

# Spanish-Language Test Accommodations: Recommended or Required by NCLB?

---

Erin Archerd\*

## I. CASE INTRODUCTION: *COACHELLA VALLEY V. STATE OF CALIFORNIA*

As of early 2005, the California Department of Education had an English-only testing policy for all California Standards Tests for grades K–12. These tests, which are mandated by the federal No Child Left Behind Act<sup>1</sup> (NCLB), are used to measure the yearly progress of students and schools. In June 2005, the Coachella Valley Unified School District, along with nine other school districts from throughout California, several community groups, and a handful of individual students and their guardians, sued the State of California, demanding that the state provide special testing for students who are still learning English.<sup>2</sup> The school districts sought reasonable accommodations, such as tests in Spanish or modified English-language tests, for their many students—most of whom are Spanish speakers—who have yet to fully master English but still must sit for the mandated annual subject tests. Such language accommodations would not be novel; fourteen other states—including New York, Massachusetts, and Texas, which will be discussed later—have already provided specialized subject testing for English learners.<sup>3</sup>

The vast majority of English Language Learners (ELLs) in California are Spanish-speaking, and the number of immigrant children in California, which comprises ninety percent of Limited English Proficiency (LEP) students, is growing.<sup>4</sup> Overall, nearly forty-seven percent of the stu-

---

\* J.D. Candidate, Harvard Law School, Class of 2008; B.A., Stanford, 2004.

<sup>1</sup> Strengthening and Improvement of Elementary and Secondary Schools Act (No Child Left Behind), 20 U.S.C.A. § 6311 (2006).

<sup>2</sup> The only available citation is 2005 WL 1869499 (N.D. Cal.) The case was originally brought in state court and the defendant attempted to remove to federal court. This is the order remanding the case back to state court.

<sup>3</sup> Nanette Asimov, *10 School Districts Cite No Child Law in Suit*, S.F. CHRON., June 2, 2005, at B1.

<sup>4</sup> In 1995, thirty-five percent of all immigrant children and children of immigrants in the United States were living in California. Jennifer Van Hook & Michael Fix, *A Profile of the Immigrant Student Population*, in *OVERLOOKED AND UNDERSERVED: IMMIGRANT CHILDREN IN U.S. SECONDARY SCHOOLS* 14 (J. Ruiz-de-Velasco & Michael Fix eds., 2000) available at <http://www.urban.org/UploadedPDF/overlooked.pdf>. *Noted in* Jennifer Van Hook & Kelly Stamper Balistreri, *Diversity and Change in the Institutional Context of Immigrant Adaptation: California Schools 1985–2000*, 39 DEMOGRAPHY 639, 642 (2002). For the purposes of this Comment, the terms “English Language Learner” and “Limited English Proficiency” will be used synonymously.

dent population in California identifies itself as Hispanic.<sup>5</sup> For the 2004-2005 school year, twenty-five percent of the student population in California was classified as ELL, and that number was even higher for children in kindergarten through third grade (thirty-six percent).<sup>6</sup> Of these ELL students, over eighty-five percent spoke Spanish as their native language, and that number is likely to increase with current immigration trends.<sup>7</sup> For Hayward Unified, the only school district in the San Francisco Bay Area to take part in the suit, the number of English learners has increased sixty-six percent in the past decade.<sup>8</sup> The concentration of Spanish-speaking ELLs is particularly high in southern California where two of the plaintiffs in the Coachella Valley lawsuit, Chula Vista Elementary and Sweetwater Union High School, are in a county in which over ninety percent of the ELL students speak Spanish.<sup>9</sup> In the Coachella Valley Unified District, another southern California plaintiff, eighty percent of the students are ELLs.<sup>10</sup>

Although the Coachella Valley suit was brought in a state court under the California Constitution, the key element of the case involves enforcement of a provision of the federal NCLB Act that allows states to use modified tests for English learners until they have reached a threshold level of English proficiency. Under NCLB, states are required to test these types of students, designated in the Act as “limited English proficiency” students, in a “valid and reliable manner . . . including, to the extent practicable, assessments in the language and form most likely to yield accurate data on what such students know and can do in academic content areas, until such students have achieved English language proficiency.” The Act presumes that students will reach English competency in three to five years.<sup>11</sup>

The school districts in the Coachella Valley lawsuit are pushing for these testing accommodations allowed by NCLB in an attempt to improve the test scores for their schools and avoid the sanctions incurred under NCLB when they repeatedly fall short of the federal standards. These sanctions can be quite burdensome on the school districts. Parents with children in underperforming schools can choose to transfer their children or seek private tutoring at the district’s expense, and eventually the state can take over or close low-achieving schools.<sup>12</sup> Although underperforming schools

---

<sup>5</sup> State of California Education Profile: Fiscal Year 2004-2005, <http://www.ed-data.k12.ca.us/profile.asp?Tab=1&level=04&reportnumber=16> (follow “Students” hyperlink) (last visited Feb. 4, 2006).

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

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

<sup>8</sup> Asimov, *supra* note 3.

<sup>9</sup> Chris Moran, *Suit to Fight for Bilingual Testing*, SAN DIEGO UNION-TRIB., June 1, 2005, at B1.

<sup>10</sup> Rosette Gonzales, *Lawsuit: Some Tests Are Unfair*, BURBANK LEADER (Glendale, Cal.), June 3, 2005.

<sup>11</sup> 20 U.S.C.A. § 6311 (b)(3)(C)(ix)(III) (2006).

