THE LEARN ACT: A BIPARTISAN LEGISLATIVE PROPOSAL TO ADVANCE EDUCATIONAL OPPORTUNITIES FOR IMMIGRANTS AND ENGLISH LEARNERS

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ABSTRACT

Immigrants and English learners ("ELs") have consistently faced overwhelming odds in attaining a sound, basic education in the United States. Today, both groups are subject to systemic discrimination and face lower than average high school graduation and college matriculation rates. This is despite the fact that nearly fifty years ago, the Equal Educational Opportunities Act ("EEOA") was passed to ensure that no child was discriminated against in the pursuit of his or her education. Recognizing the ever-present challenges that immigrants and ELs face, this Note offers a bipartisan legislative proposal to usher in a new era of educational opportunity for these and all other students. This Note begins with an examination of early legislative and litigation efforts meant to advance opportunities for immigrants and ELs. It then discusses the important role that the EEOA, Castañeda v. Pickard*, and* Plyler v. Doe *played in advancing the rights of immigrants and ELs. After discussing these landmark advancements, the Note analyzes subsequent litigation and policy battles, which have only increased the need for action at the federal level. Finally, this Note ends by offering a concrete bipartisan policy proposal via the Language Education And Rights Navigation ("LEARN") Act. The LEARN Act seeks to rectify the incomplete promises of the EEOA,* Castañeda*, and* Plyler *by: 1) expanding EEOA and* Plyler *protections to all education levels, including pre-K and college education; 2) codifying enhanced* Castañeda *standards into federal law; and 3) providing funds to states and local education agencies for new language and trauma-sensitive education measures that can be used to benefit students of all backgrounds. Ultimately, the passage of this Act would advance educational opportunities for immigrants, ELs, and all other students in the U.S. education system.*

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> Give me your tired, your poor,
> Your huddled masses yearning to breathe free,
> The wretched refuse of your teeming shore.
> Send these, the homeless, tempest-tost to me,
> I lift my lamp beside the golden door!
>
> —Excerpt from the poem inscribed on the 1903 bronze plaque located in the pedestal of the Statue of Liberty[1]

I. Introduction

The United States of America has long been viewed as a land of hope and promise for immigrants from around the world. As the words inscribed at the base of the Statue of Liberty state, America has called forth the tired and the poor to offer them a new home filled with boundless opportunity.[2] For children new to this country, the "golden door" of success is lit by the lamp of education. Yet, as history has shown, the lamp has not always shone as brightly for immigrant students as for those born in this country.

The U.S. education system can be difficult to navigate for any student. For immigrants and English learners ("ELs"), this can be especially true. Immigrant students are students born outside of the United States who have

[1] Emma Lazarus, The New Colossus (Nov. 2, 1883), *as reprinted in Statue of Liberty: The New Colossus*, U.S. National Park Service (Aug. 14, 2019), https://www.nps.gov/stli/learn/historyculture/colossus.htm [https://perma.cc/5KPL-LEZY].

[2] *Id.*

since come to the country and are enrolled in the education system. ELs are students receiving language instruction or assistance services in the pursuit of attaining English language skills.[3] While the two groups often overlap, it is important to note that not all immigrant students are ELs and not all ELs are immigrants.

For immigrants and ELs, successfully navigating the U.S. education system requires overcoming a myriad of unique challenges. For example, immigrants must not only adapt to a new education system but also to a new society. Similarly, ELs must learn both a new language and the subject material required of their grade level. For students who are both immigrants and ELs, these challenges quickly add up. Furthermore, the lack of resources for these students only exacerbates the problem. Few schools provide the holistic support systems needed for these students to achieve their full potential.[4] This is partly why immigrants and ELs struggle to reach academic milestones and face below average high school graduation and college matriculation rates.[5]

However, these challenges are not insurmountable. In fact, as some model schools have shown, immigrants and ELs can witness great academic success under the right conditions.[6] These include the use of appropriate language assistance, active parent engagement, and trauma-sensitive schooling.[7] In other words, there is already a roadmap in place for supporting immigrants and ELs. Decades of convoluted legislation and legal precedent complicate this roadmap, however, by restricting the rights and governmental assistance provided to these students. The key to moving forward thus begins with understanding how to navigate the complex terrain of education law and policy to provide these students with the resources and opportunities they need to succeed.

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[3] Amy L. Cook, *Building Connections to Literacy Learning Among English Language Learners: Exploring the Role of School Counselors*, 13 J. SCH. COUNSELING 1, 3 (2015), https://files.eric.ed.gov/fulltext/EJ1066329.pdf [https://perma.cc/YZ3K-CRT2].

[4] *See* Hannah Selene Szlyk, Jodi Berger Cardoso, Liza Barros Lane & Kerri Evans, *Me Perdía en la Escuela: Latino Newcomer Youth in the U.S. School System*, 65 SOC. WORK 131, 131–39 (2020) ("Because of funding and ideological constraints, few school systems have the adequate resources to integrate and educate newcomer youth."); *see also* Jodi Berger Cardoso, *Running to stand still: Trauma symptoms, coping strategies, and substance use behaviors in unaccompanied migrant youth*, 92 CHILD. & YOUTH SERVS. REV. 143, 150 (2018) ("Youth run to the U.S. only to stand still—often facing . . . challenges with school integration.").

[5] Claudio Sanchez, *English Language Learners: How Your State Is Doing*, NPR (Feb. 23, 2017, 6:00 AM), https://www.npr.org/sections/ed/2017/02/23/512451228/5-million-english-language-learners-a-vast-pool-of-talent-at-risk#:~:text=only%2063%20percent%20of%20ELLs,National%20Center%20for%20Education%20Statistics [https://perma.cc/QRZ2-GU7S] ("Only 63 percent of ELLs graduate from high school, compared with the overall national rate of 82 percent.").

[6] *See* DEBORAH J. SHORT & BEVERLY A. BOYSON, HELPING NEWCOMER STUDENTS SUCCEED IN SECONDARY SCHOOLS AND BEYOND 50 (2012), https://tb2cdn.schoolwebmasters.com/accnt_29013/site_29014/Documents/Tenino_ELLTeacerResources_100913.pdf [https://perma.cc/N3FA-VTCF] (noting that newcomer schools "have experienced significant success in meeting their academic and social goals for the newcomer students").

[7] *Id.* at 51–57.

II. Hearing the Call for Reform: The Path to the EEOA, *Castañeda*, and *Plyler*

The United States is a nation built and continuously rebuilt, in part, by immigrants from around the world. From its founding, the United States has had to work to meet the needs of immigrants and ELs in the public education system. In fact, as early as the mid-1800s, states began passing legislation to educate immigrants and ELs.[8] Ohio was the first state to pass a bilingual education law in 1839.[9] It authorized both German and English instruction in public school classrooms at parents' request.[10] In 1847, Louisiana followed suit with a similar provision for French and English instruction, and in 1850, the New Mexico Territory also passed legislation for Spanish and English instruction.[11] Overall, roughly a dozen states had passed similar laws by the turn of the century, and even in states where formal laws were not passed, bilingual instruction was nonetheless permitted.[12]

The nation's permissive stance towards bilingual education took a sharp turn following the first World War. In an effort to ensure loyalty to the United States and "Americanize" immigrants, by 1923, thirty-four states passed laws mandating English-only instruction.[13] That same year, however, the Supreme Court issued its decision in *Meyer v. Nebraska*.[14] The decision held that a Nebraska law that prohibited teaching grade-school children any language other than English was unconstitutional.[15] Furthermore, the Court recognized in dictum that "[i]t is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child."[16] In other words, although states were trying to ban non-English education, the Supreme Court saw these prohibitions, as applied, as "arbitrary and without reasonable relation to any end within the competency of the state."[17]

Despite this decision, discriminatory language instruction practices would continue. Among these practices was the segregation of immigrants and ELs.[18] For many Mexican-American students, such segregation resulted in bilingual instruction not being provided.[19] Furthermore, the education they

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[8] Patricia Gándara & Kathy Escamilla, *Bilingual Education in the United States*, *in* Bilingual and Multilingual Education: Encyclopedia of Language and Education 439, 439–52 (Ofelia García, Angel M. Y. Lin & Stephen May eds., 3d ed. 2017).
[9] *Id.* at 440.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] Meyer v. Nebraska, 262 U.S. 390 (1923).
[15] *Id.* at 403.
[16] *Id.*
[17] *Id.*
[18] Gándara & Escamilla, *supra* note 8, at 441.
[19] *Id.*

received was inferior to that which their non-immigrant and non-EL peers received.[20] The proof was evident in the outcomes for these students. For example, few students who attended these segregated schools graduated high school.[21] The poor conditions and outcomes of these schools prompted early desegregation efforts. In 1931, over two decades before *Brown v. Board of Education*, the Mexican community of San Diego secured the first legal victory in the nation to desegregate schools in *Roberto Alvarez v. the Board of Trustees of the Lemon Grove School District*.[22] Over a decade later, in 1947, Mexican-American plaintiffs were able to achieve a similar outcome in the Ninth Circuit case of *Westminster School District of Orange County v. Mendez*.[23] These early litigation victories were promising first steps in the struggle to desegregate schools. However, they were also a far cry from providing the language policy reforms that immigrants and ELs needed to succeed. Such reforms would require legislative action at both the federal and state levels.

Congress took its first step in addressing the needs of ELs in 1968 when it passed the Bilingual Education Act ("BEA").[24] Implemented as Title VII of the Elementary and Secondary Education Act of 1965 ("ESEA"),[25] the BEA provided federal funding, via a competitive grant process, to directly assist school districts in the instruction of ELs.[26] The competitive grants distributed $7.5 million for a number of measures meant to aid ELs, including resources for educational programs, training for teachers and teacher aides,

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[20] *Id.*

[21] *Id.*; *cf.* Susan Navarro Uranga, Comm'n on Civ. Rights, The Study of Mexican American Education in the Southwest: Implications of Research by the Civil Rights Commission 9 (1972), https://files.eric.ed.gov/fulltext/ED070545.pdf [https://perma.cc/R3PH-943E] (Even decades later, as conditions were arguably beginning to improve, a study of schools in the Southwest utilized data collected in 1968 and 1969 and estimated that, "out of every 100 Mexican American youngsters who enter first grade in the survey area, only sixty graduate from high school; only sixty-seven of every 100 black first graders graduate from high school. In contrast, eighty-six of every 100 Anglos receive high school diplomas.").

