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# California Proposition 227: An Examination of the Legal, Educational and Practical Issues Surrounding the New Law

Kirsten Gullixson\*

## Introduction

On June 2, 1998, California voters cast their ballots on Proposition 227,<sup>1</sup> the initiative statute entitled "English Language in Public Schools."<sup>2</sup> Proposition 227 passed by a margin of 61% to 39%,<sup>3</sup> overturning former California Governor Ronald Reagan's 1967 mandate that eliminated the state's English-only instruction requirement and allowed bilingual education in California schools.<sup>4</sup>

Proposition 227 calls for "English learners," meaning stu-

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1. Proposition 227 is the "English for the Children" campaign initiative promoted by Ron K. Unz, Gloria Matta Tuchman, Jaime A. Escalante and Fernando Vega of the One Nation/One California organization. The part of this organization devoted to this campaign is also sometimes referred to as the English for the Children Foundation. The "English for the Children" campaign called to end bilingual education in California public schools by June of 1998. See *English for the Children, Proposition 227, the 1998 California "English for the Children" Initiative* (visited Oct. 25, 1998) <<http://www.onenation.org>> [hereinafter *English for the Children Initiative*]; *English for the Children, Campaign Leadership* (visited Oct. 25, 1998) <<http://www.onenation.org/people.html>>.

2. See *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007, 1012 (N.D. Cal. 1998) (denying a request for an injunctive order to halt implementation of Proposition 227 because the court did not find that Proposition 227 would not work under any circumstances).

3. See *id.* at 1012. The Hispanic vote on Proposition 227, however, was significantly different. An L.A. Times/CNN exit poll indicated that Hispanics voted against Proposition 227 by a margin of 63% to 37%. See Keating Holland, *Union Voters Contributed to Davis' Victory* (June 3, 1998) <<http://cnn.com/ALLPOLITICS/1998/06/03/exit.poll/>>.

4. See Gretchen Meinhardt, *Californians to Vote on English-Only Bill* (May/June 1998) <<http://horizons.educ.ksu.edu/MayJun98/unz.html>>.

dents with limited English proficiency (LEP students),<sup>5</sup> to be taught in sheltered English immersion<sup>6</sup> classrooms "during a temporary transition period not normally intended to exceed one year"<sup>7</sup> before being "transferred to English language mainstream classrooms,"<sup>8</sup> which are regular classrooms with proficient English speakers.<sup>9</sup> The Proposition further requires that instruction be "nearly all" or "overwhelmingly" in English.<sup>10</sup> The Proposition allows waivers for children who already know English,<sup>11</sup> for children ten years old or older<sup>12</sup> and for children with "special needs" in certain circumstances.<sup>13</sup> School officials and teachers are at risk under the Proposition because any teacher or educational official who "willfully and repeatedly refuses to implement the terms of [the] statute" can be held personally liable.<sup>14</sup> The Proposition essentially does away with all other methods of bilingual education for California schools and restricts California's teaching of LEP students to one year of sheltered or structured English immersion.<sup>15</sup>

Proponents of Proposition 227 sought to do away with California's former methods of education for LEP students, calling these methods a "dismal practical failure."<sup>16</sup> They also sought to

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5. See CAL. EDUC. CODE § 306(a) (West Supp. 1999).

6. See *id.* § 305. Sheltered English immersion is also referred to as structured English immersion. See *id.* § 306(d). For a discussion of the structured or sheltered immersion method, see *infra* note 121 and accompanying text.

7. CAL. EDUC. CODE § 305 (West Supp. 1999).

8. *Id.*

9. See *id.* § 306(c).

10. See *id.* § 306.

11. See *id.* § 311(a). Students who already know English are not limited English proficient (LEP) students, but rather fluent English proficient (FEP) students according to the California Department of Education. See *Number of Limited-English-Proficient (LEP) Students and Students Redesignated as Fluent-English-Proficient (FEP) in California Public Schools, 1982 through 1998* (visited Oct. 25, 1998)

<<http://www.cde.ca.gov/ftpbranch/sbsdiv/demographics/reports/statewide/redes98.htm>>. FEP students, unlike LEP students, require no special language education. For purposes of this Article, the term "LEP student" is favored because it is more commonly used in the California Department of Education materials on the subject. See *id.*

12. See CAL. EDUC. CODE § 311(b) (West Supp. 1999) (stating that in order to obtain a waiver if the child is 10 years old or older, the school principal and educational staff must also have an informed belief that an alternative course of educational study would be better suited to the child's rapid acquisition of basic English language skills).

13. *Id.* § 311(c) (describing special needs as including physical, emotional, psychological or educational needs).

14. *Id.* § 320.

15. See *id.* §§ 305, 306; see also *infra* note 121 (defining structured immersion, which is also known as sheltered immersion).

16. *English for the Children Initiative*, *supra* note 1.

get rid of "costly experimental language programs whose failure over the past two decades [was] demonstrated by the current high drop-out rates and low English literacy levels of many immigrant children."<sup>17</sup> Proponents of Proposition 227 noted that the state's education of LEP students took too long and at times produced children who failed to become proficient in English.<sup>18</sup>

This Proposition has, to date, survived legal challenges calling for injunctive relief. On July 31, 1998, a two-judge panel of the Ninth Circuit Federal Court of Appeals affirmed San Francisco Judge Charles Legge's decision of July 15, 1998 denying a request by bilingual education advocates for an injunction.<sup>19</sup> On July 31, 1998, Southern Federal District Court Judge Lourdes Baird in Los Angeles denied a request for an injunction to prevent the Los Angeles Unified School District from implementing Proposition 227 in the district.<sup>20</sup>

Without injunctive orders stopping implementation of Proposition 227, California public schools were required to comply with the new law for the school year, which took effect on August 3, 1998.<sup>21</sup> Many problems have arisen concerning implementation of the new Proposition.<sup>22</sup>

The purpose of this Article is to examine the legal, educational and practical aspects of Proposition 227. Part I examines this Proposition under the Constitution, the Civil Rights Act, the Equal Educational Opportunities Act and the Bilingual Education Act, as well as current case law on bilingual education.<sup>23</sup> Part II examines educational issues concerning Proposition 227.<sup>24</sup> Part III examines practical issues,<sup>25</sup> including problems in the school districts concerning interpretation and implementation, as well as the effect that Proposition 227 has on limiting minority parents' rights to choose the education that their children receive. This Article concludes that, as long as the California courts continue to show their willingness to apply the test developed by the United States

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17. CAL. EDUC. CODE § 300(d) (West Supp. 1999).

18. See *English for the Children Initiative*, *supra* note 1.

19. See *Four Federal Judges Uphold Proposition 227* (visited Oct. 25, 1998) <<http://www.onenation.org/legal.html>>; *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007 (N.D. Cal. 1998).

20. See *Four Federal Judges Uphold Proposition 227*, *supra* note 19.

21. See *The California School Boards Association and the Association of California School Administrators Proposition 227 Advisory* (visited Oct. 25, 1998) <<http://www.csba.org/Admin/227advisory.htm>>.

22. See *infra* notes 166-210 and accompanying text.

23. See *infra* notes 31-116 and accompanying text.

24. See *infra* notes 117-65 and accompanying text.

25. See *infra* notes 166-210 and accompanying text.

Court of Appeals in *Castaneda v. Pickard*,<sup>26</sup> Proposition 227 should stand unless it fails to meet students' needs after a reasonable time for implementation,<sup>27</sup> or unless the public or the California legislature overturns the Proposition by the two-thirds vote required to overturn the new law.<sup>28</sup> Significant educational and public policy reasons exist, however, for not implementing the Proposition. Proposition 227 is, in essence, a giant educational experiment<sup>29</sup> that affects California's 1.4 million language minority students.<sup>30</sup> Where the potential for failure is so great and so far-reaching, such experimental programs should not be implemented as a matter of policy.

## I. Legal Aspects of Proposition 227

Proposition 227 affects the education that language minority students receive in California. Most language minorities in California are also racial minorities.<sup>31</sup> Proposition 227, therefore, must be examined in light of the United States Constitution,<sup>32</sup> the Civil Rights Act,<sup>33</sup> the Equal Educational Opportunities Act<sup>34</sup> and the Bilingual Education Act,<sup>35</sup> as well as current case law on bilingual education.

### A. U.S. Constitution: Equal Protection and Constitutional Rights

The United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."<sup>36</sup> Disparate impact alone, however, is not sufficient to show a violation of the Equal Protection Clause, as discriminatory

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26. 648 F.2d 989 (5th Cir. 1981) (holding that state and local officials are allowed flexibility to choose among various types of language instruction but that native language instruction is not required under the Equal Educational Opportunities Act). For a discussion of the three-prong test, see *infra* notes 82-92 and accompanying text.

27. See *infra* note 83 and accompanying text.

28. See CAL. EDUC. CODE § 335 (West Supp. 1999) ("The provisions of this act may be amended by a statute that becomes effective upon approval by the electorate or by a statute to further the act's purpose passed by a two-thirds vote of each house of the Legislature and signed by the Governor.").