<sup>12</sup> Moran, *supra* note 9.

usually are not immediately taken over by the state, per-pupil funding for the schools decreases every time a parent removes her child. These underperformance sanctions only apply to schools accepting federal Title I money,<sup>13</sup> so not all schools in the districts are affected. In the Hayward Unified School District, for example, ten out of seventeen schools accepting federal funds failed to meet their testing targets.<sup>14</sup> However, schools that have large ELL populations are often some of the poorest in the state and are therefore more likely to seek Title I funds.

The Coachella Valley lawsuit challenges California's alleged refusal to provide the reasonable accommodations on assessments for LEP students called for by NCLB. The plaintiffs are seeking declaratory relief and a writ of mandamus under the California Code of Civil Procedure § 1085 to force the State of California to implement "valid and reliable" testing of LEP students. The plaintiffs also allege illegal expenditures of taxpayers' funds in violation of California Code of Civil Procedure § 526(a) as well as a violation of the plaintiffs' right to education under the California Constitution.<sup>15</sup>

Although the plaintiffs originally filed the lawsuit in state court, the defendants attempted to have it removed to the Northern District of California. The State of California claimed that the plaintiffs' original complaint raised a federal question by citing NCLB. However, the Northern District judge, William Alsup, found that plaintiffs did not allege a federal question under the well-pleaded complaint rule, i.e., that the plaintiffs did not claim that their suit was based on federal authority, and remanded the case to state court, where it is currently awaiting trial in the Superior Court of California for the County of San Francisco.

The plaintiffs based their suit on the right to education found in the California Constitution. Because NCLB does not create a private right of action,<sup>16</sup> the court concluded that a state law action based on its violation perforce does not raise a 'substantial' federal question.<sup>17</sup> At this point, state court is the only venue in which *Coachella* can be heard.

---

<sup>13</sup> See *infra* p. 167 for a discussion of Title I.

<sup>14</sup> Asimov, *supra* note 3.

<sup>15</sup> 2005 WL 1869499 (N.D. Cal.) at \*1. Cal. Const. art. IX, § 5 (providing for "a system of common schools by which a free school shall be kept up and supported in each district"). See *infra* pp. 169–73 and accompanying notes for discussion of sections of the California Education Code relevant to LEP students.

<sup>16</sup> *Id.* at \*2.

<sup>17</sup> *Id.*, citing *Utley v. Varian Assocs., Inc.*, 811 F.2d 1279, 1283 (9th Cir. 1987) (concluding that a private cause of action seems to indicate that Congress intended for individuals to be able to bring a suit into federal court based on the federal law). See also *California v. Sierra Club*, 451 U.S. 287, 294 (1981) (finding that "[t]he question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights on those beneficiaries"); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). The Ninth Circuit has yet to rule on whether NCLB creates a private cause of action, but the court cited two other district courts, one in New York and one in Ohio, that have held that it does not. In *Ass'n of Community Orgs. For Reform Now v. New York City Dep't of Educ.*, 269 F.Supp.2d 338 (S.D.N.Y. 2003), parents brought claims against the school district under the Federal

Neither NCLB nor the California Constitution, upon which this claim is based, explicitly requires that California provide Spanish-language subject assessments. Rather, special accommodations are expressly permitted, perhaps even encouraged. Although at least fourteen states have chosen to use modified tests for ELL students, there are several reasons why California may be reluctant to provide them. In addition to the significant costs of creating the modified tests, the state must consider the difficulty of producing a valid exam, and the mercurial political climate of the state, which both embraces diversity and mandates English-only education.<sup>18</sup>

The school districts were likely dubious that the legislative and executive branches of state government would be able to resolve this problem in the absence of a court order. In February 2005, State Senator Denise Ducheny (D-San Diego) introduced a bill that called for developing Spanish-language tests for students who have attended schools in the United States for less than three years.<sup>19</sup> The modified tests would have been used for science, math, and other subject area exams. However, Governor Arnold Schwarzenegger vetoed the bill on October 7, 2005.

## II. NCLB AND ITS PREDECESSORS<sup>20</sup>

To understand the underpinnings of NCLB, a bit of history is in order. In 1965 Congress passed the Elementary and Secondary Education Act (ESEA) to improve education throughout the United States through federal funding primarily directed at disadvantaged students.<sup>21</sup> According to its statement of purpose, ESEA is meant to “ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic standards and state academic assessments.”<sup>22</sup> ESEA highlights one of the

---

Civil Rights Act (42 U.S.C. § 1983) for violation of NCLB and under the New York State Constitution alleging that they were denied the right to transfer their children to other schools pursuant to NCLB. The court found that “[I]t is clear that Congress did not intend to create individually enforceable rights with respect to the notice, transfer or SES provision contained in NCLB” *Id.* at 344. In *Fresh Start Academy v. Toledo Bd. Of Educ.*, 363 F.Supp.2d. 910 (N.D. Ohio 2005), the court cited *Ass’n of Community Orgs.* in deciding that a tutoring agency, a provider of supplemental educational services (SES), could not sue because “Clearly Congress was not concerned with enabling particular individuals to provide SES, but that the SES provided be of an overall minimum, uniform quality.” *Fresh Start* at 916.

<sup>18</sup> See discussion *infra* pp. 170–71.

<sup>19</sup> S.B. 385, 2005-06 Leg., Reg. Sess. (Cal. 2005). A similar and related bill, AB 482, was introduced by Assembly Member Hancock, with the instruction that the Senate bill be given precedence over it.

