

Legal Support for Bilingual Education and Language-Appropriate Related Services for Limited English Proficient Students with Disabilities

Alberto T. Fernández
Instructional Supervisor
Division of Exceptional Student Education
Dade County Public Schools

Abstract

Section 504 of the Vocational Rehabilitation Act of 1973 and the Individuals with Disabilities Education Act (IDEA) require an appropriate education for students with disabilities. Through Title VI of the Civil Rights Act, the Equal Education Opportunity Act (EEOA), and guidelines issued by the former Department of Health, Education and Welfare (HEW), limited English proficient (LEP) students are guaranteed their rights to a meaningful education. To interpret IDEA's appropriate education mandate, Title VI, EEOA, and HEW guidelines must be consulted when dealing with students who are disabled and LEP. Court cases also have affirmed the rights of LEP students under Title VI and EEOA to bilingual education. This paper provides an analysis of legislation, regulations, and litigation regarding the provision of an appropriate education for limited English proficient (LEP) students who are also disabled. Specifically, the legal basis of the right to bilingual education and the requirements that educational agencies must follow are examined. Implications for school systems and educators are discussed.

Introduction

All students in this country should have an equal opportunity to receive an adequate education. Legislation and litigation have addressed this right of individuals with disabilities to equal education. Similarly, laws and court cases have affirmed the rights of students who are limited English proficient (LEP), individuals whose native language is not English and who have limited opportunity to learn due to difficulties in speaking, reading, writing or understanding English. The results of such legislation and litigation have led to a promising outlook in the provision of an appropriate education for the unique student with disabilities who is also LEP.

This article offers a comprehensive review of legislation, regulations, and court decisions related to students who are LEP and students with disabilities, which have established legal support for bilingual special education. (Bilingual special education in this paper is defined as special instruction and related services individually designed to meet the educational needs of LEP students with disabilities.) The purpose of the article is to provide the reader with knowledge about the legal responsibility of school systems regarding services to these students and how to meet such responsibility.

The first section of the paper deals with the right of LEP students to bilingual education. The second section discusses legislation on behalf of students with disabilities as it pertains to bilingual education. The third section deals with requirements that school districts must follow regarding LEP students. The fourth section discusses litigation specifically addressing LEP students with disabilities. Finally, conclusions and implications regarding legal provisions for the education of LEP students are offered.

The Right to Bilingual Education and Equal Educational Opportunity

The basis of the right to bilingual education was established by the Civil Rights Act of 1964. Title VI, Section 601, of the Act prohibits school districts receiving federal funds from discriminating against individuals on the basis of race, color, or national origin. Section 602 of the Act authorized the former Department of Health, Education and Welfare (HEW) to issue regulations so that federal aid recipients complied with Section 601. In 1968, HEW issued guidelines that required districts receiving federal funds to ensure that students of a particular race or national origin were not denied opportunity to receive the curricula, classes and activities obtained by other students. However, the guidelines did not specify how this opportunity was to be ensured. In 1970, HEW issued a memorandum that made the guidelines more specific, requiring districts to:

- 1) take affirmative steps to rectify language deficiencies of these students;

- 2) refrain from assigning these students to classes for the mentally handicapped on the basis of criteria which reflected their English language skills;
- 3) insure that any ability grouping designed to meet these students' language skills did not result in permanent tracks; and
- 4) notify the parents of school activities in a language that they understood.

Title VI and the HEW guidelines set the foundation by which LEP students would later claim their right to bilingual education. Moreover, Title VI and the guidelines apply to all LEP students, including those with disabilities.

In 1968, Congress passed the Bilingual Education Act, the first federal legislation on behalf of LEP students. The Act, known as Title VII, did not require school districts to provide bilingual education. It only *encouraged* them to develop bilingual programs through federal funds. Nevertheless, it did confirm that LEP students need specialized services. The Act was re-authorized in 1974, 1978, 1984 and 1988. From 1968 to 1978 the Act failed to specifically address students who are LEP and disabled, though it did not prevent their participation in Title VII programs. The Bilingual Education Act of 1984, however, did address these students by funding *Special Populations Programs*, intended to meet the needs of students with disabilities who might not participate in regular bilingual programs. Bilingual special education was funded at the federal level for the first time through these programs.

Without a clear requirement from the Act to provide bilingual education, and with the 1970 HEW memorandum generally unenforced (Moran, 1987), LEP plaintiffs gradually turned to the courts. The case responsible for starting bilingual education nationally was *Lau v. Nichols* (1974). This case involved 1,800 LEP students of Chinese origin who sued the San Francisco School System for denial of language-appropriate instruction. Plaintiffs claimed violations of Section 601 of Title VI and the equal protection clause of the Fourteenth Amendment which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws" (United States Constitution, amendment XIV). The Supreme Court ruled for the plaintiffs based solely on Title VI, and did not judge on the Fourteenth Amendment claim. The Court

promoted the idea that anything that excludes students from meaningful education, or that impedes their effective participation in an educational program, violates Title VI. In reaching its decision, the Court referred to the 1968 and 1970 HEW guidelines. It ordered the establishing of procedures to adequately assess and teach LEP students.

