

Overstated Optimism: Arizona's Structured English Immersion Program

Under *Horne v. Flores*

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Abstract

This article is an analysis of the educational implications of the Supreme Court (USSC) decision in *Horne v. Flores* (2009). The USSC remanded the Arizona case to the lower court, requiring a rehearing of petitioners' request for relief from the court's oversight of AZ's "structured English immersion" (SEI) program mandated under HB2064. The article discusses flaws in the SEI program's theoretical and research base. The author refutes claims that SEI will be effective in teaching English language or in supporting ELLs' academic achievement to reach "parity of participation" with grade-level English proficient peers as required under federal court precedents. The article argues that ballot initiative P-203, which established the one-year SEI program model, is a violation of the Equal Educational Opportunities Act. Findings of the Commission on Civil Rights (1975) supported the effectiveness of bilingual bicultural education and cautioned against ESL pullout programs such as Arizona's SEI program.

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On June 25, 2009 the Supreme Court rendered a decision in the case of *Horne v. Flores*, remanding the class action suit against the state of Arizona's English Language Learner (ELL) law (HB2064) back to the District Court. The Arizona Department of Education under Thomas Horne, State Superintendent of Public Instruction, was denied injunctive relief against the District Court's penalties and continued oversight of their programs and funding for educating ELL under P-203, which was passed in 2000. At issue was whether the State Board of Education's plans for implementing a "Sheltered English Immersion" (SEI) uniformly in school districts throughout Arizona for the 14% of the population designed as ELL satisfied the requirements for Arizona to fulfill its statutory obligations to educate ELL under existing federal law (Arizona Department of Education, 2010).

The Supreme Court ruled that the lower court did not engage in the proper analysis of the state's "changed circumstances" and had ruled incorrectly that Arizona had not achieved EEOA-Compliant ELL programming "in ways other than through increased incremental funding." The appellant Horne et al. argued in part that since Arizona had moved from "bilingual education" to a one-year SEI model that they claimed is "significantly more effective," therefore the plan for the SEI program warranted the state relief from the federal courts' oversight of ELL education. In the dissenting opinion, Justice Breyer argued that Arizona had not cured the resource-linked deficiencies that caused the State Board of Education to be out of compliance. The dissenting

justices concluded that the District Court had ruled the projections of success for the newly implemented SEI program were “overly optimistic” and concurred with the findings of the lower court that injunctive relief was “premature.”

The purpose of this article is to examine the implications of decision in *Horne v. Flores* in terms of the design and implementation of theoretical and research-based models for educating language minority students. This analysis is warranted because for decades the standards applied to by the federal courts to language education program fell under precedent set in the Supreme Court decision in *Lau v. Nichols* (1974) and subsequently, the Texas District Court’s ruling in *Castañeda v. Pickard* (1981). The author presents a threefold argument against the majority ruling in *Horne v. Flores* and in support of the dissenting opinion based on an analysis of the consensus of research and scholarly opinion regarding the effectiveness of models for educating language minority students:

1) Rather than reflecting a generally accepted definition of “structured English immersion” and research regarding its effectiveness, the AZ SEI model is, in reality, an extreme version of pull-out English as a second language (ESL) instruction. This is a model of instruction or program that the Commission on Civil Rights (1975) cautioned against because many of the program’s features are counterproductive and detrimental to the English language learning and long-term academic achievement of ELL students.

2) The Arizona SEI model is not research based because the model does not meet the standards for supporting research evidence of program effectiveness recognized in the academic communities of language minority education experts. The ELL Task Force’s published research base does not address the essential elements of program design and instruction that must be in place to assure academic progress for ELL throughout the K-12 grades. In fact, the SEI model

contradicts the large and credible body of research evidence on effective instruction and school-level practices that produce high levels of academic achievement for ELL.

3) Horne et al. claim that “structured English immersion” is superior to bilingual education in educating ELL. These claims are not only fallacious, but also irrelevant to the Petitioner’s arguments allegedly supporting the effectiveness of the SEI program model. Furthermore, the federal courts must consider how the denial or restriction of bilingual education impacts Arizona’s compliance with the Equal Educational Opportunities Act, the No Child Left Behind law, and the laws and policies designed to guarantee protection of the civil rights of language minority students under federal court precedents.

Historical Context

In late 1974, Congress passed the Equal Educational Opportunity Act (EEOA) that enacted into civil rights law the provisions set forth in the *Lau* decision. EEOA Title 20, Chapter 39 states the following: “*No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by... (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.*” In the *Lau* case, the Supreme Court reaffirmed the 1970 Memorandum that prohibited denial of access and participation in an educational program due to inability to speak or understand English under civil rights law. *Lau* was a class action suit brought by Chinese speaking students in San Francisco against the school district superintendent (Nichols). The decision stated that “There is no equality of treatment by providing students with the same facilities, textbooks, teachers and curriculum, for students who do not understand English are effectively foreclosed from any meaningful education.” Further, the Supreme Court ruled that “*Basic English skills are at the very core of what public schools*

teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education." The *Lau* decision established school districts' obligations to provide programs for English Language Learners to acquire proficiency in English, but also to eventually catch up and reach "parity" with their native-English peers.

The Supreme Court's decision in *Lau* was elaborated through the so-called "*Lau* Remedies" that specified that schools could use either a "simultaneous" or "sequential" model of language and academic content instruction to remediate any deficiencies in learning resulting from students' lack of English proficiency as they moved up through the grades. The intent of the law was that students would be entitled to specialized instructional services to address their academic achievement gap until a designated academic as well as English language proficiency levels were attained. Over several decades following the first Bilingual Education Act in 1968 and other relevant legislation to clarify and expand on the rights of language minority students, several federal court decisions established criteria for judging compliance with the law regarding programs that served language minority students.

