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BILINGUAL EDUCATION: SERNA v. PORTALES MUNICIPAL SCHOOLS

In New Mexico, minority group children constituted 50 percent of all public school students in the 1972-73 school year.¹ In 39 of the state's 88 public school districts over 50 percent of the school children were Spanish-surnamed, and in nine districts one-third or more of the students were Indian.² The educational performance of Spanish-surnamed and Indian students has been extensively studied in New Mexico, and the collected data indicates that there is a significantly lower achievement level among these students than their Anglo counterparts.³ A principal factor in these disparate educational results is the English language deficiency many minority-group children carry with them to the first-grade classroom.⁴ Perhaps two-thirds of the Spanish-surnamed children in the Southwest speak Spanish in the home, making it their primary language.⁵ This apparent deprivation of a high quality education for minority-group

1. N.M. Dep't of Education, New Mexico School District Profile 9 (Apr. 1973). The ethnic composition of school children in the state was 40.7% Spanish-surnamed, 7.7% Indian, and 2.2% Black. *Id.*

2. *Id.*

3. For example, while 52.9% of Anglo students enter college, only 22.2% of their Spanish-surnamed and 24.8% of their Indian counterparts do so. U.S. Comm'n on Civ. Rights, Mexican American Educational Series, Report II: The Unfinished Education 18 (1971). These problems appear much earlier in the student's career; in the eighth grade 10.8% of Spanish-surnamed students are two or more years overage for their grade, while the average is only 2.3% for Anglos. At the fourth grade level the respective figures are 5.5% compared to 2.7%. *Id.* at 37. With regard to estimated reading levels, in the fourth grade, 17.1% of Spanish-surnamed and 10.6% of Indian students are more than two years below the national average, while only 4.8% of the Anglo students have fallen that far behind. *Id.* at 32. *See also* N.M. Dep't of Education, *supra* note 1; U.S. Comm'n on Civ. Rights, Mexican American Educational Study, Report III: The Excluded Student (1972); 2 T. Andersson & M. Boyer, Bilingual Schooling in the United States 105-25 (1970); T. Carter, Mexican Americans in Schools: A History of Educational Neglect (1970); V. John & V. Horner, Early Childhood Bilingual Education 2-7 (1971).

4. *See* text accompanying notes 23-45, *infra*.

5. U.S. Bureau of the Census, *Persons of Spanish Origin in the United States: March 1972 and 1971*, Current Population Reports 17 (Series No. P. 20, No. 250, 1973). There is a dearth of information on what proportion of Spanish-surnamed students have difficulties with the English language upon entering school. A 1969 survey indicated that responding school principals estimated nearly 50% of the first grade Spanish-surnamed students in the Southwest did not speak English as well as the typical Anglo first grader. The figure from the schools surveyed in New Mexico was 36%. U.S. Comm'n on Civ. Rights, Report III, *supra* note 3, at 13, 14.

children provided the substance for the court challenge of school district policies in *Serna v. Portales Municipal Schools*.⁶

The parents of Judy Serna⁷ brought suit on her behalf in the United States District Court for New Mexico⁸ against the Portales Municipal Schools. Plaintiffs alleged that the school district failed (1) to provide bilingual and bicultural education which would take into account the special needs of Mexican-American children and (2) to hire teachers and administrators of Mexican-American descent.⁹ This alleged denial of the right to equal educational opportunity under color of state law was claimed to violate the fourteenth amendment equal protection clause and statutory rights assured by Title VI of the 1964 Civil Rights Act.

The trial court concluded from the evidence that Spanish-surnamed children were denied an equal educational opportunity by the Portales educational programs.¹⁰ The court granted Serna relief, holding:

the conclusion becomes inevitable that these Spanish-surnamed children do not in fact have equal educational opportunity and that a violation of their constitutional right to equal protection exists.¹¹

Based upon this, the trial court fashioned a remedial action plan for the school district.

