dispute that the EEOA was passed pursuant to the enforcement authority of § 5 of the Fourteenth Amendment."); Castaneda v. Pickard, 648 F.2d 989, 1008 n.9 (5th Cir. 1981) (discussing the EEOA in relation to the Fourteenth Amendment). Speaking to the issue of the constitutional grant of authority, the *Castaneda* court states:

> The general declaration of policy contained in § 1701 and § 1702 of the EEOA expresses Congress' intent that the Act specify certain guarantees of equal opportunity and identify remedies for violations of these guarantees pursuant to its own powers under the fourteenth amendment without modifying or diminishing the authority of the courts to enforce the provisions of that amendment.

*Castaneda*, 648 F.2d at 1008 n.9.

84. Tennessee v. Lane, 541 U.S. 509, 520 (2004) (quoting City of Boerne v. Flores, 521 U.S. 507, 519 (1997)).

85. *Id.* at 531.

to the harm it seeks to prevent. Courts make this determination by analyzing (1) whether there has been a history and pattern of unconstitutional actions on account of the constitutional right at issue, and (2) whether the statute is proportional to the harm identified.

### *1. History and Pattern of Unconstitutional Action Based on National Origin*

The constitutional right at issue is the right of a national origin minority to equal educational opportunities. The EEOA seeks to prevent denial of "equal educational opportunity to an individual . . . on account of . . . national origin."[86] A history and pattern of unconstitutional action based on national origin is revealed by analyzing the legislative history of the EEOA.[87] Additionally, historical experience[88] may be shown by the congressional record;[89] "the decisions of other courts [that] document a pattern of unequal treatment";[90] by looking at law review articles, or state and local regulations;[91] and by searching for a pattern of discrimination in non-state governmental units, such as local school boards or districts.[92]

Generally, the Supreme Court notes that many states have a history of discrimination and an unequal distribution of educational opportunities based

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86. 20 U.S.C. § 1703 (2000).

87. *See infra* note 94 and accompanying text as well as *supra* Part II.B (discussing the unconstitutional treatment minority national origin status faced in school).

88. Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 638 (1999) ("[T]he propriety of any § 5 legislation must be judged with reference to the historical experience . . . it reflects." (citations omitted)); *see also Lane*, 541 U.S. at 523 (explaining that historical experiences need to be analyzed).

89. *See* United States v. Texas, No. CIVA 6:71CR5281 WWJ, 2006 WL 2350013, at *12 (E.D. Tex. Aug. 11, 2006) (stating that, in evaluating the legislative history at issue in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 730–31 nn.3 & 5 (2003), the Supreme Court looked at testimony that pertained to earlier, related legislation, not just those hearings directly related to the legislation in question).

90. Tennessee v. Lane, 541 U.S. 509, 525 (2004).

91. *See Texas*, 2006 WL 2350013 at *8 (stating that other cases have referenced these resources as evidence of past discrimination); *see also* McCarthy v. Hawkins, 381 F.3d 407, 423 (5th Cir. 2004) (Garza, J., concurring) ("The Supreme Court, in *Tennessee v. Lane*, . . . [r]elying almost exclusively on federal case law, [] concluded that 'Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs . . . .'" (quoting *Lane*, 541 U.S. at 524)).

92. *See Texas*, 2006 WL 2350013 at *8 ("[A]fter *Lane*, we do not look solely at the state level for a history and pattern of unconstitutional action, we also examine discrimination by nonstate government entities." (citing Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 277 n.14 (5th Cir. 2005))).

on the race of the students.[93] Similarly, there was other well-documented evidence of discrimination against national origin minorities in the public schools presented to Congress during the time it enacted the EEOA. For instance, months before passage of the EEOA, Martin Gerry, acting director of the Office of Civil Rights (OCR) for the Department of Health, Education, and Welfare (HEW), testified before Congress about the nationwide pattern of exclusion of national origin minority students from meaningful participation in educational programs.[94] The OCR conducted reviews of school districts' performance in meeting guidelines that it had set forth and found that "[t]he exclusion of national origin minority students from the full benefits of the educational program appeared to be continuing each year."[95] Additional congressional testimony highlighted the discrimination that was felt by national origin minorities prior to passage of the EEOA.[96] Moreover, a pattern and history of discrimination in the schools against national origin minorities motivated the 1970 HEW memo which presented findings indicating the frequency of practices denying equality of educational opportunity to Spanish-surnamed pupils.[97] Students from other national origin minority groups, for example, Chinese or Portuguese, similarly faced discriminatory practices.[98]

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93. *See generally* Bd. of Educ. of Okla. City Public Sch. v. Dowell, 498 U.S. 237, 240–41 (1991); Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 6 (1971).

94. *Bilingual Education Act: Hearing on H.R. 1085, H.R. 2490, and H.R. 11464 Before the Gen. Subcomm. on Educ. of the Comm. on Educ. and Labor*, 93d Cong. 20, 21 (1974) [hereinafter *BEA Hearings*] ("[N]ational origin minority children were, as a group, in many school districts[,] being excluded from full and effective participation in, and the full benefits offered by, the educational programs operated by such districts.").

95. United States v. Texas, No. CIVA 6:71CR5281 WWJ, 2006 WL 2350013, at *11 (E.D. Tex. Aug. 11, 2006) (citing *BEA Hearings*, *supra* note 94, at 23).

96. *See, e.g.*, 93 CONG. REC. 15431 (May 20, 1974) (statement of Sen. Kennedy) ("Mexican-American youngsters are not only shunted out of the college bound courses, but all too frequently are placed in classes for the mentally retarded—not because of any intelligence deficiency, but because of an English language deficiency."); *Bilingual Education Act: Hearing on H.R. 1085, H.R. 2490 and H.R. 22464 Before the Gen. Subcomm. on Educ. of the Comm. on Educ. and Labor*, 93d Cong. 53 (1974) (statement of L. Ling-Chi Wang, Professor, University of California at Berkeley) (testifying that several thousand Asian-American students needed, but did not receive, any English language assistance between the years of 1969 and 1973); *id.* at 187 (statement of Herman LaFontaine, Exec. Administrator, Office of Bilingual Education, New York City Board of Education) ("[W]e have this large number of students who do not speak the language and are thereby prevented to a certain extent from actually developing and taking advantage of the learning process in the schools.").

97. Memorandum from the Dep't of Health, Educ. & Welfare on Language Minority Children to School Districts with More Than Five Percent National Origin-Minority Group Children (May 25, 1970), http://www.ed.gov/about/offices/list/ocr/docs/lau1970.html (last visited Jan. 14, 2008) (on file with the Washington and Lee Law Review).