Castañeda v. Pickard (1981) set the standard for the courts in examining programs for limited English proficient (LEP) students. (1) A pedagogically sound plan for limited English proficient students: (2) Sufficient qualified staff to implement the plan, including hiring of new staff and providing relevant professional development for current staff; and (3) A system established to evaluate the program. *Castañeda* did not require bilingual education programs to meet these standards. It required only that "appropriate action to overcome language barriers" be taken through well implemented programs. The three-pronged *Castañeda* "test" became the standard for judging school districts' good faith efforts to comply with federal law.

The *Lau* decision and the *Castañeda* test are important in considering the ruling in *Horne v. Flores* and the nature of the deliberations the District Court must undertake upon remand of the case. Specifically, through *Castañeda*, the courts were empowered to judge the pedagogical soundness of programs serving ELL. The standard used for these judgments became the opinions of recognized experts in the field, who could attest to a program's likelihood for effectiveness, even in the case of programs deemed to be experimental in nature. However, the *Castañeda* court also recognized that in order to be effective, a program must have the necessary human and material resources to be properly and fully implemented according to its pedagogical design. The third prong of the *Castañeda* test affirmed that programs must demonstrate their effectiveness through systematic evaluation and by implication, modified or redesigned in response to evaluation data. The cogency and thoroughness of the *Castañeda* test established a coherence and indivisible set of criteria to address concerns regarding program effectiveness among school administrators, educators and the communities that depend upon these services to ensure that language minority students are not deprived of equal educational opportunity through school districts' malfeasance or even, benign neglect.

The Voters' "Policy Preference"

In 1998 the first of the "Unz initiatives" put to voters in five states was passed in California as Proposition 227 (P-227). The ballot initiatives were identified with their author and sponsor, Silicon Valley software entrepreneur Ron Unz. Before the 1998-99 school year, The law was intended to severely restrict bilingual education, which was mandated in CA as the program model to address the needs of its 1.4 million ELL, although only 30% of those students were enrolled in a bilingual program. The law required all ELL students to be placed in a program called structured English immersion (SEI) for a period normally intended not to exceed

one year to acquire “a working knowledge of English” before being placed in an “English language mainstream classroom.”

A petition for an injunction against implementation of P-227 was filed by several civil rights groups in federal district court in San Francisco (Mexican American Legal Defense and Education Fund, et al., 1998) in the case of *Valeria G. v. Wilson*. Opponents of P-227 claimed that the one-year immersion program would not overcome language barriers to provide language minority students equal access to the core curriculum and as required by federal civil rights law. In their court brief, the Mexican American Legal Defense and Education Fund (1998) alleged that P-227 violated the Equal Educational Opportunities Act. MALDEF claimed that P-227 failed to provide the requisite services to limited English proficient (LEP) students through an adequate instructional theory, plan of implementation and evaluative systems. In their defense against the injunction, proponents of P-227 pointed to successful immersion programs in Canada, Germany and Israel.

On July 15, 1998 Judge Charles Legge of U.S. District Court U.S. denied the injunction filed by civil rights organizations against enforcement of P-227. The court declared that "structured English immersion" was permissible as a plan for teaching limited English proficient students under federal law, based on the previous ruling in the *Castañeda v. Pickard*. The Valeria G. decision affirmed that P-227 met the standard for determining what constituted "appropriate action" for state education regulatory entities and school districts to address the educational rights of students learning English. In denying the injunction, the *Valeria G.* court ruled that P-227 was not a violation of the EEOA because conceivably, the state and local school district could implement the law in such a way as to not impede students' academic achievement. The court ruled that CA voters had expressed their “policy preference” for the SEI model and

English-only instruction through the initiative process. Further, the court said, “[B]ecause the EEOA does not require school districts to provide bilingual programs, the near elimination of bilingual education by Proposition 227 does not in and of itself violate Section 1703 (f).” The court reasoned that because bilingual education was not required under EEOA, its elimination did not, in and of itself, constitute a violation of the law protecting the equal educational opportunities of California’s ELL students. Furthermore, the District Court in *Valeria G. v. Wilson* ruled that the structured English immersion program was based on delivery of English language and content instruction that was "sequential" rather than "simultaneous" teaching of academic content. The assumption was that a focus on teaching English first and then providing intensive remedial instruction, language minority student would have equitable access to the curriculum.

Arizona’s Proposition 203

In 2000, Arizona voters approved P-203 passed with almost identical provisions to CA P-227, except for much more restrictive policies to restrict parents’ abilities to secure waivers for bilingual instruction. In fact, P-203 required that ELL already be proficient in English before they could be eligible for a waiver for instruction in their native language, while leaving open the possibility for native English speaking students who test on grade level on standardized tests to receive bilingual instruction. In other words, ELL students could only apply to receive the benefits of a bilingual education if they had already overcome the language barrier due to a lack of English proficiency that bilingual instruction is designed to ameliorate. For six years following passage of P-203, Arizona’s school districts attempted to interpret the law’s requirements, with very little guidance or articulation of program models or structures from the State Board of Education (Wright & Choi, 2006). Then in 2006 the legislature established an

ELL Task Force charged with defining models for the mandated SEI program and put in force a number of administrative structures to oversee compliance with the newly promulgated policies and requirements. This ELL program and the HB2064 law that established the program were the subject of much of the ruling in the Supreme Court's majority ruling and dissenting opinion in *Horne v. Flores* in 2009.

Defining Sheltered English Immersion

The question of how program models are defined is more than just an academic exercise or debate among academics and educators. An essential element in determining ELL program effectiveness is the level of congruence between the theoretical foundations of the selected program model and the features of the program (Mora, Wink & Wink, 2001). Classroom teachers must also have clarity about language education programs' goals and objectives, as well as the scope and sequence of content and skills to be taught in the curriculum to enable them to select, design and implement appropriate teaching strategies and learning activities.