<sup>20</sup> Much guidance into the relevant statute portions for this section was taken from the Brief for Education Law Center-PA, et al. as Amici Curiae Supporting Petitioners, Reading Sch. Dist. V. Penn. Dep’t of Educ., 855 A.2d 166 (2004) (No. 2695).

<sup>21</sup> Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965). Originally authorized through 1970, the Act has undergone revisions to become today’s NCLB.

<sup>22</sup> 20 U.S.C.A. § 6301 (2006).

ways that purpose can be accomplished: “meeting the educational needs of low-achieving children in our Nation’s highest-poverty, limited English proficient children, migratory children . . . .”<sup>23</sup> ESEA’s Title I provides funding for schools that have a certain percentage of low-income children in the school or low-income families within their attendance area, and holds schools accountable for improving the performance of disadvantaged students. Title VII contains specific provisions for bilingual education programs.

The 2002 passage of NCLB was only the most recent update to ESEA. 1994 marked the passage of President Clinton’s education reform plan called the Improving America’s Schools Act (IASA),<sup>24</sup> reauthorizing ESEA and putting into place many of the concepts that became part of NCLB. IASA required that states assess all students at certain grade levels. NCLB increased the testing frequency to yearly assessments.<sup>25</sup> Educational assessment tests are common because they are relatively inexpensive and arguably more objective compared to other forms of intervention, such as having administrators observe teachers in the classroom on a regular basis. Multiple-choice tests range in cost from approximately two to twenty dollars per tested student, while tests that ask students to conduct experiments or answer open-ended questions range in cost from around thirty to fifty dollars per student.<sup>26</sup> IASA stipulated that all students participate in the assessments, including “limited English proficient students who shall be assessed, to the extent practicable, in the language and form most likely to yield accurate and reliable information on what such students know and can do, to determine such students’ mastery of skills in subjects other than English.”<sup>27</sup>

These assessment measures were largely adopted by the 2002 NCLB revision of ESEA,<sup>28</sup> with the added provision that the LEP measures be used until the students reach English proficiency, which should take place within three to five years. NCLB, when fully implemented, will require that students take yearly assessments in reading/language arts, math, and science; LEP students will be required to take additional yearly tests in English proficiency. IASA made it clear that native-language testing was

---

<sup>23</sup> *Id.*

<sup>24</sup> Improving America’s Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (1994).

<sup>25</sup> 20 U.S.C.A. § 6311(b)(3)(C)(v) (2006).

<sup>26</sup> LORRAINE M. McDONNELL, POLITICS, PERSUASION, AND EDUCATIONAL TESTING 9–10 (2004). IASA mandates that approved tests for schools receiving funding under the Act be “valid and reliable, and consistent with relevant, nationally recognized professional and technical standards for such assessments.” These sorts of assessments are therefore often described as standards-based testing. The nationally recognized professional standards guiding test construction are the Standards for Educational and Psychological Testing. The most commonly used academic standard is the National Assessment of Educational Progress (NAEP).

<sup>27</sup> *Id.* Codified at 20 U.S.C. § 6311(b)(3)(C).

<sup>28</sup> 20 U.S.C.A. § 6311 (2006).

allowed for subject exams; the language that did so was fully incorporated into NCLB.<sup>29</sup>

The U.S. Department of Education (U.S. DOE) oversees implementation of NCLB. A 2003 non-regulatory guidance memo explained that “[t]o the extent practicable, States must make every effort to develop and administer native language assessments, if doing so is likely to yield the most accurate and reliable information about what those students know and can do.”<sup>30</sup> The non-regulatory language echoes almost verbatim the wording of NCLB and strongly suggests that the intent of NCLB is to have the states test their students in their native language when such an option is feasible.<sup>31</sup> Given California’s large Spanish-language LEP/ELL population, it is inconsistent with the recommendations of the Department of Education for the state to continue to resist efforts to move away from English-only assessments.

The standards of assessment laid out in NCLB are hardly revolutionary, but are similar to those that have been in place since 1994. The sanctions mandated by NCLB, however, are harsher. Title I funding of ESEA and the mandated assessments came together in NCLB with increased emphasis on accountability; specifically, both the entire student body and certain subgroups must make “adequate yearly progress” (AYP). This means that the results are tracked for specific subgroups, such as low-income students or LEP students. Under NCLB, schools must test at least ninety-five percent of each subgroup. For schools receiving Title I funding that fail to meet AYP more than two years in a row, either for the entire student body or within subgroups, NCLB mandates that the students be allowed a range of options. After three underperforming years, parents may transfer their children to higher performing traditional or charter schools

---

<sup>29</sup> 20 U.S.C.A. § 6311(b)(6) (2006). “Each State plan shall identify the languages other than English that are present in the participating student population and indicate the languages for which yearly student academic assessments are not available and are needed. The State shall make every effort to develop such assessments and may request assistance from the Secretary if linguistically accessible academic assessment measures are needed. Upon request, the Secretary shall assist with the identification of appropriate academic assessment measures in the needed languages, but shall not mandate a specific academic assessment or mode of instruction.”

<sup>30</sup> U.S. DEP’T. OF EDUC., STANDARDS AND ASSESSMENTS: NON-REGULATORY DRAFT GUIDANCE 20 (2003), <http://www.ed.gov/policy/speced/guid/nclb/index.html>.