98. *Id.*

Also, numerous cases leading up to the passage of the EEOA discuss at length the discrimination that was taking place towards national origin minority students in the schools,[99] including segregation justified by language deficiency.[100] Clearly, Congress passed the EEOA using sufficient evidence of a history and pattern of national origin discrimination in the schools.

### *2. The EEOA Is a Proportional Response to the Harm Identified*

Because "[t]he appropriateness of the remedy depends on the gravity of the harm it seeks to prevent,"[101] the more egregious the harm, the more latitude Congress enjoys when passing legislation. The "appropriate action" requirement is designed to "break the cycle of stereotype-driven discrimination against LEP students."[102] The EEOA is reasonably "prophylactic legislation"[103] because discriminatory conduct violates the Equal Protection Clause of the Fourteenth Amendment.

A statute invalidly abrogates state immunity if it creates new substantive constitutional rights.[104] Thus, to be valid, prophylactic legislation should be "narrowly targeted"[105] at eliminating the discrimination. The EEOA, which requires state educational agencies to take "appropriate action" only with respect to English language proficiency, is sufficiently narrow so that it does not redefine any constitutional rights. The EEOA does not impose any stringent standards on the states but rather is flexible and allows the states to create their own remedial language programs. The law is aimed specifically at

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99. *See, e.g.*, Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 197 (1973) (stating that Hispanic students in Arizona, California, Colorado, New Mexico, and Texas "suffer from the same educational inequities as Negroes and American Indians"); Hernandez v. Texas, 347 U.S. 475, 479 n.10 (1954) (finding that the Mexican-American schools in which Jackson County, Texas placed its students were provided with about half the resources of the Anglo schools); Cisneros v. Corpus Christi Indep. Sch. Dist., 324 F. Supp. 599, 612 (S.D. Tex. 1970) ("It is obvious to the court from the evidence that the Mexican-Americans have been historically discriminated against as a class in the Southeast and in Texas."), *aff'd* 467 F.2d 142 (5th Cir. 1972).

100. *See generally* United States v. Tex. Educ. Agency, 467 F.2d 848 (5th Cir. 1972); Gonzales v. Sheely, 96 F. Supp. 1004 (D. Ariz. 1951); Mendez v. Westminister Sch. Dist. of Orange County, 64 F. Supp. 544 (S.D. Cal. 1946).

101. Tennessee v. Lane, 541 U.S. 509, 523–24 (2004).

102. United States v. Texas, No. CIVA 6:71CR5281 WWJ, 2006 WL 2350013, at *13 (E.D. Tex. Aug. 11, 2006).

103. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728 (2003).

104. *See* City of Boerne v. Flores, 521 U.S. 507, 519–24 (1997) (explaining that legislation that is not a congruent and proportional response to a constitutional injury will overreach and redefine the scope of protection granted by the Fourteenth Amendment).

105. *Hibbs*, 538 U.S. at 738.

overcoming the problems of English language deficiency and the record of discrimination.

Because the EEOA is congruent and proportional to the national origin discrimination identified, sovereign immunity is validly abrogated and thus, plaintiffs can bring suits in federal courts against states and state educational agencies. Part IV describes the types of claims that are brought under the EEOA and sets forth why LEP students are better served by more explicit statutory language.

## *IV. Defining "Appropriate Action"*

A plaintiff may institute a civil action to protect his right to equal educational opportunity under the EEOA.[106] The EEOA is like "an educational bill of rights for [those] . . . who start their education under language handicaps."[107] Yet the statute's open-ended "appropriate action" requirement does not define what is required to state a claim, what type of allegations plaintiffs may make, or to what acts by an educational agency "appropriate action" applies.[108] The legislative intent of the EEOA clearly indicates Congress's desire to reserve specific decisions of LEP programming for state and local educational agencies.[109] But, equality of education is attained not only through sufficient programming. This Part explores the other areas which affect equality of education and those to which "appropriate action" should explicitly apply.

### *A. "Appropriate Action" As Understood by the Courts*

Courts emphasize that Congress and educational agencies are the bodies with the discretion to determine what "appropriate action" means.[110] Setting

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106. *See* 20 U.S.C. § 1706 (2000) ("An individual denied an equal educational opportunity, as defined by this subchapter [20 U.S.C. §§ 1701–1721] may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate.").

107. Address to the Nation, *supra* note 26, at 426.

108. Sandra Cortes, Comment, *A Good Lesson for Texas: Learning How to Adequately Assist Language-Minorities Learn English*, 13 TEX. WESLEYAN L. REV. 95, 107 (2006) (illustrating that the EEOA neither defines appropriate action nor explains what types of programs will satisfy the appropriate action requirement).

109. *See infra* Part IV.A (outlining the intended lack of specificity in programming).

110. *See, e.g.*, Gomez v. Ill. State Bd. of Educ., 811 F.2d 1030, 1041 (7th Cir. 1987) ("[W]e must be careful not to substitute our suppositions for the expert knowledge of educators

the parameters for "appropriate action" is a job for Congress, not the courts, especially in light of President Nixon's pronouncement of the inability of the courts to deal effectively with educational problems.[111] However, it is the courts themselves that have assessed and attempted to elucidate the § 1703(f) language. Still, the combination of vague statutory language, coupled with the intention for local discretion over programming, prompted the Fifth Circuit to set out a test to measure whether a program met the "appropriate action" language of the statute.[112] Using the test, the courts have found a wide array of programming to be compliant with the EEOA "appropriate action" language: bilingual education,[113] English as a Second Language

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or our judgment for the educational and political decisions reserved to the state and local agencies."); *see also* United States v. Texas, 680 F.2d 356, 370 (5th Cir. 1982) (asserting that courts are not experts on issues of education). The Fifth Circuit stated:

> The issue is essentially a pedagogic one: how best to teach comprehension of a language. Neither we nor the trial court possess special competence in such matters. It follows that on such thin ice both tribunals should tread warily, doing no more than correcting clear inequities and leaving positive programming to those more expert in educational matters than are we.

*Id.* at 370; Castaneda v. Pickard, 648 F.2d 989, 996 (5th Cir. 1981) ("[I]t is educators, rather than the courts, who are in a better position ultimately to resolve the question whether such a practice is, on the whole, more beneficial than detrimental to the students involved."); Teresa P. v. Berkeley Unified Sch. Dist., 724 F. Supp. 698, 715 (N.D. Cal. 1989) (discussing the court's reluctance to assess an educational program).

111. *See* Special Message, *supra* note 29, at 442–43 (discussing Nixon's preference that Congress, not the courts, work on educational issues).