The Court of Appeals for the Tenth Circuit affirmed both the holding and the plan, but in light of the intervening Supreme Court decision in *Lau v. Nichols*,¹² it relied on the Title VI statutory claim

6. 351 F. Supp. 1279 (D. N.M. 1972), *aff'd*, 499 F.2d 1147 (10th Cir. 1974).

7. Respondents included other Spanish-surnamed minors represented by their parents in this class action suit. See generally Note, *Adelante Juntos: The Federal Class Action as an Instrument for Securing Equal Protection for Minorities in State Schools*, 4 N.M.L.Rev. 215 (1974).

8. Jurisdiction was invoked under 28 U.S.C. § 1343. 499 F.2d at 1149.

9. The complaint also alleged that the school district failed to structure a curriculum reflecting the historical contributions of people of Mexican and Spanish descent to the State of New Mexico and the United States. *Serna v. Portales Municipal School*, 499 F.2d 1147, 1149 (10th Cir. 1974).

10. 351 F. Supp. at 1282.

11. *Id.* The Ninth Circuit, in *Lau v. Nichols*, 483 F.2d 791 (9th Cir. 1973), *rev'd on other grounds*, 414 U.S. 563 (1974), did not find affirmative state action in a similar factual setting. That court held that absent such state action, the schools were not legally bound to institute affirmative programs to correct inequalities. 483 F.2d at 798-99. A number of articles have applied the fourteenth amendment equal protection analysis to the right of non-English-speaking minority groups to a bilingual education. See, e.g., Grubb, *Breaking the Language Barrier: The Right to Bilingual Education*, 9 Harv. Civ. Rights-Civ. Lib. L. Rev. 52 (1974); Sugarman & Widess, *Equal Protection for Non-English-Speaking School Children: Lau v. Nichols*, 62 Calif. L. Rev. 156 (1974); Note, *The Constitutional Right of Bilingual Children to an Equal Educational Opportunity*, 47 S. Cal. L. Rev. 943 (1974).

12. 414 U.S. 563 (1974). *Lau* was a case very similar to *Serna*. The Supreme Court there found it unnecessary to reach the constitutional issue of equal protection, relying solely on

and did not reach the equal protection issue. In conformity with the *Lau* holding, it noted that school districts receiving federal assistance are obliged to comply with Title VI and subsequent HEW regulations.¹³ Section 601 of Title VI provides that:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving financial assistance.¹⁴

The court first observed that the State of New Mexico requires compulsory school attendance of school age children¹⁵ and that public school teaching must be in the English language.¹⁶ The net effect of these policies was held to deny non-English speakers¹⁷ the benefits of a meaningful education by precluding their participation in the educational process.¹⁸ The trial court record contained ample evidence to support such a finding.¹⁹ Secondly, the issuance of an HEW memorandum requiring school districts to take affirmative action to correct language deficiencies of non-English-speaking minority students²⁰ was deemed a contractually binding condition on the acceptance of federal funds. The Portales school district, the court held, had failed to institute adequate affirmative action programs.²¹

In effect, the *Serna* and *Lau* cases mandate that a school district

Title VI. Indeed, in deciding the case on non-constitutional grounds, the Court was following the rule set out by J. Brandeis in his concurring opinion in *Ashwander v. TVA*, 297 U.S. 288, 347 (1936). However, enforcement under Title VI may be difficult because all administrative remedies must be exhausted prior to termination of funding. 42 U.S.C. § 2000d-1 (1970).

13. 499 F.2d at 1153.

14. 42 U.S.C. § 2000d (1970).

15. N.M. Const. art. XII, § 5.

16. N.M. Const. art. XXI, § 4.

17. In this context, "non-English speakers" should be construed to include children who speak some English, yet who are more proficient in another language. A language disability is certainly a barrier to the acquisition of a "meaningful education." See U.S. Comm'n on Civ. Rights, Mexican American Education Study, Report VI: Toward Quality Education for Mexican Americans 3-7 (1974).

18. 499 F.2d at 1153-54.