Lau failed to set a standard by which to judge whether a program was acceptable under Title VI. Nonetheless, it encouraged other language-minority groups to take their cases to court. Further, albeit not specifically stated, the *Lau* decision referred to *all* LEP students. Thus, the right to specialized, language-appropriate services under *Lau* cannot be denied to students who are LEP and disabled.

Shortly after *Lau*, Congress codified the Court's ruling by passing the Equal Educational Opportunity Act of 1974 (EEOA), expanding the federal government's responsibility to enforce nondiscrimination policies in school systems not receiving federal funds. According to section 1703(f) of this Act, "no state shall deny equal educational opportunity to an individual on account of his or her race, color, sex or national origin by ... the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."

Unfortunately, Congress did not define the meaning of "appropriate action" in 1703(f), offering little guidance to determine whether agency efforts are acceptable. Nonetheless, EEOA was the first Federal Act to require specifically that steps be taken to assure equal educational opportunities to LEP students, and it became a primary law by which LEP plaintiffs (including those with disabilities) could claim their right to language-appropriate services. Further, after EEOA was passed, courts ruled for plaintiffs under this Act and not Title VI (e.g., *Keys v. School District No. 1, Denver*, 1983), following subsequent Supreme Court decisions on cases unrelated to bilingual education (See *Washington v. Davis* [1976] in which the Court held that discriminatory intent was needed to claim discrimination under the Fourteenth Amendment; see also *Regents of the University of California v. Bakke* [1978] in which the Court found Title VI to be coextensive with the equal protection clause, thus establishing a discriminatory intent standard for Title VI).

Legislation and Safeguards for Students with Disabilities - Equal Access, Appropriate Education, and Language-Appropriate Related Services

The legal responsibility to provide equal access to language-appropriate services to students with disabilities was affirmed by Section 504 of the Rehabilitation Act of 1973, which establishes that:

No otherwise qualified handicapped individual in the United States as defined in Section 7(6) shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

According to 504 regulations (1990), an agency that receives federal dollars may not “afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to ... and as effective as that provided to others” (Sec 104.4 [bI]). (This is similar to the nondiscrimination requirement under Title VI and EEOA which pertains to all students, including those with disabilities.) Thus, school systems must assure that students who are LEP and disabled have equal access to bilingual education.

According to the Act’s regulations, students with disabilities cannot receive less services than those offered to students in regular programs, and the quality of these services must equal that of the services provided to nondisabled students (Sec 104.4 [biD]. The requirement that students with disabilities cannot receive less services than other students can cause problems for school systems. They may be violating the Act if students who are LEP and disabled are not provided some form of bilingual education as provided to non-disabled LEP students. School systems must also be concerned about the quality of services offered to these students. “Appropriate education” is defined by the Act’s regulations as “the provision of regular or special education and related aids and services that ... are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons” (Sec. 104.33 [b]). Thus, to assure students who are LEP and disabled an appropriate education, special programs and related services must be designed to meet their linguistic needs.

Similar to Section 504, the Education for All Handicapped Children Act of 1975, Public Law (PL) 94-142, established guidelines to ensure an appropriate education for students with disabilities. Parents are to be an integral part of the educational program. Each student must have an Individualized Education Program (IEP) to meet his or her unique needs. Assessment must be conducted so as not to be culturally discriminatory and, unless clearly not feasible, in the student's native language.

The Act's regulations (1990) require that public agencies "take steps to insure that its handicapped children have available to them the variety of educational programs and services available to non-handicapped children" (Sec. 300.305). The program options "could include any [emphasis added] program or activity in which non-handicapped students participate" (Sec. 300.305, comment). Thus, as in Section 504, bilingual education must be available to students who are LEP and disabled under PL 94-142.

According to the Act, the term "related services" includes, but is not limited to, developmental, corrective, and other supportive services, such as speech pathology, psychological services, and counseling services, as may be needed "to assist a handicapped child to *benefit* [italics added] from special education" (Sec. 602 [17]). Thus, in order to provide LEP students with disabilities equal opportunity to effectively participate in the educational process, needed related services that deal with language must also be meaningful.

Though PL 94-142 failed to directly address LEP students, it may be responsible for establishing bilingual special education (Baca & Bransford, 1982). The IEP can be used to secure needed language-appropriate services since the LEP must address the student's individual needs. These services may include educational as well as related services. Instruction may be given by an exceptional student teacher trained in bilingual special education. Furthermore, in keeping with the least restrictive environment concept, LEP students with disabilities can receive services through the regular bilingual education program (Fernández & Pell, 1989).

Effective Parent Participation

Under PL 94-142, parents are to be involved in decisions related to their children's placement. The Act requires that communication between the home and school be carried out in the parents' primary language or mode of communication to assure that they understand,

unless clearly not feasible to do so. Therefore, conferences and any parent training offered by the school must be conducted in the parents's native tongue or with interpreters, when needed. Additionally, schools must take every step possible to assure that written communication (e.g., notice of meetings, placement consent, etc.) is in the parent's native language.

