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Leaving No Child Behind: A Civil Right

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LEAVING NO CHILD BEHIND: A CIVIL RIGHT

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I. INTRODUCTION

Over 5.4 million students in the United States are categorized as limited English proficient (LEP), representing the fastest growing student population in the nation.¹ In 2000, 79% of LEP students spoke Spanish as

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1. See U.S. DEP'T OF EDUC., BUILDING PARTNERSHIPS TO HELP ENGLISH LANGUAGE LEARNERS (July 27, 2006), *available at* <http://www.ed.gov/nclb/methods/english/lepfactsheet.pdf> [hereinafter BUILDING PARTNERSHIPS] (arguing that the growing number of LEP students in U.S. schools is a serious problem because the students' success depends on their ability to speak fluent English); NCELA FastFAQ Glossary, National Clearinghouse for English Language Acquisition and Language

their native language and, despite common assumptions to the contrary, 76% of LEP students in elementary school and 59% at the secondary level are native-born U.S. citizens.² Nearly half of all LEP students are Latino, and education experts predict that by 2025, one out of every four students will be an LEP student.³ LEP students are currently the lowest performing academic group in the U.S. If this trend continues, U.S. public education will fail to function for a vast percentage of American students.⁴

This Comment argues that courts should interpret the No Child Left Behind Act of 2001 (NCLB) as a civil rights statute, enacted in the spirit of previous civil rights statutes, that provides an implied private right of action for LEP advocates to sue states and school districts that do not comply with NCLB.⁵ Part II provides an overview of the congressional and judicial rights of LEP students, discusses NCLB's commitment to close the academic achievement gaps of LEP students, and illustrates how courts have interpreted NCLB. Part III argues that courts have erred in declining to interpret NCLB as a civil rights statute that provides an implied private right of action, thus preventing NCLB from achieving its civil rights goals to LEP students. Part IV calls for Congress to reauthorize NCLB and

Instruction Educational Programs, available at <http://www.ncela.gwu.edu/expert/glossary.html> (last visited on Feb. 23, 2009) (stating that the term LEP, mostly used by the federal government, states, and school districts, is used interchangeably with English language learner (ELL) to refer to students in the process of learning English).

2. See Jeanne Batalova, *Spotlight on Limited English Proficient Students in the United States*, Migration Policy Institute (Feb. 1, 2006), <http://www.migrationinformation.org/USfocus/display.cfm?ID=373> (last visited Feb. 23, 2009) (providing demographic information of LEP students in public schools); see also RANDY CAPPS ET AL., THE NEW DEMOGRAPHY OF AMERICA'S SCHOOLS: IMMIGRATION AND THE NO CHILD LEFT BEHIND ACT 17-18 (The Urban Institute 2005), available at http://www.urban.org/UploadedPDF/311230_new_demography.pdf (noting that more than half of LEP students are second- or third-generation Americans and do not learn English even after seven or more years in school).

3. See Melissa Lazarin, *National Council of La Raza, Improving Assessment and Accountability for English Language Learners in the No Child Left Behind Act*, 2006 NAT'L COUNCIL OF LA RAZA ISSUE BRIEF 16, at 1 n.*** (2006), available at <http://www.nclr.org/content/publications/download/37365> (stating that in 2002-2003, forty-five percent of all Latino public school children were ELLs and that the Latino population is one of the fastest-growing subgroups in the country); see also BUILDING PARTNERSHIPS, *supra* note 1 (stating that LEP students make up the fastest growing student demographic).

4. See BUILDING PARTNERSHIPS, *supra* note 1 (arguing that since academic success requires English fluency, states must identify ELLs, measure their knowledge, and assess them effectively); U.S. DEP'T OF EDUC., NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS, THE NATION'S REPORT CARD, available at http://nationsreportcard.gov/reading_math_2005/s0015.asp (for the reading scores, above the graph shown, follow the "GRADE 8" tab, then follow the "Achievement Levels" tab); *id.* (for the math scores, at the top of the window follow the "Mathematics" tab, then follow the "GRADE 8" tab, and then follow the "Achievement Levels" tab) (finding that in 2005, only 29% of eighth grade ELLs scored at or above the basic level in reading and math, compared with 75% and 71% of non-ELLs in those same subjects, respectively).

5. See 20 U.S.C. § 6311(b)(2)(F) (Supp. V 2005) (aiming to close the academic achievement gap of all children in math and science by 2014).

create an express private right of action under NCLB to protect the civil rights of LEP students.

II. BACKGROUND

A. An Overview of Rights for LEP Students

Congress and the Supreme Court have affirmed the obligations the country has made to provide meaningful access to federally-funded education for language-minority students through federal legislation and *Lau v. Nichols*.⁶ During President Lyndon B. Johnson's administration, Congress passed the Civil Rights Act of 1964 to ban discrimination and protect the civil rights of minorities.⁷ The first federal legislation to give rights to language-minority students was the Bilingual Education Act of 1968, which later became Title VII of the Elementary and Secondary Education Act of 1965 (ESEA).⁸ Congress passed the ESEA as part of President Johnson's "War on Poverty" to help low-income students obtain educational parity.⁹ The passage of the ESEA marked an unprecedented federal commitment to education, a responsibility traditionally left to state governments.¹⁰

In the 1974 case, *Lau v. Nichols*, the Supreme Court granted educational rights to language-minority students attending K-12 public schools.¹¹ The

6. See 414 U.S. 563, 568-69 (1974) (establishing that language-based discrimination is a proxy for national origin discrimination); see also 42 U.S.C. § 2000d (2000) (prohibiting discrimination based on race, color, or national origin in any program or activity receiving federal funding).

7. See 42 U.S.C. § 2000a (2000) (prohibiting segregation in public facilities and public schools).

8. See 20 U.S.C. § 6301 (providing federal funding to school districts to meet the needs of disadvantaged students); Gloria Stewner-Manzanares, *The Bilingual Education Act: Twenty Years Later*, "NEW" FOCUS SERIES: OCCASIONAL PAPERS IN BILINGUAL EDUCATION (Nat'l Clearing House for English Language Educ. Program, Washington, D.C.), No. 6, Fall 1988, available at <http://www.ncela.gwu.edu/pubs/classics/focus/06bea.htm> (explaining that former Texas Sen. Ralph Yarborough introduced the Bilingual Education Act to assist ELL students, with a focus on low-income families).

9. See John F. Jennings, *Title I: Its Legislative History and Promise*, in TITLE I: COMPENSATORY EDUCATION AT THE CROSSROADS 1, 6 (Geoffrey D. Borman et al. eds., 2001) (explaining that Title I of the Elementary and Secondary Education Act of 1965 (ESEA) is founded upon President Johnson's belief in a nexus between poverty and educational achievement).

10. See Peter Zamora, Note, *In Recognition of the Special Educational Needs of Low-Income Families?: Ideological Discord and Its Effect Upon Title I of the Elementary and Secondary Education Act of 1965 and 2001*, 10 GEO. J. ON POVERTY L. & POL'Y 413, 417, 420 (2003) (explaining that Title I federal funding sparked a federalism debate over whether the states or the federal government should fund education and decide education policies).

11. See 414 U.S. at 564, 566-67 (requiring federally-funded school districts to rectify a student's language deficiency in order for the student to participate effectively in the district's educational program).

Court held that the San Francisco school system violated the Civil Rights Act of 1964 by failing to provide English language instruction to approximately 1,800 Chinese American students who did not speak English.¹² The Court stated that students who do not understand English are deprived of a meaningful education and that leaving them to sink or swim makes “a mockery of public education.”¹³

Congress quickly endorsed the *Lau* principles by enacting the Equal Educational Opportunity Act of 1975 (EEOA), thereby laying out the states’ responsibility to provide LEP students with a meaningful opportunity to participate in public educational programs.¹⁴ Specifically, the EEOA requires state educational agencies to “take appropriate action” to ensure that all children learn English in order to participate equally in educational programs.¹⁵ Congress, however, did not define what “appropriate action” means.¹⁶

It was not until 1981, in *Castaneda v. Pickard*, that the Fifth Circuit provided some guidance on how states can comply with the EEOA by laying out a three-part test for federal courts to evaluate whether an English language learner (ELL) program complies with § 1703(f).¹⁷ First, the ELL program must be informed by a sound educational theory as recognized by some experts in the field, or at least deemed a legitimate experimental strategy.¹⁸ Second, the programs and practices have to be reasonably calculated to implement effectively the educational theory adopted by the school.¹⁹ Finally, the program must prove effective in overcoming language barriers after being employed for a sufficient time period to give the plan a legitimate trial.²⁰ Federal courts throughout the country adopted

12. See *id.* at 566 (stating that merely providing students with the same facilities, textbooks, teachers, and curriculum does not constitute equality of treatment); see also 42 U.S.C. § 2000d (2000) (banning discrimination based on national origin).

