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### Demanding More: Legal Standards and Best Practices for English Language Learners

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## PUBLIC DEBATES IN BILINGUAL EDUCATION

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### Demanding More: Legal Standards and Best Practices for English Language Learners

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In the current English-only programs in California, Arizona, and Massachusetts only a small percentage of students are learning English and subject matter content. This violates the success in practice prong of *Castañeda v. Pickard* (1981). Further, these program failures bolster the claim that these programs also violate Castañeda's sound theory and qualified expert support prong. Previous legal actions focused on the latter requirement and failed. Focusing on program failure creates a greater likelihood of successful legal challenge. This article calls for a change in interpretation of ELL rights and program requirements based on the majority consensus of best practices research.

In 1974, it seemed like the future of K–12 second-language acquisition would be grounded in bilingual education. The Bilingual Education Act (1968), Title VII of the Elementary and Secondary Education Act (ESEA), was providing financial, institutional, and legal support for using dual-language approaches to assist English language learners (ELLs) to transition to English fluency, with subject matter mastery and first-language fluency along the way. Also that year, the Supreme Court held in *Lau v. Nichols* that non-English-speaking students must be

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given an equal educational opportunity to that of English speakers. And again that same year, Congress solidified that requirement in §1703(f) of the Equal Educational Opportunity Act (EEOA, 1974), requiring that states must take “appropriate action to overcome language barriers that impede equal participation by its students.” The Congressional record contained testimony that §1703(f) was intended as support for bilingual education (Del Valle, 2003).

At the same time, research was beginning to demonstrate that bilingual education was a more effective way to teach second-language acquisition than total or structured English-immersion programs (Alanis, 2000; Greene, 1997; Thomas & Collier, 2002). Thus, best practices in second-language acquisition involved support for a student’s first language as necessary to learning English, simultaneously mastering subject matter content, and transitioning to the English-only learning environments of typical U.S. classrooms. Subsequent research continued to confirm these results. It appeared that legally, bilingual practices were necessary to give ELLs a meaningful educational experience, one where they were learning both English and subject matter content. With the law and research in sync, perhaps this was the beginning of a golden age of bilingual education in the United States.

It wasn’t. Now, some 30 years later at the beginning of the 21st Century, most ELLs (53%) receive their education only in English without any native-language support (Kindler, 2002). Further, three states, California, Arizona, and Massachusetts, have mandated English-immersion teaching and made bilingual education illegal, except under very limited circumstances. The teaching methods required by these three states directly contradict the vast majority of best practices research in second-language acquisition. Thus, the English-acquisition programs in all three states violate the spirit, and we contend the letter, of *Lau* and the EEOA. How did we get to such a state of affairs? More importantly, can these trends be reversed?

This paper argues that the current mismatch between the intent of *Lau*, the EEOA, and research on best practices for second-language acquisition on the one side, and the current experience of ELLs in schools in states that mandate English-only pedagogy on the other side, stems from court misinterpretations of the interplay between scientific knowledge production and the “appropriate action” standard of the EEOA. These misinterpretations have allowed fringe, minority views to trump the majority research consensus on best practice for second-language acquisition. The exact fringe practices, we contend, that the Supreme Court in *Lau* and the Congress in the EEOA intended to stop.

With this bad news, there is a silver lining. The English-only mandates of California (Proposition 227), Arizona (Proposition 203), and Massachusetts (Question 2) are now 11, 9, and 7 years old respectively. This is sufficient time to challenge the *application* of these English-only education requirements as being so ineffective that they violate *Lau* and the EEOA. Further, demonstrations of ineffective or harmful application can further strengthen the contention that English-only programs are not supported by sound theory, a second requirement under *Lau* and the EEOA, and one that has been unsuccessful to date. Now, advocates for sound second-language programs for ELLs may be able to mandate them through one successful legal challenge, rather than sue state by state or program by program.

In this article, we call for a change in the current interpretation of the legal rights of ELLs and educational program requirements; one that is grounded in the majority consensus of best practices research in second-language acquisition, specifically, bilingual education. In support, we present an analysis of the relationship between the legal rights of ELLs and the majority consensus of best practices research. Then, we compare these best practices to published examples

and analyses of the results of the actual school experiences of ELL students. We see these examples as strong evidence that the application of the English-only statutes in California, Arizona, and Massachusetts are violating *Lau* and the EEOA because ELL students have not been learning English and subject matter content; in other words, they are not receiving a meaningful educational experience. We conclude that English-only programs violate both the application and the sound theory prongs of the “appropriate action” requirement under §1703(f) of the EEOA. Now, we believe, they can be successfully challenged on legal grounds. The paper concludes with recommended legal actions.<sup>1</sup>

### THE LEGAL RIGHTS OF ELLS: “APPROPRIATE ACTION” UNDER THE EEOA

The Supreme Court in *Lau v. Nichols* (1974) held that ELLs have the federal constitutional right to the opportunity to learn equal to that offered native English-speaking students. In other words, ELLs must have a meaningful educational experience such that they learn both English and simultaneously subject matter content. The vague standard of *Lau* was codified in only slightly less ambiguous language in §1703(f) of the EEOA. Section 1703 requires that school districts take “appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.” Of course, “appropriate action” was not significantly more precise. Thus, when ELLs began using the EEOA to try to force school districts to change their practices, the federal courts needed to define the practical implications of “appropriate action.”

In 1981, the Fifth Circuit in *Castañeda v. Pickard* established a three-part test for determining whether a school district’s language plan was “appropriate action” as required by §1703(f), which is still in use today. The test required that a school district’s language plan:

1. must be based on (a) a sound educational theory that is (b) supported by some qualified experts;
2. must be provided with sufficient resources and personnel to be implemented effectively; and
3. after a trial period, students must actually be learning English and, to some extent, subject matter content.