112. Although the Fifth Circuit's test is the most cited, three years earlier, a South Dakota court also attempted to clarify the § 1703 language by requiring,

> more specific methods for identifying on admission those children who are deficient in the English language and for monitoring the progress of such children[,] . . . a training program for bilingual teachers and bilingual aides[,] . . . a method for transferring students out of the program when the necessary level of English proficiency is reached. It should not isolate children into racially or ethnically identifiable classes, but it should encourage contact between non-English and English speaking children . . . .

Cintron v. Brentwood Union Free Sch. Dist., 455 F. Supp. 57, 64 (E.D.N.Y. 1978).

113. Bilingual education is defined by the Department of Education as "instruction in two languages and the use of those two languages as mediums of instruction for any part of or all of the school curriculum. Study of the history and culture associated with a student's mother tongue is considered an integral part of bilingual education." Guad. Org., Inc. v. Tempe Elem. Sch. Dist., 587 F.2d 1022, 1025 n.1 (9th Cir. 1978) (citing U.S. Office of Educ., *Draft Guidelines to the Bilingual Education Program*, *in* T. ANDERSSON & M. BOYER, BILINGUAL SCHOOLING IN THE UNITED STATES, at app. B (1970)). These may include transitional bilingual education programs. *See, e.g.*, Keyes v. Sch. Dist. No. 1, 576 F. Supp. 1503, 1516 (D. Colo. 1983) (mem.) (explaining such programs facilitate the integration of the child into the regular school curriculum by emphasizing English while at the same time utilizing the student's native language as a medium of instruction to ensure academic success), *aff'd* 895 F.2d 659 (10th Cir.

(ESL) classes,[114] and English Immersion[115] programs.

### *1. The* Castaneda *Three-Prong Test*

In *Castaneda v. Pickard*,[116] the Fifth Circuit fashioned a three-prong test to determine the appropriateness of a school system's language remediation program when challenged under § 1703(f). It explained:

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1990). For an argument advocating the provision of full bilingual education, see Thomas Kleven, *The Democratic Right to Full Bilingual Education*, 7 NEV. L.J. 933, 937–39 (2007) (contending that the Equal Protection Clause mandates full bilingual education to those desiring it).

114. In an ESL program, LEP students receive instruction in English in all substantive topics and are "pulled-out" for ESL classes while English speakers are in nonacademic classes. Haft, *supra* note 39, at 248. An ESL program seeks to promote communication between a LEP student and his peers and teachers. *Id.* While ESL may lead to faster mastery of the English language, because LEP students receive all instruction in English, even before they understand it, they often suffer academic underachievement in the substantive areas. *Id.* at 249–50. For more information on ESL programs see Newman, *supra* note 13, at 612–14.

115. In this method, LEP students learn English in a short, intensive period in which subject-matter instruction is taught almost entirely in English. Catherine Johnson, Note, *The California Backlash Against Bilingual Education:* Valeria G. v. Wilson *and Proposition 227*, 34 U.S.F. L. REV. 169, 170–71 (1999). The goal here is to have the LEP students placed in mainstream classes as soon as their English skills are proficient. *Id.* For example, in *Valeria G*, Proposition 227, the program at issue, was a sheltered English immersion program. This meant that LEP students were to be taught in an immersion program "during a temporary transition period not normally to exceed one year . . . [and then] transferred to English language mainstream classrooms." Valeria G. v. Wilson, 12 F. Supp. 2d 1007, 1013 (N.D. Cal. 1998).

116. Castaneda v. Pickard, 648 F.2d 989, 1009–10 (5th Cir. 1981) (remanding to the district court to determine whether the school district had discriminated against Mexican-Americans in the past, to consider whether the effects of any past discrimination were fully erased and then to decide the merits of the claims of the plaintiffs). In *Castaneda*, the court considered, in part, whether the school district unlawfully discriminated against the plaintiffs by failing to implement adequate bilingual education to overcome the linguistic barriers that allegedly impeded the plaintiff's equal participation in the educational program of the district. *Id.* at 992. This led the court to question whether Congress, in enacting § 1703(f), intended to impose on schools, through the use of the term "appropriate action," a specific obligation. *Id.* at 1008. More specifically, the court questioned whether the school district's testing method to measure the progress of students in the bilingual education program was appropriate. *Id.* at 1014. The school district employed an ability grouping system based on achievement test scores among other things, *id.* at 996, and operated a bilingual education program, *id.* at 1004–05. While stating that the EEOA validly abrogated a state's sovereign immunity, *id.* at 999, the court found that Congress could not have intended any particular program's implementation under the EEOA, *id.* at 1008. However, the court laid forth a three-prong test to determine the appropriateness of a school's language remediation efforts. *Id.* at 1009. Finally, the court remanded the case to the district court for it to determine the precise causes of the language deficiencies of some of the district's teachers. *Id.* at 1014.

> First, the court must examine carefully the evidence the record contains concerning the soundness of the educational theory or principles upon which the challenged program is based. . . .
>
> The court's second inquiry would be whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school. . . .
>
> Finally, . . . . [i]f a school's program, although premised on a legitimate educational theory and implemented through the use of adequate technique, fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce the results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned.[117]

This test is used to evaluate allegations that an educational agency has violated a plaintiff's rights under the EEOA.[118]

Although other courts that have considered § 1703(f) claims since 1981 rely on *Castaneda*, not all of them fully subscribe to its framework.[119] Nor is the test free from criticism.[120] In fact, one scholar has claimed that the deference to defendant school districts places an "almost impossible burden

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117. *Id.* at 1009–10.

118. *See, e.g.*, Gomez v. Ill. State Bd. of Educ., 811 F.2d 1030, 1034 (7th Cir. 1987) (setting forth the plaintiff's claim under the EEOA).

119. *See* Teresa P. v. Berkeley Unified Sch. Dist., 724 F. Supp. 698, 713 (N.D. Cal. 1989) ("[T]he *Castaneda* guidelines require fine tuning, but nonetheless provide a helpful analytic structure." (citing *Gomez*, 811 F.2d at 1041)); Quiroz v. State Bd. of Educ., 1997 U.S. Dist LEXIS 24154, at *20 (E.D. Cal. 1997) (criticizing the third prong of the *Castaneda* test for failing to provide guidance as to what standards a court should use in evaluating an educational plan).