13. See *Lau*, 414 U.S. at 566 (stating that schools, at their core, teach basic English skills and cannot require students to acquire these skills prior to participating effectively in their educational programs).

14. See 20 U.S.C. § 1703 (2000) (establishing that no state shall deny equal educational opportunity to an individual because of race, color, sex, or national origin).

15. See *id.* § 1703(f) (making it unlawful to deny ELLs equal participation in educational programs because of their national origin).

16. See *Castaneda v. Pickard*, 648 F.2d 989, 1009 (5th Cir. 1981) (criticizing Congress for giving almost no guidance to courts on how to determine whether a school district’s language remediation efforts are “appropriate” within the meaning of the Equal Educational Opportunity Act (EEOA)).

17. See *id.* at 1009-10 (adopting a test to interpret the EEOA based on the plain language of § 1703(f) and clarifying that the court’s three-part test does not usurp the educational and political decisions left to state and local authorities).

18. See *id.* at 1009 (acknowledging that even respected authorities may disagree as to what is the best education program for ELLs).

19. See *id.* at 1010 (adding that a school system must provide the resources necessary to implement the educational theory).

20. See *id.* (stating that an adequately funded, scientifically based ELL program

the Fifth Circuit's three-part *Castaneda* analysis to determine what "appropriate action" means.²¹

B. NCLB's Commitment to LEP Students

In 2001, Congress reauthorized the ESEA as the No Child Left Behind Act of 2001.²² NCLB aims to close the academic achievement gap and make all students grade-level proficient in reading and mathematics by 2014 by increasing standards of accountability for states, school districts, and schools across the country.²³ NCLB is the first federal education statute to disaggregate achievement data for racial and ethnic minorities, low-income students, students with disabilities, and ELLs.²⁴ The key NCLB provisions affecting LEP students are Title I and Title III.²⁵ Although NCLB highlighted disparities in educational outcomes among K-12 students, particularly in regard to the poor academic achievement of LEP students, NCLB has had little success in closing the achievement gap for ELLs.²⁶ In the 2003-2004 school year, for example, nearly two-thirds

fails EEOA compliance if results show that the program is not helping ELLs overcome language barriers after a sufficient time).

21. See, e.g., *Gomez v. Ill. State Bd. of Educ.*, 811 F.2d 1030, 1040-42 (7th Cir. 1987) (interpreting appropriate action as giving states and local educational agencies substantial latitude in choosing programs, but emphasizing that schools must also make a genuine and good faith effort to remedy the language deficiencies).

22. See 20 U.S.C. §§ 6301 et seq. (Supp. V 2005) (incorporating programs in the areas of testing, accountability, parental choice, and reading to raise overall academic achievement); Zamora, *supra* note 10, at 415 (noting that the reauthorization expanded the 1965 ESEA).

23. See BUILDING PARTNERSHIPS, *supra* note 1 (stating that schools are responsible for ensuring that all children have the skills and knowledge to succeed in life); Press Release, George W. Bush, U.S. President, President Highlights Progress in Education Reform (June 10, 2003), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2003/06/20030610-4.html> (explaining that states submitted a plan to the Department of Education for approval, including timelines and projections on how they plan to make all students grade level proficient in reading and math by 2014 and requiring them to disseminate annual report cards to the public showing the state's progress).

24. See Lazarin, *supra* note 3, at 2 (explaining that disaggregation of achievement data allows parents to know how their child's subgroup is performing and to hold the school system accountable for closing the gap).

25. See 20 U.S.C. § 6301 (requiring accountability systems to ensure that disadvantaged students meet state educational attainment standards); 20 U.S.C. § 6801 (Supp. V 2005) (authorizing funding to carry out the immigrant education program).

26. See *Impact of NCLB on English Language Learners: Hearing Before the Subcomm. on Early Childhood, Elementary and Secondary Education, H. Comm. on Education and Labor*, 110th Cong. 28, 30-1 (2007) [hereinafter *Impact of NCLB on English Language Learners*] (statement of Peter Zamora, D.C. Regional Counsel, Mexican American Legal Defense and Educational Fund and Co-Chair, Hispanic Education Coalition) (advocating for the reauthorization of NCLB because NCLB placed issues affecting ELLs at the forefront of education even if state educational agencies did not effectively implement the law); RICHARD FRY, HOW FAR BEHIND IN MATH AND READING ARE ENGLISH LANGUAGE LEARNERS? 7-8 (Pew Hispanic Center 2007) (comparing the academic achievement of Hispanic and African Americans and finding ELLs fare worse than both groups).

of states failed to meet their respective, self-determined academic progress goals under NCLB for LEP student achievement.²⁷ In general, a lower percentage of ELLs achieved proficient scores on NCLB state tests than any other student subgroup.²⁸ States' efforts to implement language instruction programs for ELL students have not proven effective, as indicated by the students' low performance.²⁹ Consequently, educators, community leaders, elected officials, and civil rights organizations have split on whether NCLB is accomplishing its intended objectives.³⁰ In 2007, Congress considered reauthorizing NCLB, but after months of debate, neither the House nor the Senate introduced a bill to formally start the reauthorization process.³¹ Congress postponed NCLB's reauthorization until 2009.³² Although Congress has yet to introduce a bill to reauthorize NCLB, congressional opponents of the law have introduced a bill that, if

27. See U.S. GOV'T ACCOUNTABILITY OFFICE, NO CHILD LEFT BEHIND ACT: ASSISTANCE FROM EDUCATION COULD HELP STATES BETTER MEASURE PROGRESS OF STUDENTS WITH LIMITED ENGLISH PROFICIENCY, No. 06-815, at 13-14 (July 2006), available at <http://purl.access.gpo.gov/GPO/LPS73081> (finding that in thirty-one states, ELLs did not meet adequate yearly progress (AYP) set by their state under NCLB for both language arts and math); U.S. DEP'T OF EDUC., STRONGER ACCOUNTABILITY: ADEQUATE YEARLY PROGRESS, available at <http://www.ed.gov/policy/elsec/guid/secletter/020724.html> (last visited Feb. 23, 2009) (defining AYP as a state-set minimum level of proficiency that schools must achieve each year on annual academic tests in at least reading/language arts and math).

28. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 27, at 18-20 (finding that ELLs ranked below English-speaking white students in all forty-nine states that provided data, and in twelve states, ELLs performed lower than any other student subgroup).

29. See U.S. DEP'T OF EDUC., NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS, THE NATION'S REPORT CARD, available at http://nationsreportcard.gov/reading_math_2005/s0015.asp (last visited Feb. 23, 2009) (for the reading scores, immediately above the graph shown, follow the "Achievement Levels" tab); *id.* (for the math scores, at the top of the screen, follow the "Mathematics" tab and then the "Achievement Levels" tab) (finding that in 2005, only 27% of fourth grade ELLs scored at or above the basic level in reading compared with 67% of non-ELLs, and only 54% of fourth grade ELLs scored at or above the basic level in math, compared with 83% of non-ELLs).

30. See James Crawford, *No Child Left Behind: Misguided Approach to School Accountability for English Language Learners*, National Association for Bilingual Education (Sept. 14, 2004), http://www.nabe.org/documents/policy_legislation/NABE_on_NCLB.pdf (arguing that NCLB's "approach to school accountability is overly rigid, punitive, unscientific, and likely to do more harm than good" for ELLs). *But see Impact of NCLB on English Language Learners*, *supra* note 26, at 30 (stating that NCLB "is perhaps the most significant federal education, integration, and civil rights statute for" ELLs).

31. See Sam Dillon, *For A Key Education Law, Reauthorization Stalls*, N.Y. TIMES, Nov. 6, 2007, at A19 (noting that politicking in the 2008 election made reauthorizing NCLB problematic, as President Bush urged Congress to reauthorize NCLB but could not gain support from Democrats because he vetoed other Democratic bills).