29. See *infra* notes 95-96 and accompanying text.

30. See *infra* note 41 and accompanying text.

31. See *infra* note 41.

32. See U.S. CONST. amend. XIV, § 1.

33. See 42 U.S.C. § 2000(d) (1998).

34. See 20 U.S.C. § 1703(f) (1998).

35. See 20 U.S.C.A. § 7401 (West Supp. 1999).

36. U.S. CONST. amend. XIV, § 1.

purpose must also be shown.<sup>37</sup> The Proposition defines "English learner" as a limited English proficiency (LEP) child.<sup>38</sup> This classification is facially neutral, and is not a suspect classification<sup>39</sup> or a quasi-suspect classification.<sup>40</sup> Proposition 227 has a disparate impact on Hispanics and other language minorities in California.<sup>41</sup> A facially neutral classification which has a disparate impact must be examined under rational basis review, under which the burden is on the plaintiff to show that the classification is not rationally related to any legitimate government interest.<sup>42</sup>

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37. See *Washington v. Davis*, 426 U.S. 229 (1976) (holding that a facially neutral testing system requiring a certain level of verbal skill on the part of job applicants and having a disparate impact against black job applicants did not violate the Equal Protection Clause as discriminatory purpose could not be shown).

38. See CAL. EDUC. CODE § 306(a) (West Supp. 1999).

39. Suspect classifications are classifications based on race, national origin or alienage, and such classifications require strict scrutiny analysis; in other words, the suspect classification must be necessary to furthering a compelling government interest. See *Graham v. Richardson*, 403 U.S. 365 (1971) (holding that provisions of state welfare laws conditioning benefits on citizenship and imposing durational residency requirements on aliens violated the Equal Protection Clause); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (declining to uphold the racially suspect "separate but equal" doctrine in public schools); *Korematsu v. United States*, 323 U.S. 214 (1944) (finding that the isolation of persons of Japanese origin in the United States was suspect, but declining to find a violation of the Equal Protection Clause because the state had a compelling interest for such action as it occurred during wartime with Japan).

40. Quasi-suspect classifications are classifications based on gender and illegitimacy, and such classifications require intermediate scrutiny analysis; in other words, the classification must substantially further an important government interest. See *Mills v. Habluetzel*, 456 U.S. 91 (1982) (holding that a state statute providing a one-year statute of limitations on paternity suits to identify the natural father of an illegitimate child for purposes of obtaining child support denied equal protection to illegitimate children); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (holding that a state-supported university which limited its enrollment to women while excluding men violated the Equal Protection Clause).

41. According to the California Department of Education's demographic statistics for the 1997-1998 academic year, the Hispanic Group, with an enrollment of 2,319,072 students, represents 40.5% of the total public school enrollment, larger even than the "White not Hispanic" Group, which had 2,219,426 students and 38.8% of the total enrollment. See *Enrollment in California Public Schools by Ethnic Group, 1981-82 through 1997-98* (visited Oct. 25, 1998) <<http://www.cde.ca.gov/ftpbranch/sbsdiv/demographics/reports/statewide/ethstud.htm>>. According to the Department's Language Census for 1998, California has 1,406,166 students who are LEP students, representing 24.6% of the total public school enrollment. See *Limited-English-Proficient (LEP) Students and Enrollment in California Public Schools, 1993 through 1998* (visited Oct. 25, 1998) <<http://www.cde.ca.gov/ftpbranch/sbsdiv/demographics/reports/statewide/lepstpc.htm>>. Of this figure, 1,140,197 LEP students are Spanish speaking Hispanic students, representing 49.2% of the Hispanic enrollment, and 186,739 LEP students are Asian-language speaking Asian students, representing 40.1% of the total Asian enrollment. See *id.*

42. See *id.* at 246.

Although Proposition 227 has a disparate impact on Hispanics and other minorities, discriminatory purpose on the face of the Proposition or on the part of the drafters of the Proposition must also be shown to establish a violation of the Equal Protection Clause. The drafters of Proposition 227 had a legitimate concern for creating the Proposition 227 legislation: assisting language minorities in California to learn English.<sup>43</sup> In *Valeria G. v. Wilson*,<sup>44</sup> the court failed to find discriminatory intent on the face of the Proposition.<sup>45</sup> Without evidence of discriminatory intent, Proposition 227 survives rational basis review because the classification, "English learner" or "LEP student," is rationally related to a legitimate government interest, which is teaching LEP students English.

Courts in recent bilingual education cases alleging violation of the Equal Protection Clause either reject or avoid the equal protection argument altogether. Instead, courts rely on Title VI of the Civil Rights Act,<sup>46</sup> or, more commonly, on the Equal Educational Opportunities Act (EEOA).<sup>47</sup>

Proposition 227 also involves issues of whether there are constitutional rights to bilingual services provided by the state. Education, though an important interest, is not guaranteed by the United States Constitution as a fundamental right.<sup>48</sup> The Ninth Circuit has held that there is no constitutional right to a bilingual education.<sup>49</sup> Other circuits also have found that there is no right to other services in the plaintiffs' native language.<sup>50</sup> Moreover, the

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43. See *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007, 1112-13 (N.D. Cal. 1998).

44. *Id.*

45. See *id.* at 1014.

46. See *Lau v. Nichols*, 414 U.S. 563 (1974) (holding that the San Francisco School District, by placing 1800 non-English speaking Chinese students into regular classrooms without special assistance to those students, failed to provide adequate instruction to those students in violation of the Civil Rights Act).

47. See *Castaneda v. Pickard*, 648 F.2d 989, 1009-10 (5th Cir. 1981); see also *Keyes v. School Dist. No. 1, Denver, Colo.*, 576 F. Supp. 1503, 1518-19 (D. Colo. 1983) (finding that Denver failed to direct adequate resources to its language program for its non-English speaking students).

48. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.").

49. See *Guadalupe Org. v. Tempe Elementary Sch. Dist. No. 3*, 587 F.2d 1022, 1027 (9th Cir. 1978).

50. See *Toure v. United States*, 24 F.3d 444 (2d Cir. 1994) (holding that there is no right to notice of administrative seizure in French); *Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983) (holding that there is no right to Social Security notices and services in Spanish); *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975) (holding that there is no right to civil service exam in Spanish); *Carmona v. Shef-*

Ninth Circuit has also held that even if a service in a foreign language was at one time provided, the state may decide to suspend it because it is not under an obligation to provide it.<sup>51</sup>

With regard to the Proposition, there is no constitutional right for California's LEP students to receive bilingual education services in Spanish or in any other minority language group's language. Although some LEP students in California were offered bilingual services at one time, the state is not under a continuing obligation to provide such services, and may suspend those services at any time.

Nevertheless, California does have an obligation under the Civil Rights Act to provide meaningful education for LEP students,<sup>52</sup> and must take appropriate action for LEP students in overcoming their language barriers pursuant to the Equal Educational Opportunities Act.<sup>53</sup>

### *B. Title VI of the Civil Rights Act of 1964*

Because bilingual educational programs in California receive federal funding under the Bilingual Education Act<sup>54</sup> and from other sources<sup>55</sup> and because language minorities are affected<sup>56</sup> under Proposition 227, Title VI of the Civil Rights Act should be examined. Title VI of the Civil Rights Act states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiv-

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field, 475 F.2d 738 (9th Cir. 1973) (holding that there is no right to unemployment notices in Spanish).

51. See *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 706 (9th Cir. 1997).

52. See *infra* notes 54-74 and accompanying text.

53. See *infra* notes 75-100 and accompanying text.

54. 20 U.S.C.A. § 7401 (West Supp. 1998). Federal support for the education of students with limited English skills began with the enactment of the Bilingual Education Act, Title VII of the Elementary and Secondary School Education Act (ESEA), in 1968. See Anneka L. Kindler, *Title VII Funding for States and Territories from FY69 to FY95* (updated July 1996) <<http://www.ncbe.gwu.edu/askncbe/pairs/states>>; see also *Title VII Funding for States and Territories from FY69 to FY95: California* (visited Mar. 7, 1999) <<http://www.ncbe.gwu.edu/askncbe/pairs/states/ca.htm>>; *Title VII Funding for States and Territories from FY69 to FY95: Appendix I* (visited Mar. 7, 1999) <<http://www.ncbe.gwu.edu/askncbe/pairs/states/app1.htm>>. In 1995, California was awarded a total of \$72,012,156 under three new grant categories: Bilingual Education (\$54,435,722), the Foreign Language Assistance Program (\$714,981) and the Emergency Immigrant Education Program (\$16,861,453). See *id.*

55. California received \$3,796,000,000 in federal funds according to its 1998-1999 Educational Budget. See *Report on the Budget Act of 1998—Overview* (visited Mar. 3, 1999) <[http://www.cde.ca.gov/ftpbranch/efdiv/98\\_99budget/overview.htm](http://www.cde.ca.gov/ftpbranch/efdiv/98_99budget/overview.htm)>.

56. See *supra* note 41.



ing Federal financial assistance."<sup>57</sup>

In *Lau v. Nichols*, the U.S. Supreme Court held that, even absent a discriminatory intent on the part of the San Francisco School District, its failure to provide any language assistance to substantial numbers of non-English speaking Chinese students violated Title VI of the Civil Rights Act: "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."<sup>58</sup>

Courts, however, have questioned the vitality of *Lau* in recent years. *Lau* was decided prior to *Washington v. Davis*, in which the Supreme Court held that discriminatory purpose, not simply disparate impact, is necessary to show a violation of Title VI of the Civil Rights Act.<sup>59</sup> In *University of California Regents v. Bakke*,<sup>60</sup> a majority of the Court interpreted Title VI to have the same scope as the Equal Protection Clause of the Constitution.<sup>61</sup> Justice Brennan's opinion, joined by Justices White, Marshall and Blackmun, recognized that the *Washington v. Davis* developments raised serious questions about the vitality of *Lau*:

We recognize that *Lau*, especially when read in light of our subsequent decision in *Washington v. Davis*, which rejected the general proposition that governmental action is unconstitutional solely because it has a racially disproportionate impact, may be predicated on the view that, at least under some circumstances, Title VI proscribes conduct which might not be prohibited by the Constitution. Since we are now of the opinion . . . that Title VI's standard, applicable alike to public and private funds, is no broader than the Constitution's, we have serious doubts concerning the correctness of what appears to be the premise of that decision.<sup>62</sup>

Expanding on *Bakke*, the Fifth Circuit in *Castaneda* stated:

Although the Supreme Court in *Bakke* did not expressly overrule *Lau*, . . . we understand the clear import of *Bakke* to be that Title VI, like the Equal Protection Clause, is violated only by conduct animated by an intent to discriminate and not by conduct which, although benignly motivated, has a differential

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57. 42 U.S.C. § 2000(d) (1998).

