

# RESEGREGATION, LANGUAGE, AND EDUCATIONAL OPPORTUNITY: THE INFLUX OF LATINO STUDENTS INTO NORTH CAROLINA PUBLIC SCHOOLS

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## INTRODUCTION

In 2003, Latinos represented the largest minority group, outnumbering African Americans for the first time in U.S. history.<sup>1</sup> Today Latinos make up over fourteen percent of the U.S. population,<sup>2</sup> and they are projected to comprise nearly twenty-five percent of the population in 2050.<sup>3</sup> Two aspects of this growth are especially interesting: the population's youthfulness and its dispersion. The youthful makeup of the Latino population and its projected growth make concerns regarding childhood and family top priorities for the community's well-being and future stability.

Latinos are the fastest growing segment of the school age population, representing sixty-four percent of the total growth of the U.S. school population.<sup>4</sup> This growth is occurring throughout the country. Although the states where Latino communities have thrived for five centuries, California, Texas, and Florida, still have the largest concentrations of Latinos, the fastest growing Latino populations are in regions where Latinos have never traditionally lived. The phenomenon of a rapidly growing Latino population in the South, the Midwest, and other non-traditional Latino areas has been labeled by scholars as the "New Latino Diaspora."<sup>5</sup>

The youthfulness of the Latino population makes issues surrounding schooling some of the most important public policy questions concerning Latinos, and the non-traditional regions where Latino families have begun to settle are particularly unprepared for the complex issues surrounding Latino

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<sup>1</sup> Press Release, U.S. Census Bureau, Hispanic Population Reaches All-Time High of 38.8 Million, New Census Bureau Estimates Show (June 18, 2003), available at <http://www.census.gov/Press-Release/www/2003/cb03-100.html>.

<sup>2</sup> PEW HISPANIC CTR., STATISTICAL PORTRAIT OF HISPANICS AT MID-DECADE 1 tb.1 (2006), available at <http://pewhispanic.org/files/other/middecade/complete.pdf> [hereinafter HISPANICS AT MID-DECADE].

<sup>3</sup> U.S. CENSUS BUREAU, U.S. INTERIM PROJECTIONS BY AGE, SEX, RACE, AND HISPANIC ORIGIN tbl.1a (2004), <http://www.census.gov/ipc/www/usinterimproj/natprojtab01a.pdf>.

<sup>4</sup> RICK FRY, PEW HISPANIC CTR., THE CHANGING LANDSCAPE OF AMERICAN PUBLIC EDUCATION: NEW STUDENTS, NEW SCHOOLS 3 (2006), available at <http://pewhispanic.org/files/reports/72.pdf>.

<sup>5</sup> Edmund T. Hamman et al., *Education and Policy in the New Latino Diaspora*, in EDUCATION IN THE NEW LATINO DIASPORA: POLICY AND THE POLITICS OF IDENTITY 1, 1 (Stanton Wortham et al. eds., 2002).

education. In states and communities experiencing unprecedented growth in the Spanish-speaking Latino population, there has been a need to create or expand English as a Second Language (ESL) programs quickly, establish policies that integrate these new students into the educational system, and attract and train teachers and other personnel with skills necessary to provide proper instruction to these new students. This process is complicated by immigration issues, the Latino immigrant community's socioeconomic status, the community's unfamiliarity with the educational system, and the lack of a preexisting community of Spanish speakers who can provide both a model and a communication bridge for newcomers.

Although traditional Latino states gained the most new Latinos overall during the 1990s, a number of states in the Southeast experienced the fastest growth in their Latino population.<sup>6</sup> The arrival of a significant number of Latino migrants to the Southern states represented a huge increase in the Latino population because of the relatively limited numbers of Latinos in the area prior to the 1990s. North Carolina had the fastest growing Latino population in the entire country during the 1990s, increasing by 394%.<sup>7</sup> The state also experienced the largest increase in Latino school-aged children, swelling by 397%.<sup>8</sup> A 2006 study by the University of North Carolina's Kenan Institute showed that between the 2000-2001 and the 2004-2005 school years, fifty-seven percent of the total growth in the North Carolina Public Schools was on account of Latino students.<sup>9</sup> The cost of educating these students was \$467 million,<sup>10</sup> and state spending on ESL programs rose from \$10 million in 1995, when the first waves of Latinos started entering North Carolina, to \$210 million in 2005, primarily in order to accommodate the growing Spanish-speaking population.<sup>11</sup>

The influx of Latino students, many with English-language learning needs, has added a new dimension to the racial dynamic in North Carolina public schools. North Carolina has always considered itself and is often considered by outside observers as one of the most progressive states in the South.<sup>12</sup> However, the state struggled to desegregate after *Brown*.<sup>13</sup> After court-ordered desegregation, North Carolina finally lived up to its progres-

<sup>6</sup> RAKESH KOCHHAR ET AL., PEW HISPANIC CTR., THE NEW LATINO SOUTH 3 (2005), available at <http://pewhispanic.org/reports/report.php?ReportID=50>.

<sup>7</sup> *Id.*

<sup>8</sup> Elvia Y. Valencia & Valerie Johnson, *Latino Students in North Carolina: Acculturation, Perceptions of School Environment, and Academic Aspirations*, 28 HISP. J. BEHAV. SCI. 350, 351 (2006).

<sup>9</sup> JOHN D. KASARDA & JAMES H. JOHNSON, JR., FRANK HAWKINS KENAN INST. OF PRIVATE ENTER., UNIV. OF N. CAROLINA AT CHAPEL HILL, THE ECONOMIC IMPACT OF THE HISPANIC POPULATION ON THE STATE OF NORTH CAROLINA i (2006), available at [www.ime.gob.mx/investigaciones/2006/estudios/migracion/economic\\_impact\\_hispanic\\_population\\_north\\_carolina.pdf](http://www.ime.gob.mx/investigaciones/2006/estudios/migracion/economic_impact_hispanic_population_north_carolina.pdf).

<sup>10</sup> *Id.* at 33.

<sup>11</sup> Marti Maguire, *Part 2: Schools Bear Burden of Immigration*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 27, 2006, at A1.

<sup>12</sup> WILLIAM H. CHAFE, CIVILITIES AND CIVIL RIGHTS: GREENSBORO, NORTH CAROLINA, AND THE BLACK STRUGGLE FOR FREEDOM 14-17 (1981).

<sup>13</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

sive image by becoming the state in the South with the most desegregated school system and one of the most desegregated states in the nation.<sup>14</sup> But the rapid decline of federal judiciary involvement in school desegregation programs after the Supreme Court's 1991 *Dowell*<sup>15</sup> decision led school districts throughout the South to reconsider their assignment plans. A product of this new era of assignment planning is resegregation.<sup>16</sup> North Carolina, like all other Southern states, is experiencing a growing trend of resegregation.<sup>17</sup> Into this upheaval of racial dynamics in school assignment and the reality of resegregation, Latino students, many of whom are native Spanish-speakers, have entered the North Carolina public school system.

This Article will focus on North Carolina and its approach to providing appropriate schooling for its growing number of Latino students. Part I discusses the legal history of Latino education in the United States, including the struggles against the segregation of Latino children and for appropriate language minority education. Part II covers the history of desegregation and the current state of the North Carolina public schools. Part III explores the situation of Latino students in the North Carolina public schools including their language education, the barriers that they face, and their remarkable achievement. Part IV discusses proposals to enhance the educational opportunity of Latino students in North Carolina.

North Carolina has the most desegregated school system in the South today. However, the presence of Latino students, who are not just ethnic minorities, but also often language minorities, challenges North Carolina school systems and their policies both on language issues and desegregation questions. North Carolina's interest in preserving some of its progressive ideals makes it an interesting place to consider the approach to educating Latino students in the New Latino Diaspora.

Ensuring that Latino students in North Carolina receive an appropriate education that addresses both their language needs and the larger goal of integration in schools and in society means that community advocates, educators, administrators, policymakers, and members of the community all must work towards this common goal. Most of the Latino students in North Carolina are members of immigrant families and are native Spanish speakers.<sup>18</sup> Studies demonstrate that educational outcomes are much more

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<sup>14</sup> Charles T. Clotfelter et al., *Classroom-Level Segregation and Resegregation in North Carolina*, in *SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?* 70, 70 (John Charles Borger & Gary Orfield eds., 2005).

<sup>15</sup> *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991).

<sup>16</sup> It should be noted that the term "resegregation," like "segregation," is contentious. Here it is used to refer to the phenomenon of students attending schools where classmates are primarily of the same race. Although resegregation, in this context, does not suggest a return to the Jim Crow *de jure* segregation of the past, it should be recognized that governmental decisions and school policies still govern the school assignment process that creates today's school population patterns.

<sup>17</sup> Sean F. Reardon & John T. Yun, *Integrating Neighborhoods, Segregating Schools: The Retreat from School Desegregation in the South, 1990-2000*, in *SCHOOL RESEGREGATION*, *supra* note 14, at 51, 54.

<sup>18</sup> KOCHHAR ET AL., *supra* note 6, at 39.

favorable for Latinos in the first and second generations than in subsequent ones.<sup>19</sup> These first and second generation students are able to achieve educational advancement because immigrant parents tend to be more optimistic about their children's future prospects<sup>20</sup> and provide more encouragement and hold higher expectations for their children.<sup>21</sup> This reality, combined with the fact that one out of six children born in North Carolina is Latino,<sup>22</sup> brings a special urgency to the issue of Latino education. Latino educational advocates and the school districts must recognize that there is no "one size fits all" answer to the complex nature of Latino education. The appropriateness of programs aimed at or used by Latino students depends on demographics in the community and the goals of the larger assignment system in creating racial and socioeconomic school integration.

## I. LEGAL HISTORY OF LATINO EDUCATION

The Latino role in the legal history of school desegregation is often left in the shadows of *Brown*<sup>23</sup> and the African American struggle. This overlooked history includes shining victories and deep frustrations. It is also marked by seeming disjunctions in legal strategies on the part of Latino education advocates as they attempted to navigate the complexity of racial segregation and language concerns within a larger civil rights environment that was dominated by the black-white dynamic. Today, the educational situation of Latinos is further complicated by the dispersal of the Latino population throughout the United States, the socioeconomic status of the community, and immigration issues, as well as the ethnic and language minority statuses with which Latinos have always struggled.

### A. *The Latino Legal Struggle Against School Segregation*

During the first few decades of the twentieth century, Mexican Americans in the Southwest experienced significant school segregation in addition to segregation in most other aspects of public life.<sup>24</sup> However, unlike the statute-imposed racial segregation of African Americans in Southern schools, the segregation of Mexican American children in the Southwest was

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<sup>19</sup> See Vilma Ortiz, *Generational Status, Family Background, and Educational Attainment Among Hispanic Youth and Non-Hispanic White Youth*, in *LATINO LANGUAGE AND EDUCATION: COMMUNICATION AND THE DREAM DEFERRED* 95 (Antoinette Sedillo López ed., 1995); Grace Kao & Marta Tienda, *Optimism and Achievement: The Educational Performance of Immigrant Youth*, 76 *SOC. SCI. Q.* 1 (1995).

<sup>20</sup> Kao & Tienda, *supra* note 19, at 16.

<sup>21</sup> Ortiz, *supra* note 19, at 109.

