

Summer 3-1-2013

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### Recommended Citation

Scott Ellis Ferrin, *A Survey of Recent Employment Disputes of Educators Engaged in Serving English Language Learners*, 2013 BYU Educ. & L.J. 205 (2013).

Available at: <https://digitalcommons.law.byu.edu/elj/vol2013/iss2/2>

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# A SURVEY OF RECENT EMPLOYMENT DISPUTES OF EDUCATORS ENGAGED IN SERVING ENGLISH LANGUAGE LEARNERS

*Scott Ellis Ferrin, J.D., Ed.D.\**

## I. INTRODUCTION

English Language Learners (ELLs), especially Hispanic ELLs, may face legal challenges and political headwinds in the American educational, legal, and political systems. The public school employees who serve ELLs also face various legal challenges. Accordingly, this Article discusses these issues while also highlighting the possibility that conflicts over methodologies and resources for are occurring at the expense of employment conflicts and instability for many ELL educators.

This Article focuses in particular on Hispanic ELLs and the educators who serve them for several reasons: first and foremost, they make up the largest number by far of ELLs within American schools;<sup>1</sup> second, they have had an active history of seeking legal redress for discrimination and other challenges in cases impacting schools;<sup>2</sup> and third, such students and educators often unwittingly act as lightning rods for larger debates regarding language of instruction, immigration policy, and the purposes of public education. Additional issues that are of great concern include the rights of ELLs and the burdens and duties imposed on school districts, many of which are dealing with a large and growing number of Hispanic ELLs.<sup>3</sup> These issues often cause school district officials to come into conflict with budgetary constraints, public opinion, mythology and theory regarding language acquisition, and the

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<sup>1</sup> Nat'l Educ. Ass'n, *Hispanics: Education Issues* (2012), <http://www.nea.org/home/HispanicsEducation%20Issues.htm>.

<sup>2</sup> See, e.g., *Castaneda v. Pickard*, 781 F. 2d 456 (5th Cir. 1986).

<sup>3</sup> RICHARD FRY & MARK HUGO LOPEZ, PEW RESEARCH HISPANIC CTR., *HISPANIC STUDENT ENROLLMENTS REACH NEW HEIGHTS IN 2011* (Aug. 20, 2012), available at <http://www.pewhispanic.org/2012/08/20/hispanic-student-enrollments-reach-new-highs-in-2011/>.

duties imposed by state and federal laws governing adequate or appropriate implementation of programs that meet the needs of ELLs. In addition, some states have developed statutes that directly impact the educational program and attainment of ELLs, going so far as to completely outlaw certain methodologies described as bilingual.<sup>4</sup>

This Article begins in Part II by reviewing some of the sources of conflict over providing services to ELLs. These sources of conflict are rooted in efforts to close the achievement gap between Hispanic ELLs and whites, for whom English is typically their first language. Part III then reviews the basic rights of ELLs as pronounced in classic case law and statutory declarations. This and the following sections also highlight earlier case-law precedent that has not yet been fully utilized to instigate effective programmatic assessment and change for the success of ELL students. Parts IV and V cite recent employment cases involving educators, teachers, and administrators who have experienced conflicts with their employers' administrative efforts to economize while providing services for ELLs or because they advocated for full adherence to law and policy in serving the needs of ELLs. Next, Part VI describes the ongoing challenges regarding teachers and programs dedicated to serving ELL students, with Part VII discussing Massachusetts' situation specifically. Finally, Part VIII concludes with a caveat that those who are paying the price for our current lack of unanimity on how to best serve ELLs may be the educators charged with their education.

## II. EDUCATIONAL ATTAINMENT OF ELLS: DATA, CONFLICT, AND STATUTES

The importance of attending to the trends and recent legal issues raised in employment challenges or termination actions involving the educators who predominantly serve ELLs is rooted in the nation's need to educate all children, including ELLs, well. It is possible that the magnitude of the contention between employees and some educational leaders over modes of instruction and provision of adequate service to ELLs is

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<sup>4</sup> See CAL. EDUC. CODE §§ 300-34.0 (West 2012); ARIZ. REV. STAT. ANN. §§ 15-751-755 (2012); MASS. GEN. LAWS ch. 71A, §§ 1-8 (West 2012).

somewhat hidden by the fact that many of these issues are determined in unpublished opinions that are never fully appealed in a court of record. The rhetoric of the debate in states that have outlawed bilingual education as a mode of instruction has been based on a number of factors, but is ostensibly grounded in the achievement gap between whites and Hispanics. A focus on the needs of Hispanic learners seems evident in the rationale for the No Child Left Behind Act (NCLB).<sup>5</sup> NCLB requires that the data of ELLs and other learner groups be disaggregated and assessed by subgroup in order to demonstrate what the statute calls “adequate yearly progress.”<sup>6</sup> This provision remains an active area of litigation and unrest, in part because recent research shows that Hispanics in general and ELLs in particular are still not reaching levels of educational attainment comparable to other groups of American students.<sup>7</sup> Another problem is the perceived need to address such a gap by outlawing the single instructional methodology of bilingual education.