The 1986 amendments of the Act (PL 99-457) expanded parent involvement. PL 99-457 mandated that states serve all three to five-year-old preschool children with disabilities by school year 1990-91. The Act also established the Handicapped Infant and Toddler program, which provides funds to states on a voluntary basis to implement an interagency program for children from birth to two years of age.

Preschool programs for children with disabilities contain parent training. Furthermore, the Handicapped Infants and Toddlers program directly involves parents through the Individualized Family Service Plan (IFSP). Each infant/toddler with disabilities and family receive an assessment of unique needs and are provided services to meet such needs. An IFSP is developed by a multidisciplinary team, including the parents. The IFSP must contain information about the *family's* strengths and needs related to the child's development, and expected outcomes/services needed for the child *and* family. Thus, PL 99-457 added more support for bilingual services than PL 94-142, because parents -- some who could be LEP themselves -- became a greater part of the educational program and were going to receive direct services.

The Act also requires that participating states develop a comprehensive system of personnel development (CSPD) and procedures to assure that personnel needed are adequately trained. Thus, personnel training must address the linguistic needs of the LEP child/family.

Individuals with Disabilities Education Act: Addressing the Needs of LEP Students

For the first time in the Act's history, the Education of the Handicapped Act (renamed as the Individuals with Disabilities Education Act [IDEA]) specifically addressed the needs of students who are LEP and disabled through its 1990 amendments, PL 101-476. IDEA included Congressional findings on the needs of an increasingly diverse society, necessary efforts to prevent mislabeling and high drop out rates of minority students, and needed

opportunities for participation by minorities in personnel training. Section 610 (i) (1) of the Act states that:

The limited English proficient population is the fastest growing in our nation, and the growth is occurring in many parts of our nation. In the nation's largest school districts, limited English students make up almost half of all student initially entering school at the kindergarten level. Studies have documented apparent discrepancies in the levels of referral and placement of limited English proficient children in special education. The Department of Education has found that services provided to limited English proficient student often do not respond primarily to the pupil's academic needs. These trends pose special challenges for special education in the referral, assessment, and services for our nation's student from non English language backgrounds.

The Act defines *underserved* as "populations such as minorities, the poor, the *limited-English proficient* [emphasis added] and individuals with disabilities" (Sec. 602 [i]). To improve the conditions for underserved persons, the Act recommended the implementation of a policy to mobilize the country's resources to prepare minorities for careers in special education and related services. Specified activities for the *National Clearinghouse for Children and Youth with Disabilities* include strategies to disseminate information to underserved populations, including LEP individuals.

Among the priority areas to which the Secretary will give first consideration when authorizing research is the study of the:

Factors that influence the referral and placement decisions and types of placements, by disability and English language proficiency, of minority children ... and the type of support provided to parents of these children to enable these parents to understand and participate in the educational process (Sec. 618 [e] [2]).

The Act authorizes research activities designed to advance the “knowledge regarding families, minorities, limited-English proficiency, and handicapping conditions” (Sec. 641 [a] [1]).

In the selection of personnel training grants, the Act added provisions to increase the number of teachers from diverse cultural backgrounds. The Secretary will base the determination of awarding such grants on personnel shortages, including the need for “personnel in the provision of special education to children of limited-English proficiency” (Sec. 631 [b] [21]).

Similar to the Bilingual Education Act, IDEA did not mandate bilingual education. However, as in the Bilingual Education Act, it affirmed that LEP students with disabilities need special services and encouraged educational agencies to develop programs for such students.

Requirements for LEP Students

There are certain requirements for LEP students, whether disabled or not, to which school systems must adhere. The following sections outline such requirements. Court cases related to LEP students will be discussed to support these requirements. Legislation on behalf of LEP students and students with disabilities will be used to reference and document key points.

Appropriate Action

As mentioned earlier, Congress did not offer any criteria to assess whether an agency is taking “appropriate action” to overcome language barriers as required by EEOA. The courts have had to interpret the legislative intent to determine whether agency efforts are appropriate. In *Cintrón v. Brentwood Union Free School District* (1978), a Federal district court ruled that an appropriate program under EEOA must include native language instruction and bicultural education. LEP plaintiffs opposed the school system’s plan to restructure its bilingual program. The plan would immerse the students into the English language and the American culture. The court concluded that the plan overlooked the findings of Congress in EEOA in combination with the Bilingual Education Act, Title VI and the *Lau* decision.

The court in *Ríos v. Read* (1978) reached a similar decision, affirming that the students not only had a right to home language instruction, but also to bicultural education as a psychological support. This case involved Hispanic LEP students who claimed

that the Patchogue-Medford School District in Suffolk County, New York, failed to provide adequate programs, curriculum, and personnel to remedy their English deficiencies. The court found that the school district offered an inadequate bilingual program, in violation of Title VI and EEOA.

In contrast to *Cintrón and Ríos, the Ninth Circuit in Guadalupe Organization, Inc. v. Tempe Elementary School District* found no right to bilingual-bicultural education. Using EEOA to reach its decision in favor of the school system, the court found it inappropriate to rule on the adequacy of a bilingual program that was already being implemented by the school board. By providing a remedial English language program, the school system had met its requirement to provide “appropriate action” to overcome language barriers.