19. The evidence showed, *inter alia*, that Spanish-surnamed enrollment comprised 34.5% of the elementary school population, yet only 28.8% of junior high and 17% of high school enrollment. I.Q. tests administered to fifth graders at Lindsey Elementary School, which had 86.7% Spanish surnamed enrollment, were significantly lower than at two predominantly Anglo elementary schools. 351 F.Supp. at 1281.

20. 35 Fed. Reg. 11595 (1970):

Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.

21. 499 F.2d at 1153-54.

which accepts federal assistance²² affirmatively act to implement some form of bilingual education for non-English-speaking children.²³ The purpose of this Comment is to describe the various types of language-instruction programs presently employed and to demonstrate that some English instruction plans are little better than no programs at all. Furthermore, the trial court's affirmative action plan in *Serna* will be analyzed, and the likelihood that it will result in the implementation of a substandard bilingual education plan will be shown. In conclusion, it will be argued that the New Mexico Legislature should act now to initiate bilingual-bicultural programs to support its past endorsements of the multicultural concept.

Bilingual education programs are of two types.²⁴ Remedial programs are aimed at remediation and acculturation, seeking to teach the child basic English language skills rapidly so that the educational process can be conducted entirely in English.²⁵ Remedial programs rarely extend past the third grade, and there is little time allotted daily to instruction in the non-English language.²⁶ Bilingual-bicultural enrichment programs, on the other hand, "... [go] beyond the acquisition of English language proficiency, seeking development of well-integrated bilingual-bicultural individuals."²⁷ While learning English language skills is emphasized, the maintenance of the child's own language and culture is also stressed.²⁸ The success of these programs depends in great part on the presence of adequately trained bilingual teachers.²⁹

Fishman, a noted authority in bilingual education, classifies bilingual programs into four types: (1) transitional, (2) monoliterate, (3)

22. In New Mexico, all 88 school districts receive Title I funds, and thus would be subject to the Title VI holding in *Lau*. Telephone interview with Henry Pascual, Director of the Division of Instructional Services, N.M. Dep't of Education, Santa Fe, April 17, 1975.

23. The Tenth Circuit emphasized Mr. Justice Blackmun's concurring opinion in *Lau* which noted that his agreement was based on the substantial number of children involved in the case. 499 F.2d at 1154. Reading these decisions at their narrowest, they impose a numerical requirement before remedial action by a school district becomes obligatory. In New Mexico, meeting such numerical criteria poses no problem, for 71 of the 88 school districts in the state have a higher percentage of minority students enrolled in the public schools than does Portales. See N.M. Dep't of Education, *supra* note 1. This is contrary to the implication by the Court of Appeals. See 499 F.2d at 1154.

24. For a survey of different program models, see 1 Andersson & Boyer, *supra* note 3.

25. Fishman & Lovas, *Bilingual Education in a Sociolinguistic Perspective*, in *The Language Education of Minority Children* 83 (B. Spolsky ed. 1972).

26. Kobrick, *A Model Act Providing for Transitional Bilingual Education Programs in Public Schools*, 9 Harv. J. Legis. 260, 267 (1971-72).

27. Montoya, *Bilingual-Bicultural Education: Making Equal Educational Opportunities Available to National Origin Minority Students*, 61 Geo. L. J. 991, 995 (1973).

28. Fishman & Lovas, *supra* note 25, at 88.

29. John & Horner, *supra* note 3, at 108-19.

partial, and (4) full.³⁰ Strictly remedial approaches include transitional bilingualism and monoliterate bilingualism. Teaching English as a Second Language (ESL) is a common remedial plan as well, but since only the English language is used as a medium of instruction, it cannot properly be called bilingual education.³¹ Transitional bilingualism uses the child's dominant language in the early grades merely to develop English skills so that instruction can proceed in English. There is no attempt to develop fluency and literacy in both languages.³² Monoliterate bilingualism seeks to develop aural-oral skills in both languages in an effort to provide a link between the home and the school, but such programs ignore literacy skills in the child's dominant language. Programs based upon this approach tend to accentuate a language shift to English rather than maintenance of the home language.³³

Partial bilingualism is an intermediate step between remediation and full bilingualism. Literacy skills are developed in certain subject areas (usually history and the arts), and certain cultural values are emphasized in these areas.³⁴ Programs adopting this approach may provide for a certain amount of language and cultural maintenance.³⁵ However, if partial bilingual programs are taught by untrained personnel, extend only through the first three years of the child's education, and are limited to just an hour or so each day, they exhibit the characteristics of remedial plans.