[22] *See* Robert R. Alvarez, Jr., *The Lemon Grove Incident: The Nation's First Successful Desegregation Court Case*, 32 J. San Diego Hist. 116–35 (1986), https://sandiegohistory.org/journal/1986/april/lemongrove/ [https://perma.cc/UQS3-RFG4]. "Superior Court of the State of California, County of San Diego, Petition for Writ of Mandate No. 66625, February 13, 1931. This is the only official record of the court case that is in existence. A prolonged search in both city and county records led to the discovery of the school case in the microfilm collection of the Superior Court. The microfilm had deteriorated badly, but was still legible." *Id.* at n.8.

[23] Westminster Sch. Dist. of Orange Cnty. v. Mendez, 161 F.2d 774, 774 (9th Cir. 1947); *see also* Dave Roos, *The Mendez Family Fought School Segregation 8 Years Before Brown v. Board of Ed*, Hist. (Sept. 18, 2019), https://www.history.com/news/mendez-school-segregation-mexican-american [https://perma.cc/B95J-63ZH].

[24] Bilingual Education Act, Pub. L. No. 90-247, 81 Stat. 816 (1968) (codified in scattered sections of 20 U.S.C.); *see also* Gloria Stewner-Manzanares, *The Bilingual Education Act: Twenty Years Later*, New Focus (1988), https://ncela.ed.gov/files/rcd/BE021037/Fall88_6.pdf [https://perma.cc/S7P4-G6WC].

[25] Elementary and Secondary Education Act, Pub. L. No. 89-10, 79 Stat. 27 (codified in scattered sections of 20 U.S.C.).

[26] Stewner-Manzanares, *supra* note 24, at 1–2.

material development and dissemination, and parent involvement projects.[27] However, as first implemented, the BEA neither made bilingual instruction mandatory nor provided sufficient funds to support every school district in the nation.[28] Furthermore, even after the BEA was initially passed, some school districts actively discriminated against immigrants and ELs.[29] This discrimination prompted some students and teachers to protest in favor of bilingual education programs and improved schooling conditions more broadly.[30]

While momentum was building for change, the Supreme Court issued a nearly fatal blow to the education reform movement with its 1973 decision in *San Antonio Independent School District v. Rodriguez*.[31] In that case, the Court held that "education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."[32] With the Court failing to recognize education as a fundamental right, legal efforts to improve education for any child, let alone immigrants and ELs, became increasingly difficult to pursue. But that did not mean that the battle for education reform was over. Advocates within and outside of the immigrant and EL communities continued to push for changes to the education system.

These cries for reform did not fall on deaf ears. In 1974, the Supreme Court, in *Lau v. Nichols,* recognized that over 1,800 Chinese students in San Francisco were being denied an equal education.[33] While these students were receiving the same facilities, textbooks, teachers, and curricula as their peers, the resources did not meet their needs as ELs.[34] The Court thus held that the lack of adequate resources violated the provision of the Civil Rights Act of 1964 that bans discrimination based on the ground of race, color, or national origin, in any program or activity receiving federal financial assistance.[35] But although the Court recognized this discrimination, it failed to prescribe any specific remedy to assist the Chinese student population. It merely contemplated potential pathways for reform by noting, "[n]o spe-

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[27] *Id.* at 2.

[28] *Id.*

[29] *Id.*; *see generally* MARIO T. GARCÍA & SAL CASTRO, BLOWOUT!: SAL CASTRO AND THE CHICANO STRUGGLE FOR EDUCATIONAL JUSTICE (2011) (describing discrimination and poor schooling conditions for Latinx students within the Los Angeles Unified School District).

[30] *See generally* GARCÍA & CASTRO, *supra* note 29; *see also* Christopher Cruz, *Latinas Leading the Way*, HARV. POL. REV. (May 16, 2015), https://harvardpolitics.com/online/latinas-leading-way/ [https://perma.cc/DV37-M2HU] ("On March 8, 1968, educational reformer Sal Castro led thousands of Latino and Latina students belonging to a handful of East Los Angeles public schools to walk out of class in protest of the unfair conditions hindering them from reaching their goals of attending college. These students demanded a restructuring of the public education system so that they could take college preparatory classes. Following these walkouts, reforms were initiated to place more Latinos on the college track.").

[31] 411 U.S. 1 (1973).

[32] *Id.* at 35.

[33] 414 U.S. 563 (1974).

[34] *Id.* at 566.

[35] *Id.*

cific remedy is urged upon us. Teaching English . . . is one choice. Giving instructions to this group in Chinese is another. There may be others. Petitioners ask only that the Board of Education be directed to apply its expertise to the problem and rectify the situation."[36] Importantly, this dictum highlighted that the Court's restraint was due to the fact that immigrant and EL advocates had not offered a unified proposal for achieving educational equity for these students.

Later that same year, in the Tenth Circuit case of *Serna v. Portales Municipal Schools*, plaintiffs alleged even more specific discrimination claims and remedy requests for the Spanish-surnamed students of their school district.[37] They sued the school district for a host of failures, including a:

> failure to provide bilingual instruction which takes into account the special educational needs of the Mexican-American student; 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 New Mexico and the United States; and failure to hire and employ any administrators including superintendents, assistant superintendents, principals, vice-principals, and truant officers of Mexican-American descent.[38]

The district court found the alleged failures to be violations of the protections afforded by the Equal Protection Clause of the Fourteenth Amendment.[39] Its ruling issued a highly detailed plan to address each of these failures.[40] On appeal, the Tenth Circuit upheld the trial court's plan.[41] However, it followed in the footsteps of *Lau* and found the failures of the school district to be a violation of the Civil Rights Act of 1964 rather than a violation of the Equal Protection Clause.[42] Thus, by relying on statutory interpretation to come to its conclusion, the Tenth Circuit avoided issuing a decision that spoke to the educational rights afforded by the Constitution.[43] Nonetheless, the Tenth Circuit affirmed that addressing the needs of ELs required more than just an increase in funding, but also concrete actions to improve the instruction, staffing, and resources at schools.

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[36] *Id.* at 564–65.
[37] 499 F.2d 1147 (10th Cir. 1974).
[38] *Id.* at 1149 (10th Cir. 1974).
[39] *Id.* at 1153.
[40] *Id.* at 1151.
[41] *Id.* at 1154.
[42] *Id.* at 1152–53.
[43] *Id.*

Subsequent cases across the country took similar positions. For example, in the 1978 case of *Rios v. Read*, the Eastern District of New York found that, among other shortcomings, inadequate bilingual teaching staff, a failure to identify EL students, and poor language programming made for an inadequate bilingual education program in the Patchogue-Medford School District.[44] Thus, *Serna* and subsequent cases showed legal advocates that specific and unified calls for language instruction reform were effective and necessary to the achievement of their goals.

In 1974, two important legislative developments also emerged: the introduction of amendments to the BEA and the passage of the Equal Educational Opportunities Act ("EEOA").[45] The BEA was amended to formally define a bilingual education program as one in which there was instruction given in English, "and, to the extent necessary to allow a child to progress effectively through the educational system, the native language of the children of limited English-speaking ability . . . with appreciation for the cultural heritage of such children."[46] Additionally, with respect to elementary instruction, the amended BEA stated that, "such instruction shall, to the extent necessary, be in all courses or subjects of study which will allow a child to progress effectively through the educational system . . . ."[47] In other words, bilingual education programs were meant to instruct students in both their native language and English, so as to prepare these students for continued educational success while nonetheless respecting their cultural heritage.

The 1974 amendments to the BEA also increased funding to $68 million in support of 339,600 students.[48] The increased funding made it possible not only to expand the number of students served, but also to establish regional support centers and to expand curricula, staff, and research for bilingual programs.[49] This growing focus on more holistic support would continue in future iterations of the BEA. For example, in the 1978 amendments, funding was increased to $135 million and included funds for training and technical services to school districts, fellowships for graduate students, and teacher training programs for undergraduate students preparing to become bilingual teachers.[50]

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[44] 480 F. Supp. 14, 23 (E.D.N.Y. 1978).

[45] Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484 (codified in scattered sections of 20 U.S.C.); Equal Educational Opportunities Act of 1974, Pub. L. No. 93-380, 88 Stat. 514 (codified in scattered sections of 20 U.S.C.); *see* Stewner-Manzanares, *supra* note 24; *This Day in History: August 21, 1974: The Equal Educational Opportunities Act is signed into law*, HIST. (Aug. 28, 2020), https://www.history.com/this-day-in-history/equal-educational-opportunities-act-1974-signed-into-law-nixon [https://perma.cc/VVU7-BZ2M] [hereinafter *This Day in History*].

[46] Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484 (codified as amended in scattered sections of 20 U.S.C.).

[47] *Id.*

[48] Stewner-Manzanares, *supra* note 24, at 4.

[49] *Id.* at 3.

[50] *Id.* at 5.