58. 414 U.S. 563, 566 (1974).

59. See *Washington v. Davis*, 426 U.S. 229 (1976).

60. 438 U.S. 265 (1976) (holding that achieving a diverse student body is not a compelling state interest, but that race may be considered a plus factor in the admissions process).

61. See *id.* at 352.

62. *Castaneda v. Pickard*, 648 F.2d 989, 1007 (5th Cir. 1981).

impact on persons of different races.<sup>63</sup>

The *Valeria G.* court noted that the Ninth Circuit, and a different majority of the Supreme Court, have in recent years allowed plaintiffs to establish Title VI violations by establishing discriminatory effect, without a showing of discriminatory intent, where plaintiffs brought lawsuits to enforce the Office of Civil Rights Regulations<sup>64</sup> (OCR Regulations) under Title VI rather than the Title VI statute itself, and where plaintiffs sought injunctive or declaratory relief rather than compensatory relief.<sup>65</sup> The Department of Education Office for Civil Rights' Regulations under Title VI of the Civil Rights Act state that recipients of federal funding may not utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color or national origin.<sup>66</sup>

Many LEP students affected by California Proposition 227 are of a race, color or national origin different from that of the majority population in the United States; however, the grouping of LEP students into "sheltered English immersion" classrooms under Proposition 227 is not based on a student's race, color or national origin, but on the student's level of English proficiency.<sup>67</sup> Ability grouping is not the same as grouping by race and is not *per se* unconstitutional<sup>68</sup> or in violation of Title VI or its regulations, if Title VI is to be interpreted to have the same scope as the Constitution.<sup>69</sup> If Title VI is to have the same scope as the Constitution,

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63. *Id.*

64. 34 C.F.R. § 100.3 (1998).

65. See *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007, 1023 (N.D. Cal. 1998).

66. See 34 C.F.R. § 100.3(b)(2) (1998).

67. See CAL. EDUC. CODE § 305 (West Supp. 1999) (allowing schools to mix students of different ages or of different native-language fluency levels into sheltered English immersion programs).

68. See *Castaneda*, 648 F.2d at 994. The court stated:

We have consistently stated that ability grouping is not *per se* unconstitutional. In considering the propriety of ability grouping in a system having a history of unlawful segregation, however, we have cautioned that if testing or other ability grouping practices have a markedly disparate impact on students of different races and a significant racially segregative effect, such practices cannot be employed until a school system has achieved unitary status and maintained a unitary school system for a sufficient period of time that the handicaps which past segregative practices may have inflicted on minority students and which may adversely affect their performance have been erased.

*Id.*

69. See *supra* notes 60-66 and accompanying text.

a Title VI plaintiff would have to show discriminatory intent to be successful in challenging a state action. Discriminatory effects, including discrimination against language minority students, denial of services or benefits to language minority students, and different treatment of language minority students, would be necessary to raise a successful challenge under the OCR regulations.<sup>70</sup>

The *Valeria G.* court also noted that, regardless of whether a showing of discriminatory intent is required, plaintiffs were not presently likely to succeed on the merits of the Title VI claim,<sup>71</sup> and that the court could not conclude from the face of Proposition 227 that it would inevitably result in an adverse effect, exclusion, denial of benefits or discrimination as required under an OCR Regulations challenge.<sup>72</sup>

Courts in recent bilingual education cases, rather than relying on the Civil Rights Act, rely on the Equal Educational Opportunities Act,<sup>73</sup> where examination of discriminatory intent or discriminatory effect is not necessary.<sup>74</sup>

### C. *Equal Educational Opportunities Act*

Following the *Lau* decision, Congress enacted the Equal Educational Opportunities Act (EEOA), which provides: "No State shall deny equal educational opportunity to an individual 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 by its students in its instructional programs."<sup>75</sup> The EEOA was passed as a floor amendment and has little illuminating legislative history; therefore, analysis should adhere closely to the statutory text.<sup>76</sup> The EEOA does not require states to adopt any particular type of educational program, but simply requires schools to take "appropriate

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70. See 34 C.F.R. § 100.3(b)(2) (1998).

71. See *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007, 1023 (N.D. Cal. 1998).

72. See *id.*

73. 20 U.S.C. § 1703 (1998).

74. See *Keyes v. School Dist. No. 1, Denver, Colo.*, 576 F. Supp. 1503, 1519 (D. Colo. 1983) (finding that the discriminatory intent inquiry of Title VI was not necessary because it was clear from the plain language of the [EEOA] statute and the opinion in *Castaneda* that the affirmative obligation to take appropriate action to remove language barriers under 20 U.S.C. § 1703(f) did not depend on any finding of discriminatory intent and that failure to act was not excused by any amount of good faith).

75. 20 U.S.C. § 1703(f) (1998).

76. See *Castaneda v. Pickard*, 648 F.2d 989, 1001 (5th Cir. 1981); see also *Guadalupe Org. v. Tempe Elementary Sch. Dist. No. 3*, 587 F.2d 1022, 1030 (9th Cir. 1978).

action" to guarantee equal educational opportunities for students with limited English language proficiency.<sup>77</sup>

What, then, is "appropriate action"? Courts usually interpret "appropriate action" to mean that schools have flexibility in choosing among programs of competing educational philosophies or experimental theories.<sup>78</sup> "Appropriate action" does not require bilingual education.<sup>79</sup> The Fifth Circuit in *Castaneda* emphasized local discretion in determining educational programs: "We think Congress' use of the less specific term, 'appropriate action' rather than 'bilingual education,' indicates that Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA."<sup>80</sup>

The district court in *Teresa P.* concurred with the *Castaneda* court:

This court agrees with, and will heed, the warnings stated by the *Castaneda* Court itself that courts should not substitute their educational values and theories for the educational and political decisions properly reserved to local school authorities and the expert knowledge of educators, since they are ill-equipped to do so.<sup>81</sup>

To act as a guide in determining what is "appropriate action," the *Castaneda* court reluctantly<sup>82</sup> set forth a three-part test: (1) the court must examine evidence concerning the soundness of the educational theory or principles upon which the challenged program is based, and the theory must be recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy; (2) the court must determine whether the programs or practices actually used by a school system are reasonably

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77. See 20 U.S.C. § 1703(f) (1998).

78. See *Castaneda*, 648 F.2d at 1009.

79. See *Guadalupe*, 587 F.2d at 1030.

80. *Castaneda*, 648 F.2d at 1009.

81. *Teresa P. v. Berkeley Unified Sch. Dist.*, 724 F. Supp. 698, 713 (N.D. Cal. 1989).

82. See *Castaneda*, 648 F.2d at 1009. The court stated:

Congress has provided us with almost no guidance . . . to assist us in determining whether a school district's language remediation efforts are "appropriate." Thus we find ourselves confronted with a type of task which federal courts are ill-equipped to perform . . . Confronted, reluctantly, with this type of task in this case, we have attempted to devise a mode of analysis which will permit ourselves and lower courts to fulfill the responsibility Congress has assigned to us without unduly substituting our educational values and theories for the educational and political decisions reserved to state or local school authorities or the expert knowledge of educators.

*Id.*

calculated to implement effectively the educational theory adopted by the school; and (3) the court must determine that, after a reasonable period of time for implementation, application of the program actually overcomes English language barriers confronting the students and does not leave them with substantive academic deficits.<sup>83</sup> This three-part test has guided other courts.<sup>84</sup>

Applying the first prong of the *Castaneda* test to Proposition 227, the *Valeria G.* court noted that Proposition 227 is recognized by some experts in the field as "sound educational theory."<sup>85</sup> The plaintiffs in *Valeria G.* asserted that subject matter education would be delayed during the one year of sheltered immersion under Proposition 227. The court in *Castaneda* specifically addressed this issue:

[W]e do not think that a school system which provides limited English speaking students with a curriculum, during the early part of their school career, which has, as its primary objective, the development of literacy in English, has failed to fulfill its obligations under § 1703(f), even if the result of such a program is an interim sacrifice of learning in other areas during this period . . . . We believe the statute clearly contemplates that provision of a program placing primary emphasis on the development of English language skills would constitute "appropriate action."<sup>86</sup>

The *Valeria G.* court rejected the plaintiffs' assertion, noting the *Castaneda* language, and stating: "we disagree with plaintiffs' assertion that a school system which chooses to focus first on English language development and later provides students with an intensive remedial program to help them catch up in other areas of the curriculum has failed to fulfill its statutory obligation under § 1703(f)."<sup>87</sup> Nevertheless, the *Valeria G.* court fails to note that no specific remedial program has been established under Proposition 227.<sup>88</sup> California is under an obligation to provide remedial education to LEP students in structured immersion programs under Proposition 227 for the substantive education that they might miss

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83. See *id.* at 1009-10.