120. *See Teresa P.*, 724 F. Supp. at 715 (criticizing the third prong because "[n]either the EEOA nor the *Castaneda* court explains how it is that a federal court is to judge the results of a school district's language remediation program"); *see also* Tristan W. Fleming, Note, *Education on Equal Terms: Why Bilingual Education Must be Mandated in the Public Schools for Hispanic LEP High School Students*, 17 GEO. IMMIGR. L.J. 325, 338 (2003) (pointing out that the third prong does not explain what the time period should be after which the educational agency must show results, thus leaving school districts to determine for themselves whether their program has failed). Fleming also questioned whether the second prong, a rational basis review standard for "reasonably calculated" would be consistent with the Supreme Court's heightened scrutiny requirements for a "discrete class of children" expressed in *Plyler v. Doe*. *Id.*; *see also* Eric Haas, *The Equal Educational Opportunities Act 30 Years Later: Time to Revisit "Appropriate Action" for Assisting English Language Learners*, 34 J.L. & EDUC. 361, 362 (2005) (stating that the first prong "misinterprets the role of federal judges in assessing the soundness of a scientific theory and the qualifications of an expert by deferring too readily to the scientific justifications put forth by school district officials and proposition supporters").

upon the plaintiffs: [To] demonstrate that *no* expert supports the underlying theory as sound under any circumstances."[121] Still, this Fifth Circuit test largely predominates in analyzing § 1703(f) violations.

Regardless of its merits or detractions, this test fails to assess anything except programming. It serves to measure if the program is a legitimate response to LEP student needs and does not define other areas to which the term "appropriate action" applies. Moreover, it is a judicial tool of interpretation that can be used only once the case is in litigation before a court. Congress must amend the EEOA to more specifically delineate the requirements the educational agencies must take initially, in the implementation stage.[122] After the statutory language is expanded, then a test like the one in *Castaneda* can be used in litigation to measure whether the agencies' programs have reached the required level of "appropriate action." Otherwise, Congress circumvents its own legislative intent by tacitly ignoring the problems LEP students continue to face.

### *B. Categories to Which "Appropriate Action" Should Explicitly Apply*

LEP students' claims under the EEOA indicate that the courts permit broader allegations than simply claims of inadequate or improper language programming. The EEOA framework entertains, although the diffuse statutory language does not mention, five different categories of claims: (1) programming; (2) identification and grouping of students; (3) oversight and management of programming; (4) teacher hiring and training; and (5) funding. If a "district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students,"[123] then Congress, through amendment, must specify these five areas in the EEOA.

#### *1. Programming*

A common complaint by LEP plaintiffs alleges a failure of defendant educational agencies or school districts to provide them with equal educational services. Because of the variety in programming, allegations take many forms. For example, some claims of insufficient programming allege that pressing LEP

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121. Haas, *supra* note 120, at 378.

122. *See generally* Ross, *supra* note 9, at 1510, 1529–32 (arguing that voter initiatives that mandate uniform methods of instruction are not appropriate methods for making language education policy).

123. Lau v. Nichols, 414 U.S. 563, 568 (1974).

students to read and write, at grade level, in both English and their native language, violates the EEOA.[124] Plaintiffs have asserted that such demands impermissibly overemphasize the development of English language skills.[125] In California, certain plaintiffs argued that the district program did not provide them with adequate English language development instruction or adequate native tongue support.[126] Specifically, they challenged the district's alternative to bilingual education—an ESL program at the elementary level, and ESL classes and a sheltered English program at the secondary level.[127]

More recently, certain other plaintiffs in California moved to enjoin the implementation of an initiative which rejected bilingual education programs in favor of an educational system designed to teach LEP students in English early in their education.[128] Seemingly, any action an educational agency takes is subject to suit. Because of the discretion in programming inherent in the EEOA, if these discrete programming choices pass the *Castaneda* evaluation, they are considered sufficient to reach "appropriate action." Yet, other areas besides programming are as important to equal education for LEP students.

### *2. Identification and Grouping of LEP Students*

Plaintiffs also bring claims under the EEOA for improper and unequal ability grouping in the schools. In one example, plaintiffs stated the school district unlawfully discriminated against LEP students by using an ability grouping system for classroom assignment that was based on racially and ethnically discriminatory criteria.[129] In another instance, a school district used an identification questionnaire but then employed teachers not trained in "linguistics, bilingual education, other languages, or in detecting language problems"[130] to evaluate the results of the test. LEP students have also claimed

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124. *See* Castaneda v. Pickard, 648 F.2d 989, 1006 (5th Cir. 1981) (claiming that under the *Lau* Guidelines, pressing English on the LEP students is not a primary goal); *see also* Martin Luther King Jr. Elem. Sch. Children v. Mich. Bd. of Educ., 451 F. Supp. 1324, 1330 (E.D. Mich. 1978) (stating that "Black English" is as much of a language barrier as any foreign language).

125. *Castaneda*, 648 F.2d at 1006.

126. *See* Teresa P. v. Berkeley Unified Sch. Dist., 724 F. Supp. 698, 700 (N.D. Cal. 1989) (explaining one of the many claims the plaintiffs had against the school district).

127. *Id.* at 702–05.

128. *See* Valeria G. v. Wilson, 12 F. Supp. 2d 1007, 1012 (N.D. Cal. 1998) (explaining the programming under Proposition 227).

129. *See Castaneda*, 648 F.2d at 992 (setting forth the plaintiffs' claims of unlawful grouping of students which led to inequality of education).

130. Keyes v. Sch. Dist. No. 1, 576 F. Supp. 1503, 1514 (D. Colo. 1983) (mem.), *aff'd*,

that even if a program rests on a pedagogically sound basis, its implementation can violate the "appropriate action" standard of the EEOA.[131] For example, some plaintiffs claim that school districts fail completely in assessing and recognizing LEP children.[132] This is particularly dangerous because improper assessment of LEP students can result in students being "misassigned to lower academic tracks or special education programs"[133] or simply ignored altogether.

In one case, plaintiffs were injured by a failure of a local school board and superintendent to promulgate "uniform and consistent guidelines for the identification, placement and training of LEP children."[134] The school had been able to avoid education requirements by purposefully identifying less than the number of LEP children that triggered LEP programming.[135] Another court found a violation of the EEOA where identification of LEP students depended on the classroom teacher to link underachievement with possible language deficiency, stating that "there is no assurance that language deficient children in the upper grades will be identified."[136] LEP student identification and grouping are aspects of equal education, and because they are not explicitly mentioned in the EEOA, educational agencies may not aptly recognize that failures in these areas constitute failures to take "appropriate action." Students will suffer without a clear requirement in the statute saying that educational agencies must properly identify and group LEP students.[137]

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895 F.2d 659 (10th Cir. 1990).

131. *See Teresa P.*, 724 F. Supp. at 715 (arguing that the identification test is not good because it does not provide an appropriate basis to determine whether a student is limited English proficient because the test is normed upon the English language skills of LEP students rather than those of native English-speaking students).

132. *See id.* at 700 (claiming the testing exam fails to provide an appropriate basis to determine whether a student is LEP).

133. Sonja Diaz-Granados, Note, *How Can We Take Away a Right that We Have Never Protected: Public Education and Immigrant Children*, 9 GEO. IMMIGR. L.J. 827, 850 (1995).