See also U.S. Dep’t of Educ. Testing: Frequently Asked Questions, <http://www.ed.gov/nclb/accountability/ayp/testing-faq.html#5> (last visited Feb. 14, 2006) (“States must provide reasonable accommodations for students with disabilities or LEP students. For the latter, accommodations may include native-language versions of the assessment.”).

<sup>31</sup> 20 U.S.C.A. § 6311 (b)(3)(C)(ix)(III) (2006). “[L]imited English proficient students . . . shall be assessed in a valid and reliable manner and provided reasonable accommodations on assessments administered to such students under this paragraph, including, to the extent practicable, assessments in the language and form most likely to yield accurate data on what such students know and can do in academic content areas, until such students have achieved English language proficiency as determined under paragraph (7).”

See *infra* p. 174 for further discussion of what “to the extent practicable” means states ought to do.

in the district,<sup>32</sup> or low-income students may receive “supplemental educational services” like tutoring paid for by their school.<sup>33</sup> Continued poor performance may leave schools subject to “restructuring,” in which the state may take over the school, replacing faculty or turning it over to a private organization.<sup>34</sup>

### III. ASSESSMENTS IN CALIFORNIA: A RECENT HISTORY

Education is a field fraught with changing trends, and California has been far from immune to them. In the early 1990s, California found that its new curriculum—which stressed the ability to apply underlying principles to real-world problems—was at odds with its old, multiple-choice tests.<sup>35</sup> It shifted to the pioneering California Learning Assessment System (CLAS), which asked open-ended questions in addition to those with multiple-choice responses. CLAS was expensive, and the open-ended questions led to technical problems. Moreover, the assessment was quickly engulfed in controversy as a loose coalition of conservative groups blasted it for pushing a cultural agenda and being insufficiently academic.<sup>36</sup> For several years in the mid-1990s California had no statewide assessment system, but by 1998 the state had remodeled its curriculum and adopted high stakes multiple-choice testing that would be reinforced by NCLB. California enacted the Public School Accountability Program in 1999, which includes assessment of all schools, intervention for low-performing schools, and rewards for high-performing schools. Today, scores and performance on the high school exit examination are used to calculate an Academic Performance Index,<sup>37</sup> which is a determinant of schools’ adequate yearly progress under NCLB.

The main component of California’s current Standardized Testing and Reporting (STAR) system is the California Standards Test (CST), which measures student progress in grades two through eleven. Another component compares California’s scores with nationwide student performance. A third element is an English proficiency test given to Spanish-speaking English learners.<sup>38</sup> While students can opt out of the tests,<sup>39</sup> both NCLB and the California Department of Education (CDE) still require that ninety-five percent of every student subgroup take part in the state tests.<sup>40</sup> California

---

<sup>32</sup> FRANK KEMERER ET AL., CALIFORNIA SCHOOL LAW 29 (2005).

<sup>33</sup> *Id.* at 65.

<sup>34</sup> 20 U.S.C.A. § 6316(b)(8) (2006).

<sup>35</sup> McDONNELL, *supra* note 26, at 53.

<sup>36</sup> *Id.* at 65.

<sup>37</sup> CAL. EDUC. CODE § 52051 (2006).

<sup>38</sup> *See infra* note 52. The Spanish Assessment of Basic Education, Second Edition (SABE/2) will be replaced by Harcourt Assessment Inc.’s Aprenda 3 in 2006.

<sup>39</sup> CAL. EDUC. CODE § 60615 (2006).

<sup>40</sup> *But see* Fact Sheet: NCLB Provisions Ensure Flexibility and Accountability for Limited English Proficient Students, <http://www.ed.gov/nclb/accountability/schools/factsheet->

has said that it expects to have all its Title I schools meeting their yearly progress requirements by the 2013-2014 school year, but it has a long way to go. In 2004, forty percent of Title I schools were still failing to meet AYP.<sup>41</sup> The California legislature passed a comprehensive assistance program in 2004 for schools that the Department of Education has identified as being in danger of facing program improvement status under NCLB. The program is meant to preemptively aid schools so that they do not become subject to NCLB sanctions. Intriguingly, when STAR was reauthorized in 2004, the CDE was “directed to develop tests in the primary language of dominant groups of English language learners and align them with state academic content standards.”<sup>42</sup> Perhaps this development was not happening quickly enough to save the schools in the Coachella Valley lawsuit from failing to meet their AYPs to the point at which NCLB began to impose sanctions.

Thus, it would seem that the state wants to help its students, but faces a tough balancing act between federal dictates and popular opinion. California has long had a rocky relationship with anything that smacks of bilingual education. In June 1998, voters approved Proposition 227, an initiative that effectively banned the majority of bilingual education by requiring that most classes be taught in English. Bilingual education was largely replaced with English immersion.<sup>43</sup> In *Valeria v. Davis*, the court found that the purpose of Prop. 227 was not discriminatory toward non-English speakers, but was meant to improve the education of English-language learners.<sup>44</sup> The plaintiffs in *Coachella* claim that their lawsuit is not an attempt to make an end-run around bilingual education laws or about relaxing the accountability of the schools.<sup>45</sup> Indeed, the suit has nothing to say about the way students are taught in the schools, only the way

---

english.html (last visited Feb. 14, 2006). Schools can largely define what constitutes LEP students, and can thus narrow or broaden their definition of this subgroup. Couple that with the states' abilities to set the minimum number for a subgroup (usually at least forty for statistical purposes) and school districts that have low enough numbers of LEP students can remove them from counting toward AYP assessments. The U.S. Department of Education publishes this method on its own website, describing it as “using already existing flexibility.” Unfortunately, this trick does not work as well for school districts like Coachella or Chula Vista with large LEP student populations.

