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**MARYLAND’S ROLE IN BRIDGING LANGUAGE DISPARITIES:
ACCOMMODATING NEW WAVES OF ELL STUDENTS**

Kayleswari Ramu*

INTRODUCTION

In 1974, the Supreme Court established that in order to comply with the Civil Rights Act of 1964, school systems needed to provide English language instruction to students that did not speak English, or provide other adequate instruction.¹ The Supreme Court’s decision arose from *Lau v. Nichols*, where the California school system had a large population of students of Chinese ancestry.² Approximately 1,800 students of Chinese ancestry were not able to speak English, and these students were not provided with supplemental courses in English.³ As the United States becomes more and more diverse, it is important to re-evaluate whether we are continuing to provide students with appropriate educational opportunities. This Comment will focus on how educational policies have accommodated past English Language Learner (hereafter ELL) students, and whether Maryland is providing programs that offer the appropriate services to accommodate our current population of ELL students.⁴

This Comment explores whether Maryland’s educational standards for ELLs can be improved to help all students receive an equal education. In Part I, this Comment analyzes the modern view of “equal access to education,” which allows us to interpret whether ELLs are receiving the appropriate educational supports in the classroom. In Part II, this Comment analyzes the current state of ELL education in Maryland. Part III offers recommendations for future ELL programs.

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¹ *Lau v. Nichols*, 414 U.S. 563, 568–69 (1974).

² *Id.* at 564.

³ *Id.*

⁴ Kristen L. Depowski, *Limited English Proficiency Students Left Behind*, 14 WASH. & LEE J. C.R. & SOC. JUST. 331, 348 (2008).

I. EVOLUTION OF THE MODERN VIEW OF “EQUAL ACCESS TO EDUCATION” AND ITS IMPACT ON EVALUATING EDUCATIONAL SUPPORTS FOR ELL STUDENTS

A. *Lau v. Nichols Served as a Catalyst for the Equal Education Opportunity Act of 1974*

In addition to requiring English language instruction for ELL students more generally, *Lau v. Nichols*⁵ set a precedent regarding the treatment of ELLs in schools.⁶ In its holding, the Supreme Court determined that the students of Chinese ancestry were “effectively foreclosed from any meaningful education.”⁷ The school district’s failure to provide support for the students was a type of discrimination.⁸ The Court’s decision upheld the principle that, “where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district the district must take affirmative steps to rectify the language deficiency.”⁹ *Lau* establishes that schools must accommodate the needs of English learners in the classroom.¹⁰ However, the Court did not clarify the type of programs that schools would have to administer to show sufficient effort to accommodate for English learners.¹¹ It only went so far as to indicate that school districts needed to comply with the federal mandate to create meaningful opportunities for English learners to participate in their education system.¹²

⁵ 414 U.S. 563 (1974).

⁶ See Edward W. Lew, *Bilingual Education and Resegregation: Reconciling the Apparent Paradox Between Bilingual Education Program and Desegregation Goals*, 7 UCLA ASIAN PAC. AM. L.J. 88, 92 (2001) (“Although the Court did not specify what types of programs should be implemented to satisfy the ‘affirmative step requirement,’ it became clear that schools [sic] districts had to do something to comply with the federal mandate to create a meaningful opportunity for linguistic minorities to participate in the public educational system.”).

⁷ *Lau*, 414 U.S. at 566.

⁸ *Id.* at 568.

⁹ *Id.* (quoting Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11595 (July 18, 1970)).

¹⁰ *Id.* at 568–69.

¹¹ See *id.* at 568–69. See also Lew, *supra* note 6, at 92.

¹² *Id.*

After *Lau v. Nichols*, Congress enacted the Equal Education Opportunity Act of 1974.¹³ The Equal Education Opportunity Act is one of the main pieces of legislation that requires schools to provide educational opportunities regardless of an individual's race, color, national origin, and sex.¹⁴ It requires the States and their school districts to take action to overcome any language barriers that students may face in the classroom.¹⁵ It opened the doors for individuals to bring civil actions through the Attorney General of the United States if they found that school agencies were offending their civil liberties.¹⁶

B. The Threshold of an Equal Access to Education Can Easily be Reached Due to the Standards Applied in Castaneda v. Pickard

The concept of equal opportunity to an education calls for removing any barriers to access, including discriminatory ones.¹⁷ Equal access to educational opportunities can be evaluated based on No Child Left Behind's vision, which "promotes each student's right to attain at least a proficient score on state standardized tests in mathematics, reading or language arts, and science."¹⁸ If a school is not able to help a student meet these standards, they must demonstrate that they are taking action to improve the student's deficiency.¹⁹ This concept of equal opportunity has also been applied to students that face language barriers.²⁰ The Equal Education Opportunity Act of 1974 establishes that no state "shall deny equal educational opportunities to an individual

¹³ Equal Education Opportunity Act of 1974, Pub. L. No. 93-389 § 202, 88 Stat. 514 (1974) (current version at 20 U.S.C. §§ 1701–1710, 1712–1718, 1720, 1721, 1751–1758).

¹⁴ Michael A. Rosenhouse, Annotation, *Construction and Application of Equal Education Opportunities Act (EEOA)*, 20 U.S.C.A. §§ 1701 et seq., 38 A.L.R. Fed. 2d Art. 201 (2009).