32. See Press Release, Campaign for High School Equity, Statement on the Role of Education Reform in the American Recovery and Reinvestment Act (Jan. 30, 2009) (on file with author) (urging the 111th Congress to reauthorize and fund NCLB to help "restore long-term economic viability").

passed, could potentially weaken the 2001 version of NCLB that currently remains in effect.³³

C. Post-NCLB Litigation Surrounding LEP Students

Since the passage of NCLB, only three groups of ELL advocates have succeeded in challenging a state's or school district's compliance with the EEOA at the federal level in regard to ELLs.³⁴ In *Flores v. Arizona*, filed before NCLB was enacted, the Ninth Circuit held that the passage of NCLB did not alter Arizona's obligations to comply with the EEOA, nor did it render the *Castaneda* framework obsolete.³⁵ In other words, mere compliance with NCLB academic benchmarks does not automatically mean the state has satisfied the requirements of the EEOA.³⁶ The court interpreted the EEOA as an "equality-based civil rights statute" and NCLB as a "program for overall, gradual school improvement."³⁷ The court pointed to the explicit language of NCLB that provides that courts should not construe Title III in a manner inconsistent with any federal law that guarantees a civil right.³⁸ While NCLB does not contain an express private

33. See Editorial, *The Wrong Education Fix*, WALL ST. J., July 12, 2008, at A10 (describing legislation introduced by congressional opponents of NCLB aimed to suspend NCLB's accountability provisions until Congress reauthorizes NCLB); Jay Newton-Small, *Congress Lays Ground for 2009*, TIME, July 29, 2008 (stating that NCLB's one year automatic extension expired in September 2008 but that another extension was likely); David J. Hoff, *Bush Presses NCLB Renewal on His Terms*, EDUC. WEEK, Jan. 16, 2008, available at 2008 WLNR 1687310 (quoting Education Secretary Margaret Spellings's explanation that NCLB will remain "in effect without congressional action to amend or reauthorize it").

34. See *Flores v. Arizona*, 516 F.3d 1140, 1177-78 (9th Cir. 2008) (holding that Arizona must adequately fund ELL programs to comply with the EEOA), *cert. granted*, 129 S. Ct. 893 (U.S. Jan. 9, 2009) (No. 08-289). As of publication of this Comment, the Supreme Court has not yet certified the issues it will consider in *Flores*. See also *United States v. Texas*, 572 F. Supp. 2d 726, 782 (E.D. Tex. 2008) (reconsidering its 2007 ruling and holding that Texas is not complying with the EEOA and must implement an ELL program that conforms to the EEOA); *Leslie v. Bd. of Educ. for Ill. Sch. Dist.*, 379 F. Supp. 2d 952, 961 (N.D. Ill. 2005) (holding that plaintiffs stated a proper EEOA claim where the local board of education failed to provide adequate LEP services and adopted a discriminatory redistricting plan that impeded LEP students in overcoming language barriers).

35. See *Flores*, 516 F.3d at 1172 (rejecting Arizona's argument that NCLB obviates any need to do a statewide cost study of ELL program incremental costs); Plaintiffs-Appellees' Combined Answering Brief, *Flores*, 516 F.3d 1140 (Nos. 07-15603, 07-15605), 2007 WL 3081495, at *25-26 [hereinafter Answering Brief] (arguing that NCLB reinforces the applicability of the *Castaneda* test and does not replace the EEOA).

36. See *Flores*, 516 F.3d at 1173-74 (rejecting Arizona's argument that NCLB now defines appropriate action and that NCLB compliance is dispositive of EEOA compliance).

37. See *id.* at 1173 (stating that although NCLB intends to ameliorate conditions that lead to civil rights violations, it is not concerned with the individual student's rights).

38. See *id.* (finding that § 6847 of NCLB does not operate in the "rights-based framework inherent in civil rights law").

right of action, the EEOA does.³⁹

Arizona has struggled for over fifteen years to comply with part two of the *Castaneda* test.⁴⁰ In 2000, the U.S. District Court for the District of Arizona held that the state's funding level for ELLs was "arbitrary and capricious" and insufficient to ensure that ELL students attained the essential skills.⁴¹ As of July 2008, the state continues to fail to comply with court orders despite extensions for compliance and fines for noncompliance.⁴² Because of Arizona's noncompliance with the EEOA, two schools from the school district failed to meet adequate yearly progress (AYP) benchmarks under NCLB in the 2004-2005 academic year.⁴³

Post-NCLB, ELL advocates have not been successful in advancing the educational landscape for ELLs at the state level. For example, in *Coachella Valley Unified School District v. California*, ELL advocates dissatisfied with California's implementation of ELL assessments under NCLB unsuccessfully argued that California's failure to comply with an NCLB provision was a violation of state law.⁴⁴ The U.S. District Court for the Northern District of California held that NCLB did not create a private right of action and remanded the case to state court.⁴⁵ On remand, the Superior Court for the City and County of San Francisco, however, held that it did not have legal authority to issue a writ of mandate commanding the state to comply with NCLB because the state's duties are discretionary and, as a matter of law, the state's assessed method is not an abuse of discretion.⁴⁶ The superior court dismissed the case on February 1, 2008.⁴⁷

39. See 20 U.S.C. § 1706 (2000) (granting individuals denied an equal educational opportunity the right to institute a civil action for relief in an appropriate district court).

40. See *Flores*, 516 F.3d at 1144, 1160, 1177-78 (holding that Arizona failed to provide sufficient financial resources to adequately implement ELL programs in violation of the EEOA).

41. See *id.* at 1148 (providing examples of resource-linked ELL program deficiencies, including too many students per class room, too few classrooms, too few qualified teachers, and insufficient teaching materials).

42. See *id.* at 1151, 1177-78 (noting that Arizona accrued over \$20 million in fines before creating a permanent compliant funding system that the court ultimately rejected as flawed).

43. See *id.* at 1158 (indicating that ELLs in the school district generally did worse than the state average for all students and were falling behind the district average for all students).

44. See No. C 05-02657, 2005 WL 1869499, at *1 (N.D. Cal. Aug. 5, 2005) (remanding the claim for lack of subject matter jurisdiction and noting that the plaintiffs argued that California, unlike fourteen other states, was not complying with NCLB because it refused to utilize a Spanish-language test or a modified English test for ELLs).

45. See *id.* at *2-3 (holding that if a federal law does not provide a private right of action, then a state law action based on its violation does not raise a substantial federal question).

46. See *In re Coachella Valley Unified Sch. Dist.*, CPF-05-505334, at 14 (Cal. Super. Ct. S.F. County May 25, 2007) (decision denying writ of mandate) (holding that NCLB does not establish a mandatory ministerial duty because state participation is optional).

The plaintiffs appealed and are currently awaiting resolution.⁴⁸

III. ANALYSIS

A. NCLB Must Be Interpreted as a Civil Rights Statute

ELL advocates have not succeeded in improving the education of ELL students because the current legal landscape has created limited opportunities for litigation.⁴⁹ Courts have not interpreted, but should interpret, NCLB as a civil rights statute.⁵⁰ The *Flores* and *Coachella* courts should have interpreted NCLB as a civil rights statute that is an extension of the EEOA and thus grants individuals a private right of action.⁵¹

1. Congress's Intent for NCLB

Federal elected officials in support of NCLB viewed education as a civil right and intended for NCLB to be interpreted as such.⁵² On January 23, 2001, just three days after being sworn into office, President George W.

47. See *Coachella Valley Unified Sch. Dist. v. California*, CPF-05-505334, at 2-3 (Cal. Super. Ct. S.F. County Feb. 1, 2008) (judgment of dismissal) (dismissing all causes of action, including illegal expenditure of taxpayer funds and a California constitutional violation).

48. See *Coachella Valley Unified Sch. Dist.*, CPF-05-505334, at 1 (Cal. Super. Ct. S.F. County Mar. 18, 2008) (order staying superior court proceedings pending resolution of appeal) (staying the superior court proceedings until thirty days after the court of appeals decides whether to hear the case).

49. See Crawford, *supra* note 30, at 7-8 (stating that courts have not applied the *Castaneda* test on a large scale due to political resistance and limited resources for enforcement); Carl F. Kaestle, Response, *Equal Educational Opportunity and the Federal Government: A Response to Goodwin Liu*, 116 YALE L.J. POCKET PART 152, 154 (2006) (explaining that a combination of recent court decisions disfavoring an increased federal role in equal educational opportunity, together with a federal judiciary that has moved away from addressing racial balance issues, creates an environment sympathetic to states' rights).

50. See, e.g., *Fresh Start Acad. v. Toledo Bd. of Educ.*, 363 F. Supp. 2d 910, 914 (N.D. Ohio 2005) (holding that Congress did not intend NCLB to confer individual rights upon a class of beneficiaries under 20 U.S.C. § 1983 or an implied private right of action).