In a special meeting convened by the Arizona State Legislature (March 12, 2008), members of ELL Task Force stated that the SEI model design as a response to voters' mandate in P-203 (P-203), which although delayed in being implemented following the initiative's passage, was finally coming into compliance. It is farfetched to claim that Arizona voters had a clearer and more precise definition in mind when they cast their votes than the actual authors of the ballot initiative. In fact, Arizona's voters had no input into the SEI program mandate embedded in P-203. The Arizona ballot initiative was, for all intents and purposes, the same language and requirements that were contained in P-227 passed in California in 1998 (Mora, 2002). P-227 was co-authored by its two sponsors, computer software businessman, Ron Unz from San Francisco and Gloria Matta Tuchman, a first-grade teacher and school board member from Santa Ana. Ron

Unz was also a candidate for nomination to run for governor of California on the Republican ticket in 1994. Neither Mr. Unz nor Ms. Tuchman is recognized as experts or scholars in the language-minority education academic and research communities (Crawford, 2004).

Although Arizona's P-203 states that the definition of SEI in the law is the "standard" definition of SEI in the education community, this is not the case. The definition of "sheltered English immersion" and "structured English immersion" bears very little resemblance to the term foreign and second language educators use to describe bilingual programs that use the immersion model. This term is used in Canada and Europe to describe a bilingual education (dual language) program of three to six years duration in which parents voluntarily enroll their children to become proficient in a foreign language. The program model requires highly trained and skilled bilingual teachers to teach children who are adding a second language to gain the advantages of bilingualism as an educational and economic asset (Cummins, 1995).

A consultant to the Arizona State Board of Education, Kevin Clark (2009) also claimed that the term "structured English immersion" was first used to describe programs that employed instructional features of French immersion programs in Canada. However, Swain and Johnson (1997) warned against unwarranted extensions of the term "immersion" to English-only education that leads to subtractive bilingualism in the academic domain. In their comprehensive analysis of the research on immersion programs worldwide, they place immersion in a historical context as a category within bilingual education. The authors outline the strong research base that describes the differences in outcomes of true immersion programs according to implementation and context variables in different situations and settings. Such careful attention to accurate descriptions of program goals and objectives and factors that impact effective

implementation with fidelity to the terminology used by linguistic educators has been absent in the political arena (August & Hakuta, 1997). Johnson and Swain (1997) state the following:

"Given the core features we have proposed, we would argue that there are some programs labeled "immersion" that have overextended the use of this term to the point at which a discussion of common issues and problems becomes difficult, if not impossible. A good example of inappropriate over-extension is the labeling of English-only programs for Spanish-speaking minorities in the United States as "immersion education." Such English-only education leads to replacive or subtractive bilingualism in the academic domain, while the wide use of the L2 in public domains leads to the development of interpersonal and social proficiency that immersion students do not have the opportunity to acquire." (p. 12)

There is no common agreement or consensus among experts in language education about the precise meaning of the terms "sheltered English immersion" and "structured English immersion." The definition of SEI contained in P-227 and P-203 reflect the ambiguity and lack of clarity regarding the nature and design of SEI. The highly ambiguous definition of SEI that did not conform to the understanding of the term among academics and educators puzzled the education community who were left to figure out what the authors of the ballot initiatives had in mind in their use of terms sheltered or structured English immersion. Is SEI a language acquisition process, a program, a technique, a method, a curriculum, a presentation or a class?

In 2006, the Arizona legislature articulated structural and procedural requirements for the SEI program to guide the work and product of the ELL Task Force. In their *amicus curiae* brief to the Supreme Court in *Horne v. Flores* from the American Unity Legal Defense Fund et al. (2009) claimed that Arizona's Structured English Immersion (SEI) program was appropriately implemented because it is a legislative response to the "voters' decision" in passing P-203.

Clark (2009) described these five elements as comprising the framework for Arizona's SEI program: (1) The English language as the "main content" of the program, with academic content having a "supporting but subordinate, role"; 2) English as the only language used in instruction; 3) use of English as a foreign language instructional methods; 4) focus on students' learning discrete English grammar skills; and 5) Rigorous time lines for "exit" from the program (Clark, 2009). Four of the five elements that Clark describes as forming the "framework" for Arizona's SEI model are characteristics of pull-out English as a second language programs, with the exception of "exit" requirements since pull-out ESL programs are viewed as supplemental language services that continue until students' no longer require or benefit from being segregated from their age and grade level peers for specialized English language instruction (Commission on Civil Rights, 1975). Consequently, a mislabeling of commonly accepted program descriptors and theoretical models for bilingual and second language education programs has occurred, without a coherent and relevant research base that supports the actual theoretical model that is mandated for implementation uniformly throughout schools in Arizona.

The ELL Task Force compiled a collection of research studies that purported to provide evidence of the effectiveness of "structured English immersion" and "English language development" when in actuality, the program they mandated in Arizona is a pull-out ESL program based on a discrete skills grammar syllabus (McKay, 1980). The discrete points of grammar are further articulated and defined in great detail and categorized by grade levels and language proficiency levels in the Arizona English Language Proficiency Standards working draft and in the Discrete Skills Inventory (2010). However, school district personnel explained that these standards and the inventory are "not a curriculum" and do not provide teachers with a plan of instruction to implement in the classroom (Arizona State Legislature, 2008, March 12.)

The Arizona SEI model calls for “overt teaching” of English grammar for one quarter of the total instructional time students spend in SEI, where they are grouped across three grade level spans according to their level of English proficiency on the AZELLA proficiency test (Clark, 2009). However, the research base that the Task Force claims to support the effectiveness of this model does not articulate any theoretical or empirical linkages through relevant research studies between students’ explicit knowledge of English grammar structures and rules and their subsequent academic achievement outcomes. The Commission on Civil Rights (1975) described the draw-backs and limitations of the ESL pull-out model for educating ELL, including the lack of reinforcement and integration between ESL and other subject matter instruction.

Where is the academic content?

