A LITIGATION TREND ANALYSIS OF CASE LAW OUTCOMES PERTAINING TO
THE EDUCATIONAL RIGHTS OF ENGLISH LEARNERS: A CIVIL RIGHTS ISSUE

by

Delia Elizabeth Racines
A Dissertation
Submitted to the
Graduate Faculty
of
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The Requirements for the Degree
of
Doctor of Philosophy
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A Litigation Trend Analysis of Case Law Outcomes Pertaining to the Educational Rights of English Learners: A Civil Rights Issue

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DEDICATION

To my amazing parents, Jorge and Sonia Racines, and my big brother, Jorge. Thank you for always believing in me, teaching me to be proud of our language and culture, reminding me to thank God for good health, and most importantly, to ensuring that I do what makes me happy. Getting to this point in my life means nothing without each of you. I love you.
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LIST OF ABBREVIATIONS

Adequate Yearly Progress ................................................................. AYP
Annual Measureable Achievement Objectives .................................. AMAO
Common Core State Standards ........................................................ CCSS
Culturally and Linguistically Diverse .................................................. CLD
Department of Education ................................................................. DOE
Equal Educational Opportunities Act of 1974 ................................. EEOA
English Learners ............................................................................... ELs
English Language Learners ............................................................... ELLs
English Language Proficiency .......................................................... ELP
Elementary and Secondary Education Act ...................................... ESEA
English as a Second Language ........................................................ ESL
English for Speakers of Other Languages ........................................ ESOL
Fluent English Proficient ................................................................. FEP
Home Language Survey ................................................................. HLS
Language Instruction Educational Program ..................................... LIEP
Limited English Proficient ............................................................. LEP
No Child Left Behind Act ................................................................. NCLB
Office for Civil Rights ..................................................................... OCR
ABSTRACT

A LITIGATION TREND ANALYSIS OF CASE LAW OUTCOMES PERTAINING TO THE EDUCATIONAL RIGHTS OF ENGLISH LEARNERS: A CIVIL RIGHTS ISSUE

Delia Elizabeth Racines, Ph.D.

George Mason University, 2014

Dissertation Director: Dr. Susan Bon

The landmark 2001 No Child Left Behind (NCLB) Act has been a step forward in federal policy for the ever-increasing population of English Learners (ELs), fostering inclusion in standards-based assessments and college and/or career-readiness efforts, yet, ELs continue to struggle academically. The current 5.4 million ELs make up the lowest performing academic group in the United States (US) today. Despite its good intentions, NCLB is leaving behind the very students it was designed to help. The emphasis on various programs/services adopted by public schools based on the plethora of evidence-based instructional strategies has uncovered a less emphasized, yet, critical gap in research: attention to, enforcement, and/or a comprehensive and systematic analysis of the educational rights of ELs. Across the US, districts are learning of their lack of knowledge needed to meet legal requirements. The incentive to increase EL-related knowledge, beyond instructional strategies, is paramount.

This study presents a systematic analysis of EL-related case law outcomes using a
four-step method of analysis and “simple-box scoring.” Seven trends were identified using these legal policy research methodologies: (1) EL-related legislation, claims, and violations, (2) equal education opportunity violations, (3) inequitable educational programs, (4) inadequate EL programs and services, (5) funding issues, (6) ineffective EL identification, and (7) assessment.

As NCLB reauthorization draws closer, persistent focus on improving ELs’ education suggest policy-making needs will increase, particularly with Common Core State Standards (CCSS), including alternatives to costly litigation. While essential knowledge may be gained from this study, such data are but one aspect of overall challenges and do not reveal uncontroverted guidelines for educating ELs. This study bridges the gap of critical knowledge needed to meet legal requirements for ELs, each of whom are entitled by law to access mainstream curriculum. Further limitations and implications are presented.
CHAPTER ONE: INTRODUCTION

This chapter provides an overview of characteristics and identifies programs and services for students classified as English Learners (ELs). Next, ongoing inequities and the lack of adequate educational support for ELs are examined using evidence gathered from an extensive review of United States (US) law review articles, federal and state court cases, federal policies, and social science research. The consistent evidence emerging across these legal and literary resources demonstrate the urgent desire and need for relief from the inadequate and discriminatory educational opportunities provided to ELs in public education institutions. Finally, the research question, limitations, and implications for practice and future research are presented.

English Learner (EL) Terms, Programs, and Services Defined

As the population of ELs has evolved, so have the acronyms used to classify ELs, along with the programs and services provided to ELs. The No Child Left Behind (NCLB) Act of 2001 defines an EL as an elementary or secondary school student: (a) whose native language is not English; and/or (b) may experience difficulty in speaking, reading, writing, or understanding the English language, which may result in the inability to meet a state’s proficient level of achievement (where English is the language of instruction) or may not participate fully in society (Evans, 2005).
English as a Second Language (ESL), as defined by the US Department of Education (US DOE) (2012), often interchangeably used with English for Speakers of Other Languages (ESOL), refers to an intensive instructional program of techniques, methodology, and special curriculum designed to teach English Language Learner (ELL) students English language skills, which may include listening, speaking, reading, writing, study skills, content vocabulary, and cultural orientation. ESL instruction is most often in English with little or no use of native language. ESL is also considered an approach, one of the two most common approaches, used as the primary means to help ELs acquire English; the other is known as the bilingual approach, which provides dual language instruction in major content areas (Faulkner-Bond, Waring, Forte, Crenshaw, Tindle, & Belknap, 2012).

Also defined by the US DOE (2012), the term ELL refers to as a national-origin-minority student who is Limited English Proficient (LEP). The term ELL is often preferred over LEP as it highlights accomplishments rather than deficits (US DOE). However, no other research discusses or examines why changes from LEP to ELL have officially been made, yet what has been identified as critical to highlight is the fact that English fluency is best conceptualized as a continuum rather than a dichotomy in which students are or are not English proficient (Rios-Aguilar & Gándara, 2012).

The term LEP, in coordination with the state’s definition based on Title IX of The Elementary and Secondary Education Act (ESEA), are students:

(a) who are ages three through 21;
(b) who are enrolled or preparing to enroll in an elementary school or secondary school;

(c) (i) who were not born in the US or whose native languages are languages other than English;

(ii) who are a Native American or Alaska Native, or a native resident of the outlying areas; and who come from an environment where languages other than English have a significant impact on their level of language proficiency; or

(iii) who are migratory, whose native languages are a language other than English, and who come from an environment where languages other than English are dominant; and

(d) whose difficulties in speaking, reading, writing, or understanding the English language may be sufficient to deny the individuals;

(e) the ability to meet the state's proficient level of achievement on state assessments described in section 1111(b)(3);

(ii) the ability to successfully achieve in classrooms where the language of instruction is English; or (iii) the opportunity to participate fully in society (US DOE, 2012, p.1).

While the aforementioned acronyms used to identify ELs have and continue to evolve, Cook, Linquanti, Chinen, and Jung (2012) stress an additional acronym commonly used to describe ELs. Consistent with the NCLB mandate, the term English Language Proficiency (ELP), reveals a primary focus on the achievement of ELs. According to the NCLB Act, a key indicator of having sufficiently addressed the
linguistic needs of ELs is performance on state content assessments, particularly, how well ELs attain the state’s proficient performance standard on its academic content assessments (Cook, Linquanti, Chinen, & Jung; Evans, 2005). ELs, in essence, are assessed in academic content areas before they are considered proficient in English (Depowski, 2008). These aspects of the federal law imply an expected relationship between an ELs’ ELP and levels of academic proficiency when content is assessed in English. This relationship is again reinforced in the recently announced federally enhanced assessment grant program for next-generation ELP assessment systems; expected to “indicate whether individual [EL] students have attained the English proficiency necessary to participate fully in academic instruction in English and meet and/or exceed college-and career-ready standards” (Federal Register 2011, 21978). Note that the federal definition does not require ELs to be academically proficient in order to be classified as [fully] Fluent English proficient (FEP) (Cook et al.).

Several terms LEP, ESL, ELP, and ELL are often used interchangeably, while the most recent and simplified term used to identify students learning English is ELs (Adams, Robelen, & Shah, 2012). For purposes of this study, ELs will be used.

**Background of the Problem**

The ESEA of 1965, reauthorized by the 107th US Congress as the NCLB Act of 2001, includes provisions that speak to the education of ELs, specifically under Titles I and III (Faulkner-Bond, Waring, Forte, Crenshaw, Tindle, & Belknap, 2012; Faulkner-Bond & Forte, 2011; Ragan & Lesaux, 2006; Rossell, 2005). Title I outlines state standards, assessment, adequate yearly progress (AYP), inclusion, and additional school
accountability requirements for students identified as ELs, economically disadvantaged, from major ethnic and racial groups, and/or with disabilities who receive special education services, while Title III’s first purpose [and requirement] is to:

“ensure that children who are LEP, including immigrant children and youth, attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging state academic content and student academic achievement standards as all children are expected to meet” (ESEA section 2012 (1) as cited in Faulkner-Bond et al., 2012, p. 1; US DOE, 2012).

Schools which receive Title I funding must make AYP on standardized test scores; indicating expected growth each year in specified content areas (reading, language arts, and math, with science added in 2005-2006) (Ragan & Lesaux, 2006). The state defines AYP and evaluates student performance using the state’s achievement standards, known as Annual Measurable Achievement Objectives (AMAOs). Likewise, student progress is measured under Title III, for continuous and sustained improvement in each of the aforementioned subgroups, in addition to attendance and graduation rates (Ramsey & O’Day, 2010). This annual assessment measures a student’s performance where such data are disaggregated by the aforementioned subgroups; often referred to colloquially as the “triple threat,” given that some students, often ELs, fall into three categories and have a significant impact on whether a particular school meets AYP.

Entitled Improving the Academic Achievement of the Disadvantaged, Title I ultimately requires all students, including ELs, to be tested annually in grades 3-8, and once in high school, to meet a state’s proficient level on such “challenging” academic standards by the
2013/2014 school year (Rossell, 2005, p. 29; US DOE, 2012). Under Title I, states must also provide ELs with appropriate accommodations, including modifications of the assessment language and format, until students achieve ELP (Abedi, 2004).

Title III provisions parallel Title I provisions, with the goal of ELs attaining both ELP and academic achievement (Ramsey & O’Day, 2010, p.5). Under the Title III provisions, ELP must be assessed annually by the State. Before the enactment of Title III, ELP standards were not required and only 14 states had some form of such standards in place (Ramsey & O’Day). Title III specifically requires that the ELP standards be aligned with the state content and academic achievement standards to ensure that ELs are learning the type of academic English necessary to make progress in the content areas of reading, mathematics, and science. Title III, The English Language Acquisition, Language Enhancement, and Academic Achievement Act, provides funding to meet such requirements for both state and local education agencies (LEA) (Faulkner-Bond, Waring, Forte, Crenshaw, Tindle, & Belknap, 2012; Ramsey & O’Day; US DOE, 2012). School districts, in turn, are required to decide on a specific method of instruction to teach ELs, which can only be instructional programs scientifically proven effective with ELs (Faulkner-Bond & Forte, 2011). Often, because many ELs come from homes of low socioeconomic status, schools ELs attend often receive both Title I and Title III funds (more than $13 billion), respectively (US DOE; US General Accounting Office (GAO), 1999).

Under the parental notification mandates of Titles I and III, local school divisions must ensure that parents of ELs are informed about how they can be active participants in
assisting their children to learn English, achieve at high levels in core academic subjects, and meet State standards (US DOE, 2012). Parents must be notified no later than 30 days after the beginning of each school year or within two weeks of placement in a language instruction educational program (LIEP) (US DOE). Titles I and III also grant parents of ELs the right to be notified annually of the reasons for identification of their child as an EL, including: (a) the child’s ELP and how it was assessed; (b) their child’s academic level; (c) the method of instruction that will be used and how it will meet the needs of their child; (d) the needs of their child to learn English and pass state assessments; (d) the program exit requirements; (e) how the program will meet the objectives of the child’s Individual Education Plan (IEP) program if the EL has been identified with a disability; and lastly; (f) their rights, provided with written guidance, to deny their child’s participation (either removal and/or refusal) in LIEPs (Faulkner-Bond & Forte, 2011; US DOE). However, a parent’s decision to waive a child’s rights to EL services does not necessarily waive the LEAs’ obligation to help that student overcome previously identified linguistic barriers (Faulkner-Bond & Forte). Both Title VI of the Civil Rights Act of 1964 and the EEOA require LEAs to take active steps to help all students attain sufficient proficiency and outweigh the NCLB service refusal clause (Berenyi, 2008; Faulkner-Bond & Forte; Ragan & Lesaux, 2006; Wright, 2005). This is just one example of common noncompliance by schools that is due to a lack of information or misunderstanding due to the variation of sources of information from competing sources rather than a conscious decision to disobey the laws (Faulkner-Bond & Forte). Once identified as an EL, the school must also include the student in the EL subgroup, offer
accommodations, and annually administer assessments to measure ELP. The EL service requirements stem from not just one, but from multiple legal sources and are similarly governed by multiple entities. Given the civil rights implications as well as the high level of complexity, the undivided attention of education leaders is needed to preserve the rights of ELs, beyond solely responding to the mandates of Titles I and III, under the NCLB Act.

The stated purpose of NCLB was to close the achievement gap with accountability, flexibility, and choice, so that no child is left behind. NCLB has resulted in the most significant federal education reform package in the last decade, pressuring states to implement its extensive requirements, to ensure that all schools are held accountable for the academic progress of every child, regardless of race, ethnicity, income level or zip code (Evans, 2005). It is because of NCLB that closing the achievement gap between Whites and Blacks, Hispanics, ELs, Students with Disabilities (SWD), and economically disadvantaged students has become a national priority. Ultimately, the NCLB Act did commit the federal government to a more central role in driving states and districts toward measureable improvement in student achievement, particularly for ELs. Nonetheless, while ESEA mandates require school districts to evaluate ELs regularly, the Department does not necessarily provide guidance or regulations on how such evaluations should be structured; only guidance on minimum expectations are outlined (Faulkner-Bond et al., 2012). As school districts across the country try to best serve the ever-increasing number of ELs, numerous questions continue
to remain unanswered, and amazingly, some practices have yet to be questioned at all (Rossell, 2005).

For many schools, the NCLB Act marked their first introduction to EL services and program design, thus existing resources to serve ELs effectively may have been relatively scarce (Faulkner-Bond, Waring, Forte, Crenshaw, Tindle, & Belknap, 2012). One vital trend to consider today is that the most recent and fastest growth has taken place in parts of the country that have had little or no prior experience serving ELs in the educational system (Batalova, Fix, & Murray, 2006). For example, the K-12 EL population in the new growth states of Nebraska and North Carolina rose by 301 and 372 %, respectively, from 1996 to 2006 (Batalova et al.). In an effort to meet the needs of ELs today, who nationwide speak approximately 400 different languages, public schools have adopted various programs and services, stemming from analyses of different models, practices, and specialized programs (Faulkner-Bond, et al.; Wiley & Wright, 2004). President Bush’s Administration specifically pushed for more ‘scientifically-based educational research’ defined as ‘objective and systematic procedures used to get valid knowledge…whereas the studies are also replicable’ to test teaching methods ‘proven to work for ELs’ (Cho & Trent, 2006, p. 319). Yet, ELs are a remarkably heterogeneous group and despite extensive research, no one approach, model or technique has been identified as appropriate for all ELs (Evans, 2005; Faulkner-Bond et al.; Ferri, Gallagher, & Connor, 2011). Despite efforts to draw conclusions regarding effective outcomes for ELs, the current scope and scale of the instructional research base for ELs is small and insufficient to support strong conclusions; unanswered questions
about what is best for all ELs remain (Faulkner-Bond et al., p.20; Genesee & Riches, 2006; August & Shanahan, 2008; Saunders & Goldenberg, 2010).

Slavin and Cheung (2005) distinguish the most common methodological flaws that undermine EL studies’ credibility, including: (a) lack of control group; (b) lack of pretest data as a baseline; (c) insufficient study length to determine outcomes, particularly because EL cohorts may change relative to one another as students progress through their language programs; (d) studies that begin after ELs have already received an intervention; and (e) failure to track and account for attrition over time (p. 20). At the same time, without enough experimental and quasi-experimental studies to sustain comprehensive, outcome-oriented discussions regarding the ‘best’ way to instruct ELs, no definitive conclusions have been or can be drawn about outcomes of such resources (Faulkner-Bond, Waring, Forte, Crenshaw, Tindle, & Belknap, 2012, p. 1). Foundational literature reviews and experimental studies can, at best, be used to pick and choose various pieces in the process of the EL implementation program puzzle (Faulkner-Bond et al.). The mere variability of the numerous services and programs implemented for ELs is one of the four themes underlying the unmet EL educational services, yet continues to be the sole focus of discussion in research.

Lastly, despite all well-intended efforts, indicators of academic success and progress suggest that ELs struggle in their academic education to the point that their struggles are now resulting in considerably high dropout rates nationwide (Adams, Robelen, & Shah, 2012; Callahan, 2013). While ELs make up approximately 6% of high school enrollment in the US, they also make up 12% of students retained (Adams et al.,
ELs are about two times more likely to drop out than native and fluent English speakers are (Callahan). Additionally, on the 2009 National Assessment of Education Progress (NAEP), more than 70% of all fourth and eighth-grade ELs scored below Basic, with the exception of fourth-grade math, in which 43% of ELs scored below Basic (Faulkner-Bond et al., 2012, p. 2). Many ELs are still, however, excluded from NAEP (by either their state or school district), which may mean that the least proficient ELs are not even contributing to these already significantly low numbers. Further, according to the latest data from the Office for Civil Rights (OCR) (2006), only 1.4% of ELs were enrolled in programs for the Gifted and Talented compared to 8% of non-minority students. Gándara & Orfield, (2012) refer to an analysis of federal data (National Educational Longitudinal Study (NELS) that showed that students who were afforded the opportunity to attend classes identified as gifted were also significantly more likely to be assigned to algebra in the eighth grade, a major predictor of college readiness. Despite different definitions for ELs, various EL identification practices, and different assessments across the states, ELs, overall, consistently fare worse on tests of academic achievement in all subject areas than peers who have never been classified as ELs (Faulkner-Bond & Forte, 2011; Strickland & Alvermann, 2004). The end of the 2011-2012 school year marked the tenth year in which NCLB served as the nation’s primary education policy and what has become very clear is the lack of clarity regarding the basic, critical knowledge that is necessary to address ELs’ educational needs and meet the complex legal requirements for ELs’ civil rights protections.
By 2025, it is estimated that one out of every four students will be an EL (Kihuen, 2009). The impact of these changing demographics is significant in education given the looming mandate to ensure that all students, including ELs, are prepared to graduate and attend college or begin a career. In order to meet this deadline, educators and school leaders must focus not only on the adoption of evidence-based instructional strategies and sound instructional models, but also on the identification of legal doctrines that both define and support the educational rights of ELs (Johnson, 2010; Marzano, 2004). Even though instructional strategies and evaluations of programs are important variables for ELs, there is a lack of critical knowledge regarding the legal mandates establishing educational requirements for ELs. For example, ESEA mandates achievement for all students, including ELs, but fails to clearly establish or dictate the level of support that is legally required in order to help ELs access the mainstream curriculum (Faulkner-Bond & Forte, 2011). While many questions remain unanswered about how best to serve ELs, one question remains unasked, what exactly are the educational rights of ELs? To begin to improve services for ELs, the educational rights of ELs need and deserve a thorough and comprehensive examination, particularly the relationship among laws and policies at the federal, state, and district levels. Similarly, a systematic review and analysis of court cases is also needed to provide a clear understanding of judicial interpretations of the myriad laws and policies (Faulkner-Bond & Forte; Ragan & Lesaux, 2006).

Improving the education of the ever-growing population of ELs will also be important for continued domestic economic growth, the cohesion of society within the US, and for maintaining US competitiveness in the global economy (Faltis, 2011). It is
estimated that if the 1.9 million high school dropouts from the Class of 2006 had earned their diploma instead of dropping out, the US economy would have seen an additional $309 billion in wages over these students’ lifetimes (Alliance for Excellent Education, 2011). Indeed, ineffective education of ELs might have detrimental effects on the economic future of the US economy as a whole (Faltis). Whether ELs currently comprise one-in-five (who were ever classified as EL), or one-in-ten (currently identified as an EL), future workers, future voters, and future taxpayers, their educational pathways will shape the economic and demographic future of the nation (Callahan, 2013). The ability of ELs to graduate from high school will increasingly influence the American economy, labor market, and higher education system (Callahan, p.2). Careful examination is needed to first understand legal protections in order to further enforce EL program compliance, decrease the EL high school dropout rates, and help meet the new career and/or college-readiness mandates to ultimately ensure equitable educational opportunities and outcomes for all ELs (Ragan & Lesaux, 2006; Wassell, Fernández Hawrylak, & LaVan, 2010).

Statement of the Problem

After an eventful year for policy and practice related to ELs, 2010 witnessed renewed vigilance by various government agencies on the enforcement of ELs’ civil rights (Faulkner-Bond & Forte, 2011, p. 1). This heightened focus pushed the issue to the center of national education conversation and has forced many LEAs and state education agencies (SEAs) to revise their practices. Federal civil rights investigations shed light on the following four recurrent themes underlying the unmet educational
services of ELs: (a) a general lack of understanding legislation pertaining to the educational rights of ELs; (b) variability in the identification of ELs, in addition to the services and programs provided to ELs; (c) the lack of guidance for and compliance of various program requirements; and (d) the lack of monitoring and/or evaluating the effectiveness of such requirements (Adams et al., 2012; Faulkner-Bond & Forte, 2012, p.14).

Advocacy groups have joined with parents of ELs to petition courts for relief from inadequate and discriminatory educational opportunities provided by schools. Through these lawsuits, both advocates and parents have sought protection not only under Titles I and III of the NCLB Act, but also the Equal Educational Opportunities Act (EEOA) of 1974, the Fourteenth Amendment Equal Protection Clause, and Section (§) 601 of the Civil Rights Act of 1964, including the Lau Memoranda and the Castañeda principles (Berenyi, 2008; Faulkner-Bond & Forte, 2011; Kihuen, 2009; Ragan & Lesaux, 2006; Smith, 1990). Meeting program requirements for one of the aforementioned laws does not guarantee compliance with all of the legal mandates, rather the educational protections afforded to ELs are enforced and monitored by different agencies or through combinations of agencies (Faulkner-Bond & Forte; Ragan & Lesaux). Ragan and Lesaux emphasize the need to examine numerous EL-related federal policies for purposes of determining the effects on academic achievement of ELs over time. In addition, they observe that given the likelihood of continued legal challenges regarding ELs’ educational rights, policy initiatives may need to be adopted to provide an alternative remedy to litigation (Ragan & Lesaux). Existing policies and ongoing legal
purposes may serve as an additional source of support for educators who are dedicated to meeting the needs of the growing EL population among school systems in the US.

Districts across the US are just learning that some of their decade long practices lack the critical knowledge base necessary to meet legal requirements; furthermore, the educational rights of ELs have not received sufficient attention, enforcement, and/or comprehensive and systematic analysis (Faulkner-Bond & Forte, 2011). The reauthorization of the NCLB Act is an ideal time to revisit provisions that have been less effective or have created unintended obstacles to achieving the goal of high school graduation and college and/or career-readiness for ELs (Johnson, 2010).

**Purpose of the Study**

The purpose of this study is to contribute to the effort to understand the laws pertaining to the educational rights of ELs through the systematic analysis of case law and an examination of litigation trends to ensure compliant practices and ensure college/career readiness. This study relies on two established legal policy research methodologies, specifically the four-step method of analysis (Baldwin & Ferron, 2006; Kunz, Schmedemann, Downs, & Bateson, 2006) and the quantitative method of “simple box scoring” (Baldwin & Ferron). Faulkner-Bond and Forte (2011) emphasize the need for a comprehensive and systematic review of complex federal policies and case law outcomes that reflect a number of struggles, weaknesses, and trends in the field of EL services that have been simmering below the surface for years. To begin to improve services for ELs, the fastest growing student population in the country, education agencies must first ensure there is an understanding of EL-related legislation that
undergirds compliance (Kihuen, 2009). A legal trend analysis investigates not only whether a category of cases are increasing, but also examines why litigation in this area is increasing (Adler, 1996). Systematic empirical analysis of the outcomes of specific cases will inform comprehensive policy decisions and contribute to the adoption of compliant EL practices and services. Careful examination of EL-related legislation and systematic analysis of court cases is expected to reveal critical and comprehensive knowledge to the field of research focused on the educational rights of ELs. This will not only ensure equal opportunities and outcomes for ELs, but also help meet the ESEA’s mandates for school systems and educators to ensure that all ELs are college and/or career-ready (Faulkner-Bond & Forte; Johnson, 2010).

**Limitations**

While every effort will be made to access all relevant case law, the history of American jurisprudence is so voluminous, that even with the increasing power of the available search tools, a complete review of all of the cases cannot be guaranteed. Likewise, a historical review of the legal cases and legislative enactments relevant to ELs is limited in its predictive value. Therefore, while there is essential knowledge to be gained through a systematic review of cases decisions, legislative mandates, and policies, these data sources are but one aspect of the overall challenges facing ELs and will not reveal uncontroverted guidelines for educating ELs.

**Research Question**

The purpose of this proposed study is to contribute to the effort to understand the laws pertaining to the educational rights of ELs through the systematic analysis of case
law and an examination of litigation trends to ensure compliant practices and ensure college/career readiness. The following research question will guide this investigation:

1. What are the specific case law outcomes and trends of federal and state litigation involving the educational rights of ELs?

**Key Definitions of Terms**

All students who speak a language other than English will be referred to consistently as ELs throughout this study. Key terms and abbreviations, including those used in previous language research, are clarified below for purposes of this study. These additional terms and their definitions include the following:

Case law (or common law), also synonymous with jurisprudence, is determined by judges through their rulings, in particular, decisions (Russo, 2006). Case law is law based on judicial decisions and precedent rather than on statutes. In making decisions, judges use binding authority to interpret constitutions, statutes, regulations, and other case law. Judges write their decisions, which may then be used as binding authority for future cases (Elias & Levinkind, 2009). Case law is also considered the ‘logical starting point’ in the examination of primary sources (Russo, p.14).

Culturally and Linguistically Diverse (CLD) learners, as defined by the American Association of Colleges for Teacher Education’s (AACTE) Committee on Multicultural Education (2008):

a student whose culture and/or language are assets for learning, but nonetheless different, from that of the dominant culture and/or language in American society and will need accommodative programming and instruction to facilitate their
cultural and linguistic development within a content-focused learning context (p. 664).

The NCLB Act defines an EL as an elementary or secondary school student: (a) whose native language is not English, and/ or (b) may experience difficulty in speaking, reading, writing, or understanding the English language, which may result in the inability to meet a state’s proficient level of achievement (where English is the language of instruction) or may not participate fully in society (Evans, 2005).

English as a Second Language (ESL), as defined by the US DOE (2012), often interchangeably used with English for Speakers of Other Languages (ESOL), is a program of techniques, methodology, and special curriculum designed to teach ELs English language skills, which may include listening, speaking, reading, writing, study skills, content vocabulary, and cultural orientation. English as a Second Language (ESL) instruction is usually in English with little use of native language.

English Language Learner (ELL), also defined by the US DOE (2012) and now simply referred to as EL, is referred to as a national-origin-minority student who is limited-English-proficient (LEP). This term is often preferred over LEP as it highlights accomplishments rather than deficits.

LEP, in coordination with the state’s definition based on Title 9 of ESEA, are students:

(a) who are ages three through 21;

(b) who are enrolled or preparing to enroll in an elementary school or secondary school;
(c) (i) who were not born in the US or whose native languages are languages other than English;
(ii) who are a Native American or Alaska Native, or a native resident of the outlying areas; and who come from an environment where languages other than English have a significant impact on their level of language proficiency; or
(iii) who are migratory, whose native languages are a language other than English, and who come from an environment where languages other than English are dominant; and
(d) whose difficulties in speaking, reading, writing, or understanding the English language may be sufficient to deny the individuals
(e) the ability to meet the state's proficient level of achievement on state assessments described in section 1111(b)(3);
(ii) the ability to successfully achieve in classrooms where the language of instruction is English; or (iii) the opportunity to participate fully in society.

Regulations, which flesh out the meaning of statutes, are rules issued by state and federal governmental administrative agencies that are statutorily authorized to create rules that support enforcement of statutes (Elias & Levinkind, 2009; Russo, 2006). The Federal Registrar is a daily publication that publishes regulations and other documents by government agencies (Russo).

Statutory law is created by state or federal legislatures and set out the rules that we all must live by (Elias & Levinkind, 2009). Neither state nor federal statutes should
be in conflict with the US Constitution. Generally, statutes are enacted by legislatures to regulate conduct.
CHAPTER TWO: LITERATURE REVIEW

The purpose of the literature review is to first identify the specific problems and weaknesses in the field of EL, followed by an extensive review of four specific themes including: [mis]understandings in EL legislation, second, the extensive variability in EL identification, reclassification, programs, and services, third, the lack of comprehensive guidance and compliance for EL service requirements, and lastly, monitoring and evaluating the effectiveness of EL requirements. This review also necessarily includes a comprehensive examination of specific United States (US) federal education policies related to ELs. A rationale for the current study is ultimately provided.

Struggles in the Field of English Learner (EL) Services

Nationwide data, collected from nearly 7,000 school districts by the US Department of Education’s (DOE) (2010) OCR, not only revealed stark racial and ethnic disparities in student retentions, but also sparked the official opening of 15 investigations by October 2010. These 15 investigations focused essentially on whether ELs were being denied equal educational opportunities (Bartholomew & Llanos, 2010; Faulkner-Bond & Forte, 2011; Maxwell, 2011; Zehr, 2010). OCR officials have released the names of a few school districts, scattered from coast to coast, where investigations are currently taking place (Zehr). These six school districts include Los Angeles Unified, California (CA), Hazelton, Pennsylvania (PA), DeQueen, Arkansas (AK), New London,
Connecticut (CT), Tigard-Tualatin, Oregon (OR), and Lake Washington, Washington (WA). The OCR also has compliance reviews in progress in Tulsa, Oklahoma (OK) and Dearborn, Michigan (MI). Most recently, ELs are also at the center of a continued dispute in Denver, Colorado (CO) where mandatory changes must be made to EL programs as investigations uncovered there were no programs being provided at all in charter schools for beginner ELs (Maxwell, 2013b). Such investigative efforts, emerging, in part, because of an expanded Civil Rights Data Collection (CRDC) effort, have shed light on a number of ongoing inequities, struggles, weaknesses, and trends of unmet educational services in the field of ELs that have been simmering below the surface for years (Faulkner-Bond & Forte). The ensuing concerns highlight the need to identify and address possible legal avenues that may support the emergence of realistic solutions for promoting educational opportunities as the EL population only continues to increase (Faulkner-Bond & Forte; US DOE).

At the time of the first census in 1790, roughly 25% of the total US population spoke a language other than English (Lepore, 2002). Accounting for just the percentage of school-aged children (ages 5-17) that live with a family that speak a language other than English, there was a significant increase from 9% in 1979 to 21% in 2008 (US DOE’s National Center for Education Statistics (NCES) (2008). US Census figures from October in 2005, as reported by Gándara and Rumberger (2009), reflect more than 11 million elementary and secondary students of immigrant families enrolled in public schools, representing more than 20% of all students. About 75% of these students were born in the US, with one or both parents foreign-born (Gándara & Rumberger). In the
same year [2005], approximately 10.6 million school-aged (5–17) children in the US spoke a language other than English at home (US DOE, 2008 as cited in Gándara & Rumberger).

As of the 2010 census, the number of children (ages 5 to 17) who speak a language other than English at home has increased from 10.6 million in 2005 to 11.8 million, out of which 8.5 million speak Spanish (US Census Bureau, 2012). According to the National Clearinghouse for English Language Acquisition (NCELA) (2011), nearly 80% of students identified as ELs are of Hispanic origin. Today, school districts, nationwide, have reported more than 400 different languages spoken by ELs with approximately 24% of elementary through high school students with at least one foreign-born parent, reported as of October 2011 (Callahan, 2013; Kindler, 2002; US Census Bureau, 2012). Between the decade of 1997-98 and 2008-09, the number of ELs increased by 51%, while the general population of students only increased by 7% (Samson & Collins, 2012).