¹⁵ EDUCATION LAW CENTER, <http://www.educationjustice.org/federal/eeoa.html> (last visited Oct. 20, 2017).

¹⁶ 20 U.S.C. § 1706 (2016).

¹⁷ See Lew, *supra* note 6, at 91 (discussing the importance of equality in education established in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

¹⁸ Regina R. Umpstead, *A Tale of Two Laws: Equal Educational Opportunity in Special Education Policy in the Age of No Child Left Behind Act and the Individuals with Disabilities Education Act*, 263 ED. LAW REP. 1, 15 (2011).

¹⁹ *Id.* at 118.

²⁰ See *Lau v. Nichols*, 414 U.S. 563, 566–69 (1974).

on account of 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.”²¹ There are no formal requirements for a private right of action, but courts generally consider

1. whether the school’s program is based upon sound, educational theory, or principles;
2. whether the school’s program is reasonably calculated to implement the educational theory effectively; and
3. whether, after a period of time sufficient to give the program a legitimate trial, the results of the program show that language barriers are actually being overcome.²²

Both the Department of Education and the Department of Justice share authority in enforcing Title VI in schools.²³ The exercise of authority is currently monitored by the U.S. Department of Education’s Office for Civil Rights and the Department of Justice’s Civil Rights Division.²⁴ When considering whether schools are providing an appropriate education to ELL students the “[d]epartments apply the standards established by the United States Court of Appeals for the Fifth Circuit more than thirty years ago in *Castaneda v. Pickard*.”²⁵

Castaneda involved Mexican-American students who filed an action against a school district on the basis that the district engaged in practices that deprived the students of their rights as classified in the Constitution.²⁶ The case established three specific guidelines that the Departments could consider: first, whether the language assistance program being implemented has a legitimate theory accepted by experts in the field; second, whether the program and practices effectively implement the adopted educational theory; and third, whether the data

²¹ 20 U.S.C. § 1703(f) (2016).

²² *Types of Educational Opportunities Discrimination*, U.S. DEP’T. OF JUST., C.R. DIV., <https://www.justice.gov/crt/types-educational-opportunities-discrimination> (last visited Dec. 14, 2017).

²³ U.S. Dep’t of Just. C.R. Div. and U.S. Dep’t of Educ. Off. for C.R., Dear Colleague Letter 1 (Jan. 7, 2015), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf>.

²⁴ *Id.*

²⁵ *Id.* at 5–6.

²⁶ *Castaneda v. Pickard*, 648 F.2d 989, 992 (5th Cir. Unit A June 1981).

shows that student language barriers are being addressed within a reasonable time period.²⁷

The first prong of the *Castaneda* test places the burden upon the plaintiff to demonstrate the illegitimacy of the language assistance program.²⁸ As the court was hearing cases on this issue, and the *Castaneda* test was being evaluated, the extent of the burden placed on plaintiffs was not clear.²⁹ The Fifth Circuit utilized the *Castaneda* test in *United States v. Texas*, but it did not specify a standard of proof to determine whether the plaintiff had met their burden.³⁰ In 1987, the Seventh Circuit applied a similar standard to how courts provide deference to administrative agencies.³¹ The court in *Gomez v. Ill. State Bd. of Educ.*, agreed with *Castaneda* and found that in applying prong one it is the court's responsibility to "ascertain whether a school system is pursuing a program informed by an educational theory recognized as sound by experts in the field or at least considered a legitimate experimental strategy."³² The Seventh Circuit's approach towards the first factor of the *Castaneda* test tried to protect the plaintiff's interest in having equal educational opportunities while not substituting "the expert knowledge of educators or our judgment for the educational and political decisions reserved to the state and local agencies."³³ By not substituting the educational theories proposed by the plaintiff, it is difficult to undermine the current educational theories that the school district is using.

The test established in *Castaneda* is criticized because it can be extremely difficult to establish that a theory is unsound under all circumstances.³⁴ The standard applied following *Castaneda* does not

²⁷ *Id.* at 1009–10.

²⁸ Eric Haas, *The Equal Educational Opportunity Act 30 Years Later: Time to Revisit Appropriate Action for Assisting English Language Learners*, 34 J.L. & EDUC. 361, 364 (2005).

²⁹ *Id.*

³⁰ See *United States v. Texas*, 680 F.2d 356, 371 (5th Cir. 1982); see also Haas, *supra* note 28, at 365 (noting that, while the Fifth Circuit applied the *Castaneda* test, "[it] did not specify what standard or level of proof they used to determine that plaintiffs demonstrated that the educational theory was unsound.>").

³¹ *Gomez v. Ill. State Bd. of Educ.*, 811 F.2d 1030, 1041 (7th Cir. 1987).