51. See 20 U.S.C. § 1703 (2000) (requiring that educational agencies provide equal educational opportunities without regard to a child's race, color, sex, or national origin); 20 U.S.C. §§ 1706, 1712-1718 (2000) (providing a private right of action and remedies for EEOA violations); *Flores v. Arizona*, 516 F.3d 1140, 1173-74 (9th Cir. 2008) (distinguishing the EEOA as a civil rights statute and NCLB as a program for overall achievement), *cert. granted*, 129 S. Ct. 893 (U.S. Jan. 9, 2009) (No. 08-289); *Coachella Valley Unified Sch. Dist. v. California*, No. C 05-02657, 2005 WL 1869499, at *2-3 (N.D. Cal. Aug. 5, 2005) (remanding the case to state court because the lack of enforcement of a federal statute based on state law grounds does not raise a substantial federal question, and in so doing, implicitly declining to consider the NCLB as an extension of the EEOA).

52. See 150 CONG. REC. S5,402 (daily ed. May 13, 2004) (describing Sen. Richard Durbin's belief that NCLB affirms "that access to a quality education is a civil right"); see also 147 CONG. REC. S13,323 (daily ed. Dec. 17, 2001) (describing Sen. Edward Kennedy's belief that NCLB continues the civil rights movement that aimed to provide a good education and opportunity to all children).

Bush unveiled NCLB as his primary education plan to reform America's schools.⁵³ Throughout President Bush's 2000 presidential campaign, he advocated for education reform, and as president-elect, directed House and Senate legislators to introduce an education bill.⁵⁴ When the Bush Administration orchestrated the passage of NCLB, it characterized education as a civil rights issue.⁵⁵ President Bush stated that fairness requires holding disadvantaged children to high standards and "that it is discrimination to require anything less."⁵⁶ Further, President Bush's plan was described explicitly as characterizing reading education as a "new civil right" and guaranteeing to make every third-grader literate.⁵⁷

Following President Bush's intent in crafting NCLB, congressional leaders under the president's guidance—including Senator Edward M. Kennedy, Chairman of the U.S. Senate Committee on Health, Education, Labor and Pensions and co-sponsor of NCLB—also advocated education as a basic right for all students and a door to opportunities that should be open to everyone.⁵⁸ Senator Kennedy stated that NCLB continued the civil rights movement that began when leaders risked their lives to end segregation in public schools.⁵⁹ In fact, Congress passed the original ESEA during the civil rights era with the intention of leveling the academic

53. See U.S. DEP'T OF EDUC., EXECUTIVE SUMMARY OF THE NO CHILD LEFT BEHIND ACT OF 2001, at 1 (Jan. 7, 2002), available at <http://www.ed.gov/nclb/overview/intro/execsumm.html> (stating that President Bush intended NCLB to be the foremost legislative accomplishment of his administration).

54. See Nicholas Lemann, *Testing Limits; Can the President's Education Crusade Survive Beltway Politics?*, NEW YORKER, July 2, 2001, at 28 (attributing President Bush's campaign victory to his stance on education reform and describing an education gathering that he hosted in Texas where he invited members of Congress to discuss his education plan).

55. See, e.g., Press Release, U.S. Dep't of Educ., Bush Education Official Celebrates *Brown v. Board of Education* 50th Anniversary (May 18, 2004), available at <http://www.ed.gov/news/pressreleases/2004/05/05182004a.html> (describing former Education Secretary Rod Paige's comparison of the segregation overturned by *Brown v. Board of Education* to the achievement gap the NCLB sought to address).

56. See *Excerpts From Bush's Speech on Improving Education*, N.Y. TIMES, Sept. 3, 1999, at A14 (quoting George W. Bush challenging the "soft bigotry of low expectations").

57. See 147 CONG. REC. H2,405 (daily ed. May 22, 2001) (describing Rep. Todd Platts's explanation of a \$5 billion investment under NCLB for literacy programs to guarantee every student can read by the third grade); see also 147 CONG. REC. S13,395 (daily ed. Dec. 18, 2001) (stating Rep. Pete Sessions's reasons for supporting NCLB, including the fact that President Bush viewed the "Reading First" and "Early Reading First" initiatives as the cornerstones of his goal to make every third-grader literate).

58. See 147 CONG. REC. S13,323, S13,325, S13,327 (daily ed. Dec. 17, 2001) (describing NCLB's Senate Democratic and Republican floor managers commending President Bush for his role in the bill's legislative process and citing Sen. Kennedy's belief that education is the precursor to economic stability and civic participation).

59. See 147 CONG. REC. S13,323 (daily ed. Dec. 17, 2001) (referring to the seminal holding of *Brown v. Board of Education*, which called for equality of educational opportunities and an end to separate but equal educational facilities).

playing field for disadvantaged and minority students.⁶⁰

2. NCLB Is Implicitly a Civil Rights Statute

NCLB's title, stated goals, and purpose indicate that NCLB is a civil rights statute.⁶¹ Title I aims to provide all children with an equal educational opportunity to obtain at least a minimal level of academic proficiency as determined by state academic standards or assessments.⁶² Additionally, one of the main purposes of Title III is to help ensure that all LEP students attain English proficiency and reach the same academic standards as native English speakers.⁶³ Moreover, NCLB explicitly requires the participation of civil rights groups in the waiver process and in the "implementation of and operation" of Title I programs, strongly indicating a congressional desire to allow for civil rights remedies in at least these provisions which are likely to generate litigation.⁶⁴

Phrases such as "no child left behind," "all children," and "equal . . . opportunity" indicate that legislators intended to eradicate educational

60. See 20 U.S.C. § 6301 (Supp. V 2005) (codifying a federal interest in providing federal aid for the education of disadvantaged children to end the cycle of poverty); Zamora, *supra* note 10, at 418 (describing President Johnson's personal experiences growing up in poor conditions and teaching impoverished Mexicans in Cotulla, Texas, as the reason he tenaciously pursued educational equality).

61. Compare H.R. REP. NO. 107-334, at 1 (2001) (Conf. Rep.) (noting NCLB's main purpose was "to close the achievement gap . . . so that no child is left behind"), with *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954) (establishing that segregation tended to impede the educational and mental development of African American children). But cf. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (holding the U.S. Constitution does not implicitly or explicitly grant a right to education).

62. See 20 U.S.C. § 6301 (providing twelve different ways to accomplish Title I's goal, including meeting the needs of LEP children, closing the achievement gap between minority and nonminority students, and ensuring students have access to scientifically based instructional programs).

63. See 20 U.S.C. § 6812 (Supp. V 2005) (listing the nine purposes of Title III: (1) ensure LEP students learn English; (2) help LEP students achieve high academic levels; (3) develop high-quality language instruction programs to assist teachers in teaching LEP students; (4) assist educational agencies in building their capacity to provide language instruction programs that will prepare LEP students for an all-English setting; (5) assist educational agencies in establishing, implementing, and sustaining language development programs for LEP students; (6) promote parental and community participation in language instruction programs; (7) streamline language instruction programs into a formula grant program; (8) hold schools and school districts accountable for the language proficiency and academic achievement of LEP students through requiring demonstrated achievement annually and meeting AYP benchmarks; and (9) provide school districts flexibility in implementing language instruction programs based on scientific research).

64. See 20 U.S.C. §§ 7861(a), 7861(g) (Supp. V 2005) (allowing the Department of Education to waive any statutory or regulatory requirement of NCLB for a state or local educational agency that received federal funds to implement NCLB, and requiring the Department to publish its decision to grant a waiver in the *Federal Register* and disseminate the information to civil rights organizations); H.R. REP. NO. 107-334, at 797, 809 (2001) (Conf. Rep.) (stating explicitly that Congress intended for civil rights organizations to voice concerns regarding AYP and accountability measures).

inequalities.⁶⁵ These same intentions are inherent in the language of other civil rights statutes such as the Civil Rights Act of 1964.⁶⁶ Closing the academic achievement gap for all children is an ambitious goal and one that Congress could not have set without intending for the law to be an equality-based statute.⁶⁷

3. NCLB Is an Extension of the EEOA

Legislators intended for NCLB not only to serve as a civil rights statute but also to be an extension of the EEOA.⁶⁸ The *Castaneda* test, the primary test that courts use to determine state compliance with the EEOA, is integrated throughout the language of Titles I (parental involvement), II (teacher and principal training and recruiting fund), and III (formula grants to states) of NCLB.⁶⁹ For example, Title I of NCLB emphasizes that states must rely on scientifically based research and instructional strategies to ensure students' academic success, clearly reflecting the first requirement of *Castaneda*.⁷⁰ NCLB most notably stands out for its accountability

65. See 20 U.S.C. § 7913 (Supp. V 2005) (prohibiting the Secretary of Education, state and local educational agencies, and schools from denying students financial or educational benefits or imposing burdens on students in violation of the Fifth and Fourteenth Amendments); 20 U.S.C. § 7914 (Supp. V 2005) (prohibiting discrimination on the basis of race, color, religion, sex, national origin, or disability in NCLB-funded programs).