<sup>22</sup> North Carolina State Center for Health Statistics, North Carolina Live Birth Data 2005, <http://www.schs.state.nc.us/SCHS/data/births/bd.cfm> (last visited Feb. 21, 2008) (change Row and Column Output Table "Row" default to "Mother's Hispanic Origin," then select "Submit Request").

<sup>23</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>24</sup> VICTORIA-MARÍA MACDONALD, *LATINO EDUCATION IN THE UNITED STATES* 118 (2004).

achieved through school administration policymaking. School administrations justified their actions by pointing to perceived language, intelligence, and health differences between the Mexican American and Anglo student bodies.<sup>25</sup> The schools Mexican Americans were forced to attend were not only separate but often unequal with inferior facilities and resources.<sup>26</sup>

Latino civil rights in general and the issue of educational rights in particular have been influenced by a series of organizations and a variety of litigation strategies and interests that they pursued. The changing litigation strategies reflect changing opportunities and reactions to events happening outside of the Latino litigation. Latino school litigation has been defined by several distinct phases: 1) pre-World War II local attempts to desegregate schools in Texas and California, 2) post-World War II efforts that were more widespread, 3) post-*Brown*<sup>27</sup> and post-*Lau*<sup>28</sup> efforts to make bilingual education part of the larger desegregation process, and 4) the movement in the 1970s and 1980s away from desegregation concerns to promote bilingual education.<sup>29</sup>

In the early pre-World War II cases, Mexican American litigants made limited progress by winning a few lower court cases that only had local effect.<sup>30</sup> The primary strategy in these early desegregation cases was to attack segregationist policy by arguing that the segregation of Mexican American children was illegal because they were racially white and no statute allowed separation on the basis of a Latin national origin.<sup>31</sup> The first major Latino litigation force, the League of United Latin American Citizens (LULAC), was founded in 1929 in Corpus Christi, Texas, unifying three Mexican American civic organizations with the goal of promoting equal rights for Mexican Americans.<sup>32</sup> LULAC propelled the effort to push for school desegregation and other Latino civil rights through community organizing and legal action. However, change came slowly, and it was not until after World War II that Mexican Americans and Latino organizations like LULAC were able to pursue desegregation aggressively.

The most influential of the Mexican American school desegregation cases was *Mendez v. Westminster* in 1947.<sup>33</sup> The *Mendez* case spurred the

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

<sup>26</sup> See the descriptions of the Anglo and Mexican schools in El Modena, California, which were located right beside one another, in Christopher Arriola, *Knocking on the Schoolhouse Door: Mendez v. Westminster, Equal Protection, Public Education, and Mexican Americans in the 1940's*, 8 *LA RAZA* L.J. 166, 176 (1995).

<sup>27</sup> *Brown*, 347 U.S. 483.

<sup>28</sup> *Lau v. Nichols*, 414 U.S. 563 (1974).

<sup>29</sup> See Guadalupe San Miguel, Jr., *The Impact of Brown on Mexican American Desegregation Litigation, 1950s–1980s*, 4 *J. LATINOS & EDUC.* 221 (2005).

<sup>30</sup> See, e.g., *Indep. Sch. Dist. v. Salvatierra*, 33 S.W.2d 790 (Tex. App. 1930), *cert. denied*, 284 U.S. 580 (1931); *Alvarez v. Lemon Grove Sch. Dist.*, No. 66-625 (Cal. Super. Ct. filed Apr. 17, 1931).

<sup>31</sup> See *Salvatierra*, 33 S.W.2d 790; *Alvarez*, No. 66-625.

<sup>32</sup> League of United Latin American Citizens, “All for One – One For All” – History of LULAC, [www.lulac.org/about/history.html](http://www.lulac.org/about/history.html) (last visited Nov. 22, 2007).

<sup>33</sup> *Mendez v. Westminster Sch. Dist.*, 64 F. Supp. 544 (C.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947).

desegregation of Mexican American students in California schools and played an important role in the evolution of desegregation cases that led to *Brown* seven years later. Litigation was brought by several Mexican American families, who were later supported by LULAC, on behalf of their school-aged children who had been denied admission to schools reserved for Anglo whites in Orange County, California. The Mexican American families argued that the school districts' practice of segregating Mexican children violated the Fourteenth Amendment.<sup>34</sup> The Westminster School Board argued that the children were separated because of their limited English proficiency. But the district court found that the school administrators had based their assignment decisions primarily on the children's surnames.<sup>35</sup> Although the practice of segregating Mexican American children was based on school district practices and not a state statute, the district court ruled that segregating Mexican American students without credible examination to determine that they had English language deficiencies denied them equal protection of the law under the Fourteenth Amendment, and the court enjoined the districts from continuing to segregate.<sup>36</sup>

The Ninth Circuit affirmed that in the absence of a California statute that permitted the segregation of Mexican-origin students—in contrast to the laws that allowed for the segregation of Native American and Asian American students—the segregation of Latino students by school authorities violated the Equal Protection Clause.<sup>37</sup> The plaintiffs' victory in *Mendez* led California to be the first state to desegregate schools. Governor Earl Warren, who would later become Chief Justice of the Supreme Court and write the *Brown* opinion, responded to the *Mendez* decision by ordering all the school districts in California to eliminate *de jure* segregation of Mexican Americans.<sup>38</sup> Moreover, the following year, the California State Legislature repealed the statutory school segregation of Asian Americans and Native Americans.<sup>39</sup>

Many non-Latino civil rights organizations, including the NAACP, the ACLU, the American Jewish Congress, and the Japanese-American Citizens League, became involved in the case by submitting *amicus curiae* briefs.<sup>40</sup> *Mendez* was seen as a “guinea pig” case for the larger issues of *de jure* school segregation throughout the nation and Jim Crow laws in the South.<sup>41</sup> The brief filed by the NAACP asked the court to strike down the “separate but equal” doctrine that had allowed segregated institutions to constitution-

<sup>34</sup> *Id.* at 545.

<sup>35</sup> *Id.* at 550.

<sup>36</sup> *Id.* at 551.

<sup>37</sup> *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774, 780-81 (9th Cir. 1947).

<sup>38</sup> *Mendez v. Westminster: For All the Children/Para Todos los Niños* (PBS KOCE-TV television broadcast Sept. 24, 2002).

<sup>39</sup> Toni Robinson & Greg Robinson, *Mendez v. Westminster: Asian-Latino Coalition Triumphant?*, 10 *ASIAN L.J.* 161, 181 (2003).

<sup>40</sup> *Westminster*, 161 F.2d at 775.

<sup>41</sup> Guadalupe San Miguel, Jr., *Mexican American Organizations and the Changing Politics of School Desegregation in Texas, 1945–1980*, 63 *Soc. Sci. Q.* 701, 703 (1982).

ally function for fifty years since *Plessy v. Ferguson*.<sup>42</sup> The NAACP brief in *Mendez* was the basis for the brief eventually submitted in *Brown*, including both the assertion that in reality separate could never be equal and the importance of social science evidence to understand that reality.<sup>43</sup>

In the seven years between *Mendez* and *Brown*, Mexican Americans, led primarily by LULAC and the American G.I. Forum, an organization formed by Mexican American World War II veterans, tried to extend the prohibitions against segregating Mexican Americans to Texas and the rest of the Southwest. In 1948, the victory of Mexican American parents in *Delgado v. Bastrop*<sup>44</sup> pushed the Texas State Superintendent of Public Instruction and the State Board of Education to issue instructions and regulations prohibiting the segregation of Mexican Americans.<sup>45</sup> As a disturbing preview of what would happen in the South after *Brown*, the school districts utilized a number of stall tactics to overcome the state school board's instruction to stop the segregation of Mexican American students in Texas. These modes of resistance included allowing Anglos but not Mexican American students to choose their preferred school, making token transfers of Mexican American students to Anglo schools, creating segregated classrooms within the same school facility, and continuing segregation by citing language issues.<sup>46</sup>

Although LULAC and other organizations continued their legal fight to end school segregation for Mexican Americans, the larger legal community and national attention focused on the black-white desegregation issue after the *Brown* decision in 1954. During the 1960s and the early 1970s, Latinos began to self-identify in a more radicalized manner with the growth of the Chicano Movement and parallel developments in the Puerto Rican community. This growing redefinition, along with an increased recognition from outside the community, led to a shift in legal strategy for Latino organizations—from claiming equality through emphasizing their whiteness to seeking legal protection under *Brown* as a minority group suffering from discrimination.<sup>47</sup> During this period, new Latino organizations like the Mexican American Legal Defense and Education Fund (MALDEF) and the Puerto Rican Legal Defense and Education Fund (PRLDEF) were formed and started to advocate for Latino civil rights by following distinct strategies from those used by the older Latino organizations. As federal courts struggled with *Brown*'s “all deliberate speed” mandate and the subsequent foot dragging of Southern school districts, it was not until *Keyes v. School Dis-*

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<sup>42</sup> ROBERT L. CARTER, *A MATTER OF LAW: A MEMOIR OF STRUGGLE IN THE CAUSE OF EQUAL RIGHTS* 65-66 (2005).

<sup>43</sup> Judge Joe Carter, the author of both the *amicus curiae* brief in *Mendez* and the plaintiff's brief in *Brown*, explained in an interview with documentary producer Sandra Robbie how he modeled the *Brown* brief off of his *Mendez* brief. See *Mendez v. Westminster: For All the Children/Para Todos los Niños*, *supra* note 38.

<sup>44</sup> *Delgado v. Bastrop Ind. Sch. Dist.*, Civil Action No. 338 (W.D. Tex. June 15, 1948).

<sup>45</sup> San Miguel, Jr., *supra* note 41, at 704.

<sup>46</sup> *Id.* at 706.

<sup>47</sup> San Miguel, Jr., *supra* note 29, at 225.

trict *Number One*<sup>48</sup> in 1973 that the situation of Latinos reentered the national litigation spotlight.

In *Keyes*, the Supreme Court recognized that Latinos were an identifiable minority group for school desegregation purposes and could not be treated as white in desegregation plans.<sup>49</sup> The plaintiffs claimed that the school district had intentionally redrawn attendance lines and implemented other methods of maintaining racially segregated schools even as some of the city's neighborhoods had started to integrate.<sup>50</sup> The Court reframed the white-black paradigm through which desegregation had been viewed since *Brown* into a white-non-white model because of the significant presence of Latino students in the Denver public schools.<sup>51</sup> At the time of *Keyes*, Latino students made up one-fourth of the students in Denver.<sup>52</sup> The collapsing of Latinos and blacks into a single group for purposes of desegregation policy recognized that both groups were being discriminated against but disregarded the special needs of Latino students. In the remedy stage of *Keyes*, the district court ordered a plan that would allow some schools to be predominately Latino, so bilingual-bicultural programs could be implemented in those schools. The bilingual-bicultural aspect of the remedial plan was proposed by Latino advocacy groups. But the Tenth Circuit vacated that portion of the desegregation plan because the concentration of minority students it created undermined the overall desegregation plan in the court's mind.<sup>53</sup> The Tenth Circuit explained, "Bilingual education . . . is not a substitute for desegregation. Although bilingual instruction may be required to prevent the isolation of minority students in a predominately Anglo school system . . . such instruction must be subordinate to a plan of school desegregation."<sup>54</sup> As exemplified by the situation in *Keyes*, concerns about Latinos as a language minority added a new level of complication to the Latino struggle for educational rights, as Latino organizations started to think beyond desegregation to other issues that prevented Latino students from receiving an equal educational opportunity.