³² *Id.*

³³ *Id.*

³⁴ Haas, *supra* note 28, at 378 (explaining the difficulty of overcoming the threshold set by being overly deferential to scientific communities and agency discretion).

specify that majority views on educational policy should be followed, which could allow minority views in educational theory to stand.³⁵

C. Legislative History of Bilingual Education

School districts have struggled with providing equal education opportunities to students that lack English proficiency.³⁶ Bilingual education programs, as a response to the lack of instruction that ELL students receive, are the frequent targets of criticism.³⁷ One of the main critiques is that bilingual education programs reinforce segregation that *Brown v. Bd. of Educ.* has worked to overturn.³⁸ For example, the “maintenance of certain bilingual education programs has often resulted in the classroom segregation of minority students in school classrooms.”³⁹ Students of a certain background may need additional reinforcements, and one of the services they may need to improve English literacy is to receive bilingual educational instruction.⁴⁰ This would support students in language acquisition, and allow them to be educated in other core subject areas, such as math and science.⁴¹ There are two main types of bilingual education instructions: bilingual basic bilingual education classes, commonly called “English-as-a-second-language” provide basic bilingual instruction for English, while bilingual-bicultural classes, which allow students to receive core subject

³⁵ *Id.* This may be concerning because “[u]nder this standard, fringe, minority views on an area of science could drive education policy.” *Id.*

³⁶ Lew, *supra* note 6, at 88. *See also*, Eileen FitzGerald, *School Districts Struggle to Accommodate English-Language Learners*, NEWSTIMES (Oct. 4, 2010, 11:44PM), <http://www.newstimes.com/news/article/School-districts-struggle-to-accommodate-687364.php> (describing the challenge faced by the Danbury, Conn. in adapting to an increased ELL student population).

³⁷ *See* Lew, *supra* note 6, at 98 (discussing criticism of bilingual programs). As Lew explains, “the term ‘bilingual education’ describes a wide range of programs designed to provide a meaningful education for non-English and limited English speaking students. . . [u]sually achieved by teaching students core subjects in their native languages.” *Id.* at 89–90.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *See* William N. Myhill, *The State of Public Education and the Needs of English Language Learners in the Era of “No Child Left Behind,”* 8 J. GENDER RACE & JUST. 393, 411–13 (2004).

⁴¹ *See* Lew, *supra* note 6, at 98.

instruction in their native language.⁴² A bilingual-bicultural program would naturally segregate students based on their English proficiency, which could also show segregation based on student race at a school.⁴³ For example, if a school has a large percentage of students of Chinese decent that have limited English proficiency, then placing all of those students in a bilingual education program can create an environment that appears segregated. There can also be situations where students stay in bilingual-bicultural classes for an indefinite period of time, because they were unable to obtain enough English proficiency to be placed in a mainstream classroom.⁴⁴

The bilingual teaching method gained popularity in the 1960s as schools tried to accommodate students with limited English proficiency.⁴⁵ One of the most common bilingual education method provides children with instruction in their native language, and transitions them into English instruction.⁴⁶ In the 1960s there were federally supported bilingual education programs that provided instruction in “an estimated 125 languages, from Spanish and Haitian Creole to Hmong, Khmer, Chamorro and Ulithian.”⁴⁷ This is very different from many of the English-only classroom policies that states have in place today.⁴⁸

School districts have also struggled with the implementation of bilingual education programs because of problems with the incorrect classification of native English speakers to bilingual programs.⁴⁹ In 1984, the Fillmore Unified School District (located in California) faced

⁴² *Id.*

⁴³ *See id.* at 90 (explaining how “[s]tudents in bilingual-bicultural classes are typically placed in classrooms with other students of the same race or ethnicity, where they spend their entire school day.”)

⁴⁴ Lew, *supra* note 6, at 90.

⁴⁵ *See* Myhill, *supra* note 40, at 400. *See also* Edward B. Fiske, *The Controversy Over Bilingual Education in America's Schools; One Language or Two?*, N.Y. TIMES (Nov. 10, 1985), <http://www.nytimes.com/1985/11/10/education/controversy-over-bilingual-education-america-s-schools-one-language-two.html?pagewanted=all>.

⁴⁶ *See* Myhill, *supra* note 40, at 395.

⁴⁷ Fiske, *supra* note 45.

⁴⁸ *See infra* Section II.C.ii.

⁴⁹ *See* Mary Ann Zehr, *Home-Language Surveys for ELLs Under Fire*, EDUC. WEEK (Feb. 24, 2010), https://www.edweek.org/ew/articles/2010/02/16/22homelanguage_ep.h29.html. The classification of a student is often based on how a parent answers a home-language survey.

a dispute regarding English-speaking students placed in a bilingual education program despite the parents preferring English education.⁵⁰ School officials were reluctant to isolate Spanish-speaking students, but most of the Spanish-speaking students were placed in bilingual education classes.⁵¹ Many of the parents involved in the dispute, argued that their children deserved to be educated in English.⁵² The parents argued that the students were also learning Spanish at home, and did not need to receive this language instruction in skills.⁵³ Providing students with bilingual education was a method used to support students “whose progress was limited by lack of knowledge of English.”⁵⁴

i. The Bilingual Education Act

The Bilingual Education Act of 1968 played a significant role in the education of ELLs for thirty-four years prior to the enactment of the No Child Left Behind Act.⁵⁵ The Bilingual Education Act was passed in 1968 and was the first “official federal recognition of the needs of students with limited English speaking ability.”⁵⁶ The intervention of the federal government in addressing the needs of ELLs had been justified due to the belief that state and local decision makers lack sufficient information on how to ELLs learn.⁵⁷ Even though a majority of educational experts believe that the federal government should play a role in bilingual education research and policy, there is no consensus over the proper scope of the federal role.⁵⁸

⁵⁰ See Fiske, *supra* note 45.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ The Bilingual Education Act was passed in 1968 and No Child Left Behind was passed in 2002. See Bilingual Education Act of 1968, Publ. L. No. 90-247, 81 Stat. 783, 816–19 (codified as amended at 20 U.S.C. §§ 3221–3262 (1982 & Supp. IV 1986)), amended by Bilingual Education Act of 1988, Publ. L. No. 100-297, 102 Stat. 274 (1988); No Child Left Behind Act of 2001, Pub. L. No. 107–110, 115 Stat. 1425.