Unfortunately, the states that have specifically outlawed bilingual methodology have not experienced a significant rise in educational attainment of Hispanic ELLs, but rather a drop. For example, the Pew Hispanic Center analyzed the National Educational Assessment of Proficiency’s (NAEP) data in 2007, well after states had outlawed bilingual education by statute by providing gap scores, which are derived by subtracting the percent of Hispanics who achieved the basic achievement level in a subject domain from the percentage of white students at or above the basic achievement level. California, with the largest number of Hispanic ELLs and the first statute outlawing bilingual education, exhibited a gap between ELLs’ and white students’ basic math achievement of 37 in grade four and 48 in grade eight. In reading, the gap was 47 in grade four and rose to 52 in grade eight. Arizona’s gap for math was 46 and 51 in grades four and eight, respectively, and 51 and 54 in reading. Massachusetts’ gap for math was 27 in grade four and

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<sup>5</sup> 20 U.S.C. §§ 6301-7941 (2000 & 2002 Supp.).

<sup>6</sup> *Id.*

<sup>7</sup> F. CADELLE HEMPHILL ET AL., NAT’L CTR. FOR EDUC. STATISTICS, ACHIEVEMENT GAPS: HOW HISPANIC AND WHITE STUDENTS IN PUBLIC SCHOOLS PERFORM IN MATH AND READING ON THE NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS (June 2011), *available at* <http://nces.ed.gov/nationsreportcard/pubs/studies/2011459.asp>.

59 in grade eight. For math, it was 46 and 62 in grades four and eight, respectively. Massachusetts' numbers are somewhat troubling, considering that students who have experienced more time in the school system since the state's 2002 outlawing of bilingual education seem to be exhibiting a larger gap, not a closing of the basic achievement gap.<sup>8</sup>

While it is clear that not all ELLs are the same or Hispanic and certainly not all Hispanics are ELLs, most ELLs *are* Hispanic. In general, Hispanics as a group are found to lag behind other students in attainment, achievement, and educational outcomes.<sup>9</sup> Data compiled by the U.S. Census Bureau in 2011 illustrates this point. Respondents were asked the question, "What is the highest level of education you have achieved?" Although about 31% of both Hispanics and whites said that high school was their highest level of educational attainment, differences in degree attainment become more pronounced at higher education levels. More than twice as many whites obtain college degrees as Hispanics.<sup>10</sup> Only about 9% (2.8 million) of Hispanics reported their highest educational attainment as a bachelor's degree, compared to about 19% (35 million) of whites. About 2% (780,000) of Hispanics reported their highest degree as a master's degree, compared to about 7% (13 million) of whites. Less than 0.5% (147,000) of Hispanics reported that their highest degree was a professional degree such as a J.D. or M.D., while 1.3% (2.5 million) of whites reported such degrees. Similarly, about 0.5% (174,000) of Hispanics earned a doctoral degree, compared to 1.3% (2.5 million) of whites earning doctoral degrees. Although the census survey and its methodology meet with some challenges, including, for example, age cohorts that may still complete college, as a large database it shows there is still a marked gap between Hispanics and whites in educational attainment as measured by participation in higher education. Litigation has

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<sup>8</sup> Richard Fry, Pew Hispanic Ctr., *How Far Behind in Math and Reading Are English Language Learners?* Table A-1 (June 6, 2007), available at <http://www.pewhispanic.org/2007/06/06/appendix-tables-and-figures/> (figures are based on the author's examination of the data tables and his own calculations).

<sup>9</sup> U.S. Census Bureau, *Table 1, Educational Attainment of the Population 18 Years and Over, by Age, Sex, Race, and Hispanic Origin*, EDUCATIONAL ATTAINMENT IN THE UNITED STATES (2011), available at <http://www.census.gov/hhes/socdemo/education/data/cps/2011/tables.html>.

<sup>10</sup> *Id.*

resulted in part because of these differences and gaps in achievement. The types of recent legal issues based on these differences and gaps are varied and will be discussed below.

### III. SOURCES OF ELLS' RIGHTS

ELLs have powerful rights under *Lau v. Nichols*,<sup>11</sup> in which the U.S. Supreme Court declared that some type of intervention or program is required to remove language barriers that might impede ELLs' participation in any federally funded program, including public schools. The *Lau* court also cited with approval guidelines from the U.S. Department of Health, Education, and Welfare:

Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students. Any ability grouping or tracking system employed by the school system to deal with the special language skill needs of national origin-minority group children must be designed to meet such language skill needs as soon as possible.<sup>12</sup>

Following the decision in *Lau*, the Equal Educational Opportunity Act (EEOA)<sup>13</sup> was passed to codify the rights of ELLs as established in *Lau*. It states in part that “[n]o state shall deny educational opportunity to an individual on account of his or her race, color, sex or national origin, by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.”<sup>14</sup>

Congress did not clarify the types of actions that might constitute “appropriate action to overcome language barriers” but some clarification is provided by the court’s subsequent reasoning in *Keyes v. School District No. 1*,<sup>15</sup> which cites the Supreme Court opinion of *Castaneda v. Pickard*.<sup>16</sup> The holding in *Keyes* limited the types of action required to overcome

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<sup>11</sup> *Lau v. Nichols*, 414 U.S. 563, 568 (1974); see also 35 Fed. Reg. 11,595 (1970).