### B. Law Surrounding Education for Language Minorities

Although the early education cases involving Latinos focused on segregation based on their ethnic minority status, Latinos' continued use of the Spanish language has also made them a language minority. In the early Latino desegregation cases, the tendency of many Latinos to speak Spanish at home and in their communities was an excuse used by segregationist

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<sup>48</sup> *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973).

<sup>49</sup> *Id.* at 190.

<sup>50</sup> *Id.* at 191.

<sup>51</sup> Kristi L. Bowman, Note, *The New Face of School Desegregation*, 50 DUKE L.J. 1751, 1777 (2001).

<sup>52</sup> San Miguel, Jr., *supra* note 29, at 229.

<sup>53</sup> *Keyes v. Sch. Dist. No. 1*, 521 F.2d 465, 483 (10th Cir. 1975).

<sup>54</sup> *Id.* at 480.

school administrators to deny Mexican Americans entrance into Anglo schools.<sup>55</sup> Despite the fact that the plaintiffs in those cases could demonstrate that they could speak English and were being discriminated against based on their surnames or appearance, the reality is that a significant number of Latinos today, especially as immigration from Latin America has increased, enter school with limited proficiency in understanding and speaking English.

Questions concerning language rights in education have arisen throughout U.S. history as successive waves of immigrants settled in the United States,<sup>56</sup> but the modern discussion of education and language issues began in the 1960s. In 1968, Congress passed the Bilingual Education Act, which created a limited grant program to provide support for schools with large limited English proficient (LEP) student populations and to encourage research and experimentation.<sup>57</sup> The Office of Civil Rights in the Department of Health, Education, and Welfare (HEW) issued a memorandum in 1970 which recognized that school districts were engaging in practices that “have the effect of denying equal educational opportunity to Spanish-surnamed pupils.”<sup>58</sup> This memorandum called for school districts to take “affirmative steps to rectify the language” when students from a national origin group are denied effective participation due to their inability to understand English and warned districts against tracking students and isolating language minority parents.<sup>59</sup> The Supreme Court came to rely on this memorandum when it dealt for the first time with the rights of LEP students in *Lau v. Nichols*<sup>60</sup> in 1974. The Court held that Title VI of the Civil Rights Act of 1964 or its accompanying regulations required the San Francisco School District, as a recipient of federal funds, to remedy the language barrier for students who did not speak English. Although the plaintiffs had made Equal Protection claims, the Court declined to find on those grounds.<sup>61</sup> The Court refrained from endorsing a particular program as an appropriate remedy.<sup>62</sup> In response to *Lau*, the Office of Civil Rights issued guidelines in 1975 that promoted the adoption of bilingual programs. Many districts assumed they were required to follow these guidelines and implemented bilingual programs,<sup>63</sup> but the “Lau guidelines” were withdrawn in 1980 after court challenges by districts complaining about the guidelines’ lack of legal authority and were not replaced by the Reagan administration.<sup>64</sup>

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<sup>55</sup> See, e.g., *Mendez v. Westminster Sch. Dist.*, 64 F. Supp. 544, 550 (C.D. Cal. 1946), *aff’d*, 161 F.2d 774 (9th Cir. 1947).

<sup>56</sup> See *Meyers v. Nebraska*, 262 U.S. 390 (1923).

<sup>57</sup> 20 U.S.C. § 880b (1968).

<sup>58</sup> Memorandum, 35 Fed. Reg. 11,595 (July 18, 1970).

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

<sup>60</sup> 414 U.S. 563.

<sup>61</sup> *Id.* at 566-67.

<sup>62</sup> *Id.* at 569.

<sup>63</sup> MARK G. YUDOF ET AL., *EDUCATIONAL POLICY AND THE LAW* 642 (4th ed. 2002).

<sup>64</sup> JAMES J. LYONS, *MID-ATLANTIC EQUITY CTR., LEGAL RESPONSIBILITY OF EDUCATIONAL AGENCIES SERVING NATIONAL ORIGIN LANGUAGE MINORITY STUDENTS* 23 (1988).

Despite *Lau*'s prominent place in the legal history of language rights in education, it is no longer relevant in a practical sense because it was superseded by the Equal Educational Opportunity Act (EEOA) of 1974.<sup>65</sup> Section 204 of the EEOA is the primary source of LEP rights today. The EEOA mandates, "No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."<sup>66</sup> The statute leaves open for interpretation key concepts like "appropriate action" and "equal participation."

The most important interpretation of the EEOA's protection of language minority students came in the Fifth Circuit case *Castaneda v. Pickard*.<sup>67</sup> In *Castaneda*, the Fifth Circuit developed a three-pronged test to judge whether a school district had taken "appropriate action" under the EEOA. First, the court must consider whether the school district's program is based on sound educational theories or principles.<sup>68</sup> Second, the court must decide whether the actual programs and practices used by the schools "implement effectively the educational theory" that the district has relied on.<sup>69</sup> Third, the court determines whether the program has been shown over time "to produce results indicating that the language barriers confronting students are actually being overcome."<sup>70</sup> The interpretation in *Castaneda* of the EEOA's "appropriate action to overcome language barriers" had a deep impact. It was adopted by many courts and eventually used as a standard by the Department of Education's Office of Civil Rights.<sup>71</sup> The decision also recognized that it was permissible for LEP students to be segregated from other students for part of the school day for English language instruction because a benefit was being accrued by the LEP students.<sup>72</sup> After four decades of litigation and policymaking on the language rights issue, the basic requirement given to states and local school districts is that they must do something to help LEP students overcome the language barrier, but they have great leeway in determining what those programs will be.

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<sup>65</sup> 20 U.S.C. § 1703 (2006).

<sup>66</sup> *Id.*

<sup>67</sup> 648 F.2d 989 (5th Cir. 1981).

<sup>68</sup> *Id.* at 1009.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 1011.

<sup>71</sup> See *Gomez v. Illinois State Bd. of Educ.*, 811 F.2d 1030, 1041-42 (7th Cir. 1987); *Teresa P. v. Berkeley Unified Sch. Dist.*, 724 F. Supp. 698, 712-13 (N.D. Cal. 1989).

<sup>72</sup> *Castaneda*, 648 F.2d at 998.

## II. NORTH CAROLINA PUBLIC SCHOOLS

### A. *Important Aspects of the North Carolina Public School System*

Although the federal government is involved in the regulation of schools through its spending power, education is primarily the domain of the states. The structure of the state educational system and its history are important to the discussion of Latino students in the North Carolina public schools because they explain how policy that affects Latinos and LEP students is created, enforced, and funded, and they highlight avenues for advocacy within the system.

Two structural aspects of the North Carolina public school system are important. In North Carolina, the state government maintains a large role in financing and directing public schools in comparison to the role played by local school districts.<sup>73</sup> North Carolina is ranked tenth in the nation for the contribution that the state government makes to fund public schools.<sup>74</sup> The second notable feature of North Carolina's system is the large school districts.<sup>75</sup> These districts generally include an entire county, encompassing urban centers, suburbs, and rural areas.

As in many states in the 1990s, North Carolina increasingly became interested in accountability and standards. After adopting an initial district-based accountability program in 1990, the state implemented a school-based accountability program in 1997 to commend successful schools and focus attention on unsuccessful ones.<sup>76</sup> This accountability program included widespread testing, monetary incentives for teachers in high-performing schools, and increased scrutiny for low-performing schools.<sup>77</sup> In 1999, the state board of education adopted the Students Accountability Standards, including an exit exam requirement for graduation.<sup>78</sup> The exit exam provision first applied to students in the graduating class of 2003.<sup>79</sup>

### B. *Desegregation in North Carolina*

North Carolina is often viewed, and views itself, as one of the most progressive states in the South. North Carolina's early interest in education

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<sup>73</sup> Clotfelter et al., *supra* note 14, at 71.

<sup>74</sup> NAT'L EDUC. ASS'N, RANKINGS & ESTIMATES 6 tbl.8 (2005), available at [www.nea.org/edstats/images/05rankings-update.pdf](http://www.nea.org/edstats/images/05rankings-update.pdf).

<sup>75</sup> Clotfelter et al., *supra* note 14, at 71.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Amy Stuart Wells & Jennifer Jellison Holme, *No Accountability for Diversity: Standardized Tests and the Demise of Racially Mixed Schools*, in SCHOOL RESEGREGATION, *supra* note 14, at 187, 198 tbl.9.2.

<sup>79</sup> PUBLIC SCHOOLS OF NORTH CAROLINA, EXIT STANDARDS IMPLEMENTATION GUIDE 1 (2005), available at <http://www.ncpublicschools.org/doc/secondary/exitstandardsguidehs.pdf>.

led it to charter the nation's first public university in 1789.<sup>80</sup> Another educational first occurred in North Carolina when the first historically black college in the South, Shaw University, was founded in Raleigh, North Carolina, in 1865.<sup>81</sup> However, the progressive label is only relative within the context of Southern history. After the defeat of the Populism movement in the late nineteenth century, North Carolina, like all Southern states, mandated segregation of white and black children in public schools by state statute.<sup>82</sup> School segregation was part of an entire system of Jim Crow laws that separated white and black North Carolinians in most aspects of public life.

North Carolina's black citizens played a major role in the Civil Rights Movement. Greensboro was the site of the Woolworth sit-ins, Raleigh was the founding place of the Student Non-Violent Coordinating Committee (SNCC), and black parents in Charlotte fought for and won true school integration rather than verbal promises of desegregation. Although the white reaction to black civil rights demands was markedly more moderated in North Carolina than in the Deep South, the state's progressivism during this period was often an idealized image undermined by stalling practices, more talk than action, and a general inertia that helped maintain the segregated status quo.<sup>83</sup> For example, Greensboro, North Carolina, made famous in civil rights history as the birthplace of the sit-in movement, was the first school district in the South to announce compliance after the ruling in *Brown* but one of the last to actually desegregate.<sup>84</sup>

After *Brown*, the North Carolina legislature effectively stalled desegregation, first in 1955 by passing the Pupil Assignment Act that set up elaborate administrative procedures to block black families from transferring their children to white schools.<sup>85</sup> Then, in 1956, the legislature strengthened its commitment to maintaining segregation by passing the Pearsall Plan, a state constitutional amendment that transferred authority over student assignment from the state to local districts and allowed for publicly-funded vouchers to be given to students who refused to attend an integrated school if their district chose to desegregate.<sup>86</sup> By delegating the responsibility to districts, the state forced black litigants and the NAACP to bring cases against each district rather than centralizing their claims against the state as a whole. The passing of the *Brown* mandate on to local school districts led to only token desegregation in some cities as they tried to avoid litigation.<sup>87</sup> The actions of the white power structure in North Carolina brought praise from a school official in Little Rock, Arkansas, who stated, "You North Carolinians have

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<sup>80</sup> Welcome to the University of North Carolina, [www.northcarolina.edu](http://www.northcarolina.edu) (last visited Oct. 28, 2007).

<sup>81</sup> Shaw University, <http://www.shawuniversity.edu> (last visited Oct. 28, 2007).

<sup>82</sup> CHAFE, *supra* note 12, at 14–17.

<sup>83</sup> *See id.*

<sup>84</sup> *Id.* at 6.

<sup>85</sup> *Id.* at 50.

<sup>86</sup> *Id.* at 53.