84. See *Gomez v. Illinois State Bd. of Educ.*, 811 F.2d 1030, 1041 (7th Cir. 1987) (holding that the portion of the plaintiffs Title VI claim based on the implementation regulations survived a motion to dismiss, even absent allegations that the defendant acted with discriminatory intent); see also *Teresa P.*, 724 F. Supp. at 712-16; *Keyes v. School Dist. No. 1, Denver, Colo.*, 576 F. Supp. 1503, 1516-19 (D. Colo. 1983).

85. See *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007, 1018 (N.D. Cal. 1998).

86. *Castaneda*, 648 F.2d at 1011.

87. *Valeria G.*, 12 F. Supp. 2d at 1019.

88. See *id.* For a discussion of the lack of a specific remedial program, see *infra* notes 147-52 and accompanying text.

over this year.

With respect to the analysis under the second prong of the *Castaneda* test, the *Valeria G.* court could not look to programs or practices "actually used" in California schools to determine whether they met the appropriate action test, because Proposition 227 had not yet been implemented.<sup>89</sup> The court further found that it was "unlikely that there is no set of circumstances under which California's schools can adopt programs reasonably calculated to implement the educational theory of Proposition 227."<sup>90</sup>

The third prong of the *Castaneda* test requires that programs be evaluated for their success or lack thereof after a sufficient trial period.<sup>91</sup> This prong seems to be aimed at prohibiting districts from persisting with programs that are failures, not at prohibiting initial implementation of programs. The *Castaneda* court wrote that the first two prongs do "not necessarily" end the inquiry, thereby implying that the third prong may be optional.<sup>92</sup>

As with its analysis under the second prong, the *Valeria G.* court could not evaluate any "results" under the third prong analysis because Proposition 227 had not been implemented at the time of the *Valeria G.* decision.<sup>93</sup> The court could analyze only the first prong of the "appropriate action" test.

It is important to remember that the *Castaneda* court developed the above three-part test as guidance to determine whether the action an individual school district had taken was "appropriate." It is doubtful, however, that the *Castaneda* court anticipated that this test would be applied to evaluate an entire state's new program prior to its implementation, given the court's initial reluctance to set forth the test.<sup>94</sup>

While *Castaneda* involved a small-scale action against a school district's programs which had already been implemented and could be evaluated, Proposition 227's statewide structured English immersion programs had not been implemented and could not be evaluated. Proposition 227 is, in essence, a giant educational experiment,<sup>95</sup> relying on one educational theory<sup>96</sup> and af-

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89. See *Valeria G.*, 12 F. Supp. 2d at 1020.

90. *Id.* at 1020-21.

91. See *Castaneda*, 648 F.2d at 1010.

92. See *id.*

93. See *Valeria G.*, 12 F. Supp. 2d at 1021.

94. See *supra* note 82 and accompanying text.

95. See *No on Proposition 227: Bilingual Initiative Is a Dangerous Experiment with Our Children*, FRESNO BEE, May 18, 1998, at B4; Ed Mendel, *Curbs on Bilingual Education Ruled Valid*, SAN DIEGO UNION-TRIB., July 16, 1998, at A1, available in <<http://www.uniontrib.com/news/utarchives/index.html>>; *Tongue Twister*,

fecting California's 1.4 million LEP students.<sup>97</sup> The program's educational theory had not been tested in selected schools in California to determine whether it would work before its implementation.<sup>98</sup> Because of the short time between when the Proposition passed and when it was actually implemented, schools were left little time to prepare for implementation of the Proposition.<sup>99</sup> Teachers were inadequately trained in the method and there was a shortage of appropriate books.<sup>100</sup> The potential for failure under Proposition 227 is great. With this in mind, it is questionable that even the *Castaneda* court would want the 1.4 million LEP students to be experimental subjects of an educational theory that had not been broadly tested in California prior to implementation.

#### D. Bilingual Education Act

The Bilingual Education Act<sup>101</sup> recognizes that the federal government has special and continuing obligations to ensure that states and local governments take appropriate action to provide equal educational opportunities to limited English proficiency children and youth, and to assist states and local districts in developing the capacity to provide programs of instruction to that end.<sup>102</sup>

In 1995, the Bilingual Education Act appropriated \$215,000,000<sup>103</sup> and such sums as may be necessary for the four succeeding fiscal years<sup>104</sup> for initiatives such as research<sup>105</sup> and professional development<sup>106</sup> in the field of bilingual education. The Bilingual Education Act notes that native language instruction can promote children's self esteem and the nation's language resources (thereby promoting our nation's competitiveness in the global economy),<sup>107</sup> but also recognizes the shortage of teachers and other staff who are professionally trained and qualified to

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NEW REPUBLIC, June 22, 1998, at 8.

96. See *No on Proposition 227: Bilingual Initiative Is a Dangerous Experiment with Our Children*, *supra* note 95, at B4.

97. See *supra* note 41.

98. See *Tongue Twister*, *supra* note 95, at 8 and accompanying text.

99. See *infra* note 157 and accompanying text.

100. See *id.*

101. 20 U.S.C.A. § 7401 (West Supp. 1999).

102. See *id.* § 7402(a)(15)-(16).

103. See *id.* § 7403.

104. See *id.* § 7403(a).

105. See *id.*

106. See *id.* § 7471.

107. See *id.* § 7402(a)(14).

serve LEP children.<sup>108</sup>

No particular method of instruction is required for California's LEP students under the Bilingual Education Act;<sup>109</sup> nevertheless, "appropriate action" is required under the Equal Educational Opportunities Act.<sup>110</sup> The Bilingual Education Act simply encourages bilingual instruction by offering financial assistance to schools offering bilingual programs to provide such services.<sup>111</sup>

Because the Bilingual Education Act specifies no particular method of educating LEP students, Proposition 227 would survive a challenge made solely on the grounds that bilingual education services are required under the Act. Still, California is required to take appropriate action to meet the needs of its LEP students, and the federal government has an obligation to assist the state in developing programs for LEP students.<sup>112</sup>

This is not to say that parents are without legal recourse under the Constitution, the Civil Rights Act or the Equal Educational Opportunities Act. For example, if schools choose to place children in structured English immersion classes based on a Hispanic surname, not based on level of English proficiency, there may be a violation of the Constitution, the Civil Rights Act or especially the Equal Educational Opportunities Act. If schools fail to provide remedial education for students who missed out on subject matter instruction because they were in structured English immersion classrooms under Proposition 227, there may be a violation of these laws. Similarly, if schools fail to provide the necessary materials and teachers for the effective implementation of Proposition 227, there may be a violation of these laws. Parents may still sue schools or school districts for improper implementation of the Proposition.<sup>113</sup> After a reasonable time for implementation of Proposition 227, it may fail to achieve its stated goals in certain districts. Any number of violations would be possible, and parents may sue individual schools for these violations.

The courts take a hands-off approach when matters of educational theory are concerned. Judges admit that issues weighing

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108. See *id.* § 7402(a)(5)(D).

109. See *id.* § 7401.

110. See *supra* note 75 and accompanying text.

111. See 20 U.S.C.A. § 7402(a)(14) (West Supp. 1999) (noting a legislative preference for native language education for the promotion of students' self esteem and contributions to their academic achievements, among other rationales); *id.* § 7403 (appropriating funds to carry out the Bilingual Education Act).

112. See *supra* notes 75-92, 101-02 and accompanying text.

113. In fact, some parents have already sued. See *Doe v. Los Angeles Unified Sch. Dist.*, No. CV 98-6154 LBG RZX, 1999 WL 246654 (C.D. Cal. April 23, 1998).



one educational theory over another are not matters properly within its power to decide. Courts are not "Supreme Board[s] of Education,"<sup>114</sup> and they wisely choose to leave these issues to state and local educational authorities.<sup>115</sup> Judges are, for the most part, untrained in the issues of educational theory, and are, therefore, "ill-equipped" to decide these matters.<sup>116</sup> It is to the public benefit that courts recognize their limitations in the educational realm. These decisions are more properly left to state and local educational officials, who do understand educational matters. Interestingly, California left its decision-making authority not to the state and local authorities, but to the people through Proposition 227. The instructional method that teachers use inside the classroom is not something that the public should decide by referendum or initiative because they lack the expertise to determine what is best for the state's LEP students. The method used should be decided by educational officials together with the parents of children affected.

## II. Educational Issues

Proposition 227 dictates for the state one method, structured English immersion or sheltered English immersion, for the teaching of California's LEP students.<sup>117</sup> Several educational methods for teaching English to language minority students are recognized as sound, including transitional bilingual education,<sup>118</sup> maintenance bilingual education,<sup>119</sup> immersion,<sup>120</sup> structured immer-

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114. *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007, 1015 (N.D. Cal. 1998).

115. See *Castaneda v. Pickard*, 648 F.2d 989, 1009 (5th Cir. 1981); *Teresa P. v. Berkeley Unified Sch. Dist.*, 724 F. Supp. 698, 713 (N.D. Cal. 1989).