Full bilingualism stresses language and cultural development in both languages. Normally, instruction in all subject areas is conducted in both English and the home language. Maintenance of the child's language and culture is an integral part of full bilingual plans.³⁶

Many minority-group children in New Mexico have their first sustained contact with the English language upon entering the public school system.³⁷ The normal age at which children enroll in school is

30. Fishman & Lovas, *supra* note 25, at 85-89.

31. I Andersson & Boyer, *supra* note 24, at 72.

32. Fishman & Lovas, *supra* note 25, at 86.

33. *Id.* at 87.

34. One drawback to emphasizing cultural values in only some areas is that: [S]uch programs imply that while the non-English mother tongues are serious vehicles for modern literate thought, they are not related to control of the technological and economic spheres. The latter are considered to be the preserve of the majority, whose language must be mastered if these spheres are to be entered.

Id. at 88.

35. *Id.* at 87-88.

36. *Id.* at 88-89.

37. See note 5, *supra*.

a crucial period in their intellectual development. Increasingly, language has been found to play a significant role in a child's problem-solving ability between the ages of five and seven.^{3 8}

It is at this very age that the non-English-speaking child is ordinarily confronted with the demand to learn in English and, indirectly, to think in English. If we accept the view that language plays an important cognitive role in the child's development, it follows that the introduction of a second, weaker language at this point simply confuses the . . . process.^{3 9}

This confusion has many ramifications. Not only can it lead to a feeling of hopelessness, but since ". . . language and culture form an integral part of how a child views himself, . . . the rejection of a child's language and cultural values implies a rejection of the child himself."^{4 0}

Remedial bilingual programs and ESL by their nature compound the confusion experienced by the non-English-speaking child. Such programs attempt to accelerate the learning of English language skills and largely ignore the child's own language and culture. Remedial programs tend to place a premium on acquiring reading and writing skills in English, ignoring the view that language is learned most effectively through the process of hearing, understanding, and speaking.^{4 1} Insufficient time may be devoted to English instruction leading the child to become lost in other classes.^{4 2} The disruption in the child's natural development may be traumatic. In fact,

[w]hen the school attempts to teach a second language before the child has developed adequate cognitive skills in his native language, the child may become a "non-lingual" whose functioning in both his native and second languages develops in only limited ways.^{4 3}

Available evidence suggests that a child who is forced to learn a

38. John & Horner, *supra* note 3, at xxiii-xxiv. Other factors are recognized as bearing on a child's problems in school.

There are a large number of children, it is clear, who bring many of their disadvantages from home. Whatever their inherited capacity may have been, early malnutrition and the poverty of their home experiences seriously reduce their chances for development. But it is just as clear that the school itself, when it fails to recognize the implications of the language problem, creates many more disadvantaged children.

Spolsky, *Introduction*, in *Language Education of Minority Children* 1, 3 (B. Spolsky ed. 1972).

39. John & Horner, *supra* note 3, at xxiv.

40. Kobrick, *supra* note 26, at 264.

41. 1 Andersson & Boyer, *supra* note 24, at 45.

42. Kobrick, *supra* note 26, at 267.

43. John & Horner, *supra* note 3, at 171.

second language prematurely may suffer such handicaps.⁴⁴ The child becomes a victim, functioning at an inadequate level in both languages, and is penalized for life. The child receiving remedial instruction is consequently no better off than his counterpart who entered school before such programs were implemented.