<sup>41</sup> KEMERER ET AL., *supra* note 32, at 85. See also CAL. EDUC. CODE § 60810 (2001) (providing for review of existing and developing of new LEP testing).

<sup>42</sup> KEMERER ET AL., *supra* note 32, at 81.

<sup>43</sup> *Id.* at 61. See also CAL. EDUC. CODE § 305 (2006) “[A]ll children in California public schools shall be taught English by being taught in English,” and CAL. EDUC. CODE § 320 (2006) (giving parents legal standing to have English immersion enforced).

<sup>44</sup> 307 F.3d 1036 (9th Cir. 2002). See also *McLaughlin v. State Bd. of Educ.*, 75 Cal. App. 4th 196 (1999) (overturning a grant of mandamus for the school district, saying that the California Education Code only gave individual parents the right to ask for a waiver to the state's statutory English-only requirement).

<sup>45</sup> Moran, *supra* note 9.

they are tested. Nonetheless, standardized tests may be measurement tools, but they are also “strategies for pursuing a variety of political goals.”<sup>46</sup>

The presence of groups such as the California Association for Bilingual Education and Californians Together—the latter “[f]ounded in 1998 after the passage of Proposition 227 . . . to foster full participation in a democratic society through quality education for children and parents from underserved communities”<sup>47</sup>—as plaintiffs in the lawsuit suggests that the Proposition and its effects have contributed toward the situation that the suit seeks to address. While California does have programs in place designed to intervene when it appears that underperforming schools will be subject to NCLB sanctions, it has shied away from the type of actions that these groups believe would be most helpful in assessing limited English proficiency students, even though U.S. Department of Education and the California Department of Education guidelines suggest that providing native language testing should be a part of the state’s response to LEP students.

The 1990s saw a full swing in educational testing in California from innovative, open-ended assessments to more traditional, off-the-rack measurements. At the same time, the Latino population of the state grew rapidly and the English-only movement made considerable popular progress in the state, culminating with the passage of Prop. 227. Cost and feasibility of application did play a role in the change in assessment styles, but politics and the social climate were key factors in the switch to the all English, all multiple-choice style of testing. Federal and state educational guidelines urge California to provide testing for dominant LEP groups in their primary language, but California’s refusal to do so—seemingly guided by popular public opinion—means that this disjunction between principles and practice may have to be settled in the courts.

Nevertheless, changing the tests is not an easy matter, and it would not be a cure-all for low-scores by LEP students. Some LEP students will see little improvement in their scores from testing accommodations. For instance, native-language testing may not always be helpful for LEP students, especially if they are not literate in their primary spoken language.<sup>48</sup> Since students are unlikely to receive a substantial amount of instruction in their native languages, their reading and writing skills in those languages are unlikely to improve while students are in the California school system. Apart from the dictates of NCLB and the California Education Code, there is debate among scholars as to how best to design modified tests for students

---

<sup>46</sup> McDONNELL, *supra* note 26, at 2.

<sup>47</sup> Californians Together Home Page, <http://www.californianstogether.org/> (last visited Feb. 1, 2006).

<sup>48</sup> See generally NATIONAL RESEARCH COUNCIL, KEEPING SCORE FOR ALL: THE EFFECTS OF INCLUSION AND ACCOMMODATION POLICIES ON LARGE-SCALE EDUCATIONAL ASSESSMENTS 39 (Judith Anderson Koenig & Lyle F. Bachman eds., 2004) (outlining various LEP testing accommodations).

learning English. Academics have proposed a wide range of options besides native-language testing. These range from reading the questions orally in either English or the student's native language, to offering dictionaries or glossaries in the student's native language, to allowing extra time to take the exams.<sup>49</sup> There are drawbacks to all of these options. Teachers may not be clear in their oral readings of the tests. Glossaries require looking up each word individually, which is much more tedious than reading in a more familiar language. Giving students extra time raises issues of fairness and validity when compared with other students who did not receive additional time. In addition, modified tests, such as using simplified English or providing pictures or other additional/different content may remove some of the context clues to questions and thus create a harder test for LEP students than the unmodified examination.

California already makes some of these kinds of accommodations for its ELLs. English learners taking the CST may hear the test directions translated into the student's primary language and ask clarifying questions in their primary language, receive additional breaks during the testing day, be tested separately with other English learners, and have access to glossaries or word lists for the subject tests (math, science, and social science).<sup>50</sup> The CDE has also been working on its directive to develop Spanish-language standards-based tests to use under the STAR system and plans on field testing them during the fall of 2006. These tests, however, are only being created for grades two through four. For the 2005-2006 school year, the CDE purchased Spanish-language subject tests<sup>51</sup> designed to meet NCLB standards and available for grades K-12.<sup>52</sup> As of the 2005-2006 school year, then, California seems to be providing Spanish-speaking students with the option of taking subject assessment tests in their primary language. In fact, it now requires that a student who receives instruction in his native language or has been enrolled in school in the United States for less than twelve months take at least one subject test in his native language if it is available.<sup>53</sup> At the option of the school district, such students may also take a second subject test in their native language if available.<sup>54</sup> At present, the California DOE is providing Spanish-language testing. It remains to be seen whether the Coachella Valley lawsuit will continue in

---

<sup>49</sup> DENNIS HOLMES & SUSAN DURON, NAT'L CLEARINGHOUSE FOR BILINGUAL EDUC., LEP STUDENTS AND HIGH-STAKES ASSESSMENT (2000), available at <http://www.ncela.gwu.edu/pubs/reports/highstakes/index.htm> (Follow the "Approaches/Strategies" hyperlink).