66. See 42 U.S.C. § 2000d-7(b) (2000) (prohibiting the exclusion from participation in, denial of benefits of, and discrimination under federally-funded programs on grounds of race, color, or national origin).

67. See 20 U.S.C. § 6311(b)(2)(C)(v) (Supp. V 2005) (requiring states to disaggregate student achievement on state academic assessments in their annual state report cards by race, ethnicity, disability status, English proficiency, and status as economically disadvantaged to diagnose and improve student achievement). Cf. Mary Ann Zehr, *English Proficiency Can Take a While in State ESEA Plans*, EDUC. WEEK, Nov. 19, 2003, available at 2003 WLNR 10023802 (citing an educator who believes NCLB is a "political hyperbole" that "sounds good," but whose goals are impossible to accomplish).

68. See 20 U.S.C. § 1703 (2000) (reiterating the principles of *Lau v. Nichols*, which the Supreme Court decided on the grounds of § 601 of the Civil Rights Act of 1964, to ensure states provide LEP students with opportunities to participate in education); 20 U.S.C. §§ 6312, 6314 (Supp. V 2005) (using the language of the *Castaneda* test, which helps courts interpret the EEOA, to insist that NCLB programs, like EEOA programs, be informed by sound educational theory).

69. See 20 U.S.C. § 6318 (Supp. V 2005) (promoting parental involvement in all programs and activities under Title I to satisfy the second requirement of *Castaneda*); 20 U.S.C. § 6601 (Supp. V 2005) (increasing the number of highly qualified teachers to satisfy the second requirement of *Castaneda*); 20 U.S.C. § 6821 (Supp. V 2005) (requiring states to annually allot ninety-five percent of its federal funding to eligible entities that can carry out NCLB's goals to satisfy the second requirement of *Castaneda*); *Castaneda v. Pickard*, 648 F.2d 989, 1009-10 (5th Cir. 1981) (formulating a standard that requires schools to adopt an ELL program based on a sound research theory, provide sufficient resources to implement the program, and ensure the program is increasing the academic achievement and language proficiency of ELLs).

70. See 20 U.S.C. § 6312 (mandating local education agency plans under Part A, subpart 1 take into account the findings of relevant scientifically based research that indicates services may be most effective if focused on students in early grades); 20

provisions that measure whether states' language instruction programs are meeting the third requirement of *Castaneda*.⁷¹

Courts should interpret NCLB as an extension of the EEOA under the presumption against implied repeals doctrine, which states that absent a clearly expressed congressional intention to the contrary, courts have a duty to regard as effective two statutes that are capable of coexistence.⁷² NCLB does not repeal the EEOA because the NCLB explicitly states that it does not override any federal law that guarantees a civil right and because the goals of the NCLB and the EEOA are "complementary."⁷³ Congress did not manifest a clear intent for NCLB to repeal the EEOA; therefore, both statutes can coexist.⁷⁴

Given the similar goals and methods of NCLB and the EEOA, and given their necessary relationship under the presumption against implied repeal doctrine, courts should interpret NCLB as an extension of the EEOA.⁷⁵ As such, the applicable private right of action and remedies available under the EEOA should also be available under NCLB, and where there are no applicable remedies under the EEOA for actions initiated under NCLB, the court should determine the appropriate remedies.⁷⁶

B. An Implied Private Right of Action Exists Under NCLB

Under the maxim of *ubi jus ibi remedium*, which states that where there is a right, there is a remedy,⁷⁷ LEP students should be afforded a remedy

U.S.C. § 6314 (requiring a schoolwide program to use effective methods based on scientific research); *Castaneda*, 648 F.2d at 1009 (deciding that states and school districts must implement ELL programs based on scientific research).

71. See 20 U.S.C. §§ 6841-6843 (Supp. V 2005) (requiring funding recipients to provide evaluations of ELL programs and activities, achieve annual measurable objectives, including making AYP, and report the effectiveness of programs to the Secretary of Education); *Castaneda*, 648 F.2d at 1010 (requiring states and school districts to determine whether an ELL program, after a legitimate time period, has shown positive results for ELLs).

72. See *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (stating that when two statutes address the same subject, courts should give effect to both statutes unless Congress clearly expresses its intent otherwise).

73. See *Flores v. Arizona*, 516 F.3d 1140, 1173-74 (9th Cir. 2008) (citing *Morton*, 417 U.S. at 549-50 (1974) and quoting § 6847 of NCLB in refusing to repeal the EEOA by implication), *cert. granted*, 129 S. Ct. 893 (U.S. Jan. 9, 2009) (No. 08-289).

74. See *id.* (finding that NCLB does not conflict with the EEOA and that it is not necessary for NCLB to repeal the EEOA in order for NCLB to have a complementary purpose).

75. Compare 20 U.S.C. § 6301 (Supp. V 2005) (aiming to close the academic achievement gap of all children), with 20 U.S.C. § 1703 (2000) (requiring equal educational opportunities for all students).

76. Cf. 20 U.S.C. § 1706 (2000) (allowing plaintiffs denied an equal educational opportunity to seek relief "as may be appropriate").

77. See 16 AM. JUR. 2D *Constitutional Law* § 104 (1998) (stating that although the Constitution does not expressly provide a remedy for enforcing a right it does not mean the framers did not intend for a right to be self-executing).

when states and school districts fail to comply with NCLB because education is a civil right.⁷⁸ Without NCLB providing an explicit private right of action, however, courts must find an implied private right of action under NCLB.⁷⁹ In order for courts to find an implied private right of action they must determine that Congress enacted the statute for the benefit of a special class of which the plaintiff is a member.⁸⁰ Second, courts must find there is legislative intent to create a private remedy.⁸¹ Third, courts must find that an implied remedy is consistent with the purpose of the legislative scheme of the statute.⁸² Finally, courts must not find an implied federal remedy on subject matters that are of primary concern to the states.⁸³

An implied private right of action exists under NCLB because Congress enacted NCLB to improve the academic achievement of students across the country, particularly for minority and disadvantaged students, including LEP children.⁸⁴ This means that parents of LEP students who are dissatisfied with the type of education their children are receiving can challenge a state or school district because LEP students are considered a protected class under civil rights statutes.⁸⁵

NCLB meets the second requirement of the implied private right of

78. See Aspen Institute, *Accountability Recommendations: Accelerating Progress and Closing Achievement Gaps Through Improved Accountability*, June 20, 2007, available at <http://www.nclbcommission.org> (click on "Accountability Recommendations: Accelerating Progress and Closing Achievement Gaps") (recommending the creation of a streamlined process to hear complaints from parties who want to challenge a state, school district, or the Department of Education for failing to properly implement NCLB and creating a private cause of action for parties to sue in state court if the Department refuses to act); see also Editorial, *Education as a Civil Rights Issue*, N.Y. TIMES, Aug. 1, 2008, at A18 (noting that civil rights groups view education reform as a civil rights issue).

79. See *Cort v. Ash*, 422 U.S. 66, 78 (1975) (creating a four-part test to determine whether an implied private right of action exists under a statute); see also *Cannon v. Univ. of Chicago*, 441 U.S. 677, 678 (1979) (finding an implied private cause of action in Title IX of the Education Amendments of 1972, which was patterned after Title VI of the Civil Rights Act of 1964). But see *Alexander v. Sandoval*, 532 U.S. 275, 292-93 (2001) (holding there is no private right of action to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964).

80. See *Cort*, 422 U.S. at 80 (determining that the intent to protect the special class cannot be a subsidiary purpose of the statute).

81. See *id.* at 78 (concluding that legislative intent can be explicit or implicit).

82. See *id.* at 84 (conceding it is the duty of courts to provide remedies required to make Congress's intent effective).

83. See *id.* (finding it appropriate to relegate cases to state court when a remedy exists in a state statute).

84. See 20 U.S.C. § 6311(b)(2)(C)(v) (Supp. V 2005) (attempting to close the achievement gap for the special classes of racial and ethnic minorities, LEP students, disabled students, and low income students, satisfying the first requirement of *Cort*).