ELL students used the first prong of the *Castañeda* test to challenge the new English-only law in California as it was about to be implemented. Those efforts failed. Here is the logic of the legal standards that developed.

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<sup>1</sup>While this article was in press, the Supreme Court decided *Horne v. Flores*, 557 U.S. \_\_\_\_ (2009). In 2000, the federal district court had determined that Arizona was in civil contempt for failing to adequately fund its English language learner (ELL) programs, in violation of the Equal Educational Opportunities Act (EEOA). Arizona appealed and, in a 5–4 opinion, the majority held that changes in the Arizona education system beyond just funding levels for its ELL program may demonstrate that Arizona is providing sufficient support for ELLs to meet the EEOA requirements. The Supreme Court remanded the case back to the district court to make related factual and legal findings. This article provides guidance on the standard the court should use in making these determinations, as well as guidance on other legal actions.

## SOUND EDUCATIONAL THEORY AND SOME EXPERTS: DEFERENCE TO THE SCHOOL AGENCY

ELLs began challenging how they were being taught, contending that the programs violated the first prong of the *Castañeda* test: They were not based on “sound educational theory” and supported by “some experts.” These terms required interpretation, and the court interpretations left ELLs with almost no legal ability to contest a school district’s English-language acquisition program.

Subsequent court decisions developed two primary rules for making these determinations, and these rules created the presumption that a school district’s language plan was appropriate action. The first rule was procedural. The courts held that it was the burden of the ELL student to demonstrate that the school district’s education plan was not supported by sound educational theory, in other words “not pedagogically sound” (*Teresa P. v. Berkeley Unified School District*, 1989, p. 713). The second rule was substantive. To demonstrate that a school district’s language policy was “not pedagogically sound,” the ELL student must show that no expert supports the education theory underlying the school district’s education plan (*Gomez v. Illinois State Board of Education*, 1987). The courts did not make clear what constituted an expert able to make this determination. Taken together, these rules require an ELL to demonstrate that a school district’s language-assistance program violates §1703(f) of the EEOA by showing that the program “could not, in any circumstance, constitute ‘appropriate action’ as required by the EEOA” (*Valeria G. v. Wilson*, 1998, p. 1017). Thus, when a plaintiff ELL and the defendant school district presented conflicting expert testimony, the courts declared the field of second-language acquisition “unsettled” and deferred to the judgment of the school district’s experts that the school district’s language policies were pedagogically sound.

In practical terms, a school district can defend its language program as “appropriate action” toward giving ELLs the equal educational opportunity to learn if it can present one expert who will state that their program is based on sound educational theory, even when the testimony of the school district’s expert is challenged by other experts. Given the contentious and communal nature of science, especially social science, it is very easy for a school district to find one expert to contend that their language policy is pedagogically sound. This high level of deference to a governmental institution is unique in the law. It is also harming the educational experience of ELLs.

Now that the English-only programs in California, Arizona, and Massachusetts are 7 to 11 years old, we contend that ELLs can successfully challenge these programs as violating the first prong of *Castañeda* in two ways. First, the standard itself violates the intent of Congress in the EEOA and the Supreme Court in *Lau*. Second, correctly applied, the standard requires the use of some form of bilingual education practices as they are supported by educational theory viewed as sound by the vast majority of experts in the field.

## UNIQUE DEFERENCE: MISUNDERSTANDING EXPERTISE AND SCIENTIFIC KNOWLEDGE ACQUISITION

Courts constantly confront the issue of whether a theory or evidence presented as scientific is really based on science. In all instances, except in second-language acquisition, courts critically examine the theories and evidence to see if they meet the high standards of their scientific field.

Without critical judicial review, the contentious, communal nature of scientific research combined with the self-serving interests of a governmental institution defending itself against a legal challenge makes the legal system a hollow process that will never protect ELLs against unsound, and possibly harmful, second-language practices.

The whole of any field of scientific knowledge, including knowledge in the social sciences like education, is always greater than any individual scientist, expert, study, or theory (Moreno, 2001; Shermer, 2002). What is known about the best practices for second-language acquisition, for example, has been contributed in bits and pieces by many scientists over many years. It is also constantly changing, continually weeding out errors through contentious, critical exchanges whereby adherents form into majority, minority, and plurality paradigms (Kuhn, 1996).

Thus, fields of scientific knowledge are never unanimous nor are they error free. There are always fringe, minority views. For example, cold fusion, creationism, and belief in the innate intelligence differences among races still have their adherents (Close, 1991; Dembski, 1999; Herrnstein & Murray, 1994; Mallove, 1991). Yet each of these positions has been roundly refuted and rejected by the vast majority of scientists (Dewdney, 1997; Gould, 1996; Young & Edis, 2004). Given their extreme minority status, it would be folly to mandate that any of them be taught exclusively in schools because one expert was found who said they were scientifically sound.

The complex nature of the social sciences makes them especially contentious and open to minority viewpoints. The hard sciences rely on laboratory replicability to test novel theories. "The criterion of the scientific status of a theory is its falsifiability, or refutability, or testability" (Popper, 2002, p. 37). Cold fusion, for example, was rejected by the majority of the scientific community because it could not be replicated (Dewdney, 1997). For the social sciences, human agency reduces the efficacy of laboratory replicability. Human agency also minimizes the usability of statistical analyses. Thus, social science assertions are generally more contextual and limited than assertions in the hard sciences. To account for contextuality, theories or paradigms supported by the majority of a group of social scientists are often described with caveats that equate with large, accepted, minority views.