It is imperative to keep in mind that the task facing ELL in making adequate academic progress through the elementary grades and into secondary school is threefold: ELL must learn language, literacy and academic content simultaneously in order to keep up or catch up with their native English speaking peers. While language minority students are learning English, native English speakers are not standing still. As students move up through the elementary grades they encounter ever-increasing levels of difficulty in the literacy tasks and content in the curriculum. All students are expected to gain one academic years growth per school year. However, for English language learners to catch up academically, they must make greater gains each year than their native English speaking peers (Thomas & Collier, 2001). To close the achievement gap, second-language learners must make approximately three to five months extra gain in learning each year. In other words, ELL must achieve 13 to 15 months learning for every 10 months of an academic year in school. They must achieve at these accelerated levels despite the obstacles of limited English proficiency and, as in the case of the Arizona SEI model, the fact that they have

not been exposed to the same literacy and content curriculum at their grade level as their peers were proficient in English when they first enrolled in school.

After passage of P-227, the CA State Board of Education (1999) issued regulations requiring school districts to continue to provide additional and appropriate educational services to English learners in kindergarten through grade 12 for the purposes of overcoming language barriers until the ELL have demonstrated English-language proficiency comparable to that of the school district's average native English-language speakers and that ELL had recouped any academic deficits which may have been incurred in other areas of the core curriculum as a result of language barriers. When the obligations of school to overcome “language barriers” to ELLs’ parity of participation in a public school education is viewed in the light of the three-faceted task facing ELL, we begin to understand the deep flaws in the Arizona SEI model. Although the Horne et al claim that the AZ model is “sequential” there is no articulated sequence of instruction. In fact, the petitioners’ case is replete with ambiguous definitions of the “program” for ELL. In the American Unity Legal Defense Fund’s amicus brief, references are made to “graduates of the program” as being students who have been reclassified as fluent English speakers. In reality, many of these so-called program “graduates” have been in Arizona schools for many years outside of the time they have spent in the “new Structured English Immersion program” (amicus brief, p. 31). Furthermore, Petitioner Horne et al. cannot claim before the Supreme Court that the results on the AIMS test are entirely attributable to a “program” that only began implementation in the academic year 2008-09. Therefore, it is questionable what the AZ State Board of Education means by “the program.” If by law funding is cut off for “the program” after two years and “the program” is not normally intended to exceed one year, then what is Arizona’s plan for students who have completed the SEI program but have not yet “graduated”

into full English proficiency?

This lack of clear articulation of the sequence of instruction in the Task Force’s model of SEI is especially problematic if achieving full English proficiency is considered to be the criteria for “parity of participation” under federal law. In fact, the required grouping structure mandated for SEI does not support a program that addresses on-grade-level academic standards. The ELL Task Force requires that ELL be placed in separate classrooms according to their English language proficiency that may span as many as three grade levels. In such a multi-grade classroom, which grade level standards will be addressed? Inevitably in these cases, some students will be taught academic content either below or above their grade level (if they are taught any content at all since this is not a requirement under the SEI program model). This student grouping scheme is also problematic for reasons related to students’ self-esteem and behavioral issues surrounding their being older or younger than their peers. The lack of English native speaking peers in SEI classrooms for opportunities for linguistic interaction and as role models for ELL who are grouped homogeneously due to lack of full English proficiency is also an area of concern for educators and parents. Ironically, the Arizona SEI model sets up a situation where ELL are segregated due to their lack of English proficiency, and are not reintegrated into classrooms with their peers until they acquire full English proficiency and “test out” of ELL classification. This is exactly the opposite result of what the Supreme Court intended by guaranteeing limited English proficient students “access to a meaningful education” in the *Lau v. Nichols* decision.

Post P-227 Data from California

Data from other states where ballot initiatives almost identical to Arizona’s P-203 have passed on the progress of ELL from identification as limited English proficient to reclassification

are illuminating. California's P-227 mandates that ELL students' language proficiency be tested annually to determine their progress in learning English and possible eligibility for reclassification as fluent English proficient using California English Language Development Test (CELDT). This annual CELDT testing data provides a large base of longitudinal data. The Legislative Analysts Office (2004) provided an analysis of trends in language proficiency growth based on 2.3 million administrations of the CELDT. The LAO concluded that it takes an average of 6.7 years for an ELL student to move from CELDT level 1 proficiency upon initial classification to a CELDT level four or five, signally eligibility for reclassification as full English proficient (RFEP). California has multiple criteria for reclassification as opposed to Arizona where the sole criteria for reclassification as FEP is the students' AZELLA proficiency score. Consequently, if California terminated funding for its ELL population after two years as is the policy in Arizona, CA schools would not receive funding for 4.7 years to support the education of ELL until they reached full English proficiency and were reclassified as non-ELL students.

In the American Unity Legal Defense Fund's (2009) amicus brief, the Counsel argues that the cessation of funding of ELL education is necessary to prevent schools from having a "perverse incentive" to retain ELL in special programs longer than necessary in order to "...attract more education funding" (p. 39). This argument is incomprehensible in light of the lack of definition of what constitutes "the program" as discussed above. ELL students do not simply disappear from Arizona's classrooms if they have not achieved full English proficiency before the cessation of funding for their English language learning. In fact, these ELL are placed in an untenable position, a sort of academic limbo between the SEI program and "mainstream" classrooms where they are re-integrated with their native or fluent English-speaking peers to

receive standards-based content instruction at their grade level. The SEI model requires students to reach a level of English proficiency of four or five (nearing full English proficiency equivalent to their native-English speaking peers) or exit from special language services before entering “mainstream” classes. However, funding ceases before they “graduate” into the mainstream.