85. See *Lau v. Nichols*, 414 U.S. 563, 568 (1974) (holding the San Francisco school system liable for discriminating against Chinese-speaking minorities in failing to provide an adequate LEP program). Cf. *Cannon v. Univ. of Chicago*, 44 U.S. 677, 677-78 (1979) (holding that the female plaintiff who was discriminated against because of her sex belongs to the class for whom Title IX was meant to benefit).

action doctrine because, as stated earlier, the law's architect, President Bush, and the bill's congressional sponsors and floor managers all view NCLB and education as a civil right.⁸⁶ Courts must acknowledge that, because of the extraordinary role that President Bush played in crafting NCLB, and the level of deference legislators paid to his intent, President Bush's intent as an author must carry enormous weight in any discussion of legislative intent even though he was not a legislator per se.⁸⁷ President Bush modeled NCLB after a law in Texas enacted while he was governor, and under which civil rights cases were filed on state grounds.⁸⁸ He exerted legislative control throughout the process and, most importantly, members of Congress recognized his heavy legislative involvement with the federal NCLB in the legislative record, thus formally making his intent a part of Congress's intent.⁸⁹

Legislators acknowledge that NCLB continues the civil rights movement that began with the Civil Rights Act of 1964, which explicitly granted a private remedy for racial minorities who experienced discrimination.⁹⁰ Because NCLB is a statute that continues the civil rights movement, similar to the Civil Rights Act of 1964, Congress arguably intended to grant a private remedy to students that belong to a special class under NCLB.⁹¹

NCLB satisfies part three of the implied private right of action doctrine because an implied remedy under NCLB would aid its primary congressional goal to close the academic achievement gap of minority and

86. See 147 CONG. REC. H1,179 (daily ed. Mar. 21, 2001) (detailing original NCLB sponsor Rep. Richard Keller's belief that President Bush's NCLB legislation will give every child an equal educational opportunity); 147 CONG. REC. H2,311 (daily ed. May 17, 2001) (describing Ranking Member George Miller's intent for NCLB to equalize opportunity by closing the achievement gap).

87. See U.S. CONST. art. I, § 1 (stating that all legislative powers are vested in Congress, which consists of the Senate and the House of Representatives); U.S. CONST. art. II, § 1 (providing that the executive power is vested in the President of the U.S.). See generally Kathryn Marie Dessayer, Note, *The First Word: The President's Place in "Legislative History,"* 89 MICH. L. REV. 399, 402-03 (1990) (arguing that courts should pay attention to presidential input and give it greater weight because of the influential role the president plays in law making).

88. See, e.g., *G.I. Forum v. Tex. Educ. Agency*, No. CIVASA-97-CA-1278EP, 1999 WL 33290624, at *1 (W.D. Tex. July 27, 1999) (denying, in part, plaintiffs' claim that requiring students to pass a Texas state exam to receive a high school diploma is a violation of Title VI, 20 U.S.C. § 1983, and the state education code); Lemann, *supra* note 54, at 28 (describing President Bush's desire to implement Texas's education reforms on the national level).

89. See 147 CONG. REC. S13,325-27 (daily ed. Dec. 17, 2001) (describing how NCLB's Senate floor managers gave President Bush credit for his role in the bill's legislative process).

90. See 147 CONG. REC. S13,323 (daily ed. Dec. 17, 2001) (quoting Sen. Kennedy's acknowledgement that NCLB continues the march of civil rights leaders who sought a good education for all children).

91. See H.R. REP. NO. 107-334, at 797 (2001) (Conf. Rep.) (noting the conferees intended to include civil rights groups in their reference to the involvement of "other organizations involved with the implementation and operation of programs under this title").

disadvantaged children.⁹² Allowing individuals to bring civil actions to enforce some provisions of NCLB is a way to accomplish NCLB's ambitious goals.⁹³ With a private remedy, the parents of LEP children who are underperforming in federal and state academic assessments can challenge a state's or school district's LEP program.⁹⁴ Should the court find that a school or state fails to comply with NCLB, the court would be able to sanction the school district or the state or, at the very least, provide damage related remedies to the plaintiffs.⁹⁵ In fact, one reason that NCLB disaggregates student data is to make the data available to a parent who, if dissatisfied with the performance of the child's school, can transfer his or her child to another school that is meeting national and state academic standards.⁹⁶

Finally, NCLB satisfies part four of the implied private right of action doctrine because NCLB is a federal education law that Congress enacted as part of its Spending Clause authority and does not supplant state education law.⁹⁷ Even though NCLB addresses education—a matter traditionally left to state and local governments—states and school districts receiving federal funding must adopt the law's goals and abide by the law's requirements, but may reserve the right to opt out of NCLB's goals and funding.⁹⁸ NCLB authorizes the federal government to hold states and school districts receiving federal funding accountable for the education students receive.⁹⁹

92. See 20 U.S.C. § 6301 (Supp. V 2005) (attempting to close the academic achievement gap of minority and disadvantaged students in reading and math by 2014).

93. See *Castaneda v. Pickard*, 648 F.2d 989, 1009 (5th Cir. 1981) (indicating that because Congress granted a private right of action under the EEOA, states are required to remedy students' language deficiencies). Cf. David J. Hoff, *Many States Facing Tough Trek to Reach Universal Proficiency*, EDUC. WEEK, June 4, 2008, available at 2008 WLNR 11423152 (stating that in the first five years of NCLB, twenty-three states set modest annual measurable objectives, which are state-established targets for the percentage of students scoring as proficient, and will have to make "rapid and steep" jumps in the coming years to meet NCLB's unlikely 2014 goal).

94. See, e.g., *Castaneda*, 648 F.2d at 992 (describing a suit brought by parents of Mexican American children alleging a school district's failure to implement adequate bilingual education and language remediation programs).

95. Cf. 20 U.S.C. § 1706 (2000) (allowing individuals denied an equal educational opportunity an avenue to seek relief "as may be appropriate").

96. See 20 U.S.C. § 6316(b)(1)(E)(i) (Supp. V 2005) (requiring local education agencies to notify parents on the first day of school whether their child's school is in need of improvement and giving parents the option to enroll their child in another public school).

97. See U.S. CONST. art. I, § 8, cl. 1 (stating that "Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the" United States); Caroline Hendrie, *NCLB Cases Face Legal Hurdles in the Courts*, EDUC. WEEK, May 4, 2005, available at 2005 WLNR 7358348 (explaining that Congress is allowed to attach conditions to federal funding and that most money under NCLB comes from Title I).

98. See Hendrie, *supra* note 97, at 2 (stating that NCLB conditions states to set up accountability systems tied to standard-based tests and maintain high-quality teachers as part of its spending authority).

99. See 20 U.S.C. § 6311(g) (Supp. V 2005) (penalizing states that do not meet the

By receiving NCLB funding, states and school districts consent to sharing decision-making authority over educational matters with the federal government; therefore, it is appropriate for courts to infer a private cause of action under NCLB.¹⁰⁰

Courts should find an implied private right of action in the NCLB provisions that adopt aspects of the *Castaneda* test because *Castaneda* guides the courts' interpretation of the EEOA and the EEOA provides an explicit private right of action.¹⁰¹ For example, parents, school districts, and organizations should be able to institute civil actions against people or entities that are failing to properly implement NCLB because a failure to implement NCLB is a failure to comply with *Castaneda*, and thus a violation of the EEOA.¹⁰²

C. The Flores and Coachella Courts Misinterpreted NCLB

The *Flores* and *Coachella* courts failed to interpret NCLB as a civil rights statute that grants a private right of action, leaving unanswered questions and unresolved issues about how to best educate LEP students in Arizona and California.¹⁰³ Both courts disregarded the four factors for determining whether an implied private right of action exists and simply stated that NCLB does not provide an explicit private right of action.¹⁰⁴

law's requirements by allowing the Secretary of Education to withhold federal funds).

100. See *Cort v. Ash*, 422 U.S. 66, 78 (1975) (stating that it may be inappropriate to infer a private cause of action based solely on federal law if the private cause of action deals with an area that is traditionally relegated to state law).

101. See 20 U.S.C. § 6312(c)(1)(F) (Supp. V 2005) (mandating that local educational agencies take into account the findings of scientifically based research in determining the effectiveness of programs, which is the first requirement of *Castaneda*); 20 U.S.C. § 6314(b)(1)(B)(ii) (Supp. V 2005) (mandating that schoolwide programs use effective methods and strategies based on scientific research, which is the first requirement of *Castaneda*). See also *Castaneda v. Pickard*, 648 F.2d 989, 1009 (5th Cir. 1981) (guiding the courts on how to interpret the EEOA and acknowledging that it gives limited English speaking students a private right of action in 20 U.S.C. § 1706).