Social science research is also contentious because it is inherently political, including research in education. The difference between political advocacy and research authority can be fuzzy. Arguably this is unavoidable when social science research examines political decisions about the distribution of resources for creating a better society, which involves ideological and moral determinations (Anderson, 2003). Sometimes, scientific disagreements appear due to the intentional muddying of the research waters. Conservative think tanks, like the Heritage Foundation and the Manhattan Institute, are known for marketing scientific-looking reports that trade on the credibility of scientific research, while eschewing the principles and processes that help ensure that they are reliable and accurate (Haas, 2007; Howe, 2002). Thus determining who is an education expert as well as what is sound educational theory is both a difficult and necessary task for the courts. As Beyea and Berger (2001) conclude, "A legal system that takes no cognizance of these process realities is operating under a substantial misconception" (p. 340).

In interpreting "appropriate action" for second-language acquisition, the courts appear to have overlooked these processes. As a result, they have created a level of deference that goes far beyond the level of deference courts afford actors in other arenas involving scientific evidence. The most analogous actor is likely administrative agencies. Administrative agencies, such as the Environmental Protection Agency, were created specifically to develop and use scientific expertise in public policy. Nevertheless, courts carefully scrutinize administrative decisions, taking a

“hard look” (Jasanoff, 1997, p. 76) at the scientific basis for their determinations. The standard of review is described this way:

To satisfy their judicial critics, agencies would have to meet stringent criteria of clarity and consistency: “Assumptions must be spelled out, inconsistencies explained, methodologies disclosed, contradictory evidence rebutted, record references solidly grounded, guesswork eliminated and conclusions supported ‘in a manner capable of judicial understanding.’” (Jasanoff, 1997, p. 91, quoting Rodgers, 1979, p. 706)

In essence, courts require administrative agencies to demonstrate the reasonableness of their decisions, in part, by demonstrating that their decisions fit within the knowledge and procedures accepted as reliable by the majority of the scientific community in that field. It is therefore unlikely that a court would permit a contested administrative agency decision to stand merely because the agency found one expert to testify that the decision was sound.

School districts are not administrative agencies under the Administrative Procedures Act (2000), and they do not possess a legal presumption that they have educational expertise, at least in the area of second-language acquisition. Quite the opposite. Numerous courts, from at least as far back as the Supreme Court in *Lau*, have recognized that school districts have created poorly theorized and ineffective programs for second-language assistance (see e.g., *Cintron v. Brentwood Union*, 1978; *Rios v. Read*, 1978; *Serna v. Portales*, 1974). It is for this very reason that the Department of Health, Education and Welfare promulgated the *Lau* guidelines for English-language assistance programs and the U.S. Congress passed the Bilingual Education Act and §1703(f) of the EEOA. It appears likely that if 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 English-language assistance.

Courts more closely scrutinize evidence and theories presented as scientific theories when they are in matters that do not concern administrative agencies. The Federal Rules of Evidence and the Supreme Court have developed a multilevel gatekeeping test for determining the admissibility of scientific evidence. First, the judge must determine whether a witness is sufficiently qualified to testify on scientific or technical matters (Federal Rules of Evidence, 2009; *Kumho Tire Co., Ltd. v. Carmichael*, 1999). Second, the judge must determine whether the expert’s testimony is reliable and relevant. This is done through a two-prong test, known as the *Daubert* test, in which the judge must determine that the substance of the expert’s scientific testimony is “(1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue” (*Daubert v. Merrell Dow Pharmaceuticals*, 1993, p. 599).

In the first prong of the *Daubert* test, determining “scientific knowledge” requires the judge to examine the theory and methodology underlying the expert opinion to determine that they are not “unsupported speculation,” but “good science . . . derived by the scientific method” (*Daubert v. Merrell Dow Pharmaceuticals*, 1993, p. 590). The Supreme Court listed several factors to aid judges in evaluating the scientific reliability of a theory or method: (a) its testability, (b) whether it has been subjected to publication or peer review, (c) its error rate, and (d) its level of acceptance within the scientific community (*Daubert v. Merrell Dow Pharmaceuticals*, 1993, pp. 592–594). These factors are neither a required list nor applicable in every case (Fradella, Fogarty, & O’Neill, 2003). Later, the Supreme Court held that all expert testimony involving scientific, technical, or other specialized knowledge must pass this test before it can be admitted (*Kumho Tire Co., Ltd. v. Carmichael*, 1999).

The *Daubert* guidelines require that courts do more than simply declare an area of science to be unsettled, and thus all experts and their opinions are worthy of admission, or in the case of *Castañeda* and its progeny, worthy of equal consideration. Even at its most basic standard, the court must satisfy itself that the difference in views of proffered experts and scientific evidence is part of a legitimate plurality of reliable, but nondominant theories or methods and that one side (or both or many) is not a marginalized, fringe minority akin to adherents to theories of cold fusion, genetic racial inferiority, or intelligent design creationists. On remand, the Ninth Circuit in *Daubert*, put it this way, “Something doesn’t become ‘scientific knowledge’ just because it’s uttered by a scientist; nor can an expert’s self-serving assertion that his conclusions were ‘derived by the scientific method’ be deemed conclusive” (*Daubert v. Merrell Dow Pharmaceuticals*, 1995, pp. 1315–1316). It is this standard of review—relating the individual testimony in some way to scientific replicability and/or the larger body of scientific knowledge—that permits courts to assess the scientific reliability and relevance in a manner consistent with the actual processes of knowledge production that occur in scientific communities (Jasanoff, 1997).