116. See *supra* note 81 and accompanying text.

117. See CAL. EDUC. CODE § 305 (West Supp. 1999).

118. For a discussion of transitional bilingual education (TBE), see CARLOS OVANDO & VIRGINIA COLLIER, *BILINGUAL EDUCATION AND ESL CLASSROOMS: TEACHING IN MULTICULTURAL CONTEXTS* 38-39 (1985). In transitional bilingual education, LEP students receive primary language instruction in core subject areas for a period of time—usually no more than 2 years—while they learn English. See *id.* at 38. The goal of this program is to help students master content areas without losing time while the second language is developing, in an effort to mainstream these children as quickly as possible. See *id.*

119. For a discussion of maintenance bilingual education (MBE), see *id.* at 39-40. In maintenance bilingual education, less emphasis is placed on mainstreaming LEP students quickly, but more emphasis is placed on providing content area instruction in both languages equally. See *id.* at 39. Most programs are designed for elementary grades only, and these programs tend to be of great importance to communities wishing to maintain ethnic heritage. See *id.* at 39-40. Maintenance bilingual education creates new pride and dramatic improvement in achievement in some schools, but this improvement may not be apparent until after the fourth, fifth or sixth year of instruction. See *id.* at 40.

sion,<sup>121</sup> two-way enrichment education<sup>122</sup> and English as a Second Language (ESL).<sup>123</sup> These educational methods are generally recognized as sound educational theories by scholars in the field of bilingual education, and significant debate exists over which method, if any, is the preferred method of instruction for LEP students.<sup>124</sup>

Any of the above methods would satisfy *Castaneda's* first prong; other theories would have to be considered "legitimate experimental strategy" by scholars in the field to meet the first prong

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120. For a discussion of immersion education, see *id.* at 42-43. In immersion education, language minority students are placed directly into the mainstream classroom with little or no English as a Second Language (ESL) instruction. See *id.* While immersion works well for speakers of the dominant language group learning a foreign language (e.g., native English speaking students learning Spanish in the U.S.), it is not as successful for language minority students learning the language of the majority because these students perceive their status as low compared to the majority which may lead to low achievement and high drop-out rates. See *id.* at 43. Immersion education with no support for language minorities, the "sink or swim" method, often referred to as "submersion" education, is generally not accepted by scholars in the field as sound educational theory. See *id.*

121. For a discussion of structured immersion, which also is called sheltered immersion, see *id.* at 44. In structured immersion, instruction for language minorities is totally in an English-as-a-Second-Language (ESL) format with native-language support as necessary during the first few years. See *id.* Teachers accept responses from students in their native languages but respond in English only. The materials used in the classroom are highly structured to introduce students to the second language in a step-by-step fashion. See *id.*

122. For a discussion of two-way enrichment education, which is also referred to as dual-language education, see *id.* at 40-41. In two-way enrichment education, two language groups are put together in the same classroom ideally with teamed teachers (e.g., half of the students are native speakers of English and the other half of the students are native speakers of Spanish with one teacher a native speaker of Spanish and the other teacher a native speaker of English). Two-way bilingual education provides an integrated learning environment for students whereby students develop language proficiency in content areas in both languages. See *id.* As an integrated classroom, two-way bilingual education tends to influence positively English speaking students' attitudes toward language minority students, leading to improved self esteem and better achievement among language minority students. See *id.* at 41. This program is commonly referred to as dual-language bilingual education, two-way immersion education or two-way bilingual education. See GUSTAVO GONZALEZ & LENTO F. MAEZ, OFFICE OF BILINGUAL EDUCATION AND MINORITY LANGUAGE, ADVANCES IN RESEARCH IN BILINGUAL EDUCATION 155 (1995); see also PAUL LANG, THE ENGLISH LANGUAGE DEBATE: ONE NATION, ONE LANGUAGE? 65 (1995).

123. For a discussion of English as a Second Language (ESL), see OVANDO & COLLIER, *supra* note 118, at 44. In ESL, English is taught to students from a second-language perspective, at the students' level of proficiency. See *id.* ESL is not a form of bilingual education in itself, but it is an integral component of transitional, maintenance and two-way bilingual education. See *id.* Various ESL programs have been developed in public schools where language minority students share no common language. See *id.* at 44.

124. See *infra* notes 160-61 and accompanying text.

of the *Castaneda* test.<sup>125</sup> Through Proposition 227, California voters, in effect, rejected all of these other theories, limiting the state's education of LEP students to one theory. This was an unwise decision at a time when so little is known about language acquisition.

#### A. Problems with California's Former Methods of LEP Education

Proposition 227 called the state's former educational programs failures and its experimental theories a waste, noting low English literacy levels among immigrant children<sup>126</sup> in addition to the high dropout rate.<sup>127</sup> It is important to examine California's problems in educating LEP students prior to the implementation of Proposition 227 to understand what led to the adoption of Proposition 227. According to state demographic figures for the spring of 1998, only 7% of LEP-designated students were reclassified as fluent English proficient (FEP) students after one year of LEP education.<sup>128</sup> Proponents of Proposition 227 attributed students' failure to learn English as a failure of bilingual education.<sup>129</sup>

According to California Department of Education data, however, only 29.7% of LEP students in California were taught in English language development programs with subjects taught through their primary or native language (also called L1).<sup>130</sup> This means that over 70% of LEP students were in programs with no primary language instruction for content-area subjects or where English, the second language, was used to educate content to students. California's failure to educate language minority children, therefore, cannot be attributed to bilingual education since only

125. See *supra* note 83 and accompanying text (outlining the *Castaneda* test).

126. See CAL. EDUC. CODE § 300(d) (West Supp. 1999).

127. See *id.* Some scholars, however, claim that the dropout rates of Hispanic children may have more to do with socioeconomic status than with bilingual education. See generally Stephen Krashen, *Bilingual Education and the Dropout Argument*, DISCOVER (July 1998) <<http://www.ncbe.gwu.edu/ncbepubs/discover/discover4/index.htm>>.

128. See *Number of Limited-English-Proficient (LEP) Students and Students Redesignated as Fluent-English-Proficient (FEP) in California Public Schools, 1982 through 1998* (visited Oct. 25, 1998) <<http://www.cde.ca.gov/ftpbranch/sbsdiv/demographics/reports/statewide/redes98.htm>>.

129. See *English for the Children Initiative*, *supra* note 1.

130. See *Number of Limited-English-Proficient (LEP) Students Receiving Bilingual Instructional Services in California Public Schools, by Service Received, 1997* (visited Oct. 25, 1998) <<http://www.cde.ca.gov/ftpbranch/sbsdiv/demographics/reports/county/lep97.htm>>.

29.7% of California's LEP students received the primary language content instruction that is called for under bilingual education.<sup>131</sup>

One reason why LEP students may have failed to learn sufficient English under former bilingual educational programs is that many programs classified as bilingual education were not really bilingual education programs at all but almost entirely monolingual Spanish programs.<sup>132</sup> Many students in California's "bilingual" programs studied almost the entire day in Spanish, with only a few minutes of English instruction every day.<sup>133</sup>

True bilingual education supporters do not advocate all primary language instruction. Jim Lyons, Executive Director of the National Association for Bilingual Education, admits that there were "a large number of bilingual programs that [were] not worthy of the name."<sup>134</sup> Even the California Association of Bilingual Education (CABE) acknowledges that only "perhaps 10 percent or fewer" of California's bilingual programs were well implemented.<sup>135</sup>

Another reason for California's problems in its LEP educational system is that the state reflects a national problem: There is a nationwide chronic shortage of teachers qualified to teach English as a Second Language or bilingual education programs.<sup>136</sup> Major waves of immigration leave schools hard-pressed to locate teachers with adequate training in ESL or bilingual education.<sup>137</sup> In 1990, California reported that its shortage of teachers skilled to teach ESL or bilingual education had reached 20,000 and that more than half of its existing staff was teaching under waivers.<sup>138</sup>

The failure of LEP students to be recategorized as FEP can-

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131. See *supra* notes 118-19.

132. See Andrew Phillips, *Language Wars*, MACLEANS, June 1, 1998, at 34, 36; see also *Winning Propositions*, NAT'L REV., June 1, 1998, at 17 (mentioning that "[i]n most cases, 'bilingual' actually means Spanish-only"). See generally Glenn Garvin, *Loco, Completamente Loco*, REASON, Jan. 1998, at 18 (discussing problems of "bilingual" education in California and explaining that many programs under the bilingual label were mostly monolingual Spanish programs, sometimes even known to abduct English-speaking children into the "bilingual" program solely on the basis of Hispanic last names).

133. See generally Garvin, *supra* note 132, at 18.

134. Andrew Murr, *English Spoken Here—Or Else*, NEWSWEEK, Apr. 27, 1998, at 65.

135. Gregory Rodriguez, *English Lesson in California*, THE NATION, Apr. 20, 1998, at 15, 16.

136. See MARY LEIGHTON ET AL., OFFICE OF BILINGUAL EDUCATION AND MINORITY LANGUAGES AFFAIRS, MODEL STRATEGIES IN BILINGUAL EDUCATION 4 (1995).

137. See *id.* at 4.

138. See *id.*

not, therefore, be attributed to bilingual education, but should instead be attributed to the all-English programs with inadequate support services for LEP students, to the almost entirely Spanish-language programs falsely labeled as "bilingual" education or to the lack of staff qualified to teach under bilingual programs.

*B. Problems with Structured or Sheltered Immersion Under Proposition 227*

No quantitative studies exist on the effectiveness of structured or sheltered immersion<sup>139</sup> for the education of LEP students.<sup>140</sup> Rather than comparing the effectiveness of the various methods of educating LEP students, which is best left to educational researchers, this section will address potential problems with the structured English immersion method prescribed under California Proposition 227.