102. See, e.g., 20 U.S.C. §§ 6312, 6314 (requiring education agencies to implement scientifically based programs, which is the first prong of *Castaneda*); 20 U.S.C. §§ 6318, 6601, 6821 (Supp. V 2005) (requiring parental involvement in Title I programs, highly qualified teachers, and state funding to implement NCLB, which is the second prong of *Castaneda*); 20 U.S.C. §§ 6841-6843 (Supp. V 2005) (requiring states to report to the Department of Education whether their educational programs are resulting in student progress as demonstrated by state assessments); *Castaneda*, 648 F.2d at 1009-10 (stating that an educational agency that fails to meet *Castaneda*'s three-part test violates the EEOA).

103. See Christina Vanoverbeke, *State: Teaching English Learners to Cost \$40M, Not \$300M; Superintendent Submits Figure Day Before Deadline*, MESA TRIB., Mar. 4, 2008, available at 2008 WLNR 4310264 (demonstrating that Arizona is still struggling to provide adequate funding for ELL programs); Mary Ann Zehr, *State Testing of English-learners Scrutinized*, EDUC. WEEK, June 15, 2005, available at 2005 WLNR 9874693 [hereinafter Zehr, *State Testing Scrutinized*] (implying that the *Castaneda* ruling has left unsettled the plaintiffs' claim that California's failure to assess LEP students in their native language results in lower standardized test scores).

104. See *Flores v. Arizona*, 516 F.3d 1140, 1175 (9th Cir. 2008) (stating the fact that

The courts failed to consider that Congress enacted NCLB for the benefit of disadvantaged children, that NCLB legislative leaders believe that education is a civil right and intended for NCLB to be interpreted as such, that interpreting NCLB as a civil rights statute would help meet NCLB's equity goals, and that education matters are the province of states and the federal government alike.¹⁰⁵

The plaintiffs in *Flores* sued under the EEOA which, unlike NCLB, explicitly grants a private right of action.¹⁰⁶ However, despite the court ruling in favor of the plaintiffs, the state continues to fail to comply with the EEOA and has denied an entire generation of LEP students an equal educational opportunity by not providing appropriate ELL programs.¹⁰⁷ The passage of NCLB presented an opportunity for the *Flores* court to mandate compliance with the EEOA by interpreting NCLB as a civil right statute, finding an implied private right of action under NCLB, and holding that Arizona was not complying with NCLB.¹⁰⁸ The added legal burden of not complying with two civil rights statutes would have served as an incentive for Arizona to act quickly to meet the needs of ELL students.¹⁰⁹

The EEOA, using broad language, requires educational agencies to provide "equal educational opportunities" to students, whereas the NCLB specifically lays out in exhaustive detail the state's and school district's

NCLB does not contain a private right of action as support for holding that NCLB does not supersede the EEOA), *cert. granted*, 129 S. Ct. 893 (U.S. Jan. 9, 2009) (No. 08-289); *Coachella Valley Unified Sch. Dist. v. California*, No. C 05-02657, 2005 WL 1869499, at *2 (N.D. Cal. Aug. 5, 2005) (citing cases that held that NCLB does not create a private right of action as the reason to not find one either).

105. See *Flores*, 516 F.3d at 1176 (declining to analyze whether NCLB affords an implied private right of action by citing cases that have held it does not); *Coachella*, 2005 WL 1869499, at *2 (relying on the fact that plaintiffs acknowledged that NCLB does not provide an explicit private right of action to disregard a discussion of whether an implied right of action exists).

106. See *Flores*, 516 F.3d at 1146 (citing *Castaneda*, 648 F.2d at 1008 and adding that the EEOA codified *Lau v. Nichols*, which, under Title VI of the Civil Rights Act of 1964, requires schools to provide LEP students with language assistance).

107. See *id.* at 1144-45 (stating that fifteen years passed since plaintiffs filed the original complaint and eight years since the court held Arizona liable for violating the EEOA due to the state's unwillingness to finance the ELL programs).

108. See 20 U.S.C. §§ 6383(i), 6396(a)(1)(B)(iii), 6514(f), 6561b(b)(1)(F), 6536 (Supp. V 2005) (requiring states to supplement, not supplant, federal funds under Title I); 20 U.S.C. §§ 6613(f), 6623(b), 6662(a)(4), 6683(h)(2), 6763(b)(6) (Supp. V 2005) (mandating that states supplement, not supplant, federal funds under Title II); 20 U.S.C. §§ 6914(h)(4), 6934(f) (Supp. V 2005) (making states supplement, not supplant, federal funding for LEP programs and local educational agencies serving LEP students under Title III); Answering Brief, *supra* note 35 (arguing that Arizona is supplanting, not supplementing, federal funding in violation of multiple provisions of NCLB).

109. See Mary Ann Zehr, *Arizona Still Grappling With Order on Adequate Funding for ELLs*, EDUC. WEEK, Mar. 5, 2008, available at 2008 WLNR 5578081 (stating that Gov. Janet Napolitano, a Democrat, signed a bill aimed to finance ELL programs in Arizona in order to meet the district court's deadline despite facing a "stalemate" over the details of the bill with the Republican-controlled legislature).

responsibilities to LEP students.¹¹⁰ NCLB requires schools to identify LEP students, assess them appropriately, and ensure LEP students attain English proficiency.¹¹¹ As a civil rights statute, LEP students could institute a civil action against school districts and states that, for example, fail to identify, assess, and properly instruct them as required by NCLB.¹¹²

The *Flores* court correctly held that a state's compliance with NCLB does not per se constitute compliance with the EEOA; however, the court should have interpreted NCLB as a civil rights statute and still held that compliance with one statute does not necessarily constitute compliance with the other statute.¹¹³ The two civil rights statutes can coexist and simply grant individuals different types of civil rights.¹¹⁴ The EEOA provides an overall umbrella that guarantees students an equal educational opportunity whereas NCLB guarantees more specific education civil rights such as the need to classify and assess LEP students properly.¹¹⁵

The U.S. District Court for the Northern District of California in *Coachella* should have interpreted NCLB as a federal civil rights statute that grants actionable rights to individuals suing in federal court and should not have remanded the case to state court.¹¹⁶ The plaintiffs erred in moving to remand the case to superior court after defendants removed the action from superior court to the district court because the superior court

110. Compare 20 U.S.C. § 1703(f) (2000) (mandating states to “take appropriate action” to ensure students overcome language barriers that impede them from equal participation in educational programs), with 20 U.S.C. § 6301 (Supp. V 2005) (requiring states receiving federal funding to close the academic achievement gap of all students, particularly minority and disadvantaged children), and Press Release, George W. Bush, *supra* note 23 (declaring that by 2014 states “will bring all students up to grade level in reading and math”).

111. See 20 U.S.C. §§ 6812, 6892 (Supp. V 2005) (aiming for LEP students to attain English proficiency, achieve high academic levels in core subjects, meet AYP benchmarks, etc.).

112. See, e.g., *id.* §§ 6812, 6892 (requiring states to develop and sustain high-quality language instruction programs and holding states accountable for the content knowledge of LEP students, the failure of which would allow LEP advocates to sue the state and school district for relief).

113. See *Flores v. Arizona*, 516 F.3d 1140, 1174-76 (9th Cir. 2008) (distinguishing NCLB as a federal funding program and the EEOA as a civil rights statute, but acknowledging that both intend to ameliorate “conditions that lead to civil rights violations” and that NCLB does not repeal the EEOA), *cert. granted*, 129 S. Ct. 893 (U.S. Jan. 9, 2009) (No. 08-289).

114. See *id.* at 1173-74 (stating the goals of NCLB and the EEOA are “complementary” even though NCLB seeks to improve schools, while the EEOA seeks to protect individual students’ rights).

115. *Contra id.* at 1173 (arguing that NCLB is a “general plan to improve overall performance,” while the EEOA is a law that *specifically* enforces the right of LEP students to participate equally in educational programs) (emphasis added).