<sup>87</sup> *Id.* at 65.

devised one of the cleverest techniques of perpetuating segregation that we have seen.”<sup>88</sup>

It was not until the early 1970s that significant integration of schools occurred in North Carolina. Although the Civil Rights Act of 1964 tied federal funding to school desegregation, the lengthiness of litigation, token integration, and the presence of residential segregation allowed segregation to be perpetuated into the 1960s. Although the Pearsall Plan was declared unconstitutional in 1966,<sup>89</sup> the biggest blow to the stalling tactics occurred in 1971, when the U.S. Supreme Court decided against a school district in *Swann v. Charlotte-Mecklenburg Board of Education*.<sup>90</sup> After much debate and revision of its opinion, the Court unanimously upheld a district court’s order to desegregate the Charlotte-Mecklenburg public schools by busing students from their racially segregated neighborhoods to achieve racially balanced schools.<sup>91</sup>

Throughout the 1970s and 1980s, North Carolina school children were bused across the large school districts in an effort to finally achieve integration. The three largest school districts, Charlotte-Mecklenburg, Wake County, and Greensboro, were all under court-ordered plans that involved busing for desegregation. Court-ordered busing in the major metropolitan areas had a huge impact on the racial makeup of schools throughout North Carolina. By 1980, North Carolina had the highest level of school integration in the South and one of the highest in the nation.<sup>92</sup>

The federal district courts—which had been assigned the role of desegregators in *Brown II*<sup>93</sup> and eventually became so influential after the *Swann* decision—started to release their hold on school districts and their assignment policies in the 1990s. In 1991, the Supreme Court affirmed in *Board of Education of Oklahoma Public Schools v. Dowell*<sup>94</sup> a district court decision to lift its desegregation decree because the school district, in the court’s view, no longer showed vestiges of past segregation and represented a unitary rather than a dual school system.<sup>95</sup> *Dowell* paved the way for other district courts to lift their desegregation orders. A year later, in *Freeman v. Pitts*,<sup>96</sup> the Court further encouraged the federal courts to end their participa-

<sup>88</sup> *Id.* at 70.

<sup>89</sup> *Hawkins v. North Carolina Bd. of Educ.*, 11 Race Rel. Law Rep. 745 (W.D.N.C. 1966).

<sup>90</sup> *Swann v. Charlotte-Mecklenburg*, 402 U.S. 1 (1971).

<sup>91</sup> *Id.* at 32.

<sup>92</sup> Clotfelter et al., *supra* note 14, at 70.

<sup>93</sup> *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

<sup>94</sup> 498 U.S. 237 (1991).

<sup>95</sup> *Id.* at 243, 251. The courts have used the term unitary status to describe school districts that have transitioned away from a racially segregated system. To judge whether a district has sufficiently rid itself of past discrimination and has achieved or has partially achieved unitary status, courts consider whether various aspects of the school system are racially identifiable. In *Green v. County School Board*, the U.S. Supreme Court outlined a set of factors to weigh in making that judgment. The *Green* factors are: 1) student assignment, 2) faculty and staff assignment, 3) transportation, 4) extracurricular activities, and 5) facilities. *Green v. County Sch. Bd.*, 391 U.S. 430 (1968).

<sup>96</sup> *Freeman v. Pitts*, 503 U.S. 467 (1992).

tion in school desegregation plans by permitting district courts to incrementally lift desegregation orders when a district had been deemed to achieve partial unitary status. Together, *Dowell* and *Freeman* encouraged a return of power to the school districts and a decrease in the politically unpopular busing programs.

As in many parts of the country where desegregation orders were in place, North Carolina saw a movement to lift the orders and a rethinking of student assignment plans. As part of a case challenging a racial quota system for magnet programs in Charlotte-Mecklenburg, District Court Judge Robert Potter reactivated the *Swann* case and declared the district unitary in September 1999 over the objection of the school district.<sup>97</sup> The Charlotte-Mecklenburg public school district eventually ended its busing program in 2001 and implemented a school-choice plan that guaranteed admission to neighborhood schools.<sup>98</sup> Under the new plan, most parents chose to send their children to neighborhood schools. Due to this choice and to continued residential segregation, the Charlotte-Mecklenburg Schools have experienced resegregation.<sup>99</sup>

Other North Carolina schools districts have responded to the lifting of judicial oversight in a variety of ways. After implementing a court-ordered busing program in 1971, the Winston-Salem/Forsyth County Schools were declared unitary just three years later but maintained the desegregation program. As desegregation decrees were lifted throughout the South, Winston-Salem/Forsyth, the fifth largest school district and the district with the largest percentage of Latino students, adopted a controlled-choice student assignment plan that has led to increased levels of segregation.<sup>100</sup>

In contrast to the other large districts in the state, Wake County, the second largest school district in North Carolina and the one that includes the state capital, Raleigh, distinguished itself by implementing a school assignment plan based on socioeconomic balancing.<sup>101</sup> This system has allowed Wake County schools to maintain race balancing at the school-wide level, despite the lifting of its desegregation order.<sup>102</sup> Although not all the districts

<sup>97</sup> *Capacchione v. Charlotte-Mecklenburg Schools*, 57 F. Supp. 2d 228 (W.D.N.C. 1999).

<sup>98</sup> STEPHEN SAMUEL SMITH, *BOOM FOR WHOM?: EDUCATION, DESEGREGATION, AND DEVELOPMENT IN CHARLOTTE 197* (2004).

<sup>99</sup> Roslyn Arlin Mickelson, *The Incomplete Desegregation of the Charlotte-Mecklenburg Schools and Its Consequences, 1971–2004*, in *SCHOOL RESEGREGATION*, *supra* note 14, at 87. It should be noted that Charlotte-Mecklenburg and the rest of North Carolina is actually experiencing a decrease in residential segregation even while undergoing resegregation in schools. See Erica Frankenberg, *The Impact of School Segregation on Residential Housing Patterns: Mobile, Alabama, and Charlotte, North Carolina*, in *SCHOOL RESEGREGATION*, *supra* note 14, at 164, 174-78; Clotfelter et al., *supra* note 14, at 80.

<sup>100</sup> Clotfelter et al., *supra* note 14, at 80.

<sup>101</sup> Wake County Public School System, Student Assignment Process, <http://www.wcpss.net/growth-management/student-assign-process.html> (last visited Oct. 28, 2007).

<sup>102</sup> Clotfelter et al., *supra* note 14, at 77. It is interesting to note that in Guilford County, the third largest school district and the district where Greensboro is located, segregation has actually decreased. It is the only significant district in the state where a decrease has occurred. However, it is by far the most segregated district in the state at the school-wide level. Unlike other county-wide districts traditional to North Carolina, Guilford County was home to three

in North Carolina were under court desegregation orders, as the original decision in *Swann* had encouraged desegregation in districts even without decrees, the lifting of the orders throughout the country has led districts that were never under court orders to rethink their student assignment policies, furthering resegregation.<sup>103</sup>

### C. *Current Situation of Segregation in North Carolina*

School segregation levels are still modest in North Carolina but are on the rise throughout the state.<sup>104</sup> Two forces have worked to increase segregation: resegregation at the school level through changing assignment plans and classroom-level segregation within schools due to tracking. Charles T. Clotfelter, Helen F. Ladd, and Jacob L. Vigdor studied data on school racial composition from across North Carolina to develop an understanding of the current situation of segregation in the state's schools and classrooms. Clotfelter, Ladd, and Vigdor found that older students in North Carolina attend more racially balanced schools than elementary school students but sit in more segregated classrooms.<sup>105</sup> After disproving racial attitudes as a contributor to the problem, the researchers focused on two possible explanations for the resegregation occurring in the state: 1) relaxed judicial oversight, and 2) the influx of Latinos.<sup>106</sup> As discussed above, the lifting of judicial oversight of school district assignment policy has had an effect on segregation levels as many districts turn to a more politically appealing neighborhood schools model. However, the researchers speculate that the influx of Latinos will fuel resegregation. Their data shows increases in first-grade classroom-level segregation between whites and Latinos across the state, with the largest increases in the districts with large metropolitan communities.<sup>107</sup> This Latino-white segregation has grown tremendously in Charlotte-Mecklenburg, and in some districts has significantly outpaced the resegregation of blacks and whites.<sup>108</sup>

## III. LATINOS IN NORTH CAROLINA PUBLIC SCHOOLS

The respective histories of Latino educational rights and North Carolina's struggle with educational civil rights have not crossed until recently. In the 1990s, North Carolina experienced the highest Latino population growth rate of any state.<sup>109</sup> Latino immigrants started moving to North Caro-

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districts for most of the late twentieth century. The districts were merged in the 1990s creating a somewhat more complex situation regarding school assignment and desegregation issues than has been experienced in other large districts. *Id.*

<sup>103</sup> *Id.* at 80.

<sup>104</sup> *Id.* at 75.

<sup>105</sup> *Id.* at 76.

<sup>106</sup> *Id.* at 79.

<sup>107</sup> *Id.* at 83 tbl.3.4.

<sup>108</sup> *Id.*

<sup>109</sup> KOCHHAR ET AL., *supra* note 6.

lina to fill jobs in the manufacturing, meat processing, agriculture, service, and construction sectors as the state's economy grew during the decade. Most of the Latino families in North Carolina have emigrated from abroad, although a large percentage stopped in traditional immigrant gateway cities before arriving.<sup>110</sup> Although many of the current Latino students are U.S. citizens, often members of their families are of mixed immigration status and a significant number of parents, siblings, or close relatives are undocumented. In fact, 75.9% of Latinos who immigrated to North Carolina between 1995 and 2004 were undocumented.<sup>111</sup>

Today, one out of every six children born in North Carolina is Latino.<sup>112</sup> The number of Latino families that have moved to North Carolina and the number of Latino children being born in North Carolina make schooling one of the most significant issues facing this growing population. Because most Latino families in North Carolina are comprised of Spanish-speaking immigrants, English language issues are a primary concern when thinking about Latino education in the state, but many other challenges face Latino students and the North Carolina public schools charged with educating them.

#### A. *Latinos and Language in North Carolina Schools*

In discussing the litigation that has occurred around Latino education, the seeming inconsistency between the desegregation cases and the bilingual education cases highlights the special educational issues facing Latinos. Some of these issues are also faced by African Americans and other minorities, but many are unique to Latinos and underline the importance of taking Latinos into consideration as a separate group and not just as part of a grouping of all minorities. As members of both an ethnic minority and a language minority, the proper accommodation of Latino students can challenge many aspects of a school district's policy, from desegregation to standards achievement.

The foremost issue facing Latinos in North Carolina and the South is language. Ninety-two percent of Latinos and ninety-six percent of foreign-born Latinos, the largest percentage of any identifiable group, believe that teaching English to children of immigrant families is an important educational goal.<sup>113</sup> Although not all Latino students enter school with English deficiencies, in 2003 over half of the Latino students in North Carolina were

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<sup>110</sup> KASARDA & JOHNSON, *supra* note 9, at 2. Of North Carolina's Latinos, 21.6 percent were born in the state. *Id.*

<sup>111</sup> *Id.* at 9.

<sup>112</sup> North Carolina State Center for Health Statistics, North Carolina Live Birth Data 2005, *supra* note 22.