⁵⁶ Gloria Stewner-Manzanres, *The Bilingual Education Act: Twenty Years Later*, NEW FOCUS: OCCASIONAL PAPERS IN BILINGUAL EDUC. NO. 6 (Nat’l Clearinghouse for Bilingual Educ.), Fall 1988.

⁵⁷ Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CAL. L. REV. 1249, 1249 (1988).

⁵⁸ *Id.* at 1250.

The focus of the Bilingual Education Act of 1968 was to provide school districts with support in establishing education programs for students with limited English speaking ability.⁵⁹ The Act mainly centered on the education of native Spanish speaking students.⁶⁰ Part of the bill's recommendations was teaching Spanish as a native language, then teaching English as a second language with lessons on Spanish student's native cultures.⁶¹ Even though the focus of the Act was to address the educational disparities faced by Spanish speaking students, its passage spurred the enactment of "37 other bills, which were merged into a single measure known as Title VII of the Elementary and Secondary Education Act."⁶² The provisions of the Bilingual Education Act provided competitive grants that could be used by school districts for "(1) resources for educational programs, (2) training for teachers and teacher aides, (3) development and dissemination of materials, and (4) parent involvement projects."⁶³ These criteria still leave room for school districts to be creative in deciding how they would continue to support ELLs.⁶⁴ The Act encouraged schools that receive funding to establish Transitional Bilingual Programs, and provide programs that are designed to support students achieving English proficiency.⁶⁵ While the Act only encouraged bilingual education, it recognized that there was a

⁵⁹ See Bilingual Education Act §§ 7002(a)(1), 7002(a)(3), 7002(a)(4); see also, Stewner-Manzanares, *supra* note 56, at 1 (stating that the bill for the Bilingual Education Act of 1968 was "proposed to provide assistance to school districts in establishing education programs specifically for LESA [limited English speaking ability] students").

⁶⁰ Stewner-Manzanares, *supra* note 56, at 1.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 2.

⁶⁴ *Id.*

⁶⁵ Gi Hyun An, *The Right to Bilingual Education: Providing Equal Educational Opportunity for Limited English Proficient Children in a Pluralist, Multicultural Society*, 11 GEO. IMMIGR. L.J. 133, 142–43 (1996); Bilingual Education Act of 1968, Publ. L. No. 90-247, 81 Stat. 783, 816–19 (codified as amended at 20 U.S.C. §§ 3221–3262 (1982 & Supp. IV 1986)), amended by Bilingual Education Act of 1988, Publ. L. No. 100-297, 102 Stat. 274 (1988).

need for these programs in education ELLs.⁶⁶ This Act was repealed by No Child Left Behind.⁶⁷

ii. Tension Between Advocates for English-Only and Bilingual Education Programs

Before it was repealed, the Bilingual Education Act was amended in 1984 and again in 1988 to give local school districts more discretion in educating ELLs, reflecting changes in cultural norms and attitude towards ELL.⁶⁸ In the late 1990s and early 2000s, voters in California, Arizona, and Massachusetts put bilingual education on the ballot.⁶⁹ All three states passed initiatives that “dramatically limited language use with regards to how ELL were educated,” ultimately impacting around 40% of the ELLs in the United States.⁷⁰

⁶⁶ Bilingual Education Act of 1968, Publ. L. No. 90-247, 81 Stat. 783, 816–19 (codified as amended at 20 U.S.C. §§ 3221–3262 (1982 & Supp. IV 1986)), amended by Bilingual Education Act of 1988, Publ. L. No. 100-297, 102 Stat. 274 (1988).

⁶⁷ Myhill, *supra* note 40, at 426.

⁶⁸ See Stewner-Manzaneres, *supra* note 56, at 5–9. Even within the first twenty years, “[t]he 1968 Bilingual Education Act ha[d] undergone many changes.” *Id.* at 9. These, and subsequent “changes in bilingual education legislation reflect an evolutional in public opinion.” *Id.*