To meet the judicial and legislative intents of *Lau* and the EEOA—to give ELLs an equal opportunity to learn both English and subject matter content—we contend that courts should, and legally must, examine second-language acquisition programs for ELLs using a rigorous, skeptical standard of review similar to those they use for the admission of scientific evidence generally under *Daubert* or at least that used for administrative agencies under *Kumho Tire*. In practice, this would require a two-step process. First, the school district must present its second-language acquisition plan with sufficient detail and clarity for it to be capable of judicial understanding and review. This would include the requirement that evidence and theories that contradict the school district’s plan be included and discussed. Once the court is satisfied that the school district has met this requirement, the court must make a second determination. Using the evidence presented by the defendant school district and additional evidence presented by the plaintiff ELL students, it must determine whether the language program is educationally sound. In making this determination, courts should take the majority consensus within a scientific community as the standard for soundness. Thus, courts must ascertain the relationship between the theory and experts presented and the overall state of knowledge in second-language acquisition. Such a standard of education soundness requires courts to make, at least, the following determinations: (a) What is the state of knowledge? Are there majority and minority views within the scientific community as a whole? Is this an area where a plurality of theories dominate together, though none alone is considered the majority view? (b) In which of these majority, plurality, or minority views does the proposed theory and its expert reside? (c) If the theory and its expert are part of the minority view, why is this so? And, why is this minority view being presented rather than a more widely accepted majority or plurality view? Is it because the area of science is still unsettled? Is it because the methodology and analysis that support this view have been critiqued as unsound? To date, in the absence of these determinations, states have enacted, and in California, courts have upheld, second-language policies as appropriate action that use practices that are considered pedagogically unsound by the majority of the research and researchers in second-language acquisition.

In the following section, we describe the current state of best practices for second-language acquisition. They clearly require more and different support for ELLs than those provided currently under California, Arizona, and Massachusetts law.



## QUALITY INSTRUCTION FOR ENGLISH LEARNERS

English language learners face the daunting tasks of learning the academic curriculum while mastering a new language. The vast majority of the research consistently demonstrates that education that uses both English and the students' native language is not only most effective in preparing students for academic success in English (Alanis, 2000; Genesee, Lindholm-Leary, Saunders, & Christian, 2006; Greene, 1997; Krashen & McField, 2005; Rolstad, Mahoney & Glass, 2005a, 2005b; Slavin & Cheung, 2005; Thomas & Collier, 2002; Willig, 1985), but also necessary, as the failure of English-only programs demonstrates (e.g., Grissom, 2004; Massachusetts Department of Education/MCAS, 2005; Mahoney, MacSwan & Thompson, 2005; Parrish et al., 2006; Wright & Pu, 2005). The research on the impact of English-only programs, almost universally negative, will be discussed in a later section.

Research on bilingual education has established a number of principles, learning conditions, and related practices that meet the academic, dual-language, and multicultural needs of English learners and, in so doing, provide these students the support essential to achieving the equal educational opportunity required by law. In the following section, we outline research-based optimal instruction and learning features that promote academic excellence for this diverse student population.

### Quality Instruction for English Learners: Key Research Findings

The successful education of ELLs is a complex endeavor that involves attention to many factors. The acquisition of English is only one of the challenges facing ELLs; students must also succeed in all the other academic arenas of school while they learn about and integrate into a new culture. Thus, quality instruction for ELLs should be guided by the goals and expected outcomes of language development, academic achievement (including literacy), and sociocultural integration (Brisk, 2006).

By definition, ELLs (or "limited English-proficient students," as they are often referred to in schools) are still in the process of developing English. However, this population brings a wide range of English-language fluency and prior academic preparation to the U.S. classroom. This diversity is an important consideration because elementary and secondary school standards are founded on assumptions about basic literacy skill levels, academic backgrounds, and prior experiences that are based on norms developed for mainstream, monolingual English-speaking students (Gort, 2003). Because each community, school, and classroom is a unique and dynamic environment, teachers must be flexible in their lesson planning, teaching methods, instructional resources, and language use in order to accommodate bilingual students' needs based on their age, grade level, cultural backgrounds, language proficiencies, and prior schooling experiences. Recent studies of exemplary programs for culturally and linguistically diverse students provide a common set of principles for ensuring high-quality instruction for this diverse group of learners. These principles are organized around (a) the role of the native language in developing literacy and learning grade-level content; (b) meaning-making through culturally responsive, inclusive instructional methods and curriculum; and (c) the successful integration of language and content teaching for students who have achieved basic levels of English-language proficiency.

*Principle 1: Build on Children's Home Language to Develop English, and Whenever Possible, Foster the Preservation of the Home Language and Encourage Bilingualism and Biliteracy in Additive Bilingual Environments*

Additive bilingual environments promote the acquisition of English while fostering the continued development of the primary language. Research on effective education for ELLs indicates that bilingual instructional approaches provide the most positive student outcomes (Alanis, 2000; August & Shanahan, 2006; García-Vázquez, Vázquez, & López, 1997; Genesee et al., 2006; Greene, 1997; McField, 2002; McLeod, 1996; Olsen et al., 1994; Rolstad et al., 2005a, 2005b; Slavin & Cheung, 2005; Thomas & Collier, 2002; Willig, 1985). Recently, major reviews of the research on educating ELLs confirmed that children in bilingual programs typically outperform their counterparts in all-English programs<sup>2</sup> (August & Shanahan, 2006; Genesee et al., 2006; Rolstad et al., 2005a; Slavin & Cheung, 2005). Taken together with previous meta-analyses of educational programs for ELLs (e.g., Greene, 1997; McField, 2002; Willig, 1985), the reviews represent the most concerted efforts to date to identify effective approaches to help ELLs succeed in school.