<sup>113</sup> PEW HISPANIC CTR./KAISER FAMILY FOUND., NATIONAL SURVEY OF LATINOS: EDUCATION 11 (2004), available at <http://pewhispanic.org/files/reports/25.pdf> [hereinafter NATIONAL SURVEY OF LATINOS].

categorized as limited English proficient.<sup>114</sup> The variation of ESL programs implemented across the state and state policy for LEP students have a huge impact on the education of Latinos in North Carolina.

Prior to the mid-1990s, ESL in North Carolina was a small program, mainly serving refugee and immigrant populations from Vietnam and the former Soviet block. At first, the North Carolina State Legislature had a difficult time appropriately responding to the increased demand for ESL programs. For four consecutive years in the 1990s, the legislature refused requests for state money to help fund ESL programs, even as the Latino immigrant population in the state soared.<sup>115</sup> In 1998, state lawmakers finally allocated \$5 million of state funds for ESL.<sup>116</sup> Since then, the number of Spanish-speaking LEP students entering North Carolina schools has continued to grow. Between 2002 and 2005, the LEP student population grew sixty-three percent, from approximately 55,000<sup>117</sup> students in 2002 to 83,627 students in 2005.<sup>118</sup> An overwhelming majority of those LEP students were Spanish speakers. In 2002, Spanish speakers made up over eighty-three percent of the LEP student population.<sup>119</sup> Native Spanish speakers numbered 45,478 while the next largest category, Hmong speakers, numbered only 2733.<sup>120</sup> In compliance with No Child Left Behind's Section 3113 of Title III, North Carolina developed ESL standards for the first time in 2003.<sup>121</sup> The assessments of LEP students' English language proficiency are given annually and are based on the standards laid out in the state's Standard Course of Study.<sup>122</sup>

North Carolina, as required by federal law, has a statewide policy to identify LEP students. The process of identification begins with a home language survey given to each child at the time of his or her enrollment.<sup>123</sup> If an answer to any of the survey questions is "a language other than English," then the student must take the IDEA English Language Proficiency Test

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<sup>114</sup> In 2003, there were 88,355 Latino students enrolled in North Carolina Public Schools, North Carolina Public Schools, 2003-04 Facts & Figures, <http://www.ncpublicschools.org/docs/fbs/resources/data/factsfigures/2003-04figures.pdf> (last visited Nov. 19, 2007), while 45,478 Spanish-speaking students were categorized as LEP, North Carolina Public Schools, English Language Development: Standard Course of Study and Grade Level Competencies K-12 9 (2003), available at <http://www.ncpublicschools.org/docs/curriculum/esl/scos/eld.pdf> [hereinafter English Language Development: Standard Course of Study].

<sup>115</sup> Maguire, *supra* note 11.

<sup>116</sup> *Id.*

<sup>117</sup> English Language Development: Standard Course of Study, *supra* note 114, at 9.

<sup>118</sup> Dep't of Public Instruction, North Carolina State Board of Education, English as a Second Language, [http://community.learnnc.org/dpi/esl/archives/2005/06/ncs\\_lep\\_numbers.php](http://community.learnnc.org/dpi/esl/archives/2005/06/ncs_lep_numbers.php) (last visited Jan. 15, 2008).

<sup>119</sup> English Language Development: Standard Course of Study, *supra* note 114, at 9.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 7.

<sup>122</sup> *Id.*

<sup>123</sup> N.C. PUB. SCS., IDEA ENGLISH LANGUAGE PROFICIENCY TEST: NORTH CAROLINA POLICY AND PROCEDURAL INFORMATION, INITIAL TESTING 2007-2008 2, available at <http://www.ncpublicschools.org/docs/accountability/policyoperations/iptpolicyprocedureinitial2007.pdf>.

(IPT).<sup>124</sup> Administrators of the test must be properly trained, and the IPT must be given at the time of enrollment and then every school year in the spring.<sup>125</sup> When a student scores “Superior” on all parts of the IPT, he or she can no longer be classified as LEP for funding and classification headcount purposes.<sup>126</sup> When a student no longer has LEP status, a school can decide whether the student should still receive ESL services.<sup>127</sup> This discretion may be problematic because paternalistic or possibly even racist reasons might be employed to hold Latino students in ESL tracked classes and deny them the opportunity to experience the full mainstream curriculum; however, such impulses might be countered by the fact that the schools would no longer receive special funding for that student.

The ESL programs can take many forms. Broad categories of programs include bilingual-bicultural education, transitional bilingual education, mainstreaming with ESL pull-outs, ESL classes with sheltered subject matter courses, dual language programs, and structured immersion. Under federal law, schools must address the language deficiencies of non-native English speakers, but the federal government is agnostic as to the shape that those programs take.<sup>128</sup> North Carolina policy also leaves it up to the local school district to decide what type of program fits best within its system.<sup>129</sup> This flexibility has resulted in a variety of programs for LEP students across school districts in North Carolina. The nature of the language barrier for many Latino students means the set-up of a district’s ESL program has a great impact on what classroom or school a Spanish-speaking student ends up in and how much interaction he or she has with students from other backgrounds. The type of program a school district chooses can also affect the levels of classroom segregation that LEP students experience, which can be correlated with racial segregation, since in North Carolina LEP status is highly correlated with ethnic identity.

The category of bilingual education includes a wide variety of programs. Bilingual-bicultural programs have been favored traditionally by Latino advocacy organizations and were the focus of much Latino education litigation in the 1970s and 1980s.<sup>130</sup> Bilingual-bicultural education programs, in addition to promoting English proficiency, seek to build literacy in a student’s native language and respect the student’s heritage.<sup>131</sup> The programs are often favored by advocacy groups because they allow LEP stu-

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<sup>124</sup> Understanding the IDEA English Language Proficiency Test (IPT), <http://www.ncpublicschools.org/docs/accountability/testing/briefs/iptassessmentbrief-finalaug2007.pdf> (last visited Jan. 12, 2008).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Equal Educational Opportunity Act, 20 U.S.C. § 1703 (2006).

<sup>129</sup> English Language Development: Standard Course of Study, *supra* note 114, at 10-11.

<sup>130</sup> KENNETH J. MEIER & JOSEPH STEWART, JR., *THE POLITICS OF HISPANIC EDUCATION: UN PASO PA’LANTE Y DOS PA’TRAS* 76-77 (1991).

<sup>131</sup> Rachel F. Moran, *Bilingual Education as a Status Conflict*, 75 CAL. L. REV. 321, 321 (1987).

dents simultaneously to progress in subject matter areas, learn English, and retain their native language abilities. Another form of bilingual education is transitional bilingual education. Transitional bilingual education offers subject matter instruction in the native language until a student reaches proficiency in English so that he or she can move into the regular English language classes.<sup>132</sup> These programs teach subject matter classes in an understandable language for the children so that they can progress in all subjects while learning English in a separate course.

Although bilingual programs offer major benefits and still retain favor among Latino advocates, they present major problems concerning issues of segregation, cost, and feasibility. In bilingual programs, segregation is inescapable because only students whose native language is the language of instruction can be in those classrooms. So, Spanish speakers are isolated not only from native English speakers but from other LEP students who would need to have their own separate classrooms. The cost for bilingual programs can be troubling because different materials and teachers are needed for those classrooms. These costs may especially trouble taxpayers who already have misgivings about the presence of immigrant communities. Although bilingual education might be a practical solution in traditional Latino states like Texas and California, where there are bilingual teachers and administrators who can administer these programs, finding the personnel to properly staff these classrooms in a non-traditional setting like North Carolina would most likely not be feasible.

Most school districts in North Carolina use some sort of ESL program. Often the type of ESL program differs according to grade level. In the Charlotte-Mecklenburg school district, elementary level LEP students are placed in mainstream classrooms and are pulled out for a period of time each day to attend ESL classes.<sup>133</sup> Under this system, the students are not segregated from native English speakers, but their participation in the mainstream curriculum is suspended for at least part of the day. This method can minimize the cost to the school district because it only has to pay for a few ESL specialty teachers, rather than an entire bilingual staff. However, this pull-out method does not ensure that the children maintain the benefits of their native language.

At the middle and high school levels, Charlotte-Mecklenburg provides sheltered content courses in addition to ESL instruction.<sup>134</sup> This method prevents older students from being completely lost in a mainstream classroom, where the demanding curriculum and lack of language comprehension could leave them isolated. However, it exacerbates the classroom-level segregation, as the Latino-dominated LEP demographic in North Carolina would mean these classes would most likely be entirely Latino. Classroom-level segregation may also be created by a specific type of tracking if a student

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<sup>132</sup> *Id.* at 321-22.

<sup>133</sup> Charlotte-Mecklenburg Schools, English as a Second Language-ESL, <http://www.cms.k12.nc.us/departments/esl/esl.asp> (last visited Nov. 15, 2007).

<sup>134</sup> *Id.*

fails to be released from the ESL track. Dr. María Teresa Unger Palmer, the first Latino/a to serve on the North Carolina Board of Education, highlighted the problems of ESL in a 2006 article. She described how a school counselor guided Latinos into classes the counselor deemed welcoming to them; however, this limited their opportunities to take college preparatory classes.<sup>135</sup> Dr. Palmer also relayed the story of one Latina student who followed her counselor's suggestion, learned English, and graduated from high school through the ESL track, only to discover she had not completed the required classes to pursue her dream of a health-related college degree.<sup>136</sup>

Some districts in the state have adopted more progressive or alternative programs to deal with the challenge of LEP students. In a structured immersion program, the subject matter is taught in English, but the teacher is bilingual and can therefore help the LEP students with the curriculum.<sup>137</sup> Structured immersion can have an integrating effect because native English speakers can be in the same classrooms as LEP students. In Johnston County, North Carolina, a variation of structured immersion, labeled "structured inclusion," is used at the elementary school level.<sup>138</sup> This structured inclusion model is considered to be the preferred instruction method in the state because it encourages elementary school LEP students to keep up with grade-level material, but it has not been replicated in many other districts.<sup>139</sup> The Johnston County program educates LEP students alongside hand-picked native English speakers where an ideal class makeup would be one-third LEP students, one-third gifted native English-speaking students, and one-third mainstream English-speaking students.<sup>140</sup> The native English speakers who participate in the program do so with their parents' consent.<sup>141</sup> A bilingual teacher teaches the entire classroom for part of the day and gives an hour of specialized English language instruction to the LEP students.<sup>142</sup> In addition to the bilingual teacher, bilingual teacher's aides are present in the classroom throughout the day to assist the LEP students.<sup>143</sup>

Another progressive program is a dual language or "two-way" program. This type of program addresses the language learning needs of LEP students while fostering integration and retention of their native language. Dual language programs group language minority students from one language background in a classroom with native English-speaking students.<sup>144</sup> Instruction is given in both languages, and all the students gain proficiency

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<sup>135</sup> María Teresa Unger Palmer, *Desperate to Learn: Latino Youth in NC Schools*, NC CROSSROADS, June 2006, at 7, available at <http://www.nchumanities.org/publications/crossroads/xrd0606.pdf>.

<sup>136</sup> *Id.*

<sup>137</sup> Moran, *supra* note 131, at 322.