⁶⁹ Schools and School Districts – English Language in Public Schools – Initiative Statute, 1998 CAL. LEG. SERV. PROP. 227 (West), approved election June 2, 1998, (codified at Cal.Ed.Code § 300 (West 1998)), amended by S.B. 1174, 2014 Leg., Sess. (Cal. 2014) (enacted 2016); An Initiative Measure, 2000 Prop. 203, approved election Nov. 7, 2000, (codified at ARIZ. REV. STAT. § 15- 751 (2000)); Schools and School Districts–Bilingual Education, 2002 Mass. Legis. Serv. Ch. 386 (H.B. 4839) (West) (codified as amended at MASS. GEN. LAWS. ch. 71A § 1). Don Terry, *California Schools Toddle as Bilingualism Ends*, N.Y. TIMES (Aug. 8 1998), <http://www.nytimes.com/1998/08/08/us/california-schools-toddle-as-bilingualism-ends.html> (describing the passage of Proposition 227 in 1998, and immediate impact); Jacques Steinberg, *The 2000 Campaign: Education Initiatives; Frustrated Parents Hope Their Votes Will Change Schools’ Ways*, N.Y. TIMES (Oct. 10, 2000), <http://www.nytimes.com/2000/10/10/us/2000-campaign-education-initiatives-frustrated-parents-hope-their-votes-will.html> (discussing several education initiatives in the 2000 election, including Arizona Measure 203); Jennifer Medina, *Bilingual Education on the Ballot in Two States*, N.Y. TIMES (Oct. 9, 2002), <http://www.nytimes.com/2002/10/09/us/bilingual-education-on-ballot-in-two-states.html> (describing the ballot measures in Massachusetts and Colorado in 2002).

⁷⁰ See Medina, *supra* note 69; Ester J. de Jong et al., *Bilingual Education Within the Context of English-Only Policies: Three Districts’ Responses to Question 2 in*

Compared to California and Arizona, Massachusetts had a relatively small population of ELLs, and had originally passed one of the first laws in the nation to require bilingual education, rather than simply encouraging this approach.⁷¹ In 1971 the Massachusetts legislature passed Chapter 71A, in response to a two-year advocacy effort by grass root organizations to improve ELL services.⁷² Chapter 71A mandated a Transitional Bilingual Education (TBE) programs that required instruction in the student's native language and English in all subject areas.⁷³ For the next thirty years, Chapter 71A attracted critics, many arguing that the inconsistent demographics within the student body students the Act's mandatory Transitional Bilingual Education programs impractical.⁷⁴ On November 5, 2002, Question 2 (ballot initiative) passed in Massachusetts,⁷⁵ which removed bilingual education programs and required "sheltered" English immersion programs.⁷⁶ However, on November 22, 2017, Governor Charlie Baker signed An Act Relative to Language Opportunity for Our Kids (LOOK) into law, a movement back towards earlier bilingual policy. While, "[t]he new law does not overturn the existing requirement that schools teach all students in English as rapidly as possible . . . it gives school districts flexibility to choose a research-based teaching method other than Sheltered English Immersion to help them develop their English language skills."⁷⁷

California has had a similar inconsistent path.⁷⁸ In 1998, California voters passed Proposition 227 which was widely interpreted to prohibit

Massachusetts, 19 EDUC. POL'Y 595, 596 (2005) (discussing the history of Chapter 71A in Massachusetts).

⁷¹ See de Jong et al., *supra* note 70, at 396.

⁷² *Id.*

⁷³ *Id.* at 596–97.

⁷⁴ *Id.* at 598.

⁷⁵ *Id.*

⁷⁶ See William Francis Galvin, THE OFFICIAL MASS. INFO. FOR VOTERS: THE 2002 BALLOT QUESTIONS (2002), <http://www.sec.state.ma.us/ele/elepdf/ifv02.pdf>.

⁷⁷ Press Release, Office of Governor Charlie Baker and Lt. Governor Karyn Polito, Governor Baker Signs Bipartisan Legislation to Provide Flexibility to School Districts Teaching English Language Learners (Nov. 22, 2017), <https://www.mass.gov/news/governor-baker-signs-bipartisan-legislation-to-provide-flexibility-to-school-districts>.

⁷⁸ Lillian Mongeau, *Battle of Bilingual Education Once Again Brewing in California*, THE HECHINGER REPORT (Apr. 18, 2016),

teaching foreign languages in schools.⁷⁹ Many schools abandoned their bilingual education programs or required parents to sign waivers for their children to participate.⁸⁰ However, bilingual education advocates made another push for programs and Proposition 58, the Multilingual Education Act, was approved by 73.5% of California voters on November 8, 2016.⁸¹ This Proposition allows California public schools to have more flexibility in their language acquisition programs, and repeals Proposition 227's English-only requirement.⁸² This Act allows students to learn English through programs outside of mainstream English immersion classes, and allows school districts to design programs that meet the needs of their student population.⁸³ It also allows a more streamlined process for bilingual education, where "schools [are] free to offer recommendations to parents on bilingual education, and parents won't be required to sign a waiver form."⁸⁴ The law went into effect on July 1, 2017, and demonstrates a shift in California's approach towards bilingual education.⁸⁵

Before Proposition 58, there was a marked disparity in the performance of ELLs in California schools.⁸⁶ The San Francisco school district, as a result of *Lau v. Nichols*, has a "long-term investment in English learner programs and bilingual that is typically far ahead of other districts."⁸⁷ The consent decree from the lawsuit pushed San Francisco to ensure that ELLs were able to overcome language barriers