The EEOA was also passed in 1974.[51] It bars states from discriminating against students based on gender, race, color, or nationality and requires public schools to provide for students who do not speak English.[52] More than a symbolic victory, the Act created an explicit statutory cause of action for minority students facing discrimination.[53] Ultimately, this provision of the Act codified the holding of *Lau* and extended it to all public schools.[54]

While on the surface the EEOA appeared to be a major step forward for immigrant and EL advocates seeking legislative education reform, the statutory language of the EEOA was overly broad and thus less than ideal. Specifically, the portion of the Act intended to assist ELs did so by prohibiting "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."[55] However, the Act failed to define what constituted "appropriate action." Such language thus made civil suits complicated for litigants to pursue.[56]

In 1981, in *Castañeda v. Pickard*, the Fifth Circuit attempted to add some clarity to how "appropriate action" should be interpreted under the EEOA.[57] In that case, Mexican-American children and their parents alleged, inter alia, that the Raymondville Texas Independent School District (RISD) engaged in policies and practices of racial discrimination that violated the EEOA.[58] The Fifth Circuit evaluated the allegation by determining that a violation of 20 U.S.C.A. § 1703(f) required a three-pronged analysis:

> First, the court must examine carefully the evidence the record contains concerning the soundness of the educational theory or principles upon which the challenged program is based. . . .
>
> The court's second inquiry would be whether the programs and practices actually used by a school system are reasonably calcu-

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[51] *This Day in History*, *supra* note 45.
[52] 20 U.S.C. § 1703 (2018).
[53] *Id.* § 1706.
[54] Stewner-Manzanares, *supra* note 24, at 3.
[55] 20 U.S.C. § 1703(f).
[56] *See* Jessica R. Berenyi, Note, *"Appropriate Action," Inappropriately Defined: Amending the Equal Educational Opportunities Act of 1974*, 65 WASH. & LEE L. REV. 639, 657 (2008) ("A plaintiff may institute a civil action to protect his right to equal educational opportunity under the EEOA . . . Yet the statute's open-ended 'appropriate action' requirement does not define what is required to state a claim, what type of allegations plaintiffs may make, or to what acts by an educational agency 'appropriate action' applies."); Maria-Daniel Asturias, Note, *Burden Shifting and Faulty Assumptions: The Impact of Horne v. Flores on State Obligations to Adolescent ELLs under the EEOA*, 55 HOW. L.J. 607, 616 (2012) ("But as any civil rights advocate well knows, a requirement that a state actor take 'appropriate action' leaves ample room for interpretation, and there is no legislative history to help determine how 'appropriate action' should be defined.").
[57] 648 F.2d 989, 1009–10 (5th Cir. 1981).
[58] *Id.* at 992.

> lated to implement effectively the educational theory adopted by the school. . . .
>
> Finally, a determination that a school system has adopted a sound program for alleviating the language barriers impeding the educational progress of some of its students and made bona fide efforts to make the program work does not necessarily end the court's inquiry into the appropriateness of the system's actions. If a school's program, although premised on a legitimate educational theory and implemented through the use of adequate techniques, fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned.[59]

Ultimately, the Fifth Circuit found that, under its three-pronged analysis, there were sufficient grounds for remanding the case to the district court to further examine the discrimination claims.[60] In doing so, the Fifth Circuit set the guardrails for future evaluations of bilingual education programs under the EEOA's "appropriate action" standard. Specifically, when evaluating EEOA "appropriate action" claims, a number of later courts would also look to examine whether the programming was 1) based on a sound educational theory or on research, 2) implemented with adequate and appropriate resources, and 3) resulted in demonstrable academic outcomes for ELs.[61]

The next year, in 1982, the Supreme Court issued another landmark decision in favor of immigrants. In *Plyler v. Doe*, the Court considered whether Texas could deny undocumented immigrants the right to a public education.[62] In its decision, the Court formally recognized what was already evident to education and immigrant rights advocates:

> [E]ducation has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.
>
> In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated

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[59] *Id.* at 1009–10.

[60] *Id.* at 1015.

[61] *See e.g.*, Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030 (7th Cir. 1987); *see also* MASS. DEP'T. OF EDUC., INTEGRATION OF CASTAÑEDA'S THREE-PRONGED TEST INTO ELE PROGRAM DEVELOPMENT AND REVIEW PROCESS, https://www.doe.mass.edu/ele/resources/castaneda-three-pronged-test.docx [https://perma.cc/Q4UQ-3KJL] (describing how the Massachusetts Department of Education has also looked to *Castañeda*'s three-pronged test when advising its school districts on the formation of EL programming).

[62] 457 U.S. 202, 205 (1982).

> group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority.[63]

Building off of this powerful language, the Court held that Texas had no rational basis for denying undocumented immigrants their right to a public education.[64] Importantly though, the Court failed to recognize education as a fundamental right and also refused to view undocumented immigration status as a suspect classification.[65] Effectively, this meant that, going forward, immigrant rights and education rights would not receive the high level of protection given to rights deemed fundamental. Therefore, while *Plyler* was certainly a victory for immigrants, it also created uncertainty as to how far immigrant and education rights advocates could push the Court to protect students. It is with this uncertainty that both advocates and opponents entered into the next set of education reform battles.

III. A Nation Divided: The Rise of Recent Litigation and Policy Challenges

The 1980s would continue to witness major developments from the federal government. During this period, the BEA was reauthorized twice.[66] The passage of the Bilingual Education Act of 1984 continued grants for language instruction programming and increased the flexibility offered to state and local school districts in choosing how to educate their EL students.[67] Additionally, it expanded the rights and opportunities available to parents. Specifically, it gave parents the right to be informed of their child's selection for language instruction programming as well as any alternatives available.[68] Finally, grants were also designated for family English literacy programs, which were meant to offer English language instruction to parents as well as instruction on how parents could support their students in school.[69] The 1988 amendments built off of the 1984 contributions by once again increasing language instruction flexibility and parent engagement funding.[70] Overall, the BEA of 1988 authorized $152 million dollars for the 1989 fiscal year.[71]

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[63] *Id.* at 221–22.
[64] *Id.* at 230.
[65] *Id.* at 223.
[66] *See* Stewner-Manzanares, *supra* note 24.
[67] *See id.*
[68] *See id.*
[69] *Id.* at 7.
[70] *Id.* at 8.
[71] *Id.* at 9.

In 1994, the BEA was reauthorized for the final time.[72] It introduced new grant categories, gave preference to programs which promoted bilingualism, and introduced language enhancement of indigenous languages.[73] For some, however, the increasing immigrant and EL student population highlighted the need for more dedicated funding beyond that of the traditional grant funding offered by the BEA. Such calls for dedicated funding were heard in 2002 when the No Child Left Behind Act of 2001 ("NCLB")[74] was enacted into law. While the Act is infamously remembered today for its furtherance of high-stakes testing,[75] it also marked an important funding advancement for ELs. Instead of utilizing grant funding, which left some school districts with little or no funding, NCLB's Title III created a dedicated revenue stream that was indexed to reflect each state's EL student population.[76] This funding was meant to "supplement, and not supplant, the services that must be provided to ELs under" Title VI and the EEOA.[77] At the time of NCLB's enactment, there were around 3.77 million ELs in the United States.[78] While the law initially authorized up to $750 million in federal Title III funding, Congress only appropriated $664 million[79] that year, meaning that federal EL funding in 2002 came out to just under $175 per EL.[80]

In addition to the BEA being reauthorized and NCLB being enacted into law, legal developments also continued. The Fifth Circuit's 1981 decision in *Castañeda* offered hope to bilingual education proponents. While the holding's enforceability was originally limited to the Fifth Circuit, the three-pronged test soon proved to be of interest to other circuits as well. In fact, in 1987, just six years after the Fifth Circuit issued its ruling in *Castañeda*, the Seventh Circuit applied the same three-pronged test in *Gomez v. Illinois*

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[72] *See* Ann-Marie Wiese & Eugene E. García, *The Bilingual Education Act: Language Minority Students and Equal Educational Opportunity*, 22 Bilingual Rsch. J. 1, 1 (1998).

[73] *Id.* at 8.

[74] No Child Left Behind Act of 2001, Pub. L. No. 107-10, 115 Stat. 1425 (2002) (codified in scattered sections of 20 U.S.C.).

[75] *See generally* Sharon L. Nichols, Gene V. Glass & David C. Berliner, Educ. Pol'y Stud. Lab'y at Ariz. St. U., High-Stakes Testing and Student Achievement: Problems for the No Child Left Behind Act (2005), https://files.eric.ed.gov/fulltext/ED531184.pdf [https://perma.cc/9W27-2MX7].

[76] *Title III State Formula Grants,* Nat'l Clearinghouse for Eng. Language Acquisition, https://ncela.ed.gov/title-iii-state-formula-grants [https://perma.cc/N8HC-2YYK].

[77] *Id.*

[78] Lee McGraw Hoffman, U.S. Dep't of Educ., Nat'l Ctr. for Educ. Stat., Overview of Public Elementary and Secondary Schools and Districts: School Year 2001–02 23 (2003), https://nces.ed.gov/pubs2003/2003411.pdf#page=33 [https://perma.cc/FA8S-5W4T].

[79] U.S. Dep't of Educ., Education Department Budget by Major Program, Fiscal Years 1980–1984 (2018), https://www2.ed.gov/about/overview/budget/history/edhistory.pdf#page=5 [https://perma.cc/8BPB-QZW5].

[80] Conor P. Williams, *The Case for Expanding Federal Funding for English Learners*, Century Found. (March 31, 2020), https://tcf.org/content/commentary/case-expanding-federal-funding-english-learners/ [https://perma.cc/DF62-S2NN].

State Board of Education.[81] In that case, the Seventh Circuit also found that EEOA's "appropriate action" obligation applied to both state and local educational agencies.[82] In doing so, the Seventh Circuit helped to ensure that state governments in its jurisdiction would be held liable for ensuring the adequate education of ELs. Thus, the application of the standards first articulated in *Castañeda* began to strengthen and spread across jurisdictions.

The use of *Castañeda*'s three-pronged test as a tool for EL advocates would face a setback in 2009 by the Supreme Court. In *Horne v. Flores*, students in the Nogales Unified School District in Arizona and their parents filed a class action in 1992 alleging a violation of the EEOA for the district's failure to adequately educate ELs.[83] The United States District Court for the District of Arizona originally entered a series of orders and injunctions, including ordering Arizona to "prepare a cost study to establish the proper appropriation to effectively implement" EL programs.[84] This ultimately resulted in the court giving Arizona ninety days to appropriately and constitutionally fund the state's ELL programs, a deadline the state would fail to meet.[85] The state was held in contempt and litigation would ensue for years, with Arizona and Congress enacting new education law and policy in the interim.[86] Arizona moved to dismiss the case based on changed circumstances, but both the district court and the Ninth Circuit denied the motion.[87]

Nearly two decades after the onset of the litigation, in 2009, the case reached the Supreme Court. In reviewing the rulings of the lower courts, the Supreme Court issued a blow to EL advocates along several dimensions. First, the Court allowed for states to shirk their duties to ELs due to changed circumstances. In its analysis, the Court recognized the precedent set by *Castañeda* but failed to determine whether Arizona and its educational entities violated the EEOA, noting that an inquiry into changed conditions was necessary.[88] Specifically, the Court recognized that the following constituted changed conditions meriting a remand: "the State's adoption of a new [EL] instructional methodology, Congress's enactment of NCLB, structural and management reforms in Nogales, and increased overall education fund-

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[81] 811 F.2d at 1041 ("We find that, as a general matter, the framework set out in *Castañeda*, 648 F.2d at 1009, provides the proper accommodation of the competing concerns identified above. Of course, we do not mean to say that we are adopting without qualification the jurisprudence developed in the Fifth Circuit regarding the interpretation of the EEOA. However, the *Castañeda* decision provides a fruitful starting point for our analysis. The fine tuning must await future cases.").