ELs are now enrolled in almost half of public schools nationwide—that is, in an estimated 45,283 public schools of the approximately 91,000 schools in the US (Zehler, Fleischman, Hopstock, Stephenson, Pendzick, & Sapru, 2003, p. 3). An even more important trend to consider is that the fastest growth has taken place in parts of the US that have had little or no prior experience serving K-12 ELs; both Nebraska and North Carolina EL populations rose by 301 and 372 %, respectively, from 1996 to 2006 (Batalova et al., 2006). With nearly 6.3 million ELs already in our classrooms today, the current projections are for children from racially and linguistically diverse backgrounds
to make up 48% of total enrollment in public educational settings by 2020, for one out of
every four students to be identified as an EL by 2025, and an estimated one out of every
seven American residents to be foreign born (Banks & Banks, 2007; Berenyi, 2008;
Kihuen, 2009).

Even with such drastic past, current, and projected population shifts, a movement
has continually tried to make English the official language of the US in an effort to
preserve English and the ‘American’ way of life (Berenyi, 2008). Regardless of the
English-only debate, the reality is that language diversity has been and will remain a fact
of life in the US (Wiley & Wright, 2004). The US has prospered, in part, because of its
demographic diversity, nevertheless, the rapid shift to English has resulted in the denial
of language rights and hindered access to educational benefits; evident with continued
achievement gaps and civil rights litigation (Ancheta, 2006; Howard & Aleman, 2008;
Wiley & Wright). With the passage of the NCLB Act, there has been an increase in the
use of ELP tests, central to the education of ELs (Gottlieb, 2006). Such tests, however,
have the potential to act as gateways to academic success and often result in excluding
ELs from exposure to age-appropriate content (Ragan and Lesaux, 2006; Wiley, 2005).
ELs require special instruction in schools in order to acquire the English skills needed to
succeed in school and in life. Meaningful access to education is predicated upon English
language knowledge and is necessary for ELs to obtain the same education as other
students. Currently, performance on national assessments demonstrates that ELs struggle
to achieve academically at the same levels as their native-English speaking peers (Ragan
& Lesaux; Wightman, 2010).
Inequitable accountability in school systems also illuminates the harsh reality that the needs of hundreds of thousands of ELs are not being met. Specifically, ELs have considerably high dropout rates, four times the rate of their peers who are fluent in English and make up 12% of students retained despite making up only 6% of high school enrollment (Adams, Robelen, & Shah, 2012; Berenyi, 2008; Depowski, 2008; Howard & Aleman, 2008; Kihuen, 2009; Wiley & Wright, 2004). Similarly, only 1.4% of ELs are enrolled in programs for the Gifted and Talented compared to 8% of non-minority students (Office for Civil Rights, 2006). Students who are afforded the opportunity to attend Gifted and Talented classes are more likely to be enrolled in algebra in eighth grade, a major predictor of college readiness (Gándara & Orfield, 2012). Schools are failing to meet the needs of language-minority students and failing to provide opportunities early in ELs’ educational careers; ELs are quite simply being left behind (Wiley & Wright).

While no formal announcements from the DOE have been made regarding how data from the CRDC survey will be analyzed or responded to, data will likely reveal which LEAs show persistent gaps in EL achievement, graduation, and participation in challenging classes, as well as numerous other areas (Faulkner-Bond & Forte, 2011). In order to begin to apply realistic solutions today, however, it is important to name specifically the struggles unique to the field of ELs to begin to ensure both equitable opportunities and outcomes. The following four recurrent themes have been identified via civil rights’ enforcement regarding unmet educational services of ELs: (a) a lack of understanding legislation pertaining to the educational rights of ELs, (b) the variability in
identification of ELs, in addition to the services and programs provided to ELs, (c) the lack of guidance for and compliance of various program requirements, and (d) the lack of monitoring and/or evaluating the effectiveness of such requirements (Faulkner-Bond & Forte, p.4).

[Mis]understandings in EL legislation

The lack of a clear understanding of legislation pertaining to ELs’ educational rights has resulted in the noticeable misalignment of enforcement systems with LEAs’ responsibilities to provide adequate educational services for students (Faulkner-Bond & Forte, 2011). As the formal entities directly responsible for educating children, LEAs hold primary responsibility for ensuring that ELs, in particular, receive the services civil rights laws guarantee, yet, from district to district, civil rights investigations uncovered significant variation among service gaps, in addition to a variety of reasons for such gaps. Forty-three percent of ELs in the Seattle, WA district, for example, did not receive language services of any kind in the 2006-2007 school year, while in 2010, multiple LEA evaluation outcomes with similar results surfaced in Boston, Massachusetts (MA), Buffalo, NY, and Portland, OR; all of which caused ELs to miss eligible services (Faulkner-Bond & Forte). Results from such DOJ investigations required LEAs to implement changes to their practices, as ELs were not receiving services entitled to them by law, mostly due to misunderstanding EL-related legislation.

SEAs, similarly, came under scrutiny for statewide practices that affected the education of ELs, such as in Illinois (IL) and Arizona (AZ), both of which faced DOJ investigations for misinterpreting EL-related policies (Zehr, 2010). Though IL denied the
allegations, the DOJ found the IL State Board of Education was in violation of the EEOA due to a policy that allowed non-proficient ELs to exit out of transitional-bilingual programs after three years of instruction with no clear mandate that LEAs must continue support for ELs after they exit the program (Faulkner-Bond & Forte, 2011).

The EEOA’s main purpose is to ensure equal opportunities through reporting and monitoring activities designed to make certain that no state denies equal educational opportunities to an individual on account of his or her race, color, sex or national origin or language barriers. Failure by an educational agency to take ‘appropriate action’ to overcome language barriers may impede equal participation in its instructional programs (Berenyi, 2008; Depowski, 2008; Rios-Aguilar & Gándara, 2012). Yet, while the EEOA is clearly capable of assisting ELs, its current verbiage is too narrowly defined with respect to ELP and, as Berenyi suggests, needs revision with more explicit statutory language to more sufficiently protect the rights of ELs and ensure support is extended beyond EL programs. EL student identification and groups are aspects of equal protection and need to be mentioned explicitly in the EEOA (Berenyi). Much flexibility is granted to states to comply with EL-related policies, like the EEOA, to create their own language remedial programs, which explains the vast assortment of remedial LIEPs for ELs across the country, yet, the very lack of consistency and great variation in program content have become major concerns for the quality of education ELs are receiving across the country (Wiley & Wright, 2004).

Berenyi (2008) further suggests Congress revise the EEOA to specifically state that failure to take ‘appropriate action’ to overcome language barriers includes failures
beyond simply programming. Failure to take ‘appropriate action’ includes identification, teaching hiring, and funding; again, more explicit statutory language is needed.

Ultimately, IL amended its policies to ensure LEAs understand their responsibility to provide continued support to all ELs until proficiency is achieved on the states’ ELP assessments; a common misunderstanding for many states and districts with regard to EL-related legislation.

Parental waiver decisions contributed to confusion and violation of another EL-related policy, in particular Titles I and III of the ESEA of 1965, reauthorized as the NCLB Act of 2001. Multiple states and districts (Boston, Seattle, Portland, and IL) were under investigation for failure to provide language support to ELs who had opted out of language programs either because their parents had requested their child not participate or because the child attended schools in a district that did not have formal LIEPs (Faulkner-Bond & Forte, 2011; Ragan & Lesaux, 2006; Rossell, 2005). The monitoring agencies believed the decision made by ELs’ parents to opt-out of such programs waived the district or state’s responsibility to help a student learn English (Faulkner-Bond & Forte, 2011). To the contrary, Titles I and III under the NCLB Act grant parents of ELs the right to deny their child’s participation in LIEPs, but do not necessarily waive the LEAs’ civil rights obligations to overcome previously identified linguistic barriers (Berenyi, 2008; Faulkner-Bond & Forte, 2011). Both Title VI of the Civil Rights Act of 1964 and the EEOA require LEAs to take active steps to help all students attain sufficient proficiency, which essentially “trumps” the NCLB service refusal clause (Berenyi, 2008; Faulkner-Bond & Forte, 2011, p.6; Ragan & Lesaux, 2006; Wright, 2005). This is
another example of common noncompliance that stems more from misunderstanding overlapping laws, rather than deliberate disregard for ELs’ educational rights (Faulkner-Bond & Forte). Once classified as an EL, schools must include the student in the EL subgroup, offer accommodations, and annually administer assessments to test ELP.

EL-related legislation outlines specific service requirements with guidelines for implementation that stem from multiple legal sources of authority and are governed by various entities under which all laws and requirements for each one must be met (Faulkner-Bond & Forte, 2011) (see Figure 1).

Insight into the expectations regarding the roles of different educational agencies in preserving the rights of ELs, beyond solely Titles I and III under the NCLB Act, deserves undivided attention as a matter of civil rights. Ultimately, the NCLB Act did commit the federal government to a more central role in driving states and districts toward measureable improvement in student achievement, particularly for ELs. However, while ESEA mandates require school districts to evaluate ELs regularly and meet specific academic targets, the Department does not necessarily provide regulations on how such evaluations should be structured; only guidance on minimum expectations are identified (Faulkner-Bond et al., 2012; Samson & Collins, 2012). Decontextualized EL programming as well as inadequate systems at the state and district levels reflect the enhanced risk of noncompliance attendant to unclear guidelines. Thus, multiple agencies need to adopt legally astute and informed techniques to balance all of the services entitled to ELs in order to avoid violations of ELs’ rights. For program design, for example, the laws require LEAs to provide ELs with access to both academic content and supports for English language acquisition; both without isolating ELs from other students or keeping ELs from full access to the educational opportunities available to native-English speakers (Faulkner-Bond & Forte, 2011; Ramsey & O’Day, 2010). As school districts across the country try to best serve the ever-increasing number of ELs, however, numerous questions continue to remain unanswered, and amazingly, some practices have yet to be questioned at all (Rossell, 2005).
Extensive Variability in EL Identification, Reclassification, Programs, and Services

Identification of ELs: Entry and Exit Criteria. The identification of ELs for and actual length of an EL program may have significant effects on an ELs’ academic achievement (Ragan & Lesaux, 2006). While states use the same ESEA definition of an EL, criteria used to make initial EL placement decisions vary widely across the US, as does how to determine when an EL should no longer be designated as an EL; referred to as both redesignation or reclassification (Klingner, 2010; Ragan & Lesaux). The requirement for school divisions to identify, screen, and place ELs, however, is not explicitly stated in federal law. Rather, this requirement stems from various court rulings and federal policy decisions relating to the civil rights of ELs over the years (VA DOE, 2012). Even with overwhelming anecdotal evidence that suggest such extensive variability in the identification and reclassification practices of ELs, few studies have examined such practices. While the major lack of standardization and clarity of entry, as well as exit criteria, for EL programs at the national, state, and or/district level effect ELs, such tremendous inconsistencies also affect the validity, accuracy, and comparability of outcome data for the EL subgroup (Klingner; The Working Group on ELL Policy, 2009).

One study, conducted by Ragan and Lesaux (2006), did extensively and systematically examine federal laws, including published entry and exit criteria, for EL programs for 10 individual states and districts with the largest enrollment of ELs in the US. These states, from largest to smallest, included: CA, Texas, (TX), Florida (FL), NY, AZ, IL, CO, New Mexico (NM), Georgia (GA), and New Jersey (NJ) (Ragan & Lesaux). The ten districts, also in order from largest to smallest, included: Los Angeles Unified
School District (LAUSD), CA, NY City Public Schools (NYCPS), NY, Dade County Public Schools (DCPS), FL, Chicago Public Schools (CPS), IL, Houston Independent School District (HISD), TX, Santa Ana (SA) USD, CA, San Diego City (SDC) USD, CA, Long Beach (LB) USD, CA, Clark County Public Schools (CCPS), Nevada, (NV), and Broward County Public Schools (BCPS), FL (Ragan & Lesaux). EL enrollment in the aforementioned cities and states made up more than 80% of total EL enrollment in the 50 states, including the District of Columbia (DC), while EL enrollment in the aforementioned districts made up more than 21% of total EL enrollment in the 50 states, also including DC (Hoffman, 2003).

With data gathered from the DOE’s websites regarding entrance criteria, each of the 10 states studied, except GA and NJ, used a home language survey (HLS) to identify students for whom a language other than English is spoken at home; NJ does, however, include prescreening by a certified EL teacher (Ragan & Lesaux, 2006). In six of the states (AZ, CA, CO, GA, NM, and NY), the identification process for EL programs involves two steps, an initial prescreening tool (a HLS or prescreening by a teacher) and one additional criterion, a test of ELP, which, currently, Klinger (2010) emphasizes, are not peer-reviewed. Four states used additional criteria including parental request/approval, teacher input, student achievement, and the recommendations of an EL or LEP committee or named group of educators who monitor an ELs’ progress (Ragan & Lesaux). In six of the states, AZ, CA, CO, FL, IL, and TX, criteria differed as a function of the grade level of the EL; where kindergarteners and first graders are administered only the listening and speaking portions of the ELP test, while children in grades two and
beyond are also assessed for reading and writing skills. In the other four states, the exact same criteria are used in kindergarten through grade 12 (Ragan & Lesaux).

As for exit criteria, the majority of states studied use ELP tests to redesignate ELs to mainstream programs (Ragan & Lesaux, 2006). The lack of agreement between ELP tests is even greater at the point of redesignation with the problem of the tests being unable to differentiate between a student who does not know the answer and a student who does not know enough English to understand the question; more likely upon redesignation when ELP exams are more difficult (Rossell, 2005). Eight states use additional criteria such as parental notification or request, teacher request and/or evaluation, determination of an EL committee, and standardized test results in reading and language arts. Only four states (CA, NJ, NM, and TX) require academic achievement performance in each subject area (determined by either standardized test performance or grades) that are reviewed before they are reclassified; with CA, which enrolls more than one-third of the nation’s ELs, as the only state which requires comparison to native-English speakers using standardized tests in all subjects (Aud, William, Johnson, Kena, Roth, Manning, Wang & Zhang, 2012; Ragan & Lesaux).

Further, only three states, CO, IL, and NY, specify the amount of time ELs should be served in EL programs. In CO, after only two years in an EL program, ELs are no longer funded, whereas in NY, after three years an ELs’ individual progress is reviewed, and in IL, ELs cannot be considered for redesignation before spending at least three years in language support programs (Ragan & Lesaux). With regards to monitoring ELs after reclassification, only four states (CA, TX, AZ, and FL) provide relative information; ELs
must be monitored for two years after exiting an EL program in CA and AZ, only one year in FL, and in TX, language proficiency assessment committees (LPACs) can re-enroll an EL in language support programs if he/she struggles in mainstream classrooms because of their LEP (Ragan & Lesaux).

State laws and regulations for the 10 states studied with regards to entering and exiting EL programs are readily available online, as are three districts, while seven districts provided various levels of information (Ragan & Lesaux, 2006). Some districts could not provide any written documentation of district policies either online or via hard copy. LAUSD and NYCPS, however, indicated the same entry criteria for EL programs as the state, while four districts provided criteria distinctly different from the state. LBUSD, for example, assessed native language literacy or L1 of every EL from kindergarten through grade 12, while HISC considered results from a standardized academic achievement test (Terra Nova CAT 6) in addition to the entrance criteria set out by the state of TX (Ragan & Lesaux). Similarly, out of the eight districts with information readily available regarding exit criteria, five (DCPS, LAUSD, LBUSD, SDCS, and BCPS) considered scores on ELP tests as well as additional criteria to determine if ELs were to be redesignated. LAUSD and LBUSD considered academic achievement in two or more subject areas, including writing, of an ELs’ potential to exit out of the EL program. In DCPS, HISD, SDCS, CCSD, and BCPS, achievement in language arts was the only content area considered, in addition to ELP test achievement. For four districts (NYCPS, DCPS, CCSD, and BCPS), there was only one difference
between entry and exit criteria, the use of a HLS in the entry criteria, while only two districts (HISC, CCSD) monitored ELs who exited an EL program for two years.

Overall, findings from Ragan and Lesaux’s (2006) study suggest that the entry and exit criteria for EL programs are overly broad and focus primarily on ELP without much consideration to the overall long-term academic achievement of ELs. While Title III of NCLB requires states to set AMAOs for AYP for the acquisition of ELP and content-area knowledge in language arts, mathematics, and science for ELs, states and districts are measuring ELP in reading, writing, listening, and speaking; not academic skills and language as they relate to content areas (Ragan & Lesaux). Furthermore, there is a lack of consideration for the developmental nature of language acquisition in the entry and exit criteria used by states and districts; language does not vary as a function of grade level. Baker (2006) stresses how insensitive essentially all forms of standardized tests are to the qualitative aspect of language and to the great range of language competencies. Likewise, Baker suggests that NCLB subjects ELs to various types of testing without adequate preparation. Although standardized testing results indicate that some ELs do test well, many of these students are also doing very poorly in class and developing weak writing skills that limit rather than extend creative writing and responses (Baker, 2006). Linquanti (2001) similarly explains that part of the difficulty in defining “proficient” lies in identifying for what purposes, since “language performance depends on the task performed, the subject matter, and the audience” (p. 4).

**Redesignation/Reclassification from EL to Fluent English Proficient.** In addition to the identification of ELs, there is also great variation, and great tension,
surrounding one of the most common milestones used for defining and measuring an ELs’ progress, redesignation or reclassification from an EL to fluent English Proficient (FEP) (Linquanti, 2001). According to Linquanti, the concept of reclassification, as it is currently defined and implemented, may actually be contributing to educational inequity, lack of accountability, and student failure. Linquanti’s policy report reviews the purposes and methods of identifying, classifying, and serving ELs and identifies three specific problems with the current methods. These specific problems with the current methods include the complexity of what ELs have to demonstrate in order to be reclassified as FEP, the inadequate procedures which rely on standardized tests to provoke a review for reclassification, and ultimately, the distortion of EL progress due to how reclassification rates are calculated (Linquanti).

There is no simple or standard definition of what it means for an EL to become FEP. As aforementioned, Linquanti (2001) emphasizes that proficiency in and of itself depends on the purpose, the audience, and the topic. The tension surrounding reclassification has to do with what educators, policymakers, and the public understand to be the benefits, risks, and meaning of ELs being classified in particular language categories. More importantly, reclassifying ELs prematurely may also put them at risk, if indeed, they lack academic language skills or content-area knowledge (Linquanti).

Three major problems with the way ELs are currently reclassified as FEP begin with the complex nature of what ELs have to demonstrate: both mastery of basic and academic language skills and academic achievement standards in grade-level subject matter using English (Linquanti, 2001). Secondly, reclassification policies and
procedures in many schools and districts are simply inadequate and use standardized, norm-referenced tests (NRT) to “trigger” reclassification reviews (Linquanti, p.10). NRTs produce student scores referenced to a norm group, which often do not include ELs, whereas, a criterion-referenced test is scored against language proficiency standards and shows where students are on the language proficiency continuum; not compared to other test takers, yet, may be compared to previous performance. Apart from validity issues of testing ELs with tests designed for monolingual, native English-speakers, there may be misinterpretations about the causes of low performance that must be considered (Linquanti). Third, the methods that are in place to calculate reclassification rates largely misrepresent the reality of EL progress and program effectiveness, which diminish accountability.

States and districts, overall, tend to adopt similar operational criteria and procedures for reclassification and include: (1) basic language proficiency standards, (2) more cognitive/academic language dimensions, (3) academic achievement standards, and (4) consent or notification of a parent or guardian (Linquanti, 2001). Almost all districts include certain cut-scores on standardized, NRTs and minimum teacher-assigned grades as performance standards. Districts usually require that all the criteria be met before an EL is reclassified (Linquanti). Out of the three aforementioned problems with the reclassification method, the most problematic area that needs the most revision, is that most districts rely heavily on the results of a standardized, NRT in English to determine whether an EL may be promoted to FEP. Such assessments are not developed, intended or valid for the purpose of measuring ELP (Linquanti). Additionally, Linquanti
challenges concerns regarding the timing of particular “trigger” assessments that initiate reclassification review. In many districts, a number of months pass before the others are even applied. For example, a student may score well on an oral language proficiency measure in November, yet has to wait until May before taking the English NRT. This student may not actually be reclassified until the following academic year (Linquanti).

Reclassification, while is an important milestone in an ELs’ journey toward proficiency does not measure the whole story; there are enormous trajectories of progress which are critically important for educators to monitor and understand (Linquanti, 2001). Thus, the current reclassification process should not be considered a conclusive finish to an ELs’ educational journey (Linquanti). It is also possible, and must be seriously considered, that reclassified ELs may have academic needs that remain and may possibly emerge two or three years later. Linquanti recommends more useful data, collected more regularly, and analyzed more carefully, as critical for an accurate assessment of the effectiveness of school and district efforts. While the stakes are very high for educators of ELs, true accountability for the success of an EL requires much better monitoring of the full trajectory of an ELs’ journey (Linquanti).

**Programs and Services for ELs.** Not surprisingly, in light of the diverse characteristics of ELs, there is great variety in the programs and services provided to ELs, in addition to the identification, exit, and reclassification of ELs, across the US (Cheung & Slavin, 2012). English-immersion or English-only programs focus mainly on English language development and all instruction and activities are delivered in English, while the main content of Structured English Immersion (SEI) instruction is English itself. SEI,
first coined by Keith Baker and Adriana de Kanter, was characterized as the model of successful French immersion programs in Canada and also strongly supports learning English before introducing content material (Martinez-Wenzl, Pérez, & Gándara, 2012).

Transitional bilingual programs, on the other hand, provide most instruction in students’ L1 in the early grades and eventually transition into all English or L2. The purpose of transitional programs is to assimilate ELs into the general population while helping them keep up with content instruction. L1 is used initially between 50-90% of the time, increasing the use of English over time (Martinez-Wenzl, Pérez, & Gándara, 2012). Two-way bilingual immersion programs provide instruction in English and most commonly, Spanish, for both ELs and non-ELs in the same class, where the goal is for both groups of students to become bilingual and biliterate (Cheung & Slavin, 2012). In theory, in two-way bilingual programs, neither language is privileged and students should come to have relatively equal competencies in both languages (Martinez-Wenzl, Pérez, & Gándara). Lastly, paired bilingual programs provide reading instruction to ELs in both Spanish and English throughout different times of the day, with the main difference in that the native-English-proficient students are taught Spanish or in the L2, with an increase in the time taught in English for ELs as the students learn more English.

Bilingual education, overall, is an umbrella term that incorporates many different models, but the one characteristic they have in common is they incorporate L1 to some degree (Martinez-Wenzl, Pérez, & Gándara).

Faulkner-Bond, Waring, and Forte (2012) provide a review of the foundational literature with regard to LIEPS, which is not a meta-analytic study about program
efficacy, outcomes, or effort, but still provides a valuable insight into the various programs available for ELs. Furthermore, they acknowledge that they were not focused on determining which LIEP is the ‘best’ because there are simply not enough experimental and quasi-experimental studies to make such an informed conclusion. Thus, no definition conclusions can be draw about the effectiveness of various programs (p. vii). The term program used throughout this study is also synonymous with the term model. Similarly, while multiple meta-analyses and large-scale research studies and systematic syntheses of research have found that models following the bilingual approach can produce better outcomes than ESL models, as measured by general academic content assessments or measures of reading comprehension or skills, other studies, including a recent large-scale quasi-experimental study and a recent large-scale experimental study, indicate that quality of instructional practices matters as well as language of instruction. In other words, researchers have found examples of high-quality programs that come from both bilingual and ESL approaches, which suggests that no single approach (ESL or bilingual) is effective at all times and under all circumstances, especially considering the great language proficiency variation within the EL population overall (Williams, Hakuta, & Haertel, 2007; Parrish, Merickel, Perez, Linquanti, Socias, & Spain, 2006; Howard & Christian, 2002; August & Pease-Alvarez, 1996, Thomas & Collier, 2002). However, Faulkner-Bond et al., emphasize that providing any kind of special instruction or program is better for ELs than not providing and special services at all.

A civil rights investigation, under a joint DOJ and ED civil rights offices investigation, has cited AZ for violation of the identification instruments used with ELs
and instructional programs and services provided to ELs under another EL-related policy, Title VI of the Civil Rights Act of 1964 (Faulkner-Bond & Forte, 2011). With regards to the identification instruments used, the psychometrician hired for AZ’s investigation concluded that the state’s placement test was an invalid measure of language skills and also ruled that the use of its one-question HLS, a survey given to parents for initial placement, was insufficient to identify all students who are eligible for and may need EL services (Faulkner-Bond & Forte; Zehr, 2010).

AZ’s particular model/program for EL instruction, as investigated by the DOE’s OCR, was found to violate federal law, which had researchers asking whether segregating AZs’ ELs was a return to the “Mexican room” (Gándara & Orfield, 2012, p.1). Gándara and Orfield explain that when Latino students faced discrimination, educators 60 years ago justified such segregation as an educational necessity, saying that segregation was good, particularly in the “Mexican room” because of their language problems (p.3). Indeed, AZ’s mandated instructional model for the education of ELs is very restrictive (Gándara & Hopkins, 2010; Wiley, Lee, & Rumberger, 2009). The SEI model was mandated in AZ after Proposition 203 was passed in 2000 (Gándara & Hopkins). With this Proposition, the local flexibility that existed regarding the choice of program models for ELs came to an end; Proposition 203 effectively barred and dismantled bilingual programs in AZ and replaced them with a loosely designed, yet required, program defined as SEI (Lillie, Markos, Arias, & Wiley, 2012).

The SEI model that is currently in place results from the intersection of the Flores Consent Order (2000) issued by Federal District Judge Marquez as part of the Flores v.
Arizona (1992) case; Proposition 203, the voter initiative mandating English-only instruction in AZ; regulations were made even more restrictive after the establishment of the AZ ELLs Task Force, which was responsible for the implementation of the English Language Development (ELD) block model where first year ELs are secluded to for four hours per day (Mahoney, MacSwan, Haladya & García, 2010). Losen (2010) referred to an analysis of data from NAEP with evidence that English-only instruction implemented under Proposition 203 has not improved ELs’ reading or math scores. Similarly, Martinez-Wenzl, Pérez, and Gándara (2012) extensively reviewed the research on SEI and did not find a research basis for the statement that SEI is ‘significantly more effective’ in teaching ELs, at best SEI is no better or worse than other models, including bilingual instruction, when both are implemented with fidelity. However, SEI as implemented in AZ, carries serious negative consequences for ELs stemming from the excessive amount of time dedicated to a sole focus on English instruction, the de-emphasis on grade level academic curriculum, the discrete skills approach it employs, and the segregation of ELs from mainstream peers. SEI provides a more subtractive instead of additive educational experience for ELs (Martinez-Wenzl, Pérez, & Gándara, 2012). Federal civil rights officials have found serious fault with the aforementioned practices in AZ and a high federal court in 2011 also found that the state’s second largest city has failed to desegregate adequately (Gándara & Orfield, 2012).

It is imperative to note that AZ has had a history of serious school segregation that has harmed not only ELs, but also African American students. In 1950, AZ still had a
law mandating racial segregation of students and even when the Supreme Court ruled
Southern segregation unconstitutional in 1954, AZ was one of only a handful of states
where state law still permitted school districts to segregate their students openly (Gándara
& Orfield, 2012). Both Hispanic and African American students went to court to try to
reverse segregation, winning victories in state and federal courts in the 1950s, but this did
not resolve the issues; still being litigated in AZ even sixty years later in 2011 (Gándara
& Orfield).

Ultimately, Title VI prohibits discrimination based on race, color, or national
origin in any program that receives federal funding (Garcia, Lawton, & De Figueiredo,
2012; Kihuen, 2009; Ragan & Lesaux, 2006). AZ’s current four-hour model, as
implemented in K-12 SEI classrooms, hinders policy intentions; ELs simply do not have
access to quality instruction, or a curriculum that is comparable in quality nor amount to
that of native-English speakers. Lillie, Markos, Arias, and Wiley (2012) suggest that a
reexamination of the SEI policy is warranted if AZ is to realize the intentions of the
Flores Consent Order, Title VI of the Civil Rights Act, and equal educational
opportunities for ELs.

Overall, although well-intended, the identification of ELs and adoption of a
variety of programs and services for ELs among public schools, before, and as a response
to sanctions, reflect a lack of consistency and great variation in its content and quality
across state programs (Wiley & Wright, 2004). As seen through various examples across
the country, quantity has increased, yet, the quality of education has decreased; ELs, now,
more than ever, are subjected to hours of rote test preparation without much consistency
in the way ELs are identified, reclassified nor serviced (Linquanti, 2001; Ragan & Lesaux; Wiley & Wright, 2004). Ragan and Lesaux (2006) question whether greater uniformity in identification and reclassification law at the federal level would more accurately operationalize the goal of NCLB for all students to attain high levels of achievement. Ultimately, Ragan and Lesaux emphasize the severe need to examine the relationship among EL-related legislation and policy at the federal, state, and district level.

Several implications are raised to the policies designed to ensure that ELs are effectively served in schools across the country with initial placement practices and the services provided after such placement. ELs continue to struggle academically, even after they exit out of EL programs, however, without exit criteria that includes the assessment of academic achievement and without consistent monitoring practices after exit, there is no way to determine whether ELs are prepared to excel in mainstream classrooms without any continuation of language support.

**Lack of Comprehensive Guidance and Compliance for EL Service Requirements**

Currently, there is no one authoritative source of guidance or governing body dictating the full extent of EL service requirements. The main pieces of EL-related legislation that designate such requirements not only include NCLB, specifically under Titles I and III, but also Title VI of the Civil Rights Act of 1964, including the *Lau* Memoranda and the *Castañeda* principles (whose outcomes derived from Title VI), the EEOA of 1974, and the Fourteenth Amendment Equal Protection Clause (Berenyi, 2008; Faulkner-Bond & Forte, 2011; Kihuen, 2009; Ragan & Lesaux, 2006; Smith, 1990). The
two main governing bodies overseeing EL-related legislation are the US DOJ and the US DOE (Faulkner-Bond & Forte). Under the US DOJ are the EEOA and Title VI of the Civil Rights Act. Under the US DOE is the OCR, which also oversees Title VI of the Civil Rights Act as well as The Office of ESEA, School Accountability and Student Achievement Program (SASA), which ultimately oversees the NCLB Act. These offices watch for implementation errors and failures, yet only LEA administrators are held accountable for ensuring that each of these requirements are met (Faulkner-Bond & Forte, 2011). EL service requirements are difficult to implement because they stem from multiple sources, and as OCR investigations demonstrate, service requirements for ELs actually extend well beyond NCLB provisions (Faulkner-Bond & Forte). As for the Equal Protection Clause of the Fourteenth Amendment, this Clause forbids states from denying any person equal protection of the law. Similarly, the Fifth Amendment Equal Protection Clause applies to the federal government.

Comprehensively, these federal laws, policies, and supporting documents reveal that it is up to individual states and districts to develop a system for identifying ELs who need language support programs, develop EL services according to various language proficiencies, and assess ELs with appropriate assessments. It is also up to states and districts to determine when ELs no longer need support as determined by their EL status (Ragan & Lesaux, 2006). The mere multiplicity of governing statutes have far-reaching implications for compliance; meeting program requirements for one of these laws does not exactly guarantee compliance with each across the gamut of legal protections since each initiative is governed by its own agency or combination of agencies that each serve
a unique purpose. Exact details of the systems that must be used to ensure ELs progress academically and develop ELP to ultimately participate in the mainstream classroom are left to the discretion of each individual state and district without much guidance, yet services for ELs must be designed to satisfy criteria for each governing body of law which often become the product of practitioners’ own initiatives (Faulkner-Bond & Forte, 2011; Ragan & Lesaux; Samson & Collins, 2012).

While ED and OCR offer resources on how to interpret and implement NCLB and Title VI, such support is almost completely isolated and has to be retrieved separately. The DOJ acts as the primary enforcer, but guidance for how to implement EEOA is left up to the OCR. Not much support is offered to LEAs nor is there a way to ensure requirements have been met thoroughly or correctly until after the fact. The problem only trickles down to school districts, mandated by ESEA to evaluate ELs regularly and meet specific academic targets, yet, the Department also does not necessarily provide guidance on how such evaluations should be structured; again, only guidance on minimum expectations are mentioned (Faulkner-Bond et al., 2012; Samson & Collins, 2012).