Bilingual enrichment programs which strive for language and culture maintenance avoid victimizing the child by allowing greater freedom to use the native language in problem-solving activities. Moreover,

. . . some research indicates . . . , where the child has an opportunity to develop his two languages fully, his mental and educational development is not only unimpaired, but having two languages has, in addition, a favorable effect on cognition. . . .⁴⁵

Enrichment programs are less disruptive to the natural development of the child and may even promote greater intellectual curiosity and maturity.⁴⁶

The trial court in *Serna* designed a plan for the Portales school district intended to correct the educational deprivations suffered by Spanish-surnamed children.⁴⁷ The plan is derived from combining portions of program proposals submitted to the court by the plaintiffs and the school district.⁴⁸ The Court of Appeals refused to alter the plan, affirming the lower court's rejection of the school district's claim that its proposal was adequate. The court stated,

There was adequate evidence that appellants' proposed program was only a token plan that would not benefit appellees. Under these circumstances the trial court had a duty to fashion a program which would provide adequate relief for Spanish-surnamed children.⁴⁹

Plaintiffs' proposed program stressed that ". . . in order to afford equal educational opportunity, the Plaintiffs' language and culture must become an ongoing component of the school program."⁵⁰ Although the trial court endorsed the maintenance concept, careful

44. *Id.* at 171.

45. *Id.* at 172.

46. *Id.* at 171-77.

47. The final judgment appears at 499 F.2d at 1151.

48. See Plaintiffs' Program to Comply with the Memorandum Opinion of the Court (Apr. 17, 1973), and Defendants' Program to Comply with Court's Memorandum Opinion of November 14, 1972 (Feb. 14, 1973).

49. 499 F.2d at 1154. The school district proposed 30-minute bilingual sessions each day in grades one through four at the one school with the most Chicano students. Defendants' Program, *supra* note 48.

50. Plaintiffs' Program, *supra* note 48, at 4.

reading of the plan demonstrates that it fails to require more than a strictly remedial program.^{5 1}

The trial court's judgment directs the Portales school district to design and enlarge programs to meet the special needs of Spanish-surnamed children, recruit and hire Spanish-speaking personnel, and seek available resources to fund bilingual instruction.^{5 2} The court specifically prescribed the adoption of a minimum bilingual curriculum. The school district was ordered to provide at least one hour of bilingual instruction daily in grades one to three at Lindsey Elementary School, which had a Spanish-surnamed enrollment of 87 percent.^{5 3} Lindsey students in grades four to six were to receive 45 minutes of such instruction daily.^{5 4} The plan directed that Spanish-speaking students in the other elementary schools in Portales be taught bilingually 30 minutes per day and that testing procedures be developed to measure the adequacy of the programs.^{5 5} The court's curriculum plan specified that junior high school students should be tested for English proficiency and bilingual instruction arranged if necessary, and that an ethnic studies course should be offered as an elective in the high school.^{5 6}

The court's plan, however, addressed bicultural enrichment only minimally, stating, "A bicultural outlook should be incorporated in as many subject areas as practicable."^{5 7} By giving the school district the option to disregard the inclusion of language and culture maintenance in a program, the court clearly leaned towards a remedial

51.

The evolution of bilingual education during the past five years points to goals much different than those of remediation and acculturation to an all English language and culture curriculum.

H. Pascual, N.M. Dep't of Education, A Report on Bilingual Education for New Mexico Schools 15 (undated). In noting the balancing of the two program proposals before the court, it seems probable that the court sympathized with the Portales school district's claim that it did not have sufficient resources to initiate a full bilingual program.

52. 499 F.2d at 1151.

53. 351 F. Supp. at 1281.

54. 499 F.2d at 1151.

55. *Id.*

56. *Id.* at 1151-52.

57. *Id.* at 1151. Numerous factors may be claimed to make a bicultural program "impracticable." The lack of trained personnel may be one reason. The uniformity of public school textbooks may make the acquisition of special bicultural materials prohibitively expensive for a poor school district. In *United States v. Texas*, where a pattern of de jure segregation was found, the federal district court was more emphatic about incorporating a bicultural approach into its plan. The court stated,

... that the education program of the district should incorporate, affirmatively recognize and value the cultural environment and language background of all of its children so that the development of positive self-concepts in all children of the district can proceed apace.