First, Proposition 227 allows schools to group together LEP students of different ages whose level of English proficiency is similar.<sup>141</sup> Students of different ages have different maturity levels, different abilities and different educational needs. Placement of students of different age groups into one classroom is not generally accepted in the educational community as an effective teaching strategy for children.<sup>142</sup> Schools divide children into grade levels and ability levels to facilitate education. Lumping children of different ages, abilities and needs together into one classroom does not facilitate the education process but just makes education more difficult.

Second, LEP students after one year of a sheltered immersion program normally are to proceed directly into mainstream classes.<sup>143</sup> Although educational research has no conclusive findings regarding the time needed for LEP children to become proficient in a second language, many bilingual education scholars and teachers doubt that one year is a sufficient period of time for LEP

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139. Structured English immersion is sometimes also referred to as sheltered English immersion. See CAL. EDUC. CODE § 306(d) (West Supp. 1999).

140. See *infra* note 161 and accompanying text.

141. See CAL. EDUC. CODE § 305 (West Supp. 1999).

142. Even those who advocate combined-grade classes recognize that teaching a multi-grade class is a demanding task requiring different skills than teaching a traditional single-grade class. Students' needs and learning styles are diverse in multi-grade classrooms. Teachers note insufficient class time to cover effectively different curricula for the different student groups. See VIRGINIA EDUCATION ASSOCIATION & APPALACHIA EDUCATION LABORATORY, TEACHING COMBINED GRADE CLASSES: REAL PROBLEMS AND PROMISING PRACTICES 7 (1990).

143. See CAL. EDUC. CODE § 305 (West Supp. 1999).

students to acquire the English necessary for classroom instruction.<sup>144</sup> Research indicates that four years is the time needed to acquire classroom-level English.<sup>145</sup> Indeed, the necessary time may vary greatly from student to student, as students acquire languages at different speeds.<sup>146</sup> One year of English immersion may not be enough for many students to be ready to join a mainstream classroom.

Third, LEP students are limited in the content which they can learn in the one year of structured English immersion they would receive under the Proposition. Some teachers report that they have had to resort to music, art and physical education for their "structured" English immersion classes because their LEP students simply were not ready to get into content-area courses such as reading, math or social studies.<sup>147</sup> Teachers also report that they are only able to teach the most basic concepts to students because of language difficulty.<sup>148</sup> Many teachers have "watered down" their teaching of core subjects, and they worry that students are falling behind in their studies and may not be able to enter mainstream English classes after one year.<sup>149</sup> Other schools state that they will not provide reading or writing classes for students until the LEP students' English is fluent.<sup>150</sup>

Will these children be held back one grade simply because they failed to master the necessary content for their grade level, or will there be remedial education for them? If there will be remedial education for these children, who will fund it and when will it take place? Although Proposition 227 calls for fifty million dollars to fund English classes for adults who agree to tutor LEP stu-

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144. See GONZALEZ & MAEZ, *supra* note 122, at 7.

145. See *id.*

146. See ANGELA L. CARRISQUILLO & VIVIAN RODRÍGUEZ, LANGUAGE MINORITY STUDENTS IN THE MAINSTREAM CLASSROOM 62 (1996). Carrisquillo and Rodríguez contend that "[l]earning is affected by many conditions both internal and external to learners. There is in any group a wide range of individual differences in styles, strategies, and pace of learning. These factors influence the rate and success of second language acquisition." *Id.*

147. See Kate Folmar, *Parents Overwhelmingly Request Bilingual Classes, Hue-neme: Teachers Say They Look Forward to Communicating with Their Limited-English Speaking Students After Weeks of Frustration*, L.A. TIMES, Sept. 26, 1998, at B1, available in 1998 WL 18877859.

148. See Dennis Love, *These Kids Eager to Learn English; Students: Carrying Out Proposition 227 Brings Considerable Challenges to Johnson Middle School*, ORANGE COUNTY REG., Nov. 25, 1998, at A8.

149. See Louis Sahagun, *Students' English Success Changes Belief About Bilingual Education*, HOUSTON CHRON., Jan. 24, 1999, at 8, available in 1999 WL 3970704.

150. See *California Education Remains Bilingual*, MINN. DAILY, Oct. 12, 1998, at 15.

dents,<sup>151</sup> no formal program has been established for remedial education. Will LEP students be put back with their original grade level and be expected to "catch up" with the mainstream students? The loss of one year of academic curriculum to an LEP student can be a severe handicap to these students.<sup>152</sup> These issues have not been addressed to date.

Fourth, Proposition 227 lacks a specific pedagogical plan<sup>153</sup> other than the stated one year of structured English immersion.<sup>154</sup> Since the measure was passed in June of 1998, teachers have had inadequate time to prepare new lesson plans and to acquire new materials for the year.<sup>155</sup> Structured or sheltered immersion, however, calls for highly structured materials to introduce LEP students step-by-step to the new language.<sup>156</sup> It is not clear just what and how much teachers will teach their students in this year. Without adequate materials and training in structured or sheltered English immersion, many teachers may have to resort to "winging it" in the classroom by creating their own loosely-developed programs for their LEP students under the label of structured or sheltered immersion.<sup>157</sup> Structured English immersion necessitates a regimented program for the acquisition of English.<sup>158</sup> Without materials and training, teachers are on their own

151. See CAL. EDUC. CODE § 315 (West Supp. 1999).

152. For this reason, advocates of bilingual education note that it is impractical to postpone teaching content to students until they become proficient in English. See GONZALEZ & MAEZ, *supra* note 122.

153. See *Fallout from Ending Bilingual Ed* (NPR Morning Edition broadcast, Nov. 12, 1998) (visited Mar. 16, 1999) <<http://www.onenation.org/1198/111298.html>> ("There are no standard guidelines for what is called 'structured English immersion,' and some parents and teachers of non-English speaking children say the quality of education is suffering.").

154. California Proposition 227 calls for one year of sheltered or structured English immersion defining this method as "an English language acquisition process for young children in which nearly all classroom instruction is in English but with the curriculum and presentation designed for children who are learning the language." CAL. EDUC. CODE § 306(d) (West Supp. 1999).

155. See John Gittelsohn, *Prop 227 Is Upheld by Judge*, ORANGE COUNTY REG., July 16, 1998, at A1, available in 1998 WL 2638411; see also Harry P. Pachon, . . . but the Measure's Flaws Make It Hard to Implement, L.A. TIMES, Oct. 9, 1998, at B9.

156. See OVANDO & COLLIER, *supra* note 118, at 44.

157. See Janine DeFao, *School Districts Far Apart on Prop 227: Bilingual Education Still Taught*, SACRAMENTO BEE, Dec. 6, 1998, at A1, available in 1998 WL 22563815 ("Educators say they are doing their best to obey the new law despite the struggle of implementing the new programs with very little lead time and an ongoing shortage of qualified teachers and appropriate books for English learners."); *Fallout from Ending Bilingual Ed*, *supra* note 153 ("Each teacher at each school seems to have a different interpretation of how to implement Proposition 227 . . . . [T]eachers are just making things up as they go along.").

158. See *supra* note 121.

in the classroom.

Fifth, structured English immersion significantly reduces the role parents can play in the LEP child's early school education. Parental support is key for the success of any educational program for LEP students. Because education is likely to take place almost entirely in English, this program significantly limits the assistance that parents who are not proficient in English can give to students during after-school hours. Bilingual education proponents note the importance of parental support in reinforcing the material learned in school.<sup>159</sup> Parents who are not proficient in English will have a difficult time helping children in lessons that they themselves cannot comprehend.

### *C. Conflicting Research*

The research on the effectiveness of the different methods for educating LEP students is conflicting. In 1997, the National Research Council's Committee on Developing a Research Agenda on the Education of Limited English Proficient and Bilingual Students critiqued a number of studies in the field of bilingual and immersion education.<sup>160</sup> This report found that the beneficial effects of native language instruction were clearly evident in programs labeled bilingual education, that these benefits also appear in some programs labeled immersion and that, although there seemed to be benefits with programs labeled structured immersion, there was no quantitative analysis of these programs.<sup>161</sup> The researchers noted the "extreme politicization" interfering with the

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159. See GONZALEZ & MAEZ, *supra* note 122, at 4. Students outside of school are surrounded in a non-English milieu. Without education in the primary language, some students may lose their primary language altogether, or the second language (L2) may overtake the primary language (L1). When students are unable to communicate with their family, links to family and members of the social infrastructure weaken. Because this may contribute to family dissolution, bilingual education advocates note the importance of maintaining the primary language in efforts to strengthen the family unit. See *id.* at 1-2.

160. See DIANE AUGUST & KENJI HAKUTA, NATIONAL ACADEMY OF SCIENCES—NATIONAL RESEARCH COUNCIL, IMPROVING SCHOOLING FOR LANGUAGE-MINORITY CHILDREN: A RESEARCH AGENDA 139-61 (1997) (reviewing several larger-scale program evaluations, including the American Institutes for Research (AIR) Study, the National Longitudinal Evaluation of the Services for Language Minority English Proficient Students, the Ramirez et al. Longitudinal Study of Immersion and Dual Language Instructional Programs for Language Minority Children, Early-Exit and Late-Exit Transitional Bilingual Education Programs for Language Minority Children, as well as some smaller-scale program evaluations, including Baker and de Kanter, Rossell and Ross, Rossell and Baker, Willig and the U.S. General Accounting Office study).