<sup>50</sup> CAL. DEP'T OF EDUC., MATRIX OF TEST VARIATIONS FOR ADMINISTRATION OF STATEWIDE ASSESSMENTS FOR ENGLISH LEARNERS (2004), <http://www.cde.ca.gov/ta/tg/sa/documents/matrix5.pdf>.

<sup>51</sup> Jack O'Connell, *Standards and Assessment STAR Notes* (Cal. Dep't of Educ., Sacramento, Cal.), Jan. 2006.

<sup>52</sup> See Harcourt Assessment Inc., *Apreda 3*, <http://harcourtassessment.com/HAIWEB/Cultures/en-us/dotCom/Apreda+3.htm> (last visited Feb. 11, 2006) (describing the various standards, such as those of the NCLB, that the tests meet).

<sup>53</sup> Codified at CAL. EDUC. CODE § 60640(g) (2006).

<sup>54</sup> CAL. EDUC. CODE § 60640(f) (2006).

order to gain judicial reinforcement for the testing or if the plaintiffs will drop the lawsuit.<sup>55</sup>

#### IV. A BRIEF COMPARISON OF LEP TESTING REFORM IN OTHER STATES

California is not the only state that has struggled with language accommodations for its educational assessment tests. However, although states vary as to the type of accommodations that they currently provide, the general trend appears to be that states with significant LEP populations are moving toward providing increased native language testing.

At the time *Coachella* was filed, only fourteen other states employed primary language testing as suggested by the language of NCLB and the non-regulatory U.S. Department of Education Guidelines, and the vast majority of states did not provide native language testing. For states with small LEP populations this makes sense, but for states like California with large numbers of LEP students, the need for specialized testing is much greater.<sup>56</sup> Many states have been going back and forth on how they will provide such tests, and even those that do use them often use them sporadically. Massachusetts and Texas both use some Spanish-language tests but—unlike California, which as of 2005-2006 allows for Spanish-language tests in grades 2–11 inclusive<sup>57</sup>—their use varies based on grade level. New York has one of the broadest accommodation policies and allows LEP students at all grade levels to take the subject assessments in Spanish.<sup>58</sup> It also provides accommodations like extra time and glossaries for its English language assessment tests.<sup>59</sup> California's testing model now closely models New York's, suggesting that other states may follow suit.

Use of Spanish-language tests can also vary within a state. In 2003, Philadelphia used Spanish-language exams, but other Pennsylvania cities did not. This disparity in testing accommodations prompted the Reading School District, which has thirteen schools identified as failing to meet their AYP, to bring a suit against the Pennsylvania Department of Educa-

---

<sup>55</sup> However, as of Feb. 24, 2006, *Coachella* remained as pending litigation on the California State Board of Education's March 2006 Agenda, available at <http://www.cde.ca.gov/be/ag/ag/yr06/agenda0306.asp> (last visited Mar. 1, 2006).

<sup>56</sup> See NATIONAL RESEARCH COUNCIL, *supra* note 48, at 21. During the 1990s, the number of ELL/LEP students reported by states nearly doubled, but the concentration was much heavier in certain states like California, Texas, Florida, and New York. However, the percentage increase has been much higher in other states. For example, during the 1990s, Georgia saw a 113% increase in ELLs.

<sup>57</sup> CAL. EDUC. CODE § 60640(g) (2006).

<sup>58</sup> See also N.Y. STATE EDUC. DEP'T., OFFICE OF BILINGUAL EDUC., THE TEACHING OF LANGUAGE ARTS TO LIMITED ENGLISH PROFICIENT/ENGLISH LANGUAGE LEARNERS 6 (2004), available at <http://www.emsc.nysed.gov/ciai/biling/resource/NLA/html>. New York also has the tests in Chinese, Haitian Creole, Korean, and Russian. As of 2002, sixty-four percent of New York's LEP students had Spanish as their native language.

<sup>59</sup> N.Y. STATE EDUC. DEP'T., OFFICE OF BILINGUAL EDUC., N.Y. STATE TESTING PROGRAM, A PARENT'S GUIDE 7, available at <http://www.emsc.nysed.gov/3-8/parentguide.pdf>.

tion alleging that the Department had failed to provide adequate technical assistance, that the department's failure to provide native language testing was discriminatory and violated NCLB, and that the number the state chose to determine testing groups for analysis (the "N" number) was arbitrary and not statistically sound.<sup>60</sup> The Commonwealth Court found for the Department of Education. In its decision, the court emphasized that under the language of NCLB, the state only had to provide native language testing "to the extent practicable," and concluded that, "The clarifying language makes clear that native language testing is not mandatory, but it should be provided to the extent that it is practicable for the state to do so."<sup>61</sup> Most courts are likely to interpret the legislation in this way, though a broader reading might focus more on the language that follows "to the extent practicable" in the text of the Act, which provides that the state "shall make every effort to develop such assessments."<sup>62</sup> Phrasing like "shall make every effort" indicates a greater burden on the state to create native language testing than "to the extent practicable." The U.S. DOE even offers to help states find native language assessment tests for their students. *Reading* is currently under appeal and the appellate court must now decide whether the Pennsylvania Department of Education made enough of an effort to provide Reading School District with native language tests.