<sup>12</sup> 35 Fed. Reg. 11,595 (1970).

<sup>13</sup> Equal Educational Opportunities Act of 1974, § 204(f), 20 U.S.C. § 1703(f) (2012).

<sup>14</sup> *Id.*

<sup>15</sup> *Keyes v. Sch. Dist. No. 1*, 576 F. Supp. 1503 (D. Colo. 1983).

<sup>16</sup> *Castaneda v. Pickard*, 781 F. 2d 456 (5th Cir. 1986).

language barriers by holding that bilingual education itself was not necessarily always required. However, in granting such freedom to depart from previously required bilingual education methodologies, the court applied *Castaneda's* three-pronged test to determine if the action undertaken to remove language barriers from ELLs was appropriate:

1. Is the school system pursuing a program based on an educational theory recognized as sound or at least as a legitimate experimental strategy by some of the experts in the field?
2. Is the program reasonably calculated to implement that theory?
3. After being used for enough time to be a legitimate trial, has the program produced satisfactory results?<sup>17</sup>

Although responses to these three questions to determine appropriate action on behalf of ELLs has had varied effects in cases, the second prong has been one of the easiest tests for courts to apply. For example, in *Castaneda* itself, the training of the bilingual teachers was found to be problematic<sup>18</sup> and thus the court appropriately questioned whether the school district had adequately implemented the program it chose to employ. The court noted that the training seemed, on its face, to be inadequate:

The record in this case indicates that some of the teachers employed in the RISD [Raymondville Independent School District] bilingual program have a very limited command of Spanish, despite completion of the TEA [Texas Education Agency] course. Plaintiffs' expert witness, Dr. Jose Cardenas, was one of the bilingual educators who participated in the original design of the 100 hour continuing education course given to teachers already employed in RISD in order to prepare them to teach bilingual classes. He testified that a subsequent evaluation of the program showed that although it was effective in introducing teachers to the methodology of bilingual education and preparing them to teach the cultural history and awareness components of the bilingual education program, the course, was "a dismal failure in the development of sufficient proficiency in a language other than English to qualify the people for teaching bilingual programs."<sup>19</sup>

The *Castaneda* court also noted that the program used to evaluate Spanish proficiency of the bilingual teachers was probably inadequate:

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<sup>17</sup> *Keyes*, 576 F. Supp. at 1510 (citing *Castaneda v. Pickard*, 648 F.2d 989, 1009 (5th Cir. 1981)).

<sup>18</sup> *Castaneda*, 648 F.2d at 1012.

<sup>19</sup> *Id.*

Teachers were required to write a paragraph in Spanish. Since in completing this task, they were permitted to use a Spanish-English dictionary, [former bilingual supervisor] Ibarra acknowledged that this was not a valid measure of their Spanish vocabulary. Teachers also read orally from a Spanish language text and answered oral questions addressed to them by the RISD certification committee. There was no formal grading of the examination; the certification committee had no guide to measure the Spanish language vocabulary of the teachers based on their performance on the exam. Thus, it may well have been impossible for the committee to determine whether the teachers had mastered even the 700 word vocabulary the TEA had deemed the minimum to enable a teacher to work effectively in a bilingual elementary classroom. Following the examination, the committee would have an informal discussion among themselves and decide whether or not the teacher was qualified. Mr. Ibarra testified that the certification committee had approved some teachers who were, in his opinion, in need of more training “much more than what they were given.”<sup>20</sup>

These deficiencies in training and evaluation are instructive for educational agencies and districts seeking to serve ELLs because they provide a concrete example of how to determine whether an ELL program bears evidence of being reasonably calculated to actually serve ELLs adequately.

Recently there have been cases related to staffing issues that implicate *Castaneda*'s second prong dealing with implementing a program adequately.<sup>21</sup> However, they have often been decided on other grounds, such as application of a state tenure statute.<sup>22</sup>

#### IV. TENURED ELL TEACHER TERMINATIONS FOR FINANCIAL EXIGENCY

In addition to analyzing how ELL programs are being implemented, some recent courts seem to be carefully scrutinizing reductions in the ELL teaching force or terminations based on multiple doctrines, including tenure statutes. For example, in the 2011 unpublished opinion of *Shoemaker v. Board of Education of Brandywine School District*, the Delaware Superior Court<sup>23</sup> reversed the termination of a tenured ELL teacher previously upheld by a hearing officer. The factual findings and circumstances of the

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<sup>20</sup> *Id.*

<sup>21</sup> *Shoemaker v. Bd. of Educ. of Brandywine Sch. Dist.*, No. N10A-09-006 CLS, 2011 WL 2803375 (Del. Super. Ct. July 12, 2011).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at \*1.

case were significant.<sup>24</sup> The Brandywine School District claimed that it was responding to a projected decrease in enrollment and determined that the district needed to eliminate four teaching positions at Claymont Elementary School.<sup>25</sup> In response to this mandate, the principal of Claymont Elementary recommended that Shoemaker's position be eliminated,<sup>26</sup> making clear at the termination hearing that it was not for cause but as a result of a decrease in enrollment in the school's "regular education program" from 757 to 681.<sup>27</sup> Notably, Shoemaker was the school's only certified instructor in English as a Second Language (ESL), and ESL methodology was being employed to meet the needs of ELLs at the school. Accordingly, the court analyzed the state's Tenured Teacher Act<sup>28</sup> to determine if the Act's provisions were violated by the facts presented. The Act permitted the termination of tenured teachers when there is a decrease in enrollment. The court then had to determine whether the Act was violated by terminating a tenured teacher as a response to a decrease in enrollment if the program the teacher teaches in is not itself experiencing a decrease in enrollment.