<sup>138</sup> Maguire, *supra* note 11.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> English Language Development: Standard Course of Study, *supra* note 114, at 11.

in both languages.<sup>145</sup> Research has shown that both LEP and native English-speaking students who participate in these programs generally perform better on standardized tests later on in their educational careers, in addition to gaining the benefit of being bilingual.<sup>146</sup> Chapel Hill-Carrboro Schools, often considered the best school district in North Carolina, introduced a dual language program at two elementary schools in 2002. The program at one elementary school caters to Spanish speakers while the other dual language program features Chinese Mandarin. By their very nature, dual language programs promote classroom-level integration, but they most likely would concentrate many Spanish speakers into a small number of schools. There are eleven dual language programs in North Carolina, and the state funded the creation of a statewide curriculum for these programs in 2006.<sup>147</sup>

*B. Beyond ESL: Educational Issues Facing Latinos in North Carolina and the Southeast*

The law mandates that schools address the language needs of Spanish-speaking Latino students, but issues beyond language abilities affect Latino students' ability to learn. Even if a school district has implemented the most appropriate language program for the circumstances it faces, many other educational barriers challenge Latino students from immigrant families, especially in the Southeast. These barriers arise from the convergence of culture and language differences, existing school policy, and non-educational policy that impacts immigrant families.<sup>148</sup>

Many Latino immigrants have a limited understanding of the U.S. educational system when they arrive. Aspects of the U.S. educational system that most citizens intuitively understand from being exposed to the system as children and living within the system, such as attendance expectations, parent-school interaction, tracking and segregation concerns, and education rights, are foreign concepts to Latin American immigrants. Moreover, in the Southeast, the problem is exacerbated because the Latino community has formed so recently that newcomer parents lack access to U.S.-born Latinos who might be able to model through their behavior or explain in a language newcomers understand how to navigate the system. For example, in a two-year study of Latino immigrant families in Georgia and the systems that serve them, researchers found that school officials saw truancy as a problem among Latinos, and Latino parents admitted that when they first arrived they

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<sup>145</sup> *Id.*

<sup>146</sup> Cara Solomon, *New Accent on Learning Two Languages*, SEATTLE TIMES, Apr. 1, 2003, at B1.

<sup>147</sup> Public Schools of North Carolina, Curriculum & School Reform: Draft K-5 Dual Language/Immersion Curriculum, [http://community.learnnc.org/dpi/secondlang/archives/2006/07/draft\\_k5\\_dual\\_1\\_1.php#more](http://community.learnnc.org/dpi/secondlang/archives/2006/07/draft_k5_dual_1_1.php#more) (last visited Nov. 22, 2007).

<sup>148</sup> See Stephanie A. Bohon et al., *Educational Barriers for New Latinos in Georgia*, 4 J. LATINOS & EDUC. 43, 49 (2005).

did not understand the emphasis schools placed on attendance.<sup>149</sup> The immigrant parents are simply reflecting their experience in Latin America where school attendance, especially among the working class, can be seasonal or secondary to work and family obligations. This misunderstanding represents only a small part of the enormous communication problem faced by schools and non-English-speaking parents.

Another barrier to Latino education achievement in the Southeast is the limited exposure that many Latino parents and some of the students who immigrated have with education in general. Because many of the Latino immigrants settling in non-traditional areas like North Carolina are from the lower classes in their home country, they tend to have low levels of educational attainment. In 2005, 34.4% of the foreign-born Latino population had less than a ninth grade education.<sup>150</sup> Latino immigrant parents with limited education are restricted in the assistance and guidance they can provide their children. Although nationwide, Latino parents are more likely than African Americans and far more likely than whites to report that it is “very important” that their children receive a college education,<sup>151</sup> parents with limited exposure to education and a limited understanding of its financial benefits might emphasize other priorities for their children. In the Georgia study, researchers noted stories of high-achieving Latina students who dropped out of school to fulfill family obligations such as caring for younger siblings and of young Latino men leaving in order to help support their families.<sup>152</sup> A 2006 study of Latino students in North Carolina revealed that the level of acculturation of students, measured by their years of residency in the United States and language preferences, correlated with their interest in attending college; students with low acculturation levels were more likely to aspire simply to do well in school.<sup>153</sup>

The issue of language prevents schools from interacting with Spanish-speaking parents and discourages parental involvement to the detriment of the students. In the U.S. school system, parental involvement is key, both because many schools set policies that assume parental involvement and because aspects of a number of education laws rely on a parent’s ability to assert his or her rights. Language concerns undermine the traditional notification systems used by many schools, whether it is a note sent home in English or a phone call made by an English-speaking teacher to Spanish-speaking parents. Children whose conduct may include truancy or other disciplinary concerns end up being the translators for their parents and have strong incentives to alter the messages,<sup>154</sup> especially considering the strict-

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<sup>149</sup> *Id.*

<sup>150</sup> HISPANICS AT MID-DECADE, *supra* note 2, at 19 tbl.19.

<sup>151</sup> NATIONAL SURVEY OF LATINOS, *supra* note 113, at 10.

<sup>152</sup> Bohon et al., *supra* note 148, at 53.

<sup>153</sup> Valencia & Johnson, *supra* note 8, at 362.

<sup>154</sup> Bohon et al., *supra* note 148, at 49.

ness of many Latino households.<sup>155</sup> This interruption in communication between teacher and parent creates a major barrier.

Language also plays a significant role in preventing Latino parents from engaging in school activities. In the Georgia study, researchers found that Spanish-speaking Latino parents, although very interested in their children's education, felt that communicating with teachers and administrators was difficult and embarrassing because of their language limitations.<sup>156</sup> Those findings support the results in other studies that Latino parents are or want to be highly involved in their children's schools.<sup>157</sup> Although Latinos nationwide are more likely than African American or white parents to report that they have attended PTA meetings,<sup>158</sup> the Georgia study found that Latino parents who tried to get involved in the larger school community felt isolated and embarrassed at the meetings because of their limited English.<sup>159</sup>

The demographics of the Latino community in North Carolina mean that immigration policy touches all aspects of the lives of most Latino families. Although twenty-one percent of Latinos are native-born North Carolinians, most of the parents of those native-born Latinos have migrated from another part of the United States or from abroad. Seventy-six percent of Latinos who immigrated to North Carolina between the mid-1990s and 2004 are undocumented, making a conservative estimate that forty-five percent of all Latinos in North Carolina are undocumented today.<sup>160</sup> Parents without legal immigration status raise their families in an unnerving environment where they can never feel totally comfortable and secure. They may feel uncomfortable pursuing their children's educational rights to the fullest, fall victim to intimidation, or fear bringing attention to themselves. This unsettling situation only adds to the access barriers that many Latino parents feel stand between them and their children's schools.

Although a significant number of Latino students in North Carolina's public schools are citizens by virtue of their U.S. birth, some, especially those currently in high school, are undocumented, thus limiting their future opportunities. Each year, 65,000 students without legal immigration status graduate from U.S. high schools.<sup>161</sup> Their ability to attend college is severely limited because they are generally barred from qualifying for in-state tuition, cannot receive government loans or federal financial aid, and cannot legally work to pay their way through school. These bars to higher education for

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<sup>155</sup> See Sofia Villenas, *Reinventing Educación in New Latino Communities: Pedagogies of Change and Continuity in North Carolina*, in EDUCATION IN THE NEW LATINO DIASPORA, *supra* note 5, at 17 (discussing the strictness of Latino parents and the primacy of moral education in Latino households in North Carolina).

<sup>156</sup> Bohon et al., *supra* note 148, at 50.

<sup>157</sup> Valencia & Johnson, *supra* note 8, at 361; see NATIONAL SURVEY OF LATINOS, *supra* note 113.

<sup>158</sup> NATIONAL SURVEY OF LATINOS, *supra* note 113, at chart 8.

<sup>159</sup> *Id.*

<sup>160</sup> KASARDA & JOHNSON, *supra* note 9, at 9.

<sup>161</sup> JEFFREY S. PASSEL, URBAN INST., FURTHER DEMOGRAPHIC INFORMATION RELATING TO THE DREAM ACT 1 (2003), available at [http://www.nilc.org/immigrationpolicy/DREAM/DREAM\\_Demographics.pdf](http://www.nilc.org/immigrationpolicy/DREAM/DREAM_Demographics.pdf).

undocumented Latino students have been addressed in the states with the largest Latino populations through legislation giving in-state tuition to any student who graduates from a high school within the state, but North Carolina has not alleviated the situation of its undocumented high school graduates.<sup>162</sup> The DREAM Act, proposed federal legislation that would eliminate any federal immigration law obstacles to undocumented graduates' receipt of in-state tuition and provide a pathway to legalization for these students, has stalled in Congress for years.<sup>163</sup> The DREAM Act has also been included in some of the recent comprehensive immigration reform plans but still remains only an aspiration. The limitations faced by undocumented immigrant students are not always well understood by their U.S. citizen teachers who are used to operating in a system where the ultimate outcome is attending college. The student subjects of the Georgia study referred to the end goal of college pushed by their teachers as the "Big Lie" because for so many of them that opportunity is not available.<sup>164</sup>

### C. *Latinos and Achievement in North Carolina*

Educational achievement can be measured in many ways, but in today's world of education policy accountability, standards and testing are the most salient manifestations of achievement. The standards and accountability movement has interesting implications for Latino students in North Carolina. The primacy of language issues challenges the conventional testing model, while cultural issues affect dropout rates in ways that do not necessarily correlate to Latino students' abilities to meet promotion standards.

LEP status makes a difference in testing both for the individual LEP student and for the schools. Under federal law, states must include LEP students in large-scale assessments to measure system accountability, but it is up to the state whether the individual LEP student is subject to the consequences usually involved in high-stakes testing, such as not being promoted or not graduating.<sup>165</sup> The No Child Left Behind Act (NCLB) includes LEP students as one of the disaggregated groups for which schools must show adequate yearly progress. Yet it is a strange category in which to demand progress. Unlike other disaggregated groups, which are defined by immutable characteristics like race and most disabilities, individual LEP students will hopefully move out of that status at some point, and the LEP ranks, by definition, will always be filled with students who cannot understand the

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<sup>162</sup> CARL KRUGER, EDUC. COMM'N OF THE STATES, IN-STATE TUITION FOR UNDOCUMENTED IMMIGRANTS (2006), <http://www.ecs.org/clearinghouse/61/00/6100.htm> (last visited Mar. 6, 2008).

<sup>163</sup> Development, Relief, & Education for Alien Minors Act of 2005, S. 2075, 109th Cong. § 2 (2005); Student Adjustment Act of 2003, H.R. 1684, 108th Cong. (2003).

<sup>164</sup> Bohon et al., *supra* note 148, at 55.

<sup>165</sup> Jay P. Heubert, *High-Stakes Testing, Nationally and in the South: Disparate Impact, Opportunity to Learn, and Current Legal Protections*, in SCHOOL RESEGREGATION, *supra* note 14, at 212, 215.

language in which most of the testing occurs.<sup>166</sup> NCLB has, therefore, provided for some accommodations for the LEP grouping regarding testing,<sup>167</sup> and North Carolina has adopted nearly all of them.