Much like California, Massachusetts has a growing population of Latino students. In 1999, twenty-six percent of the state's Latino public school students were designated as LEP, and Latinos made up sixty percent of the state's bilingual education program. Massachusetts also passed an education reform law in the early 90s, only to have some of the more open-ended, less traditional aspects of the reforms replaced by high-stakes standardized testing (the Massachusetts Comprehensive Assessment System) in 1998. Unlike California, Massachusetts did have Spanish language versions of the mathematics and science and technology tests. Native Spanish speakers were required to take these alternate versions if they had been enrolled in the schools for less than three years, received special language support, and did not have sufficient English-language skills to take the tests in English.<sup>63</sup> However, the students had to be able to read and write in Spanish.<sup>64</sup> For the students who did take the 1999 MCAS in Spanish, there is no indication of how many took it or how they scored.<sup>65</sup>

---

<sup>60</sup> *Reading Sch. Dist. v. Pa. Dep't. of Educ.*, 855 A.2d 166 (Pa. 2004). See also *supra* note 40 for a discussion of the manipulation of "N."

<sup>61</sup> *Id.* at 172.

<sup>62</sup> 20 U.S.C.A. § 6311(b)(6) (2006). See *supra* note 29 for text of the entire section. *Reading* relegated it to note 4 in the decision.

<sup>63</sup> Miren Uriarte, *The High Stakes of High-Stakes Testing*, in *THE POWER OF CULTURE: TEACHING ACROSS LANGUAGE DIFFERENCE* 3, 7 (Zeynep F. Beykont ed., 2002).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 21 n.29. Apparently the Massachusetts Department of Education did not keep records of which LEP students had taken the English version and which had taken the Spanish version. See generally RALPH E. BEALS & ROSALIE PEDALINO PORTER, *THE IN-*

Again, much like California, the English-only movement made a successful push in Massachusetts, resulting in an effective end to bilingual education with the passage of a November 2002 ballot initiative.<sup>66</sup> As of early 2006, tenth grade LEP students were still allowed to take the tenth grade mathematics test in Spanish if they could write near grade level and had been enrolled in U.S. schools for less than three years, but Spanish-language subject tests were discontinued for all other grades.<sup>67</sup> Massachusetts does allow the use of approved bilingual dictionaries on the subject tests.<sup>68</sup>

Similar to the state constitutional challenge raised in *Coachella*, a group of public school students from low-income schools in Massachusetts recently brought a suit against the Commissioner of Education for failure to “cherish the interests” of the public schools as required by the state’s constitution. The suit followed a landmark 1993 decision that found that the state was violating students’ right to education and needed to do more to educate children in poorer communities.<sup>69</sup> In *Hancock v. Commissioner of Education*,<sup>70</sup> the Supreme Judicial Court held that Massachusetts is meeting its constitutional charge. In his concurrence, Judge Marshall explained that:

In Massachusetts the democratic imperative to educate finds strong voice in the “education clause” of the Massachusetts Constitution, Part II, c. 5, § 2 (education clause) which “imposes an enforceable duty on the magistrates and Legislatures of this Commonwealth to provide education in the public schools for the children there enrolled, whether they be rich or poor and without regard to the fiscal capacity of the community or district in which such children live.”<sup>71</sup>

The Massachusetts Constitution has been interpreted as requiring the state to put the funding into schools to ensure that all students receive an

---

STITUTE FOR RESEARCH IN ENGLISH ACQUISITION AND DEVELOPMENT, BILINGUAL STUDENTS AND THE MCAS: SOME BRIGHT SPOTS IN THE GLOOM (2002).

<sup>66</sup> The ballot initiative was led, in large part, by Richard Unz, a Silicon Valley entrepreneur who backed Prop. 227. The Massachusetts initiative was thus labeled by many as the “Unz” initiative. See, e.g., Deborah Lynn Blumberg, *Hispanic Kids Go ‘Home’ for Summer*, CHRISTIAN SCI. MONITOR, July 28, 2005, at 12.

<sup>67</sup> MASS. DEP’T OF EDUC., REQUIREMENTS FOR THE PARTICIPATION OF STUDENTS WITH LIMITED ENGLISH PROFICIENCY IN MCAS AND MEPA 2 (2006), [http://www.doe.mass.edu/mcas/2006/news/lep\\_partreq.doc](http://www.doe.mass.edu/mcas/2006/news/lep_partreq.doc). The tenth grade exams are the high school exit tests in Massachusetts.

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

<sup>69</sup> *McDuffy v. Secretary of Executive Office of Educ.*, 615 N.E.2d 516, 519 (Mass. 1993) (“[W]e are confident that the executive and legislative branches of government will respond appropriately to meet their constitutional responsibilities.”).

<sup>70</sup> 822 N.E.2d 1134 (Mass. 2005).

<sup>71</sup> *Id.* at 1139 (Marshall, J., concurring).

adequate education regardless of income. These schools claimed they still were not receiving enough resources from the state.

*Hancock* had been sent before a single judge, who prepared a report of over 300 pages detailing the quality of education in four focus districts. Although she found that subgroups in these districts were underperforming,<sup>72</sup> their MCAS scores were showing improvement and the schools were making steps toward progress—such as creating compass schools, developing tutoring programs in mathematics, and increasing teacher training—as mandated by the state’s education reform act.