Evidence at the termination hearing showed that the enrollment in ELL services had experienced a 160% increase over the immediate past nine years.<sup>29</sup> The principal also testified that he did not project a decrease in ELL enrollment, but rather a steady level or increase in enrollment.<sup>30</sup> Based on these facts, the court found that a tenured teacher could not be terminated based on a decrease in enrollment under the Delaware tenure statute when enrollment for the service taught by the teacher will not itself experience a decline in enrollment.<sup>31</sup>

The school district testified that they thought non-certified contract tutors could "pick up the slack" of the terminated ESL teacher.<sup>32</sup> The court rejected this argument, as

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> 14 DEL. CODE §§ 1401-1420 (2012).

<sup>29</sup> *Shoemaker*, 2011 WL 2803375 at \*1 n.19.

<sup>30</sup> *Id.* at \*1.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at \*3.

well as cases cited by the school district because they dealt with a decrease in enrollment or interest in the areas in question.<sup>33</sup> In addition, the court rejected a somewhat factually similar case that dealt with replacing full-time counselors with newly created contracted counselor positions<sup>34</sup> because the new positions were newly created and included different duties. In the case of Shoemaker, the contracted tutors' position existed before and the tutors were engaged in the same tasks as Shoemaker.

Thus, the court held that under the statute, a tenured teacher may not be terminated so that a non-tenured teacher may remain to perform the functions of the tenured teacher. The statute's purpose was to protect tenured teachers in their employment. Based on this fundamental understanding of the statute's purpose, the court also rejected the school district's arguments that employing the outsourced contracted tutors was not the equivalent of replacing a tenured teacher with non-tenured teachers because they did not work full-time but on an as-needed basis to do the same services the tenured teacher was performing.

Although the above case is grounded in the interpretation of Delaware's tenure statute, it is also representative of other districts' and educational leaders' plans that might exalt financial economy over quality in serving ELLs.<sup>35</sup> Always waiting in the wings is the argument in *Castaneda* that whatever program is implemented to serve ELLs must be appropriately implemented. It is possible that a reviewing court may find that plans such as the replacement of a certified ELL teacher with less expensive outsourced contract tutors is not an adequate implementation of a district's ESL methodology. The plan to "pick up the slack"<sup>36</sup> with outsourced contract part-time tutors seems somewhat reminiscent of *Castaneda*, in which it appeared that the school district was not necessarily intent on

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<sup>33</sup> Compare *Shoemaker*, 2011 WL 2803375 at \*3 with *Atkinson v. Sussex Cnty. Vocational Tech. Sch. Dist.*, No. 96-A-09-002, 1997 WL 127976 (Del. Super. Ct. Feb. 25, 1997); *Brumbley v. Bd. of Educ. of Polytech Sch. Dist.*, No. 97A-09-001 HDR, 1998 WL 283378 (Del. Super. Ct. Feb. 18, 1998).

<sup>34</sup> Compare *Shoemaker*, 2011 WL 2803375 at \*3 (Del. Super. Ct. July 12, 2011) with *Furrow v. Bd. of Educ. of Christina Sch. Dist.*, 12 A.3d 1154 (Del. 2011).

<sup>35</sup> See also *Deschenie v. Bd. of Educ. of Cent. Consol. Sch. Dist. No. 22*, 473 F.3d 1271 (10th Cir. 2007).

<sup>36</sup> *Shoemaker*, 2011 WL 2803375 at \*1.

providing a high-quality program to implement their chosen methodology for ELLs.

#### V. TERMINATION OF AT-WILL ADMINISTRATIVE EMPLOYEES WHO ADMINISTER PROGRAMS FOR ELLS

##### *A. Jaramillo v. Adams County School District*

In *Jaramillo v. Adams County School District*,<sup>37</sup> another unreported termination case, choice of methodology for ELLs and its implementation were implicated, although they were not central to the court's holding. The student population of Adams County School District is predominantly Hispanic with seventy percent Hispanic students at Hanson Elementary where Judy Jaramillo served as principal for nine years before her termination. The court found that of that group, the majority spoke Spanish as their first language. Hanson was unique, also, in that it was the only pre-kindergarten through eighth grade school, and, with the charter school, was the only year-round school. Additionally, Hanson utilized a bilingual program providing academic instruction in both Spanish and English.