Without clearly articulated guidelines and a program structure for this interim period between concluding the one-year SEI program and entry into the mainstream classrooms, how do teachers know how to address the educational needs of ELL students? What instructional materials are schools and teachers required or allowed to use to bring students, who still lack full proficiency in English, up to the level of language, literacy and content knowledge equivalent to their grade-level peers? The Arizona State Board of Education has not clearly addressed these questions. Instead, Petitioner Horne et al. argued before the Supreme Court that acceptance of the state’s plan for addressing the academic achievement gaps between subgroups of students under No Child Left Behind (NCLB) was evidence for satisfying the “appropriate action” criteria under the EEOA. The Supreme Court rejected this argument, while finding that NCLB represented a “significantly changed circumstance” that warranted reexamination by the lower court upon remand of the *Flores* case.

There is considerable precedent in federal court rulings for consideration of ELL students’ opportunities for access and satisfactory progress in academic content-area learning as a component of the “appropriate action” standard. In the case of *Illinois v. Gomez* (1987), the Court of Appeals for the Seventh Circuit ruled that Illinois’ school authorities were required to provide for content-area instruction to facilitate students’ transition from a bilingual education program into the “regular curriculum” as part of their statutory responsibility for ensuring equal educational opportunity for limited English proficient students. In addition, an earlier ruling in

Ríos v. Reed (New York, 1978) also recognized the responsibility of the schools to design programs to address the full range of students' educational needs. The Court wrote: "While the District's goal of teaching Hispanic children the English language is certainly proper, it cannot be allowed to compromise a student's right to meaningful education before proficiency in English is obtained."

Again, it is informative to look at the California data regarding entry into and exit from ELL status since passage of P-227 in 1998 as a means of projecting the outcomes of implementation of Arizona's almost identical law, P-203. In a study commissioned by the California Department of Education on the effects of P-227 five years after its passage in 1998, Parrish et al (2006) concluded from their analysis of five years of achievement data that the probability of an ELL being reclassified to fluent English proficient status after 10 years in CA schools to be less than 40%. If these same conditions and achievement opportunities held true for Arizona's ELL population as exist under P-227 in California, it would mean that 60% of the state's ELL would never become eligible for "mainstream" education classrooms. This is clearly the opposite result of what the federal courts meant in prior rulings by "parity of participation" and "equal educational opportunity" for language minority students.

What constitutes a "bona fide" effort?

In the amicus brief of the American Unity Legal Defense Fund et al, Counsel argued that the *Castañeda* court sought "bona fide efforts" to ensure that ELL attain English proficiency and "...develop high levels of academic attainment in English, and meet the same challenging State academic content standards as all children" to meet the standard set by No Child Left Behind (p. 34). Thus, petitioners acknowledged that the goal of English language proficiency alone is insufficient to meet federal educational accountability goals and requirements. The Arizona

legislature required that the ELL Task Force develop and adopt “research based models of structured English immersion programs” that were intended “not normally to exceed one year” and that included four hours per day of “English language development” in the students first year or enrollment classified as ELL. Because of its continued oversight authority, the District Court in *Flores* was in the position to make judgments about the adequacy of resources allocated to the implementation of the SEI program as it was evolving, although the court lacked any authority to guide or regulate this process. However, upon appeal of the lower court’s oversight authority and rulings in *Flores*, the appellants made the argument that the effectiveness of their yet-to-be-implemented SEI program was germane to the issue. The Supreme Court took testimony regarding the program’s effectiveness from several expert witnesses regarding the theoretical soundness of the Task Force’s SEI model. In addition, appellant Horne presented data from one year of implementation of a pilot SEI program. In his dissent, Justice Breyer found that the lower court had reviewed the data and supporting expert testimony and had found it to be contradictory and inconclusive. Therefore, Justice Breyer in the minority opinion concluded that the plaintiff’s appeal for relief from the District Court’s oversight authority to be “premature.”

Research-base Criteria for Judging Program Effectiveness

In the majority opinion in *Horne v. Flores*, Justice Alito stated that the Court found that Arizona’s Structured English Immersion program is “significantly more effective than bilingual education.” This judgment does not represent the broad consensus of the language minority education research community, as is evidenced in the findings of the Language Minority Literacy Research Panel (August & Shanahan, 2006). Justice Alito’s assertion is even more questionable when considering its relevance to factual analysis of the effectiveness of the proposed Arizona program model. Was it sufficient for Arizona to claim that the program that it planned to

implement was allegedly more effective than a program that was basically outlawed that was no longer being implemented as evidence of the planned program's potential effectiveness? This issue raised concerns, especially because there had been a six-year hiatus between passage of Arizona's P-203 in 2000 and the formation of the ELL Task Force charged with the design of the SEI program.

The AZ State Board of Education's arguments about the relative effectiveness of bilingual education versus SEI reveal a fundamental assumption about language minority education that was put to a popular vote through the ballot initiative process. This (false) assumption is that ELL will learn English more quickly and thoroughly if they are denied instruction in their native language, in the case of Arizona's bilingual programs, the Spanish language. The effects of an inadequate academic foundation for children are cumulative, with the real consequences only becoming apparent as students move through the public school system hampered by their lack of literacy skills and content-area knowledge stemming back to the early grades. Students who fail one grade or more are more likely to drop out or be underachievers because they become academically disengaged from their own education (Halcón, 2001). Once students experience failure, it is difficult to undo the negative affects later on in school. The possibilities of lingering effects of an ineffective program in the early years of schools are increased by a lack of definition of what types of remedial programs must be implemented to address students' academic deficits.

When P-227 passed in 1998 in California, and again in 2000 when Arizona enacted P-203, many experts in the language-minority education academic community warned that a one-year English immersion program would be unlikely to provide either fully developed basic conversational skills or sufficient proficiency in English for students to keep up with academic

learning over the long term. This concern regarding students' readiness of mainstream classroom instruction was raised in the testimony of expert witnesses for the plaintiffs in the federal court challenge in *Valeria G. v. Wilson* (Hakuta, 1998; Wong Fillmore, 1998).