The final lever for institutionalizing change in introducing educational reform has historically been through the courts (Samson & Collins, 2012). Courts have played a key role in the advocacy of educational rights and equity for ELs, as in the landmark 1974 case, *Lau v. Nichols*, and today, seem to be the only route to ensure the civil rights of ELs, including compliance of various EL services (Samson & Collins). In the face of numerous OCR investigations regarding the educational rights of ELs, the incentive for
practitioners to increase their knowledge regarding ELs services, provide alternative remedies rather than litigation, and establish more effective coordination of mechanisms to bring together institutions that service ELs is of upmost importance. Finally, researchers conclude that ELs and education systems will continue to face challenges because comprehensive resources and guidance regarding the educational rights of ELs are not readily available today (Faulkner-Bond & Forte, 2011; Samson & Collins; The Working Group on ELL Policy, 2009).

**Monitoring and Evaluating Effectiveness of EL Requirements?**

The OCR examined the academic opportunities and access of ELs in the two largest school systems in the nation, LA USD and NYC DOE schools, to assess whether they were being denied equal educational opportunities. This investigation found that there was absolutely *no* centralized process for evaluating the effectiveness of EL services, nor a process for identifying how to improve EL services across schools; both school systems acknowledged that they are not meeting the needs of hundreds of thousands of ELs (Maxwell, 2011; 2013b). The probe also found that a vast majority of ELs in middle and high schools continued to struggle academically even after being deemed FEP.

In LA, which has nearly 200,000 ELs, this investigation not only uncovered the lack of resources for ELs, but also uncovered the need to target additional resources to its African American students. NY was found in need to improve communication with the parents of ELs regarding the EL services available to them, improve their method for identifying ELs to determine if EL services are needed, hire more teachers with EL
certifications, and monitor the progress of current ELs; all part of a corrective action plan that if not followed, will be severely sanctioned by withholding both federal and state funding (Maxwell, 2011). NY and LA, both, have been mandated regular progress reports to be conducted by external auditors.

In May of 2012, however, a new lawsuit was filed by the American Civil Liberties Union (ACLU), as reported in the LA Times (Blume, 2012). According to Blume’s investigative reporting about the pending lawsuit, the state of CA is neglecting their legal obligation to ensure ELs are receiving an adequate and equal education. Blume reports that legal action is needed because schools are failing to monitor ELs and as a result, ELs are not keeping pace academically with their peers across CA. This suit was filed by two unidentified students, their parents, and five teachers from the Dinuba Unified School District in Tulare County, where they claim the use of a “substandard curriculum to improve the lagging performance of students who have yet to master English” (Blume, p.1). Filed in the Sacramento County Superior Court, ELs in Dinuba, which account for approximately 30% of the overall 6,150 student population, have been “subjected to a program…that lacks educational support and contradicts bedrock principles of how children learn language” (Blume, p.1). First and second grade ELs are removed from their regular class to be drilled in English grammar which causes them to miss grade-level curriculum. With hopes to avoid costly and excessive litigation, the Superintendent of Dinuba declined to comment, but intends to cooperate with advocacy groups. CA’s Education department, however, has adopted a hands-off approach to the issues facing ELs, citing a lack of resources and deferring to local school officials.
As of April 2013, another lawsuit was filed by the ACLU of Southern CA and was joined by the Asian Pacific American Legal Center, and the private law firm of Latham & Watkins LLP, alleging that more than 20,000 ELs in CA’s public schools are still not receiving language instruction and the state DOE is failing to ensure that schools educate such students (Maxwell, 2013a). Among the allegations, the ACLU says that some districts are receiving tens of millions of dollars in state aid, as well as federal Title II dollars, specifically for providing English language instruction to ELs, but then do not and have not provided the services. School districts themselves reported to the state department that they have ELs who are, indeed, not receiving any instructional services and are actually labeled in a category entitled “ELs Not Receiving Any EL Instructional Services” (Maxwell, p.1).

Just as there is no one authoritative source of guidance or governing body dictating the full extent of EL service requirements, there is also no one effective comprehensive system of data collection to monitor and/or evaluate EL service requirements (The Working Group on ELL Policy, 2009). The Working Group on ELL Policy emphasizes just how important it is to track ELs longitudinally because each ELs’ designation and achievement levels in reading and mathematics changes as he or she improves in their ELP. Disaggregating performance data by the number of years in the program or by classifications such as former ELs or ELs with interrupted schooling allows states and districts to determine the effectiveness of programs for ELs, however, only 22 states and DC have data systems that would allow them to track former ELs beyond the two years of monitoring which are required under Title III of ESEA. As of
2010, 22 states provided information to the ongoing National Evaluation of Title III, but only one state reported that it could directly identify ELs whose formal education was interrupted (Boyle, Taylor, Hurlburt, & Soga, 2012).

As school districts across the country try to serve the ever-increasing number of ELs, numerous questions continue to remain unanswered, and some practices have yet to be questioned at all, particularly in monitoring and evaluating effectiveness of EL requirements (Rossell, 2005). Perhaps the most controversial part of NCLB, referred to by Rossell as not only an unrealistic, but an illogical requirement, is Title I, under which ELs, SWD, students identified as economically disadvantaged, and students from major racial and ethnic groups, must all achieve the state’s proficient level on “challenging” academic standards by 2013/2014 (p. 29). Rossell points out that very little is written about the provisions of NCLB that pertain to ELs, particularly with regard to monitoring and evaluating EL requirements. Rossell argues that it is the test scores and how they are determined that are illogical; unlike the Black-White achievement gap and the poor-affluent gap, the achievement gap between ELs and FEPs can “never be eliminated” because an EL is from a non-English speaking family who scores low in English and if you define a group “by their low test scores, that group must have low test scores or ‘someone has made a mistake’” (p.29).

The analyses of NCLB incorrectly treat LEP as it were the same kind of achievement disadvantage as race, ethnicity or poverty – that is, something that can be corrected with enough money or power (Rossell, 2005). It is not. Blacks and Hispanics remain Black or Hispanic no matter how high their test scores get (Rossell, p.30).
Rossell explains that poor children remain poor no matter how high their scores get, however, ELs are removed from the EL/LEP category once their scores reach a certain level, leaving only low scorers in the EL/LEP subgroup. In other words, if an EL meets the state standards for “proficient” on the state achievement test, then they are not considered an EL/LEP; the essential flaw of NCLB is that it does not recognize that ELs as a group can never be at the state’s proficient level if that level is high and challenging.

Title I requires 100% of ELs to be at the state’s proficient level by 2013/14. This includes annual objectives expressed as percentages of students achieving at the proficient level where the starting percentage is higher of either the percentage of students at the proficient level who are in the state’s lowest achieving subgroup of students or the school at the 20th percentile in the state, based on enrollment. Rossell expresses not only astonishment at the use of this formula, but also absolute surprise that no one questions this outlandish formula.

To explain her point, Rossell (2005) uses ILs’ accountability plan from their 2002 achievement data as an example. The percent proficient of the school representing the 20th percentile is substantially higher (40% for Reading and 39% for Math) than any other subgroup except Asians and Whites, which means that ELs, low-income students, SWD, Blacks, and Hispanics have a starting point that is substantially higher than their actual starting point. Schools with large numbers of the types of students whose statewide starting point is substantially higher than their actual starting point could be unfairly targeted as needing improvement because they do not meet their statewide annual target even if they made substantial improvement. An affluent high scoring
school, on the other hand, could actually have a decline in their achievement and still meet their Title I Objective since their statewide point was well below their actual starting point. Rossell’s recommendation is that because current standards unfairly reward schools with affluent students and punish schools with poor students or ELs, each subgroup should have its own starting point for percentage proficient and realistic ending points; “a one-size-fits-all plan is not realistic” (p.37).

The Working Group on ELL Policy (2009), and Short and Boyson (2012) suggest addressing the problematic accountability provisions of the current NCLB Act to ensure more solid NCLB accountability measures, particularly an accountability framework to ensure ELs are making AYP toward ELP and academic proficiency, both within a reasonable time frame. Data systems need to enable longitudinal tracking of student progress for all ELs, particularly for ELs whose designation status varies by district and changes as their ELP progresses. There is a need for a statewide or national definition of an EL in order to facilitate data comparison across district contexts to also include the type of LIEP programs ELs have participated in (The Working Group on ELL Policy, 2009). Goldenberg (2008) also highlights an often unconsidered resource, even with such significant accountability problems, most schools fail to capitalize on the linguistic resources that all ELs do bring to the classroom, which may make a difference in closing the gap between ELs and non-ELs. Thus, the current policy and practice do not align with what the scientific research, which does show the value of the L1 in promoting ELs’ academic success.
The Working Group on ELL Policy (2009) ultimately recommends Title I and Title III to include reporting requirements for ELs at all language proficiency levels, beginning, intermediate, and advanced in which ELP and academic content outcomes are reported out as well as the long-term performance of students that have exited EL status and services. This stronger framework is needed to ensure that all educators are given clearer information and held accountable for an ELs’ academic performance and ELP progress, simultaneously (The Working Group on ELL Policy).

The landmark NCLB Act committed the federal government to a more central role and active involvement overseeing schools’ efforts to demonstrating measurable improvement in student achievement. It is the very legislation that put the academic and linguistic achievement of ELs under the microscope. Reauthorization of the NCLB Act provides an opportunity to build on the best aspects of current law and its federal-state-district partnership to revisit provisions that have created unintended obstacles to achieving the goal of high achievement for all students, particularly ELs (Johnson, 2010). As Ragan and Lesaux (2006) suggest, there has been an urgency to examine a number of federal policies and their effects on the academic achievement of ELs over time and the time is now.

**A Critical Examination of EL-Related Legislation**

Over the past four decades, the number of judicial decisions and federal policy initiatives has increased in order to address the education of ELs. However, the terms of EL education are dictated by various pieces of legislation in which meeting requirements for one law does not guarantee compliance with all laws; in part because each legal
mandate is monitored and enforced by a different combination of agencies (Faulkner-Bond & Forte, 2011; Ragan & Lesaux, 2006). A comprehensive examination of these federal laws and policies is past due as the courts have and will continue to be petitioned for relief from inadequate educational opportunities provided by schools for ELs seeking protection through numerous lawsuits under the following pieces of legislation: (1) Title VI of the Civil Rights Act of 1964, including a series of memoranda from OCR referred to as the *Lau Memoranda* clarifying LEA responsibilities for ELs along with the *Castañeda* principles (outcomes grounded in Title VI); (2) the EEOA of 1974; (3) the Fourteenth Amendment Equal Protection Clause; and (4) the most recent authorization of the ESEA, known as the NCLB Act of 2001, particularly Titles I and III (Faulkner-Bond & Forte, 2011; Ragan & Lesaux). While NCLB is arguably one of the more influential federal initiatives today related to ELs, prior legislative initiatives, as described in the chronological review below, are critical underpinnings necessary to examine in an effort to understand current efforts.

Prior to 1968, there were no federal educational language policies regarding the unique requirements of minorities in need of English language development; it was either English immersion or ‘sink or swim’ (Wiley & Wright, 2004). Dominance of the English language can be traced back under British rule during the colonial period and the choice among our founding fathers not to designate English as the official language out of respect for linguistic diversity and minority rights (Wiley & Wright). By the turn of the 20th century, however, neo-nativists succeeded in making English a requirement for naturalization and citizenship. Coercive federal assimilation policies toward Native
Americans were also implemented to destroy their customs and languages. In 1917, restrictions against foreign languages resulted in the decline of not only foreign language education, but also of bilingual education which resulted in restricting such education until Grades 6 to 8, when it was less likely that children would draw on their native languages (Wiley & Wright). Historically, English literacy was a gatekeeping tool to bar unwanted immigrants from entering the country, resembling literacy requirements that barred African Americans at the polls (Wiley & Wright). Complications deriving from the decentralized nature of education in the US are highlighted by state initiatives that came later, such as Propositions 227 (CA) and 203 in AZ, in 1998 and 2000, which imposed English-only instruction and their impact on the education of ELs, whereas research regarding appropriate assessment of ELs, particularly the effects of high-stakes tests, appear to have negative effects for ELs (Wiley & Wright).

A key development in the history of federal education policy for ELs did begin with bilingual education, initially sparked by the establishment of the first bilingual program in Dade County, Florida (FL) in 1963 to serve a Cuban immigrant community (New York State Education Department (NY SED), 2006). Congress passed Title I of the original ESEA in 1965. It allocated funds to improve the education of disadvantaged students with little federal involvement as to how the resources were to be spent by the receiving SEAs and LEAs. It remains the first major incursion of the federal government into local K-12 education policy. As for ELs in public schools, the then Title VII of ESEA also then known as the Bilingual Education Act, was passed in 1968 and was continually amended in 1974, 1984, 1988, 1994, and 2001 as part of what we now refer
to as NCLB (NY SED). From 1965 to 1975, federal funds for elementary and secondary education, in general, more than doubled (National Center for Education Statistics (NCES), 2000).

Historical trends of repressive policies, political periods of tolerance in the 1960s, including the Bilingual Education Act of 1968 and its reauthorization in 1984, to more resistance toward bilingualism are followed emphasizing the eventual disappearance of the term *bilingual* from The NCLB Act (Crawford, 2002; Wiley & Wright, 2004). Even the name of the Office for Bilingual Education and Minority Language Affairs expired and was quietly changed to the Office of English Language Acquisition (OELA) in 2002 (Crawford; Wiley & Wright). The starting point for EL-related federal policies emerged prior to the enactment of the ESEA Act when Title VI of the Civil Rights Act of 1964 passed in Congress. Not long after the passage of this influential federal legislation, two landmark court cases, *Lau v. Nichols* (1974) and *Castañeda v. Pickard* (1981) dramatically changed the landscape of ELs’ educational rights and opportunities.

**Title VI of the Civil Rights Act of 1964**

As part of the Civil Rights Act of 1964, Congress enacted Title VI prohibiting discrimination on the grounds of race, color or national origin in any programs or activities that receive federal financial assistance (NY SED, 2006; Ragan & Lesaux, 2006; US DOE, 2009; VA DOE, 2012). In order to determine compliance with Title VI, the OCR followed certain procedures of educational programs with ELs that receive federal financial assistance from the DOE.
In May of 1970, the former Department of Health, Education and Welfare (DHEW), originally established in 1953, published a memorandum to school districts on the Identification of Discrimination and Denial of Services on the Basis of National Origin, known as the May 25th Memorandum (US DOE, 2012; VA DOE, 2012). The purpose of the May 25th Memorandum was to clarify OCR's Title VI policy on issues concerning the responsibility of school districts to provide equal educational opportunities to ELs. This memorandum alerted school districts of their responsibilities when the inability to speak and understand the English language excludes national origin minority-group children from effective participation in the educational program offered by a school district. Specifically, pursuant to the directive that the district must take affirmative steps to rectify the language deficiency and open its instructional program to these students (VA DOE). The result of this memorandum was the adoption of either bilingual education programs or ESL programs.

The landmark case, *Lau v. Nichols*, decided in 1974, was the first US Supreme Court case to interpret Title VI of the Civil Rights Act and has had a lasting impact on the educational rights of ELs. In their ruling, the Supreme Court relied on the May 25th Memorandum and the legal standard for the DOE’s Title VI policy concerning discrimination on the basis of national origin. In *Lau*, non-English speaking Chinese students challenged the SFUSD to provide all non-English speaking Chinese students with a bilingual education in English. The US Supreme Court decided that the SFUSD had denied the non-English speaking students the right to an equal education as required by Title VI of the Civil Rights Act of 1964. *Lau* had a significant impact on the
education of ELs. However, the court did not exactly specify how to implement change to the district’s discriminatory practices and resulted in no clear mandate to the SFUSD in order to satisfy Title VI. The *Lau* decision did not require school districts to use any particular program or teaching method, but did affirm that ELs could not be denied “meaningful opportunity to participate in the public education program” (*Lau v. Nichols*, 1974, p.1; Ragan & Lesaux, 2006). In 1975, the former DHEW disseminated a document designed to describe appropriate educational steps that would satisfy the Supreme Court's *Lau* mandate, referred to as the "*Lau* Remedies" which ushered in rather significant federal influence over educational judgments to be made by LEAs and SEAs.

In *Castañeda v. Pickard* (1981), the Fifth Circuit stated that the provision of bilingual education not to establish a sufficient bilingual program in Raymondville’s Independent School District (RISD) in TX did not necessarily violate Title VI of the Civil Rights Act of 1964. Mr. Castañeda, however, filed for an appeal based on *Lau* and stated that there was no way to overcome the educational barrier for his children who did not understand instruction in English. The court established what is now a precedent for current federal policy on EL programs, referred to as the famous “*Castañeda* three-part test” to guide school efforts to take “appropriate action” as required by the EEOA of 1974 with the following three guidelines for evaluating programs: (1) the program must be based on sound educational theory, (2) the program must be implemented effectively with ample resources and teachers to serve ELs, and (3) the program must achieve results in overcoming language barriers confronting ELs, as well as discontinue a program if it is not producing results (Ragan & Lesaux, 2006). No specific programs were designated as
preferred methods for teaching and promoting the educational rights of ELs either, however, there is a clause designated to ensure that ELs acquire English, whether a state chooses to teach English first and then grade level content, but not at the expense of learning content area material altogether where districts have the responsibility to ensure that learning and growth are evident after enrollment in LIEPs, not just during these programs (Castañeda v. Pickard, 1981; Ragan & Lesaux).

**The Equal Education Opportunities Act of 1974**

Following *Lau v. Nichols*, the civil rights statute, the EEOA, was passed, prohibiting states from denying equal educational opportunities to an individual on account of his or her race, color, sex or national origin or language barriers which may impede equal participation in its instructional programs (NE SED, 2006; Ragan & Lesaux, 2006; US DOE, 2009; VA DOE, 2012). The statute protects the rights of ELs and specifically prohibits states from denying equal educational opportunities by the failure of an educational agency to take ‘appropriate action’ to overcome language barriers that impede equal participation by its students in its instructional programs. However, the EEOA is vaguely defined and needs to be amended to assure equality of education for language minority students; ‘appropriate action’ is still needed to amend the EEOA of 1974 (Berenyi, 2008).

The US Supreme Court has never recognized a constitutional right of ELs to be taught in their L1 (Berenyi, 2008). In fact, bilingual education is not required by the EEOA, nor specifically mentioned in federal legislation. Instead, the court has concluded that under federal law, a school district must provide non-ELs English language
instruction. In 1974, Nixon had declared that the EEOA would create a uniform set of standards for all the federal courts by establishing criteria of some sort for determining what constitutes a denial of equal opportunity (Berenyi). Nixon also stated that these “children will not have true equality of educational opportunity until these language and cultural barriers are removed” (Berenyi, p. 640). Drawing upon the critical message delivered by the court in *Lau v. Nichols*, schools must overcome the unfairness of teaching all students alike, with no regard to language abilities. Simply providing the same textbooks, teachers, and curriculum does not necessarily equate to an equal or meaningful education (Berenyi; *Lau v. Nichols*, 1974).

While the purpose of the EEOA is to ensure equal opportunities, the verbiage is narrowly defined with respect to ELP. Much flexibility is allowed for states to create their own remedial language programs and therefore sets forth why ELs are better served by more explicit statutory language. Such remedial language programs can include a wide array of programming: bilingual education, ESL, and English immersion programs. The EEOA also does not mention five different categories of ELs’ claims including programming, grouping of students, management of programming, teaching training and hiring, and funding; which Berenyi (2008) proposes also needs be specified in the EEOA. Claims of insufficient programming, for example, allege that pressing ELs to read and write at grade level in both English and their native language violates the EEOA. Additionally, identification of ELs is dependent upon the classroom teacher to link underachievement with possible language deficiency without any assurance that students
will actually be identified. EL student identification and groups are aspects of equal education and need to be explicitly mentioned in the EEOA as well.

It should be noted that the EEOA only applies to the activities of SEAs and LEAs at the elementary and secondary levels. The EEOA does not impose any obligation on any state higher education systems. The courts have also not required teachers to possess language-specific credentials in order to deliver remediation programs consistent with the EEOA. Without specific language in the EEOA indicating improper training as a failure to comply with the statute, ELs may continue to be taught by unqualified teachers. Fewer than one sixth of teacher education institutes address EL content or policies in their preparation curricula, while currently, only five states (AZ, CA, FL, NY, and PA (as of 2011)) require mainstream teachers to complete any type of coursework focused on ELs, all of which are only related to instructional practices (Ballantyne, Sanderman, & Levy, 2008; Menken & Atunez, 2001). Teachers often enter and stay in the profession without a clear understanding of laws regarding ELs like the EEOA; any understanding of laws beyond the basics about the NCLB Act (Faulkner-Bond & Forte, 2011). If states do not commit resources to ELs, the EEOA should also indicate that such funding deficiencies equate to a violation of the statute and further clarify the standards necessary to state a claim under the EEOA.

**Significance of the United States Fourteenth Amendment**

Both the Equal Protection Clause and Due Process Clauses of the Fourteenth Amendment are significant sources of legal, and some might argue, moral authority over educational rights (Bon, 2012). Notably, the Equal Protection Clause of the Fourteenth
Amendment, which is specific to states, and prohibits states from denying any person equal protection of the law. The requirements of equal protection also apply to the federal government under the Fifth Amendment; thus both federal and state equal protection rights are guaranteed. The Equal Protection Clause prohibits states from denying any person equal protection of the law and is most notably referenced in the landmark desegregation case, *Brown v. Board* (1954). In short, the Supreme Court’s decision in *Brown* established that the “separate but equal” doctrine, first endorsed by the court in *Plessy v. Ferguson* (1845), violated the Fourteenth Amendment Equal Protection Clause, making segregation in the educational setting unconstitutional.

In *Plyler v. Doe* (1982), the US Supreme Court ruled that the Fourteenth Amendment of the US Constitution protected illegal aliens, who are indeed considered “persons” despite the ludicrous assertion that their undocumented immigrant status somehow deprived them of person status (Bon, 2012). Despite the efforts of the TX legislature to classify undocumented alien children as undeserving of basic human dignity under the Fourteenth Amendment, the *Plyler* decision marked a resounding affirmation of educational rights. Accordingly, undocumented immigrant children are protected by the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments (*Plyler v. Doe*).

The Fourteenth Amendment also played a pivotal role in the Supreme Court’s ruling on state efforts to both enact and enforce statutes mandating English-only instruction in public schools (*Meyer v. Nebraska*, 1923). In this case, a Nebraska (NE) statute that allegedly focused on promoting American ideals, was enacted to prohibit
foreign language instruction of young children in public, private or parochial schools. Initially, the NE Supreme Court upheld the statute; yet the US Supreme Court determined that the state law violated students’ liberty interests protected by the Fourteenth Amendment. This decision has potential implications that could be interpreted to invalidate legislative attempts to prohibit bilingual education in favor of English-only instructional strategies.

**No Child Left Behind and ELs**

In 1965, Congress passed the ESEA to improve education throughout the US directed at disadvantaged students (Boyle, Taylor, Hurlburt, & Soga, 2012; Rossell, 2005; Wright, 2005). The ESEA was a key component of President Lyndon Johnson’s war on poverty, intended to provide resources to disadvantaged students with very little federal involvement or guidance to SEAs and LEAs on how to use them and is still considered a key legislative achievement of the great society (Wright, 2005). President Clinton passed an education reform plan called the Improving America’s Schools Act (IASA) in 1994, reauthorizing ESEA, and putting into place many of the concepts that became part of the NCLB Act; increased parental involvement, professional development for teachers, and support to states to develop standards and assessments (NYSED, 2006). It is this very reauthorization that also required economically disadvantaged students to be assessed using the same state tests given to all other students and schools with low performance to be identified as schools that need improvement (NYSED).

Education became a key component of both Clinton’s and Bush’s agendas in an attempt to appeal to the public, and ultimately, the ESEA was reconfigured, but also
increased the size and scope of the federal government’s role in education. The ESEA of 1965, reauthorized again by the 107th Congress of the US as the NCLB Act of 2001, was signed by President Bush on January 8, 2002 (Wright, 2005). This reauthorization implemented the standard for all students to be proficient in reading, mathematics, and science by 2014 to be assessed via standardized tests (to be developed by the states) annually in grades three through eight and once in high school. NCLB increased the testing frequency to yearly assessments which became common because they are relatively inexpensive and arguably more objective, ranging from two to twenty-two dollars per tested student, while open-ended questions range from around thirty to fifty dollars per student (Archerd, 2006). This reauthorization also required achievement results to be disaggregated and published publically assigning almost full responsibility for closing the achievement gap to schools to provide stronger accountability for results, expand options for parents, and emphasize teaching methods proven to work (Evans, 2005; Ferguson, 2007). NCLB, overall, has resulted in the most significant federal education reform package in the last decade, pressuring states to implement its extensive requirements, to ensure that all schools are held accountable for the academic progress of every child, regardless of race, ethnicity, income level or zip code (Evans). It is because of NCLB that closing the achievement gap between Whites and Blacks, Hispanics, ELs, SWD, and economically disadvantaged students has become a national priority.

Titles I and III are two provisions under NCLB that speak specifically to the education of ELs (Faulkner-Bond et al., 2012; Faulkner-Bond & Forte, 2011; Ragan & Lesaux, 2006; Rossell, 2005). Title I, Improving the Academic Achievement of the
Disadvantaged, outlines state standards, assessment, AYP, inclusion, and additional school accountability requirements for students identified as ELs, economically disadvantaged, from major ethnic and racial groups, and/or with disabilities who receive special education services. Title I requires each state to implement an accountability system with sanctions and rewards incorporated to ensure that every student makes AYP, or expected growth each year, in grades three through eight and once in high school, in each content area (reading, language arts, math, and science (Ragan & Lesaux). AYP is defined by the state and evaluated against the state’s achievement standards, known as AMAOs, progress measured by Title III, for continuous and sustained improvement in each of the aforementioned subgroups, in addition to attendance and graduation rates (Ramsey, & O’Day, 2010). This annual assessment measures a student’s performance where such data are disaggregated by the aforementioned subgroups, often referred to colloquially as the “triple threat;” often ELs qualify into all three categories, which significantly affects their school’s AYP. A school fails to make AYP if any identified group fails to meet the state’s academic achievement standards. However, if the percentage of students in a particular group that has not attained proficiency decreases by 10% from the year before, AYP is considered to be met; Safe Harbor. For students in a subgroup who do make significant academic progress, Safe Harbor is a special feature in NCLB considered for a particular subgroup if they make a 10% reduction in the number of students who are not proficient. For example, if the LEP subgroup is 30% proficient and then achieves a 7% increase (10% reduction) then they are considered to have met AYP for that subgroup and would not be identified as needing improvement.
This has often been the case for the LEP subgroup which often makes gains. Under Title I, states must also provide ELs with appropriate accommodations, including modifications of the assessment language and format, until the students achieve ELP (Abedi, 2004). NCLB does allow for native language testing of ELs (to the extent practical), with a maximum time limit of five years and only on a case-by-case basis after three years (Ragan & Lesaux). Some ELs may not find tests in their native language helpful, especially if they are not literate in their native language. NY, however, has one of the broadest accommodation policies and allows ELs at all grade levels to take assessments in Spanish (Archerd, 2006).

Title III provisions parallel Title I provisions with great flexibility allowed to states and districts in how federal funds are spent on programs, in return for greater accountability for student progress, with the ultimate goal of ELs attaining both ELP and academic achievement (Ramsey & O’Day, 2010, p.5). ELP standards were not required before the implementation of Title III, The English Language Acquisition, Language Enhancement, and Academic Achievement Act (Ramsey & O’Day). Title III specifically requires that the ELP standards be aligned with the state content and academic achievement standards to ensure that ELs are learning the type of academic English necessary to make progress in the content areas of reading, mathematics, and science. Title III provides funding to meet such requirements (Faulkner-Bond et al., 2012; Ramsey & O’Day; US DOE, 2012). Title III’s accountability measures require districts to submit the number and percentage of children who attain ELP over the year as
well as the number who are meetings state academic content requirements; AMAOs (Ragan & Lesaux, 2006).

AMAOs specifically include three criteria: (a) annual increases in the number/percentage of ELs making progress in learning English (AMAO 1); (b) annual increases in the number/percentage of students attaining ELP (AMAO 2); and (c) making AYP (AMAO 3) (US DOE, 2009). Through the AMAOs, states hold districts receiving Title III funds accountable for improving the levels of ELP and academic performance of their ELs. If a state determines that an applicable district has not met its AMAOs for two consecutive years, the district must develop an improvement plan with support from the state. If the district has not met AMAOs for four year in a row, the district must then implement modifications to its curriculum, program, and method of instruction, or the state must assess whether the district will continue to receive additional funds. Additionally, the district is required to replace educators who do not meet AMAOs. Parents of ELs who are being served by Title III or who are eligible for Title III services must be notified of a district’s AMAO status if a district has missed any of the AMAOs for a year or more. Districts must also report on progress made by ELs two years after they have been classified as FEP (VA DOE, 2012).

The debate over the ‘best way’ to educate ELs infer that the US has the best practices for all children, however, this debate continues. The final lever for institutionalizing change in introducing educational reform has historically been through the courts, which have played a key role in the advocacy of educational rights and equity for ELs (Samson & Collins, 2012). In the face of numerous OCR investigations
regarding the educational rights of ELs, the incentive for practitioners to increase their knowledge regarding ELs services, provide alternative remedies rather than litigation, and establish more effective coordination of mechanisms to bring together institutions that service ELs is of upmost importance (Faulkner-Bond & Forte, 2011; Samson & Collins; The Working Group on ELL Policy, 2009). The legal briefs identified in this study reveal how courts have ruled on cases filed on behalf of ELs, by either ELs’ parents or advocates of ELs; seeking relief via EL-related legislation, from insufficient educational opportunities provided by schools throughout the US.

**Rationale for Current Study**

To begin to improve services for ELs, there must first be an awareness and comprehension of federal and state constitutional provisions, federal and state legislative authority, and judicial rulings with respect to the educational rights of ELs. There is essential knowledge to be gained through this systematic and iterative review of case law decisions, while simultaneously interpreting the influence of legislative mandates and policies that affect past, present, and future litigation trends. Through a careful review, as well as critical reflection on the extent of Constitutional protections of children’s educational rights under the Fourteenth and Fifth Amendments, this study bridges the gap of critical knowledge necessary to ensure the legal requirements for the educational right of ELs are met. An extensive review of key social sciences research databases, as well as scholarly law publications, support the need for a thorough examination of the relationships among EL laws and policies at the federal, state, and district level.
Understanding the effects of these policies on the academic achievement of ELs over time is a much-needed endeavor in order to support the growing population of ELs.

A narrow research focus on instructional strategies or minimal mandates under the NCLB Act is insufficient given the well-established need for educational opportunity in an increasingly complex society. Teachers working with ELs in their classrooms today need support and guidance so that they can help ELs not only meet 100% passing standards by 2014, but also now be college and/or career-ready. This examination is needed to first understand and further enforce EL program compliance, decrease the EL high school dropout rates, and help meet the new career and/or college-readiness mandates to ultimately ensure equitable educational opportunities and outcomes for all ELs (Ragan & Lesaux, 2006; Wassell, Fernández Hawrylak, & LaVan, 2010). This study systematically analyzes case law and litigation, including litigation trends, pertaining to ELs using both Kunz, Schmedemann, Downs, and Bateson’s four-step method of analysis and Baldwin and Ferron’s (2006) quantitative method of “simple-box scoring;” legal policy research methodologies examining what and why litigation in this area is increasing (Adler, 1996).

Ultimately, where there is a right, there is a remedy. There is an implied right of action which exists under NCLB; ELs should be afforded a remedy when states and school districts fail to comply with NCLB because education is a civil right (Kihuen, 2009). Courts must first determine that Congress enacted the statute for the benefit of a special class of which the plaintiff is a member in order to find an implied private right of action. Civil actions against people/entitles should be permissible because a failure to
implement NCLB is a failure to comply with Castañeda, and thus a violation of the EEOA. Undoubtedly, Congress must reform NCLB and EEOA as it has burdened states, school districts, teachers, and ELs; courts must interpret the laws as civil rights statutes that grants rights to students belonging to a special class to reduce educational inequities for ELs; the fasting growing student population in the country.
CHAPTER THREE: METHODS

The purpose of the methods chapter is to describe the procedures used to carry out this study. The chapter begins with a rationale for and summary of the research design. Next, data sources are identified and study procedures are outlined. Finally, limitations, including validity and confirmability, are described.