342 F. Supp. 24, 30 (E.D. Texas 1971).

approach. Furthermore, other elements of the plan encourage the adoption of remedial programs. The judgment requires that only a short daily session be devoted to bilingual instruction, and the substance of such instruction is aimed at grades one to three. At three elementary schools, the Spanish-speaking children can be segregated for the bilingual program,⁵⁸ a conspicuous indicator of remediation.⁵⁹ The school district lamented the fact that it had no qualified bilingual teachers and feared it would be impossible to recruit such personnel.⁶⁰ Even had the court mandated a bilingual enrichment program, the school district could not have complied until it hired trained personnel. It is obvious that implementation of no more than the minimal standards permissible under the trial court's plan would lead to remedial programs to the detriment of those children the court intended to benefit.

The *Serna* case indicates that some public school officials are reluctant to initiate bilingual programs. There would seem to be three primary reasons for this. First, bilingual programs cost more money at their inception.⁶¹ Secondly, new programs disrupt the traditional curriculum.⁶² And finally, bilingual programs require highly trained teachers, necessitating either the training of current staff or the hiring of new personnel.⁶³ When faced with a court order to implement bilingual instruction, it seems logical for the schools to prefer the remedial approach over bilingual-bicultural enrichment programs.

Since the trial court's plan permits the use of remedial programs, it can be assumed that many school districts will choose to formulate plans based on the minimum requirements. Yet the non-English-speaking child does not profit from such programs, and the courts are unable to afford adequate relief because of their limitation to the particular facts before them⁶⁴ and their inability to provide directly for funding.⁶⁵ Effective action seems possible in the New Mexico

58. See 499 F.2d at 1151. To segregate students would seem to contravene subsequently enacted N.M. Stat. § 77-23-5(C) (Supp. 1973).

59. Segregation for remedial English instruction may stigmatize the child. See Kobrick, *supra* note 26, at 264.

60. Defendants' Program, *supra* note 48, at 4. The school district stated that because of a declining enrollment rate in the Portales schools, fewer teachers are needed; thus when vacancies occur, they are not always filled.

61. Grubb, *supra* note 11, at 57.

62. *Id.*

63. Sugarman & Widess, *supra* note 11, at 177.

64. See *Adelante Juntos*, *supra* note 7.

65. It is interesting to speculate on what the courts would do faced with a claim that only bicultural enrichment programs provide children with a meaningful education.

When will a bilingual program be sufficient to meet the requirements of 601

Legislature, however, where there has been a growing trend over the past decade to advocate the concept of bilingual-bicultural enrichment programs. In fact, a brief study of legislative concern with bilingual education confirms that the Legislature has kept abreast of developments in the field better than the courts or even the public school educators.

The State of New Mexico showed an early interest in the protection of the rights of its Spanish-speaking citizens by embodying these rights in the state constitution.⁶⁶ No interest in New Mexico's bilingual tradition was shown by the Legislature, however, until 1963 when it issued a memorial asking that attention be directed to the training of teachers in Spanish and English.⁶⁷ In 1968 another House Memorial urged all school boards and administrators to develop programs designed to aid the child with English-speaking deficiencies.⁶⁸

In 1971 the Legislature enacted the Bilingual Instruction Act.⁶⁹ The Act was developed to encourage school districts to help English-deficient children attain competency in English.⁷⁰ It authorized the payment, subject to the availability of funds, of up to \$150 per participating student in an approved program.⁷¹ There is a clear,

and the affirmative action regulations? Lau does not address this question, nor do the regulations.

The legal developments in the bilingual education area all seem to be focused on [remedial English instruction.] At some point . . . we may see legal action aimed at establishing a "right" for *culture retention* bilingual education.

C. Cuddy, N.M. Dep't of Education, A Report on Recent Legal Developments Affecting Bilingual Instruction in Public Schools 2, 6 (undated). The sufficiency of a program would seem to depend on the evidence presented. In the absence of HEW policy directives, courts might require that the program totally fail to meet student needs. *Cf.* San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), which held that despite inequalities of resources between school districts, the equal protection clause did not apply since poorer districts had sufficient resources to provide a minimum basic education.