The process for designing a “research based” model of instruction for ELL was distorted from the onset of the ELL Task Force’s work because their charge from the legislature defined a structure and parameters for the program a priori before consideration of the general body of knowledge and research findings in the field of language minority education. Therefore, the Task Force was obligated to find research to support the model, rather than being able to design a model to fit the research on effective programs for educating limited English proficient students. In the Arizona English Language Learner Task Force Research Summary and Bibliography for SEI Program Models (2007), the Task Force concluded that “... there is little U.S research literature to guide the design and delivery of oral ELD instruction or to substantiate its effects.” (p. 1) However, the Task Force cites research studies on time-on-task, explicit teaching of discrete English language skills such as phonology, grammar and syntax, and vocabulary development. In addition, they describe research on reduced class size in support of their model for grouping students for ELD instruction in the SEI program.

Krashen, Rolstad and MacSwan (2007) conducted a critical analysis of the AZ Task Force’s research base, pointing out areas of cogent research that the Task Force failed to review or consider that tend to undermine their arguments for the content and structure of the SEI programs. In addition, the authors noted internal contradictions and misinterpretations of research findings within the document. Similarly, this author found studies that clearly contradicted the Task Force’s assertions about the effectiveness of the proposed instructional strategies mandated through their SEI models. For example, the Task Force approved SEI model

requires that ELD instruction be divided into four separate one-hour discrete language blocks, including grammar instruction. This is despite statements in one study cited in the Task Force's research document, Dulay and Burt (1973) that contradicts claims of effectiveness of a focus on teaching syntax and grammar: *"Thus, in answer to the question "Should we teach children syntax?" the available research indicates, "No." Although we believe that an L2 teacher should continue to diagnose children's L2 syntax, our findings suggest that we should leave the learning to the children and redirect our teaching efforts to other aspects of language."* (p. 257)

Effective ELL Schools Research

Among the relevant and informative research that the AZ ELL Task Force failed to consider is the rich body of research on the characteristics of schools that are deemed effective in raising the achievement levels of ELL students. In their study of the five-year impact of implementation of P-227, researchers from the American Institutes for Research and WestEd (Parrish et al, 2006) concluded that the model of instruction as defined by the language(s) used as a medium of instruction (bilingual versus English-only models) is not the operative variable in differentiating the academic success of ELL. Therefore, the researchers explored the common characteristics of schools and districts that were achieving high-level academic performance for ELL student populations.

The AIR/WestED research report (Parrish et al, 2006) identified four critical characteristics of successful ELL schools: 1) staff capacity to address ELL needs; 2) school-wide focus on English Language Development and standards-based instruction; 3) shared priorities and expectations in regard to educating ELL; and 4) systematic, ongoing assessment and data-driven decision-making. The identification of the common elements of successful ELL schools prompted recommendations for improvements statewide to limit the prolonged separation of

ELL from English-speaking student to cases of demonstrated efficacy and the careful articulation of a plan of instruction across classes within grades, across grades within schools, and across schools with a school district. Neither of these elements is present in the AZ Task Force’s SEI models. Under the AZ ELL education plan, students face prolonged periods of isolation in ELD classrooms for the majority of the school day unless and until they acquire full English proficiency. In addition, there is no articulated plan as to how students recoup academic deficits in literacy and content learning that accrue as they are learning English.

In the majority opinion in *Horne v. Flores*, Justice Alito stated the follow in reference to the lower court’s ruling regarding the “persistent achievement gaps” between ELL and other student subgroups in Nogales: “...*the EEOA requires “appropriate action” to remove language barriers, ... not the equalization of results between native and nonnative speakers on tests administered in English—a worthy goal, to be sure, but one that may be exceedingly difficult to achieve, especially for older ELL students.*” There is ample research evidence on the characteristics of effective schools that serve linguistically and culturally diverse student populations to call this statement in the Supreme Court’s opinion in *Horne v. Flores* into question. The National Center for Urban School Transformation (NCUST) at San Diego State University grants National Excellence in Urban Education awards to schools that achieve impressive results with high achievement for every demographic group of students they serve. In the announcement of the 2010 competition award winners, Executive Director Joseph F. Johnson, Jr. stated, “If every school in America served diverse populations of students as well as these 13 schools, achievement gaps would be eliminated” (NCUST, 2010).

Among the 13 NCUST award winning schools in 2010 was Horace Mann Dual Language (DL) Magnet School (2009) in Wichita, Kansas. The school’s K-8 student population is 75%

Hispanic, 3% African American and 19% White, including 57% classified as ELL. Eighty-three percent of the students are classified as economically disadvantaged. The school provides instruction through a 50/50 dual immersion model, where instruction is half time in English and half in Spanish and where students become fully proficient and literate in both languages. Aleman, Johnson and Perez (2008) report on four award-winning elementary schools that serve school populations with 30% or more of students classified as ELL. The characteristics these researchers found among all of the high-achieving schools were high expectations, a focus on conceptual understanding, a culture of appreciation of cultural and language diversity, leadership, and complex lessons that emphasize deep levels of understanding and critical thinking. It is difficult to discern how a focus on discrete points of English grammar and syntax for four hours of instruction per day devoid of academic content can produce high levels of academic achievement among ELL.

A “good faith effort”?