Research Rationale

According to Lee and Adler (2006), traditional legal research answers the primary question, “what is the law?” (p.25). Law is typically viewed as a socially constructed phenomenon, which is best examined through legal research to explore “why and how courts and legislative bodies interpret and create specific laws” (Lee & Adler, 2006, p.25). An important aspect of legal research is the analysis of court cases, however “courts do not render decisions in a vacuum,” instead courts abide by common law, precedent, and stare decisis (Decker, 2010, Romantz & Vinson, 1998, p.8). Common law is also referred to as case law and is defined as the comprehensive body of law that is derived from court decisions (Permuth & Mawdsley, 2006). Another distinction is that common law is the law that judges make; whereas statutes are the laws enacted by legislatures (Barkan, Mersky, & Dunn, 2009; Romantz & Vinson). Judges rely on precedent, or past court decisions or opinions that essentially serve as examples of how similar law can be applied. Stare decisis, or “stare decisis et quieta non movere,” is
translated from Latin as “those things which have been so often adjudged ought to rest in peace,” and is the legal principle that requires courts to use precedent when deciding similar cases to ensure fairness so similar cases are decided the same (Decker, 2010; Romantz & Vinson, p.8). *Stare decisis* requires a lower court to follow a higher court’s decisions when the same legal issue and jurisdiction are at hand. Continuity in court decisions is provided by *stare decisis* and helps predict how courts may decide in future cases; the foundation upon which models of legal research are created (Barkan, Mersky, & Dunn, 2009). The purpose of undertaking legal research is to conduct a systematic inquiry in the law with the intention of informing both policymakers and practitioners (Permuth & Mawdsley, 2006; Russo, 2006). The purpose of this study is to contribute to the effort to understand the laws pertaining to ELs through the systematic analysis of case law and an examination of litigation trends to inform policymakers and practitioners and ultimately ensure and improve equitable educational opportunities for ELs.

Two of the primary legal policy research methodologies have been adopted to achieve the identified purposes in this study (Kunz, Schmedemann, Downs, & Bateson, 2008; Baldwin & Ferron, 2006). Through the four-step method of analysis (Kunz et al.) and Baldwin and Ferron’s quantitative method of “simple-box scoring,” this research study first identifies what the law is and then answers the why and how questions relative to ELs’ educational rights. Finally, legal research provides descriptive details through the legal trend analysis investigation focusing not only on whether a category of cases is increasing, but also on why litigation in this area is increasing (Adler, 1996).
Research Design

Kunz et al., (2008) suggest the following four-step process: (1) consider whether legal authorities and sources are available; (2) analyze the legal question in order to generate search terms; (3) locate secondary sources to research the relevant legal issues and search terms; and (4) review primary sources to determine what the law itself says, all in an effort to extrapolate principles from hearings in order to provide guidelines about how programs should be developed and services should be delivered for ELs (Decker, 2010).

To go beyond legal research, this study also includes quantitative methods as recommended by Baldwin and Ferron (2006). The quantitative methods will substantiate and enhance the legal research methodology and provide a rich source of data. The purpose of using quantitative methods is to create a database to make ‘rational decisions’ and allows the researcher to disaggregate data to examine nuances that may be occurring (Baldwin & Ferron).

Baldwin and Ferron (2006) describe the key elements of quantitative research studies: (1) identification of the problem; (2) study design; (3) examination of internal and external validity; and (4) review the “appropriateness of the statistical analyses” (p.59). Baldwin and Ferron describe a variety of research strategies including the ‘studies of the past’ which involve counting the prevailing/losing parties in court decisions; also referred to as “simple box scoring;” a quantitative method similar to the research tool of case law analysis charts which organizes relevant primary sources of law and establishes values within a table to easily distinguish different characteristics,
outcomes, and specific dates from each case. Baldwin and Ferron also warn that applying quantitative methodology to education law research should not ‘be limited to counting cases…quantitative inquiry can also deal with the opinions and effects of specific and multiple court decisions’ on issues facing ELs (p. 59).

The qualitative method employed provides “interpretive insight into legal issues” and has the potential to enlighten, supplement, reinterpret, and validate perspectives about legal issues, according to Lee and Adler (2006) (p.26). In this current study, characteristics of case law are not only quantified, but also coded and disaggregated by theme in order to identify specific litigation trends (Decker, 2010). Denzin and Lincoln (2003) describe qualitative research as being ‘a situated activity’ that locates the observer in the world, consisting of interpretive practices that make the world visible. Thus, qualitative methods do not seek to quantify information, but rather a qualitative approach aims to gather and group, or collect and code, data so that the researcher can interpret it and find meaning through data analysis.

Data Sources

Primary and Secondary Sources of Law. Legal research is conducted with the help of primary sources, secondary sources, and search tools (Russo, 2006). Primary sources are written statements of law by governmental sources that include legislation, case law, rules, regulations, constitutions, and administrative agency opinions, which are all applicable until they are repealed or overruled (Clark, 2011; Permuth & Mawdsley, 2006; Russo). Primary sources of law are created by all three branches of the US government, while secondary sources are writings about the law rather that the law itself
Secondary sources include law reviews, scholarly journals, textbooks, legal encyclopedias, and legal dictionaries used to help interpret and locate primary sources (Clark, 2011; Elias & Levinkind, 2009). It should be noted that it is common for courts to refer to articles published in scholarly journals, however, they are often used only as persuasive authority (Permuth & Mawdsley, 2006; Romantz & Vinson, 1998). Yet, because primary sources of the law often appear in the footnotes of secondary sources, Russo suggests that review of these articles is similar to the triangulation of data used by qualitative researchers because researchers are led to other research through cross-referencing. Finally, search tools also help locate primary and secondary sources, particularly full-text legal resources, state and federal court cases, statutes, and administrative laws; all readily available online.

The most comprehensive electronic databases used [through subscriptions] as search tools are Lexis/Nexis and Westlaw and free online databases found on the Internet such as and Findlaw.com (Clark, 2011; Elias & Levinkind, 2009; Permuth & Mawdsley, 2006). Legal databases allow searches via citations, key-words, and Boolean and hold roughly three million cases with 50,000 decisions added each year (Decker, 2010; Russo, 2006). In addition, both Illuminate and Education Research Complete aide in locating additional scholarly journals, not to leave out the importance of national newspapers, which highlight new lawsuits across the nation. Likewise, the tradition of shepherdizing cases is a critical procedure because even though the legal system is bound by precedent, appeals may result in subsequent decisions that supersede the original ruling.
Data Collection Procedures

In order to locate primary and secondary sources of the law, actual written statements of the law and writings about the law, various search tools were utilized. The principle databases used were both LexisNexis and Westlaw. Secondary sources used included government documents and scholarly journals, as well as selected textbook materials. The comprehensive examination of federal laws and policies started with Title VI of the Civil Rights Act of 1964 and extended over four decades up to the most recent authorization of the ESEA, known as the NCLB Act of 2001. Such legislative initiatives were researched and then described chronologically by year. The starting point for cases was the 1974 landmark US Supreme Court case Lau v. Nichols, which significantly impacted the education of ELs, and the ending point was April of 2013, the latest lawsuit filed by the ACLU; filed in CA. This study addressed a very narrow population of cases, described and collected with the following process (Decker, 2010).

Step One. This step actually corresponded with both Kunz et al.’s step two and Baldwin and Ferron’s step one, which was to first identify the legal issues/problems, describe the significance of the problem, and then develop research questions to generate search terms. The following research question was developed and generated search terms, thus providing set parameters to maintain clear boundaries that guided the study and were researched in the following step, step two: 1) what are the specific case law outcomes and trends of federal and state litigation involving the educational rights of ELs?
Step Two. This step corresponds with a combination of Kunz et al.’s (2008) steps one and three and Baldwin and Ferron’s (2006) step two. Kunz et al.’s first step is to consider whether legal authorities and sources are available, and it was determined that legal authorities and sources were available to respond to the identified research question. Relevant primary and secondary sources were located and summarized and ultimately highlighted gaps in the existing literature emphasizing a need to understand the educational rights of ELs. This step also attended to Baldwin and Ferron’s second step toward the development and application of this research design with both a legal and a quantitative trends analysis that used a “simple box scoring” tool to deepen the level of data collection and analysis (Decker, 2010). The use of the databases allowed for Boolean combinations of various search terms and included the following: “civil rights,” “educational rights,” “English language instruction,” “education,” “language,” and “assessment.” In addition, as previously discussed, although the term EL has been utilized throughout this study, the evolution of acronyms used to classify ELs, along with the programs and services provided to ELs, have been interchangeably used throughout secondary and primary sources and, therefore, Boolean combinations of the following terms were used with the aforementioned search terms “English Language Learner,” “English as a Second Language,” “English Language Proficiency,” “Limited English Proficient,” and/or “English Learners.”

Step Three. This step was added to Kunz et al.’s (2008) four-steps in an effort to indicate how litigation and cases were collected (Decker, 2010). The relevant primary sources of law were collected and organized as were all the cases with a key-word search
of all “state and federal cases” published from 1974-2013, restricted dates, involving PK-12 ELs’ educational rights, to also include any cases involving assessment practices of ELs. Procedures included careful reading of each statute, regulation, and case; organized chronologically. After the first search with a combination of the aforementioned Boolean key-word search with combinations of EL acronyms, an initial 998 cases were collected from Lexis Nexis and Westlaw. After eliminating cases that were not published, eliminating cases that dealt with only immigration issues regarding ELs, limited to only federal and state cases, and were restricted with dates ranging from 1974-2013, 106 cases were left. It was necessary in this step to screen the generated 106 cases for those that met the combination of the following selected criteria: (a) parental suit or advocacy groups on behalf of an EL, (b) at least one specific claim and court ruling on the educational rights of ELs, to also include educational assessment issues with ELs; and (c) at least one of the defendants listed in the suit is an educational institution serving only public, PK-12 grade range ELs. Exclusions were also extended to higher education institutions. If the cases did not include substantive issues related to the education of ELs, they were considered irrelevant and were excluded from the data set. If a case was a lower court decision and its appeal was in the data set, this too was excluded based on its appeal. The process of identifying whether a case has been overturned, reaffirmed, questioned or cited by subsequent courts, described by legal researchers as “shepardizing” or “keyciting” was key to ensuring “good law” for the final list of cases (Decker, p. 152). After accounting for duplicate cases and excluded or irrelevant cases on the aforementioned criteria, the number of final cases totaled 25.
These 25 cases were ultimately entered into a final spreadsheet that served as a case analysis chart; a “simple box scoring” spreadsheet entitled Final Case Data Set Spreadsheet. The column headings of the spreadsheet included: case number, case name, citation, date decided, state of origin, claim(s), outcome, relief sought, remedy awarded, findings and clarifying comments, case law outcome codes, and outcome code of prevailing party. A thorough written synopsis of each of the 25 cases is indicated in the following chapter and includes briefings of case facts and the judgment of the court.

Step Four. In step four, as suggested by Barkan, Mersky, and Dunn (2009), the creation of a “simple box scoring” spreadsheet allowed for a legal analysis of the case law to determine what the primary source itself said; Kunz et al.’s (2008) step four. Trends from each of the case were analyzed with regard to federal policy and were organized and synthesized thematically. To begin to complete the Final Case Data Set Spreadsheet, each column was filled with specific information and various data were disaggregated to better explain legal trends. One particular column, the outcome code, used a one to seven Likert-scale adapted from Lupini and Zirkel (2003) where a one signified a “complete win for parents/ELs/advocacy groups on behalf of ELs,” a four signified a “split decision,” and seven signified a “complete win for the school authorities” (Appendix A). Additionally, the cases were color-coded. If the parents/ELs/advocacy groups on behalf of ELs were the prevailing party, then the case was highlighted green. If the school district was the prevailing party, then the case was highlighted red. If the case was inconclusive then the case was highlighted yellow. A comparison of cases across categories included facts, issues, decisions, rationale, remedy
awarded, state of origin, and dissenting or concurring opinions. Baldwin and Ferron’s (2006) method allows for the identification of similarities and differences in fact patterns that either met or failed to meet a legal rule.

**Step Five.** Finally, an examination was conducted of the internal and external validity of the study; corresponding to Baldwin and Ferron’s (2006) step three. If a study is valid, then the research measures what it claims to measure. Thus, a study with good internal validity is reproducible and will yield similar results if conducted again. External validity addresses questions as to the value of the findings to a larger or different groups, in other words, are the findings generalizable. First, would another researcher include the same cases in their data sets and secondly, would the interpretation of who prevailed in each case be the same (Decker, 2010). In an effort to double-check the cases, each case was cross-referenced in different databases and various Boolean combinations were used to ensure a complete data set was collected for data analysis. Similarly, different databases were utilized in an effort to ensure accurate interpretation of who prevailed in each case.

**Limitations**

A limitation of using quantitative methods in legal research is that the access to data is limited; oftentimes, cases are settled outside of court and also variables that affect courts’ decisions are not recorded (Baldwin & Ferron, 2006). Additionally, while there is essential knowledge to be gained through a systematic review of case decisions, legislative mandates, and policies, these data sources are but one aspect of the overall challenges facing ELs and will not reveal uncontroverted guidelines for educating ELs.
While every effort was made to access all relevant case law, the history of American jurisprudence is so voluminous, that even with the increasing capability of the available search tools, a complete review of all of the cases could not and cannot be guaranteed (Decker, 2010). Likewise, a historical review of the legal cases and legislative enactments relevant to ELs is limited in its predictive value.

**Credibility, Transferability, Dependability, and Confirmability**

Lincoln and Guba (1985) encourage policy researchers to closely attend to four additional, specific criteria, including credibility, transferability, dependability, and confirmability.

**Credibility/Internal Validity.** Credibility is additionally concerned with the truth of the findings for particular subjects in a particular context and would replace the concern with internal validity found in traditional research methods. A study’s internal validity is when a researcher determines whether or not the study can be reproduced with similar results and a study is said to have external validity if its results can be generalized (Baldwin & Ferron, 2006; Decker, 2010; First, 2006). A comparison could only be made via a cross-reference to cases in the data set with different databases using similar Boolean combinations. With only one researcher, there was no opportunity to measure internal validity through inter-rater reliability in this study, however, findings about prevailing parties could be validated in each of database and at times as well as through various newspapers highlighting various lawsuits brought to light by the OCR. A design limitation is that the study failed to employ statistical analyses, Baldwin and Ferron’s last step. However, this study is an EL-related litigation study, adapted from Decker’s first
special education-related litigation study that attempted to employ a mixed method
design, both written for an education and legal audience. Although in this study, similar
to Decker’s study, the sample sizes are small, the depth of the findings and analysis are
comprehensive. Lastly, the identification of themes from the OCRs’ investigations were
similar to the litigation trends identified in this study which suggests that this study’s
findings may be generalizable.

**Transferability.** To determine transferability or applicability of a policy to the
context, the fit of the findings would need to be assessed to the particular problem. The
more complete the description of the original study, the more likely a potential fit can be
assessed. Concern with applicability essentially replaces concern with external validity
found in traditional research studies (First, 2006). This particular study includes a
complete description of the combination of both methodologies utilized.

**Dependability.** Dependability of consistency of the study replaces concern for
traditional reliability. An audit trail is used to determine whether or not if a second
policy research team reviewed the documentation and the underlying reasoning would
agree on the findings being reached (First, 2006). A thorough explanation is outlined
with step-by-step data collection procedures.

**Confirmability.** Lastly, confirmability means objectivity. Data should be factual
and confirmable. Information (legislation, literature reviews and research, as well as case
law) must be confirmable at each step in the process and was done with the confirmation
of two separate databases used to collect cases and confirm the outcome of each case.
All four criteria are even more important for researchers in the aftermath of NCLB of 2001, with the federal government promoting scientifically-based research for use in the public schools (First, 2006). Criticism of education research has requested randomized trials in education like those conducted in medicine, therefore, the quality and trustworthiness of legal research must be demonstrated clearly throughout the study. The relationship between social science and public policy can then be strengthened to make a positive difference in the “ongoing quest for the “good” of society….based upon “law, freedom, and justice” for all….ELs (First, p. 156). The following chapter summarizes 25 cases and their findings from 1974 through 2013 in which parents of ELs, ELs, or advocacy groups on behalf of ELs brought action seeking relief against unequal EL educational opportunities and outcomes provided by schools under the NCLB Act, the EEOA of 1974, the Fourteenth Amendment Equal Protection Clause, and § 601 of the Civil Rights Acts of 1964, including the *Lau* Memoranda and the *Castañeda* principles (Berenyi, 2008; Faulkner-Bond & Forte, 2011; Kihuen, 2009; Ragan & Lesaux, 2006; Smith, 1990). The summary of these briefs reveal how courts have ruled and reflect continued efforts in an attempt to ultimately fulfill *Brown’s* promise.
CHAPTER FOUR: RESULTS

This chapter presents a summary of cases and their outcomes, characterized as trends, that have emerged in litigation since the landmark US Supreme Court case *Lau v. Nichols* was enacted in 1974 and resulted in perhaps the most important court decision regarding the education of ELs. Case law outcomes were reviewed to determine how federal and state courts have ruled in various instances where the educational rights of ELs were questioned and included case law outcomes pertaining to assessment practices of ELs.

More than fifty years ago, it took the persistent efforts of parents and students in cities and hamlets across the country to persuade the Supreme Court in *Brown v. Board of Education* to rule that all students should have access to an inclusive, high-quality education. Today, our nation is still struggling to fulfill *Brown’s* promise (Lawyers Committee for Civil Rights under Law, 2012, p. 14).

**Case Law Summaries: Educational Rights of ELs**

Case law is judge made law (Clark, 2011, p.84). Judges determine laws through their rulings in particular decisions, using persuasive and binding authority to interpret statues, regulations, and other case law (Clark; Elias & Levinkind, 2009; Permuth & Mawdsley, 2006). Decisions written by judges may also be used as binding or persuasive authority for future cases, however, only published opinions may be cited as authority.
(Permuth & Mawdsley). This section summarizes cases in which parents or advocacy group(s) on behalf of ELs and their parents brought action seeking relief against unequal EL educational opportunities provided by PK-12 public schools and includes cases involving assessment practices of ELs under the NCLB Act, the EEOA of 1974, the Fourteenth Amendment Equal Protection Clause, and §601 of the Civil Rights Acts of 1964 (Berényi, 2008; Faulkner-Bond & Forte, 2011; Kihuen, 2009; Ragan & Lesaux, 2006; Smith, 1990).

The purpose of this study is to contribute to the effort to understand the laws pertaining to ELs through the systematic analysis of case law and an examination of litigation trends to improve equitable educational opportunities for ELs. The following data set was comprised of cases in which the following criteria were met. First, the cases occurred between 1974-2013. Second, the cases were published. Third, the cases were considered “good law” meaning that they had precedential value; cases were shepherdized using Lexis Nexis and Westlaw. Fourth, the cases involved at least one specific claim regarding the educational rights and/or assessment issues of ELs. Fifth, the cases were brought by a parental suit or advocacy group(s) on behalf of an EL, and sixth, at least one of the defendants listed in the suit was an educational institution serving public, PK-12 grade-range ELs.

After an initial search with the aforementioned Boolean key-words with a combination of EL acronyms, an initial 998 cases were collected from Lexis Nexis and Westlaw. After eliminating cases that were not published, eliminating cases that dealt with only immigration issues regarding ELs, and limiting cases to only federal and state
cases, 106 cases were left. These 106 cases then were subjected to a subsequent review in order to eliminate cases that did not fit within the specified dates ranging from 1974-2013. Cases that did not meet such criteria, for example, cases that dealt with higher education institutions, were also excluded; considered irrelevant to this data set. After accounting for duplicate cases and excluded or irrelevant cases on the aforementioned criteria, the final number for this sample totaled 25.

Each of the final 25 cases was then entered into a Microsoft Word document entitled Case Law Claims/Issues and Codes and Case Law Outcomes and Codes. This document was organized with specific details about each case in chronological order by year to more easily identify litigation trends (see Appendix B). Appendix C includes three separate tables, all in an effort to identify litigation trends entitled Coding, Themes, & Litigation Trends of Case Law Outcomes. In the first table, case law outcomes were coded by each case in order by year. These case law outcomes were transferred into the next chart under Axial Coding for Case Law Outcomes to organize all of the codes in alpha order next to one column with a description of each code and an additional column to keep count of each code. The final chart transferred each of the codes from the Axial coding chart and added a column to further theme each code into the final seven themes/litigation trends (Appendix C). Finally, all data were transferred into a Microsoft Excel spreadsheet that served as a case analysis chart entitled “Final Case Data Set;” a “simple box scoring” spreadsheet that can be found in Appendix D. The column headings of the spreadsheet include: case number, case name, citation, date decided, state
of origin, claim(s), outcome, relief sought, remedy awarded, findings and clarifying comments, case law outcome codes, and outcome code of prevailing party.

Findings from the data set are presented after a summary of cases through four subcategories: (1) number and frequency of cases, (2) prevailing party, (3) geographical distribution, and (4) trends in case law outcomes. The findings were then applied to answer the study’s research question. The following is a detailed summary of this study’s final 25 briefs that reveal how courts have ruled on cases filed on behalf of ELs and reflect continued efforts in an attempt to ultimately fulfill Brown’s promise (Lawyers Committee for Civil Rights under Law, 2012).

Lau v. Nichols (1974). Approximately 1,800 non-English speaking Chinese students brought a class suit against officials of the San Francisco Unified School District (SFUSD) in CA in 1974, seeking relief against unequal educational opportunities from failure to establish a program to address the language problems of students who were then referred to as non-English speaking students (Kihuen, 2009). The issue in this landmark US Supreme Court Case was whether a school system was actually required to provide a program to address the language problems of non-English speaking students. The plaintiffs sought to compel the District to provide bilingual compensatory education in English and claimed that the District violated their rights under § 601 of the Civil Rights Act of 1964, the Fourteenth Amendment Equal Protection Clause, the California Constitution, and provisions of the California Education Code.

The District court concluded that the Equal Protection Clause was not violated because students were provided equal educational opportunities when they received the
same education as all other students in the District. The Equal Protection Clause prohibits states from denying any person equal protection of the law. In *Brown v. Board* (1954), the US Supreme Court determined the “separate but equal” educational settings were unconstitutional. The court of Appeals affirmed the District court’s holding further concluding that there was no violation of § 601 of the Civil Rights Act of 1964, and that in fact, the students’ rights to an education and to equal educational opportunities had been satisfied by the SFUSD when they received the same education that was available to the other students in the district and, therefore, denied relief to the non-English speaking Chinese students (Depowski, 2008).

The Supreme Court granted certiorari, a Supreme Court decision to hear an appeal from a lower court, and determined that these students could not read or speak English proficiently and therefore the District was denying their right to an equal education as required by § 601 of the Civil Rights Act of 1964 (*Lau v. Nichols*, 1974). Section 601 of the Civil Rights Act states that an individual may not be discriminated against based on race, color, or national origin in any program receiving financial assistance. The court further granted the Department of HEW the right to regulate the Civil Rights Act and school districts must comply if they wish to receive federal funds.

After *Lau*, Congress also enacted the EEOA of 1974 and the Bilingual Education Act of 1974. Unfortunately, however, no clear outline of solutions addressed SFUSD’s discriminatory practices nor were any in order made to satisfy the obligation to educate non-English speaking students. This lack of guidance has led to current policy debates
determining appropriate programs for non-English speaking students; ELs. *Lau,* nonetheless, significantly impacted the education of non-English speaking students.

**Serna v. Portales Municipal Schools (1974).** A class of parents of Hispanic students brought a class action against the local public school in NM alleging discrimination in education under § 601 of the Civil Rights Acts of 1964 and the Fourteenth Amendment’s Equal Protection Clause. Parents were seeking declaratory and injunctive relief; neither remedy for monetary damages, instead these remedies are often sought in civil rights actions. A declaratory judgment being where the court declares something and an injunctive relief is an equitable remedy where the court orders the defendant to do/not do something (Elias & Levinkind, 2009).

Allegedly, there was discrimination in the appellants' failure to provide bilingual instruction to meet the unique educational needs of Mexican-American students; failure to hire any teachers of Mexican-American descent; failure to structure a curriculum that takes into account the particular education needs of Mexican-American children; failure to structure a curriculum that reflects the historical contributions of people of Mexican and Spanish descent to the State of NM and the US; and failure to hire and employ any administrators including superintendents, assistant superintendents, principals, vice-principals, and truant officers of Mexican-American descent. The failure to provide equal educational opportunities allegedly deprived appellees of their right to equal protection of the laws under the Fourteenth Amendment.

An evaluation of the Portales Municipal Schools by the NM DOE to the Office of the US Commission on Civil Rights in 1969 concluded that the language arts program at
Lindsey School was below average. In fact, achievement test results disclosed Lindsey’s students were a full grade behind children attending other schools in reading, language mechanics, and language expressions. Intelligence quotient tests show that Lindsey students fell further behind as they moved from the first to the fifth grade. Undisputed evidence showed that Spanish-surnamed students did not reach the achievement levels attained by their Anglo counterparts; 86% of the school was Spanish surnamed, with only four students with a Spanish surname that spoke English as well as the average Anglo. As the disparity in achievement levels increased between Spanish surnamed and Anglo students, so did the disparity in attendance and school dropout rates. In the 1971-72 school year, approximately 34% of the children attending Portales’ four elementary schools, Lindsey, James, Steiner, and Brown, were Spanish surnamed. The junior high school and senior high school enrollments of Spanish surnamed students were 29% and 17%, respectively. Unquestionably, as Spanish surnamed children advanced to the higher grades, a disproportionate number quit school. Similarly, appellants also neither applied for funds under the federal Bilingual Education Act nor accepted funds when they were offered by the State of NM.

After hearing all of the evidence, the District court found that in the Portales schools Spanish-surnamed children did not receive an adequate nor equal educational opportunity and thus a violation of their constitutional right to equal protection existed. The Portales School District was ordered to create some type of plan to remedy the situation and reassess and enlarge its program directed to the specialized needs of its Spanish-surnamed students at Lindsey as well as establish and operate adequate programs.
in the other elementary schools where no bilingual-bicultural program existed. An investigation was directed to identify and utilize sources of funds to provide equality of educational opportunities for its Spanish-surnamed students. Additionally, the court held that the district court’s action was proper given the tradition of the public schools’ discrimination and mere token plans created as superficial remedies.

**Guadalupe Organization, Inc. v. Tempe Elementary School District (1978).** The appellants in this case, elementary school children of Mexican-American and Yaqui Indian origin, asserted in a civil rights action, that an elementary school district in AZ failed to provide Mexican-American and Yaqui Indian students with a bilingual-bicultural education. Appellants assert that their rights to equal educational opportunity have been disregarded in violation of the Equal Protection Clause of the Fourteenth Amendment and that the school district's failure to provide bilingual-bicultural education also violated rights granted by Section 601 of the Civil Rights Act of 1964 and the Equal Education Opportunity Act of 1974. A clear distinction between the relief sought in this case and that ordered by the Supreme Court in *Lau v. Nichols* was that the complaint was not about the school district's efforts to cure existing language deficiencies of non-English-speaking students. Instead, they contended that the District failed to provide them with a program of instruction in which a child graduates at each grade level from kindergarten to fourth year in high school competent and functional in reading, writing, and comprehension both in the child's own language, Spanish, and the language of the majority culture, English. Additionally, the plaintiffs alleged that the District failed to provide an educational program in that all courses of instruction, testing procedures, and
instructional materials (were) bilingual and bicultural. Finally, appellants contended that the school district failed to reflect in its program of instruction the language, customs, and history of the parents of each child attending the school.

The court held that the Constitution neither required nor prohibited the bilingual and bicultural education sought by the appellant and that the District fulfilled its equal protection duty under the Fourteenth Amendment when it adopted methods to ‘cure’ existing language deficiencies of ELs. By providing Mexican-American and Indian ELs with remedial instruction in English, meaningful education was made available and equality of educational opportunity required by Section 601 of the Civil Rights Act of 1964 was met. The court reemphasized that school districts were not required to implement bilingual-bicultural education programs staffed with bilingual instructors. Similarly, the court found that under the EEOA of 1974, a bilingual-bicultural education was not required.

**Cintron v. Brentwood Union Free School District (1978).** The plaintiffs in this case, Puerto Rican students with ‘deficiencies’ in the English language, brought this class action for injunctive and declaratory relief claiming violations of Title VI of the Civil Rights Act of 1964 and the EEOA of 1974. The suit was filed in response to the announced intention of the defendant, Brentwood Union Free School District (Brentwood) in NY, to restructure its bilingual program known as Project Avelino (with Plan V).

Under the Project Avelino program, which is offered to those whose dominant or exclusive language is Spanish, Hispanic students in kindergarten and the first grade were
taught the subject matter of the curriculum in Spanish, while at the same time they were exposed to some English. As the students progressed from year to year, the percentage use of English increased while the use of Spanish decreased. The increasing emphasis on English speaking in each successive year was expected to produce a level of language proficiency such that by the time the student reached the sixth grade, all courses were to be taught entirely in English. The bilingual program, however, segregated Spanish-speaking students from the rest of the student body; students remained in the same classroom except for physical education (PE) and lunch. Yet, during lunch and PE, students continued together with the same Spanish-speaking group. Students who had attained the level of proficiency in English which would permit learning in the English language, nevertheless, were retained in the program for the purpose of maintaining their Spanish cultural level. No student had been transferred from the bilingual program to the regular English curriculum in the history of Project Avelino.

Under Plan V, the proposed plan, seven elementary schools in the district would offer an ESOL center run in substantially the same manner as under Project Avelino, and offer a Spanish basic skills room for remedial help and cultural instruction. Hispanic students in the bilingual program would spend the majority of the school day in homeroom with English-speaking students where substantive courses (reading, math, and social studies) would be taught in English. ELs would also be required to attend the Spanish basic skills room for periods ranging from one-half hour to one and one-half hours depending upon the student's English comprehension level. Bilingual teachers would offer remedial help by explaining in Spanish the subject matter covered in the
monolingual homeroom. From the third grade up, students would be instructed in Puerto Rican cultural inheritance.

The Federal District Court for the Eastern District of NY rejected the Brentwood School District’s plan to restructure its bilingual program, finding that the current plan kept ELs separate from English-speaking students in music and in art and was in violation of the *Lau Guidelines* and of the EEOA of 1974. In favor of the students in their action for injunctive and declaratory relief, the court found that the current program also failed to provide for existing students whose ELP would enable them to understand regular English instruction; discouraging transfer out. However, even under the proposed plan, there was no assurance that language deficient children would be identified and, even if they were, there was the continued threat of insufficient remedial assistance. The district was ordered to submit a proposed plan in compliance with the *Lau Guidelines* and to modify its current program, Project Avelino, with the best interests of ELs.

The court emphasized that public school programs for educating ELs must contain: (1) methods for identifying on admission those children who are deficient in English and for monitoring progress of such children, (2) training program for bilingual teachers and bilingual aides, (3) both bilingual and bicultural aspects, and (4) method for transferring students out of program when necessary level of English proficiency is reached. The court defined the obligation of the school district by reference to clarifying guidelines issued by the DHEW in 1970, requiring school districts to take affirmative steps to rectify the problems of ELs so that they might participate as fully as English-speaking students in the educational opportunities offered and should not isolate children
into racially or ethnically identifiable classes, but instead, encourage contact between non-English and English speaking children.

**Rios v. Read (1978).** On behalf of their ELs, Puerto Rican parents filed a class action against the defendants, school officials and members of the board of education of Pastchogue-Medford School District in NY, alleging that their children were deprived an equal educational opportunity with monolingual, English-speaking students, in violation of the Fourteenth Amendment as well as Section 601 of the Civil Rights Act of 1964.

Prior to 1975, identification of children with English language ‘deficiencies’ was made on an informal basis, through either observations made by school personnel or by a child's or parent's admission of language difficulties. In May of 1975, the school district administered two subtests of the Stanford Achievement Test (listening comprehension and vocabulary) solely to assess proficiency in spoken English; no established procedure for referring students to bilingual instructors existed. Often a student's language deficiency came to the attention of a bilingual teacher only in an informal manner, such as in casual conversation among teachers at lunch. No valid test was used to determine when a student had reached the required level of competency in English. The Stanford Achievement Test, which measures the capability of a child to understand spoken English, was the usual test used for exiting a student from the ESL Program, yet was not valid for such purposes.