While it would be impossible to fully summarize the findings of the recent syntheses, their key findings in relation to the role of the native language in developing literacy and content learning for ELLs deserve attention. Although the syntheses use slightly different criteria for including studies and different dates of publication, the average effect sizes are remarkably similar, with bilingual education approaches showing consistently positive impact versus those in all-English instruction. Moreover, Rolstad et al. (2005a) found that developmental bilingual programs designed to develop children's academic use of both languages (i.e., high levels of bilingualism and biliteracy) are superior to short-term (e.g., transitional) bilingual programs that use the native language as a bridge to all-English instruction. The fact that various different meta-analyses on the same issue conducted by different groups of independent researchers with diverse perspectives all reached essentially the same conclusion—clear support for bilingual approaches as means of helping ELLs succeed academically in English—is worth noting.<sup>3</sup>

Thomas and Collier's (1997, 2002) seminal research on bilingual students' long-term achievement provides strong evidence that sustained cognitive complex instruction in both the native language (L1) and English enhances students' academic success in later years. Following very large cohorts of English learners enrolled in various program types (e.g., immersion, short-term transitional bilingual education, developmental transitional bilingual education, two-way developmental bilingual education) and comparing their achievement against national norms, they found that the strongest predictor of student achievement in English is the amount of L1 formal schooling (i.e., the more L1 grade-level schooling, the higher English achievement); further, Thomas and Collier found that bilingually schooled students outperformed comparable monolingually schooled students in academic achievement in all subjects after 4–7 years of

<sup>2</sup>These include three meta-analyses (August & Shanahan, 2006; Rolstad et al., 2005; and Slavin & Cheung, 2005) and a narrative research synthesis (Genesee et al., 2006).

<sup>3</sup>In a summary of five of these meta-analyses (i.e., Green, 1997; McField, 2002; Rolstad et al., 2005a; Slavin & Cheung, 2005; and Willig, 1985), Krashen and McField (2005) examined whether the consistency in results was due to simple redundancy of study inclusion. They found that, while there was some overlap, the vast majority of studies appeared in only one or two of the five meta-analyses. This suggests that the conclusion of "broad support for results favoring bilingual education" (p. 9) is reliable.

dual-language schooling. They concluded that first-language support “explains the most variance in student achievement and is the most powerful influence on [ELL] students’ long term academic success” (Thomas & Collier, 1997, p. 64).

Numerous other studies have shown the advantage of incorporating a student’s native language into their instruction (e.g., Berman, Minicucci, McLaughlin, Nelson, & Woodsworth, 1995; Lucas & Katz, 1994; Pease-Álvarez, García, & Espinosa, 1991); others support the findings that proficiency in the students’ native language correlates with academic performance in English (e.g., Beykont, 1994; García-Vázquez et al., 1997; Ramírez, 1992; Verhoeven, 1991) and does not prevent English-language development (Nguyen, Shin, & Krashen, 2001). Taken together, these findings imply that time spent learning the native language is not time lost in developing English. In fact, for many children, time spent in their native language is time gained on academic tasks. This is especially true for young children who have not fully grasped basic concepts.

In the area of literacy development, empirical studies and research syntheses concur that teaching literacy through the use of effective strategies developed for monolingual, English-speaking student populations is not sufficient to ensure success for ELLs (August & Hakuta, 1997; August & Shanahan, 2006; McLeod, 1996; Slavin & Calderón, 2001; Slavin & Cheung, 2003, 2005). Teachers of ELLs need to complement the components for teaching basic reading skills to mainstream student populations (National Reading Panel, 2000; Slavin & Cheung, 2003; Snow, Burns, & Griffin, 1998) with an extensive teaching repertoire that includes: (a) opportunities for second-language acquisition through integrated oral, literacy, and content area instruction; (b) bilingual instruction in the first and second languages, including literacy in both languages; (c) explicit instruction in contrastive linguistics, including cognates/false cognates; (d) teaching different tiers of vocabulary, including basic, high-frequency words, domain-specific vocabulary, and challenging levels; (e) fast-track decoding in English for students who are literate in the native language; (f) reading comprehension for content mastery; (g) other basic skills, including study skills, for students with limited formal schooling; and (h) opportunities to develop written expression, including explicit instruction in English discourse structures, voice, and mechanics (August & Shanahan, 2006; Calderón, 2006; Slavin & Cheung, 2003).

Other key research findings focus on the role of the native language in the development of mature literacy and language skills in English. Programs that provide initial literacy instruction in a child’s native language and promote long-term native-language development have proved the most effective in the development of English literacy (Espinosa & Burns, 2003; International Reading Association, 2001). Supporting literacy and language skills in the native language provides a base for successful literacy development in English, builds on children’s strengths, and leads to higher reading achievement in English (Snow et al., 1998). Two recent meta-analyses of reading instruction for ELLs (August & Shanahan, 2006; Slavin & Cheung, 2005) similarly conclude that the existing empirical evidence favors bilingual approaches to reading instruction.

### *Principle 2: Culturally and Linguistically Responsive Instruction and Curriculum Contribute to Improved Learning and Outcomes for English Learners*

Learning emerges from and builds on experience (Nieto, 1999). Building on students’ strengths to support their learning means acknowledging that all students have significant experiences, insights, and talents to bring to their learning; it also means finding ways to integrate these experiences into the classroom and curriculum as a means of making school concepts more

meaningful to students' everyday lives. Effective instruction for bilingual learners, including ELLs, takes into consideration the match (or mismatch) between students' cultural backgrounds and those of their teachers, including culturally-based classroom behaviors, routines, teaching, and management practices, interactional or communication styles, learning styles or preferences, as well as a curriculum that generally reflects the dominant culture. Culturally and linguistically responsive pedagogy is a learner-centered approach that includes aspects of students' social, cultural, and linguistic knowledge in classroom activities, texts, and instruction to optimize learning (García, 2005; Nieto, 1999, 2004).