161. See *id.* at 147.



program evaluation process.<sup>162</sup> The study emphasized identifying the specific teaching components that work best in different communities given their respective resources rather than trying to prove the superiority of one method over another.<sup>163</sup>

Currently, there is significant debate over the effectiveness of different educational methods for the teaching of LEP students.<sup>164</sup> Indeed, there may not be any single method that is best for educating the state's LEP students. Certain methods may work better than others for certain groups of students in certain areas. Because the relative effectiveness of these methods is still a matter of debate in the educational field, California voters should not have abandoned all programs, especially the effective ones,<sup>165</sup> in favor of a single method, structured immersion, for educating the state's LEP students.

Few voters have teaching certification, much less bilingual or ESL certification. How is it that the inexperienced voters are given the authority to set the educational method for the state's LEP children and abandon all other methods? Leaving the state's educational policy to the voters to decide is questionable, at best. Rather than politicizing the issue and dictating one method of education for all of California's LEP students, the State Board of Education should have encouraged schools to improve the effectiveness of English education in all existing programs for LEP students and to learn from successful programs in similarly situated districts.

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162. See *id.* at 148-49. Advocates of one position or another cite to research studies on the various methods to support their positions, despite the poor quality of the studies overall. When a new study comes out, it is quickly labeled as a pro- or anti-bilingual education study.

163. See *id.* at 147. This study noted three reasons for not conducting evaluations to determine which educational program is best for LEP students: First, the key issue is not finding one program to work for all areas, but in finding a set of program components that works for the children in a particular community; second, programs might be loosely implemented, and evaluation of those programs would have no clear focus as in the past; and third, programs are not unitary but a complex series of components. See *id.* The researchers, therefore, found it more important to focus on effective components, and they argue that effective programs, bilingual or immersion, share many common elements. See *id.*

164. See *supra* note 160 and accompanying text.

165. Many dual-language programs have demonstrated success throughout the state of California. See *Some Bilingual Programs Deserve to Be Saved*, S.F. CHRON., Aug. 16, 1998, at 6; Nori Naylor, *Foreign Languages Should Be Encouraged, Not Discouraged, in State's Schools*, FRESNO BEE, May 15, 1998, available in 1998 WL 8744258. For a discussion of dual language programs, see *supra* note 122. Some schools have applied for district waivers for just such programs. See Duke Helfand, *School Board Seeks Prop. 227 Exemption for 34 L.A. Campuses*, L.A. TIMES, Sept. 25, 1998, at B5, available in 1998 WL 18877477. For a discussion of district waivers, see *infra* notes 174-88 and accompanying text.

### III. Practical Issues Concerning Proposition 227

Proposition 227 involves a number of practical issues outside the educational context. One problem is that the California Board of Education interpreted Proposition 227 "broadly" and "left many of the definitions and program decisions to the local districts."<sup>166</sup> Interpretation left to the districts paves the way for confusion in school districts attempting to follow the terms of the statute. Proposition 227 gives the final authority as to the kind of education the district's LEP students receive to the individual school districts, not to the parents whose children are affected and for whom such authority would be proper.

#### *A. Problems with Interpretation and Implementation of Proposition 227*

Certain problems have resulted concerning implementation of California Proposition 227, in interpreting the terms of the statute and in determining the circumstances under which general school waivers or parental waivers will be permitted. This section examines these practical issues.

##### 1. Interpretation of "Nearly All" and "Overwhelmingly"

Proposition 227 calls for education in the one-year structured English immersion programs to be conducted "nearly all" in English<sup>167</sup> and for the education in English language classrooms to be conducted "overwhelmingly" in English.<sup>168</sup> The State Board of Education has not defined either of these terms in the educational context for LEP students.<sup>169</sup> The Board also allows school districts a great deal of flexibility in the interpretation of Proposition 227's ambiguous language.<sup>170</sup> What specific percentage of English instruction time do these terms require: 90%? 75%? 51%? This question has not been answered. According to Theresa Garcia, a policy analyst with the California School Boards Association: "It's a legal and political issue for boards to determine what is

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166. *The California School Boards Association and the Association of California School Administrators Proposition 227 Advisory* (visited Sept. 29, 1998) <<http://www.csba.org/Admin/227advisory.htm>>; see also Association of California School District Administrators, *ACSA Quick Response Task Force Proposition 227 Update* (July 28, 1998) <[http://www.acsa.org/news/prop\\_227\\_implementation/07-28-98\\_minutes.html](http://www.acsa.org/news/prop_227_implementation/07-28-98_minutes.html)>.

167. See CAL. EDUC. CODE § 306(d) (West Supp. 1999).

168. See *id.* § 306(b).

169. See *supra* note 166 and accompanying text.

170. See *id.*

'overwhelmingly' or 'nearly all' in their communities . . . . Districts are really all over the place."<sup>171</sup>

The districts' choice in this matter will be watched closely by the community and proponents of Proposition 227.<sup>172</sup> Because Proposition 227 subjects teachers and other administrators to personal liability for violation of the Proposition,<sup>173</sup> schools and school districts have a lot at stake when making these determinations.

## 2. General School District Waivers and Other Compliance Issues

Proposition 227 gave no mention to school district waivers or general waivers, which would exempt schools from complying with the requirements of the Proposition. Nevertheless, some school districts are applying for general waivers, charter school waivers and alternative school waivers under the California Education Code.<sup>174</sup> General waivers are permitted under California Education Code section 33050;<sup>175</sup> however, the district must make a strong case for circumventing the law or the waiver will not be granted.<sup>176</sup> Charter schools are allowed under California Education Code section 47605.<sup>177</sup> Charter schools are generally experimental, and they are not subject to most of the laws that govern public schools.<sup>178</sup> Alternative schools are allowed under California

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171. Lynn Schnaiberg, *State of Confusion*, TCHR. MAG., Aug./Sept. 1998, at 16.

172. See *id.* at 16; see also *California Education Remains Bilingual*, *supra* note 150, at 15. Proponents of Proposition 227 threaten to sue teachers and schools for noncompliance. See *id.* (quoting a prominent Proposition 227 proponent as stating, "It's going to take the California Supreme Court to make school districts in California comply."); Michelle Locke, *Calif. Bilingual School Law Looms*, AP ONLINE, Aug. 1, 1998, available in 1998 WL 6702691 (quoting Proposition 227 initiator Rob Unz as stating, "I think we may have to end up taking a lot of these districts to court").

173. See CAL. EDUC. CODE § 320 (West Supp. 1999).

174. See Alessandra Djurklou, *Waivers at Work*, (visited Nov. 20, 1998) <<http://www.onenation.org/1198/110998.html>>.

175. See CAL. EDUC. CODE § 33050 (West Supp. 1999) (providing that the governing board of a school district or county board of education may request that the State Board of Education waive, for a school or schools within its district or county, all or part of the code or any regulation adopted by the State Board of Education that implements a provision of the code).

176. See Djurklou, *supra* note 174.

177. See CAL. EDUC. CODE § 47605 (West Supp. 1999) (providing that a charter school may be established by a petition of one or more persons submitted to the governing board of a school district; the board decides whether to establish a charter school based on the level of support by parents, teachers and other employees of the school).

178. See Djurklou, *supra* note 174.

Education Code section 58500.<sup>179</sup> If a majority of parents, teachers, students and administrators want a special program in their school, the district can ask for designation as an "alternative school."<sup>180</sup> Although the charter school provision is grudgingly accepted by Proposition 227 proponents, the other waivers make them "hopping mad."<sup>181</sup>

Ron Unz, the Proposition's sponsor, and other supporters contend that Proposition 227, as an initiative measure which represents the "will of the voters," should take precedence over the waiver statute in the Education Code.<sup>182</sup> The court in *Estate of Gibson*, however, recognized: "It is a cardinal rule of statutory construction that statutes relating to the same subject matter must be read together and reconciled whenever possible . . . . This rule applies to initiative measures enacted as statutes as well as to acts of the legislature."<sup>183</sup> Under this rule, Proposition 227 would be read as reconciled with the other sections of the Education Code—in this case, allowing waivers for schools. Although Proposition 227 never explicitly spoke to the issue of school-wide waivers, this should not mean that they will not be allowed, as waivers are permitted in other areas of the Education Code.

At the time of this writing, over seventy schools have applied for waivers, citing their respective program's solid academic foundations.<sup>184</sup> The Oakland, Berkeley and Hayward districts are among those schools seeking waivers for their programs.<sup>185</sup> The State Board of Education, however, refused to grant waivers pending litigation on the matter.<sup>186</sup>

Rather than seeking school waivers, other school districts have chosen different ways to comply with the Proposition. San

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179. See CAL. EDUC. CODE § 58500 (West Supp. 1999) (defining an alternative school as a school or a separate class group within a school designed to maximize opportunities for students to develop positive self values; to maximize opportunities for teachers, parents and students to develop cooperatively the learning process and subject matter; and to allow teachers, parents and students to react to a changing world and community).

180. See Djurklou, *supra* note 174.

181. See *id.*

182. See *id.*

183. 139 Cal. App. 3d 733, 736 (Cal. Ct. App. 1983).

184. See Helfand, *supra* note 165, at B5.

185. See Schnaiberg, *supra* note 171, at 16.

186. See Helfand, *supra* note 165, at B5; see also Djurklou, *supra* note 174. District Court Judge Henry Needham ruled that the State Board of Education has the authority to consider the waivers. However, at the time of this writing, the waiver issue remains on appeal. See Christopher Heredia, *English for Parents/Literacy Programs Help Immigrants Tutor Their Kids*, S.F. CHRON., May 4, 1999, at A17, available in 1999 WL 2686069.