The defendants argued the following: (1) that there were not enough students with English language deficiencies in the District to have warranted application of the *Lau Guidelines*; (2) that the Transitional Bilingual Program of the school district was actually
in compliance with the *Lau Guidelines*; (3) the program was considered highly effective in achieving its objectives; and (4) that the Bilingual Education Act of 1974 was not applicable.

The Federal District Court for the Eastern District of NY found Pastchogue-Medford School District’s transitional bilingual program inadequate, with regard to the school district’s knowledge of bilingual teaching methods, language assessment, program placement procedures, native language curriculum materials, and native language instruction. The program violated the students’ rights to an equal educational opportunity as protected by § 601 of the Civil Rights Acts of 1964, in addition to the EEOA of 1974, and the Bilingual Education Act of 1974. The court emphasized that while the district’s goal of teaching Hispanic children the English language is certainly proper, the students’ right to meaningful education before proficiency in English is obtained should not be compromised. An ESL and bilingual program was to be established and the school district was obliged to identify children in need of bilingual education by objective, validated tests conducted by competent personnel. The district was required to establish procedures for monitoring the progress of students in the bilingual program and was to exit them from the program only after validated tests indicated the appropriate level of English proficiency.

The purpose, with regards to bilingual education, as reminded by the court, was to assure language-deficient children the same opportunity to learn as that offered his or her English-speaking counterpart. Additionally, teaching subject matter to such children in their native tongue (when required) by competent teachers was mandated, and
programs for such children should be bicultural. The school district had an obligation to identify children in need of bilingual education by objective, validated tests conducted by competent personnel and to establish procedures for monitoring progress of students in bilingual programs, and to permit students to exit bilingual programs only after validated tests have indicated appropriate level of English proficiency. The court ruled in favor of the parents and ordered the district to file a plan for an ESL and bilingual educational program in accordance with the court’s opinion.

_Idaho Migrant Council v. Board of Education (1981)._ A non-profit corporation, Idaho (ID) Migrant Council, representing ID public school’s ELs, filed an appeal against the ID State DOE, the State Board of Education, and the Superintendent of Public Instruction, seeking declaratory and injunctive relief, asserting that educational authorities were in violation of Title VI of the Civil Right Act of 1964, the EEOA of 1974, and the Fourteenth Amendment, for failing to exercise supervisory responsibility over local school districts to ensure that ELs were given an equal educational opportunity with instruction which addressed their linguistic needs.

The issue before this court was not whether the State Agency or local districts were in compliance with the mandates of federal law, rather, the issue was whether the State Agency actually had an obligation to supervise the local districts to ensure compliance. The State had maintained that it was not empowered, under State law, to supervise the implementation of federal requirements at the local level. The District court had agreed with the State and granted summary judgment in its favor. However,
ID law does empower the State Agency to supervise the local school districts and federal law did impose such an obligation, and therefore the decision was reversed.

The court emphasized, however, that the only conclusion being made was that the State Agency was empowered under state law and required under federal law to ensure that needs of ELs was addressed and, therefore, it was improper for the district court to have previously granted summary judgment. The Council asserted that it was the responsibility of the State Agency, according to the EEOA of 1974, Title VI of the Civil Rights Act of 1964, and the Fourteenth Amendment, to supervise local districts and ensure that ELs be given instruction which addresses their linguistic needs. On remand, the district court should receive evidence regarding the educational needs of ELs and information regarding the programs currently in place for ELs, in order to determine whether federal requirements were being met.

*Castañeda v. Pickard (1981).* In this case, Roy Castañeda, the father of two Mexican-American children, claimed that the Raymond Independent School District (RISD) was discriminating against his children because of their ethnicity in violation of the Fourteenth Amendment, Title VII of the Civil Rights Act, and the EEOA of 1974. He argued that the classroom his children were being taught in was segregated, using a grouping system for classrooms based on criteria that were both ethnically and racially discriminating. Mr. Castañeda also claimed the RISD failed to establish sufficient bilingual education programs, which would have aided his children in overcoming the language barriers that prevented them from participating equally in the classroom.
The federal district court ruled in favor of the RISD, stating they had not violated any of the Castañeda children’s constitutional or statutory rights. As a result of this federal ruling, Castañeda filed for an appeal, arguing that the Federal court made a mistake. In 1981, the US Court of Appeals for the Fifth Circuit ruled in favor of the Castañeda’s and issued the famous “three-prong” test, often referred to as the Castañeda principles, which requires a program for ELs to meet the requirements of the EEOA of 1974 and demonstrate its effectiveness (Gándara & Hopkins, 2010). The EEOA was interpreted to require school districts to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs. The ‘three-prong’ criteria to determine appropriate actions by a school district to overcome language barriers include the following (1) the district (or LEA) must pursue a program informed by an educational theory recognized as sound by experts in the field; (2) the programs and practices used by the district must be a reasonable reflection of the educational theory adopted; and (3) after a trial period, the success of the program’s purpose, which is to overcome language barriers, must be evaluated and be proven effective (Gándara & Hopkins, 2010).

**Plyler v. Doe (1982).** The Texas legislature voted to withhold funds from local school districts for children who had not been legally admitted to the US and further authorized local school districts to deny enrollment in their public schools. The illegal aliens, the plaintiffs in this case, challenged the statute claiming the benefit of the Equal Protection Clause of the Fourteenth Amendment, which states that no State shall “deny to any person within its jurisdiction the equal protection of the laws.” The court recognized
that illegal aliens are, indeed, “persons” and, particularly, undocumented immigrant children are “people,” in any ordinary sense of the term, and therefore protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. The court majority also found that the TX law discriminated against children on the basis of a legal characteristic over which children have little control — namely, the fact that they had been brought illegally into the US by their parents. The five to four majority recognized that denying children in question a proper education would likely contribute to "the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime." Judge Marshall further concurred and emphasized his belief that an individual’s interest in education is fundamental and that a class-based denial of public education does not comply with the Equal Protection Clause of the Fourteenth Amendment.

_Plyler_ is the sole federal case protecting the constitutional right of undocumented children to receive a free public K-12 education, yet, the decision is silent with respect to the quality guaranteed to these children. To date, no federal court has directly ruled on the issue of whether school districts can ask students about their immigration status, yet the citation of _Plyler_ has supported the invalidated section seven of California Proposition 187 requiring school districts to not admit, verify legality, and report undocumented students. _Plyler_ also indirectly indicates that even denial to a particular extracurricular activity after school impedes the education of an undocumented student. An undocumented alien “is not eligible for any Federal public benefit,” however, the question that arises is whether or not that equates with the secondary services students
receive, for example, free or reduced-cost meals or transportation. It has not yet been
applied to public K-12 education, nor is it likely a bar to undocumented students from
receiving them. Additionally, undocumented children identified with disabilities are also
protected under the Individuals with Disabilities Education Act (IDEA). The McKinney-
Vento Act also provides for the education of homeless children, even if they are unable to
prove residency. *Plyler* ultimately established that undocumented students brought to
this country by their parents are eligible for full access to K-12 schooling in the US
(Gándara & Hopkins, 2010).

In terms of B-2 visas, which are issued to individuals for pleasure and also
prohibit attendance in public school, there is again, little uniformity in how to approach
this issue at the state level. Parents of undocumented children or children with B-2 visas
may become wary of sending their children to school if a school district calls
Immigration and Customs Enforcement (ICE) to report a violation of a visa, thus
“chilling” undocumented children’s access to an education. Releasing such information
regarding legality from student records in violation of The Family Educational Rights and
Privacy Act (FERPA) can be costly. As in the case of The City of Manassas and
Manassas City Public Schools, Virginia, a lawsuit for $775,000 was handed over after a
school employee released student record information, without consent from the parents,
over to city officials who targeted Hispanic families for housing violations (Borkowski,
2009).

*Keyes v. School District No.1 (1983).* In a desegregation suit pending for over a
decade, the plaintiffs, thirteen Mexican-American parents of ELs and plaintiff-
Interveners, The Congress of Hispanic Educators (CHE), asserted that the defendant public school district in Denver, CO denied equal access to educational opportunities to ELs in violation of the Fourteenth Amendment, Title VI of the Civil Rights Acts of 1964, and the EEOA of 1974.

For the 1981-82 school year, the defendant school district used a survey which identified 3,322 children as ELs. At the elementary level, a transitional bilingual program existed at twelve elementary schools, out of which four had a full-time EL teacher. The remaining elementary schools were served by full or part-time tutors who instructed ELs. All EL instruction, whether it was by a teacher or tutor, occurred on a "pull-out" basis, where ELs were taken out of their regular classrooms from 30 to 60 minutes for daily ESL instruction. An average of 20 ELs met with teachers/tutors per each six-hour day. For the rest of the day, ELs received content instruction in the regular classroom, entirely in English. Some students did receive some content instruction in his/her native language if their teachers was bilingual. At the secondary level, there was no program comparable to that found in the designated bilingual elementary schools. The main program for secondary level ELs was an ESL class taught by teachers and tutors for about 45 minutes each day in which the ESL curriculum consisted of four sequential levels of reading, writing, and conversation instruction. Advanced ELs did not receive ESL instruction unless they chose to take courses offered as electives, such as "Practical English," "Language Development in English," or language lab courses.

As for testing, the identification of ELs and the placement of ELs in categories referred to as Lau categories A, B, and C, had no formal testing process, instead, the
school district utilized a Lau questionnaire that was filled out by each child’s parents and reviewed by a teacher. If the parents and the teachers concurred that the child was not to be identified as an EL, the child was found ineligible for bilingual/EL services. At the secondary level, students identified as ELs took an ESL test to place them in the appropriate proficiency level. To measure the progress of [elementary] ELs receiving EL instruction, a test entitled the IDEA test was used and if achieved “mastery,” left the ESL program and was mainstreamed.

Funding for ESL instruction increased from $139,326 in 1979 to $1,293,625, at the time of the trial. The maximum amount to be used for beginner and intermediate ELs, or Lau A and B students, was $400 per year and $200 per year for an advanced or Lau C students. Additionally, funding of a particular student's educational program was prohibited for longer than two years. The state did not, however, direct the use of any particular type of language program. Denver elected to use a "transitional bilingual approach" to facilitate the integration of ELs into the regular school curriculum. According to the District, English was not sacrificed, in fact it is was emphasized; the native language was used as a medium of instruction to ensure academic success in content areas such as math and social studies, while the ELs acquired ELP at the same time.

The plaintiffs identified numerous causes for concerns that supported their claims, such as poorly trained instructors and unsupported language program objectives. Designated instructors, for example, who taught ELs had not been subjected to any standardized testing for their language skills and had received very little training in EL
theory and methodology. The record showed that in the secondary schools there were designated EL teachers who had no second language capability. There was no basis for assuming that the policy objectives of the program were being met in such schools. The tutorial program relied on paraprofessionals who were not required to show any experience with content area knowledge or teaching techniques.

The emphasis on the acquisition of oral English skills for ELs was another cause for concern. Forty minutes per day of remedial English instruction with a focus on an audiolingual methodology approach with only a focus on oral English skills did not include any attention or remediation to reading and writing skills. Lau C students, or advanced ELs, also did not receive any type of remediation. The defendant district was not meeting the obligation to provide services for all ELs. Lastly, a failure to adopt adequate tests to measure progress was considered a failure to take reasonable action to implement the transitional bilingual policy. In summary, plaintiffs claimed that the defendant district had failed with such segregative policies, in varying degrees, to satisfy the requirements of the EEOA of 1974.

In the final judgment, the court applied Castañeda’s three-part test to determine whether the District violated its obligation to overcome language barriers that impeded equal student participation. The evidence showed that the district's program was based on sound educational theory, however, the District had failed to satisfy the second element of the three-part test, a lack of implementation of an adequate delivery system for ELs. There was inadequate emphasis on reading and writing skills, a disregard of the special curriculum needs of ELs, and inadequate testing. The District was ordered a
remedy for changes in the program’s design. Judgment was entered finding that the district failed to comply with the statutory mandate to overcome language barriers that impeded ELs’ equal participation. A hearing was set to establish a panel to ensure procedures for the district were followed.

**Jimenez v. Honig (1987).** The plaintiffs requested review of the order from the Superior court of Sacramento County, CA that denied a preliminary injunction to restrain the defendants, the State Board of Education (BOE) and Superintendent of Public Instruction, from implementing an amendment to the California Education Code (CEC) on the grounds that its standards for reclassifying ELs conflicted with the CEC.

By allowing a language appraisal team to reclassify students after three years in a bilingual program, irrespective of standardized test results, the trial court found that it was in conflict with the CEC and denied the preliminary injunction. However, the court held that the regulation was valid although it did not use all of the necessary criteria. The challenged amendment added a provision allowing a language appraisal team to reclassify an EL irrespective of standardized tests, in addition to the original criteria of teacher evaluation, objective assessment by oral testing, parent consultation, and assessment by norm-referenced tests.

The court of appeal affirmed. The court held that the use of a language appraisal team, irrespective of standardized test results, was not inconsistent with the requirement in the CEC that the reclassification process included some type of objective comparison of an ELs basic skills with those of their English-proficient peers. The court also held that the amendment was not a waiver of reclassification criteria and the Board did not
intend reclassification based solely on test results. The amendment to the CEC was considered a reaction to responses from school district personnel that strict cutoff scores were unreliable as the sole indicator of an EL’s language skills because some students simply perform poorly on standardized tests for various other reasons, such as test anxiety and curricular environment. Under the original regulation, too many students who could have benefited from the curriculum available in an English-only program were unfairly denied that opportunity. The amendment, according to the Board, allowed the needed flexibility to consider norm-referenced test results as well as other factors for reclassification purposes.

The court affirmed the denial of a preliminary injunction restraining defendants, the State BOE and Superintendent of Public Instruction, from implementing an amendment to a regulation that allowed a language appraisal team to reclassify a student in a bilingual program irrespective of standardized test results. The court held that if the Board had intended that ELs be reclassified based on solely a norm-referenced test, or any other test, it would have been decided otherwise. The flexibility given the language appraisal team in evaluating students did not sacrifice objectivity. The plaintiffs were dissatisfied because under the amended reclassification, ultimate responsibility for appropriate decision-making rested with the local school districts and that under the new classification procedures, parents must take affirmative steps to counter the language appraisal team's recommendation or face reclassification of their children against their wishes. The defendants pointed out that this was an inaccurate statement because ELs
were already in the bilingual program and did not need to fight in order to be retained in the program. The order denying the preliminary injunction was affirmed.

**Gomez v. Illinois State Board of Education (1987).** Six years after Castañeda, this case demonstrated the value of the Castañeda test to address inadequate programs (Wright, 2010). The US Court of Appeals for the 7th Circuit relied heavily on Castañeda and ultimately gave state boards of education power to enforce compliance with the EEOA of 1974. The court decided, similarly to *Lau*, that school districts ultimately have a responsibility to serve ELs and cannot allow ELs to simply sit in classrooms where they cannot understand instruction. The court, however, did not mandate any specific program models.

In *Gomez*, six Spanish-speaking appellant students, five of whom were ELs and one who had yet been tested for ELP designation by their local school system, enrolled in the Iroquois West School District No. 10 or the Peoria School District No. 150, appealed a dismissal of their request for injunctive and declaratory relief by the Illinois Federal District Court. The students had sought this relief because they claimed their school districts failed to instill uniform guidelines for the identification, placement, and training ELs. The plaintiffs alleged that the Board and the Superintendent failed to provide local districts with adequate, objective, and uniform guidelines for identifying ELs. As a result, local districts perceived that they had unlimited discretion in selecting methods of identifying such children and as a result had been able to avoid transitional bilingual education requirements by identifying less than 20 ELs of the same primary language in a particular building. Due to the absence of proper guidelines, local districts had been
found to use as many as 23 different language proficiency tests, 11 standardized English
tests, 7 standardized reading tests, and many formal and informal teacher-developed
tests. Many of these tests did not accurately measure ELP; ELs were not properly
identified and the variation resulted in inconsistent results.

Accordingly, the plaintiffs claimed that ELs throughout the state of IL had been
denied the appropriate educational services they were entitled to under federal and state
law. Furthermore, plaintiffs argued that the failure to provide local districts with proper
guidelines for the identification and placement of ELs and failure to monitor and enforce
the local districts’ compliance with the law, violated their rights under the EEOA of 1974,
the Equal Protection Clause of the Fourteenth Amendment, and Title VI of the Civil
Rights Act of 1964.

The plaintiffs, after alleging that they had no adequate remedy at law, sought
declaratory and injunctive relief, as well as costs and attorney's fees. The defendants
filed a motion to dismiss for failure to state a claim upon which relief can be granted.
The defendants conceded that they were required under IL law to issue regulations for the
identification and placement of LEP children, but argued that they were not empowered
to supervise and enforce the local school districts’ compliance with those regulations.
However, at oral argument, counsel for the defendants agreed that the Board and the
Superintendent did have the power to mandate that local districts were to provide the
proper education for ELs.

The Seventh Circuit Court of Appeals found that state education agencies as well
as local education agencies are required, under the EEOA of 1974, to ensure that the
needs of ELs are met. The court reversed and remanded the students’ claims under federal law because the state's Eleventh Amendment immunity was repealed by the EEOA. The court, however, dismissed Title VI claims as well as the equal protection clause of the Fourteenth Amendment because the plaintiffs had failed to allege that the board and superintendent acted with discriminatory intent.

*Teresa P. v. Berkeley Unified School District (1989).* Plaintiff public school ELs sued defendant Board of Education in Berkeley Unified School District (BUSD) in Northern California under the EEOA of 1974 and Title VI of the Civil Rights Act of 1964, alleging the denial of equal educational opportunities and civil rights violations because of the school district's failure to take appropriate action to overcome their language barriers. Particularly, the defendants claimed that the school district's testing and procedures for identifying and assessing ELs was inadequate, as was the instruction and requisite qualifications of the teachers. Additionally, the plaintiffs also claimed that the District failed to allocate adequate resources to the District’s special language services for ELs.

Plaintiffs claimed that even if the program rested on a pedagogically sound basis, its implementation violated the appropriate action standard of the EEOA. Plaintiffs argued that by failing to provide qualified teachers, sufficient supporting resources, and necessary monitoring systems, the BUSD violated the EEOA. Similarly, the procedures utilized by the BUSD to identify, place, and exit students from EL language services also violated the EEOA.
However, the overwhelming weight of evidence in this case established that the language programs of the BUSD assured equal educational opportunity for ELs and that they were effective in removing the language barriers faced by the LEP students. The court concluded that plaintiffs failed to establish a violation of the EEOA. However, the plaintiffs, in fact, stated that they did not argue that the BUSD harbors any racially discriminatory intent whatsoever in the delivery of any of its educational programs, yet proof that the BUSD’s program has a disparate impact on ELs, was the only avenue that remained open to them to establish that the BUSD violated Title VI. The court disagreed, and also added that even though funds were limited, the evidence in this case showed BUSD’s commitment of significant funds to language remediation program delivery and further that the actual delivery of those programs as to qualified teachers, supporting resources, and program monitoring, did not violate the EEOA on grounds of ineffective implementation.

The court entered judgment for the defendant after reviewing the school district's criteria and procedures; the plaintiffs failed to meet their burden to show that the actual programs and practices were not reasonably calculated to effectively implement the educational theories on which the overall program was premised. The court held that because plaintiffs failed to offer any evidence of racially discriminatory effect, the burden of proof under Title VI of the Civil Rights Act was similarly not sustained.

Flores v. Arizona (1992). This case was filed in federal district court by the parents of Miriam Flores, along with parents of other children enrolled in the Nogales Unified School District (NUSD) in AZ. The plaintiffs alleged that the civil rights of ELs
had been violated because the state failed to provide an LEIP that included adequate language acquisition, academic instructional programs and funding for at-risk, low-income, minority students; a violation of the EEOA, which requires all public schools to provide ELs with a program of instruction designed to achieve ELP and succeed in the standard core classes taught to all students. Additionally, the Plaintiffs alleged that the district allowed ELs to exit EL programs and enter mainstream classrooms when those students still lacked necessary English language and reading comprehension skills.

In January of 2000, the district court ruled in favor of the Plaintiffs and declared AZ’s EL programs in violation of the EEOA because the funding level as it related to ELs was “arbitrary and capricious.” While the district court agreed that AZ’s standards were based on sound educational theory, it did not agree that the existing programs served to appropriately advance the standards. The ruling stated that there were: (1) too many students in a classroom; (2) not enough classrooms; (3) not enough qualified teachers; (4) not enough teacher aids; (5) inadequate tutoring programs; and (6) insufficient resources for teaching; a result of inadequate funding. The state did not appeal this decision, however, the issue of funding was not addressed. The number of ELs at the end of this year is 126,000.

Over the next four years, there are various orders made by the courts. In 2001, the court ordered another study to identify language services and the actual cost of providing such services. By the end of 2001, the number of ELs has increased to 153,000. In 2002, the court rejected the increase in state’s funding per student to $350 because it is not actually based on a cost study. In 2004, a cost study report by the
National Conference of State Legislatures reports that Arizona’s ELs need approximately $2,495 in elementary schools and up to an estimated $1600 in high school. By this time, there are approximately 161,000 ELs.

In 2005, the court threatens a $500,000 fine a day if the state does not comply with the order and in 2008, the state gives the schools $40 million to create a new language-learning program, however, a two-year limit on funding is maintained. The court of Appeals states that Arizona has still not complied with the original order. By 2009, there are approximately 143,000 ELs in Arizona. On January 9, 2009, the US Supreme Court was asked to step in to hear the case and sent the case back to the appeals court to consider whether Arizona had complied with civil rights laws by improving both EL programs and legislation and whether Arizona had adequately funded its programs for ELs. Tom Horne, the Superintendent of Public Instruction argued the case and asked for relief from the judgments in *Horne v. Flores* (2009). This case continued for over 22 years; see the *Horne v. Flores* case that follows in 2009. The case is currently ongoing.

*United States v. Yonkers Board of Education* (1997). The Plaintiffs in this case, the Yonkers branch of the National Association of the Advancement of Colored People (NAACP), filed a civil lawsuit against the city of Yonkers, NY, the Yonkers School Board, and the Yonkers Community Development Agency claiming that the city had disproportionately segregated populations in Yonkers for the previous 30 years and lacked adequate services for students with LEP. The Plaintiffs specifically alleged that the city government had restricted new subsidized housing projects to particular areas
throughout the city already heavily populated by minorities; the first time racial
segregation charges were brought against housing and school officials in the same
lawsuit.

The US District Court for the Southern District of NY found that the defendants,
had, in fact, segregated housing and schools throughout the city based on racial identity.
The State was found responsible for eliminating segregation and was mandated to fund a
remedy and specifically included enhancement of training for ELs. An Educational
Improvement Plan (EIP) was put into place to include a housing remedy order for State
funding to implement the creation of housing opportunities in Yonkers. By 1986, the city
was to designate sites for public housing, however, the city refused to comply throughout
the appeals process. The US Court of Appeals for the Second Circuit upheld the racial
discrimination rulings, yet the compliance issues were still not resolved. In January of
1988, the parties agreed to a decree to develop a new housing plan and pass legislation
outlining the plans within 90 days. The city did not pass the legislation and was found in
contempt and incurred fines totaling nearly $1 million per day.

The City contended, however, that the State did not distribute an equitable share
of the total cost of education in Yonkers to include the cost of the EIP, especially in
comparison to five other school districts. Yonkers actually receives the lowest total per
student aid—approximately 65% of the next lowest and 50% of the district with the
highest total per student State aid. Gaps in achievement scores between minority and
majority students were caused by conditions related to race as a statistically significant
factor in accounting for such disparity in reading and math scores even after factoring out
other possible causes. The issue of segregation in the Yonkers Public School (YPS) system was addressed by teacher training programs, efforts to increase parental involvement, and the development of magnet school programs. Additional testimony introduced in court reflected many teachers’ attitudes and expectations did reflect past stereotypes and that segregation still exists in the YPS system.

The court did not determine the EIP to be complete and imposes a continuous need to ensure that the YPS can offer a quality and equitable education for all children who choose to enroll to ensure that the 1986 Order to Desegregate the YPS is fulfilled. The next several years saw little agreement over progress. Early in 2002, an agreement was announced that would provide $300 million in state funding to the school district over a five-year period to be used to fund programs that boost academic achievement for all city students. A monitor was supposed to be assigned to ensure that the school district was living up to its promises, yet, as of March 2003 the district had been unsuccessful in filling the position.

*Abbott v. Burke (1998).* The Plaintiffs in this case were children attending public schools in school districts located in poor urban areas classified as special needs or “Abbott” districts in NJ. The Plaintiffs filed a motion seeking relief, alleging that the Comprehensive Educational Improvement and Financing Act (CEIFA) of 1996 failed to assure them a thorough education. In its 1994 and 1997 decisions, the NJ Supreme Court ordered “parity” funding; state aid to bring per-pupil revenues in the 31 Abbott districts up to the per-pupil expenditures in the state’s 110 successful, suburban districts. The court held that the CEIFA was unconstitutional and was inadequate to meet the plaintiffs’
educational needs. In the absence of legislation that would assure adequate education, the plaintiffs were entitled to relief directed toward the improvement of educational opportunities available to them, students who were at-risk students, ELs, and students with disabilities. The court required the following provisions: implementation of high quality pre-school programs, full-day kindergarten, class size limits of less than 25 in grades six and above, implementation of research-based whole school reform models, and the creation of a technology-rich educational environment. Enhanced services for special education and bilingual students were also included.

The National Education Access Network (NEAN) (2011) continually reports updates regarding the Abbott follow-through of the case requirements. In 2002, NJ announced a $10 - $12 billion school construction program, of which $6 billion was designated to build and renovate school buildings in the Abbott districts. While the School Construction Corporation provided financing for projects in suburban districts in a timely manner, it failed to finance most of the projects in the Abbott districts and was shut down when corruption came to light. Overcrowded classrooms and dilapidated facilities continue to hamper progress in the school districts educating most of the state’s most disadvantaged schoolchildren.

On March 22, 2011, Judge Doyne concluded that the state is not meeting the constitutional mandate to provide NJ school children, particularly at-risk students, ELs, and students with disabilities, a “thorough and efficient education” (NEAN, 2011, p.1). Judge Doyne heard extensive evidence on the actual impact of the cuts in six districts in various parts of the state. Although he acknowledged that a number of efficiencies had
been created in these districts, he held that “without quantification of the savings
achieved or to be achieved by all districts for the FY 11 fiscal year, it is impossible to
find, based on anecdotal evidence alone, these efficiencies would significantly impact the
effectuated reductions” (NEAN, 2011, p.1). While the fight continues to ensure equitable
education in poorer communities throughout NJ, *Abbott v. Burke* is still widely
recognized as the most important education litigation for poor and minority school
children since *Brown v. Board of Education*.

**Doe v. Los Angeles Unified School District (1999).** The plaintiffs in this case, a
group of parents on behalf of their minor children, filed a class-action lawsuit challenging
the LA USD’s implementation of Proposition 227, an initiative that restricted the use of
bilingual education to teach ELs in public schools, on the grounds that their rights to an
equal education under the EEOA of 1974 and Title VI of the Civil Rights Act of 1964
were violated. The plaintiffs sought declaratory and injunctive relief, as well as class
certification. Attorneys for the Mexican-American Legal Defense and Education Fund
and the ACLU represented the plaintiffs. Plaintiffs also sought an emergency Temporary
Restraining Order, which was denied, however, plaintiffs then filed an amended
complaint which alleged (1) that defendants failed to take appropriate action to address
the needs of ELs and (2) that national origin minorities were deprived of a language
program that provided them an opportunity to learn English.

Before Proposition 227’s enactment, the LA USD employed a plan entitled ‘A
Master Plan for ELs’ which offered three bilingual educational program options for ELs.
There was a basic program where ESL courses were taken in conjunction with other
academic courses in the ELs’ first language, an Alternative Instructional Program option where all instruction was in English, and a third option entitled Dual-Language where students were taught in their first language and English equally. In an effort to comply with Proposition 227’s mandates, LA USD issued the ‘Revision to the Master Plan’ that provided a sheltered English immersion program where two models offered either all instruction in English with the use of native language only to clarify instructions or English with limited amounts of first language to provide context for instruction.

However, evidence indicated that the LA USD’s ‘Revision’ did not constitute a significant change as required to comply with Proposition 227 to respond to inadequate teacher training, inadequate curriculum, and inadequate waiver criteria, as argued by the plaintiffs. The objections of the defendants, a school district and its superintendent, to the certification of the class were without merit. On April 23, 1999, the district court certified a class consisting of all of the current and future ELs enrolled in the LA USD. Plaintiffs’ motion for class certification to oppose an initiative that restricted the use of bilingual education was granted because plaintiffs met the requirements for class certification of numerosity, commonality, typicality, and adequacy of representation.

As for numerosity, while ELs were continuously enrolling in and leaving the district, this number fluctuated throughout the school year, yet, the number was in the three-hundred thousand range and, therefore, qualified as a class. So, the plaintiffs met the first factor of numerosity. As for commonality and typicality, commonality is met when the court is convinced that class members share a common harm or violation of their rights that predominate over their claims that a class action is the most efficient
method for adjudicating those claims. A finding of commonality frequently supports a finding of typicality. Typicality assesses whether the named plaintiffs have incentives that align with the class members that are absent to ensure that the interests of those that are absent will be fair. Requirements for class certification of numerosity, commonality, and typicality were met and any relief from defendants' actions or refusal to act would also be considered appropriate for the class as a whole.

*McLaughlin v. State Board of Education (1999).* The plaintiffs in this case included a group of school boards in Alameda County, CA applying for waivers based on the CEC. This case originated in California in 1998 when the voters of CA passed Proposition 227, which created a new chapter in the CEC, requiring ELs to be taught only in English. However, within this Proposition, subject to the right of the parents of each EL was the right to seek a waiver from the requirement of English-only instruction. The plaintiffs in this case stated that an existing provision, the CEC, allowed school districts to apply for waivers from program requirements of the state education code applied to the new legislation. However, the court decided that school districts may not obtain wholesale waivers from the requirements of Proposition 227. The court ruled that only parents have the right, under the initiative, to request that bilingual programs be continued. The court of Appeal stated that Proposition 227’s failure to expressly amend the CEC, which permits the State BOE to waive any Code requirement was simply the ‘product of neglect.’

*Valeria v. Davis (2002).* Proposition 227 was approved in 1998 by a margin of 61 to 39 which dismantled CA’s public school bilingual education programs; intended to
teach ELs their native language or L1. Consequently, Proposition 227 replaced bilingual education with SEI, not intended to exceed one year, to then transfer ELs into mainstream classrooms; once proficient in English. *Valeria v. Davis* was filed the day after Proposition 227 passed arguing whether the elimination of bilingual education in CA’s public schools by Proposition 227 violates the Equal Protection Clause of the Fourteenth Amendment. The plaintiff’s argued that political restructuring violates equal protection anytime it affects a program that benefits racial minorities. Given the neutrality of Proposition 227 and lack of evidence that it was motivated by racial considerations, Proposition 227’s political authority over bilingual education did not offend the Equal Protection Clause according to the California District Court.

**Hancock v. Driscoll (2004).** The *Hancock* case stems from the *McDuffy v. Secretary of the Executive Office of Education* case which declared that under the Massachusetts (MA) Constitution, the Commonwealth has an “enforceable duty” to provide “education in the public schools …whether they be rich or poor and without regard to the fiscal capacity of the community..” The Commonwealth of MA was not fulfilling its constitutional duty in 1993 (when the *McDuffy* case was decided) and was therefore followed by the Education Reform Act (ERA) that same year. The ERA is the statute’s provisions dealing with school finance and funding, and more importantly, on the establishment of a foundation budget for every school district per pupil; with the ultimate intention of substantially improving K-12 education in MA.

Six years following the enactment of ERA, 19 public school children, represented by *Julie Hancock*, returned to the Supreme Judicial court for further relief representing all
students in four, high-poverty, low-income urban districts, each with large populations of racial and ethnic minorities, which claim were not adequately implementing the MA curriculum framework nor equipping its students with the capabilities described in *McDuffy*.