Beyond ruling that bilingual-bicultural education was not required, the *Guadalupe* court provided no specific criteria to evaluate whether an educational agency has met its obligation under EEOA. However, in *Castañeda v. Pickard* (1986), the Appeals Court for the Fifth Circuit was proactive and provided such criteria. In *Castañeda*, Mexican-American children sued the Raymondville, Texas school district, claiming that the district’s failure to provide an adequate bilingual education program resulted in discrimination. The court delineated a three-pronged test to establish the program’s appropriateness: the adequacy of the educational theory by which the program was based, the school district’s efforts to carry out the program, and the program’s effectiveness. Subsequent court cases have consistently used the three-pronged test to determine compliance with EEOA (e.g., *Keys v. School District No.1, Denver, 1983*; *Gómez v. Illinois Board of Education, 1987*).

Program Based on Sound Theory

The *Lau* Court left it up to the educators to determine how to educate LEP students. The Court stated that teaching English was one choice, giving instruction in the native language is another, and that there might be others. Further, EEOA does not mandate a specific educational approach or program. Nevertheless, while school systems have latitude in selecting the approach they use, the approach chosen cannot result in students falling behind in academic areas while they are learning English. In *Serna v. Portales* (1974), a class action suit on behalf of Spanish surnamed students, the district court ordered the Portales Municipal School District to develop a

plan to expand its bilingual-bicultural program. Evidence showed that the students were not reaching achievement levels attained by their English-proficient counterparts and that they had a higher dropout rate. The court relied on expert witnesses which testified that Hispanic children become withdrawn and nonparticipating and develop low self-esteem when they find that their language and culture are rejected and that only English is acceptable. On appeal, the Tenth Circuit Court of Appeals affirmed the district court's ruling for the plaintiffs.

In *Ríos*, the school system had adopted a particular bilingual program that emphasized English for Speakers of Other Languages (ESOL) because it was the quickest approach of teaching English. The judge noted that the goal of teaching English, while proper, could not be allowed to compromise the student's right to meaningful education before proficiency in English. The judge also held that a three-year limitation of instruction in the bilingual education program had been set arbitrarily. He noted that students were prematurely transferred from the program, restricting their opportunity to learn.

In *Castañeda*, the court held that the school system must be pursuing a program based on "an educational theory recognized as sound by some experts in the field, or at least, deemed a legitimate experimental strategy" (648, F. 2nd 1009, 5th Cir. 1981). Thus, school districts do not necessarily have to educate LEP students in their native language. They can educate them in English as long as some experts agree that the approach is sound. Whatever approach is used, instruction and services must be understandable (e.g., using ESOL techniques), and students must show progress comparable to their English-proficient peers.

Implementing the Program

Adopting a program based on a sound theory is not enough to provide equal educational opportunity to LEP students. *Castañeda's* second prong requires that a district's program be "reasonably calculated to implement effectively the theory adopted" (648, F. 2nd 1010, 5th Cir. 1981). The court reasoned that a school system would not be taking appropriate action if it failed to follow through with practices, resources and personnel necessary to implement the program.

In *Keys v. School District No. 1, Denver* (1983), the court found that the school system failed the second prong of *Castañeda*

because the teachers did not have the necessary skills to provide “understandable instruction”. School systems must establish policies needed to implement and regulate programs/practices. They must provide the curriculum materials, personnel, and in-service training needed to carry out the program.

Measuring Program Effectiveness

The third prong in *Castañeda* requires that a school system’s program “produce results indicating that the language barriers ... are actually being overcome.” As in *Ríos*, the *Castañeda* court held that a student could not be permitted to fall behind in the basic subjects while attending classes to learn English. The court interpreted EEOA as requiring educational agencies to overcome the language barrier through intensive English language instruction *and* through assistance in other areas of the curriculum where equal participation could be impaired. The court felt that schools were free to determine the manner in which to develop English and academic skills so long as the programs would enable students to attain parity of participation in the standard instructional program within a reasonable amount of time.

The court in *Keys*, while noting that the inadequacies of the district’s program made it premature to consider analysis of its results, found that LEP students failed to attain parity of participation with other students in the educational process. The court noted that there were large numbers of Hispanic drop-outs in the district and that there was inequitable use of “handouts” for LEP students that were not comparable to English textbooks. In a more recent case, *Teresa P. v. Berkeley Unified School District* (1989), the court used results of standardized achievement scores and classroom grades to determine the program’s effectiveness and to rule in favor of the school system; the students were learning at rates comparable to other LEP students in the state.

Program Standards and Supervision

To provide effective programs, educational agencies must establish and monitor standards for the education of LEP students. The duty of developing and supervising standards rests on both state and local educational agencies. This duty has been affirmed in at least two cases.