North Carolina policy permits alternative assessments and procedural accommodations that can help native Spanish-speaking students (and their schools) in the high-stakes testing process. In accordance with NCLB, LEP students who score “below intermediate high” in reading on the state IPT and who have been enrolled in U.S. schools for less than two years can take the state’s alternative assessment, the North Carolina Checklist of Academic Standards (NCCLAS), instead of the standard end-of-course test; however, this decision is made on an individual basis.<sup>168</sup>

Beyond the mandates of federal law, North Carolina adopted promotion standards in April 1999 that were defined by testing. There are four gateway tests that a student must pass in his or her educational progression. For LEP students, waivers are available in place of passing the test, but waivers can be granted for no more than two consecutive gateways.<sup>169</sup> The request for a waiver can be made by a teacher, administrator, or parent.<sup>170</sup> This variety of people is important because many parents of LEP students who themselves most likely have limited English language ability and limited understanding of the system would be unlikely to make the waiver request. To be promoted after receiving a waiver, documentation must be submitted that shows: 1) the student’s limited English proficiency is the reason for the student’s inability to test at grade level, and 2) the student is making adequate progress. The final gateway is an exit exam that students must pass to graduate from a North Carolina public high school. The exam was first given to students set to graduate in 2003, and a new exit exam will be administered to students entering the ninth grade in the 2006–2007 school year. The same waiver procedure is available for students on the exit exam as in the general promotion process. In addition to the alternative assessments, school districts must provide LEP students with focused intervention until they meet the state’s promotion standards and graduation requirements up to age twenty-one, including a personalized education plan (PEP) for each student.<sup>171</sup>

Latino students in North Carolina trail white students in testing above grade level in both reading and math; 73.3% of Latinos test at or above grade level in reading, compared to 91.2% of whites, and 81.9% of Latinos

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<sup>166</sup> LAURA BATT ET AL., THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., POLICY BRIEF: LIMITED ENGLISH PROFICIENT STUDENTS: INCREASED ACCOUNTABILITY UNDER NCLB 2 (2005), available at [http://www.civilrightsproject.ucla.edu/research/esea/LEP\\_Policy\\_Brief.pdf](http://www.civilrightsproject.ucla.edu/research/esea/LEP_Policy_Brief.pdf).

<sup>167</sup> *Id.* at 3–4.

<sup>168</sup> 16 N.C. ADMIN. CODE 6G.0312 (2007).

<sup>169</sup> 16 N.C. ADMIN. CODE 6D.0507(1)(a) (2007).

<sup>170</sup> 16 N.C. ADMIN. CODE 6D.0507(1)(b) (2007).

<sup>171</sup> 16 N.C. ADMIN. CODE 6D.0507(3) (2007).

test at or above grade level in math, compared to 93% of whites.<sup>172</sup> Although Latinos also fall slightly behind African Americans on the reading tests, with 74.7% of African Americans testing at or above grade level, they outperform African Americans in testing at or above grade level in math by more than four percentage points.<sup>173</sup> LEP students, most of whom are Latino, unsurprisingly fall behind the general population in achieving grade level for math and reading.<sup>174</sup> Although only slightly over half of LEP students achieve grade level in reading, 71.7% of LEP students tested at or above grade level in math in 2004–2005, falling only a few percentage points behind African Americans, who are primarily native English speakers.<sup>175</sup>

A recent study by Duke University researchers reveals a surprising reality about these numbers and Latino achievement in North Carolina. Despite all the barriers—language and otherwise—faced by Latino students in North Carolina, research that tracked the individual student testing shows that Latino students are making continual progress.<sup>176</sup> Although they start out at a disadvantage to their white classmates, Latino students steadily close the gap as they move through the North Carolina public school system.<sup>177</sup> If the data is adjusted to account for their parents' low educational attainment and their low socioeconomic status, Latino students are actually outperforming whites by the time they reach sixth grade.<sup>178</sup>

Although the Duke research shows a surprising and encouraging aspect of Latino achievement in North Carolina, another achievement marker, the Latino dropout rate, exhibits a dimmer picture. The dropout rates for Latinos in North Carolina, as in other states in the South, are high. Only slightly over fifty percent of the Latino students who enter ninth grade graduate from North Carolina public schools within four years.<sup>179</sup> However, even this figure might not reflect the total picture of Latino youth who are not receiving a high school education in the state because some Latinos who arrive in North Carolina in their mid to late teens never enroll in school.<sup>180</sup> Further, the graduation rate of Latinos varies widely across the state. Although the average Latino graduation rate in the three largest school districts, Charlotte-

<sup>172</sup> Education First NC School Report Cards, Percentage of Students' Scores at or Above Grade Level by Group and Subject, <http://www.ncreportcards.org/src/stateDetails.jsp?Page=8&pYear=2004-2005&pDataType=1> (last visited Jan. 12, 2008).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> Charles Clotfelter et al., *Surprising Success among Hispanic Students*, DUKE UNIV. NEWS & COMM. (Duke Univ., Durham, N.C.), June 12, 2006, [http://www.dukenews.duke.edu/2006/06/hispanic\\_oped.html](http://www.dukenews.duke.edu/2006/06/hispanic_oped.html) (last visited Mar. 6, 2008).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> Press Release, North Carolina Dep't of Public Instruction, NC Releases First Four-Year Cohort Graduation Rate (Feb. 28, 2007), <http://www.ncpublicschools.org/newsroom/news/2006-07/20070228-01>.

<sup>180</sup> Palmer, *supra* note 135, at 3; *see also* Bohon et al., *supra* note 148, at 49 (discussing the confusion of Latin American immigrants in Georgia over enrollment of their children in public schools).

Mecklenburg, Wake County, and Guilford County, is 67.4% (only one percentage point behind the total average and far outpacing the 56.2% rate for African Americans), it is nearly ten percentage points behind the average rate for whites in the three districts.<sup>181</sup> Interestingly, in a few districts, including the largest, Charlotte-Mecklenburg, Latino graduation rates were actually higher than rates for whites.<sup>182</sup> The one enormous exception is Robeson County, North Carolina, the district with the worst graduation rates in the state for all students, where the graduation rate for Latinos is a shocking 9.7%.<sup>183</sup>

#### D. Funding and Latino Students in North Carolina

The cost of educating the growing Latino population has been a key source of tension in the immigration debate throughout the country. In addition to testing, LEP status also makes a difference in funding. Although education policy is concerned with the appropriateness of education provided to LEP students, the major limitation on this ideal is money. ESL programs, in whatever form they take, require more funding because of the extra personnel and special training that go beyond what is offered in the purely mainstream environment. Both the federal and state governments offer sources of funding to assist districts in dealing with these extra expenses. The federal government offers grants for two types of situations experienced by school districts with LEP students. The Language Acquisition Grant, under Title III of the No Child Left Behind Act, grants funds for LEP students when a district has more than 150 LEP students and when a district experiences a significant increase in its LEP student numbers.<sup>184</sup> The state of North Carolina also provides funds for school districts or charter schools that have more than twenty LEP students.<sup>185</sup>

North Carolina has not escaped the hostile debate surrounding undocumented immigration and the effect, or perceived effect, on school costs. A one billion dollar school bond issue was attacked in Wake County because it was perceived to be supporting the education of the children of undocumented immigrants.<sup>186</sup> This perception persisted even though whites, many

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<sup>181</sup> GARY ORFIELD ET AL., THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., LOSING OUR FUTURE: HOW MINORITY YOUTH ARE BEING LEFT BEHIND BY THE GRADUATION RATE CRISIS 63 (2004), available at [http://www.urban.org/uploadedPDF/410936\\_LosingOurFuture.pdf](http://www.urban.org/uploadedPDF/410936_LosingOurFuture.pdf).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* The total graduation rate in Robeson County is thirty-seven percent.

<sup>184</sup> Dep't of Public Instruction, English as a Second Language: Federal Funding for LEP Students, [http://community.learnnc.org/dpi/esl/archives/2005/06/federal\\_funding.php](http://community.learnnc.org/dpi/esl/archives/2005/06/federal_funding.php) (last visited Nov. 22, 2007).

<sup>185</sup> Dep't of Public Instruction, English as a Second Language: State Funding for LEP Students, [http://community.learnnc.org/dpi/esl/archives/2005/06/state\\_funding\\_f.php](http://community.learnnc.org/dpi/esl/archives/2005/06/state_funding_f.php) (last visited Nov. 22, 2007).

<sup>186</sup> T. Keung Hui, *Immigrants a Small Proportion of New Students*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 17, 2006 [hereinafter Hui, *Immigrants a Small Proportion*]. The bond issue ended up passing and the outspoken county commissioner, Phil Jeffreys, who opposed it based on the idea that it supported undocumented immigration, was voted out of office in the

of whom moved to North Carolina for technology jobs in the Research Triangle, made up an overwhelming percentage of the growth in Wake County schools.<sup>187</sup> Most of this animosity has been directed towards undocumented immigrants and their children in general and not at the extra cost of the ESL programs, but the funding debates should be kept in mind when considering policy.

#### IV. PROPOSAL FOR MOVING FORWARD

The increasing Latino student population creates unique challenges for North Carolina public schools, especially as the school districts look to reconfigure their general student assignment plans. Ensuring that Latino students receive an appropriate education as both ethnic and language minorities requires a comprehensive look at the system involving school policy, community participation, and prudent advocacy by Latino organizations and other interested institutions.

##### A. Language Programs

The substance of school policies are the basic part of any program to provide appropriate education to Latino students. Both federal law and North Carolina state policy leave local school districts with substantial leeway to determine appropriate programs for LEP students, most of whom are Latinos. The history of North Carolina's struggle with civil rights in education raises concerns about the capacity of local school districts to overcome inertia and perhaps political opposition to implement appropriate programs for minority students. It took federal court orders to desegregate public schools after the state passed down the *Brown* mandate to the local districts through the Pearsall Plan.<sup>188</sup> However, unlike the school districts involved in the experience of African American desegregation in the 1960s and 1970s, today's school districts are not trying to overcome an entrenched system when considering language needs of Latino students. Instead, they are generally trying to build programs from scratch. The challenge of language education for LEP Latino students is best dealt with through individually crafted plans that fit the needs and demographics of different districts throughout the state, with adequate cross-district communication and best practices sharing efforts.

Despite concerns about inertia and problematic local politics, the variation in the demographic makeup of communities throughout the state makes school programs shaped at the local level most appropriate. Some commu-

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same election. T. Keung Hui, *Bond Supporters Say Thanks, Look Ahead*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 8, 2006; *A Few New Faces Will Fill Wake Posts*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 9, 2006.

<sup>187</sup> Hui, *Immigrants a Small Proportion*, *supra* note 186.

<sup>188</sup> See *supra* notes 86-91 and accompanying text.

nities in North Carolina, like Siler City, are approximately forty percent Latino, while others, like the three major metropolitan areas, have growing Latino communities that are still under ten percent of the population.<sup>189</sup> Appropriate language programs that take into account variations in the ethnic makeup of a community will better answer the question of segregation and new language learning issues.

Scholarly articles and Latino advocacy groups have looked to bilingual-bicultural education as the gold standard of language education programs. However, bilingual education has been a lightning rod for criticism, an excuse for tracking, and not always representative of the preferences of Latino parents. It also represents an ideal that may be better suited for the traditional Latino states and not the New Latino Diaspora. Programs that are appropriate for highly segregated communities in California, Texas, and New York would be impractical and unsuitable for many communities in North Carolina. Such programs would open up a vulnerable population to antagonism, undermine desegregation efforts by the districts, and not be sustainable at a decent level of quality with the limited personnel and experience available in North Carolina.

Other programs, such as the dual language program in Chapel Hill-Carrboro Schools, which would preserve native language ability as well as limit segregation, or the structured inclusion program at Four Oaks Elementary in Johnston County, which promotes integration, may be ideal where they can be implemented. However, most districts in the state are using mainstreaming with ESL pull-outs at the elementary school level and ESL sheltered subject matter courses at the middle and high school level. These programs threaten at least some isolation during the day in elementary school and segregation as well as tracking problems in middle and high school. But they also represent the easiest programs to quickly put in place and administer.