This request for remedy, for what was considered the Commonwealth’s failure to provide a quality education required by the MA Constitution, is supported by test scores, dropout rates, high school graduation rates, SAT scores, and graduation plans of high school seniors, which, compared to the rest of the state, were far below the average. In *McDuffy*, the court concluded that the plaintiffs in the case proved that the Commonwealth had failed to meet its obligation. While the fiscal support, or lack of it, had a significant impact on the quality of education, the reality was that these children, who were living in less affluent communities, were not receiving their constitutional entitlement of education.

The central question, however, was whether all the public school students in the aforementioned districts were receiving the level of education that the Commonwealth is required to provide, particularly with the capabilities set out in *McDuffy*. Three major recommendations to the Supreme Judicial Court concerning remedial relief included: (a) determine the actual cost of the providing to all children the opportunity to acquire the capabilities outlined in *McDuffy* or the seven curriculum frameworks for all children; (b) determine the cost associated with enacting measures to improve the educational leadership capabilities of the focus districts; and (c) implement these administrative and funding changes in a timely fashion. The mere reason the *Hancock v. Driscoll* case was
necessary to file in the first place, being 10 years after the *McDuffy* decision, was that the Commonwealth was still not meeting its constitutional obligation to provide the required education to all students, particularly students at risk for school failure. The *Hancock* trial lasted 78 days over a seven-month period and included the testimony of 114 witnesses and more than 1,000 exhibits and Judge Botsford concluded that "the factual record establishes that the schools attended by plaintiff children were not currently implementing the MA curriculum frameworks for all students, and were not currently equipping all students with the *McDuffy* capabilities." Further, the inadequacies of the educational programs in these schools are "many and deep," and "even more profound" for those students at greatest risk of failure, "children with learning disabilities, children with LEP, racial and ethnic minority children, and those from low-income homes."

Judge Botsford found that the ability to address these issues is limited by both inadequate funds and the DOE’s inadequate capacity to provide assistance to school districts. The department has since shrunk from 1,000 employees in 1980 to less than 400 today, in spite of all the additional responsibilities under the ERA. In the meantime, however, Judge Botsford concluded that “the plaintiff children in the failing schools still continue to suffer.”

**Daniel v. Board of Education for Illinois (2005).** The plaintiffs in this case, both minority students and ELs, in the Illinois (IL) School District filed a four-count class action lawsuit against the BOE alleging that the school district had violated the EEOA of 1974 and the Equal Protection Clause of the Fourteenth Amendment. The ELs claimed that the district failed to take “appropriate action” to eliminate language barriers, while
the minority students argued that they were subjected to enduring discriminatory burdens and diminished educational opportunities. Part of the new redistricting plan led to the opening of new schools in predominantly White neighborhoods. Plaintiffs alleged that the consulting group did not review racial and ethnic information, despite information from the District’s counsel that race and ethnicity were legitimate and considered permissible facts to review in preparation for redistricting.

According to the plaintiffs, the Redistricting Plan increases the likelihood that one or more of the District schools on the warning lists will continue not to make AYP under NCLB, while with the new Plans, 50% of ELs are transported out of their neighborhood schools. For example, one family of Hispanic siblings all receive EL services and are currently split between three schools, none of which are in the family’s neighborhood. ELs are also allegedly segregated from regular education students for all instruction rather than for specific educational subjects only and are denied proper access to special education.

According to the plaintiffs, the District now says it will permit voluntary transfers. Defendants argued that plaintiffs have failed to allege that ELs have received inadequate services. However, the defendant’s own audit by an outside expert revealed numerous deficiencies in EL services, including deficiencies in staff training, disseminating information to staff and parents, and properly assessing students’ need for language services. Therefore, plaintiffs alleged that they were injured by being impeded in their equal participation in educational opportunities by defendant’s failure to take appropriate action to overcome language barriers. Accordingly, the plaintiffs stated a claim under
The EEOA and under the Illinois Civil Rights Act, no unit of State shall utilize criteria “or methods of administration that have the effect of subjecting individuals to discrimination because of their race, color, or national origin.” All of the defendant’s motions to dismiss were denied.

**Connecticut v. Spellings (2008).** The state of CT and its General Assembly, referred to as the ‘State,’ claimed that the Secretary’s’ [Margaret Spellings’] denials of two proposed plan amendments regarding the timing and method of assessment of ELs and special education students violated the Administrative Procedure Act (APA). In return for educational funds under the NCLB Act, States must abide by educational assessments and accountability measures and are required to submit a plan to the Secretary developed by the SEA which includes the following three elements: (a) the adoption of challenging academic content standards; (b) the development and implementation of a single, statewide accountability system that will be effective in ensuring AYP; and (c) the implementation of high-quality academic assessments in math, reading, and science. The State is also required to include separate AMAOs for continuous improvement for the achievement of ELs and special education students using the same assessments and also provide accommodations. The Act also states that ELs are to be tested in English after attending US schools for three years using assessments in the “language and form most likely to yield accurate data on what students know in the academic content areas may be administered until such students have achieved ELP.” The Secretary ultimately has authority to disapprove a State’s plan for not meeting the
requirements of the Act, but cannot require a State to include specific academic
assessment instruments or items.

The former Secretary of Education, Rod Paige, issued final regulations
implementing the Act with regards to the Academic Achievement of the Disadvantaged
regulation which emphasizes that NCLB requires States to test both ELs and special
education students. However, on August 6, 2002, Paige proposed regulations to permit
alternative assessments for students with the most “significant cognitive disabilities” and
could not apply to more than 0.5 percent of all students in the grades assessed.
Congress passed the then new legislation in 2006 – the IDEA, which specifically allows
LEAs to “measure the achievement of SWD against alternative academic achievement
standards.” A policy letter issued by Spellings discussed the one percent exemption and
discussed how SWD have historically been held to lower standards and assessed in ways
that fail to accommodate their disabilities. ELs, on the other hand, who recently arrived
to the US were granted a one-year exemption from language arts, however, all ELs were
still to be assessed in their ELP and mathematics each year, regardless of time of arrival
to the US.

CT’s proposed plan sought to assess special education students at instructional,
rather than grade level, and to exempt recently arrived ELs for three years from reading,
math, and, science. Spellings denied the proposed plan because they did “not comply
with the statute and regulations.” The State asserts that the court should have set aside
the Secretary’s denials because the Secretary failed to provide the State with a hearing
which is violating the APA, however, that request was not made and when it was, was not taken.

The court also acknowledged the argument that testing students who are newly arrived in English, when they are not at all proficient in English, may not be a particularly sensible way to determine their academic achievement or knowledge and similarly, testing special education students at grade level. However, both of these issues were not considered the issues before the court during this case and although heard, were not ruled upon by the court. The only question considered was whether the Secretary’s denial of the State’s request that they were contrary to statute was arbitrary; the court denied the State’s motion for judgment. The Secretary argues that the State’s proposed plan amendment would eliminate Congress’ requirement of annual grade-level testing of all students. Spellings did state that accommodations could include testing in the students’ L1 for the first three years until they achieve ELP. The Secretary’s interpretation of the provision was deemed correct and therefore the State’s motion was denied.

*United States v. Texas (2008)*. The background of this case begins thirty-seven years ago, with a suit filed in the US District Court for the Eastern District of TX which involved nine all-black school districts and resulted in a comprehensive order directed toward the Texas Education Agency (TEA). The court entered an order and retained jurisdiction over the TEA and indirectly over the TX public education system to ensure that no child would be denied equal educational opportunities based on race, skin color or national origin.
In 1975, the League of Latin American Citizens filed a motion to address denials of equal education opportunity to Mexican-American students in TX public schools. The demand was for TEA to implement a plan to provide all ELs with bilingual instruction and programs to overcome the effects of past discrimination. The courts upheld that the defendants had violated the EEOA by failing to take action to address the language barriers of ELs, however, because no evidence of purposeful discrimination was present, Title VI of the Civil Rights Act was not considered to have been violated.

The TX 1981 Bilingual and Special Language Programs Act also created a new program for ELs. Texas educates one of the largest populations of ELs in the country and contrary to conventional wisdom, in 2005, only 13.1% of ELs were classified as immigrants, therefore 86.9% of TX’ ELs are not immigrants, as defined by TEA. The Texas Education Code, particularly Chapter 29, mandates bilingual education and ESL programs to meet the needs of ELs and facilitate their integration into the regular school curriculum. By law, every TX school district with twenty or more ELs in the same grade level must offer a bilingual education or an ESL program and establish standardized criteria for identification, assessment, and classification of ELs for entry or exit from the program. The problem is, however, that the District Effectiveness and Compliance (DEC) system, intended to monitor these programs, was never effectively implemented. By 1996, onsite mentoring had only been done in 18% of the districts and 202 districts had not been visited in over six years! There was no way to ensure that Bilingual Education Program funds were spent appropriately, nor that equal educational opportunities for bilingual students were properly provided.
Replacing the DEC system, Performance Based Monitoring Analysis System (PBMAS) did not use onsite visits, but instead, a data-drive system to evaluate EL performance. This system revealed that school districts were likely under-identifying ELs, while a large number of parent denials appeared, that at least in some schools, parents may not have been well-informed of the advantages of bilingual/ESL programs or were subject to coercion. The accountability rating system in TX also did not disaggregate student performance for ELs nor were schools or districts accountable for failure to comply with standards governing EL education. Additionally, the EL student dropout rate is greater than the ‘All Students’ category statewide, as is the retention rate.

Recognizing the stagnation of ELs in comparison to their non-EL counterparts, defendants were ordered to rectify the monitoring failures with a monitoring plan to address the failures as well as implement a new LEIP for secondary ELs in order to meet and satisfy the requirements of the EEOA.

*Coachella Valley Unified School District v. State of California (2009).* Nine school districts receiving funding under NCLB sought a writ of mandate (a court order to a government agency to follow the law by correcting its prior actions or ceasing illegal actions) requiring the State to abide by the laws for assessing ELs. The decision to test all ELs in English fulfilled the assessment requirements of NCLB, in light of the fact that under CA’s policy, almost all ELs were taught in English; recognition that many ELs lack exposure to academic vocabulary in their primary language. The school districts claimed that because CA tested ELs in English, that the tests were not valid and reliable. The court of appeals upheld that the purpose to measure an ELs’ mastery of academic
content standards in English is not incompatible with NCLB. NCLB does not say that ELs students must be tested in English, except that reading and language arts must be administered in English after a student has attended school in the US for three years. It is up to the states, under NCLB, to adopt a “testing scheme that is valid and reliable for LEP students.”

It is up to the federal Secretary of Education, however, to make a decision, with the assistance of the peer review process, to determine whether a state’s plan meets the requirements. In keeping with the federal-state relationship, the Secretary of Education cannot order a state to use a specific assessment. Accommodations for ELs, however, are outlined to include extra time, native language assessments, administration to small group, flexible scheduling, simplified instruction, use of dictionaries, and giving instructions in native language. The Act does delineate that states must make every effort to develop and administer native language assessments, if doing so is likely to yield the most accurate and relatable information about what the students know and can do. States may also exempt ELs from reading and language arts if they have attended schools in the US for less than 11 months. Similarly, if the percentage of students in a particular subgroup that has not attained proficiency decreases by 10% from the year before, AYP is considered to be met; Safe Harbor.

The School Districts then further asked to: (1) withhold or withdraw test results of ELs for NCLB accountability purposes; (2) cease administering the State’s current tests in English for ELs enrolled in public schools for less than three consecutive school years; (3) for testing purposes, to develop and administer tests in Spanish to ELs who are literate
in Spanish or instructed in Spanish and English (and for other languages); and (4) modify assessments to account for linguistic complexity. The court, again, reasoned that NCLB does not direct a specific manner or course of conduct as to how to test ELs; instead it specifies that the results must ensure valid and reliable assessments aligned with the state’s content standards consistent with professional testing standards. The court also referred to the Proposition 227 mandate that given the range of languages it was not feasible for the State to decide that translating assessments was not practicable and therefore assessments would be in English, the ‘official’ language of our educational system. Further clarification was made regarding that a valid test, in essence, is one that measures what it is supposed to measure, whereas a reliable test is one that produces consistent test scores over time. In fact, the states, as designated by the US DOE, have a lot of flexibility in determining how to best test ELs and which accommodations to use. The School District argues exactly this, however, that because NCLB imposes mandatory assessment of ELs, a state’s function becomes what was referred to as ministerial, notwithstanding the exercise of discretion as to how to fulfill the mandate and because the assessment program adopted by the states has not been shown to validly measure the academic achievement of ELs, CA has failed to fulfill its duties under federal law.

The District maintains that testing in English is inherently invalid, in addition to the fact that states which have opted for primary language tests have encountered obstacles to gaining approval based on concerns of test comparability. Therefore, the trial court should have issued a mandate to order the State to come back with a more valid system of measuring what ELs know academically. The court, nevertheless, stated
that the School District’s position imposes on the separation of powers. Additionally, the expert panel that advised the State Board on testing policies concluded that more than 90% of ELs are taught in English and therefore testing in primary languages would not improve the accuracy of state test results. The State Board did not opt for primary language testing for statewide NCLB accountability purposes and the Secretary cannot order a state to use a specific assessment or mode of instruction and reiterates that the purpose to measure an ELs’ academic content standards in English is not incompatible with NCLB.

Horne v. Flores (2009). The underlying matter of this case concerns the rights of Spanish-speaking students attending a school near the Mexican border. In Horne, originally filed in 1992 by a fourth grade student, Miriam Flores, joined by a group of ELs and ELs’ parents, alleged that there was no showing of adequate funding being provided to the EL program in AZ (Flores v. Arizona, 1992) The suit, filed against the defendant Thomas Horne, the AZ Superintendent of Public Instruction, specifically claimed underfunding by the NASD, claiming that ELs were not provided adequately prepared teachers, instructional materials or a program which is supported by funds as required by the EEOA (Rios-Aguilar & Gándara, 2012). The federal district court in AZ held that the state was violating the EEOA because the amount of funding reserved for ELs was arbitrary and not related to the actual funding needed to cover the costs of EL instruction.

The EEOA of 1974 requires states to take ‘appropriate action’ to overcome language barriers that impede equal participation by students in an instructional program.
The state appealed the judgment of the US Court of Appeals which upheld a denial of relief from the decree. The US Supreme Court held that consideration of only the adequacy of the funding for EL instruction was improper; since the appropriate inquiry was whether the obligations under EEOA were satisfied. The responsibility for EEOA compliance was turned over to the state to determine whether the EEOA violation still existed, rather than whether the state provided the funding required by the decree. The EEOA leaves state and LEAs a substantial amount of latitude in choosing how this obligation is met.

The EEOA’s ‘appropriate action’ requirement does not necessarily require a particular level of funding, and to the extent that funding is relevant, the EEOA does not require that the money come from a particular source. The question under review in the court was not whether AZ must take ‘appropriate action’ to overcome the language barriers that impede ELs. Simply requiring a State to “take appropriate action to overcome language barriers” without specifying particular actions, again leaves the state broad latitude to design, fund, and implement EL programs that suit local needs. While the EEOA seeks to provide “equal educational opportunity” to all children enrolled in public schools, its ultimate focus is on the quality of educational programming and services provided to students, not the amount of money spent on them. Additionally, the EEOA does not give the federal courts the authority to judge whether a State or a school district is providing ‘appropriate’ instruction to other subjects; that remains the province of the States and the local schools.
The *Horne* case prolonged for almost a decade and a half with AZ refusing to answer the federal court’s demand that the state provide a level of funding for services for ELs. On June 25, 2009, the US Supreme Court overturned the decision of the state court, deciding in favor of *Horne*, allowing the state to determine its own requirements with regards to EL instruction. In sum, AZ was given a pass (Martinez-Wenzl, Pérez, Gándara, 2012). The Supreme Court stated that the district court had erred in insisting that AZ had to demonstrate a rational relationship between the funding of programs for ELs and their probable effectiveness (Rios-Aguilar & Gándara, 2012). According to the court, when evaluating the actions of the state, attention should focus on student outcomes rather than on spending and inputs to schools. Furthermore, the court discussed AZ’s SEI program established by Proposition 203 and indicated that research showed that it was more effective than bilingual education. It is important to note that at the time of the 2009 remand, there was no empirical research on the impact of the SEI program which keeps ELs segregated for four hours a day from other English-speaking peers and denies them access to the mainstream curriculum. Since this ruling, however, the Civil Rights Project at the University of California Los Angeles (UCLA), CA has published nine research studies to examine how AZ’s ELs are performing under the state’s current language policies to produce the best possible evidence so that the state and the federal district courts could consider this when applying the Supreme Court decisions (Rios-Aguilar & Gándara; Gándara & Orfield, 2012).

In August of 2010, the DOJ found that AZ’s mechanisms for identifying ELs in need of language services and the instruments it used to assess student’s ELP are in
violation of Title VI of the Civil Rights Act of 1964. Pursuant to the *Horne v. Flores* ruling, the Arizona Federal District Court must determine whether or not Arizona was violating the EEOA on a statewide basis. As of March 29, 2013, after 21 years of litigation and a series of appeals, the district court determined that the funding for the programs in *Horne* were insufficient and the defendants prevailed, not without costing ELs and the state of AZ significantly (Arizona Center for Law in the Public Interest, 2013).

In a nation where nearly 47 million people (18%) speak a language other than English, it is important to ensure that ELs receive the English they need to participate in the US and ensure that linguistic diversity can “support, versus undermine, our democracy.” The decision in the *Horne v. Flores* case emphasizes numerous important principles that are at stake, particularly one which seems to undermine the essence of *Lau v. Nichols*. *Horne* supports the idea of sequential instruction for ELs, first learn English, then have access to the mainstream/core curriculum, which ultimately widen gaps in academic achievement. Such a decision could limit ELs’ ability to graduate on time with their peers and could encourage separation of ELs from students on the basis of race alone. However, as suggested by Rios-Aguilar and Gándara (2012), resolving educational policy through the courts may not be the most effective way to solve the educational inequities experience by thousands of ELs.

**Alejo et al., v. Tom Torlakson (2013).** The plaintiffs in this case requested that the defendants, the State Superintendent of Public Instruction, the State BOE, and the CA DOE cancel the suspension of onsite reviews of school districts’ compliance with state
and federal standards in programs benefitting educationally disadvantaged students, including ELs. NCLB provides funding to CA for programs for ELs, migrant, homeless, and neglected children in exchange to monitor school districts to comply with NCLB regulations. The CA DOE conducts between 100-250 onsite visits for review each year. However, in December of 2008, Governor Schwarzenegger issued an Executive Order requesting that public agencies cut the budgets for the upcoming fiscal years. So, the State Superintendent of Schools announced that all non-mandated onsite monitoring will be suspended for at least one year; 105 onsite district audits were cancelled.

The plaintiffs, comprised of several advocacy groups and individuals, requested the trial court to compel the Defendants to reinstate onsite review and develop an onsite monitoring schedule, as well as declare that Defendants' actions unlawful. Defendants moved for summary judgment, which the trial court granted. The California Court of Appeal affirmed the trial court's ruling, concluding that Defendants did not violate ministerial duties nor abuse their discretion. The court examined three issues, beginning with an examination of the EEOA of 1974 which requires states to take appropriate action to overcome language barriers of ELs. However, the court determined that the EEOA does not require a specific type of monitoring system nor did the plaintiffs shows that the Defendants' other monitoring activities were insufficient. The second issue reviewed the BOE’s NCLB funding application that included a description of how it would monitor school districts. However, again, the court maintained that the BOE was allowed to alter their monitoring activities. Lastly, the court examined whether the Superintendent was required to monitor school districts, based on previous legislation;
the CEC. However, the court affirmed that the Superintendent had flexibility in frequency to determine school district compliance with program requirements and ultimately determined that the Superintendent did not abuse his discretion when he suspended onsite monitoring of the programs. The Superintendent emphasized that these measures had been taken due to budget cuts. The court held that the suspension of monitoring activities was lawful under the EEOA of 1974. The court held that the temporary suspension of program monitoring reviews was not an abuse by the Superintendent.

**Litigation Trends**

The preceding discussion provided an overview of the variation and complexity in terms of the issues, involved parties, and applicable laws in dispute for each of the 25 cases in this study. The following discussion will provide a comprehensive and systematic analysis of the 25 cases. Findings gleaned from the data set are presented through the following four subcategories: (1) number and frequency of cases, (2) prevailing party, (3) geographical distribution, and (4) [research question] litigation trends in case law outcomes. These findings are further applied to the study’s research question in a discussion in Chapter Five.

**Number and Frequency of Cases**

To begin, the data set was comprised of 25 cases that were decided over 39 years, from 1974-2013 (see Figure 2). The highest number of cases (n=3) was decided in 1978 and 1981 (n=3). Over the 39 years, the number of cases has remained fairly constant.
In an effort to determine further differences and with the cases spread over nearly 40 years, the cases were divided by four decades. As shown in Figure 3, nine of the total 25 cases were decided from 2000-2013, while there were eight cases in the 1980s, compared to five cases in both the 1970s and 1990s. Key developments in the history of federal education policy, as described in chapter two, often provide insight as to why there may be a slight increase in litigation. In the 2000’s, for example, the NCLB Act was enacted in 2001 with reports form all schools disaggregated by groups of students, including ELs, and was closely followed by the dismantlement of bilingual education in 1998 in CA public schools by Proposition 227. Similarly, the 1980s was a significant

Figure 2. The number of cases per year between 1974 through 2013.
decade for reform with the initiation of standards and standardized assessments, including an accountability movement with a heavy emphasis on major inadequate and declining achievement scores in PK-12 schools across the country.

Disaggregated into four-year cycles (1974-1978; 1978-1982; 1983-1987; 1988-1992; 1993-1997; 1998-2002; 2003-2007; 2008-2012; 2013), the number of cases was fairly constant, except for 1993-1997 (see Figure 4). As illustrated by Figure 4, between 1-5 cases were decided in each of the last three, four-year cycles. There does not seem to be any sharp increase or decrease in case law over any particular period of time. The rate of published litigation pertaining to substantive issues has remained somewhat constant over the last twenty years.

Figure 3. The distribution of cases over four decades, divided into the 1970s, 1980s, 1990s, and 2000s.
**Prevailing Party**

Overall, 64% (n=16) of the 25 cases were decided in favor of parents of ELs and/or advocacy groups on behalf of ELs and 28% (n=7) of the cases were decided in favor of the school districts (Figure 5). One case resulted in an inconclusive win for the school district/authorities, while another case was decided largely for ELs’ Parents/Advocacy Groups. The seven-point Likert-scale adapted from Lupini and Zirkel (2003) was used to determine whether a party prevailed (Appendix A).

*Figure 4.* The distribution of cases over four-year cycles between 1974-2013.
Figure 5. The distribution of case law outcomes according to the prevailing parties, either EL Parents/advocacy groups prevailed, school districts prevailed, the decision was largely for EL Parents/advocacy groups or the win was inconclusive for school district/authorities.

The purpose of Lupini and Zirkel’s (2003) Likert-scale is to assign more accurate labels to describe to what extent a party prevailed because classifying parties simply as prevailing v. non-prevailing is problematic since court decisions are more complicated in awarding relief (Decker, 2010). This study assigned the Likert-scale outcome codes to the 25 cases in the data set. For any case with an outcome code of 1 or 2, the parents of ELs and/or advocacy groups on behalf of ELs are considered to be the prevailing parties. This is similar to the outcome codes 6 and 7, which resulted in school districts/authorities being designated as the prevailing parties (see Table A).
Table 1. Outcomes Codes (O.C.) Disaggregated by Prevailing Party (N=25)

<table>
<thead>
<tr>
<th>1974-2013 Cases, EL Parents/Advocacy Groups Prevailed (n=16)</th>
<th>O.C.</th>
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<tbody>
<tr>
<td>Lau v. Nichols (1974)</td>
<td>1</td>
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<tr>
<td>Serna v. Portales (1974)</td>
<td>1</td>
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<tr>
<td>Cintron v. Brentwood (1978)</td>
<td>1</td>
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<tr>
<td>Rios v. Read (1978)</td>
<td>1</td>
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<tr>
<td>Idaho Migrant Council v. Board of Education (1981)</td>
<td>1</td>
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<tr>
<td>Castañeda v. Pickard (1981)</td>
<td>1</td>
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<tr>
<td>Plyler v. Doe (1982)</td>
<td>1</td>
</tr>
<tr>
<td>Keyes v. School District No.1 (1983)</td>
<td>1</td>
</tr>
<tr>
<td>Gomez v. Illinois State Board of Education (1987)</td>
<td>1</td>
</tr>
<tr>
<td>United States v. Yonkers (1997)</td>
<td>1</td>
</tr>
<tr>
<td>Abbott v. Burke (1998)</td>
<td>1</td>
</tr>
<tr>
<td>Doe v. Los Angeles Unified School District (1999)</td>
<td>1</td>
</tr>
<tr>
<td>Hancock v. Driscoll (2004)</td>
<td>1</td>
</tr>
<tr>
<td>Daniel v. Board of Education for Illinois (2005)</td>
<td>1</td>
</tr>
<tr>
<td>United States v. Texas (2008)</td>
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<tr>
<td>Horne v. Flores (2009)</td>
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<tr>
<th>1974-2013 Cases, School District/Authorities Prevailed (n=7)</th>
<th>O.C.</th>
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<tbody>
<tr>
<td>Guadalupe Organization, Inc. v. Tempe Elementary School District (1978)</td>
<td>7</td>
</tr>
<tr>
<td>Jimenez v. Honig (1987)</td>
<td>7</td>
</tr>
<tr>
<td>Valeria v. Davis (2002)</td>
<td>7</td>
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<tr>
<td>Alejo et al. v. Tom Torlakson (2009)</td>
<td>7</td>
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<th>1974-2013 Cases, Decision Largely for EL Parents/Advocacy Groups (n=1)</th>
<th>O.C.</th>
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<tr>
<td>Flores v. Arizona (2009)</td>
<td>2</td>
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</table>

<table>
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<tr>
<th>1974-2013 Cases, Inconclusive Win for School District Authorities (n=1)</th>
<th>O.C.</th>
</tr>
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</table>

Average Outcome Code: 2.88
As depicted in Table A., the average outcome code for the 25 cases was 2.88 which slightly favors the parents of ELs/advocacy groups overall. When the cases were disaggregated by older cases (1974-1993) and recent cases (1994-2013), the average outcome codes were 2.5 and 3.2 respectively. Again, based on the outcome code data, it appears that EL parents/advocacy groups prevailed in more total cases.

**Geographical Distribution**

As depicted by Figure 6, the 25 cases originated in 11 different states/federal districts. The highest number of cases (n=8) were litigated in CA. Three states, Texas, Arizona, and New York tied for the second highest number of cases.

*Figure 6. The total number of cases distributed by state/federal districts.*
Research Question: Litigation Trends in Case Law Outcomes

The following subcategory, litigation trends of case law outcomes, is an analysis intended to answer the research question, what are the specific case law outcomes and trends of federal and state litigation involving the educational rights of ELs?

After analyzing the 25 cases, a total of 95 codes emerged. These 95 outcomes were then examined to identify themes, which resulted in the documentation of the following seven litigation trends, as depicted in Figure 7. These seven trends are ordered from highest to lowest number of case law outcomes codes: (1) EL-related legislation, claims, and violations, (2) equal education opportunity violations, (3) inequitable educational programs for ELs, (4) inadequate EL programs and services, (5) EL program funding issues, (6) ineffective EL identification, and (7) assessment issues. The following is a detailed examination of each of the seven litigation trends.
Overall, these 41 case law outcomes were coded under the trend, EL-related legislation, claims, and/or violations. Given that 18 of the cases included multiple case law outcomes, it is not surprising that the trend EL-related legislation, claim/violation, emerged in all 18 of these cases.

The trend, EL-related legislation claims/violations, included the following major federal statutes and constitutional guarantees: (1) Title VI of the Civil Rights Act of 1964, including the Lau Memoranda clarifying LEA responsibilities for ELs along with the Castañeda principles; (2) the EEOA of 1974; (3) the Fourteenth Amendment Equal Protection Clause; and (4) the NCLB Act of 2001, particularly Titles I and III.

Additionaly, one code that related to EL-related legislation outside of the
The aforementioned four major laws included the Bilingual Education Act. The frequency of claims/violations of legislation are depicted in Figure 8. As depicted by Figure 8, the EEOA of 1974 (n=15) and Title VI of the Civil Rights Act of 1964 (n=13) have the highest number of claims and violations.

Figure 8. The distribution of claims and violation of major EL-related legislation based on case law outcomes.

Equal Education Opportunity Violations

Overall, 16 case law outcomes emerged for the trend, equal education opportunity violations. As aforementioned, out of the 25 cases, 18 had more than one case law outcome that could be classified into more than one litigation trend. Out of those 18 cases, 16 had a final court ruling that the defendant party violated ELs’ equal educational opportunities. Each of these 16 cases also included additional rulings that were coded in
various categories to further explain how the court determined that ELs’ equal educational opportunities had been denied.

**Inequitable Educational Programs for ELs**

Fourteen case law outcomes were included in the trend titled inequitable educational programs for ELs. This final trend incorporated a variety of issues that ranged from no instructional plans existing at all for ELs, housing segregations that resulted in inequitable programs for ELs, and segregation and inequitable grouping of ELs within classrooms. Twelve of the fourteen codes stemmed from no instructional plan existing at all for ELs where districts were mandated to implement some type of plan to ensure ELs had an equitable opportunity to learn. One district claimed that there were not enough students with English language deficiencies in the district to have warranted application of an ESL program, however, such districts’ programs did not meet the previously established *Lau* standards and therefore were found in violation of *Lau Guidelines*. Consequently, the courts determined that districts failed to comply with the statutory mandate to overcome language barriers that impeded ELs’ equal participation.

**Inadequate EL Programs and Services**

Nine total case law outcomes were identified for the trend, inadequate EL programs and services. Similar to previously discussed trends, this trend also included a range of issues, including alleged violations for a lack of communication with EL parents, claims regarding the insufficient or non-existent monitoring of ELs who had completed an ESL program, overcrowded classrooms that were in violation of the state mandated ratios of teachers to ELs, and teachers who did not meet the minimum
credential qualifications to provide services to/teach ELs.

**EL Program Funding Issues**

The EL program funding trend included seven case law outcomes related to issues and claims, such as the school district’s failure to comply with federal funds, as well as the “arbitrary and capricious” funding levels provided for ELs’ instructional needs. Each of these case law outcomes was a result of either: (1) too many students in a classroom; (2) not enough classrooms; (3) not enough qualified teachers; (4) not enough teacher aids; (5) inadequate tutoring programs; and (6) insufficient resources for teaching, and in these particular cases, were found to be a direct result of inadequate funding for ELs. The case law outcomes for this trend were generally determined in accordance with the EEOA requirements, which are imposed on school districts and mandate the use of funds to adequately prepare teachers, provide sufficient instructional materials, and establish appropriate English Language Development (ELD) programs and services.

**Ineffective EL Identification**

Five case law outcomes were identified for the trend, ineffective EL identification, that also included a variety of violations. These violations included an investigation that revealed a Texas accountability system where school districts were under-identifying ELs, Arizona’s mechanisms for identifying ELs in need of EL services and the instruments used to assess ELP were found to be invalid and therefore also in violation of Title VI, and a school district in NY that lacked procedures for identifying ELs where a student’s language deficiency often came to light through casual conversations in the teacher’s lunch room.
**Assessment Issues**

In the final category of litigation trends, assessment issues, only three case law outcomes emerged. For these three outcomes, which were identified in only two court cases, the courts ruled in favor of the defendants and failed to recognize the ELs’ alleged allegations. Claims included testing accommodations provided to ELs, particularly whether the use of an ELs’ native language was allowed. NCLB does not direct a specific manner or course of conduct as to how to test ELs; instead it specifies that the results must ensure valid and reliable assessments aligned with the state’s standards. Although one court ruled that no valid assessment existed for exiting ELs from the program, the case law outcome ultimately favored the defendants.