In *Idaho Migrant Council v. Board of Education* (1981), LEP plaintiffs claimed that the state education agency failed to supervise

local districts to ensure language-appropriate instruction to LEP students. The district court ruled for the state, on the basis that under Idaho law the state agency was not empowered to supervise local school districts' compliance with federal laws. On appeal, the Ninth Circuit reversed and held that the state had the duty to require minimum standards of instruction for LEP students and to monitor school districts. The court noted that the duty of implementing 1703(f) of EEOA was imposed on both the state and local school boards since the term "educational agency" includes both.

In *Gómez v. Illinois Board of Education* (1987), LEP plaintiffs claimed that the state failed to: issue appropriate guidelines to identify and place LEP students, provide them an effective program, and monitor such program. The district court ruled for the defendants, holding that the eleventh amendment gave the state sovereign immunity from suit by the plaintiffs and that the burden of executing the program under EEOA was on local districts and not the state. On appeal, the Seventh Circuit ruled for the plaintiffs under EEOA and the regulations issued pursuant to Title VI. The court found that the school system failed the second test of *Castañeda*, which relates to program implementation, and held that the state board could be sued for violating EEOA. The court concurred with the *Idaho* decision, that the responsibility to take appropriate action fell on both state and local education agencies.

Identification and Assessment for Services

Specific court decisions have reinforced the requirements for language proficiency assessments to identify and serve LEP students. In *Aspira of New York v. Board of Education of the City of New York* (1974), the court required the district to develop language proficiency tests to identify students needing bilingual education and to indicate at what point students would be prepared for instruction in English. The court's ruling required that students demonstrate stronger language skills in the native language than in English to receive bilingual services. This ruling differed from the ruling in *Lau* which based eligibility solely on limited English speaking ability. In general, courts have not established a need to assess students in the native language as well as in English to determine "relative" language proficiency to identify them for services. However, more recent courts have addressed the testing of the student's total language (e.i., reading and writing in addition to speaking abilities). In *Cintrón*, the court required the school

system to employ specific methods to identify LEP students by the use of validated tests to ascertain achievement levels and English proficiency. In *Keys*, the district was required to determine students' abilities in English by both oral and written tests; and limited ability in speaking, reading, writing or understanding could entitle a student to bilingual education.

Monitoring Student Progress

After LEP students are placed into bilingual education programs, their progress must be monitored to assure that the programs are effective and that needed services are not discontinued prematurely. In *Keys*, the court ordered the school district to monitor students exiting bilingual programs to avoid subsequent learning problems. The court found that the district's program was flawed by the failure to adopt adequate tests to measure the results of the district's efforts.

In *Cintrón* and *Ríos*, the courts called for specific methods for monitoring the progress of LEP students by the use of validated tests to determine English proficiency. The *Cintrón* court required that tests be used to determine achievement levels. *Ríos* ordered that students be kept in bilingual programs until they attained sufficient proficiency in English to be taught along with non-LEP students. In *Aspira*, LEP Hispanic students were to receive instruction in Spanish until they reached an adequate level of English proficiency. In *Castañeda*, the court ordered the district to acquire validated Spanish achievement tests to determine their progress vis-a-vis that of their English proficient peers.

Recruitment and Training of Personnel

To provide LEP and disabled students effective instruction and related services by properly trained persons, school systems must hire qualified personnel and provide in-service training that addresses these students' linguistic needs. IDEA requires states, in their CSPD, to coordinate and facilitate efforts among state and local educational agencies, colleges, and professional groups to recruit, prepare, and retain qualified personnel from minority backgrounds. To qualify for PL 94-142 funds, a state must provide a system of personnel development which includes the in-service training of general and special education instructional and related services personnel and "detailed procedures to assure that all [emphasis added] personnel necessary to carry out the purposes of this Act are appropriately and adequately prepared and trained..." (20 USC

1411, Sec. 613 [a] [3]). Further, according to Section 504 regulations, students with disabilities are entitled to instruction by properly trained teachers. Thus, unless personnel are trained to deal with the needs of students who are LEP and disabled, educational agencies may be in violation of the Section 504 and IDEA (Fernández & Pell, 1989). Unfortunately, training in bilingual special education is lacking in most states (Fradd & Vega, 1987).

In *Serna*, plaintiffs presented evidence showing that the district had failed to hire any Hispanic teachers. The court ordered the district to improve its recruitment and hiring of qualified bilingual teachers. In *Ríos*, plaintiffs claimed that the district's bilingual program teachers did not speak Spanish, were unaware of the educational and social needs of LEP students, and were not trained in ESOL. The court ordered that the school system educate teachers about cultural issues of language minority students, train teachers in ESOL, and recruit and hire Hispanic teachers of the same ethnic group as the students. In *Keys*, the court ordered the district to take affirmative action to remedy a lack of bilingual teachers, and to establish adequate standards and testing of the qualifications for bilingual teachers, tutors, and aides working with LEP students. In *Aspira*, the district was required to recruit and train personnel for the bilingual programs, and to assure that such staff had the proper licenses to teach in such programs.