<http://www.pbs.org/newshour/rundown/battle-of-bilingual-education-once-again-brewing-in-california/>.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Ashley Hopkinson, *A New Era for Bilingual Education Explaining California's Proposition 58*, EDSOURCE (Jan. 6, 2017), <https://edsources.org/2017/a-new-era-for-bilingual-education-explaining-californias-proposition-58/574852>.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Craig Clough, *LAUSD's English Learners Fall Far Behind Other Large California Districts. Will Prop. 58 come to the rescue?*, L.A. SCH. REP. (Nov. 10, 2016), <http://laschoolreport.com/lausds-english-learners-fall-far-behind-other-large-california-districts-will-prop-58-come-to-the-rescue/>.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

and access the curriculum being taught.⁸⁸ In order to help support San Francisco's large population of ELLs, the city has provided dual language and bilingual programs. As of 2016, approximately "30 percent of San Francisco's ELLs are enrolled in bilingual or dual language programs, compared to L.A. Unified, which has under 2 percent of ELLs enrolled."⁸⁹ About 11% of San Diego's ELLs are enrolled in dual language or bilingual programs.⁹⁰

II. MARYLAND'S ABILITY TO MEET THE NEEDS OF AN INCREASINGLY DIVERSE ELL POPULATION

A. *The Needs of Bilingual Students*

When teaching literacy to students, it is important that they are able to demonstrate grade level proficiency in listening, speaking, reading, and writing skills.⁹¹ While it can be challenging, it is critical for ELLs to meet these goals.⁹² To help ELLs, achieve literacy the instruction they are receiving must integrate listening, speaking, reading, and writing across various academic content areas.⁹³ The students should also be supported in developing their oral language skills.⁹⁴ In order to help build a strong foundation in literacy it is imperative that they receive explicit instruction in phonemic awareness, phonics, vocabulary, comprehension, and fluency.⁹⁵ Separating students who are designated as ELLs does not satisfy providing differentiated instruction. ELL students need to be provided instruction that is "differentiated, consistent with students' current performance

⁸⁸ Modified Consent Decree, *Lau v. S.F. Unified Sch. Dist.*, No. C70-0627 (N.D. Cal., June 24, 2015) (4:70-cv-00627-CW, ECF No. 199), <https://www.justice.gov/opa/file/482461/download>.

⁸⁹ Clough, *supra* note 84.

⁹⁰ *Id.*

⁹¹ *Elementary Literacy*, THE EDUC. ALL. BROWN UNIV., <https://www.brown.edu/academics/education-alliance/teaching-diverse-learners/about> (last visited Nov. 25, 2017).

⁹² *Id.*

⁹³ Alba A. Ortiz & María E. Fránquiz, *Coeditors' Introduction: Essential Elements of Comprehensive Literacy Frameworks for Emergent Bilinguals*, 38 BILINGUAL RES. J. 249, 249 (2015).

⁹⁴ *Id.*

⁹⁵ *Id.*

levels in their native languages and in English.”⁹⁶ Instruction for ELL students should be based on instructional strategies that are research-based and have been credited by Emergent Bilinguals.⁹⁷

Student motivation can be a key factor when trying to engage students in literacy activities.⁹⁸ Students are more likely to be engaged when the material allows them to make connections to their own background experiences, and involves topics that they can relate to.⁹⁹ Developing intrinsic motivation is crucial, because this allows students to meet high academic and accountability standards.¹⁰⁰ This is an important consideration when determining whether current policies are providing students with the skills they need to access the same type of educational instruction as their peers.

i. Needs of Bilingual Students in the Baltimore Region

The Baltimore region has seen an increase of immigrant students in schools because of the influx of refugees seeking support.¹⁰¹ Currently, the “Baltimore region scrambles to educate the flow of refugees from war-torn countries and undocumented youths from Central America.”¹⁰² The needs of this group of language learners may be significantly different from other influx of immigrants because the students are more academically limited and carry trauma from fleeing war.¹⁰³

Owings Mills High School in Owings Mills, Maryland has received a large population of immigrant refugees from Central America, and the largest percentage of immigrant students in the country.¹⁰⁴ This influx of immigrants has significantly changed the graduation rate for immigrants at Owings Mills from 64% to 11% over

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Ortiz & Fránquiz, *supra* note 93, at 249–50.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 250.

¹⁰¹ Liz Bowie, *A Hub of Immigrants, Owings Mills High Looks for New Education Models*, BALT. SUN (June 8, 2016), <http://www.baltimoresun.com/news/maryland/education/bs-md-co-owings-mills-immigrants-20160526-story.html>.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

the span of two years.¹⁰⁵ About 30% of the school is bilingual and the students come from thirty-six different countries, and speak twenty-four different languages.¹⁰⁶ This creates a challenging environment to provide ESL instruction because the students may have varying skill sets.¹⁰⁷

The county and state graduation rate for immigrants has also decreased.¹⁰⁸ The large changes in student population and student need have led to the creation of a “state task force [that] is grappling with how to improve the academic achievement of these students, who are performing worse than any other group in the state, including special education students from disadvantaged backgrounds.”¹⁰⁹ Dallas Dance, Superintendent of Baltimore County Schools has considered creating an International High School within Owings Mills.¹¹⁰ One main goal is to improve the academic achievement gains of English learners in the classroom.¹¹¹ One of the main concerns is how to provide English learners with access to quality core instruction in subjects outside of English when students have yet to gain English proficiency.¹¹² For example, how would a high school teach biology to students when most of the terms are foreign to them? This raises significant concern when evaluating whether schools in Maryland are still able to provide adequate student instruction that meets the federal mandate of providing opportunities to overcome language barriers and create opportunities for participation in the education system.¹¹³