In an extensive review of culturally compatible education, Tharp (1989) concluded that children's academic achievement improves when schools and classrooms become more attuned to children's cultures. García (2005) provides a useful framework for designing and sustaining responsive pedagogy and curriculum for culturally and linguistically diverse learners that necessarily addresses issues of diversity in order to maximize students' academic potential and educational attainment through culturally and linguistically responsive learning communities. Teachers in such responsive learning communities (a) demonstrate bilingual/bicultural skills and awareness; (b) maintain high expectations of diverse students; (c) treat diversity as an asset to the classroom; and (d) engage in ongoing, diversity-focused professional development. In addition, curriculum development in such learning communities specifically addresses cultural and linguistic diversity by (a) attending to and integrating students' home culture and practices; (b) maximizing student interactions across English-language proficiency and academic performance designations, as well as groups of students with varying prior schooling experiences; (c) making regular and consistent attempts to elicit curricular ideas from students; (d) incorporating thematic approaches to learning activities; and (e) focusing on language development through authentic, contextualized, and meaningful interaction and communication.

Several studies have documented the success of programs and schools designed around culturally responsive and reflective approaches to meet the educational needs of bilingual and bicultural students from specific cultural groups (e.g., Abi-Nader, 1993; Ballenger, 1999; Darder, 1993; Erickson & Mohatt, 1982; Lipka & Mohatt, 1998; Vogt, Jordan, & Tharp, 1993). These studies demonstrate that teachers of any background can learn to be culturally responsive by adapting their social interactions, knowledge, and values toward their students' cultures. They also make evident that good teaching is not enough. In increasingly multilingual and multicultural classrooms, teachers must take advantage of the presence of linguistic and cultural diversity to challenge their instructional practices and enrich curricular content.

Such meaningful contexts have been notoriously inaccessible to linguistically and culturally diverse children, in general, and English learners (including American Indian students), in particular. On the contrary, the monolithic culture transmitted by U.S. schools in the form of pedagogy, curricula, instruction, classroom configuration, and language (Walker, 1987) often contribute to these students' educational vulnerability and dramatizes the lack of fit between the culturally diverse student and the U.S. school experience (García, 2005). The dominant culture is reflected in and promoted through schooling practices such as the systematic exclusion of the histories, languages, experiences, and values of diverse students from classroom curricula and activities (Banks & Banks, 1995); tracking, often based on English-language proficiency, which limits access to rigorous academic courses and learning environments that foster academic development and integration (Noguera, 1999; Oakes,

1990); and a lack of opportunities to engage in developmentally and culturally appropriate ways of learning (García, 1999; Ladson-Billings & Tate, 1995). As sites where legitimate knowledge and language are reproduced, schools have historically denied the experiences of culturally and linguistically diverse learners and produced a 'deficit view' of these students.

*Principle 3: Quality Instruction for English Learners Requires the Continued Successful Integration of Language and Content Teaching*

A major challenge of teaching English learners is the need to integrate academic content, language, and culture in every lesson. Sheltered content instruction, grounded in two decades of classroom-based research, is an approach for teaching grade-level academic content in English in areas such as social studies, mathematics, and science to English learners in strategic ways that make content-matter concepts comprehensible while promoting students' English-language development (Krashen, 1992). Sheltered content teaching, thus, incorporates specialized strategies and techniques that accommodate the second-language acquisition process to teach the general core curriculum. Some of the techniques that characterize sheltered content instruction include the adaptation of academic content to the students' level of English-language proficiency, the use of supplementary materials to a high degree, the emphasis of key vocabulary and language development, the modification of speech to make information comprehensible to students (including sufficient wait time), the development of clear language and content objectives for each lesson, and the integration of students' background and experiences into each lesson (Addison, 1988; Echevarría, 1995; Echevarría & Graves, 2003; Genesee, 1999; Krashen, 1992; Short, 1991; Vogt, 2000).

The Sheltered Instruction Observation Protocol (SIOP) (Echevarría, Vogt, & Short, 2000), a research-based professional development model of sheltered content instruction, offers a framework for teachers to present curricular content concepts to English learners while developing students' English-language skills across the domains of reading, writing, listening, and speaking. Beyond a simple smattering of instructional strategies into teachers' lesson plans, the SIOP method embraces the understanding that "without systematic language development, students never develop the requisite academic literacy skills needed for achieving success in mainstream classes, for meeting content standards, or for passing standardized assessments" (Echevarría, Short, & Powers, 2006, p. 199). In one study of the effects of the model on student learning, middle school English learners whose teachers were trained in implementing the model outperformed a comparison group of English learners on overall gains in expository writing and made significant improvement in the areas of language production, focus, support/elaboration, organization, and mechanics (Echevarría et al., 2006). Several other studies of the effects of applying key SIOP principles across the curriculum have demonstrated similar positive gains in student learning and achievement (see, for example, Abedi & Dietel, 2004; Carter & Dean, 2006; Freeman & Crawford, 2008; Harmon, Hedrick, & Wood, 2005).

Another widely used instructional model for content and language learning, the Cognitive Academic Language Learning Approach, or CALLA (Chamot & O'Malley, 1994), makes extensive use of learning strategies as it prepares ELLs for content-area instruction. Through CALLA, teachers explicitly teach learning strategies while also developing students' language and content knowledge. In order to benefit from the conscious focus on learning strategies, CALLA is designed to meet the academic and cognitive needs of ELLs in upper elementary and secondary schools at intermediate and advanced levels of English proficiency. Three types of

learning strategies are incorporated in the CALLA method. These include: metacognitive strategies (e.g., advance organization, organizational planning, selective attention, self-management, monitoring comprehension, monitoring production, self-evaluation), cognitive strategies (e.g., resourcing, grouping, note-taking, elaboration of prior knowledge, summarizing, deduction/induction, imagery, auditory representation, making inferences), and social/affective strategies (e.g., questioning for clarification, cooperation, self-talk). Through carefully designed lesson plans tied to the content curriculum, teachers explicitly teach the learning strategies and have students apply them in instructional tasks. These plans are based on the propositions that: (a) mentally active learners are better learners, (b) strategies can be taught, (3) learning strategies transfer to new tasks, and (4) academic language learning is more effective with learning strategies (O'Malley & Chamot, 1990, p. 196). Like SIOP, CALLA does not simplify the curriculum. Rather, it presents cognitively demanding activities at English learners' developmental level. Learning strategies taught through CALLA provide extra support for the negotiation of content-area instruction in English. By developing the habit of using learning strategies, students have transferable skills that remain with them as they progress to higher levels of academic instruction in the content areas.