In *Castañeda*, the court held that the school district's program had failed the second prong of the three-prong test of program effectiveness, because the schools did not have teachers who were competent to teach in such a program. The court directed the district court to investigate the causes of the teachers' deficiencies and to require the state and local educational agencies to devise an improved in-service training program and adequate evaluation procedures to determine teacher qualifications. After its investigation, the district court held that the bilingual education program was adequate under EEOA. On appeal, the Fifth Circuit affirmed these findings. The school system had taken steps to improve its bilingual program; it had hired additional Spanish-speaking teachers and had implemented in-service training to improve Spanish instruction in content areas.

Litigation Addressing LEP Exceptional Students Jose P. v. Ambach

The first case to specifically address bilingual special education was *Jose P. v. Ambach* (1979). This litigation merged three cases involving the rights of students with disabilities living in New York City: *Jose P. v. Ambach* (1979), *United Cerebral Palsy (UCP) v. Board of Education* (1979), and *Dyrcia S. v. Board of Education* (1979). *Jose P.* was a class action suit on behalf of students between the ages of five and 21 who claimed they were denied an appropriate education because of the school board's failure to promptly evaluate and place them in special programs. UCP was a class action suit on behalf of UCP and individuals with impairments to the nervous system. Plaintiffs alleged that the board did not provide them appropriate services. *Dyrcia S.* was filed on behalf of Hispanic children who were not receiving needed bilingual special education.

In *Jose P.*, the judge found that the school board had violated state and federal mandates concerning timely evaluations and placements. A judgment was entered against the board, which included strategies for meeting the board's obligations. Later, the judge entered a Consolidated Judgment, combining the other two related cases --*UCP* and *Dyrcia S.*

Regarding students who are LEP and disabled, the court ordered several measures to provide language-appropriate services. The defendants were required to complete a census of all students with disabilities, recording by language the number of those who spoke a language other than English. A detailed plan was to be filed by the defendants with a description of each program for students with disabilities, including bilingual programs for LEP students. An outreach office was to be maintained to disseminate information about special education programs, with enough bilingual personnel to provide information to LEP individuals. Procedures were to be developed for the provision of competent interpreters for LEP parents, for evaluations of LEP students, and for identifying appropriate bilingual tests. The defendants were to prepare a due process booklet explaining students' rights, in at least English and Spanish. They were to conduct a staff needs assessment for bilingual resource rooms. They were required to recruit, hire, and train bilingual staff for resource rooms and to provide services consistent with the consent decree in *Aspira*. Defendants were also ordered to file a description of the bilingual programs for LEP

students, and to submit reports and assessments of staff assigned to such programs.

As a result of *Jose P.*, the right to bilingual special education for LEP students who are disabled was specifically affirmed for the first time. This case set a precedent that other courts could follow (Fernández & Pell, 1989).

Y. S. v. School District of Philadelphia

Y. S. v. School District of Philadelphia (1986) was a federal class action suit filed on behalf of Philadelphia's 6,800 Asian students, who alleged violations of the Fourteenth Amendment, Title VI, EEOA, and the Education of the Handicapped Act. Y., one of three students named in the case, was a Cambodian refugee who was enrolled in ESOL courses but received no other bilingual services. The ESOL classes and all of his other courses were taught strictly in English. The plaintiffs alleged that Y. was unable to make progress in school partly because he did not receive help from someone who could speak his home language. Three years after entering the school system, Y. was placed in a class for students who were mentally handicapped. Plaintiffs claimed that the decision to classify Y. was made relying on a test developed for English-speaking students, that the person who wrote Y.'s LEP never met Y. nor his family, and that the district failed to communicate with Y. and his parents in their home language regarding his progress and the special education placement.

A settlement was reached between plaintiffs and school district officials. The agreement required the district to review placements of all LEP Asian students in general and special education, and to develop a remedial plan to address the needs of such students, including evaluation and counseling in their home language, a revised curriculum for the district's ESOL program, and a special education component of the remedial plan. The district agreed to recruit and train personnel who spoke the plaintiffs' home languages and to improve communication with the students. It also agreed that both oral and written communication to parents would be in their home language.

As in *Jose P.*, laws protecting the rights of both LEP students and students with disabilities were claimed to be violated, and LEP students with disabilities were to receive language-appropriate services. Moreover, *Y.S.* was unique in that all LEP Asian students

were to receive adequate services, and that lack of bilingual services allegedly led to an inappropriate special education placement.

League of United Latin American Citizens et al. v. Florida Board of Education

In a recent case, *League of United Latin American Citizens et al. v. Florida Board of Education* (1990), plaintiffs alleged that the state board of education failed to set standards and monitor districts to adequately serve LEP students, violating EEOA, Title VI, and related federal and state provisions regarding special education. A consent agreement was reached between both parties. The agreement included procedures for identifying LEP students; monitoring students' performance after exiting the bilingual program; providing students ESOL and understandable instruction in basic subject areas; requiring districts to develop local plans to serve LEP students; promoting parent involvement through leadership councils with a majority membership of parents of LEP students; providing equal access for appropriate services to all LEP students, including students with disabilities; and training personnel. Related specifically to students with disabilities, the agreement required that IEP's of LEP students incorporate modifications to accommodate their levels of English proficiency, including the provision of ESOL and/or home language programming. Borrowing language from PL 94-142, the agreement required that all communication with parents of LEP students be in the home language unless clearly not feasible.