[82] *Id.* at 1042. The Seventh Circuit also noted that its decision to apply the standards of *Castañeda* to a state school system fell in accordance with another Fifth Circuit decision subsequent to *Castañeda*. *Id.* at 1041 (citing United States v. Texas, 680 F.2d 356, 371 (5th Cir. 1982)).

[83] 557 U.S. 433, 438 (2009).

[84] Flores v. Arizona, 160 F. Supp. 2d 1043, 1047 (D. Ariz. 2000).

[85] Horne v. Flores, 557 U.S. 441 (2009).

[86] *Id.* at 442–45.

[87] *Id.* at 444.

[88] *Id.* at 439.

ing."[89] On remand, it was determined that relief from judgment was warranted given the changed circumstances.[90] Thus, in effect, the Court gave Arizona a pass on taking appropriate action to address the needs of ELs given that some conditions had changed since the onset of the litigation.

Second, the decision weakened the power of the federal government in enforcing the EEOA.[91] This is because the Court went beyond just remanding the decision to the district court when it noted that there was also no valid basis for the statewide federal injunction issued by the district court that mandated increased EL funding.[92] Instead, the Court believed that the matter should have remained confined to only the Nogales Unified School District because, "[i]t is a question of state law, to be determined by state authorities, whether the equal funding provision of the Arizona Constitution would require a statewide funding increase to match Nogales' ELL funding, or would leave Nogales as a federally compelled exception."[93] Under this reasoning, the Court would have required the plaintiffs to show that ELs across the state were receiving inadequate support for the statewide federal injunction to be justified. This thus made it more difficult for plaintiffs to pursue statewide remedies in court.

Third, the decision heightened the pleading burden for plaintiffs. The Court believed that "the District Court made insufficient factual findings to support a conclusion that the high schools' problems stem from a failure to take 'appropriate action,' and constitute a violation of the EEOA."[94] Explaining its reasoning in a footnote, the Court wrote that, "[t]here are many possible causes for the performance of students in Nogales' high school ELL programs. These include the difficulty of teaching English to older students . . . and problems, such as drug use and the prevalence of gangs."[95] As Justice Breyer explained in his dissent, "this ignore[s] well-established law that accords deference to the District Court's fact-related judgments," and shifts the burden to plaintiffs to "negate the possibility" that causes outside of state failures account for the poor performance of EL students.[96] In other words, the Court placed the onus for the widespread failure of high school English learners directly on the shoulders of the students themselves.[97] Such

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[89] *Id.* at 459.

[90] Flores v. Huppenthal, 789 F.3d 994, 1004 (9th Cir. 2015).

[91] *See* Gary Orfield & Patricia Gándara, *Horne v. Flores: Statement on the Decision of the U.S. Supreme Court*, The Civil Rights Project/Proyecto Derechos Civiles (June 25, 2009), https://www.civilrightsproject.ucla.edu/legal-developments/court-decisions/crp-statement-on-the-flores-decision-of-the-u.s.-supreme-court [https://perma.cc/BD97-VFLF] ("The Court has tilted the field strongly in favor of states (sic) rights, multiplied the procedural barriers to plaintiffs seeking remedies, and [the majority has] made dubious educational conclusions . . . .").

[92] *Horne*, 557 U.S. at 471.

[93] *Id.*

[94] *Id.* at 468.

[95] *Id.* at 468 n.20.

[96] *Id.* at 505 (Breyer, J., dissenting).

[97] *See* Asturias, *supra* note 56.

burden shifting frustrated the purpose of the EEOA and further victimized ELs. Its impact soon manifested in subsequent cases, as only a year later in *United States v. Texas*, the Fifth Circuit directly cited this reasoning when it held that Texas could not be found to violate the EEOA because the district court abused its discretion in failing to address other possible causes of student failure.[98]

Ultimately, *Horne v. Flores* not only denied ELs in Arizona educational justice, it also set a frightening precedent that opened the door for states to potentially use legal loopholes to avoid addressing the needs of ELs. For example, states could prolong litigation and then cite changed conditions, such as changes in federal education law, as reason for their inaction. Alternatively, they could assert that plaintiffs had made insufficient pleadings to justify a finding of an EEOA violation. Thus, *Horne v. Flores* sent a signal from the highest court that the protections afforded by the EEOA were limited.

As recent litigation has shown, courts have split on how far the provisions of the EEOA reach. In 2017, in *Issa v. School District of Lancaster*, the Third Circuit upheld a preliminary injunction compelling the School District of Lancaster to allow refugee students to transfer from Phoenix Academy, an accelerated credit-recovery high school, to McCaskey High School's International School, a program designed principally to teach language skills to ELs.[99] In contrast, in 2018, in *Antoine on behalf of I.A. v. School Board of Collier County*, the Middle District of Florida denied a motion for a preliminary injunction that would have allowed immigrant students to transfer from a local career technical college to a public high school, where the students believed they would be better educated.[100] Thus, while both cases examined the power of the EEOA in requiring a transfer requested by immigrant students, the courts came to opposite conclusions. This inconsistency highlights the modern-day difficulties that immigrant and EL education advocates are facing in upholding the original vision of the EEOA.

Recent federal legislation has been more promising for immigrant and EL students. In 2015, the Every Student Succeeds Act ("ESSA") was passed.[101] It had two major consequences for ELs and immigrants. Importantly, it amended the Elementary and Secondary Education Act ("ESEA") to require state educational agencies that receive Title III grants, after "timely and meaningful consultation with local educational agencies," to create and implement "standardized, statewide entrance and exit procedures" for ELs, "including an assurance that all students who may be [ELs] are assessed for such status within 30 days of enrollment in a school in the

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[98] 601 F.3d 354, 373 (5th Cir. 2010).
[99] 847 F.3d 121, 125 (3d Cir. 2017).
[100] 301 F. Supp. 3d 1195, 1197–203 (M.D. Fla. 2018).
[101] Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015) (codified in scattered sections of 20 U.S.C.).

State."[102] Secondly, it authorized increasing Title III funding from $756 million in 2017 to $884 million by 2020.[103] However, despite this authorization, funding was only $737 million annually during 2015–2019.[104] Thus, despite the ambitions of the ESSA, funding for ELs has been no higher than approximately $150 per EL in U.S. schools since 2016.[105] After accounting for inflation, it is safe to say that, in reality, funding for EL students has actually decreased.[106] But even putting inflation aside, the power of this dedicated funding is dismal. Consider, for example, the fact that a school district with 100 EL students would only receive $15,000 in additional funding. These funds would be insufficient to hire an additional instructor, let alone devote adequate resources to curriculum development, textbooks, and other vital aspects of language education programming.[107]

While the federal government seemed to signal a renewed and unified commitment to immigrant and EL education, some states were outright hostile to these students. In Alabama, for example, an anti-immigration bill was passed in 2011 that required parents to submit proof of their children's citizenship or immigration status.[108] This provision was undoubtedly meant to deter immigrants from enrolling in public schools. Fortunately, the Eleventh Circuit ordered that the district court impose injunctive relief after finding that the "provision impose[d] a substantial burden on the right of undocumented school children to receive an education."[109] In contrast, in Indiana, immigrant students did not receive support from either the courts or the federal government following the state's decision to block non-U.S. citizen immigrant children from enrolling in its 2015 preschool expansion program.[110] While this prompted a strong rebuke from then-Education Secretary Arne Duncan, nothing in federal law at the time mandated (or precluded) that preschool education be provided to all students.[111] Furthermore, because *Plyler*, which held that undocumented students could not be denied the right to an education, only applied to education that was universally public, there was no judicial precedent in place to find this policy unconstitutional. Thus,

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[102] *Id.*; *see also* U.S. Dep't of Educ., English Learner Toolkit: Chapter 1: Tools and Resources for Identifying all English Learners (2016), https://www2.ed.gov/about/offices/list/oela/english-learner-toolkit/chap1.pdf [https://perma.cc/YE5E-G4WQ].

[103] *See* 20 U.S.C. § 6801 (2018).

[104] *See* U.S. Dep't of Educ., Educ. Dep't Budget by Major Program, Fiscal Years 2015–2019 (2020), https://www2.ed.gov/about/overview/budget/history/edhistory.pdf#page=9 [https://perma.cc/TF3X-URJL].

[105] Williams, *supra* note 80.

[106] *Id.*

[107] *See id.*

[108] Beason-Hammon Alabama Taxpayer and Citizen Protection Act, Ala. Code § 31-13-8 (2011).

[109] Hisp. Int. Coal. of Ala. v. Governor of Ala., 691 F.3d 1236, 1249 (11th Cir. 2012).

[110] Scott Elliott, *Duncan: Indiana's Preschool Pilot Should Be Open To All Kids*, Chalkbeat (Aug. 18, 2015, 4:15 PM), https://in.chalkbeat.org/2015/8/18/21092341/duncan-in diana-s-preschool-pilot-should-be-open-to-all-kids [https://perma.cc/99KH-ZBM3].

[111] *Id.*

while Indiana's policy clearly went against the spirit of the EEOA and *Plyler*, it could not be struck down under federal law.