66. *See, e.g.*, N.M. Const. art. VII, § 3, which protects the right to vote, hold office, and sit as a juror regardless of religion or the ability to speak, read, or write in English or Spanish; N.M. Const. art. XII, § 10, which protects the educational rights of children of Spanish descent; and N.M. Const. art. XII, § 8, which provides that teachers shall be trained to be proficient in the English and Spanish languages.

67. House Memorial No. 13, [1963] Laws of N.M. 1221, calling attention to N.M. Const. art. XII, § 8. *See generally* Comment, *Education and the Spanish-Speaking—An Attorney General's Opinion on Article XII, Section 8 of the New Mexico Constitution*, 3 N.M.L.Rev. 364 (1973).

68. House Memorial No. 12, [1968] 28th Legis., 2d Sess., *reprinted as a note to* N.M. Stat. Ann. § 77-23-1 (Supp. 1973). This document stated that:

. . . our school system should strive not only to teach English better, but it should also encourage Spanish-speaking children and children speaking Indian languages to be proud of their linguistic heritage, as well as their cultural heritage, and to strive to both preserve and improve it.

69. N.M. Stat. Ann. § 77-21-1 to 5 (Supp. 1971).

70. N.M. Stat. Ann. § 77-21-3 (Supp. 1971).

71. N.M. Stat. Ann. § 77-21-5 (Supp. 1971).

though muted, intent that these programs be developed along the lines of cultural retention, for the program "must use two languages as mediums of instruction for any part or all of the curriculum of the grade level . . . within the program"⁷² and include "the history and culture associated with the student's mother tongue [as an] integral part of the instruction program."⁷³

The 1971 Act was repealed by the Bilingual Multi-Cultural Education Act of 1973,⁷⁴ reflecting a desire to further emphasize bicultural enrichment. This Act expands the previous legislation by creating an administrative apparatus, with power vested in the State Board of Education and the State Department of Education.⁷⁵ The Board of Education is authorized to set program guidelines⁷⁶ and the Department is licensed to administer and enforce the Act.⁷⁷ The Act also requires participating programs to employ teachers with special bilingual training in order to meet eligibility standards,⁷⁸ and provides for the setting up of parent advisory committees to participate in the formulation and review of local program goals.⁷⁹ Under the 1973 legislation the state pays the difference between the average per pupil expenditure for enrollees in bilingual programs and non-

72. N.M. Stat. Ann. § 77-21-4 (Supp. 1971).

73. N.M. Stat. Ann. § 77-21-4 (Supp. 1971).

74. N.M. Stat. Ann. § 77-23-1 to 8 (Supp. 1973).

75. N.M. Stat. Ann. § 77-23-4 (Supp. 1973).

76. N.M. Stat. Ann. § 77-23-4(A) (Supp. 1973). The guidelines include:

I. To Establish Need

1. Priority will be given to programs designed to improve the language capabilities of culturally and linguistically different students in grades K-3.
2. In order to comply with the law, schools must show a need to improve the language, and reinforce and expand the cultural capabilities of the children. . . .

II. Program Development and Implementation

1. The objectives of the programs should include:
 - a) the use of the cultural background of the students in implementing the programs (background=daily life, history, and cultural heritage).
 - b) the inclusion of components to insure effective (self-image) development of the children.
 - c) specific instruction to expand the languages spoken by the children (expand=improve proficiency in the two languages).
2. A parent advisory committee, the local Board, and at least one representative of the Department of Education shall review the goals and priorities of the plan. This implies close monitoring for appropriate conceptual, effective, and linguistic development of the students. No less than two reviews of the program shall be made yearly.

N.M. Board of Education, Guidelines for Submitting Bilingual-Multicultural Education Proposals to be Funded Under the Provisions of SB 421 (1973).