134. Gomez v. Ill. State Bd. of Educ., 811 F.2d 1030, 1033 (7th Cir. 1987).

135. *See id.* (alleging that that districts would purposefully identify less than twenty LEP students of the same primary language and claiming that the grouping problems were caused by insufficient guidance by the board of education and the superintendent).

136. Cintron v. Brentwood Union Free Sch. Dist., 455 F. Supp. 57, 63 (E.D.N.Y. 1978).

137. *See* United States v. Texas, 506 F. Supp. 405, 424 (E.D. Tex. 1981) ("The accuracy of this initial assessment mechanism is vital to ensuring that special help is provided to those children who need it.").

### 3. *Oversight and Management of Language Programs*

Plaintiffs also claim that the EEOA is violated by a lack of management over language remediation programs—broadly categorized as oversight claims. This may include claims of inadequate staffing of the administrative body in charge of monitoring.[138] For example, plaintiffs charge that educational agencies violate the EEOA by failing to supervise districts in the state to ensure that no child is denied program benefits on account of national origin.[139] Plaintiffs have brought claims following an educational agency's abandonment of on-site monitoring, enforcement, and supervision of school districts to ensure compliance with the state's bilingual education program.[140] The DOJ has reviewed whether a school district was sufficiently monitoring the students enrolled in the LEP program and those students who had already exited the program.[141] One court found a violation of the EEOA because of a lack of adequate testing.[142] Without oversight of the programs in place, efforts to help LEP children are futile.

### 4. *Teacher Hiring and Qualifications*

Allegations under the EEOA also include claims of improper teacher hiring, promotion, and training.[143] "[I]f the teachers charged with day-to-day responsibility for educating these children are termed 'qualified' despite the fact that they operate in the classroom under their own unremedied language

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138. *See id.* at 427 (discussing how the responsibilities of the agency charged with administrating the language programs include having sufficient numbers of staff).

139. *See Cintron*, 455 F. Supp. at 70 (claiming that the State Department of Education, Board of Education, and Superintendent failed to sufficiently exercise their supervisory powers over the local districts); *see also Texas*, 506 F. Supp. at 408 (alleging violations of the EEOA).

140. *See* United States v. Texas, No. CIVA 6:71CR5281 WWJ, 2006 WL 2350013 at *2 (E.D. Tex. Aug. 11, 2006) (setting forth the plaintiffs' claims).

141. *See* U.S. Dep't of Justice, Civil Rights Division, Equal Educational Opportunities Section, Case Summaries, http://www.usdoj.gov/crt/edo/documents/casesummary.htm, (last visited Feb. 22, 2008) [hereinafter Case Summaries] (explaining the Civil Rights Division's actions with respect to the Bound Brook, New Jersey school district) (on file with the Washington and Lee Law Review).

142. *See* Keyes v. Sch. Dist. No. 1, 576 F. Supp. 1503, 1518 (D. Colo. 1983) (mem.) ("The lack of an adequate measurement of the effects of such service is a failure to take reasonable action to implement the transitional bilingual policy."), *aff'd*, 895 F.2d 659 (10th Cir. 1990).

143. *See* Castaneda v. Pickard, 648 F.2d 989, 992 (5th Cir. 1981) (claiming the school district unlawfully discriminated against Mexican-Americans in the hiring and promotion of faculty and administrators).

disability,"[144] then the language program is unlikely to have a significant impact on the LEPs' language barriers. Thus, plaintiffs argue that education agencies must provide expert assistance to school districts to remedy both the foreign language deficiencies of the teachers and the in-service training they receive.[145] Other claimants argue that school districts fail to ensure that teachers and other instructional personnel have the requisite qualifications, credentials, and skills to provide their services effectively.[146] The courts have not required teachers to possess language-specific credentials in order to deliver remediation programs consistent with the EEOA.[147] Courts still seem to allow agencies a high degree of deference in hiring, training, and maintaining their staff so that, although plaintiffs can bring claims against educational agencies for violations of § 1703(f) with respect to teacher hiring and preparedness,[148] they often lose. For example, a statistical difference between bilingual teachers in a geographic area and qualified teachers that are actually employed by a school may create a prima facie case of unlawful discrimination as prohibited by the EEOA, but defendants may rebut this prima facie evidence when they explain the statistical difference in light of "local circumstances and resources."[149] A court that looked into this issue tested all programs "against reality."[150] Meaning, where an area proves to be a less desirable place to work than its neighboring school districts, and when the school district charged has engaged in "substantial

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144. *Id.* at 1013.

145. *See* Castaneda v. Pickard, 781 F.2d 456, 470 (5th Cir. 1986) (alleging a violation of the EEOA by the state educational agency).

146. *See* Teresa P. v. Berkeley Unified Sch. Dist., 724 F. Supp. 698, 700 (N.D. Cal. 1989) (setting forth a claim of a violation of the EEOA); *see also* Moran, *supra* note 11, at 323 ("[B]ilingual education statutes have typically included waiver provisions that enable English-speaking teachers to instruct . . . LEP students while acquiring bilingual teaching skills.").

147. *Teresa P.*, 724 F. Supp. at 714–15. *But see Keyes*, 576 F. Supp. at 1516 (finding that schools without adequate qualification testing of bilingual teachers violated the EEOA). The EEOA was also violated when the court found that the school did not require any special training for ESL teachers. *Id.* at 1514.

148. *See, e.g.*, *Castaneda*, 648 F.2d at 1013 (exemplifying problems in teacher preparedness). The *Castaneda* court, commenting on problems with teachers stated:

> The record in this case strongly suggests that the efforts [the school district] has made to overcome the language barriers confronting many of the teachers assigned to the bilingual education program are inadequate. . . . Until deficiencies in this aspect of the program's implementation are remedied, we do not think [the district] can be deemed to be taking "appropriate action" to overcome the language disabilities of its students.

*Id.*

149. *Teresa P.*, 724 F. Supp. at 14.

150. *Id.*

recruiting" efforts, the court did not find a violation of the "appropriate action" requirement.[151]

Unqualified teachers will surely stymie efforts by LEP students to overcome their language barriers. "The key to an effective elementary bilingual classroom is the ability of the teacher to communicate with the children."[152] But, without specific language in the EEOA indicating that improper training of personnel constitutes a failure to comply with the statute, LEP students may continue to be taught by unqualified teachers.

#### *5. Funding for LEP Programs*

Plaintiffs bring claims faulting districts for failing to allocate adequate resources to the special language services for LEP students.[153] A claim of failure to take "appropriate action" by insufficient funding also exists when there are insufficient services for LEP students. For example, a strict neighborhood assignment system permitted only students living in white neighborhoods to "reap the benefits"[154] of the construction of new schools. Surely a benign intent to help LEP students is inadequate if states do not commit resources to the programs. The EEOA should indicate that such funding deficiencies equate to a violation of the statute.