On the other end of the spectrum, several states have doubled down on their efforts to assist immigrant and EL students. In California, for example, voters in 2016 lifted restrictions on bilingual education that had been in place for 18 years.[112] This was promising news for a large number of ELs given that California's 1.3 million ELs make up 25 percent of the total enrollment of ELs in U.S. public schools.[113] New York has also worked to advance support for ELs. Over the past several years there has been a push to increase dual language programs, with forty-seven new pre-kindergarten ("pre-K") dual language programs opened in the 2019–2020 school year alone.[114] In addition to states taking action to assist immigrant and EL students, local school districts and individual schools have also stepped up. For example, in Houston, Texas, the Las Americas Newcomer School continues to offer holistic support to immigrant and refugee students.[115] It provides tailored English instruction to its students and maintains strong relationships with community organizations that assist families with broader needs outside of the school system, such as housing and job training.[116]

While it may seem reassuring that some areas of the country are working to meet the needs of their immigrant and EL students, the immigrant population is growing in areas outside of just California, New York, and Texas. In fact, between 2000 and 2016, South Dakota, South Carolina, North Dakota, and Tennessee experienced the largest percentage increases in immigrant population in the United States.[117] Thus, while each state should have autonomy in determining how to address the needs of its unique populations, there is nonetheless a need for new federal legislation to set improved statutory safeguards that will protect the rights of immigrant and EL students no matter the state in which they reside.

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[112] Claudio Sanchez, *Bilingual Education Returns to California. Now What?*, NPR (Nov. 25, 2016, 4:00 AM), https://www.npr.org/sections/ed/2016/11/25/502904113/bilingual-education-returns-to-california-now-what [https://perma.cc/889C-4LC8].

[113] Amaya Garcia, *A New Era for Bilingual Education in California*, PHI DELTA KAPPAN (Jan. 27, 2020), https://kappanonline.org/a-new-era-for-bilingual-education-in-california/ [https://perma.cc/A8J7-QFER].

[114] Press Release, New York City Mayor de Blasio, Chancellor Carranza, Announce 47 New Pre-K Dual Language Programs Across Every Borough (Feb. 4, 2019).

[115] Judy Woodruff & April Brown, *For Young Newcomers, School Offers a Stepping Stone to Life in America*, PBS (Nov. 19, 2015, 8:18 PM), https://www.pbs.org/newshour/show/for-young-newcomers-school-offers-a-stepping-stone-to-life-in-america [https://perma.cc/HWS8-PUX9] (describing how Interfaith Ministries, a resettlement organization that helps newcomers with everything from housing and job training to finding schools for their children, often refers immigrant families to Las Americas Newcomer School).

[116] *Id.*

[117] Leah Shafer, *Newcomer Students in Rural and Suburban Communities*, HARV. GRADUATE SCH. EDUC. (Apr. 19, 2018), https://www.gse.harvard.edu/news/uk/18/04/newcomer-students-rural-and-suburban-communities [https://perma.cc/Q2G9-SJS9].

IV. The LEARN Act: A Bipartisan Proposal to Transform Immigrant and EL Education

The history of legislative and legal developments shows that support for immigrant and EL students has been neither consistent nor unanimous across the country. Furthermore, ELs continue to constitute a sizable portion of the student population, with the latest statistics showing that ELs make up roughly ten percent of students.[118] These students still face many of the same challenges as their predecessors while also confronting the immense educational obstacles posed by the COVID-19 pandemic.[119] Both historical developments and current conditions thus highlight the need for a bold, bipartisan federal response that can address the challenges facing these students across the nation.

Building off of the nearly two-century history of immigrant and EL legislation and litigation, I offer the Language Education and Rights Navigation ("LEARN") Act as a modern-day bipartisan proposal to transform immigrant and EL education. The LEARN Act seeks to rectify the incomplete promises of the EEOA, *Castañeda*, and *Plyler* by: 1) expanding EEOA and *Plyler* protections to all education-levels, including pre-K and college education; 2) codifying enhanced *Castañeda* standards into federal law; and 3) providing federal funds to states for new language and trauma-sensitive education measures that can be used to benefit students of all backgrounds. This Act would prove immensely beneficial for students, families, and the nation as a whole, especially given the correlation between GDP growth and the educational attainment of minority students.[120] Furthermore, given the Act's commitment to strengthening federal rights while nonetheless maintaining the autonomy of local education agencies ("LEAs") to craft specific policies, it offers a truly bipartisan approach to reforming U.S. education law. To understand the full impact that the provisions of the LEARN Act will have on students, the challenges facing immigrants and ELs under current law must be described in greater detail.

A. Expanding EEOA and Plyler *Protections to All Education Levels, Including Pre-K and College Education*

Given the recent efforts of some states to restrict the educational rights of immigrant and EL students, the first provision of the LEARN Act looks to

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[118] Kristin Lam & Erin Richards, *More US Schools Teach in English and Spanish, but Not Enough to Help Latino Kids*, USA Today (May 23, 2020, 8:27 PM), https://www.usatoday.com/in-depth/news/education/2020/01/06/english-language-learners-benefit-from-dual-language-immersion-bilingual-education/4058632002/ [https://perma.cc/6FEW-JFGP].

[119] *See generally* Christopher Cruz, *From Digital Disparity to Educational Excellence: Closing the Opportunity and Achievement Gap for Low-Income, Black, and Latinx Students*, 24 Harv. Latinx L. Rev. 33 (2021).

[120] *Cf. id.*

expand EEOA and *Plyler* protections to all education levels. Currently, EEOA and *Plyler* protections are limited to students enrolled in the public education system.[121] Since states typically define their public education system as beginning in kindergarten and ending in the twelfth grade, this means that educational rights and benefits are not guaranteed for pre-school and college students. With the Biden administration emphasizing the need to increase the amount of federal funds allocated to early and higher education, the federal government may be poised to make pre-school and community college increasingly more available to the public.[122] However, reaching universal early and higher education access will take time, and not all institutions may initially receive full public funding. As such, subtle revisions to current federal education law are needed to ensure that all students receive the protections intended by the EEOA and *Plyler*.

In particular, 20 U.S.C. § 1701(a)(1), the codification of the EEOA, should be amended. It currently reads as follows:

> "[A]ll children enrolled in *public schools* are entitled to equal educational opportunity without regard to race, color, sex, or national origin."[123]

While the EEOA itself did not define a public school, 42 U.S.C. § 2000(c) defines the meaning of public school and public college as follows:

> "Public school" means any elementary or secondary educational institution, and "public college" means any institution of higher education or any technical or vocational school above the secondary school level, provided that such public school or public college is operated by a State, subdivision of a State, or governmental agency within a State, or operated wholly or predominantly from or through the use of governmental funds or property, or funds or property derived from a governmental source.[124]

Thus, EEOA protections for students in "public schools" do not naturally extend to students in early or higher education institutions. On the other hand, the holding of *Plyler*, which ensures public education for immigrants regardless of documentation status,[125] is free of the definitional restraints imposed by the U.S. Code. As such, it can be interpreted to extend to any form

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[121] 20 U.S.C. § 1701(a)(1) (2018) ("[A]ll children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin."); Plyler v. Doe, 457 U.S. 202, 230 (1982) ("If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest.").

[122] *See* Press Release, White House, Fact Sheet: The American Families Plan (Apr. 28, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/28/fact-sheet-the-american-families-plan/ [https://perma.cc/V9RR-8AMH].

[123] 20 U.S.C. § 1701(a)(1) (2018) (emphasis added).

[124] Civil Rights Act of 1964, 42 U.S.C. § 2000(c) (2018).

[125] *Plyler*, 457 U.S. at 230.

of public education offered by a state.[126] However, this still leaves the possibility of students being denied an education that is not seen as fully public, such as preschool or higher education that is only funded in part by the government. Therefore, 20 U.S.C. § 1701(a)(1) should be amended so that EEOA and *Plyler* protections are understood to apply to all levels of education involving some degree of public funding.

The amended language for 20 U.S.C. § 1701(a)(1) would read:

> "[A]ll children enrolled *or seeking to enroll in public schools, public colleges, or schools otherwise receiving public funds* are entitled to equal educational opportunity without regard to race, color, sex, or national origin."

This updated language would mirror Title IX and its prohibition against discrimination on the basis of sex by utilizing a similar federal funding hook.[127] Similarly, limited exceptions, much like those that exist under Title IX, could be permitted. For example, Title IX is known not to apply to educational institutions controlled by a religious organization to the extent that its application would be inconsistent with the religious beliefs of the organization.[128] Limited exceptions aside, this amendment would thus ensure that immigrant and EL students are afforded the opportunity to attend a school utilizing some degree of public funding, whether that be in pre-K, elementary, secondary, or higher education.

B. Codifying Enhanced Castañeda Standards into Federal Law

Castañeda set a powerful precedent for evaluating whether a state or LEA failed to take appropriate action for ELs under the EEOA. However, as noted above, the standards articulated in *Castañeda* did not guarantee relief for ELs. In fact, as *Horne v. Flores* and *United States v. Texas* showed, states and LEAs could use legal loopholes to find ways to avoid or delay providing adequate language education to their students. In order to remedy the deterioration of EEOA protections under the judiciary's recent decisions, the second provision of the LEARN Act codifies and enhances the protections

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[126] *See, e.g.*, Shiva Kooragayala, *Preschool for All: Plyler v. Doe in The Context of Early Childhood Education*, 15 NORTHWESTERN J.L. & SOC. POL'Y 98, 118 (2019) (arguing that "the Supreme Court's reasoning [in *Plyler*] can be interpreted to also protect children seeking to attend public early childhood education programs.").

[127] Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2018); *see Sex Discrimination: Frequently Asked Questions*, U.S. DEP'T OF EDUC. OFF. FOR C. R., https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/sex.html [https://perma.cc/Y2KK-UGX9] ("nearly all private colleges and universities are covered [by Title IX] because they receive assistance by participating in federal student aid programs.").