The preceding discussion provided a comprehensive and systematic analysis of the 95 case law outcomes that emerged after careful analysis of the 25 cases included in this study. Findings gleaned from the data set were presented through four subcategories: (1) number and frequency of cases, (2) prevailing party, (3) geographical distribution, and (4) [research question] litigation trends in case law outcomes. The litigation trends of case law outcomes answered the research question asking, what are the specific case law outcomes and trends of federal and state litigation involving the educational rights of ELs. The next chapter will present a discussion of the results summarized in this chapter. Following the discussion of results, a summary of limitations and implications for future research are also presented.
CHAPTER FIVE: DISCUSSION

This research is significant because these 25 cases tell the untold stories of ELs and bring awareness to their inequitable educational experiences in public schools across the nation. Each of these cases reveals how US courts have interpreted various EL-related legislation and ultimately how the courts ruled in cases dealing with the educational rights of ELs; reflecting the continued efforts in an attempt to fulfill Brown’s promise. Unfortunately, the mere fact that these 25 cases exist reflect that the legal requirements of educating ELs are, quite simply, still not being met; ELs are not adequately served in our nation’s schools by current efforts. This chapter presents a discussion of the results from a systematic analysis of case law outcomes and identification of litigation trends intended to contribute to the effort to understand EL-related legislation and ultimately improve educational opportunities and outcomes for ELs.

This research is significant because it can provide alternative proactive remedies other than costly litigation and demonstrates the need for more effective coordination of mechanisms to bring together institutions that service ELs. Utilizing two established legal research methodologies, seven key litigation trends were identified from the analysis of 25 cases that have emerged over the past 40 years (from 1974-2013). In conclusion, results from the systematic analysis indicated the following seven trends: (1)
EL-related legislation, claims, and violations; (2) equal education opportunity violations; (3) inequitable educational programs for ELs; (4) inadequate EL programs and services; (5) EL program funding issues; (6) ineffective EL identification; and (7) assessment issues. Following the discussion of results of litigation trends, a summary of limitations, significance and implications of this research, and recommendations for future research is presented.

**An Emerging Civil Rights Issue**

The findings summarized in Chapter Four may be characterized as an extensive review and analysis of laws, regulations, policies, and litigation trends that are crucial to understanding an emerging civil rights issue. These 25 cases and the plaintiffs’ ongoing efforts to resolve their disputes with school districts in the courts reveal that there is an unmet need for ELs in the public school setting and that there is seemingly no other alternative for justice besides this contentious legal venue. However, while the final lever for institutionalizing change in introducing educational reform has historically been through the courts, the results of this study strongly encourage and demonstrate the need for a more proactive and less reactive approach (Samson & Collins, 2012). The EL-related legislative literature that was reviewed in Chapter Two, along with the seven identified litigation trends, are likely to provide legal and education practitioners and researchers, as well as policymakers, with a bigger picture of the numerous ongoing inequities and trends of unmet educational services in the field of ELs that have been simmering below the surface in the field of ELs for years. This research also encourages better coordination of services for ELs, but, without alternative options, also empower
parents and advocates of ELs better pathways of litigation for successful outcomes in court. The ensuing concerns highlight the need to identify and address possible legal avenues that may support the emergence of realistic solutions for promoting educational opportunities as the EL population only continues to increase (Faulkner-Bond & Forte; US DOE, 2010).

**Identification of Litigation Trends**

The key litigation trends identified from these 25 cases are consistent with the four major themes recognized by the civil rights investigations that are ongoing around the country and essentially triggered this study. The four themes identified by the OCR included: (1) [mis]understandings in EL legislation, (2) extensive variability in EL identification, reclassification, programs, and services, (3) the lack of comprehensive guidance and compliance for EL service requirements, and (4) monitoring and evaluating the effectiveness of EL requirements (Faulkner-Bond & Forte, 2011). Consistent with the OCR investigations, this study expanded these four themes to seven litigation trends in order to include a distinction of a variability in programs and services into two separate trends of inequitable educational programs for ELs and inadequate EL programs and services to distinguish where programs for ELs simply did not exist, in addition to two additional themes to include EL program funding issues and lastly, assessment issues.

**Key Pieces of EL-Related Legislation**

Analyzing litigation trends and outcomes provides critical insight into the key pieces of EL-related legislation for teachers, policymakers, researchers, and parents/advocates of ELs that are seemingly misunderstood and frequently overlooked.
With a heavy emphasis on increasing test scores with specific instructional strategies for ELs, the rights of ELs have not had much attention. The extensive analysis of cases provided further clarification to understand to what extent each piece of legislation was more of a misunderstanding over the other. The four major pieces of legislation include the following, in order of highest violations: 1) the EEOA of 1974 (n=15), 2) Title VI of the Civil Rights Act of 1964, including the *Lau Memoranda* clarifying LEA responsibilities for ELs along with the *Castañeda* principles (n=13), 3) the Fourteenth Amendment’s Equal Protection Clause (n=8), and 4) the NCLB Act of 2001 (n=2).

**The EEOA of 1974 and the Equal Protection Clause of the Fourteenth Amendment**

The essence of *Lau* was codified into federal law through the EEOA of 1974, soon after the case was decided. The *Lau Guidelines* are reflected in the EEOA declaration that no state can deny educational opportunities to anyone regardless of race, color, sex or national origin or language barriers and educational agencies must take appropriate action to ensure equal participation among all students (Wright, 2010). EEOA’s “appropriate action” verbiage, however, allows for much flexibility and without much guidance, schools misunderstand what “appropriate action” entails. The EEOA does not require schools to adopt any particular type of language acquisition program. The main purpose of the EEOA is to ensure equal opportunities through reporting and monitoring activities that are designed to make certain that no state denies equal educational opportunities. EL student identification and groups are both aspects of equal protection, however, and must be *explicitly* mentioned in the EEOA (Berenyi, 2008).
In *Cintron v. Brentwood* (1978), for example, a class action suit was filed against a school district in New York and was found to be in violation of both the EEOA of 1974 and the *Lau Guidelines* because Spanish-speaking students were being kept separate from English-speaking students in music and in art. The increasing emphasis on English speaking in each successive school year was expected to produce a level of language proficiency such that by the time the student reached the sixth grade, all courses were to be taught entirely in English. The bilingual program, however, segregated Spanish-speaking students from the rest of the student body; students remained in the same classroom except for physical education (PE) and lunch. Yet, during lunch and PE, students continued together with the same Spanish-speaking group. Students who had attained the level of proficiency in English which would permit learning in the English language, nevertheless, were retained in the program for the purpose of maintaining their Spanish cultural level. No student had ever been transferred out of the bilingual program to the mainstream classroom. Similarly, in Texas’ *Castañeda v. Pickard* (1981), the courts decided on a win for the plaintiffs against the school system because the classrooms were segregated by use of a grouping system based on criteria that were both ethnically and racially discriminating. In 2005, in *Daniel v. Board of Education for Illinois*, minority students in IL filed a class action suit against the district and the Board of Education alleging that ELs and minority students suffered from the district’s failure to take “appropriate action” to eliminate language barriers for ELs and that minority students endured discriminatory burdens and diminished educational benefits not suffered
in the same proportion by White students; both in violation of the EEOA of 1974 and the Equal Protection Clause of the Fourteenth Amendment.

**Title VI of the Civil Rights Act of 1964**

Title VI of the Civil Rights Act of 1964, including the *Lau Memoranda* clarifying LEA responsibilities for ELs along with the *Castañeda* principles totaled the next highest amount of violations (n=13). Title VI is part of the Civil Rights Act of 1964 and prohibits discrimination on the grounds of race, color or national origin in any programs or activities that receive federal financial assistance (NY SED, 2006; Ragan & Lesaux, 2006; US DOE, 2009; VA DOE, 2012). In order to determine compliance with Title VI, the OCR followed certain procedures of educational programs with ELs that receive federal financial assistance from the DOE. In 1999, a group of parents filed a class-action claim on behalf of their children (*Doe v. Los Angeles Unified School District*) claiming that the LA USD’s implementation of Proposition 227, an initiative that restricted the use of bilingual education to teach ELs in public schools, violated their rights to an equal education under the EEOA of 1974 and Title VI of the Civil Rights Act of 1964. They claimed that the defendants failed to take appropriate action to address the needs of ELs and that national origin minorities were deprived of a language program that provided them an opportunity to learn English. The court ruled in favor of the plaintiffs.

**The NCLB Act**

The NCLB Act has had the fewest, but the most recent claims and violations, however, this litigation trend is closely related to another trend, assessment. The issues
emerging in claims initiated under both the NCLB Act and assessment will most likely increase, especially in regards to the validity of tests used to assess ELs’ language skills. School administrators consistently identify the accountability pressures of NCLB and specifically testing in English as the main factor in their decision to eliminate bilingual programs (Menken, 2013). Because NCLB mandates the inclusion of all students in large-scale standardized assessments, much attention is drawn to the validity and fairness of such assessments for ELs who may not fully demonstrate their knowledge and skills due to their limited ELP (Wolf & Leon, 2009).

In Coachella Valley Unified School District v. State of California (2009) the court ruled that NCLB does not direct a specific manner as to how to test ELs; instead only a specification is made with regards of ensuring results are measured via valid and reliable assessments. Similarly, in Connecticut v. Spellings in 2008, the court also acknowledged the argument that testing students who are newly arrived in English when they are not at all proficient in English, may not be a particularly sensible way to determine their academic achievement or knowledge. However, such an issue was not considered the issue before the court during this case and although ‘heard’, was not considered. Serious validity concerns, however, are raised if test items contain unnecessary linguistic complexity and interfere with the ability to show content knowledge.

Most standardized, content-based tests are administered in English and normed on native English-speaking test populations, as also aforementioned by Linquanti (2001). This is a major criticism of standardized achievement tests; the exclusion of ELs from the norming group for these tests (Linquanti, 2001; Wolf & Leon, 2009). Not ensuring for
ELP has led to justified accusation of bias and unfairness in testing (Abedi, 2002). ELs may also perform poorly on tests because they read more slowly (Abedi).

ELs are subject to standardized tests that are typically not normed with EL students in the norming group. It would be beneficial to determine at what level of ELP the English-language test becomes meaningful and then include those students who are at or above that level or ELP in the norming group (Abedi, 2002). Additionally, the complexity of the language used means students who may know the content may not be able to understand the test questions. Tests in English are reading tests as well as content tests. Ultimately, most accommodations that are offered to ELs are taken from those developed for Students with Disabilities, so the evidence on accommodations in place to help ELs are also mixed and also often used as blanket accommodations for all ELs without a proper procedure in place to determine its benefits (Abedi).

Though NCLB highlighted the needs of ELs, some feel the heightened focus on ELs, particularly in schools labeled as failing, may result in slight improvements to the quality of education they receive, yet still raise concerns that current language policies unintentionally marginalize and penalize ELs in US schools (Menken, 2009). Case law has had a major impact on federal and state policy for ELs and their families, but the courts have failed to actually mandate a particular model or approach or any type of decision directly related to the use of ELs’ native languages. Nonetheless, the courts have made it very clear that schools may no longer ignore the unique needs of ELs (Wright, 2010). Schools must provide instruction in English for ELs, however, must not focus on just teaching English; ELs must also learn the same academic content.
Overall, the next ESEA authorization is an opportunity to strengthen NCLB’s capacity-building purpose so that federal, state and local leaders sustain and sharpen attention, direction, and innovation in effectively educating and more meaningfully accounting for EL to meet the law’s original goal of improving outcomes and narrowing achievement gaps for ELs (Hopkins, Thompson, Linquanti, Hakuta, & August, 2013). Without any explicit consideration of these issues with NCLB and assessment, however, litigation may be the only current avenue for such concerns to be ‘heard.’

**Funding: An Emerging Trend**

While funding is not one of the major trends identified, this is an issue that is likely to emerge as a more prominent trend in future litigation; and also in the headlines. In recent news reports, advocates threatened to initiate a funding lawsuit against the state of Nevada, which they claimed provides no funding in its formula for ELs; they added that this “zero dollars” approach is unconscionable and must be terminated (Doughman, 2013). Similarly, Arizona’s *Horne v. Flores* has been and continues to be in the headlines for violating the EEOA by not only failing to overcome language barriers to participate in instructional programs, but by capping the amount of additional per pupil funding appropriated to school districts serving large numbers of ELs (Iddings, Combs, & Moll, 2012).

Despite consensus on the need for additional funding to adequately educate ELs, funding recommendations, if made, vary considerably across states and methodologies (Gibson, 2011). Although this is not entirely surprising, given the variations in state contexts and EL characteristics, it underscores the general lack of concerted inquiry and
overall complexity of determining how much ELs cost to educate (Gibson, p.202).

Although Arizona is but one state, the resolution of the high profile Arizona case could catalyze important and much needed change in EL education nationwide and overall, exemplifies the significance of problems within this particular litigation trend of EL funding.

Traces of funding issues can be seen as far back as in *Lau v. Nichols* in 1974 where schools were mandated to comply with federal funds for ELs and throughout almost 40 years up to 2004 in *Hancock v. Driscoll*. The judge in *Hancock* recommended relief for the plaintiffs to include the district’s determination of the actual cost of providing an equitable education to all students given that the students were not receiving the level of education as required based on inadequate funds. Given that ELs are the fastest growing school-age population, cost studies and states would highly benefit from refining resource estimates to ensure that adequate funds are allocated equitably to ELs, although this does bring an additional layer of complexity to an already politicized process (Gibson, 2011). In the meantime, the challenge of providing adequate funding for the various educational needs of ELs continues.

**Implications and Continued EL-Related Legal Challenges**

There are many additional implications for school personnel, leadership preparation, faculty members in teacher education, administrators, researchers, and most importantly for families/advocates of ELs. What has previously been treated as an unspoken dysfunction in our education system, the inequitable treatment of ELs as evident throughout these cases, is no longer an area that can be ignored. As the litigation
trends and outcomes examined in this study reveal, the responsibility to educate and promote equity and opportunity for the EL student population in all regions of the nation is presumed to fall upon educational agencies, however, without much guidance. While this research, in particular with legal research, helps educators, politicians, and researchers gain a better understanding of the educational rights of ELs and understand numerous continued challenges that litigation trends have identified over the years, this research emphasizes the lack of comprehensive resources and guidance for LEAs, SEAs, educators, researchers, and parents/advocates of ELs, regarding the educational rights of ELs (Hopkins, Thompson, Linquanti, Hakuta, & August, 2013).

Guided by the US Constitution, state law, and local regulations, school leaders are ultimately bound to deliver the educational services required by these federal and state laws (Militello, Schimmel, & Eberwein, 2009). The majority of principals, however, are generally uninformed or misinformed about school law issues with regards to the rights of students and teachers and the most frequent area of threatening lawsuits, that although filed were dismissed or settled against principals/schools, include student discipline and issues related to both special education and ELs (Militello, Schimmel, & Eberwein). Very few states actually require training for either administrators or teachers in educational law, so it is by no surprise that there is such a large gap in legal knowledge. After discussing the number of legal challenges of being a school administrator, one principal concluded, “I should have gone to law school” (Militello, Schimmel, & Eberwein, p. 40). Schools need legal updates and access to user-friendly resources regarding legislation to not only practice preventative law, but build a legally literate staff.
who can reduce the risks of lawsuits and spend more time equally educating ELs (Militelo, Schimmel, & Eberwein, p. 42). There is a significant need for additional preparation for all future teachers in school law related issues and this study begins to fill the critical gap in research and in legal knowledge regarding understanding the pieces of legislation related to the educational rights of ELs. This study also demonstrates the urgent need for inclusion of legal research/educational law research in teacher education and leadership preparation programs nationwide.

The investigations that have made national headlines, in combination with the outcomes identified in this study, brings much needed attention to the educational rights of ELs and may provide legal and education practitioners and researchers, and policymakers with a bigger picture of what has occurred in the courts with EL-related litigation. This study can help coordinate the required services to improve practice and ensure that such requirements for EL-related instruction are met. LEAs and SEAs wishing to avoid public exposure and ensure EL program compliance will also benefit from studying the lessons and trends identified in this study and conducting a self-evaluation to ensure there is an understanding of EL legislative requirements. Any lessons learned from historical missteps are invaluable (Faulkner-Bond & Forte, 2011).

Ultimately, the review of the case law outcomes and key litigation trends demonstrate the complexity of inter-related state and federal mandates. To this point, these legal requirements are mandated for states and districts, without much how-to guidance, or concrete support for school districts faced with decisions about developing a system for EL identification, providing programs and services for ELs, and deciding
when EL support is no longer needed (Faulkner-Bond & Forte, 2011; Ragan & Lesaux, 2006). Federal law requires that states and districts ensure ELs develop ELP and progress academically to ultimately participate in mainstream classrooms. However, as evidenced by the examination of EL-related legislation, the terms of EL education are dictated by various pieces of legislation in which meeting requirements for one law does not guarantee compliance with all; each is enforced and monitored by a different combination of agencies and with issues such as language, as well as content instruction to ELs, testing, identification and exiting of ELs, and funding, the problem of equity and ELs is not an easy one to begin to solve (Ragan & Lesaux). This examination of federal policies increases awareness and comprehension of legislation related to the educational rights of ELs that is an alternative starting point rather than only utilizing research-based instructional strategies that can provide a basis to begin to improve equitable educational opportunities for all ELs.

It is equally important to stress that the majority of the 7,000 civil rights complaints that have been filed with the OCR do not necessarily proceed to the courts and, therefore, do not and did not result in a case law outcome. Many of these investigations are settled outside of court, which in essence means that the review of these 25 court cases is not necessarily providing a true, complete picture of the challenges that ELs encounter (Faulkner-Bond & Forte, 2011).

In 2010, for example, the Boston district settled outside of court to fix the violations of the civil rights of approximately 8,300 ELs (Zehr, 2010). Since 2003, the Boston district failed to properly identify and adequately service thousands of ELs as
required by both the EEOA of 1974 and Title VI of the Civil Rights Act of 1964. However, the school district cooperated with a joint investigation by the two federal departments into those violations and did not proceed in court, which meant that this violation could not be recorded as a case law outcome (Zehr). Similarly, on September 5, 2013, the DOJ’s OCR issued a press release announcing that a comprehensive settlement agreement with the Prince William County School District in Virginia (VA) had been reached to improve services for approximately 13,000 ELs and provide language access for parents of ELs district-wide (US DOJ, 2013). The OCR conducted an examination of the EL programs offered by all 93 schools to determine whether ELs were receiving adequate services as required by the EEOA of 1974 that was prompted by compliance issues identified during the department’s earlier EEOA investigation of a complaint regarding the EL program at a particular district middle school. Similar to the cases in this study, numerous issues were identified in VA, including inadequate services for ELs, an insufficient number of properly qualified teachers and administrators, inadequate EL materials, gaps in the district’s communications with parents of ELs, insufficient procedures for identifying and serving ELs with disabilities, failure to ensuring nondiscriminatory discipline of ELs, an incomplete process for families to opt out of EL services, and a lack of effective monitoring and evaluation of the district's EL programs (US DOJ). However, again, VA’s investigation has not been litigated in the courts, and therefore, also did not result in a case law outcome for this study. The announcement from the OCR’s Assistant Attorney General stated “We applaud the …district for working cooperatively… to ensure that all ELs have access to the services to which they
are entitled…and will continue…to monitor its compliance with the agreement” (US
DOJ, p.1). Whether or not Prince William County, VA will eventually be sued in court
for noncompliance is unknown. However, the fact that 7,000 current complaints have
been filed also reveals that the number of litigation and outcome trends, which emerged
from past cases, could increase or change. Thus, the violations that exist today may be
indicative of future and ongoing disputes over the educational rights guaranteed to ELs.
Flores v. Arizona for example, began with a lawsuit in 1992, however, it wasn’t until
seven years later, in 1999, that the case reached trial in the US District Court.

Lastly, while these 7,000 cases, however, may not make it to the courtroom, the
25 cases that did make it to court can serve as a lesson for parents and advocates of ELs
across the country. Parents can work with their districts and encourage their districts to
meet legal requirements and if refuse or do not change service requirements, can
ultimately file a complaint with the OCR. The three-prong test identified in Castañeda
must be met, however, failure of an educational agency to take “appropriate action” to
eliminate language barriers for an ELs allows a complaint to be filed under EEOA and if
there is purposeful discrimination of no program at all for ELs, parents/advocacy groups
can also file a claim under Title VI of the Civil Rights Act.

With this research, parents/advocates of ELs are empowered with a realization of
better pathways of litigation for successful outcomes in the courts based on the outcome
codes from this study where parents of ELs/advocacy groups prevailed and the trends of
EL-related legislation claims/violations that reflect cases with the most successful claims.
What must be kept in mind, however, is that during litigation, ELs continue to receive a
poor education. Again, more proactive solutions are possible with a better understanding of EL-related legislation and required EL services identified in this study that encourage services to not solely be “triggered” by standardized test scores nor ELs “exited” from services based on standardized test scores alone either. Overall, strong advocates for equitable educational opportunities for ELs not only can continue to be strong advocates for ELs, this research educates advocates with how to be stronger advocates with legal knowledge of the educational rights of ELs.

**Recommendations for Future Research**

This study begins to bridge the gap between social science research and legal research regarding the educational rights of ELs and provides a strong benchmark for future exploration. This research utilizes a strong methodological foundation that can be used in the future to develop a study outside of the scope of this dissertation.

Specifically, additional future qualitative research studies could include interviews from the perspectives of ELs, principals, LEAs, SEAs, key stakeholders, educators, and/or parents to offer a richer explanation of what is happening or not happening in schools. A future study could include a case study of just one school or a number of schools in one particular city where the population of ELs is beginning to increase or has the largest or smallest EL population in the US. Similarly, a future study could focus on one particular population of ELs. Additionally, to expand the case law outcome findings, the numerous strict parameters could be removed on the range of dates used in this particular study and could also including private schools, higher education
institutions, cases of illegal immigrants who are also ELs, unpublished cases, and/or subsequent court decisions.

Recommendations for future research also include analysis and closer examination of the previously mentioned 7,000 civil rights complaints that are pending, but not yet before the courts. With current projections for one out of every four students to be identified as an EL by 2025, there are decisions being made in each of these 7,000 complaints that are affecting ELs and the nation’s future today, and not one of them has been systematically studied (Banks & Banks, 2007; Berenyi, 2008; Kihuen, 2009).

Limitations

There are limitations in this study, particularly in the data collection and data analysis procedures. Every effort was made to access all relevant case law and to ensure that each possible case fit within the parameters set forth for this study. The history of American jurisprudence is so voluminous, however, that even with the numerous search tools, a complete review of all of the cases cannot be guaranteed. Similarly, the review of legal cases and legislative enactments relevant to ELs is limited in its predictive value, so while there is critical knowledge to be gained through this systematic review of cases decisions, legislative mandates, and policies, these data sources are only one aspect of the overall challenges facing ELs and do not reveal uncontroverted guidelines for educating ELs.

Another limitation of using quantitative methods in legal research is that the access to data is limited; oftentimes, because cases are settled outside of court and also variables that affect courts’ decisions are not published/recorded (Baldwin & Ferron, 2008).
2006). This particular data set only included cases that were published to be considered and considered to be official case law outcomes. For example, Faulkner-Bond and Forte (2011) report that OCR has reviewed approximately 7,000 civil rights complaints in fiscal year 2010—a 10% increase from 2009 and the largest one-year increase in the past decade. While these civil rights complaints have been filed with OCR, the official outcomes of these 7,000 complaints may take years to resolve and very few will likely result in formal litigation in the courts.

Additionally, while there is essential knowledge to be gained through a systematic review of case decisions, legislative mandates, and policies, these data sources are but one aspect of the overall challenges facing ELs and will not reveal uncontroverted guidelines for educating ELs. While every effort was made to access all relevant case law, the history of American jurisprudence is so voluminous, that even with the increasing capability of the available search tools, a complete review of all of the cases could not and cannot be guaranteed (Decker, 2010). Likewise, a historical review of the legal cases and legislative enactments relevant to ELs is limited in its predictive value.

**Concluding Thoughts**

The purpose of this study was to contribute to the effort to understand the laws pertaining to the educational rights of ELs through the systematic analysis of case law and an examination of litigation trends to ensure compliant educational practices and ensure college/career readiness of ELs. The following research question guided this investigation, what are the specific case law outcomes and trends of federal and state
litigation involving the educational rights of ELs, and ultimately revealed seven key litigation trends.

The threat of lawsuits of educational inequities are not new, with advocates bringing up threats to file suit against school districts about every two years (Doughman, 2013). The court decisions that grew and continue to grow out of these lawsuits have and led to legislative changes that have helped to shape the policy climate of today (Wright, 2010, p. 1). Rios-Aguilar and Gándara (2012), however, suggest that resolving educational policy through the courts may not be the most effective way to solve the educational inequities experienced by thousands of ELs. While ELs present unique challenges in education, in this global economy, meeting these unique challenges for ELs could ultimately be a strategic advantage for the United States (The Equity and Excellence Commission, 2013).

Even though I once qualified as an EL and was previously a teacher of ELs, this study provided deep insights. Despite an extensive background in this area, prior to data collection, I was not fully aware of the depth or breadth of the legal complexity both in the courts and in the DOJ’s open investigation files. This study highlighted numerous issues and exposed an urgent need to understand and ensure equitable, inclusive, high-quality educational opportunities and outcomes for all ELs. Furthermore, the complex tapestry of federal laws, regulations, and court ordered mandates, while challenging to navigate, guarantees an educational entitlement to ELs that educators and educational leaders are bound to protect.
APPENDICES
Appendix A
Likert-Scale Outcome Codes

This Likert-scale has been adapted from Lupini, W. H., & Zirkel, P. A. (2003). An outcomes analysis of education litigation. *Educational Policy, 17*(2), 257–279. All adjustments made to the original scale appear in bold.

<table>
<thead>
<tr>
<th>Outcome Code</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 – Parents of ELs/advocacy group(s) on behalf of ELs Complete Win</td>
<td>This category consists of summary judgments in favor of the parents of ELs/advocacy group(s) on behalf of ELs, including other conclusive wins on all major issues of the case in favor of the Parents of ELs/advocacy group(s) on behalf of ELs, including summary judgments.</td>
</tr>
<tr>
<td>2 – Decision largely, but not completely, for the parents of ELs/advocacy group(s) on behalf of ELs</td>
<td>This category represents conclusive decisions in the Parents of ELs/advocacy group(s) on behalf of ELs’ favor for the majority of the issues or the awarding of relief of more than 50% and less than 100% of what the parents of ELs/advocacy group(s) on behalf of ELs originally sought. Further, in review officer and court decisions where the published opinion does not specify the amount of relief sought by the parents of ELs/advocacy group(s) on behalf of ELs, the frame of reference was the amount of relief awarded by the preceding level.</td>
</tr>
<tr>
<td>3 – Inconclusive decision favoring the parents of ELs/advocacy group(s) on behalf of ELs</td>
<td>This category includes the granting of a preliminary injunction if the case was “remanded” and will return to the lower court for a trial. This category also includes the denial of a summary judgment motion sought by school authorities (because this preliminary ruling will result in a trial). It also includes cases in which the court denied the school authorities’ motion to dismiss and the case remains open (or could have been potentially settled outside of court).</td>
</tr>
<tr>
<td>4 – Split decision</td>
<td>This category includes the awarding of relief of approximately 50% of that originally sought by the parents/child(ren). Further, in situations where the original amount of relief sought is unknown, this category includes the awarding of relief approximating 50% of that originally awarded by a lower court to the parents/child(ren).</td>
</tr>
<tr>
<td>5 – Inconclusive win for the school authorities</td>
<td>This category includes the denial of a preliminary injunction or summary judgment sought by parents of ELs/advocacy group(s) on behalf of ELs. It includes cases dismissed for failure to exhaust administrative remedies and cases dismissed without prejudice.</td>
</tr>
<tr>
<td>6 – Decision largely, but not completely, for school authorities</td>
<td>This category includes the awarding of relief (e.g., compensatory education, tuition reimbursement) of clearly less than 50% of that originally sought by the parents of ELs/advocacy group(s) on behalf of ELs. Further, in situations where the original relief sought is not known, this category includes the awarding of relief approximating 50% of that originally awarded by a lower court to the parents of ELs/advocacy group(s) on behalf of ELs.</td>
</tr>
<tr>
<td>7 – Complete win for school authorities</td>
<td>This category includes granting of summary judgment in favor of school authorities (the school authorities have won decisively at this preliminary step, ending the proceedings against them).</td>
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### Appendix B

Case Law Claims/Issues & Codes & Case Law Outcomes & Codes

<table>
<thead>
<tr>
<th>#</th>
<th>CASES</th>
<th>CLAIM CODES</th>
<th>CLAIMS/ISSUES</th>
<th>CASELAW OUTCOMES</th>
<th>CASELAW OUTCOME CODES</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td><em>Lau v. Nichols</em> (1974)</td>
<td>UNEQ LOLP</td>
<td>Whether a school system was actually required to provide a language program to address the language “problems” ELs; unequal educational opportunities</td>
<td>EPC 14th Amendment, Violation of § 601 CRA,</td>
<td>DEQED VCRA CMPLYFUNDS ELINSTPLAN VEPC14</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>US Supreme Court determined that these students could not read or speak English proficiently &amp; therefore the District was denying their right to an equal education as required by § 601 Civil Rights Act of 1964</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td>Schools must comply with federal funds.</td>
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<tr>
<td>2</td>
<td><em>Serna v. Portales Municipal Schools</em> (1974)</td>
<td>UNEQ LOLP</td>
<td>A class of parents of Hispanic students brought an action against the local public schools alleging discrimination in education under Title VI of the Civil Rights Act, and Amendment 14</td>
<td>EPC 14th Amendment, Violation of § 601 CRA,</td>
<td>DEQED VCRA VEPC14 ELINSTPLAN FUNDS</td>
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<tr>
<td></td>
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<td>District was denying their right to an equal education as required by § 601 Civil Rights Act of 1964</td>
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<td></td>
<td>Create some type of plan to remedy</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Identify and utilize sources of funds to provide equality of educational opportunities for its Spanish-surnamed students</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>Appellants to compel appellees to provide bilingual-bicultural education</td>
<td>Providing Mexican-American and Indian ELs with remedial instruction in English, meaningful education was made available and equality of</td>
<td></td>
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</table>
educational opportunity required by Section 601 of the Civil Rights Act of 1964 was met. The court reemphasized that school districts were and are not required to implement bilingual-bicultural education programs staffed with bilingual instructors. Similarly, the court found that under the EEOA of 1974 that a bilingual-bicultural education was not required.

<table>
<thead>
<tr>
<th>4</th>
<th>Cintron v. Brentwood (1978)</th>
<th>CSEGR IDEN UNEQ</th>
<th>A class action against defendant school district, seeking injunctive and declaratory relief claiming violations of Title VI of the Civil Rights Act of 1964, the EEOA of 1974, and the &quot;Lau Guidelines,&quot; because Spanish speaking students were kept separate from English speaking students in music and art</th>
<th>Violation of § 601 CRA, EEOA</th>
<th>Modify current plan to meet Lau</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
<td>Rios v. Read (1978)</td>
<td>UNEQ</td>
<td>Alleging that their children were deprived an equal educational opportunity with monolingual, English-speaking students, in violation of the Fourteenth Amendment as well as Section 601 of the Civil Rights Act of 1964.</td>
<td>EPC 14th Amendment, § 601 CRA</td>
<td>Right to meaningful education before proficiency in English is obtained should not be compromised. An ESL and bilingual program was to be established &amp; school district was obliged of identifying children in need of bilingual education by objective, validated tests. The district was required to establish procedures for</td>
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<tr>
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<th>Case Name</th>
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<th>情況描述</th>
<th>相關條例/法規</th>
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<td>6</td>
<td>Idaho Migrant Council v. Board of Education (1981)</td>
<td>COMP UNEQ</td>
<td>Monitoring the progress of students in the bilingual program and was to exit them from the program only after validated tests indicated the appropriate level of English proficiency.</td>
<td>EPC 14th Amendment, Violation of § 601 CRA, EEOA of 1974, SEA AND LEA are responsible for supervision over EEOA, State Agency was empowered under state law &amp; required under federal law to ensure that needs of ELs was addressed</td>
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<td>7</td>
<td>Castañeda v. Pickard (1981)</td>
<td>DISCR CSEGR UNEQ LOBP</td>
<td>Segregated, using grouping system based on criteria that were both ethnically and racially discriminating. Failure to establish sufficient bilingual education programs, overcome language barriers that prevented equal participation in the classroom.</td>
<td>EPC 14th Amendment, Violation of § 601 CRA, EEOA, &quot;Three-prong&quot; test, the Castañeda principles, requires a program for ELs to meet EEOA requirements of 1974 and demonstrate its effectiveness, Determine appropriate actions by a school district to overcome language barriers include: 1) the district (or LEA) must pursue a program informed by an educational theory</td>
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2) the programs and practices must reflect educational theory; and 3) the success of the program’s purpose, which is to overcome language barriers, must be evaluated and effective

| 8 | **Plyler v. Doe (1982)** | WHFUN DS DENYEN R | Texas (TX) voted to withhold funds from local school districts for children who had not been legally admitted to the US and further authorized local school districts to deny enrollment in their public schools. Due Process of 5th and 14th Amendments EPC of 14th Amendment | Illegal aliens are, indeed, “persons” and, particularly, undocumented immigrant children are “people,” in any ordinary sense of the term, and therefore protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. A class-based denial of public education does not comply with the Equal Protection Clause of the Fourteenth Amendment. *Plyler* is the sole federal case regarding the constitutional right of undocumented children to receive a free public K-12 education, 

Undocumented children identified with disabilities are also protected under the Individuals with Disabilities Education Act (IDEA).