Whether students should be tested in their native language is not a recent debate. The Fifth Circuit found in 1981 in *Castaneda v. Pickard* that in order to provide a valid assessment for areas other than English language literacy, a Texas school district should test its LEP students in Spanish.<sup>73</sup> *Castaneda* was one of many cases in which plaintiffs alleged that testing violated civil rights statutes, in that case a violation of Title VI of the Civil Rights Act.<sup>74</sup>

Texas is often regarded as a model of the standards-based education reform that has become popular across the country and which President Bush, the former governor of Texas, and Congress reinforced with NCLB. The Texas Assessment of Academic Skills (TAAS) is a high-stakes testing system that disaggregates students’ performance data by ethnicity and socioeconomic status.<sup>75</sup> While the numbers show that students have made great improvements on the tests and the achievement gap between groups is decreasing, some argue that these improvements have come by excluding low-achieving minority students from the tests. More minority than white students are placed in special education classes exempt from testing, held back a grade level, or drop out of school.<sup>76</sup> In grades three through six, Texas LEP students may take subject assessment tests in Spanish for a maximum of three years.<sup>77</sup>

---

<sup>72</sup> In all four focus districts, public school students who required special education, and students who had limited English proficiency, came from low-income families, or were members of racial or ethnic minority groups, performed at substantially lower levels on the MCAS examinations than did their peers. *Id.* at 1147–51.

<sup>73</sup> *Castaneda v. Pickard*, 648 F.2d 989, 1014 (S.D.Tex. 1981). (“Valid testing of students’ progress in these areas is, we believe, essential to measure the adequacy of a language remediation program. The progress of limited English speaking students in these other areas of the curriculum must be measured by means of a standardized test in their own language because no other device is adequate to determine their progress vis-a-vis that of their English speaking counterparts.”)

<sup>74</sup> See also *Teresa P. v. Berkeley Unified Unified Sch. Dist.*, 724 F.Supp. 698 (N.D.Cal 1989). A class of LEP students unsuccessfully claimed that a language remediation program violated the Equal Education Opportunity Act and Title VI of the Civil Rights Act.

<sup>75</sup> Walt Haney, *Revealing Illusion of Educational Progress: Texas High-Stakes Tests and Minority Student Performance*, in *THE POWER OF CULTURE: TEACHING ACROSS LANGUAGE DIFFERENCE* 25, 27 (Zeynep F. Beykont ed., 2002).

<sup>76</sup> *Id.* at 31–38.

<sup>77</sup> 19 TEX. ADMIN. CODE Part 2 § 101.1007 (2005).

## V. CALIFORNIA REVISITED

The language of NCLB indicates a strong intent on Congress's part to create some means, at least for a LEP student's first few years in the U.S. educational system, of more adequately measuring what students know. Like many federal laws, the requirements set down by NCLB have the potential to conflict with state laws and practices. Yet most states have tried to implement the standards laid out by NCLB—standards that reflect the current trend in education of high-stakes testing that emphasizes progress and accountability for students and schools.

Although some states do provide various forms of accommodated assessments for their limited English students, few have gone so far as to translate the entire test into the native language of the primary LEP populations. This may be because such modified testing is expensive, because of debate over the most effective accommodation, or even and perhaps especially because of the political and social climate within the particular state. Some states have purchased tests from educational publishing companies, while others, like California, are in the process of developing their own tests. In addition, the scholarly debate is still undecided as to what the best forms of accommodated testing are and whether it is possible to create a modified test that will test the same content as the original.

All of these factors are at play in California, a state perennially strapped for cash with a huge Latino LEP student population. The California citizenry is largely Latino, and becoming more so, but is also uncomfortable with language accommodation and has responded by passing English-only laws. Yet, even more than many other states, California's own educational code appears to urge accommodation for students for whom English is not a native language. The question that remains for the California Superior Court to decide in *Coachella v. State* is whether California is required to provide modified testing for some or all of its LEP students. The California Department of Education has taken steps that show it recognizes it ought to provide modified testing, but it remains uncertain whether this is merely good sense or a legal requirement.

California is trapped between its own, often liberal, laws and a political climate with strongly conservative strains; legislative intent and perceived popular will have reached an impasse. Even without the passage of a bill specifically allowing for the accommodations, the court may find that the Education Code requires some form of modified testing.

Proposition 227 has withstood challenges in the California courts, but *Coachella* is not about having students receive education in their native languages. Rather, it is about having students be tested in the language best suited to show how much they know about subjects like math and science. Not all Latino LEP students will do better on Spanish-language tests, but school districts want that option. It would be expensive for California to produce these exams, but the state has laws that

compel schools likely to be marked by NCLB as needing improvement to join a state intervention program, committing itself to aiding these schools. Neither the state nor the school districts want to face sanctions for poor student progress, and the required testing of subgroups based on categories such as income and LEP status is meant to promote special attention for these groups. Children with Spanish as a native tongue make up the vast majority of California's limited English proficiency students, and since immigration of Spanish speakers into the state continues, LEP and Spanish language will remain connected for some time to come.

California is moving toward more Spanish-language testing for its Spanish-speaking LEP students in keeping with California's own Education Code. The California Department of Education wants the tests. The school districts want the tests. It is now up to state courts to end the logjam between the desires of the schools and the legislature and the desires of the Executive and his administration.