[128] *See Exemptions from Title IX*, U.S. DEP'T OF EDUC. OFF. FOR C. R. https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html [https://perma.cc/AK6Z-2CXP] ("Title IX does not apply to an educational institution that is controlled by a religious organization to the extent that application of Title IX would be inconsistent with the religious tenets of the organization. 20 U.S.C. § 1681(a)(3) (2018); 34 C.F.R. § 106.12(a).").

envisioned by the EEOA and *Castañeda*. In particular, the Act formally adopts the definition of "appropriate action" as defined in *Castañeda* and adds in another layer of protection by requiring that state education agencies ("SEAs") and LEAs provide the best possible language instruction programs to their ELs. It does this by adding the following provision as 20 U.S.C. § 1703(f)(1):

> Appropriate action shall be understood to mean that an educational agency must, within a timely manner, formulate a sound language instruction educational plan, implement that plan, and achieve adequate results in furtherance of a meaningful education. When weighing various plans, a rebuttable presumption shall exist in the affirmative as to whether an educational agency's proposed plan constitutes a sound language instruction educational plan. This presumption may be rebutted at any time upon a showing that an alternative plan is both feasible and would prove more beneficial to students facing language barriers.

This language would codify the holding of *Castañeda* and add in a rebuttable provision by which students and their families could challenge a potentially inadequate plan prior to its implementation.[129] This would help to ensure that SEAs and LEAs are held accountable to the families they serve. By offering students and families the opportunity to propose a more beneficial plan, SEAs and LEAs would need to diligently work with and incorporate the views of students and their families.

The codification of *Castañeda* would also help to prevent future cases from following in the footsteps of *Horne v. Flores* and *United States v. Texas*. As mentioned above, *Horne v. Flores* was detrimental in several ways to the education of ELs.[130] To combat SEAs and LEAs citing changed circumstances as a means of avoiding the duties imposed by the EEOA, the "timely manner" provision aims to hold SEAs and LEAs accountable for producing real results for students before the legal landscape drastically changes. Furthermore, the rebuttable presumption within the newly proposed subsection would allow students and their families to show, at any time, why the SEAs and LEAs proposed plan is insufficient to meet their needs. This would include when an SEA or LEA attempts to argue that a changed circumstance justifies a plan of non-action. With regards to the burden shifting

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[129] This could also potentially avert the problem of litigants battling to define a "failure to take appropriate action," an area that other legal scholars have argued needs further statutory definition. Specifically, the proposal of an alternative plan that is both feasible and more beneficial to students facing language barriers would demonstrate what appropriate action entails. *Cf.* Berenyi, *supra* note 56 (proposing the following statutory definition: "Failure to take appropriate action shall apply to, but shall not be limited to, failures in (i) programming, (ii) identification and grouping of students, (iii) oversight and management of the language program, (iv) teacher hiring and training, and (v) funding. To state a claim, a plaintiff need not look any further than the requirements within this subsection").

[130] *See* Part III.

imposed by *Horne v. Flores*, the proposed subsection would require SEAs and LEAs to propose and implement a plan regardless of any potential outside factors also influencing the educational attainment of students. Similarly, the rebuttable presumption provision allows students and families to offer alternative proposals without regards to, or perhaps in light of, other potential outside factors. For example, students and families may not want assumptions about drug use and gang affiliation to be made about them, but may wish for SEAs and LEAs to consider how socioeconomic factors make education more or less accessible for their community members. Therefore, the codification of *Castañeda* as proposed above would help to rectify the harmful precedents set by *Horne v. Flores* and *United States v. Texas*.

C. Providing Funds to States for New Language and Trauma-Sensitive Education Measures

Even if Congress were to make the above amendments and additions to the U.S. Code, these new statutory provisions would only provide immigrant and EL students with enhanced protections for their educational rights. However, immigrant and EL students need not just legal protections, but also increased educational and societal support. Thus, to truly provide holistic support to immigrant and EL students, the final aspect of the LEARN Act looks to provide the financial assistance necessary to meet the heightened needs of these students. In doing so, proposed funding should follow in the tradition of the BEA and *Serna* and build off of the practices found in model newcomer schools. More specifically, funds should not only be directed towards specialized programming but also towards measures that can fundamentally alter the school culture and environment in which these students receive their education. In doing so, these funds will help to shape a new educational ecosystem that will prove beneficial to not only immigrants and ELs, but to all students in the U.S. education system.

Potential areas to which the LEARN Act might allocate funds include, but are not limited to: 1) language programming; 2) EL identification; 3) teacher recruitment and training; 4) family education liaisons and programming; 5) trauma-sensitive schooling measures; and 6) ethnic studies and critical race theory incorporation. By utilizing a mix of dedicated funds and grant funds across these areas, immigrants, ELs, and all other students can witness renewed educational opportunity. Furthermore, because these proposals would provide schools with sufficient autonomy to direct funding as needed, debates regarding the federal oversight of education need not be raised. Instead, such measures, if implemented, would represent a bipartisan commitment to supporting the educational success of students across our country.

1. Language Programming

Current language programming within school districts often suffers from several common issues. To start, many school districts often do not fully understand or appreciate the differences that exist between the various types of language instruction. Broadly speaking, language instruction programs can fall within three categories: English as a second language ("ESL"); transitional bilingual education ("TBE"); and dual-immersion.[131] In ESL, children are taught English as quickly as possible and without much, if any, consideration of the child's native language.[132] In TBE, subjects are initially taught in a student's native language and the student is taught separately and simultaneously to become proficient in English.[133] Once the student is deemed to have enough mastery over the English language, she is taught her other subjects in English as well. In dual-immersion programs, the school day is split between instruction in English and instruction in the child's native language.[134] Ideally, dual-immersion programs aim to enroll roughly equal numbers of native and non-native English speakers so as to immerse both sets of students in a new language.[135]

While in theory all three programs sound as if they would assist ELs, in practice the programs have had dramatically different results. One study assessed former ELs in the eleventh grade on nationally standardized English tests.[136] It found that ESL programs were the least effective, TBE programs were somewhat more effective, and dual-immersion programs were the most effective in improving the English reading achievement scores of these students.[137] While the study was observational and conducted two decades ago, and while different students may witness varying levels of success in each type of program, more recent data also supports the idea that dual-immersion programs may be the most impactful mode of instruction for ELs.[138]

Unfortunately, many school districts fail to implement a high number of dual-immersion programs across their schools. In New York City, for example, despite a push to increase dual-language programs since 2015, only

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[131] *See* Sanchez, *supra* note 5.
[132] *See id.*
[133] *See id.*
[134] *See id.*
[135] *See id.*
[136] Virginia P. Collier & Wayne P. Thomas, *Reforming Education Policies for English Learners Means Better Schools for All*, 3 THE STATE EDUC. STANDARD 31, 31–36 (2002).
[137] *Id.*
[138] *See* Conor Williams & Catherine Brown, *Schools that Teach in Two Languages Foster Integration — So How Come So Many Families Can't Find Programs?: Dual Immersion's Policymaking Opportunity*, HECHINGER REP. (Aug. 31, 2016), https://hechingerreport.org/schools-that-teach-in-two-languages-foster-integration-so-how-come-so-many-families-cant-find-programs/ [https://perma.cc/A3MV-39B6]; Conor Williams, *The Intrusion of White Families Into Bilingual Schools*, ATLANTIC (Dec. 28, 2017), https://www.theatlantic.com/education/archive/2017/12/the-middle-class-takeover-of-bilingual-schools/549278/ [https://perma.cc/97CT-85NH].

about six percent of ELs were enrolled in a dual-language program in the 2018–2019 school year.[139] In contrast, over eighty percent of ELs were in the equivalent of an ESL program that year.[140] Therefore, even in states that are making conscious efforts to increase the number of dual-immersion programs, there is still much room to further improve language programming by increasing the availability of these programs.

The length of the language instruction that ELs receive is also critical, a finding confirmed by longitudinal research spanning 32 years that was conducted in 36 school districts across 16 U.S. states with more than 7.5 million student records analyzed.[141] This longitudinal research found that "English-only and transitional bilingual programs of short duration only close about half of the achievement gap between English learners and native English speakers, while high-quality, long-term bilingual programs close all of the gap after 5–6 years of schooling through the students' first and second languages."[142] In other words, to develop the best language programming for ELs, resources must be devoted to ensuring that the programming is both high-quality and long-term. Otherwise, schools that choose to maintain the opportunity gap via poor language programming risk unnecessarily perpetuating achievement gaps among their students.[143] Thus, with the emphasis being on high-quality and long-term programming, dedicated funding must not go solely towards increasing the number of language instruction programs, but more specifically it must go towards supporting the underlying attributes that make these programs both high-quality and sustainable over the long term.

2. EL Identification

High-quality instruction must begin with identifying ELs as soon as possible. As described above, the passage of the ESSA created a statutory obligation for states to identify ELs within thirty days of enrollment in a school.[144] Unfortunately, even well-intentioned efforts by some states have fallen short of adequately meeting this goal. In New York, for example, several issues in EL identification have emerged that exemplify those found in other states across the nation. For one, despite the fact that students speak at least fifty-two languages in New York City alone,[145] the state screener for

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[139] N.Y.C. Dep't of Educ. Div. of Multilingual Learners, 2018-2019 English Language Learner Demographic Report 29 (2019), https://infohub.nyced.org/docs/default-source/default-document-library/ell-demographic-report.pdf [https://perma.cc/ZE34-UXC4].

[140] *Id.*

[141] Virginia P. Collier & Wayne P. Thomas, *Validating the Power of Bilingual Schooling: Thirty-Two Years of Large-Scale, Longitudinal Research*, 37 Ann. Rev. Applied Linguistics 203, 203 (2017).

[142] *Id.*

[143] *See* Cruz, *supra* note 119 (providing further detail on the connection between the opportunity and achievement gaps generally).

[144] U.S. Dep't of Educ., *supra* note 102.

[145] N.Y.C. Dep't of Educ. Div. of Multilingual Learners, *supra* note 139.

ELs is only available in sixteen languages.[146] This means that there are a number of students who are likely to not be adequately assessed for language instruction. Additionally, ELs in New York City public schools are at risk of being "routinely misclassified [as having disabilities] due to their low literacy levels and the apparent lack of alternatives for intensive literacy support."[147] These misclassifications can lead some students to be referred for special education services when no such services are actually needed. In turn, requiring these students to engage in special education services may prevent these students from receiving traditional instruction. With EL identification thus being vitally important to ensuring students receive the services they need, and only the services they need, dedicated funding should be allocated to assist states with these efforts. For example, funds can be designated for the creation of screening materials, administrative personnel overseeing the screening process, early outreach to ELs entering the education system, and other organizational and operational efforts.