The evidence suggests that sheltered and cognitive strategy approaches to content and language learning, as part of a quality bilingual program of instruction (i.e., in conjunction with native-language instruction), play an important role in providing ELLs with the language of academics needed for successful content mastery. Without the sheltered instructional features described above, academic instruction becomes partially or wholly incomprehensible and inaccessible to ELLs. Thus, an effective educational program that meets the first prong of the *Castañeda* test should include significant aspects of each of the three principles above. It should (a) actively and strategically build on students' native language to develop English and, whenever possible, foster the preservation of children's home language and encourage bilingualism and biliteracy among language-minority children in additive bilingual environments; (b) use culturally and linguistically responsive teaching methods and curriculum; and (c) integrate language and subject-matter content teaching through sheltered content and cognitive strategy-building instructional techniques. These principles of practice are supported by the vast majority of experts in the field as based on sound theory of second-language acquisition. It seems clear, then, that local and state policies that limit use of the primary language and limit instructional modifications for ELLs are, therefore, not based on the best scientific evidence available.

### "REASONABLE" PRACTICES NOT BEING USED IN CA, AZ, AND MA

The best practices principles provide a standard for determining whether a given program is supported by sound educational theory according to the majority view of experts in the field. Applying them to the California, Arizona, and Massachusetts English-only programs, it is clear that they do not.

The statutes in all three states are similar. They were initiated by Ron Unz, a California multimillionaire determined to end bilingual education in the United States (English for the Children, 2007). Each state statute requires that ELLs be placed in English-immersion classes where nearly all instruction is in English (Proposition 203: Ariz. Rev. Stat. Ann. §§ 15–751 to 15–755; Proposition 227: CA Ed. Code §§ 300–340; Question 2: Mass. Gen. Laws. Ann. Chs. 69–71B). The intent of all three statutes is that ELLs should be taught solely in English; little or

no native-language support is permissible.<sup>4</sup> In Arizona, for example, if school board members are found to have acted in violation of the mandate to teach only in English, they will be removed from the school board and barred from holding a position of authority in the public schools for 5 years (Ariz. Rev. Stat. Ann. §15–753[B] [4]). In all three states, language support (through Structured English Immersion) was intended to not exceed 1 year.

The ability of parents to opt out of these English-only programs differs between California and the latter statutes passed in Arizona and Massachusetts. In California, unintended loopholes in the statute have allowed parents to waive out of English-only programs and demand that their child be taught in a bilingual program. The decision to opt-out can be made solely by parents and cannot be overruled by school officials (*McLaughlin v. State Board of Education*, 1999). This “loophole” has been closed in both Arizona and Massachusetts. In both states, school officials can deny a parental waiver request at their discretion (Ariz. Rev. Stat. Ann. §15–753[B][3]; Mass. Gen. Ann. Laws Ch. 71A §5[b][3]).

On their face, these statutes do not conform to the guidelines for effective classroom practices for second-language acquisition derived from sound educational theory. These statutes violate Principle 1, for they specifically prohibit, rather than preserve and strengthen, the child’s home language. None of the statutes addresses Principle 2, and given their assimilative intent (Burdick-Will & Gómez, 2006), they appear to actively discourage the use of culturally congruent teaching methods. On their face, these statutes do not explicitly violate Principle 3. They do not rule out the integration of English-language instruction with subject-matter content teaching nor do they explicitly require it. It is simply left unstated. Taken together, it is difficult to imagine that these statutes on their face even come close to conforming to the first prong requirement of *Castañeda*.

In practice, there is growing evidence that these statutes also do not meet *Castañeda*’s third prong requirement—effectiveness in application. As evidence from their implementation grows, ELLs, especially in Arizona and Massachusetts, may be able to use this evidence to successfully challenge the English-only statutes. In addition, the evidence of their ineffectiveness may lend further support to the contention that they violate *Castañeda*’s first prong as well.

## EVIDENCE FROM IMPLEMENTATION: VERY POOR RESULTS

Now that these English-only statutes have been in effect for 11, 9, and 7 years, there is growing evidence that the resulting English-only programs, which do not follow the majority best practice research, are not effective at helping students to learn either English or subject matter content.

### Learning English

There is mounting evidence that English-only programs are not effective in teaching ELLs English. This is certainly true in California. Grissom (2004) followed three cohorts of between

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<sup>4</sup>For example, California’s Proposition 227 states that even in the “sheltered English immersion” or “structured English immersion” settings, “nearly all classroom instruction is in English” (Article 2, Section 306 (d)). Arizona’s Proposition 203 requires even in “sheltered English immersion” or “structured English immersion” that “nearly all classroom instruction is in English . . . books and instructional materials are in English . . . [and] no subject matter shall be taught in any language other than English” (Section 15–751 [5]).