### *C. Requirements for a Legally Sufficient EEOA Claim*

Vague statutory language creates a broad scope of possible allegations, forcing a court to struggle in determining what the EEOA requires to state a claim. Additionally, there is "limited case law regarding what is required to state a claim under § 1703(f) of the EEOA."[155] A Michigan court required that plaintiffs allege language barriers, demonstrate how language barriers impede education, note what appropriate actions the defendant

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151. Castaneda v. Pickard, 781 F.2d 456, 469 (5th Cir. 1986).

152. Keyes v. Sch. Dist. No. 1, 576 F. Supp. 1503, 1516 (D. Colo. 1983) (mem.), *aff'd*, 895 F.2d 659 (10th Cir. 1990).

153. *See* Teresa P. v. Berkeley Unified Sch. Dist., 724 F. Supp. 698, 700 (N.D. Cal. 1989) (setting forth claims that the defendant violated the EEOA).

154. Leslie v. Bd. of Educ. for Ill. Sch. Dist. U-46, 379 F. Supp. 2d 952, 956 (N.D. Ill. 2005). *But see* Deerfield Hutterian Ass'n. v. Ipswich Bd. of Educ., 468 F. Supp. 1219, 1232 (D.S.D. 1979) (finding no violation where, for example, a local board of education refuses to provide funds for establishment of a school near a Hutterite colony but offers to bus children into town and establish a bilingual-bicultural program at an existing school).

155. *Leslie*, 379 F. Supp. 2d at 960.

failed to take, and identify the causal connection.[156] Recently, however, an Illinois court declared that such requirements were too rigorous because they forced the plaintiffs to propose a solution.[157] The Illinois court chose to look "to the clear language of the statute, which establishes . . . the elements of a § 1703(f) violation: (1) language barriers; (2) defendant's failure to take appropriate action to overcome those barriers; and (3) a resulting impediment to students' equal participation in instructional programs."[158] Thus, by some courts' standards, a plaintiff can state a claim by expressly alleging that a defendant's failure to provide adequate LEP services interferes with and impedes an LEP student's ability to overcome language barriers. Congress should alleviate this confusion among courts by clarifying the standards necessary to state a claim under the EEOA. Part V's proposed amendment seeks to incorporate lessons from case history into the EEOA in order to clarify requirements under the Act.

## *V. An Amendment to the EEOA*

Unfortunately, "America's schools have achieved limited success in meeting the needs of these [LEP] students, who have four times the dropout rate of their peers who are fluent in English, as well as higher grade repetition rates."[159] The statute's vague wording does not sufficiently protect the students in school who are unable to understand English.[160] Because the issue of instruction for LEP students under the EEOA has never reached the Supreme Court,[161] a "return to the courts to litigate these

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156. *Id.* (citing Martin Luther King Jr. Elem. Sch. Children v. Mich. Bd. of Educ., 463 F. Supp. 1027 (E.D. Mich. 1978)).

157. *See id.* (stating reasons why the Michigan court's analysis would not be applied in Illinois).

158. *Id.*

159. MARNIE S. SHAUL, U.S. GEN. ACCT. OFFICE, PUBLIC EDUCATION: MEETING THE NEEDS OF STUDENTS WITH LIMITED ENGLISH PROFICIENCY 3 (2001).

160. *See, e.g.*, Peter W. Hahn, Note, *Recognizing the Disability: Extending the (Tenuous) Rights of English-Language-Deficient Students in Public Schools*, 53 WASH. U. J. URB. & CONTEMP. L. 271, 274 (1998) (commenting that although there is federal legislation in place to protect the rights of LEP students, it has resulted in ambiguous standards and is particularly disturbing in light of debate over making English the official language of the United States). Also, "while Congress has enacted legislation that requires schools to help [LEP] students overcome their language barriers, it nonetheless has failed to articulate the statutes' coverage. Finally, neither the courts nor Congress have established standardized procedures to guide schools on how to overcome these language barriers." *Id*. at 292.

161. *See, e.g.*, Fleming, *supra* note 120, at 337 ("The Supreme Court has not interpreted the statute's language, the legislative history is not clear, nor has the statute not [sic] been

issues"[162] leads to undesirable results: (1) LEP students may have to await verdicts before they are given equal educational opportunities; (2) the courts, in fashioning tests and analyses in an attempt to understand § 1703(f), end up legislating in place of Congress; and (3) different courts achieve disparate and incongruent results that create a confusing atmosphere and an uncertainty as to what is truly required.[163]

The *Castaneda* test is only useful as a judicial tool of interpretation once a case is brought to court by a plaintiff and, as noted above, the claims brought may be as egregious as a teacher's own "unremedied language disability."[164] It comes too late. Although the Educational Opportunities Section of the DOJ has listed conditions that may violate the EEOA,[165] if Congress truly wants the EEOA to be an "educational bill of rights"[166] for language minority students, then it needs to signal to educational agencies that they must initially take "appropriate action" with respect to more than just programming, and cannot wait until a claim is brought in court. If a claim is still brought to court, then a test such as an adapted *Castaneda* test could be applied to measure whether there was, in fact, a violation. With over thirty years of EEOA experience behind it, Congress has enough information to amend the 1974 legislation in a way that guarantees "appropriate action" for LEP students, while at the same

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amended or clarified by Congress. Furthermore, because there has been little litigation in general on this subject, we are left with a problematic statute.").

162. Keyes v. Sch. Dist. No. 1, 576 F. Supp. 1503, 1521 (D. Colo. 1983) (mem.), *aff'd*, 895 F.2d 659 (10th Cir. 1990).

163. *See* Haft, *supra* note 39, at 213 ("As a consequence of the Court's failure to set a standard form of relief, lower federal courts considering the issues of compensatory language instruction have ordered various remedies, ranging from deference to locally formulated remedies on the one hand, to bilingual-bicultural methods on the other.").

164. Castaneda v. Pickard, 648 F.2d 989, 1013 (5th Cir. 1981).

165. These conditions include:

1. A school fails to provide a language acquisition program to its [LEP] students;
2. A school fails to provide resources to implement its language acquisition program effectively (e.g., an ESL program lacks ESL teachers or ESL materials);
3. A school fails to take steps to identify students who are not proficient in English;
4. A school does not exit [LEP] students from a language acquisition program when the [LEP] students have acquired English proficiency, or a school exits [LEP] students without written parental or guardian permission before the students acquire English proficiency.

U.S. Dep't of Justice, *Discrimination Against English Language Learner Students*, http://www.usdoj.gov/crt/edo/ellpage.html (last visited Feb. 23, 2007) (setting forth examples of conditions that may violate the EEOA) (on file with the Washington and Lee Law Review).