3. Teacher Recruitment and Training

Teachers are also crucial for delivering high-quality programming to both immigrants and ELs. Yet more than thirty states reported critical shortages in ESL teachers and world language teachers.[148] As such, dedicated funds should be distributed to increase teacher recruitment and training. Such funding could go directly to universities to increase the number of bilingual teacher education programs. In addition, such funds could be directed towards scholarship funds to incentivize and support future and current teachers looking to receive their certification in bilingual education. As it stands, one major obstacle for those interested in becoming bilingual education teachers is the high cost of higher education.[149] Funding for teacher development need not be limited to strictly university-level efforts. For example, funding can also be allocated to school districts or between universities and school districts to create more awareness of the bilingual teaching profession for students in the K-12 school system. Such efforts may even prove helpful in encouraging students to return to their local school districts as bilingual education teachers.[150]

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[146] Gita Martohardjono & Jennifer Chard, *Multilingual Literacy SIFE Screener*, SECOND LANGUAGE ACQUISITION LAB, https://slal.commons.gc.cuny.edu/projects/multilingual-assessment/current-projects/multilingual-literacy-sife-screener-mls/ [https://perma.cc/8TWW-CKDA].

[147] ADVOCATES FOR CHILDREN OF N.Y, STUDENTS WITH INTERRUPTED FORMAL EDUCATION: A CHALLENGE FOR THE NEW YORK CITY PUBLIC SCHOOLS 27 (2010), https://www.advocatesforchildren.org/SIFE%20Paper%20final.pdf?pt=1 [https://perma.cc/JF74-N5AC].

[148] Lam & Richards, *supra* note 118.

[149] *See id.*

[150] *See id.* (noting that faculty at the University of Texas Rio-Grande Valley stated that "[m]ost of our students come from the local community and plan to return to teach in local K-12 schools after graduation").

Although increasing the number of bilingual education teachers will be vital to properly implementing language programming, teachers also need to be prepared to meet the other needs of their EL and immigrant students. As discussed in more detail below, teachers need to be aware of how to implement trauma-sensitive schooling measures in their classrooms.[151] Such measures are critical to ensuring that students are being taught in a supportive environment that seeks to uplift them rather than admonish them for the trauma they may have suffered outside the classroom.

4. Family Education Liaisons and Programming

While teachers will always be the backbone of the education system, they cannot be expected to single-handedly provide students and their families with every resource needed to succeed in and out of the classroom. Teachers should be able to recognize the needs of students and make referrals or suggestions when possible, but ultimately their focus should be on teaching students. To assist teachers, schools can hire family education liaisons or individuals meant to provide the ongoing support and advocacy that students and their families need in order to gain access to necessary educational and community resources.[152] Such liaisons are already mandated under federal and state law for homeless youth and some foster youth.[153] Furthermore, even when liaisons are not mandated for certain students, community organizations in some parts of the country have stepped up to provide family liaisons for minority youth and their families.[154] Finally, as mentioned above, in the context of immigrant students, newcomer schools have found that connections and partnerships with community organizations can have positive effects for students and their families.[155] Supporting these partnerships with family education liaisons would only help with the facilitation of services and supports. For example, family education liaisons may be able to conduct the outreach necessary to connect families with assistance programs or aid families with completing any necessary program applications. Thus, increasing federal funding for education liaisons to apply to immigrant and EL students and their families could prove immensely beneficial.

With enough dedicated funding such liaisons could be made available for all children regardless of their housing, language, or national origin. In fact, expanding the availability of liaisons even beyond immigrant and EL

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[151] *See infra* Section IV.C.5.

[152] *See generally* Lois A. Weinberg, Michael Oshiro & Nancy Shea, *Education Liaisons Work to Improve Educational Outcomes of Foster Youth: A Mixed Methods Case Study*, 41 CHILD. & YOUTH SERVS. REV. 46 (2014); THE OAKLAND REACH, THE OAKLAND REACH CITY-WIDE VIRTUAL HUB (2021), https://oaklandreach.org/wp-content/uploads/2021/08/Hub-1-pager_5-Draft.pdf [https://perma.cc/U5G7-BTFW].

[153] *See* 42 U.S.C. § 11432(g)(6)(A); Weinberg, Oshiro & Shea, *supra* note 152, at 50 (noting that California, Missouri, and Washington have similar state laws).

[154] *See, e.g.*, THE OAKLAND REACH, *supra* note 152.

[155] *See, e.g.*, Woodruff & Brown, *supra* note 115.

students would produce benefits for all families and could prove helpful in advancing a bipartisan vision for education reform. Importantly, and out of respect for family autonomy, such liaisons would not be mandated, but would simply be made available to those wishing to receive this type of support. This could be implemented by adding in a new section to Title 20 or Title 42 of the United States Code that builds off of the language found in 42 U.S.C. § 11432(g)(6)(A), but removes any reference to a student's housing status. Model language describing the duties of family education liaisons would be as follows:

> Each local educational agency family education liaison shall ensure that:
>
> (i) children and youth are enrolled in, and have a full and equal opportunity to succeed in, schools of that local educational agency;
>
> (ii) children and youths have access to and receive educational services for which such families, children, and youths are eligible, including services through Head Start programs (including Early Head Start programs) under the Head Start Act (42 U.S.C. § 9831 et seq.), early intervention services under part C of the Individuals with Disabilities Education Act (20 U.S.C. § 1431 et seq.), and other preschool programs administered by the local educational agency;
>
> (iii) children and youth receive referrals to health care services, dental services, mental health and substance abuse services, housing services, and other appropriate services;
>
> (iv) parents or guardians of children and youth are informed of the educational and related opportunities available to their children and are provided with meaningful opportunities to participate in the education of their children;
>
> (v) public notice of the educational rights of children and youth is disseminated in locations frequented by parents or guardians of such children and youths, and unaccompanied youths, including schools, shelters, public libraries, and soup kitchens, in a manner and form understandable to the parents and guardians of children and youths, and unaccompanied youths;
>
> (vi) enrollment disputes are properly mediated;

> (vii) the parent or guardian of a youth, and any unaccompanied youth, is fully informed of all transportation services, including transportation services to and from school; and
>
> (viii) school personnel providing services under this part receive professional development and other support.

The expansion of federal funding to increase the availability of liaisons would help improve the delivery of resources to students, assisting them in their educational endeavors as well as promoting their general welfare. Beyond liaisons, funding should also be dedicated to programming geared towards empowering families. Much like the grant proposals located in various iterations of the BEA, this funding can be used to deliver language instruction to parents and assist them in their efforts to support their children's education. It can also take the additional step of helping these families with other needs such as housing, employment, and nutrition, to list only a few examples.

5. Trauma-Sensitive Schooling Measures

Providing immigrant and EL students with adequate language instruction and outside resources can only go so far if these students are not being taught in the right learning environment. The process of entering the country, seeing one's family face discrimination due to language barriers, and other related events can all be traumatic experiences. Furthermore, there may be a multitude of other home conditions that can be traumatic for children, regardless of their immigration and EL status. For example, millions of children witness violence in their homes each year.[156] These experiences may be at the heart of a student's learning, behavior, or relationship difficulties.[157] As such, schools and their staff must implement trauma-sensitive schooling measures.

Trauma-sensitive schools are schools that look to create a safe, welcoming, and supportive community for students so that they can overcome feelings of disconnection created by trauma and excel in their educational and extracurricular pursuits.[158] Staff at these schools keep in mind that trauma "is

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[156] *See* SUSAN F. COLE, JESSICA GREENWALD O'BRIEN, M. GERON GADD, JOEL RISTUCCIA, D. LURAY WALLACE & MICHAEL GREGORY, 1 HELPING TRAUMATIZED CHILDREN LEARN: A REPORT AND POLICY AGENDA 1 (2009).

[157] *See* SUSAN F. COLE, ANNE EISNER, MICHAEL GREGORY & JOEL RISTUCCIA, 2 HELPING TRAUMATIZED CHILDREN LEARN: CREATING AND ADVOCATING FOR TRAUMA-SENSITIVE SCHOOLS 9 (2013).

[158] *See id.* at 8. Massachusetts state legislation supporting trauma-sensitive schools has also offered a more extensive definition of such schools. *See* MASS. GEN. LAWS ch. 69 § 1P (2014) (defining safe and supportive schools as, "schools that foster a safe, positive, healthy and inclusive whole-school learning environment that: (i) enables students to develop positive relationships with adults and peers, regulate their emotions and behavior, achieve academic and non-academic success in school and maintain physical and psychological health and well-being and (ii) integrates services and aligns initiatives that promote students' behavioral health,

not the event itself, but rather a response to a highly stressful experience in which a person's ability to cope is dramatically undermined."[159] By doing so, a culture of collective responsibility is established among school members to develop awareness and understanding while promoting values such as teamwork, coordination, and collaboration to enhance the school experience for all.[160] This enhanced school experience leads to students being embraced by a school culture "where everyone is seen as having something significant to offer and is encouraged and supported to do so."[161]

Trauma-sensitive schooling measures have already been successful in a number of Massachusetts schools.[162] The Trauma and Learning Policy Initiative ("TLPI") worked with a small handful of Massachusetts schools between April 2015 and September 2017 to implement trauma-sensitive measures.[163] During the second year of study, staff were asked to take a survey regarding how they felt about the implementation of trauma-sensitive measures. Most staff agreed that the work was moving their school towards trauma sensitivity.[164] In addition to staff perceptions, schools also witnessed visible impacts on their students. For example, one school saw an increase in the number of students who were participating in extracurricular activities and a reduction in the number of students who were missing special school events.[165] Thus, the implementation of trauma-sensitive schooling measures can help create a culture of inclusivity, resulting in increased student engagement and success.