77. N.M. Stat. Ann. § 77-23-4(B) (Supp. 1973).

78. N.M. Stat. Ann. § 77-23-6(A)(4) (Supp. 1973).

79. N.M. Stat. Ann. § 77-23-5(B) (Supp. 1973).

enrolled children of comparable age in the school district.⁸⁰ The 1973 Act strongly endorses the need for bilingual-bicultural enrichment programs in New Mexico, by stating its avowed purpose to be the encouragement of the cognitive development of students through:

- (1) utilizing the cultural and linguistic backgrounds of the students in the curriculum;
- (2) providing students with opportunities to expand their conceptual and linguistic abilities and potentials in a successful and positive manner; and
- (3) teaching students to appreciate the value and beauty of different cultures.⁸¹

Despite this, the Act makes school district participation voluntary and the state financing scheme is dependent on ". . . the availability of funds."⁸² These conditions present obvious barriers to the adoption of high quality bilingual plans in the state.

In practice, the result of the conditions has been predictable. In 1974 the Legislature appropriated \$1 million for bilingual programs for the 1974-75 school year.⁸³ The existing programs are generally remedial in nature, however, since few of them are directed toward retention of the child's language and culture.⁸⁴

A more forceful approach is needed to protect the interests of non-English-speaking children. The Legislature should require the implementation of bicultural enrichment programs in school districts with a certain proportion of non-English-speaking children. The 1973 Act is an excellent step towards the enactment of such legislation, creating an administrative structure and promoting community involvement. It merely needs to be revised to require school district participation under appropriate circumstances.

New Mexico would not be the first state to enact such legislation. Alaska and Massachusetts presently have bilingual legislation, and both states require the teaching of bilingual programs in school dis-

80. N.M. Stat. Ann. § 77-23-7 (Supp. 1973). This is the method recommended by Kobrick, *supra* note 25, at 296, and follows the Massachusetts scheme. See Mass. Gen. Laws ch. 71A, § 8 (Supp. 1973).

81. N.M. Stat. Ann. § 77-23-3(B) (Supp. 1973). One attempt to further emphasize the bilingual-bicultural enrichment character of programs under the Act was recently defeated. See H.B. 105, 32d Legis., 1st Sess. (1975).

82. N.M. Stat. Ann. § 77-23-7 (Supp. 1973).

83. Ch. 3, § 4(1) [Spec. Sess. 1974] Laws of N.M. 520, *reprinted as note to* N.M. Stat. Ann. § 11-4-4 (Interim Supp. 1974). The 1975 Legislature appropriated approximately \$1.5 million. Ch. 17, § 4(1) [Spec. Sess. 1975]. Bilingual programs reach only 12-15% of the state's minority children. Telephone interview with Jose Griego, Bilingual Specialist of the Div. of Instructional Services, N.M. Dep't of Education, Santa Fe, Apr. 14, 1975.

84. *Id.*

tricts where student characteristics meet certain criteria.⁸⁵ Language and culture maintenance is an important component of each state's approach.⁸⁶

Legislative action in the area of bilingual education is preferable to affirmative action plans by the courts. The trial court's plan in *Serna* demonstrated some of the pitfalls which a good faith effort to correct serious educational deprivations may encounter. It is not only the greater perspicacity of the Legislature for the problems involved which favors action by that body, but also its wide range of resources for developing bilingual education. It can plan on the basis of the needs of the entire state, unlike the courts which merely respond to the factual setting presented. Moreover, the Legislature can appropriate funds for program development and the vital area of teacher training. Therefore, the Legislature should act rapidly, for further delays only serve to deprive non-English-speaking children in the State of New Mexico of a meaningful educational experience.

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85. In Alaska, if in a state school there are at least 15 students whose native language is other than English, there must be at least one teacher fluent in that language. Alas. Stat. Ann. § 14.08.160(a) (Cum. Supp. 1973). In Massachusetts, if there are 20 or more students in the public schools of a school district in the same language classification, a bilingual education program shall be established. Mass. Gen. Laws Ann. ch. 71A, § 2 (Supp. 1973).

86. See Alas. Stat. Ann. § 14.08.160(b) (Cum. Supp. 1973), and Mass. Gen. Laws Ann., ch. 71A, § 1 (Supp. 1973).