In their amicus curiae brief supporting petitioners, the American Unity Legal Defense Fund argues that the *Castañeda* test is a test of “genuine and good faith effort” rather than a “resources test” and therefore, the District Court in *Flores* “unnecessarily injected itself into legislative resources decisions” regarding the implementation of Arizona’s SEI program. This author postulates that it is within the authority of the District Court to render a judgment about whether or not, even with a “good faith effort” to faithfully implement a model and programs for educating language minority students, the model and programs have a high likelihood to achieve results. This authority is especially cogent and critical in light of the lack of a track record for Arizona’s SEI program. Horne et al. rely heavily on discussions of the relative effectiveness of bilingual education as compared to models of ELL education that exclude use of students’

primary language as a medium of instruction. The untruth of the assertion that bilingual education is inferior in results in educating ELL programs such as Arizona's SEI is well established through decades of relevant research and meta-analyses of that research (August & Shanahan, 2006; Genesse, Lindolm-Leary, Saunders & Christian, 2006; Goldenberg, 2008; Rolstad, Mahoney & Glass, 2005). The National Literacy Panel (August & Shanahan, 2006) found that language minority students who were instructed in their primary language, predominantly Spanish, as well as in English, on average perform better on English reading measures than their peers taught only in English at the elementary and secondary levels. The panel of experts concluded that "*[L]anguage-minority students who are literate in their first language are likely to be advantaged in the acquisition of English literacy.*" (p. 17). National Literacy Panel member Claude Goldenberg from Stanford University concluded that the review of research showed a 12-15 percentile point advantage on measures of academic achievement in English for students who received first-language literacy instruction.

The theory that one year of specialized language instruction is sufficient to overcome language barriers as set into law under P-227 and P-203 is also not supported in the research literature. Hakuta, Butler and Witt (2000) found that there is no evidence in the accumulated data to support the claim that the use of the native language in the bilingual program delayed English acquisition since the data did not yield different results in the length of time it took students to learn English in bilingual programs and in English-only programs. The data suggest that policies that assume rapid acquisition of English such as California's P-227 are "wildly unrealistic." Hakuta et al (2000) proposed that a more sensible policy is to consider the entire spectrum of the elementary grades as the range in which students acquire English proficiency. Consequently, policies should support a "balanced curriculum" that focuses on the full array of students'

language-learning and academic needs. Since slower progress is associated with higher levels of poverty and lower socioeconomic status, arbitrary limits on the number of years special services are provided would most adversely affect the most vulnerable students. The achievement gap between English language learners and native English speakers continues and widens as students move up through the elementary grades. Therefore, literacy and academic content learning must be attended to in schooling ELL so that they have the opportunity to achieve parity with their native English speaking peers and close the achievement gap as they move up through the K-12 grades and complete requirements for graduation.

A Better Chance to Learn

The U.S. Commission on Civil Rights report was titled “*A better chance to learn: Bilingual bicultural education* (1975). The Commission stated that the purpose of the report was to provide educators and the general public with information about bilingual education “...as a means for equalizing educational opportunity for language minority students.” The report thoroughly documented the Commission’s research base and legal rationale undergirding bilingual education as a means for providing limited English proficient students a “meaningful education” as required under *Lau v. Nichols*. It is inconceivable that four decades later, the federal courts would allow state electorates to deny opportunities for bilingual bicultural education to language minority students in the public schools. Furthermore, the Commission on Civil Rights (CCR) specifically warns against the type of ESL program that Arizona has mandated as its exclusive route to education for its language minority population. CCR states that the ESL approach is not appropriate when it is used in schools in which students fall behind in subject matter to the extent that they cannot recuperate. In the report, the Commission on Civil Rights concluded this: “The Commission’s basic conclusion is that bilingual bicultural education

is the program of instruction which currently offers the best vehicle for large numbers of language minority students who experience language difficulty in our schools” (p. 137).

Was the Commission on Civil Rights wrong in 1975 and the majority of the voters in California, Arizona and Massachusetts right in 1998, 2000 and 2002? Does the “policy preference” of a majority of voters supersede the equal educational opportunities of language minority students? At what point does experimentation end and enforcement of the Fourteenth Amendment and the EEOA begin? Passage of the so-called “Unz initiatives” in California, Arizona and Massachusetts has seriously complicated the delivery of appropriate educational services and programs to address the complex and multifaceted academic needs of language minority students. Unfortunately, the federal courts’ role in protecting the rights of ELL has been weakened in response to popular ballot initiatives and the highly politicized debate over immigration and the changing cultural and linguistic demographics in American public schools.

The District Court in the *Valeria G. v. Wilson* did not apply the “compelling state interest” standard for the elimination of opportunities for bilingual instruction for language minority students established by previous judicial rulings and endorsed by the Commission on Civil Rights in its 1975 report. The court’s reasoning is incomprehensible when the conclusion is that federal laws designed to protect equal educational opportunities for language minority students was not violated when a majority of the electorate restricts or denies well-established educational opportunities to those same students through the popular ballot initiative process. It is inconceivable that public policies can foresee and therefore “require” every possible educational program that will provide opportunities for language minority students to achieve an equal education. The ruling in *Valeria G. v. Wilson* established a precedent that turns the flexibility that the EEOA allows for school systems to devise innovative approaches or to select

from an array of pedagogically-sound program models to close the academic achievement gap against itself. This is the very sort of discrimination that the EEOA was intended to prohibit. The majority should not be allowed to vote away the civil rights of the minority under the Constitution of the United States.

Arizona's school officials bear the responsibility for providing effective programs for ELL in the absence of the academic and linguistic advantages that students derive from high-quality transitional bilingual education and dual language programs since voters passed a law restricting such instruction. Arizona's ELL Task Force appears to be more concerned with carrying out "the will of the voters" in implementing a program to conform to the language of P-203 than they are in protecting the equal educational opportunities of the state's ELL students. Language minority educators, parents and community members must be able to rely on the federal courts to intervene between an uninformed electoral majority without the capacity to design sound instructional programs for ELL, a legislative Task Force intent on carrying out their wishes, and the rights of language minority students to protections of their rights to equal educational opportunities. If not the federal courts, then who will protect the civil rights of language minority students in the United States?