This case was similar to *Y.S.* in the requirement of developing a remedial plan. It was unique in that the consent agreement ordered standards, monitoring, and equal access to appropriate services for all LEP students, including those with disabilities.

Jose P., *Y.S.*, and *League* clearly confirmed that the laws and court cases protecting the rights of LEP students applied to *all* LEP students.

Conclusions

Through Section 504 and IDEA, students with disabilities can claim their right to an appropriate education. Similarly, with Title VI, EEOA, and the HEW guidelines, LEP students are assured their rights to a meaningful education. Section 504 and IDEA apply to *all* students with disabilities. These laws do not exclude LEP students,

in the same way that Title VI and EEOA do not exclude students with disabilities.

In *Board v. Rowley* (1982), the Supreme Court attempted to define the free, appropriate education clause in PL 94-142. The Court declared that programs do not have to maximize a student's potential, but rather show that the special instruction and related services would "benefit" him or her. However, special programs and related services that ignore the LEP student's language may not benefit him or her. To interpret properly the Act's provision of an appropriate education, Title VI, the HEW guidelines, and EEOA must be referred to when dealing with the LEP student.

The Act offered additional support for bilingual special education and related services through its amendments under PL 99-457, because the student's family became a more integral part of their child's education. Language-appropriate services must be provided to LEP infants, preschoolers, *and* their families.

The Act's 1990 amendments, IDEA, for the first time added language to the Act regarding students who are LEP. Its definition of "underserved" reaffirms that these students have generally not been served adequately. Although IDEA failed to mandate bilingual special education, these students have a stronger case than ever in claiming their right to bilingual educational and related services under this Act.

The implications of present legislation and litigation on behalf of students who are LEP and individuals with disabilities are straightforward. First, not only must the education for these students be "appropriate" as mandated by IDEA, but it must be based on sound theory and be effective as outlined in *Castañeda*. This implies that the educational program must go beyond merely benefiting the student. The program must be well planned, incorporating established sound practices (e.g., ESOL, home language instruction). Further, these practices must be reasonably calculated to produce measurable positive outcomes.

Second, as decided in *Idaho*, both state and local educational agencies have the responsibility to take steps to rectify language barriers that may impede learning opportunities, to set educational standards for students who are LEP, and to monitor programs for such students. State and local educational agencies must have procedures for bilingual programs to provide students who are LEP and disabled the same opportunity to benefit from an education as that of nondisabled LEP students and English-proficient students

with disabilities. Such procedures should include entry and exit criteria, post-exiting monitoring strategies, instructional and related services standards, provisions for recruiting and training qualified personnel, and evaluation of program effectiveness.

All students who are LEP must be identified for needed language-appropriate services, and they should receive such services until such time as they are reclassified as English proficient. Unfortunately, the criteria for identifying students and for exiting them from bilingual programs differ among school districts and among schools within the same district (Fradd, 1987). Language-appropriate services must not be prematurely discontinued as a result of an arbitrary criteria. Years in a bilingual education program must not be used as a criteria for establishing proficiency in English (*Ríos v. Read*, 1978). Rather, the criteria must take into account the student's total academic language development (See *Keys* and *Cintrón*). Further, the criteria must take into account the English and native language proficiency (See *Aspira*), specially when dealing with students with disabilities who may be limited in both languages.

Consistent with the ruling in *Keys*, the performance of former LEP students must be monitored periodically to avoid subsequent learning problems in the current program once they have been reclassified. *Castañeda's* three-point test of program effectiveness can serve as a basis for determining whether bilingual programs are adequate. Educational agencies must assess the programs to assure that they are based on sound educational theory and that the schools are carrying out the program(s). They should also gather data to ascertain whether the programs are effective.

Third, IEP committees will be required to write IEP's that take into account the student's primary language. (This is already the case in Florida as a result of *League*). Fourth, personnel training will be impacted in order to provide LEP students who are disabled with equal access to bilingual education. Bilingual education teachers must be prepared to work with students with disabilities. Special education teachers, school psychologists, speech pathologists, and other related services professionals must be prepared to work with students who are LEP. Preservice and in-service training for bilingual education teachers should include special education strategies. Training for special educators and related services personnel should include developing skills in

assessment of LEP students, cultural awareness, second language development, and language-appropriate techniques (ESOL).

Fifth, since related services also must benefit the LEP student, steps must be taken so they are indeed appropriate. For example, speech therapy -- the related service that most directly involves language -- should be conducted in the student's primary language (American Speech-Language Hearing Association, 1987). School systems should recruit and train needed personnel to provide meaningful (understandable) related services to LEP students. Since it may not be possible to find the personnel needed to deliver services in all the languages spoken, educational agencies should develop and implement specialized training (e.g., ESOL) for such personnel to meet the linguistic needs of LEP students.

Finally, school administrators must become knowledgeable about their legal responsibilities to LEP students who are disabled. They must assume responsibility for providing an appropriate program for such students and enforce policies intended for this purpose.