Creating a trauma-sensitive school is highly dependent on the individual culture of a school and requires everyone—administrators, educators, paraprofessionals, parents, custodians, bus drivers, lunch personnel, etc.—to take part in school-wide change.[166] For some schools this may require reducing the use of peace officers and increasing the use of positive behavioral supports, such as providing students with breaks or explanations of proper behavior in the classroom. Such positive behavioral supports help school staff to work collaboratively with students rather than to automatically im-

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including social and emotional learning, bullying prevention, trauma sensitivity, dropout prevention, truancy reduction, children's mental health, foster care and homeless youth education, inclusion of students with disabilities, positive behavioral approaches that reduce suspensions and expulsions and other similar initiatives.").

[159] COLE ET AL., *supra* note 157, at 7.

[160] *Id.* at 9.

[161] *Id.* at 23.

[162] *See* WEHMAH JONES, JULIETTE BERG & DAVID OSHER, TRAUMA AND LEARNING POLICY INITIATIVE (TLPI): TRAUMA SENSITIVE SCHOOLS DESCRIPTIVE STUDY 39–52 (2018), https://p9k7f8i6.stackpathcdn.com/wp-content/uploads/2019/02/TLPI-Final-Report_Full-Report-002-2-1.pdf [https://perma.cc/G9W8-EMWS].

[163] *Id.* at 14.

[164] *Id.* at 52.

[165] *Id.* at 93.

[166] *See* COLE ET AL., *supra* note 157, at 9.

pose disciplinary measures.[167] For other schools, the path to becoming trauma-sensitive may mean increasing active parent engagement. In some cases, schools should take all of these measures and more. Immigrant and EL students, in particular, would likely benefit most from the measures just described as well as initiatives that seek to build community and promote understanding of the unique challenges these students face.[168] Such initiatives may include dedicated time for students to bond with one another or regular workshops for school personnel to learn the skills necessary to best support their students.

Because the appropriate measures will vary by school, the federal government should not look to mandate any one particular action, but rather supply the grant funds necessary for schools to implement the host of trauma-sensitive schooling measures they see fit. Such grant funding could mirror the state legislation passed in Massachusetts in 2014.[169] It provided a framework for the creation of safe and supportive schools, a self-assessment tool for schools, and funding for schools looking to take the lead in becoming exemplar trauma-sensitive schools.[170] Importantly, this legislation did not set a threshold for schools seeking funding based on the number of students identified as needing trauma-sensitive measures. This is because the implementation of trauma-sensitive measures leads to the creation of safe and supportive environments for all members of a school and is thus beneficial for all students.[171] As such, this specific federal grant proposal should be viewed as a measure meant to improve schooling for not only immigrant and EL students, but for all students. In fact, given the challenges that students have had to overcome throughout the COVID-19 pandemic, there is even greater reason to disperse these grant funds to school districts across the nation.[172] Such funding would prove widely beneficial as the United States works to overcome the learning losses created by the pandemic.

6. Ethnic Studies and Critical Race Theory Incorporation

Another avenue for creating a supportive environment for immigrant and EL students lies in the incorporation of ethnic studies. The addition of

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[167] Reducing the use of peace officers may also assist in dismantling the school-to-prison pipeline, thus further contributing to the overall success of students. *See* Cruz, *supra* note 119, at 60.

[168] *Cf.* Trauma Sensitive Schools, *A School's Journey to Trauma Sensitivity*, YouTube (Sept. 25, 2019), https://www.youtube.com/watch?v=YVXrmi5kbi0 [https://perma.cc/N95Q-LWTA] (explaining the measures one school took to build community and promote understanding among school members).

[169] Mass. Gen. Laws ch. 69, § 1P (2014); *see also* Trauma and Learning Policy Initiative, *Massachusetts General Laws (M.G.L.) Chapter 69 Section 1P Safe and Supportive Schools Framework*, https://traumasensitiveschools.org/get-involved/safe-and-supportive-schools/ [https://perma.cc/69RY-NKY6].

[170] *See* Trauma and Learning Policy Initiative, *supra* note 169.

[171] *See* Cole et al., *supra* note 157.

[172] *See* Cruz, *supra* note 119.

ethnic studies has been found to increase the attendance and academic performance of students at risk of dropping out.[173] By engaging immigrants, ELs, and other students of color in ways that offer insight into their own histories and communities, ethnic studies can help these students gain critical-thinking skills and feel more confident in school.[174] Additionally, ethnic studies can benefit other students as well. This is because regardless of the race of a student, such courses can help students better understand the pluralistic history of the United States and the art of social change.[175]

Similar to ethnic studies, critical race theory can also be an important tool in helping to create understanding across students. Critical race theory posits that racism is not just the product of individual bias, but is embedded in legal systems and policies.[176] Its teaching does not seek to shame or victimize students, but rather helps students to see the systemic barriers facing individuals across the nation in the hopes of promoting antiracism.

As it stands, however, the adoption of ethnic studies and critical race theory has not been met with universal support. There is a complicated history at the state level regarding the incorporation of ethnic studies into school curricula, with some questioning the efficacy of ethnic studies as well as what particular content should be included in these courses.[177] For example, while California made ethnic studies a graduation requirement for all 430,000 undergraduates in the California State University system, its governor vetoed a similar measure in 2020 that would have made ethnic studies a high school graduation requirement.[178] Hearing the concerns of the public, he asked for a revised ethnic studies curriculum that was balanced, fair, and inclusive of all communities.[179] Following the development of a revised cur-

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[173] *See* Brooke Donald, *Stanford Study Suggests Academic Benefits to Ethnic Studies Courses*, STANFORD NEWS (Jan. 12, 2016), https://news.stanford.edu/2016/01/12/ethnic-studies-benefits-011216/ [https://perma.cc/4S8X-F368].

[174] Melinda D. Anderson, *The Ongoing Battle Over Ethnic Studies*, ATLANTIC (Mar. 7, 2016), https://www.theatlantic.com/education/archive/2016/03/the-ongoing-battle-over-ethnic-studies/472422/ [https://perma.cc/Q7PR-8QFR] (quoting Siobhan King Brooks, an assistant professor of African American studies at California State University, Fullerton on the far-reaching benefits for all students of color—inside and out of the classroom: "The critical-thinking skills and self-esteem they develop in ethnic studies helps them advance in their education, communities, and careers.").

[175] *See, e.g.*, *id.* ("Ethnic-studies courses dispel myths, Brooks said, and build connections among students as opposed to divisions. 'Similar to students of color, white students have been miseducated about the roles of both whites and people of color throughout history,' she said, and culturally relevant lessons allow white children to 'not only learn about people of color, but also white people's roles as oppressors and activists fighting for racial change. This is very important because often whites feel there is nothing [they] can do to change racism.'").

[176] *How Critical Race Theory Went from Harvard Law to Fox News*, NPR (July 6, 2021, 5:03 PM), https://www.npr.org/2021/07/02/1012696188/how-critical-race-theory-went-from-harvard-law-to-fox-news [https://perma.cc/8UZ6-7W2E].

[177] *See* Donald, *supra* note 173.

[178] Nina Agrawal, *Governor Newsom Vetoes High School Ethnic Studies Bill*, L.A. TIMES (Sept. 30, 2020, 10:16 PM), https://www.latimes.com/california/story/2020-09-30/governor-newsom-vetoes-high-school-ethnic-studies-bill [https://perma.cc/5KAX-BRBE].

[179] *See* Howard Blume & Melissa Gomez, *California Becomes First State to Require Ethnic Studies for High School Graduation*, L.A. TIMES (Oct. 8, 2021, 5:13 PM), https://

riculum, California's governor signed an amended ethnic studies bill into law in 2021.[180]

While California was ultimately able to enact its ethnic studies bill into law, others parts of the country more sharply opposed the adoption of ethnic studies and critical race theory. In 2021, a wave of states began considering and passing bills to ban the teaching of critical race theory.[181] Debates will surely continue at the state and local level over whether or not to incorporate ethnic studies and critical race theory into curricula. However, the federal government can look to promote their incorporation via voluntary grant funds. Such grants should allow LEAs and schools the autonomy to develop ethnic studies and critical race theory programs as they see fit, so long as the overall design of such courses and lessons seeks to engage and positively support all students. Grant funding for these programs, alongside the statutory amendments and other funding proposals noted above, would be a major step forward in supporting immigrant and EL students and their families. Additionally, the direct and spillover benefits for other students would be immense. Therefore, the LEARN Act should be viewed as more than simply an act meant to improve the education of immigrant and EL students. The LEARN Act is a bipartisan act to revolutionize the education system for all students.

V. Conclusion

Since its inception, the United States has struggled to adequately educate immigrants and ELs. Legislation and litigation battles have brought about repeated waves of reform and pushback in the efforts to support these students. And now, the United States has reached another inflection point in its long history of educating immigrants and ELs. While education is being influenced more and more by state and local policy decisions, the federal government nonetheless has the opportunity to address the patchwork of subpar policies currently in place to support immigrant and EL students. Additionally, the federal government has the opportunity to rectify the recent turn in judicial precedent that has undermined legal protections for these students. It can do this by enacting the LEARN Act, which offers a bipartisan solution to enhance the federal rights of students and promote the autonomy of LEAs. The provisions of the act would: 1) expand EEOA and *Plyler* protections to all education levels, including pre-K and college education; 2) codify enhanced *Castañeda* standards into federal law; and 3) provide funds

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www.latimes.com/california/story/2021-10-08/california-first-state-require-ethnic-studies-high-school-graduation [https://perma.cc/CP4Q-XYFL].

[180] *Id.*

[181] Char Adams, Allan Smith & Aadit Tambe, *Map: See Which States Have Passed Critical Race Theory Bills*, NBC News (June 17, 2021, 2:54 PM), https://www.nbcnews.com/news/nbcblk/map-see-which-states-have-passed-critical-race-theory-bills-n1271215 [https://perma.cc/EFX7-EAYY].

to states for new language and trauma-sensitive education measures that can be used to benefit students of all backgrounds. Enacting these policy proposals will usher in a new era of promise for immigrants, ELs, and their peers. By empowering students, families, teachers, and other community members, the LEARN Act can relight the lamp of education, allowing immigrant and EL students to pass through the golden door of opportunity that this country has promised each new generation of Americans.