Another concern for ELLs is declining graduation rates.¹¹⁴ In 2011, the U.S. Department of Education released standardized graduation rate data, which demonstrated that states are struggling with ELLs.¹¹⁵ The report showed that “twenty-four of the 47 reporting states

¹⁰⁵ *Id.*

¹⁰⁶ Bowie, *supra* note 101.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Bowie, *supra* note 101.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Dylan Scott, *Graduation Data Shows States Struggle with English Learners*, GOVERNING THE STATES AND LOCALITIES (Dec. 6, 2012), <http://www.governing.com/blogs/view/gov-graduation-data-shows-states-struggle-with-English-learners.html>.

¹¹⁵ *Id.*

had a graduation rate for students with limited English proficiency that was 60 percent or lower.”¹¹⁶ The disparities shown in the data across states indicates that policies within states could have an influence on whether ELLs are succeeding in the classroom.¹¹⁷ This is a concern for ELL students in Maryland, because in 2014, the graduation rate for ELLs decreased from 57% to 54%.¹¹⁸ It was also indicated that ELL students spend an additional year in high school.¹¹⁹ The five-year graduation rate is higher for ELL students in Maryland, with about 67% of the students graduating.¹²⁰

In order to accommodate the growing needs of ELL students, a task force has suggested creating an international high school.¹²¹ Another option is to create a “school for immigrant students that keeps them out of the mainstream high school classes and provides more academic support, with a curriculum geared to immigrants learning English.”¹²² This has been implemented in certain schools in New York City and Houston, and there are currently two international schools that have recently opened in Prince George’s County, Maryland.¹²³ The Prince George’s County schools “mirror schools across the nation that have successfully gotten high percentages of immigrant students to graduate.”¹²⁴

New York City moved to embrace the diverse needs of their students by increasing the number of multilingual programs across New York City.¹²⁵ For the 2016-2017 school year, the NYC Department of Education created an additional “29 Dual Language and nine Transitional Bilingual Educational programs, which will be implemented across 36 schools and serve more than 1,200 students

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Press Release, Bill Reinhard, Maryland High School Graduation Rate Hits Record High (Jan. 27, 2015), http://archives.marylandpublicschools.org/press/01_27_2015.html.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See Bowie, *supra* note 101.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Press Release, N.Y.C. Dep’t of Educ., Chancellor Fariña Announces 38 New Bilingual Programs (Apr. 4, 2016), <http://schools.nyc.gov/Offices/mediarelations/NewsandSpeeches/2015-2016/Chancellor+Farina+Announces+38+New+Bilingual+Programs.htm>.

across the City.”¹²⁶ Funding for the program comes from the Federal Title III Language Instruction for English Language Learners, and the funds are provided to the schools based on which aspects of the program the school implements.¹²⁷ For example, there is a \$5,000 grant for programs that create classroom libraries in a target language other than English.¹²⁸ The implementation of these Dual Language classes addresses the segregation concerns that arise from traditional bilingual bi-cultural classes, because 50% of the students are ELLs and 50% of the students are English-proficient students.¹²⁹ This allows both groups of students to receive targeted support in English as well as a target language.¹³⁰ The goal in New York City for these types of programs is to ensure that ELL students achieve equal educational opportunities.¹³¹

The bilingual climate in Maryland will continue to shift with the influx of Syrian refugees.¹³² However, this is subject to change. President Trump has stated that “supporting the humanitarian needs of displaced Syrian citizens as close to their home country as possible is the best way to help most people.”¹³³ Of the 10,000 refugees accepted

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Press Release, N.Y.C. Dep’t of Educ., Chancellor Fariña Announces 38 New Bilingual Programs (Apr. 4, 2016), <http://schools.nyc.gov/Offices/mediarelations/NewsandSpeeches/2015-2016/Chancellor+Farina+Announces+38+New+Bilingual+Programs.htm>.

¹³¹ *Id.*

¹³² Scott Dance, *As U.S. Accepts More Syrian Refugees, Baltimore Resettlement Center Plans for Influx*, BALT. SUN (Sept. 10, 2015), <http://www.baltimoresun.com/news/maryland/bs-md-syrian-refugees-20150910-story.html>; *The IRC in Baltimore, MD*, INT’L RESCUE COMM., <https://www.rescue.org/united-states/baltimore-md#how-does-the-irc-help-refugees-in-baltimore> (last visited Dec. 14, 2017). Under the Trump Administration, this is subject to change. *See, e.g.*, Peter Baker & Adam Liptak, *U.S. Resumes Taking in Refugees, but 11 Countries Face More Review*, N.Y. TIMES (Oct. 24, 2017), <https://www.nytimes.com/2017/10/24/us/politics/trump-lifts-refugee-suspension.html>; Libby Solomon, *Building New Lives: Syrian Refugees Find Support, Friendship from Churches*, BALT. SUN (Nov. 8, 2017, 9:50 AM), <http://www.baltimoresun.com/news/maryland/baltimore-county/catonville/ph-ca-at-syrian-cover-1108-story.html>.