The most important characteristic of a language program should not be what category it fits into, but how it is administered. Any program should be used responsibly, be effective, and ensure that students are moved into mainstream situations in a timely manner. The mechanisms to achieve such systems are in place in state ESL policy. However, the necessary flexibility built into state policy to reflect the inevitable differences in the personal language development of each child, such as the ability to keep students in ESL classes even after they test out of LEP status, could be exploited or, more likely, used in an overly paternalistic manner to keep students in ESL tracks and deny them the opportunities available in the mainstream program.

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<sup>189</sup> See U.S. Census Bureau, Factfinder, [http://factfinder.census.gov/home/saff/main.html?\\_lang=en](http://factfinder.census.gov/home/saff/main.html?_lang=en) (go to "Get a Fact Sheet for your community").

*B. Enhanced Communication Between Schools and Latino Families*

Even if the appropriate language program is found and implemented well on the school side, communication must be enhanced between Latino parents and schools in order to make sure Latino students are receiving true educational opportunity. In Georgia's Dekalb and Hall counties, immigrants are provided with a special orientation program to the public school system.<sup>190</sup> No similar orientation programs seem to be officially operational in North Carolina school districts, and no state policy encourages implementation of such programs. Latino parents and students not only need to be informed about school expectations and curriculum, but they also need to be made aware of the opportunities the system has to offer.

Under Governor Mike Easley, North Carolina has implemented a number of innovative programs that would be especially beneficial to Latino students, but awareness of and guidance to these programs must be communicated to Latino families to ensure Latino involvement. The Spanish for Native Speakers program promotes the maintenance of native language competency and high-level bilingualism.<sup>191</sup> It was developed and implemented in the 2002–2003 school year.<sup>192</sup> In a state that is in desperate need of people to bridge the language gaps in the larger community, ensuring participation in such a program could provide an essential service to the state. Another new initiative is the Governor's "Learn and Earn" High School Program. The program seeks to provide incentives for students to stay in school by allowing them to choose a five year high school program at the end of which they earn both a high school diploma and a community college associate degree.<sup>193</sup> Latino students might be especially attracted to this program because for those concerned with helping support their families they can elect to pursue skills and training programs that would be marketable upon graduation and because it allows attendance at community colleges that might be financially out of reach for some Latinos.<sup>194</sup> Considering the high Latino dropout rate in North Carolina, the Learn and Earn program would be especially helpful for Latino students if it is effective in dropout prevention. However, without proper guidance into these two programs and other innovative instruction, Latino students may not be aware of them, despite their potential attractiveness to the Latino student population.

Latino families not only need to understand the school system, but teachers and administrators need to understand Latino families. A number

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<sup>190</sup> Bohon et al., *supra* note 148, at 49.

<sup>191</sup> North Carolina Public Schools, NC Standard Course of Study: Spanish for Native Speakers, <http://www.ncpublicschools.org/curriculum/secondlanguages/resources/spanish> (last visited Nov. 22, 2007).

<sup>192</sup> *Id.*

<sup>193</sup> Press Release, State of North Carolina Office of Governor, Gov. Easley Announces 'Learn and Earn' High School Program (Sept. 8, 2004), *available at* [www.governor.state.nc.us/Reform/\\_pdf/20040908.pdf](http://www.governor.state.nc.us/Reform/_pdf/20040908.pdf).

<sup>194</sup> See *supra* notes 161-164 and accompanying text for a discussion about the inaccessibility of in-state tuition to undocumented immigrants.

of articles geared toward the professional development of North Carolina teachers seek to educate them about the cultural expectations of their Latino students and those students' families.<sup>195</sup> These articles appropriately encourage teachers to work within the family and cultural norms of Latinos rather than attempting to supplant the Latino culture with values more in line with the traditional educational system.<sup>196</sup> Although the University of North Carolina program that publishes the articles coordinates its professional development with every district in North Carolina, it is unclear if all teachers have been exposed to these lessons.

### C. Advocacy

Although Latino legal organizations like LULAC, MALDEF, and PRLDEF have made education rights history through their litigation addressing the complex needs of the Latino community as ethnic and language minorities, their education and policy initiatives that have awakened and empowered Latinos have created even more lasting effects. Litigation, undoubtedly necessary to protect vulnerable Latino communities, especially during the current immigration crisis, may be less appropriate in addressing education issues in new Latino communities because of the great leeway given to local school districts under state and federal law. However, advocates can play a significant role in educating both Latinos and the schools, providing a political voice and policy advocacy for Latinos and promoting a sense of urgency surrounding these issues, which are necessary to increased educational opportunity for Latino students in North Carolina.

Although communication must be developed between Latino families and schools, most school districts, already overburdened with demanding obligations and the high-stakes education world, may not have the ability to create effective communication programs alone. Latino families may not know that they should be seeking information, they may have misgivings about asking questions because of language concerns or immigration issues, and they may simply be too preoccupied with demanding work and family obligations to take the lead in communicating with the schools. Latino community organizations and institutions that serve the Latino community, like the Catholic Church, should help facilitate communication between the community and the schools by educating and orienting them to one another.

The Catholic Church is both familiar to Latino immigrants and respected by the larger community. It could provide a bridge by organizing programs for Latino immigrants to be oriented to these educational systems

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<sup>195</sup> See, e.g., Sarah Plastino, Learn NC, Helping Latino Students Feel Comfortable in Your Classroom, <http://www.learnnc.org/lp/pages/latinosclassman2006-01> (last visited Nov. 22, 2007); Regina Cortina et al., Learn NC, Bridging Spanish Language Barriers in Southern Schools, <http://www.learnnc.org/lp/editions/brdglangbarriers> (last visited Nov. 22, 2007); Regina Cortina, Learn NC, From Rural Mexico to North Carolina, <http://www.learnnc.org/lp/pages/rural-mexico-north-carolina> (last visited Nov. 22, 2007).

<sup>196</sup> See Plastino, *supra* note 195; Cortina et al., *supra* note 195.

in a manner that will likely be culturally sensitive and in their own language. Such a program would also provide a forum for Latino parents to share their concerns with an institution that might be able to bring their concerns to the schools. Currently, the Dioceses of Raleigh and Charlotte have Hispanic ministries to address the spiritual needs of the Latino community.<sup>197</sup> Although the Diocese of Charlotte, as part of its social justice efforts, supports Casa Guadalupe to deal with immediate concerns of Latino immigrants, such as immigration problems, tax advice, and court translation, the diocese does not offer official programs to enhance communication and understanding between Latino immigrant families and schools.<sup>198</sup>

Another important role for Latino community and advocacy organizations is that of a political voice. In a 1991 study of the Latino quest for educational opportunity, Kenneth J. Meier and Joseph Stewart, Jr. concluded that Latino education is best where Latinos are highly involved politically in the community.<sup>199</sup> However, the Latino community in North Carolina, as in the rest of the South, is made up primarily of newly arrived immigrants and includes a significant undocumented population. Without the opportunity to vote or take office, the traditional methods of exerting political influence are limited in these Latino communities. Even as Latinos begin to make up a significant percentage of the population in North Carolina, it will most likely be decades before they make up a significant portion of the voting pool in the state. Of course, waiting until that time would not be acceptable. However, it is a stark realization and an uncomfortable position for the Latino community to find itself in that many members must depend on the good will of others to provide educational opportunities for their children. North Carolina's civil rights history has shown that the ideals of progressivity and civility can undermine the implementation of equal educational opportunity for minorities until the minority community itself pushes to overcome the status quo. Latino community organizations and legal advocacy groups can pursue policy agendas that support equal educational opportunity for Latinos, giving a voice to those who are effectively voiceless.

Good education policy is the responsibility of the state, but North Carolina currently does not have, and will not have for some time, a representative number of policymakers who are part of the Latino community or who even understand the Latino community well. Latino organizations need to lobby at all levels of state government and the education administration for policies that will enhance Latino access to quality education. Such policies would include passing a state DREAM Act that would open in-state tuition at the University of North Carolina campuses to all students who graduate from North Carolina high schools and encouraging community colleges in

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<sup>197</sup> Roman Catholic Diocese of Charlotte, Ministerio Hispánico, <http://www.charlottediocese.org/hispanicministry.html> (last visited Nov. 22, 2007); Catholic Diocese of Raleigh, Hispanic Ministry, <http://www.dioceseofraleigh.org/how/hispanic/> (last visited Nov. 22, 2007).

<sup>198</sup> Catholic Social Services Diocese of Charlotte, Services, <http://www.cssnc.org/cgservices.html> (last visited Nov. 22, 2007).

<sup>199</sup> MEIER & STEWART, *supra* note 130.

the state to adopt policies that would boost Latino and immigrant access to their programs. The Latino organizations could also advocate for policies to encourage professional development, such as enhanced training of all teachers in schools with LEP students so that they can better understand and welcome them into their classrooms and training of counselors in the history and purposes of ESL education so that they can provide the best advice for LEP students and avoid falling into discriminatory mindsets. Other education policies could include development of mechanisms to share best practices among school districts and the encouragement of dual-language or non-segregated programs where practical. Advocates for the Latino community can also push for the expansion of innovative initiatives like the Spanish for Native Speakers and the Learn and Earn programs, so that more Latino students can take advantage of them.

One of the most important functions of advocates for Latino education in North Carolina is ensuring that positive change occurs in a timely fashion. The rapid emergence of the Latino community in North Carolina has created a great challenge for the state, but it also offers a window of opportunity. Today in the United States, our education system often reinforces segmentation in society, but the idealistic thought that public education can play a part in the American Dream is still a strongly held conviction. For Latino immigrant families, studies show that the opportunity for advancement diminishes as generations pass. By aggressively addressing the needs of Latino students in the first and second generations, North Carolina might avoid what has happened to Latinos in California and Texas, where educational opportunity is often limited by the entrenched education system and political environment. Advocates, by educating the public and schools, pushing for good policies, and even watching the system for violations of the law, can ensure that North Carolina is doing what it can for Latino students in this generation, rather than putting off real change until the next, when it may be too late to change the system.

#### CONCLUSION

The influx of Latino students, most from immigrant families and with English language learning needs, into North Carolina's public schools is a major challenge for the state and the Latino community. The recent issues of Latino students come at the same time as concerns about revisiting student assignment plans after the lifting of federal judicial oversight and the subsequent resegregation. School policies should ensure that Latino students are not isolated by their ethnicity or their native language, but they also must be comprehensive to overcome other barriers faced by Latino students, potentially including their socioeconomic status, their family's limited understanding of the U.S. educational system, their parents' low levels of educational attainment, and the students' or their family members' immigration status. Only by making an active and comprehensive effort can the schools provide Latino students with true educational opportunity. The re-

cent Duke study that showed Latino students closing the achievement gap as they move through North Carolina schools is heartening, but the realities of the Latino dropout rate and the limitations of Latino students after they leave high school cast a shadow over that achievement. The potential for both schools and Latino students to advance is there, but a coordinated effort by policymakers, schools, Latino families, and Latino organizations and institutions that serve Latinos must be made to turn that potential into a reality where educated Latino North Carolinians can contribute to the Latino community and the state.