In 2008, Dr. Sue Chandler was appointed as the Interim Superintendent of the school district. In the fall of that school year, the school district began to consider two policy changes that would impact Hanson and the plaintiff: first, the requirement that all ELLs be taught under an English-immersion program, doing away with bilingual education; and second, moving Hanson and the charter school to a traditional school year as opposed to year-round calendars. These proposals met with understandable resistance from Hispanic parents and teachers at the school and were the focus of community protests.

Principal Jaramillo's termination was supposedly based on "insubordination" related to this community dissatisfaction and unrest, as well as Jaramillo's efforts to publicize a normally-scheduled Board of Education meeting to include a study session over the issue of replacing bilingual methodology with English immersion in the entire district. An

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<sup>37</sup> *Jaramillo v. Adams Cnty. Sch. Dist.* 14, No. 09-cv-02243-RPM, 2011 WL 1043332 (D.Colo. Mar. 17, 2011), *aff'd*, 680 F.3d 1267 (10th Cir. 2012) (*amended on denial of reh'g* (June 28, 2012)).

e-mail was intercepted by the superintendent “concerning a meeting of teachers to discuss the proposed policy changes before the Board meeting.”<sup>38</sup> On February 6, 2009, the superintendent confronted Jaramillo, who she believed to be behind the e-mail. Chandler demanded that Jaramillo disclose who had informed her of the study session, although the session was announced in the usual way. Jaramillo declined to offer a name, concerned that there would be adverse action taken against her “informant.”

As a result, Jaramillo was advised to submit her resignation in three days’ time. Jaramillo still declined to offer a name or to resign, so Chandler placed her on “administrative leave” and informed her that Chandler would recommend her termination as an at-will administrative employee who could be terminated without regard to any tenure restrictions.

Jaramillo brought suit for wrongful termination in violation of key civil rights statutes, alleging that her termination was racially motivated. She claimed that her termination for insubordination was both pretextual and a violation of her due process rights:

The focus is on the question of whether the reason for termination was pretextual. The charge of insubordination for failure to give Dr. Chandler the name of the informant on February 6, 2009, appears to be unfair and unreasonable, given the plaintiff’s years of performance as the principal of Hanson. That possible finding does not support a claim under § 1981. A violation of that statute depends upon a showing that the termination was made because of the plaintiff’s race.<sup>39</sup>

Unfortunately for Jaramillo, the court found that there was no credible evidence introduced that Chandler harbored any racial animus against her as a Hispanic. In fact, evidence was submitted that showed that for the years before Chandler became the Interim Superintendent, Chandler’s relationship with Jaramillo was “cordial.”<sup>40</sup> The court noted that the facts surrounding the abrupt firing of Jaramillo were suspicious, even perhaps unreasonable. However, the facts presented could not support a claim of racial discrimination.

The court did note that it was likely that Jaramillo was fired because of her tacit opposition to doing away with

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<sup>38</sup> *Id.* at \*1.

<sup>39</sup> *Id.* at \*2.

<sup>40</sup> *Id.*

bilingual education. This, together with the replacement of her position with a white principal in a predominantly Hispanic school and school district, was not sufficient to show “direct evidence” of racial bias:

There is no direct evidence that Dr. Chandler had a bias or prejudice against Hispanics. . . . The difficulties that developed in the relationship between these two women arose after Dr. Chandler became interim superintendent and under her administration the proposals for change in the ELL policy and school calendar were being developed. What may be inferred is that Dr. Chandler was annoyed that these proposals were meeting resistance from the Hispanic community served by the Hanson school and perceived Ms. Jaramillo as a leader of that resistance. Accordingly, Dr. Chandler may have used insubordination as a justification for removal of Ms. Jaramillo as principal. That view may be supported by Mr. Chandler’s comments about undermining [his wife’s] authority. That factual finding, if made, does not support a claim of discrimination against Ms. Jaramillo because of her race. Removing an employee because she is seen as undermining authority or an obstacle to a policy change is not racial discrimination.<sup>41</sup>

This case provides a cautionary reminder that individuals within school districts are severely limited in confronting issues touching on language of instruction. These issues, such as choice-of-instruction methodology for ELLs, may become very politically charged in a community. The extremely heavy-handed and abrupt about-face in the school district’s abandonment of bilingual education and the harsh circumstances surrounding the firing of the only Hispanic principal in the district (apparently over a disagreement regarding bilingual education versus English immersion) should give pause to others involved in similar suits. Such battles over choice-of-language methodology or abandonment of bilingual education do not occur in a vacuum, but are currently increasingly politicized.<sup>42</sup>

It is likely that similar outcomes may recur in other courts based on similar discrimination claims with similar factual records. However, school districts that make such sudden about-faces regarding methodology terminate employees on seemingly unreasonable grounds may become vulnerable to

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<sup>41</sup> *Id.* at \*3.

<sup>42</sup> For example, although the court did not take judicial notice of the issue, Colorado had just finished a very divisive and bruising political fight over a referendum signature drive to outlaw bilingual education in the state under Proposition 31. See Eric Hubler, *Amendment 31 Bilingual-Ed Ban Fails*, DENVER POST, Nov. 6, 2002, at E1.

claims based in the EEOA utilizing the prongs of *Castaneda*. For example, was a sufficient record established to document why bilingual education was abruptly abandoned? What was the theoretical basis for the change? After employing English immersion as the sole methodology for ELLs, did the school district assess whether the program was providing ELLs a successful path to participation in the educational program?