¹³³ Alex Brandon, *Trump Says Keeping Syrian Refugees In Region Is ‘Best Way To Help Most People,’* NPR (July 25, 2017, 6:37 PM), <http://www.npr.org/sections/thetwo-way/2017/07/25/539318758/trump-says-keeping-syrian-refugees-in-region-is-best-way-to-help-most-people>.

for resettlement, some percentage will be school age children that will need language accommodations in the classroom.¹³⁴ Similar, to the approach of New York City, Maryland may have to think of educational programs to ensure that students are receiving access to equal educational opportunities as their mainstream peers.

B. Education of ELLs in Maryland

The Code of Maryland Regulations requires that each local school system establish a language development program, and it provides the local school systems with discretion in the development of these programs.¹³⁵ It requires that the programs contain the following twelve components: goals, student identification, student placement, curriculum and instruction, certified teachers, materials of instruction, facilities, program delivery models, parent and community involvement, support services, exit criteria, and a program evaluation.¹³⁶ ELL students are required to be placed in an English language development program and are evaluated each year on a State approved summative English language proficiency assessment in order to determine their ELL status.¹³⁷ The English language development program is also required to meet standards in mathematics, social studies, science and social communication.¹³⁸

The Maryland State Department of Education has retroactively raised the standards for English proficiency.¹³⁹ This step was taken to ensure that students were prepared academically, but it has resulted in more students staying in ESOL (English as a second language) programs.¹⁴⁰ Currently there are over 68,000 students learning English statewide.¹⁴¹ Baltimore County would have had 850 students qualified

¹³⁴ Dance, *supra* note 132 (“[R]efugees will be provided . . . classes in English and American culture . . .”).

¹³⁵ MD. CODE REGS. 13A.05.07.03(A) (2017).

¹³⁶ MD. CODE REGS. 13A.05.07.03(B) (2017).

¹³⁷ MD. CODE REGS. 13A.05.07.03(C) (2017).

¹³⁸ MD. CODE REGS. 13A.05.07.03(D) (2017).

¹³⁹ Liz Bowie, *New Academic Standards Will Keep More Immigrant Students in English Proficiency Classes Next Year*, BALT. SUN (June 26, 2017), <http://www.baltimoresun.com/news/maryland/education/k-12/bs-md-immigrant-school-test-20170623-story.html>.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

to move out of their ESOL program, however with the changes in proficiency standards only 410 students will be moved out of the program for the upcoming school year.¹⁴²

C. Current Monitoring of School Compliance

The Department of Education and the Department of Justice work to monitor noncompliance of schools in accommodating ELLs.¹⁴³ These departments have identified several areas that have resulted in noncompliance by school districts.¹⁴⁴ Some of the school districts' obligations have been to timely identify ELL students in need of assistance, to provide the students with language assistance programs that are based off educational data, to appropriate staff, and to support the language assistance programs, ensuring that ELL students have opportunities to take part in curricular and extracurricular activities.¹⁴⁵ These are requirements that the departments use to check for compliance when considering whether schools are accommodating the needs of ELLs.¹⁴⁶ By knowing where some schools are noncompliant, all schools can have a better understanding of the main services they should provide for their ELL students.

III. RECOMMENDATIONS AND CONCLUSION

As Maryland tries to improve standards so that ELL students are academically prepared,¹⁴⁷ Maryland should consider the benefits of incentivizing bilingual education programs for its students. Several studies indicate that there is a small to moderate benefit to bilingual classrooms.¹⁴⁸ Remedial English programs have difficulty satisfying the second prong of the *Castaneda* test, which inquires whether the

¹⁴² *Id.*

¹⁴³ U.S. Dep't of Just. C.R. Div. and U.S. Dep't of Educ. Off. for C.R., Dear Colleague Letter 1 (Jan. 7, 2015), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf>.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 8–9.

¹⁴⁷ *Id.*

¹⁴⁸ Ilana M. Umasnsk, *Reclassification Patterns Among Latino English Learner Students in Bilingual, Dual Immersion, and English Immersion Classrooms*, 51 AM. EDUC. RES. J. 879, 880 (2014).

programs implemented by the school system are reasonably calculated to effectively implement the theory followed by the school.¹⁴⁹

In Maryland, local school systems establish their own English language development programs for ELLs.¹⁵⁰ However, with the large influx of immigrant populations in communities such as Baltimore,¹⁵¹ it is important to consider the effectiveness of bilingual education, as well as the impact of English-only programs. Giving parents more flexibility to decide whether their children need bilingual education could help local school systems move away from English-only instruction. Bilingual education programs could help serve the diverse needs of Maryland's ELL students because English and native language proficiency is necessary to help students maximize academic success.¹⁵² Maryland should provide support and funding for these programs to allow all students to reach their full academic potential.

¹⁴⁹ Marilyn Farguharson, *Proposition 227: A Burning Issue for California's Bilingual Students*, 8 B.U. PUB. INT. L.J. 333, 344 (1999).

¹⁵⁰ MD. CODE REGS. 13A.05.07.03(A) (2017).

¹⁵¹ Dance, *supra* note 132.

¹⁵² Myhill, *supra* note 40, at 404–05.