166. Address to the Nation, *supra* note 26, at 426.

time maintaining local discretion to prevent any court from acting as a "Supreme Board of Education."[167] This Part proposes an amendment to § 1703(f) that will clarify its purpose, lay out more specific requirements for educational agencies, and protect the right of LEP students to equality of education.[168]

### *A. New Statutory Language Proposed*

The language of the proposed § 1703 would state (addition in italics):

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . .
>
> (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.[169] *Failure to take appropriate action shall apply to, but shall not be limited to, failures in (i) programming, (ii) identification and grouping of students, (iii) oversight and management of the language program, (iv) teacher hiring and training, and (v) funding. To state a claim, a plaintiff need not look any further than the requirements within this subsection.*[170]

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167. Valeria G. v. Wilson, 12 F. Supp. 2d 1007, 1015 (N.D. Cal. 1998) ("There is a legitimate policy debate among respected educators and scholars on this issue [of which education system is better]. But, most important, that is not a debate for this court to resolve. This court is not a Supreme Board of Education.").

168. It is also important to remember that, as it stands now, individual state constitutions supply their own appropriate standards, and these clauses vary by state. The courts are therefore further stymied when trying to determine whether the "appropriate action" requirement has been met. *See* Diaz-Granados, *supra* note 133, at 834 (explaining how the additional factor of state constitutions adds to the confusion over the EEOA in the courts).

169. 20 U.S.C. § 1703(f) (2000).

170. Of course, new statutory language creates the concern that the legislation will no longer be remedial and prophylactic but that it instead becomes substantive and thus no longer validly abrogates a state's sovereign immunity. The EEOA is distinguishable from the Americans with Disabilities Act of 1990 at issue in *Garrett*, in which the ADA was found not to validly abrogate states' sovereign immunity because there was no "pattern of discrimination by the States which violates the Fourteenth Amendment," nor was the remedy "congruent and proportional to the targeted violation." Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356, 374 (2001). The proposed EEOA language here is such that it is still congruent and proportional to the harm identified. As Part III.D analyzes, this language is also narrowly targeted and yet flexible so that it addresses the constitutional violation without creating any new rights. As Part III describes, the EEOA is both remedial in its response to a history of discrimination, and proportional to the harm that was identified. Additionally, the language of the proposed amendment is still broad enough that is does not infringe on the power of the states to regulate the health, safety, and welfare of their citizens.

Language regarding the identification of students is critical to support the goal of the EEOA that LEP students receive equality of education. Misidentification of students wastes scarce resources,[171] and "[i]mproper assessment of LEP students results in students being wrongly assigned to lower academic tracks or special education programs."[172] The DOJ recognizes the danger of not identifying students as LEP students.[173] It recently raised concerns about a school district's procedures for screening new students to determine whether they were LEP students.[174] The proposed amendment will help alleviate such identification problems because it will affirmatively establish and explicitly direct educational agencies to look to areas like identification when taking "appropriate action" to overcome its students' language barriers.

With respect to oversight and management, besides the obvious concern that the programs will not be effectively helping LEP students, ineffective management could lead "to problems with orientation, enrollment delays, transportation snafus, special education evaluations, confusion over school expectations and a lack of information to parents on meetings and activities."[175] Valid testing of student progress is "essential to measure the adequacy of a language remediation program"[176] and "[t]he success of any language education program depends largely on how it is implemented."[177] The statute should be clear that program oversight is included with the "appropriate action" requirement so that educational agencies will initiate effective management

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171. Johnson, *supra* note 115, at 188 (quoting a particular social science analyst and former Educational Researcher for the U.S. Department of Education).

172. Diaz-Granados, *supra* note 133, at 850.

173. *See* Case Summaries, *supra* note 141 (explaining the investigation the DOJ's Equal Educational Opportunities did into the Bound Brook Board of Education in Bound Brook, New Jersey). As a result of the investigation, good-faith negotiations between the DOJ and the Board of Education took place, resulting in an October 16, 2003 agreement requiring the district to provide timely assessment of all students with non-English speaking backgrounds. *Id.* The DOJ was also concerned in *United States v. North Plainfield Board of Education* that the school district was insufficiently screening new students to determine whether they were LEP students. *Id.* On September 3, 2004, the school district and the school entered into a settlement agreement outlining the measures the district would take to ensure it complies with the EEOA. *Id.*

174. *Id.*

175. Eleanor Chute, *Somalis Say Rights Violated*, PITTSBURGH POST-GAZETTE, May 17, 2005, at B1 (discussing complaints under the EEOA by more than fifty Somali Bantu refugees enrolled in the Pittsburgh Public Schools).

176. Castaneda v. Pickard, 648 F.2d 989, 1014 (5th Cir. 1981).

177. Ross, *supra* note 9, at 1535.

methods when implementing their program instead of only after this issue is litigated.

Not all states require that teachers of ESL or bilingual programs hold any special certification, and for those that do, many of the teachers have substandard certificates.[178] Paradoxically, evidence suggests that the "quality of the teachers is a more significant factor in student achievement than the choice between bilingual instruction and English immersion."[179] Without specific language in the EEOA indicating that improper training of personnel constitutes a failure to comply with the statute, LEP students may continue to be taught by unqualified teachers. This proposed language will heighten the standards of what is provided to LEP students in the way of teacher competency.

Language about funding must be included in the EEOA such that LEP students and educational agencies will know that there is a failure "to take appropriate action" where there is inadequate program funding.[180] Lastly, although no specific type of language remediation is required by § 1703(f), including "programming" in the statute that will serve to reinforce the necessity that school districts affirmatively implement remedial language programs. Recent settlements by the DOJ also emphasize that the above categories should be included in the understanding of the § 1703(f) "appropriate action"[181] language by requiring action by educational agencies in the above areas.[182]

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178. *See* Diaz-Granados, *supra* note 133, at 849–50 (highlighting the problem of inadequate teaching for LEP students).

179. Martha Minow, *Surprising Legacies of* Brown v. Board, 16 WASH. U. J.L. & POL'Y 11, 20 (2004).

180. *See, e.g.*, Pat Kossan, *Language-Learning History in Arizona*, ARIZ. REPUBLIC, Feb. 28, 2006, at 13A (reporting that in February of 2005, a study found that adequate funding for LEP students was $1,200 per student instead of the $350 that the Arizona state legislature had allowed). In December of 2005, Federal Judge Raner Collins ordered lawmakers to improve LEP education or face a fine of $500,000 a day. *Id.* The fines are now suspended and the State Superintendent for Public Instruction, Tom Horne is appealing their imposition. Robert Robb, *A Language Barrier; The English-Learner Saga is Worthy of the Twilight Zone*, ARIZ. REPUBLIC, Mar. 8, 2006, at 9B.