*B. Maze v. North Forest Independent School District*

*Maze v. North Forest Independent School District*,<sup>43</sup> another unreported termination case, underscores the same challenge presented in *Jaramillo* above in one respect: when bilingual or ESL staff are terminated, in *Maze's* case for supposed financial exigency, in most states there are no tenure rules or rights to assist a former administrative employee in challenging her termination, as was the case in *Shoemaker*. Most administrators are at-will or contracted employees without contract protection.

In *Maze*, the terminated plaintiff brought suit in federal court in Texas. She had been hired as the sole Bilingual/ESL and Gifted and Talented (GT) Coordinator for the North Forest Independent School District after serving as assistant principal. According to *Maze's* complaint,<sup>44</sup> the basis for her termination was her provision of information to district administrators of district violations of federal and state laws, many relating to inadequate service of ELLs. *Maze's* complaint alleged that *Maze* “uncovered and reported that North Forest ISD had teachers in positions in the ESL program who were not qualified for that position.”<sup>45</sup> As in *Jaramillo*, the termination dispute allegedly had its roots in an administrator seeking to provide a high-quality and appropriately implemented program for ELLs and apparently coming into conflict with her superiors.

The hearing examiner to which *Maze* successfully appealed her termination found that *Maze* had been wrongfully terminated and that she should be reinstated with back pay.

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<sup>43</sup> *Maze v. N. Forest Indep. Sch. Dist.*, No. H-08-cv-01780, 2009 WL 7808954 (S.D. Tex. May 11, 2009).

<sup>44</sup> Second Amended Complaint, *Maze v. N. Forest Indep. Sch. Dist.*, No. H-08-cv-01780, 2009 WL 7808954 (S.D. Tex. May 11, 2009).

<sup>45</sup> *Id.* at 21.b.

The school district's Board of Trustees placed the reinstatement recommendation on the agenda for the next Board meeting but then did not act on it, leaving the plaintiff in a limbo where she was offered a job in another school district but could not accept it because she had not been formally terminated. These factual issues will be resolved at a further trial or, if possible, during settlement discussions. However, the key gravamen of the case is again a previously satisfactory employee who ran afoul of her superiors and may have lost her employment by working to ensure appropriate implementation of programs for ELLs.

#### VI. DISPUTES REGARDING ELL POLICIES AND IMPLEMENTATION

Issues related to adequate implementation or provision of bilingual education or staffing of ELL classes often become matters of public interest. The question is then raised whether an employee who is seeking to advocate for more services and staffing for ELLs may be terminated or disciplined for speech that the educator believes to be constitutionally protected. Such cases are difficult to prove, however.

In *Nieves v. Board of Education*,<sup>46</sup> public school employee Rose Nieves noted that Polish-American ELL students were entering a room for academic tutoring. Nieves claimed that she was previously informed that the room was to be locked and not utilized by ELLs during the school day. Moreover, Hispanic ELLs were to come before or after school or on weekends for academic tutoring. In the ensuing conflict, Nieves was terminated for exercising what she believed were her free-speech rights on a matter of public interest in determining whether Hispanic ELLs were being given less support than ELL students of other ethnic backgrounds. The Seventh Circuit Court of Appeals found that, although it could assume that Nieves' speech was a matter of public interest, the teacher had failed to provide evidence of a causal link between the speech and her termination. Her termination was consequently upheld.<sup>47</sup>

A similar outcome resulted in New Mexico in the Tenth

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<sup>46</sup> *Nieves v. Bd. of Educ.*, 297 F.3d 690, 690-691 (7th Cir. 2002).

<sup>47</sup> *Id.*

Circuit case of *Deschenie v. Board of Education of Central Consolidated School District No. 22*.<sup>48</sup> In *Deschenie*, a school district employee wrote a letter to a newspaper expressing gratitude for an article that voiced some of her concerns regarding the school district's bilingual education program and its lack of sufficient resources. As a result of this letter's publication against the intentions of the employee, the employee was terminated. The court found that her letter to the editor was not protected speech and also was not a substantial motivating factor in her termination.<sup>49</sup>

Such cases based on protected speech are difficult for employee plaintiffs to prove and seem to require rather compelling evidence of retaliation for appropriately protected speech on a matter of public concern. The challenge is that issues concerning language of instruction are politically volatile and do not necessarily lend themselves to dispassionate disagreements between administrators and other educators. It is possible that conflicts in this arena will be difficult to parse out from other appropriate grounds for termination since sufficient evidence of motivation for the termination is difficult to obtain.