Francisco officials announced that they will add English immersion options in the classroom while continuing bilingual programs, which they say they are required to keep under a 1976 consent decree following the *Lau* decision.<sup>187</sup> The Los Angeles school district, educating one-fourth of the state's LEP students, decided to allow parents different options, including the English mainstream classroom, bilingual classes (which will require parental waivers) and two types of English immersion programs with varying degrees of primary language assistance.<sup>188</sup>

Whether the schools decide to go the waiver route or to create their own programs, they will be watched carefully by proponents of the Proposition and members of the community. Without clear guidance from the State Board of Education, however, schools have difficulty knowing how to comply with the Proposition.

### 3. Parental Exception Waivers

Under Proposition 227, parents may request waivers for (1) children who already know English as measured by standardized test scores, (2) children ten years old or older subject to the school principal's and the educational staff's belief that an alternative course of study is preferable, or (3) children with "special needs."<sup>189</sup>

The "special needs" requirement is of particular importance. The school's principal and educational staff must find that "the child has such special physical, emotional, psychological or educational needs that an alternate course of educational study would be better suited to the child's overall educational development."<sup>190</sup> Under parental waiver conditions, children may be transferred to bilingual education or "other generally recognized educational methodologies permitted by law."<sup>191</sup> Even so, waivers offered under this provision are subject to limitations. There must be at least twenty students in a given class for the school to offer an alternative program; otherwise, the schools must allow pupils to transfer to a public school where the class is offered.<sup>192</sup> Schools also may refuse to grant these waivers if they determine that a child does not have those special needs.<sup>193</sup>

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187. See Schnaiberg, *supra* note 171, at 16.

188. See *id.*

189. CAL. EDUC. CODE § 311 (West Supp. 1999).

190. *Id.* § 311(c).

191. *Id.* § 310.

192. See *id.* § 310.

193. See *id.* § 311(c); see also *California Education Remains Bilingual*, *supra* note 150, at 15.

The State Board of Education left decisions regarding waivers to the districts.<sup>194</sup> Thousands of language minority parents requested waivers for their children, mostly under the "special needs" exception.<sup>195</sup> Some districts report few requests, while other districts report rates of 50% to 99%.<sup>196</sup> Alice Callaghan, a leading Proposition 227 proponent, says that the "special needs" exception was meant only for extraordinary cases and is being abused.<sup>197</sup> While many districts interpret the term "special needs" broadly under the State Board of Education's flexible guidance and are reviving their bilingual programs,<sup>198</sup> some schools are denying parents' waiver requests.<sup>199</sup>

Again, proponents of Proposition 227 are watching closely as schools accept these waiver requests because they believe that this provision is being abused by parents, teachers and schools.<sup>200</sup> Ron Unz and his English for the Children Foundation have offered to help parents sue schools which they believe violate the terms of the Proposition.<sup>201</sup>

#### *B. Proposition 227 Limits Language Minority Parents' Rights*

A discussion of Proposition 227 would not be complete if it failed to address the racial issues surrounding the Proposition. Although the Proposition will most likely stand under current law, it is important to note that this Proposition, which concerns the education of LEP students—and therefore the education of language minority students—was enacted by a mostly White majority and not by the parents of the language minority students, 63% of whom opposed the measure.<sup>202</sup>

It is not surprising that Proposition 227 was passed by the White majority. The White majority, at least a substantial number of people in that majority, fears the rapidly increasing Hispanic

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194. See Chris Moran, *Bilingual Waivers Denied to 15 Oceanside Students: Burden Put on Parents to Prove Special Need*, SAN DIEGO UNION-TRIB., Jan. 27, 1999, at B10, available in <<http://www.uniontrib.com/news/utarchives/index.html>>.

195. See *id.*

196. See *id.*

197. See *California Education Remains Bilingual*, *supra* note 150, at 15.

198. See *id.*

199. See *id.*

200. See *id.*

201. See Locke, *supra* note 172.

202. See *supra* note 3 and accompanying text (noting that while Proposition 227 passed by an overall margin of 61% to 39%, 63% of voting Hispanics voted against the measure).

population in California.<sup>203</sup> Propositions 187 and 209, both of which were anti-immigrant measures,<sup>204</sup> won healthy landslide victories among the White population in California.<sup>205</sup> The White majority also gave Proposition 227 over two-thirds of their votes.<sup>206</sup> California's huge waves of immigration every year instill in the White majority a fear of the Latinification of the state.<sup>207</sup>

Despite the opposition of the majority of Latino parents to Proposition 227, it is being implemented in California schools this fall.<sup>208</sup> The White majority wants the education of language minority students to be a certain way, so the Hispanic population must suffer the consequences of the inherent inequality of the democratic process in California.

Although school districts are allowed a great deal of flexibility in interpreting the provisions of Proposition 227, there is no guarantee that parents' requests for waivers will be granted. Certain school districts may choose to deny parents' requests for children with "special needs," while other districts may decide to grant these requests. Because parents' waiver requests are subject to approval by the school's principal and educational staff, parents' rights are limited.<sup>209</sup> Moreover, the school must also have twenty or more requests before it will allow a bilingual education class,<sup>210</sup> and, for some students and their parents, transferring to another school district to be placed in a bilingual education program might be impossible. This twenty-student requirement also seriously limits parents' choices in their children's education. Proposition 227 allows schools and school districts too much discretion to limit parents' right to choose the kind of education they feel is appropriate for their children.

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203. See *Public Forum: Wilson Used Hatred Politics for Own Gain*, L.A. DAILY NEWS, Dec. 14, 1998, at N16.

204. Proposition 187 banned public education services and health care for illegal immigrants, but was later blocked by the courts. See *id.* Proposition 209 was a rollback of state affirmative action programs. See *id.*

205. See *In Plain English*, NAT'L REV., July 6, 1998, at 16.

206. See *id.*

207. See *Public Forum: Wilson Used Hatred Politics for Own Gain*, *supra* note 204, at N16; see also Nancy Cleeland, Times Orange County Poll, *Great Diversity in Expectations: Amid Continuing Demographic Shifts, Minorities See Opportunity and Improvement, but Whites Less Upbeat*, L.A. TIMES, Sept. 28, 1998, at A1, available in 1998 WL 18878469; Jennifer Kerr, *GOP Accused of Demonizing Hispanic Lawmakers*, SAN DIEGO UNION-TRIB., Oct. 1, 1998, at A3, available in <<http://www.uniontrib.com/news/archives/index.html>>.

208. See *supra* note 21 and accompanying text.

209. See CAL. EDUC. CODE § 311 (West Supp. 1999).

210. See *id.* § 310.

## Conclusion

This Article shows that Proposition 227 probably stands under current law, but that it should not be implemented as a matter of educational policy. As written, Proposition 227 probably does not violate the Constitution, the Civil Rights Act, the Equal Educational Opportunities Act or the Bilingual Education Act. Individual schools, however, may violate these laws in their inappropriate implementation of the provisions of Proposition 227. Currently there are two ways to undo the Proposition. One way is legislative—California's public or its state Legislature could amend or overturn the Proposition, but this action requires a two-thirds vote.<sup>211</sup> Another way is judicial—if students fail to overcome their language barriers or if they are left with substantial academic deficits after a reasonable time of implementation of the Proposition, courts could apply the *Castaneda* test to the Proposition, under which test the Proposition would fail.

As a matter of educational policy, California's decision to limit LEP education to one method, structured English immersion, was unwise at a time when so little is known about language acquisition. There is significant debate about the effectiveness of the various methods of educating LEP students. The educational strategy under the Proposition is vague. The Proposition leaves teachers scrambling to implement a method for which they have received no special training and no special materials.

Proposition 227 involves many practical problems concerning interpretation and implementation of the statute's vague language. The California State Department of Education chose to leave interpretation to the individual districts, which may subject some district officials and educators to liability for noncompliance with the Proposition. The practical effects of Proposition 227 remain to be seen. Under what circumstances will general school district exemptions be allowed? Just how will the individual school districts interpret the ambiguous language of the Proposition, including the parental exception waiver provisions? These questions remain to be answered.

Proposition 227 is not limited to the issues of bilingual education. It involves California's significant problems adjusting to the large and ever-increasing minority population. The significant difference between the White and Hispanic votes shows a great cultural divide. The White majority seeks to bring language minori-

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211. See *No on Proposition 227: Bilingual Initiative Is a Dangerous Experiment with Our Children*, *supra* note 95, at B4.



ties into the English-speaking mainstream in the way it feels is most effective, whittling away at the power of Hispanics and other language minorities to choose the kind of education they desire for their children.

Ironically, Hispanics and the White majority share a common goal. Both sides agree that English education is important for the state's LEP children, but they differ on what they believe is the best means to achieve that end. Instead of turning the education of California's language minority students into a highly politicized issue that divides the races, both sides should have focused their attention on working together to develop effective strategies for the teaching of English to limited English proficient students in the various California communities, depending on resources available in each community. This may have entailed restructuring of existing "bilingual" programs, or creating new programs entirely. Such restructuring would have allowed different English instructional programs and ideologies to coexist and permitted the communities to determine for themselves which programs were effective and which programs were not.

Proposition 227, instead of uniting the races in pursuing a common goal, divided them. The Proposition is yet another story in the ongoing saga of California's persistent problems adjusting to its large and ever-increasing immigrant population. Such problems reflect poorly on a nation of former immigrants that prides itself in being a cultural melting pot. The White majority seems to be saying, "If the immigrant children must be here, send them to overwhelmingly English-speaking classrooms." This sentiment is now incorporated into California law not because it is what Hispanic parents want for their children, but because the White majority says so.