181. 20 U.S.C. § 1703(f) (2000).

182. *See Justice Reaches Settlement with New Jersey School District Regarding Educational Opportunities*, STS. NEWS SERVICE, Oct. 17, 2003 [hereinafter *Justice Reaches Settlement*] ("The settlement agreement [between the DOJ and Bound Brook, New York Board of Education] requires timely assessment of all students with non-English speaking backgrounds, . . . monitoring of academic progress, . . . quality curricula and instruction for English Language Learner students, sufficient library and teacher resources, [and] adequate teacher training."); *see also* United States v. Bd. of Educ. of Chi., 1:80-CV-05124, amended app'x C (N.D. Ill. Aug. 10, 2006) (entering a consent decree requiring, among other things, that the Board of Education: assess children for possible placement in a language acquisition program, allocate sufficient funds to provide language learners with educationally sound

Critics will argue that the Fifth Circuit, in *Castaneda*, clearly laid out an analytical outline,[183] to apply to "appropriate action." Some may claim that its second prong of the test[184] already assesses whether the educational agencies have sufficiently provided for LEP students with respect to identification, oversight, teacher credentials, and funding. However, the *Castaneda* test only applies once the harm has occurred—only once the students are immersed in programs that are, for example, insufficiently managed or funded. The amended language seeks to attack the problem before it reaches the courts by mandating that educational agencies and school districts take "appropriate action" with respect to these five (and other) specific areas.

Additionally, even if it was said that the *Castaneda* test evaluated these five areas, it is important to remember that *Castaneda* is a Fifth Circuit decision that is not binding on other circuits.[185] The Seventh Circuit gave only mild support to the Fifth Circuit's test.[186] Moreover, as stated earlier, the *Castaneda* test measures and does not define "appropriate action." Before a *Castaneda*-like test can be applied, educational agencies should understand what areas must be addressed in order to have "appropriate action." This new language serves to emphasize the affirmative duty on educational agencies to take "appropriate action."[187]

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instructional materials, adequately train teachers, and monitor the implementation of its language acquisition programs); Press Release, Justice Dep't, Justice Department Settles Civil Rights Allegations Concerning Violence-Plagued Brooklyn High School (June 1, 2004) ("[T]he consent decree requires the school district reform the school's English Language Learner (ELL) program to ensure, among other things, adequate assessment, placement, and academic counseling of ELL students.") (on file with the Washington and Lee Law Review).

183. This court as well chided Congress on its sparse statutory language. *See* Castaneda v. Pickard, 648 F.2d 989, 1009 (5th Cir. 1981) ("Congress has provided us with 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.'").

184. *Id.* at 1010 ("The court's second inquiry would be whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school.").

185. *See, e.g.*, Teresa P. v. Berkeley Unified Sch. Dist., 724 F. Supp. 698, 712 (N.D. Cal. 1989) (stating that there are "no Ninth Circuit cases which establish a legal framework for assessing whether or not a particular language remediation program constitutes appropriate action").

186. Gomez v. Ill. State Bd. of Educ., 811 F.2d 1030, 1041 (7th Cir. 1987) ("Of course, we do not mean to say that we are adopting without qualification the jurisprudence developed in the Fifth Circuit regarding the interpretation of the EEOA. However, the *Castaneda* decision provides a fruitful starting point for our analysis. The fine tuning must await future cases.").

187. *See supra* note 123 and accompanying text (discussing the affirmative duty schools have to help LEP children).

The amended language will also clarify that, to state a claim, a plaintiff must look only to the statutory language which requires a showing of (1) a language barrier; (2) defendant's failure to take appropriate action to overcome that barrier; and (3) a resulting impediment to the students' equal participation in instructional programs. Because, as this amendment proposes, the "appropriate action" language will be enlarged, plaintiffs and courts will more easily recognize if a violation has occurred and educational agencies will more clearly understand their responsibilities.

## *VI. Conclusion*

LEP and non-English proficient students face many obstacles; while English is not the official language of the United States, LEP students suffer because "the covert language policy of the United States is not neutral, it favours the English language."[188] School districts and educational agencies continue to fall short in their provision of services to LEP students: "[I]f there were to be any legal presumption for most, if not all, school districts, it would be that they do *not* employ sound education theory in devising their programs for second language assistance."[189] Thankfully, thirty-four years after its inception, the EEOA is still alive and serves as a tool for securing equal education in the schools by LEP students.

However, efforts must continue to protect LEP students. The DOJ has intervened in numerous cases and initiated its own investigation of educational agencies' language remediation programs. President Bush has also shown interest in assuring that LEP students receive equality of education by supporting the DOJ's enforcement of the EEOA[190] and by passing the No Child Left Behind Act.[191] In order to further ensure equal educational opportunity for

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188. Nuñez-Janes, *supra* note 21, at 73 (citations omitted).

189. Haas, *supra* note 120, at 379; *see, e.g.*, Cortes, *supra* note 108, at 99 (arguing that Texas currently lacks a language education program that "focuses, addresses, and remedies the needs of language-minority students").

190. *Justice Reaches Settlement*, *supra* note 182 ("'This comprehensive settlement agreement reflects the Bush Administration's ongoing efforts to ensure that those with limited English proficiency are able to learn the language and receive a quality education.'" (quoting R. Alexander Acosta, Assistant Attorney General for the Justice Department's Civil Rights Division)).

191. No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified at 20 U.S.C.A. §§ 6301–6578, §§ 6801–7014 (2003)). The No Child Left Behind Act (NCLB) is beyond the scope of this Note. However, Title I and Title III of the Act do affect LEP students. For more information on the effects of NCLB as well as a comprehensive report on LEP student statistics, see RANDY CAPPS ET AL., URBAN INST., THE NEW DEMOGRAPHY OF AMERICA'S

LEP students, Congress must expressly signal that a failure to take "appropriate action to overcome language barriers that impede equal participation by its students"[192] extends beyond programming and includes failures in identification, oversight, teacher hiring, and funding.

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SCHOOLS: IMMIGRATION AND THE NO CHILD LEFT BEHIND ACT (2005), *available at* http://www.urban.org/UploadedPDF/311230_new_demography.pdf (last visited Mar. 17, 2008) (describing the change in primary and secondary education as a result in recent immigration). Title I requires schools to improve LEP students' performance on reading and math assessments beginning in third grade. *Id.* at 3. Title III requires schools to measure and improve students' English proficiency. *Id.* It holds states accountable for improving English proficiency on an annual basis. *Id.*

192. 20 U.S.C. § 1703(f) (2000).