#### VII. EMPLOYEE ISSUES ARISING FROM MASSACHUSETTS' REFERENDUM OUTLAWING BILINGUAL EDUCATION AND ENSURING ENGLISH PROFICIENCY OF TEACHERS

In 2002, Massachusetts passed a referendum outlawing bilingual education.<sup>50</sup> Since then, issues and challenges related to ELLs and ELL services have been simmering, often beneath the surface of public discourse, perhaps arising from conflicts begun by ELL educators calling into question teachers' own proficiency in English. Massachusetts' statute requires that "all children shall be placed in English language classrooms," conducted by teachers "fluent and literate in English."<sup>51</sup> Unfortunately, since passage of the law, there continues to be a persistent and growing gap in the academic achievement

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<sup>48</sup> *Deschenie v. Bd. of Educ. of Cent. Consol. Sch. Dist. No. 22*, 473 F.3d 1271, 1274 (10th Cir. 2007).

<sup>49</sup> *Id.* at 1279.

<sup>50</sup> MASS. GEN. LAWS ch. 71A § 9 (West 2012).

<sup>51</sup> *Id.* ch. 386, § 1-4 (implementing the referendum).

between ELL and white students in Massachusetts.<sup>52</sup> NAEP data, as discussed above, shows that the gap in math between ELL and white students in Massachusetts more than doubled between fourth grade and eighth grade (from 27 to 59). The reading gap also widened significantly, rising from 46 to 62.<sup>53</sup> While there may be multiple explanations for the persistent gap, it is troubling that after outlawing bilingual education and changing to the new Structured English Immersion (SEI) methodology the gap persists. The widening of this gap for those exposed longest to SEI after the outlawing of bilingual education is consonant with the theories of those who opposed Massachusetts' decision to outlaw bilingual education, such as Massachusetts researchers MacSwan and Pray:

[o]pponents of the English only measure warned that the negative effects of SEI are likely to show up most prominently in later years, when the accumulative effects of incomprehensible classroom instruction would begin to take a toll. Thus, the question of how much time immigrant children generally need to become proficient in English is a fundamental question underlying the current controversy.<sup>54</sup>

MacSwan and Pray found evidence that pointed to harm to students who do not have access to bilingual education programs and found positive outcomes from such programs.

The regulations adopted to implement the referendum outlawing bilingual education require superintendents of schools in Massachusetts to annually provide a written

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<sup>52</sup> *Id.*

<sup>53</sup> Fry, *supra* note 8.

<sup>54</sup> Jeff MacSwan & Lisa Pray, *Learning English Bilingually: Age of Onset of Exposure and Rate of Acquisition Among English Language Learners in a Bilingual Education Program*, 29 BILINGUAL RES. J. 653, 654 (2005) (internal citations omitted). The research also found that students in bilingual education programs learn English in a reasonable amount of time. Furthermore, the authors found that older children in bilingual education programs learn English faster than younger children, appearing to counter most of the tenets of immersion and time-on-task theories of those supporting Structured English Immersion in Massachusetts and other states. "Children ( $N = 89$ ) were found to achieve parity with native English speakers in a range of 1 to 6.5 years and in an average of 3.31 years on measures of English language. Indirect comparisons with other data suggest that children in bilingual education programs learn English as fast as or faster than children in all-English programs, and an ANOVA analysis indicates that older school-age children in the sample learn English faster than younger children,  $F(4, 84) = 9.037, p < .001, \text{adjusted } R^2 = .268$ . The evidence supports the underlying rationale of bilingual education programs; in addition, the authors argue that English-only programs may inhibit successful learning of academic subject matter." *Id.* at 653.

assurance that teachers of “English language classrooms . . . are literate and fluent in English.”<sup>55</sup> Assessing the fluency for such teachers is accomplished through one or more of the following methods:

- (a) [C]lassroom observation and assessment by the teacher’s supervisor, principal, or superintendent; or (b) an interview and assessment by the teacher’s supervisor, principal, or superintendent; or (c) the teacher’s demonstration of fluency in English through a test accepted by the Commissioner of Education; or (d) another method determined by the superintendent and accepted by the Commissioner.<sup>56</sup>

However, on March 27, 2003, the state’s Department of Education for the Commissioner published a memorandum with guidelines meant to help implement the recently passed referendum outlawing bilingual education. These guidelines were sent as a memorandum to all school superintendents in the state declaring that

[a] test is needed only in cases where the teacher’s English fluency is not apparent through classroom observation and assessment or interview and assessment.” If a teacher fails to demonstrate fluency through assessments by classroom observation or interview, the DOE [Department of Education] recommends the administration of the American Council on the Teaching of Foreign Languages (ACTFL) Oral Proficiency Interview (OPI) for assessment of the teacher’s language skills. The DOE guidelines state also that, in the event that a school district chooses to employ an assessment tool other than the OPI, it should contact the DOE to ascertain whether the alternative would be “accepted by the Commissioner.”<sup>57</sup>

In October of 2003, responding to the recently passed referendum, the Lowell Public Schools, through their superintendent, terminated three long-standing tenured teachers who served ELLs in *School Committee of Lowell v. Oung*.<sup>58</sup> The termination was allegedly for failure to demonstrate fluency in English. Each of the teachers had taught bilingual students and other students whose primary language is English and had consistently received the highest ratings on their evaluations. There was no evidence introduced by the school district at any level of litigation or arbitration

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<sup>55</sup> 603 MASS. CODE REGS. § 14.05(1) (2012).

<sup>56</sup> *Id.* § 14.05(3).