References

- American Unity Legal Defense Fund et al (2009). Amicus Curiae brief in *Horne v. Flores* supporting Petitioners. Nos. 08-289, 08-294.
- Arizona Department of Education (2010). AZ English Language Proficiency Standards. Office of English Language Acquisition Services. Pheonix, AZ: Author. Retrieved from <https://www.ade.az.gov/oelas/ELPS/>
- Arizona State Legislature (2008, March 12) Arizona English Language Learner Special Meeting [Video archives] Retrieved from http://azleg.granicus.com/MediaPlayer.php?view_id=7&clip_id=3015
- Aleman, D., Johnson, J.F., Perez, L. (2009). Winning schools for ELLs. *Educational Leadership*, 66(7), 66-69.
- August, D. & Shanahan, T. (Eds.) (2006). Developing literacy in second-language learners: Report of the National Literacy Panel on Language-minority Children and Youth. Mahwah, NJ: Erlbaum Associates.
- California State Board of Education (1999, April) Emergency Regulations. Title 5, California Code of Regulation, Division 1, Chapter 11, English Language Education for Immigrant Children. Retrieved from http://www-rcf.usc.edu/~cmmr/kerper_mora.html
- Castañeda v. Pickard 648 F.2d 989 (1981)
- Clark, K. (2009). The case for structured English immersion. *Educational Leadership*, 66(7), 42-46.
- Crawford, J. (2004). Educating English Learners: Language diversity in the classroom, 5th edition. Los Angeles, CA: Bilingual Education Services.
- Cummins, J. (1995). The European Schools Model in Relation to French Immersion Programs in Canada. In T. Skutnabb-Kangas (Ed.) *Multilingualism for all*, pp. 159-168. Lisse, the Netherlands: Swets & Zeitlinger B.V.
- Dulay, H. C. & Burt, M. K. (1973). Should we teach children syntax? *Language Learning*, 23, 245-258.
- Genesse, F., Lindolm-Leary, K., Saunders, W., & Christian, D. (Eds.) (2006). Educating English Language Learners: A synthesis of research evidence. Cambridge, England: Cambridge University Press.

Goldenberg, C. (2008). Teaching English language learners: What the research does-and does not-say. *American Educator* (Summer), 11-44.

Gómez v. Illinois 811 F.2d 1030 (1987)

Horace Mann Dual Language Magnet (2009). Escuela en dos idiomas: Retrieved from <http://horacemann.usd259.org/aboutus.htm>

Horne v. Flores 129 S. Ct. 2579 (2009)

Hakuta, K. (1998). Supplemental declaration as an expert witness for Plaintiffs in Valeria G. v. Wilson. Retrieved from <http://www.humnet.ucla.edu/humnet/linguistics/people/grads/macswan/hakuta3.htm>

Hakuta, K., Butler, Y. G., & Witt, D. (2000, January). How long does it take learners to attain English proficiency? University of California Linguistic Minority Research Institute Policy 2000-1. Berkeley, CA: University of California.

Halcón, J.J. (2001). Mainstream ideology and literacy instruction for Spanish-speaking children. In M. L. Reyes & J.H. Halcón (Eds.) *The best for our children: Critical perspectives on literacy for Latino students*, p. 65-77. New York, NY: Teachers College Press.

Johnson, R.K., & Swain, M. (1997). *Immersion education: International perspectives*. Cambridge, England: Cambridge University Press.

Lau v. Nichols 414 US 563 (1974)

Legislative Analyst's Office (2004). A look at the progress of English Learner students. Sacramento, CA: Author. Retrieved from http://www.lao.ca.gov/2004/english_learners/021204_english_learners.htm

McKay, S. (1980). Toward an integrated syllabus. In K. Croft. *Readings on English as a second language for teachers and teacher trainees, 2d edition*, p. 72-83. Boston, MA: Little, Brown.

Mexican American Legal Defense Fund et al (1998). Plaintiffs' Legal Brief Requesting a Preliminary Injunction against Proposition 227. Retrieved from <http://www.humnet.ucla.edu/humnet/linguistics/people/grads/macswan/PIBRIEF.htm>

Mora, J.K., (2009). From the ballot box to the classroom. *Educational Leadership* 66 (7), 14-19.

Mora, J.K. (2002). Caught in a policy web: The impact of education reform on Latino education. *Journal of Latinos and Education*, 1(1), 29-44.

Moran, R.F. (1995). Bilingual education as a status conflict. In A. Sedillo López (Ed.). *Latino language and education: Communication and the dream deferred*. New York, NY: Garland Publishing, pp. 113-154.

Rolstad, K., Mahoney, K., & Glass, G.V. (2005). The Big Picture: A Meta-Analysis of Program Effectiveness Research on English Language Learners. *Educational Policy*, Vol. 19(4), 572-594.

Thomas, W. P., & Collier, V. (2001). A national study of school effectiveness for language minority students' long-term academic achievement. Washington, D.C.: Center for Research on Education, Diversity and Excellence. Retrieved from University of California, Berkeley Graduate School of Education website: Retrieved from http://crede.berkeley.edu/research/crede/research/llaa/1.1_es.html

Parrish, T.B., Pérez, M., Merickel, A., & Linqanti, R. (2006) Effects of the implementation of Proposition 227 on the education of English Learners, K-12: Findings from a five-year evaluation. Final Report submitted to California Department of Education. Sacramento: American Institutes for Research/WestEd.

Ríos v. Reed (1978) 480 F. Supp 14 (1978)

United States Commission on Civil Rights (1975, May) *A better chance to learn*. Washington, D.C.: U.S. Commission on Civil Rights Clearinghouse, Publication 51.

Valeria G. v. Wilson 307 F3rd 1036 (1998)

Wright, W. E. & Choi, D. (2006). The impact of language and high-stakes testing policies on elementary school English language learners in Arizona. *Education Policy Analysis Archives*, Vol. 14(13), 1-40.

Wong Fillmore, L. (1998). Supplemental declaration in testimony as an expert witness for Plaintiffs in *Valeria G. v. Wilson*. Retrieved from <http://www.humnet.ucla.edu/humnet/linguistics/people/grads/macswan/fillmor1.htm>