Similarly, The McKinney-Vento Act also provides for the education of homeless children, even if they are unable to prove residency. |

<p>| 9 | <strong>Keyes v. School</strong> | UNEQ | Denied equal access to equal | EPC 14th Amendment, 3PT VCRA |</p>
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<tr>
<th>District No.1 (1983)</th>
<th>participation/ equal educational opportunity</th>
<th>Violation of § 601 CRA, EEOA</th>
<th>DEQED VEEOA ELINSTPLAN</th>
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<td>Gomez v. Illinois State Board of Education (1987)</td>
<td>According to the complaint, the defendants' failure to provide local districts with proper guidelines for the identification and placement of ELs and failure to monitor and enforce the local districts' compliance with the law, violated the plaintiffs' rights</td>
<td>EEOA</td>
<td>VEEOA SEA.LEA.ELS ELIDEN DEQED</td>
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<td>Teresa P. v. Berkeley Unified School District (1989)</td>
<td>Alleging the denial of equal educational opportunity because of the school district's</td>
<td>Violation of § 601 CRA, EEOA</td>
<td>NVVEEOA</td>
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failure to take appropriate action to overcome their language barriers. Particularly, they asserted that the school district's testing and procedures for identifying and assessing them was inadequate, as was their instruction and teachers.

| 13 | *Flores v. Arizona* (*1992*) | CRVIO LOLP VEEOA ERLYEXIT | Violation of civil rights; state failed to provide an LEIP that included adequate language acquisition, academic instructional programs, and funding for at-risk, low-income, minority students

A violation of the EEOA (all schools required to provide ELs with a program of instruction designed to achieve ELP and succeed in core classes taught to all students.)

District allowed ELs to exit EL programs and enter mainstream classrooms when those students still lacked necessary English language and reading comprehension skills.

VEEOA 

AZ's EL programs in violation of the EEOA because the funding level as it related to ELs was “arbitrary and capricious.”

Existing programs did not serve to appropriately advance the standards

1) too many students in a classroom; 2) not enough classrooms; 3) not enough qualified teachers; 4) not enough teacher aids; 5) inadequate tutoring programs; and 6) insufficient resources for teaching; a result of inadequate funding. *The issue of funding not addressed – this case has continued for 17 years; the *Horne v. Flores* case, to follow, in 2009.* |

| 14 | *United States v. Yonkers Board of* | HSEGR DEQED (NAACP), filed a civil lawsuit against the city of | Defendants, had, in fact, segregated housing and schools throughout the city |

| 174 |
| **Education (1997)** | Yonkers, NY, the Yonkers School Board, and the Yonkers Community Development Agency claiming that the city had disproportionately segregated populations in Yonkers for the previous 30 years. The plaintiffs specifically alleged that the city government had restricted new subsidized housing projects to particular areas throughout the city already heavily populated by minorities; the first time racial segregation charges were brought against housing and school officials in the same lawsuit. Lack of services for ELs | Based on racial identity. State found liable for eliminating segregation and was mandated to fund a remedy. An Educational Improvement Plan (EIP) included a housing remedy order for State funding to implement the creation of housing opportunities in Yonkers. The City contended, however, that the State did not distribute an equitable share of the total cost of education in Yonkers to include the cost of the EIP, especially in comparison to five other school districts. Yonkers actually receives the lowest total per student aid—approximately 65% of the next lowest and 50% of the district with the highest total per student State aid. Gaps in achievement scores between minority and majority students were caused by conditions related to race as a statistically significant factor in accounting for such disparity in reading and math scores even after factoring out other possible causes. The court did not determine the EIP to be complete and imposes a continuous need to ensure that the YPS can offer a quality and equitable education for all children who choose to enroll to ensure that the 1986 Order to Desegregate the YPS is fulfilled. The next several years saw little agreement over progress. Early in 2002, an agreement was | ELINSTPLAN |
announced that would provide $300 million in state funding to the school district over a five-year period to be used to fund programs that boost academic achievement for all city students. A monitor was supposed to be assigned to ensure that the school district was living up to its promises, yet, as of March 2003 the district had been unsuccessful in filling the position.

| 15 | Abbott v. Burke (1998) | UNEQ FINANREL | The plaintiffs in this case were children attending public schools in school districts located in poor urban areas classified as special needs or “Abbott” districts in New Jersey (NJ). The plaintiffs filed a motion seeking relief, alleging that the Comprehensive Educational Improvement and Financing Act (CEIFA) of 1996 failed to assure them a thorough education. | Comprehensive Educational Improvement and Financing Act of 1996
NJ Supreme Court ordered “parity” funding; state aid to bring per-pupil revenues in the 31 Abbott districts up to the per-pupil expenditures in the state’s 110 successful, suburban districts.

The court held that the CEIFA was unconstitutional and was inadequate to meet the plaintiffs’ educational needs.

The plaintiffs were entitled to relief directed toward the improvement of educational opportunities available to them. The court required the following provisions: implementation of high quality pre-school programs, full-day kindergarten, class size limits of less than 25 in grades six and above, implementation of research-based whole school reform models, and | DEQED FINANREL ELINSTPLAN ROVERCRWD |
| 16 | Doe v. Los Angeles Unified School District (1999) | UNEQ PROP 227 | Bilingual education to teach students that were limited in English proficiency on grounds that their rights to an equal education under the EEOA | Violation of § 601 CRA, EEOA
Plaintiffs' motion for class certification to oppose an initiative that restricted the use of bilingual education was granted because plaintiffs met the requirements for class certification of numerosity, commonality, typicality, and adequacy of representation. | DEQED VCRA VEEOA ELINSTPLAN |
| 17 | McLaughlin v. State Board of Education (1999) | PROP227 UNED LOLP | For waivers from program requirements of the CEC the new statute included no reference to the existing waiver provision | Provisions of the CEC
The court of appeal stated that Proposition 227’s failure to expressly amend the CEC, which permits the State BOE to waive any Code requirement was simply the ‘product of neglect.’ | NVWAIV |
| 18 | Valeria v. Davis (2002) | LOBP VEPC | Proposition 227 was approved in 1998 by a margin of 61 to 39 which dismantled CA’s EPC 14th Amendment,
Given Proposition’s 227 neutrality and lack of evidence that it was | NOVBEEOA |
public school bilingual education programs; intended to teach ELs their native language or L1. Consequently, Proposition 227 replaced bilingual education with SEI, not intended to exceed one year, to then transfer ELs into mainstream classrooms; once proficient in English. Valeria v. Davis was filed the day after Proposition 227 passed arguing whether the elimination of bilingual education in CA’s public schools by Proposition 227 violates the Equal Protection Clause of the Fourteenth Amendment.

motivated by racial considerations, Proposition 227’s political authority over bilingual education does not offend the Equal Protection Clause and therefore the judgment of the district court held that Proposition 227’s political restructuring is not inconsistent with the Equal Protection Clause.

19 **Hancock v. Driscoll (2004)**

| UNEQ FINANR EL | Whether all the public school students in the districts were receiving the level of education that the Commonwealth is required to provide, particularly with the capabilities set out in *McDuffy*. Three major recommendations concerning remedial relief include: a) determine the actual cost of the providing to all children the opportunity to
| DEQED ELINSTPLAN FUNDS | Schools attended by plaintiff children are not currently implementing the MA curriculum frameworks for all students, and are not currently equipping all students with the *McDuffy* capabilities. Further, the inadequacies of the educational programs in these schools are "many and deep," and "even more profound" for those students at greatest risk of failure, "children with learning disabilities, children with LEP, racial and ethnic minority children, and those from low-income homes."
acquire the capabilities outlined in *McDuffy* or the seven curriculum frameworks for all children; b) determine the cost associated with enacting measures to improve the educational leadership capabilities of the focus districts; and c) implement these administrative and funding changes in a timely fashion.

The mere reason the Hancock v. Driscoll case was necessary to file in the first place, being 10 years after the *McDuffy* decision, is that the Commonwealth is still not meeting its constitutional obligation to provide the required education to all students, particularly students at risk for school failure.

Judge Botsford found that the ability to address these issues is limited by both inadequate funds and the DOE’s inadequate capacity to provide assistance to school districts.

| 20 | Daniel v. Board of Education for Illinois (2005) | Minority students and ELs, in the Illinois (IL) School District filed a four-count class action lawsuit against the Board of Education alleging that ELs and minority students suffered from the District’s failure to take “appropriate action” to eliminate EPC 14th Amendment, Violation of § 601 CRA, EEOA | Numerous deficiencies in EL services, including deficiencies in staff training, disseminating information to staff and parents, and properly assessing students’ need for language services (iden). Therefore, |

|          | LOLP | DEQED | EPC | EEOA | EPC 14th Amendment, Violation of § 601 CRA, EEOA |
| 20       | Daniel v. Board of Education for Illinois (2005) | Minority students and ELs, in the Illinois (IL) School District filed a four-count class action lawsuit against the Board of Education alleging that ELs and minority students suffered from the District’s failure to take “appropriate action” to eliminate EPC 14th Amendment, Violation of § 601 CRA, EEOA | Numerous deficiencies in EL services, including deficiencies in staff training, disseminating information to staff and parents, and properly assessing students’ need for language services (iden). Therefore, |

<p>|          | TEACHERQ | ELIDEN | AA | VEEOA | DEQED | DISCR |</p>
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| Redistricting Plan increases the likelihood that one or more of the District schools on the warning lists will continue not to make AYP under NCLB, while with the new Plans, 50% of ELs are transported out of their neighborhood schools. For example, one family of Hispanic siblings all receive EL services and are currently split between three schools, none of which are in the family’s neighborhood. ELs are also allegedly segregated from regular education students for all instruction rather than...
| plaintiffs clearly allege that they were injured by being impeded in their equal participation in educational opportunities by defendant’s failure to take appropriate action to overcome language barriers. Accordingly, the plaintiffs stated a claim under The EEOA and under the Illinois Civil Rights Act (ICRA), no unit of State shall utilize criteria “or methods of administration that have the effect of subjecting individuals to discrimination because of their race, color, or national origin. All of the defendant’s motions to dismiss were denied.
| language barriers for ELs and that minority students endured discriminatory burdens and diminished educational benefits not suffered in the same proportion by White students; both in violation of the EEOA of 1974 and the Equal Protection Clause of the Fourteenth Amendment. |
than for specific educational subjects only and are denied proper access to special education.

| 21 | **Connecticut v. Spellings (2008)** | ASSMT | CT’s proposed plan sought to assess special education students at instructional, rather than grade level, and to exempt recently arrived ELs for three years from reading, math, and, science. Spellings denied the proposed plan because they did “not comply with the statute and regulations.” The State asserts that the court should have set aside the Secretary’s denials because the Secretary failed to provide the State with a hearing which is violating the APA, however, that request was not made and when it was, was not taken. The court also acknowledged the argument that testing students who are newly arrived in English, when they are not at all proficient in English, may not be a particularly sensible way to determine their academic achievement or knowledge and | Administrative Procedure Act (APA)  
Unfunded Mandates Provision  
The Secretary argues that the State’s proposed plan amendment would eliminate Congress’ requirement of annual grade-level testing of all students. Spellings did state that accommodations could include testing in the students’ L1 for the first three years until they achieve ELP. The Secretary’s interpretation of the provision was deemed correct and therefore the State’s motion was denied. | NVACCOM L1 |
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<td>United States v. Texas (2008)</td>
<td>VEEOA</td>
<td>No child would be denied equal educational opportunities based on race, skin color or national origin. School districts were likely under-identifying ELs, parents were misinformed of advantages of bilingual/ESL programs or were subject to coercion. The accountability rating system in TX also did not disaggregate student performance for ELs nor were schools or districts accountable for failure to comply with standards governing EL education. Additionally, the EL student dropout rate is greater than the ‘All Students’ category statewide, as is the retention rate. Recognizing the stagnation of ELs in comparison to</td>
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<td>EEOA</td>
<td>This system revealed that school districts were likely under-identifying ELs, while a large number of parent denials appeared, that at least in some schools, parents may not have been well-informed of the advantages of bilingual/ESL programs or were subject to coercion. The accountability rating system in TX also did not disaggregate student performance for ELs nor were schools or districts accountable for failure to comply with standards governing EL education. Additionally, the EL student dropout rate is greater than the ‘All Students’ category statewide, as is the retention rate. Recognizing the stagnation of ELs in comparison to</td>
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<td><strong>Coachella Valley Unified School District v. State of California (2009)</strong></td>
<td>The school districts claimed that because CA tested ELs in English, that the tests were not valid and reliable. The School Districts then further asked to: (1) withhold or withdraw test results of ELs for NCLB accountability purposes; (2) cease administering the State’s current tests in English for ELs enrolled in public schools for less than three consecutive school years; (3) for testing purposes, to develop and administer tests in Spanish to ELs who are literate in Spanish or instructed in Spanish and English (and for other languages); and (4) modify assessments to account for linguistic complexity.</td>
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<td><strong>ASSMT</strong></td>
<td>NCLB does not direct a specific manner or course of conduct as to how to test ELs; instead it specifies that the results must ensure valid and reliable assessments aligned with the state’s content standards consistent with professional testing standards. The court also referred to the Proposition 227 mandate that given the range of languages it was not feasible for the State to decide that translating assessments was not practicable and therefore assessments would be in English, the ‘official’ language of our educational system. Further clarification was made regarding that a valid test, in essence, is one that measures what it is supposed to measure, whereas a reliable test is one that produces consistent test scores over time. In fact, the states, as designated by the US DOE, have a lot of flexibility in determining how to best test ELs and which accommodations to use. The court, nevertheless, stated that the School</td>
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| 2007 | Horne v. VEOA | VEEOA | The state was violating the VEOA.

District’s position imposes on the separation of powers. Additionally, the expert panel that advised the State Board on testing policies concluded that more than 90 percent of ELs are taught in English and therefore testing in primary languages would not improve the accuracy of state test results. The State Board did not opt for primary language testing for statewide NCLB accountability purposes and the Secretary cannot order a state to use a specific assessment or mode of instruction and reiterates that the purpose to measure an ELs’ academic content standards in English is not incompatible with NCLB.
In Horne, originally filed in 1992 by a fourth-grade student, Miriam Flores, joined by a group of ELs and ELs’ parents, alleged that there was no showing of adequate funding being provided to the EL program in AZ (Flores v. Arizona, 1992).

The suit, filed against the defendant Thomas Horne, the AZ Superintendent of Public Instruction, specifically claimed underfunding by the NASD, claiming that ELs were not provided adequately prepared teachers, instructional materials or a program which is supported by funds as required by the EEOA.

The Horne case prolonged for almost a decade and a half with AZ refusing to answer the federal court’s demand that the state provide a level of funding for services for ELs.

In August of 2010, the DOJ found that AZ’s mechanisms for identifying ELs in need of language services and the instruments it used to assess student’s ELP in violation of Title VI of the Civil Rights Act of 1964.

The litigation on Horne v. Flores requires the federal district court to determine if AZ is violating the EEOA on a statewide basis. The court will fully evaluate the state-mandated SEI program under Castañeda’s three prong test, which will most likely be held as a violation of the EEOA.

2013 March 29th, sided with defendants and made a final decision to vacate its earlier judgment.

Horne supports the idea of sequential instruction for ELs, first learn English, then have access to the mainstream/core curriculum; WIDENS gaps

Rios-Aguilar and Gándara (2012), resolving educational policy through
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<th>Case Title</th>
<th>Act/Rule</th>
<th>Summary</th>
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<td>25</td>
<td><em>Alejo et al., v. Tom Torlakson</em> (2013)</td>
<td>EEOA</td>
<td>DOE cancel the suspension of onsite reviews of school districts’ compliance with state and federal standards in programs benefiting educationally disadvantaged students. Superintendent did not abuse his discretion when he suspended onsite monitoring of the programs.</td>
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The courts may not be the most effective way to solve the educational inequities experienced by thousands of ELs.
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# Appendix D

## Final Case Data Set: Simple Box Scoring Spreadsheet

<table>
<thead>
<tr>
<th>#</th>
<th>Case Name</th>
<th>Citation</th>
<th>Date Decided</th>
<th>State</th>
<th>Claim(s)</th>
<th>Relief</th>
<th>Remedy Awarded</th>
<th>Findings &amp; Clarifying Comments</th>
<th>O.Codes</th>
<th>P.P.</th>
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<tbody>
<tr>
<td>1</td>
<td><em>Lau v. Nichols</em></td>
<td>414 US 563</td>
<td>January 21, 1974</td>
<td>CA</td>
<td>§ 601 CRA</td>
<td>equitable educational opportunities</td>
<td>District was denying ELs a right to an equal education as entitled by § 601 CRA</td>
<td>Schools must comply with federal funding provisions of the California Education Code (CEC)</td>
<td>DEQED, COMPLYFNDS, ELINSTPLAN, VEPC 14</td>
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<td>EPC 14th Amendment, the CA Constitution</td>
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<td>lack of guidance has led to current policy debates determining appropriate programs for non-English speaking students</td>
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<td>District was denying ELs a right to an equal education as entitled by § 601 CRA</td>
<td>VCRA, VEPC 14</td>
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<td>2</td>
<td><em>Serna v. Portales</em></td>
<td>499 F.2d 114</td>
<td>July 17, 1974</td>
<td>NM</td>
<td>§ 601 CRA</td>
<td>declaratory and injunctive relief</td>
<td>District was denying ELs a right to an equal education as entitled by § 601 CRA</td>
<td>The Portales School District was ordered to create some type of plan to remedy the situation where no bilingual programs existed</td>
<td>DEQED, VCRA, VEPC 14, ELINSTPLAN</td>
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<td></td>
<td>EPC 14th Amendment</td>
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<td>An investigation was directed to identify and utilize sources of funds to provide equality of educational opportunities for its Spanish-surnamed students. Additionally, the court held that the District Court’s action was proper given the tradition of the public schools’ discrimination and mere token plans created as superficial remedies</td>
<td>FUNDSP</td>
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<tr>
<td>#</td>
<td>Case Name</td>
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<td>Date Decided</td>
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<td>Claim(s)</td>
<td>Relief</td>
<td>Remedy Awarded</td>
<td>Findings &amp; Clarifying Comments</td>
<td>O.Codes</td>
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<td>3</td>
<td>Guadalupe Organization, Inc. v. Tempe Elementary School District</td>
<td>587 F.2d 1022</td>
<td>December 18, 1978</td>
<td>AZ</td>
<td>601 CRA</td>
<td>program of instruction that &quot;has as its goal having a child graduate at each grade level from K to fourth year in high school competent and functional in reading, writing, and comprehension both in the child's own language, Spanish, and the language of the majority culture, English.</td>
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<td>providing Mexican-American and Indian ELs with remedial instruction in English, meaningful education was made available and equality of educational opportunity required by Section 601 of the Civil Rights Act of 1964 was met</td>
<td>EEOA of 1974, EPC 14th Amendment</td>
<td>NVBEEOA</td>
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<td>4</td>
<td>Cintron v. Brentwood Union Free School District</td>
<td>455 F. Supp. 57</td>
<td>January 10, 1978</td>
<td>NY</td>
<td>§ 601 CRA</td>
<td>declaratory and injunctive relief</td>
<td>declaratory and injunctive relief</td>
<td>The court ordered the district to modify its current program in accord with the court's opinion. It directed the district to submit proposed plan that complied with the Lau Guidelines.</td>
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<td>VCRA, VLAI, ELINSTPLAN, VIOL, SEG</td>
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<td><em>Rios v. Read</em></td>
<td>1978</td>
<td>October 13, 1978</td>
<td>NY</td>
<td>§ 601 CRA</td>
<td>Violation of the student’s right to an equal educational opportunity as protected by § 601 of the Civil Rights Acts of 1964, in addition to the EEOA of 1974, and the Bilingual Education Act of 1974. Right to meaningful education before proficiency in English is obtained should not be compromised. An ESL and bilingual instruction plan should be validated and monitored.</td>
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<td><em>Castañeda v.</em></td>
<td>June 23, 1981</td>
<td>TX</td>
<td>601 CRA</td>
<td>EPC 14th Amendment, EEOA of 1974</td>
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<td>“Three-prong” test, the <em>Castañeda</em> principles, requires a program for ELs to meet EEOA requirements of 1974 and demonstrate its effectiveness</td>
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<td>determine appropriate actions by a school district to overcome language barriers include:</td>
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<td>1) the district (or LEA) must pursue a program informed by an educational theory;</td>
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<td>2) the programs and practices must reflect educational theory; and 3) the success of the program’s purpose, which is to overcome language barriers, must be evaluated and effective</td>
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<th><em>Plyler v. Doe</em></th>
<th>June 15, 1982</th>
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<td>A class-based denial of public education does not comply with the Equal Protection Clause of the Fourteenth Amendment.</td>
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Keyes v. School District No.1

576 F. Supp. 1503

December 30, 1983

CO § 601 CRA

Ordered for changes in the program’s design

Judgment was entered finding that the district failed to comply with the statutory mandate to overcome language barriers that impeded ELs’ equal participation

The evidence showed that the district’s program was based on sound educational theory, but had failed to satisfy the second element of the three-part test, a lack of implementation of an adequate delivery system.


188 Cal. App. 3d 1034

January 20, 1987

CA Provisions of the CEC

Preliminary injunction to restrain defendants on added amendment to reclassify ELs to mainstream

The court held that the use of a language appraisal team, irrespective of standardized test results, was not inconsistent with the requirement in the CEC that the reclassification process included some type of objective comparison of an ELs basic skills with those of their English-proficient peers.

Gomez v. Illinois State Board of Education

811 F.2d 1030

January 30, 1987

IL § 601 CRA

declaratory and injunctive relief

declaratory and injunctive relief

The Seventh Circuit Court of Appeals found that state education agencies as well as local education agencies are required, under the Equal Educational Opportunities Act (1974), to ensure that the needs of limited-English-proficient children are met.
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<th>Case</th>
<th>Plaintiff(s)</th>
<th>Citation</th>
<th>Date</th>
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<th>District</th>
<th>Issue</th>
<th>Decision</th>
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<td>12</td>
<td>Teresa P. v. Berkeley Unified School District</td>
<td>724 F. Supp. 698</td>
<td>September 8, 1989</td>
<td>CA</td>
<td>601 CRA EEOA of 1974 funds</td>
<td>An injunction ordering the BUSD to design and implement a comprehensive plan to ensure plaintiffs’ equal educational opportunity and effective participation in the learning process.</td>
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<td>plaintiffs had failed to meet their burden to show that the actual programs and practices were not reasonably calculated to effectively implement the educational theories upon which an overall program was premised. Thus, the court found that the school district had not violated the EEOA by a failed implementation. Further, the court held that because plaintiffs failed to offer any evidence of racially discriminatory effect, they did not sustain their burden of proof under Title VI.</td>
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<td>13</td>
<td>Flores v. Arizona</td>
<td>48 F. Supp. 2d 937</td>
<td>Filed in 1992</td>
<td>AZ</td>
<td>EEOA of 1974 declaratory relief</td>
<td>failed to provide an LEIP</td>
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<td>exit EL programs and enter mainstream classrooms when those students still lacked necessary English language and reading comprehension skills.</td>
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<td>The ruling stated that there were: 1) too many students in a classroom; 2) not enough classrooms; 3) not enough qualified teachers; 4) not enough teacher aids; 5) inadequate tutoring programs; and 6) insufficient funding not addressed.</td>
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<td>United States v. Yonkers Board of Education</td>
<td>984 F. Supp.</td>
<td>October 8, 1997</td>
<td>NY</td>
<td>SEGREGATION unfunds no EL services</td>
<td>SEGREGATION - housing and schools</td>
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<td>unfunds no EL services</td>
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<td>15</td>
<td>Abbott v. Burke</td>
<td>1998</td>
<td>January 22, 1998</td>
<td>The Plaintiffs were entitled to relief directed toward the improvement of educational opportunities available to them. The Court held that the CEIFA was unconstitutional and was inadequate to meet the Plaintiffs' educational needs.</td>
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<tr>
<td>16</td>
<td>Doe v. Los Angeles Unified School District</td>
<td>1999</td>
<td>April 21, 1999</td>
<td>The Court held that the CEIFA was unconstitutional and was inadequate to meet the Plaintiffs' educational needs.</td>
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**Abbott v. Burke (1998)**

- **CEIFA**
- **Judicial relief**
- **Parity funding**

The Plaintiffs were entitled to relief directed toward the improvement of educational opportunities available to them. The Court required the following provisions: implementation of high quality pre-school programs, full-day kindergarten, class size limits of less than 25 in grades six and above, implementation of research-based whole school reform models, and the creation of a technology-rich educational environment. Enhanced services for special education and bilingual students were also included.

The Court held that the CEIFA was unconstitutional and was inadequate to meet the Plaintiffs' educational needs.


- **Inadequate teacher training, an ill-prepared curriculum, and inadequate transition and waiver criteria.**
- **Plaintiffs' motion for class certification to oppose an initiative that restricted the use of bilingual education was granted because plaintiffs met the requirements for class certification of numerosity, commonality, typicality, and adequacy of representation.**

**VEEOA**

**VCRA**

**FEQED**

**FINANREL**

**ROVERCRWD**

**ELINSTPLAN**

**DEQED**

**1**
<table>
<thead>
<tr>
<th></th>
<th>Case Name</th>
<th>Citation</th>
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<th>Court</th>
<th>Type</th>
<th>Provisions of the CEC</th>
<th>Remarks</th>
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<tr>
<td>17</td>
<td>McLaughlin v. State</td>
<td>75 Cal. App. 4th 196</td>
<td>September 27, 1999</td>
<td>CA CEC</td>
<td>declaratory and injunctive relief</td>
<td>The Court of Appeal stated that Proposition 227’s failure to expressly amend the CEC, which permits the State BOE to waive any Code requirement was simply the “product of NO VIOLATION</td>
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<tr>
<td>18</td>
<td>Valeria v. Davis</td>
<td>307 F.3d 101</td>
<td>March 14, 2002</td>
<td>CA EPC 14th Amendment</td>
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<td>offend the Equal Protection Clause and therefore the judgment of the district court held that Proposition 227’s political restructuring is not inconsistent with the Equal Protection Clause. NO VIOLATION</td>
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<td>19</td>
<td>Hancock v. Driscoll</td>
<td>2004 Mass. Super. LEXIS 118</td>
<td>April 26, 2004</td>
<td>MA</td>
<td>adequate funds</td>
<td>students, and are not currently equipping all students with the McDuffy capabilities. Further, the inadequacies of the educational programs in these schools are &quot;many and deep,&quot; and &quot;even more profound&quot; for those students at greatest risk of failure, &quot;children with learning disabilities, children with LEP, racial and ethnic minority children, and those from low-income homes.&quot; DEQED</td>
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<td>Judge Botsford found that the ability to address these issues is limited by both inadequate funds and the DOE’s inadequate capacity to provide assistance to school districts. ELINSPLAN FUNDS</td>
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<tr>
<td></td>
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<td>20</td>
<td>Daniel v. Board of Education for Illinois</td>
<td>379 F. Supp. 2d 952</td>
<td>July 25, 2005</td>
<td>IL IL CRA</td>
<td>failed to state a claim for relief?</td>
<td>Numerous deficiencies in EL services, including deficiencies in staff training, disseminating information to staff and parents, and properly assessing students’ need for language services (iden). Therefore, Plaintiffs clearly allege that they were injured by being impeded in their equal participation in educational opportunities by defendant’s failure to take appropriate action to overcome language barriers. Accordingly, the Plaintiffs stated a claim under The EEOA and under the Illinois Civil Rights Act (ICRA), no unit of State shall utilize criteria “or methods of...</td>
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<td>EPC 14th Amendment, EEOA of 1974</td>
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<td>21</td>
<td>Connecticut v. Spellings</td>
<td>549 F. Supp. 2d 161</td>
<td>April 28, 2008</td>
<td>CT APA violation</td>
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<td>The Court also acknowledged the argument that testing students who are newly arrived in English, when they are not at all proficient in English, may not be a particularly sensible way to determine their academic achievement or knowledge and similarly, testing special education students at grade level. However, both of these issues were not considered the issues before the Court during this case and although heard, were not considered. The only question considered was whether the Secretary’s denial of the State’s request that they were contrary to statute was arbitrary; the Court denied the State’s motion for judgment. The Secretary argues that the...</td>
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<td>NO VIOLATION/ACCOM L1</td>
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<td>22</td>
<td>United States v. Texas</td>
<td>572 F. Supp. 2d 726</td>
<td>July 24, 2008</td>
<td>TX EEOA of 1974</td>
<td></td>
<td>This system revealed that school districts were likely under-identifying ELs, while a large number of parent denials appeared, that at least in some schools, parents may not have been well-informed of the advantages of bilingual/ESL programs or were subject to coercion. The accountability rating system in TX also did not disaggregate student performance.</td>
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<td>ELIDEN</td>
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<td>Case Title</td>
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<td>Coachella Valley Unified School District v. State of California</td>
<td>CA NCLB</td>
<td>July 30, 2009</td>
<td>The Court, nevertheless, stated that the School District’s position imposes on the separation of powers. Additionally, the expert panel that advised the State Board on testing policies concluded that more than 90 percent of ELs are taught in English and therefore testing in primary languages would not improve the accuracy of state test results. The State Board did not opt for primary language testing for statewide NCLB accountability.</td>
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<td>Horne v. Flores</td>
<td>AZ EEOA of 1974</td>
<td>June 25, 2009</td>
<td>The state was violating the EEOA because the amount of funding reserved for ELs was arbitrary and not related to the actual funding needed to cover the costs of EL instruction. In August of 2010, the DOJ found that AZ’s mechanisms for identifying ELs in need of language services and the instruments it used to assess student’s ELP in violation of Title VI of the Civil Rights Act of 1964. The litigation on Horne v. Flores requires the federal district court to determine if AZ is violating the EEOA on a statewide basis. The court will fully evaluate the state-mandated SEI program under Castañeda’s three prong test, which will most likely be held as a violation of the EEOA. 2013 March 29th, sided with defendants and made a final decision to vacate its earlier judgment.</td>
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<tr>
<td>Alejo et al. v. Tom</td>
<td>CA EEOA of 1974</td>
<td>January 9, 2013</td>
<td>Superintendent did not abuse his discretion when he suspended onsite monitoring of the programs.</td>
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1. EEOA
2. NCLB
3. CA
4. AZ
5. NVNCLB
6. FUNDS
7. ELIDEN
8. ASSMT
9. DEQED
10. 3PT
11. NVASSMENT0S
REFERENCES


Federal Register, 76 (75), 21978–21984. April 19, 2011.


Lau v. Nichols, 483 F. 2d 791 (9th Cir. 1973).


Serna v. Portales Municipal Schools, 499 F.2d 1147 (1974)


CURRICULUM VITAE

Delia Elizabeth Racines graduated from Mount Vernon High School in Alexandria, Virginia (VA). She earned her Bachelor of Science in Sociology with a concentration in Crime and Deviance from Virginia Tech, her Master of Science in Criminal Justice from Radford University, and her Master of Education in Curriculum and Instruction with a concentration in Multilingual Multicultural Education from George Mason University. Delia taught middle school English Learners (ELs) as an English for Speakers of Other Languages and Spanish for Fluent Speakers teacher in Fairfax County Public Schools in VA for seven years where she also served as a Cluster-based Instructional Coach.

Delia’s research interests include teacher education, particularly for teachers of ELs, civil rights, curriculum design, and promoting various avenues to increase attendance of all ELs in higher education settings. Delia is currently a Faculty member at the University of Southern California’s Language Academy in Los Angeles, California.