TABLE 1  
Percentage of California EL Cohort Reclassified  
as RFEP by Grade and Cohort Year [summary  
of data from Grissom (2004)]

<i>Grade</i>	<i>1998</i>	<i>1999</i>	<i>2000</i>
2	1.5	1.4	2.2
3	5.4	6.9	10.5
4	20.4	20.4	23.5
5	32.3	32.3	32.2

50,000 and 80,000 California students each from second through fifth grade beginning in the years following Proposition 227 (1998, 1999, and 2000). Grissom tracked their reclassification rates from “English Learner” (EL) to “Reclassified Fully English Proficient” (RFEP). He found that at most 2.2% of the EL students were reclassified at the end of 1 year of Structured English Immersion (SEI) instruction. After 4 years, more than 2/3 of the EL students had still not learned enough English to be reclassified. Grissom’s data are summarized in Table 1.

Grissom concludes that Proposition 227’s requirement of English-only programs for ELLs did not improve reclassification rates of these students. Nor did ELLs learn English in 1 year as Proposition 227 supporters predicted (Proposition 227, Section 305). In fact, 98% did not. Instead, the data support what the majority of bilingual researchers have found: It takes 3 to 5 years to develop oral fluency in a second language and 4 to 7 years to develop academic fluency (see e.g., Hakuta, Butler & Witt, 2000).

A 5-year longitudinal study of the impact of Proposition 227 by WestEd and the American Institute for Research came to similarly negative conclusions about the rate at which ELLs are learning English in California. Parrish et al. (2006) used survival analysis to examine the ELL enrollment and redesignation rates across the state and concluded that “after ten years of schooling, it is estimated that less than 40 percent of California’s ELs attain redesignation status” (p. III-34).

In Arizona, most students in the English-only programs did not learn English either. According to a study by Mahoney et al. (2005), during the 2003–2004 school year, 60% of the ELL students in the elementary grades had no change in their English proficiency. For middle and high school students, the *no improvement* rate was 70%. Similar results have been reported in Massachusetts. ELLs were expected to transition from the Structured English Immersion program to regular classes after 1 year; however, in 2006, 3 years after implementation of Question 2, 83% of the ELLs in grades 2 through 12 who had been in the system for 1 year could not understand English sufficiently to be placed into mainstream classes (Sacchetti & Jan, 2006). Looking at the data more cumulatively, after 3 years and more, only 39% to 59% of ELLs actually understood English well enough to make the change (Massachusetts Department of Education/Transition, 2005).

### Learning Subject Matter Content

There are also strong indications that English-only programs have not improved the subject-matter comprehension of ELLs. In California, the achievement gap between ELLs and monolingual English speakers has remained constant since the passage of Proposition 227, with ELLs scoring approximately 0.75 of a standard deviation below their monolingual



peers (Parrish et al., 2006). In other words, ELLs in California, before and after reclassification, historically score below their native-English-speaking peers, and Proposition 227 did not improve that (Grissom, 2004). In Arizona, Wright and Pu (2005) found that the achievement gap between ELLs in the English-only program and mainstream students has actually grown larger since Proposition 203.

In Massachusetts, data from the State Department of Education show that ELLs are doing alarmingly poorly in the English-only system. ELLs have a significantly higher dropout rate than non-ELLs (Massachusetts Department of Education/Dropout, 2005). In addition, ELLs are scoring well below their non-ELL counterparts on the Massachusetts Comprehension Assessment System (MCAS), the state standardized test. The failure rate for ELLs in Massachusetts on the third-grade reading test was 23% in 2002 and 23% in 2005, the last year that the reading test was given. In 2007, 30% of ELLs failed the English language arts test (as compared to 9% of all students). And, it appears, ELLs have actually fallen farther behind since the English-only curriculum was implemented (Massachusetts Department of Education/MCAS, 2005; see also Abedi & Dietel, 2004).

In sum, consistent evidence appears to show that the English-only programs in all three states violate the third prong of *Castañeda*: The programs, once implemented, are not effective. The conclusion of Rolstad et al. (2005b) following their meta-analysis of ELL language programs in Arizona appears applicable to California, Massachusetts, and every state:

In Arizona, bilingual education is quite clearly an educationally effective alternative to English-only approaches, demonstrating its appropriateness to the specific communities that have used it. Policy that forbids bilingual education cannot be defended on empirical grounds. (p. 64)

## CONCLUSION

*Lau* requires that ELLs receive sufficient language support so that they can have an equal opportunity to a meaningful educational opportunity, and the EEOA requires states to take appropriate action to ensure that this occurs. We believe that English-only programs do not meet these requirements. Specifically, their practices violate the sound theory prong of the *Castañeda* test. Further, it appears that they may violate the effective implementation prong as well. After 7 to 11 years of mandated English-only programs in California, Arizona, and Massachusetts, there is sufficient data to demonstrate that their ineffectiveness amounts to multiple violations of *Castañeda*.

We contend that the research discussed above, which documents the lack of effectiveness of these English-only programs, is sufficient to challenge them under the implementation prong of *Castañeda*. In addition, this evidence of ineffective implementation should bolster challenges based on the first prong of *Castañeda* as well. That is, programs that deviate from the majority view of sound second-language acquisition practices also have no theoretical credibility. ELLs can now challenge the very standard itself. Again, evidence that fringe programs are ineffective should strengthen the argument that courts must more critically assess the scientific basis of second-language programs as they do in all other areas of science. Thus, in the future, ELLs should be able to use the first prong of *Castañeda* to stop fringe programs before they start and push for programs that truly work. There are nonlegal hurdles to overcome that go beyond program effectiveness, including nativist fears of the "other," especially when it appears that these "others" are receiving special treatment (Ovando, 2003). Thus, legal action is not a silver bullet;

however, when ELLs have substantive and enforceable legal rights, they can be a powerful tool, though one among many, to be used toward creating the meaningful education support that *Lau* and the EEOA intended more than 30 years ago.

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