As explained earlier, EEOA requires that both state and local educational agencies take action to meet the needs of LEP students. There appears to be a trend toward requiring standards for teaching LEP students and supervision of such standards (e.g., *League*) and toward monitoring of program effectiveness (e.g., *Castañeda*). Given this scenario, future litigation will probably concentrate more on the issue of holding both states and local school boards accountable for establishing and enforcing policies related to the education of LEP students. Further, future court cases will probably deal less with the issue of whether or not agencies must provide bilingual programs (e.g., *Lau*) and more with the issue of whether a particular program is effective (e.g., *Castañeda*).

Students who are LEP and disabled can assert their right to an appropriate education through laws and litigation related to students with disabilities as well as for students who are LEP. School systems must develop bilingual programs to meet the special needs of students who are LEP and disabled in order to fulfill their responsibility of providing an appropriate education. Considering the continuous growth in the LEP student population and the legal research reviewed in this article, failure to address the linguistic needs of LEP students who are disabled may be at best ignorant and at worst discriminatory.

References

American Speech-Language Hearing Association. 1987. Clinical management of communicatively handicapped minority language populations. *Asha*, 27(6), 29-32.

Aspira of New York v. Board of Education of the City of New York, 394 F.Supp. 1161 (S.D.N.Y. 1975).

Baca L., & Bransford L. 1982. *An appropriate education for handicapped children of limited English proficiency*. Reston, VA: The Council for Exceptional Children.

Bilingual Education Act of 1968, 81 Stat. 816 (1968).

Bilingual Education Act of 1974, 88 Stat. 503 (1974).

Bilingual Education Act of 1978, 92 Stat. 2268 (1978).

Bilingual Education Act of 1984, 98 Stat. 2366 (1984).

Bilingual Education Act of 1988, 102, Stat. 130 (1988).

Board v. Rowley, 458 U.S. 176, 102 5. Ct. 3034 (1982).

Castañeda v. Pickard, 648 F.2nd 989 (5th Cir. 1981).

Cintrón v. Brentwood Union Free School District, 455 F.Supp. 57 (E.D.N.Y. 1978).

Civil Rights Act of 1964, 42 U.S.C. Sec. 2000d, 2000d-1 (1976).

Dyrchia S. v. Board of Education, 79 C. 2562 (E.D.N.Y. 1979).

Education of the Handicapped Act Amendments of 1986, 100 Stat. 1145 (1986).

Education of the Handicapped Act Amendments of 1990, 104 Stat. 1103 (1990).

Education for All Handicapped Children Act of 1975, 20 U.S.C. Sec. 1401 (1975).

Education for All Handicapped Children Act of 1975, Implementing regulations, 34 C.F.R. 300 et seq. (1990).

Equal Educational Opportunity Act of 1974, 42 U.S.C. Sec. 1701-21 (1990).

Fernández, A. T., & Pell, S. W. J. 1989. The right to receive bilingual special education. *West's Education Law Reporter*, 53, 1067-1081.

Fradd, S. H., & Vega, J. E. 1987. Legal considerations. In S. H. Fradd, & W. J. Tikunoff (Eds.), *Bilingual education and bilingual special education: A guide for administrators*. Boston, MA: College-Hill Press.

Gómez v. Illinois Board of Education, 811 F.2nd 1030 [37 Ed. Law Rep. 1073] (7th Cir. 1987).

Guadalupe Organization, Inc. v. Tempe Elementary School District, 587 F. 2nd 1022 (9th Cir. 1978).

HEW guideline, 33 Fed. Reg. 4956 (1968).

HEW memorandum, Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595 (1970).

Idaho Migrant Council et al., v. Board of Education, 647 F.2nd 69 (1981).

Jose P. v. Ambach, 3 EHLR 551:245 (E.D.N.Y. 1979).

Keys v. School District No. 1, Denver, 576 F.Supp. 1503 [15 Ed. Law Rep. 796] (Cob. 1983).

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

League of United Latin American Citizens et al. v. Florida Board of Education, Case No. 90-1913 Civ. Scott (S.D. FL 1990).

Moran, R. F. 1987. Bilingual education as a status conflict. *California Law Review*, 75, 321-362.

Regents of University of California v. Bakke, 438 U.S. 265, 352, 98 S.Ct. 2733, 2779, 57 L.Ed.2nd 750 (1978).

Rehabilitation Act of 1973, Section 504, 29 U.S.C. Sec. 794 (1973).

Rehabilitation Act of 1973, Section 504, Implementing Regulations, 34 C.F.R. 104 et seq. (1990).

Ríos v. Read, 480 F.Supp. 14 (E.D.N.Y. 1978).

Serna v. Portales, 499 F.2nd 1147 (10th Cir. 1974).

Teresa P. v. Berkeley Unified School District, 724 F. Supp. 698 (N.D.Cal. 1989).

United Cerebral Palsy v. Board of Education, 79 C. 560 (E.D.N.Y.).

United States Constitution, amendment XIV.

Washington v. Davis, 426 U.S. 229, 240, 96 S.Ct. 2040, 2047, 48 L.Ed.2nd 597 (1976).

Y. S. v. School District of Philadelphia, C.A. 85-6924 (E.D. PA 1986).