<sup>57</sup> *School Comm. of Lowell v. Oung*, 893 N.E.2d 1246, 1249-50 (Mass. App. Ct. 2008).

<sup>58</sup> *Lowell*, 893 N.E.2d 1246.

that any students experienced difficulty understanding the teachers. There was, rather, substantial evidence introduced that the teachers had excellent educational backgrounds and teaching credentials.

An arbitration hearing reinstated the teachers and found that their constitutional rights had been violated. This decision was affirmed later by the Massachusetts Superior Court, which also awarded back pay and benefits, and was again affirmed in the instant case by the Massachusetts Court of Appeals.<sup>59</sup> The latter's rationale was based on the fact that the method the Lowell School District chose to assess English fluency did not follow the regulations or guidelines promulgated by the Massachusetts DOE. The method deviated from the guidelines in several regards. It ignored the process of assessment of fluency by classroom observation or interview, presumed that native speakers of English who were educated in "mainland" U.S. schools for a minimum of four years of K-12 education were fluent and thus exempt from assessment, and required assessment of the plaintiff teachers by use of tests not authorized by the DOE.

The terminated teachers had been evaluated several times through observations and were awarded satisfactory ratings in all categories, including "the use of appropriate instruction and questioning techniques, proper monitoring of students' understanding of the curriculum, and clear communication of learning goals."<sup>60</sup> In Fall 2003, however, the Lowell School Committee determined that because the teachers had not been educated in U.S. schools for a minimum of four years, and were not native speakers of English, they were required to be tested for English fluency using two different instruments: the Oral Proficiency Interview (OPI) and the SPEAK test. The SPEAK test consists of pre-recorded questions answered and recorded by the test taker and later graded by examiners. Plaintiffs failed the SPEAK test and then took and failed the OPI test multiple times. As a result, the superintendent terminated the teachers because she could not guarantee their fluency in English as she believed was required by the new statute. The recent Massachusetts Court of Appeals' ruling, though, has helped ensure that long-standing, commended

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<sup>59</sup> *Id.* at 1246.

<sup>60</sup> *Id.* at 1249.

teachers not born in the United States and perhaps other teachers of ELL students will not be subjected to unauthorized testing in an attempt to ensure their English fluency.

Yet Massachusetts law still has the potential to cause a hostile or chilling environment for ELL teachers, especially if they are not native English speakers or native-born citizens. For one, Massachusetts law provides a private right of action allowing parents to sue educators directly and making it illegal for any immunity, indemnification, or third-party assistance to be provided to such educators found to be in violation of the statute. Educators who violate the statute may also be terminated and cannot be considered for rehire for five years, as set forth in Section Six:

(a) . . . [A]ll school children are to be provided at their assigned school with an English language public education. The parent or legal guardian of any school child shall have legal standing to sue for enforcement of the provisions of this chapter, and if successful shall be awarded reasonable attorney's fees, costs and compensatory damages.

(b) Any school district employee, school committee member or other elected official or administrator who willfully and repeatedly refuses to implement the terms of this chapter may be held personally liable for reasonable attorney's fees, costs and compensatory damages by the child's parents or legal guardian, and shall not be subsequently indemnified for such monetary judgment by any public or private third party. Any individual found so liable shall be barred from election or reelection to any school committee and from employment in any public school district for a period of five years following the entry of final judgment.<sup>61</sup>

This personal liability and exposure for individual educators is highly unusual and most likely to be employed against teachers who work with ELLs. It is also likely that when combined with school districts' use of tests for English fluency for non-native born teachers only, the policies could potentially work together to intimidate, target, or demoralize the very teachers relied upon to serve the needs of ELLs in Massachusetts. While there are challenges in many states that impact educators who serve ELLs, Massachusetts' policy and legal environment for teachers of ELLs is unusually problematic. Massachusetts presents the dysfunctional nexus of a persistent achievement gap with the outlawing of bilingual methodology, which may not be poised to cause ELL success, and mixes in a private right of action against teachers with

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<sup>61</sup> MASS. GEN. LAWS ch. 71A, §6 (West 2012).

what appears to be the potential for targeting non-native educators. Until these issues are worked out, it is unlikely that Massachusetts and her educators will see the new age of ELL achievement that proponents of the new law promised. In the meantime, as in other states, it will be the educators themselves who bear the brunt of public dissatisfaction and institutional employment actions as these issues are resolved.

### VIII. CONCLUSION

Undoubtedly, there is still great unrest concerning how to meet the needs of ELLs in public education. While it is good to engage in debate over methods and modes of instruction in school settings, the relatively recent cases discussed above may highlight that, although many of the big-picture issues regarding the rights and methodology of provision of services to ELLs are relatively settled, it appears that there is still a rather heated and perhaps somewhat hidden controversy brewing on local levels. Those who raise these issues are often public school educators tasked to provide services to ELLs, and they are likely to suffer negative consequences for doing so. Advocates for ELLs and for reform in education would be well-advised to pay attention to the possibility that educators who serve ELLs seem to bear the brunt for the current lack of unanimity. This lack of unanimity impedes society's goal to meet the needs of ELLs in ways that are appropriately implemented and resourced and likely to lead to higher academic achievement.