116. See *Coachella Valley Unified Sch. Dist. v. California*, No. C 05-02657, 2005 WL 1869499, at *2-3 (N.D. Cal. Aug. 5, 2005) (holding that Congress did not grant a federal cause of action under NCLB and a complaint alleging a violation of a federal statute as an element of a state cause of action does not state a claim “arising under the Constitution [or] laws . . . of the” United States).

interpreted NCLB as a voluntary “comprehensive federal education program” and not a “nationwide standardized educational system” required by state or federal law.¹¹⁷ ELL advocates unsuccessfully sought relief at both the federal and state levels, leaving unresolved whether California and its school districts should assess LEP students in their native language under NCLB.¹¹⁸ Consequently, the Coachella Valley Unified School District continues to struggle to comply with NCLB.¹¹⁹ The court’s interpretation of NCLB as a civil rights statute, however, would have given the plaintiffs an opportunity to receive compensation for the state’s or school district’s violation.¹²⁰

D. The Correct Interpretation of NCLB Would Change the LEP Landscape

Interpreting NCLB as a civil rights statute would improve the education of ELL students by allowing ELL advocates the ability to sue in federal court for civil rights violations under NCLB.¹²¹ With a threat of legal action, states and school districts would both feel obligated to comply with NCLB’s requirements, demand more federal funding to comply with NCLB, and allocate more of their own resources to improving the education of ELL students.¹²² NCLB’s clarification as a civil rights statute also elevates its standing in public discourse; policymakers, educators, community leaders, and the public at large will pay greater attention to LEP students and their needs.¹²³

117. See *In re Coachella Valley Unified Sch. Dist.*, CPF-05-505334, at 9-10, 14 (Cal. Super. Ct. S.F. County May 25, 2007) (decision denying writ of mandate) (stating that the Department of Education has the authority to withhold funds from California if it fails to meet NCLB requirements).

118. See 20 U.S.C. § 6311(b)(3)(C)(ix)(III) (Supp. V 2005) (requiring “valid and reliable” assessments that reasonably accommodate students, including where “practicable . . . in the language and form most likely to yield accurate data”).

119. See Zehr, *State Testing Scrutinized*, *supra* note 103 (contrasting California’s argument, that English-based ELL assessments are superior measurements, with the ELL advocates’ argument that these assessments do not reflect the content knowledge of ELLs); Posting by Mary Ann Zehr to EdWeek Blog, http://blogs.edweek.org/edweek/learning-the-language/2008/05/appeal_filed_for_Coachella_val.html (May 16, 2008, 11:01 EST) (reporting that the Coachella Valley Unified School District, “where more than sixty percent of students are ELLs, is facing a possible takeover under NCLB because nineteen of its twenty-one schools have not made their AYP benchmarks for four years in a row.”).

120. Cf. 42 U.S.C. § 2000d-7(b) (2000) (allowing plaintiffs suing under the Civil Rights Act of 1964 to obtain remedies both at law and in equity from a private or public entity other than a state).

121. Cf. *id.* (providing plaintiffs ability to sue and recupere remedies in federal court for violations of the Civil Rights Act of 1964); 20 U.S.C. § 1706 (2000) (allowing plaintiffs to sue and obtain remedies in federal court for EEOA violations).

122. See, e.g., Mary Ann Zehr, *Study Urges Aid to Hispanics*, EDUC. WEEK, July 10, 2002, available at 2002 WLNR 5590566 (quoting Mercy Viana, a White House spokeswoman, advocating for a better accountability system to help improve state programs, rather than just providing more funding).

123. See, e.g., Mary Ann Zehr, “No Child” Effect on English-Learners Muddled,

Prior to NCLB, states excluded ELLs from accountability mechanisms and easily masked the poor performance of ELLs by excluding them from accountability measures in order to disguise underachievement.¹²⁴ By disaggregating scores, NCLB has shed more light on the poor academic performance of ELLs.¹²⁵ However, the Department of Education is not properly enforcing NCLB's requirements. For example, some states are failing to properly distribute Title III funds aimed exclusively to support LEP students.¹²⁶ Additionally, the Department of Education has issued a large number of waivers for school districts unable to meet NCLB's requirements.¹²⁷

Undoubtedly, Congress must reform NCLB as it has burdened states, school districts, teachers, and ELL students.¹²⁸ Regardless of the need for legislative reform, however, courts must interpret the law as a civil rights statute that grants substantive rights to students belonging to a special class.¹²⁹

EDUC. WEEK, Mar. 1, 2006, available at 2006 WLNR 4056763 [hereinafter Zehr, *Effect Mulled*] (citing educators who believe that NCLB has brought about more communication between ESL teachers and mainstream teachers, more time spent on ESL programs to help ELL students pass state tests, and more teacher participation in professional development courses to learn how to better instruct ELLs).

124. See Lazarin, *supra* note 3, at 2 (noting that prior iterations of the ESEA, such as the Improving America's School Act of 1994, did not contain accountability provisions for ELLs and educational agencies hardly enforced the law's provisions); Zehr, *Effect Mulled*, *supra* note 123, at 25 (stating that many schools failed to make AYP benchmarks because their ELL students scored low in assessments); Zehr, *State Testing Scrutinized*, *supra* note 103 (quoting school district officials in California saying that the low test scores of ELLs are "making their schools look bad").

125. See Zehr, *Effect Mulled*, *supra* note 123 (citing an ELL teacher's belief that NCLB forced its school district to provide ELL strategies training for middle and high school teachers).

126. See Peter Zamora, *Policies To Help English Language Learners*, in THE EROSION OF RIGHTS 80, 82 (William L. Taylor et al. eds., 2007), available at http://www.americanprogress.org/issues/2007/03/pdf/civil_rights_report.pdf [hereinafter Zamora, *Policies to Help*] (attributing the improper distribution of Title III funds to poor data collection regarding the total number of LEP students in school districts).

127. See Notice of Waivers Granted Under Section 9401 of the Elementary and Secondary Act, as Amended, 73 Fed. Reg. 19,056-57 (Apr. 8, 2008) (enumerating the thirty-five waivers approved by the Department of Education in 2007, including one waiving the requirement to identify two or more public schools to which parents may transfer their child under Title I).

128. See Crawford, *supra* note 30, at 1-2 (criticizing NCLB as a law that is narrowing schools' curriculum due to the excessive amount that teachers spend on test preparation); Karla Scoon Reid, *Civil Rights Groups Split Over NCLB*, EDUC. WEEK, Aug. 31, 2005, available at 2005 WLNR 14417470 (describing National Education Association President Reg Weaver's critique of NCLB for disaggregating data but failing to provide enough resources to meet student needs); Mary Ann Zehr, *A Balancing Act: NCLB's Renewal, English-Learners*, EDUC. WEEK, Mar. 28, 2007, available at 2007 WLNR 6058671 (quoting an educator describing NCLB as problematic because of "its one size fits all approach" that does not take into consideration that ELLs enter schools with varying academic levels).

129. *Contra* Amy M. Reichbach, Note, *The Power Behind The Promise: Enforcing No Child Left Behind To Improve Education*, 45 B.C. L. REV. 667, 695 (2004) (arguing

IV. CONCLUSION

In order to protect the civil rights of the 5.4 million LEP students in the United States, courts must interpret NCLB as a civil rights statute and find an implied private right of action under NCLB.¹³⁰ Additionally, Congress should clarify that it intended for NCLB to be a civil rights statute and create an express private right of action in the provisions of the law that embody *Castaneda*.¹³¹

In the meantime, Congress must reauthorize NCLB so the law can achieve its civil rights goals and increase the amount of federal funding given to the states.¹³² States must do their part in providing their own resources to develop and implement valid and reliable assessments for ELLs, preferably in the students' native language.¹³³ Finally, the Department of Education needs to continue providing effective and ongoing technical assistance in the development of appropriate assessments to states and ensure that state educational agencies assess and include LEP students in all accountability provisions.¹³⁴ With assistance from the courts, Congress, and the Executive Branch, NCLB will be able to reduce educational inequities for LEP students, the fastest growing student population in the country.¹³⁵

that enforcing an implied private right of action under NCLB would not succeed because a court would have to find Congress intended to create both a private right and a private remedy).

130. Cf. Zamora, *Policies to Help*, *supra* note 126, at 83 (arguing that NCLB "is at its core a federal civil rights measure designed to reduce class- and race-based inequalities" in public schools and is the "legislative counterpart to *Brown v. Board of Education*'s call for equality of educational opportunities").

131. Cf. 20 U.S.C. §§ 6312, 6314, 6318, 6601, 6821 (Supp. V 2005) (integrating *Castaneda*'s test to determine EEOA compliance).

132. See Lazarin, *supra* note 3, at 23 (recommending that the President and Congress increase federal funding for Title III, which has decreased over the years, in order for NCLB to serve ELLs properly).

133. See Mary Ann Zehr, *Advocates Note Need to Polish "Bilingual" Pitch*, EDUC. WEEK, Feb. 1, 2006, available at 2006 WLNR 2359606 (discussing research studies concluding bilingual education is more effective in teaching students English than English-only instructional methods).

134. See BUILDING PARTNERSHIPS, *supra* note 1 (creating the "LEP Partnership" initiative comprised of education experts working toward creating a valid, reliable and appropriate content-based assessment for ELLs in every state); Lazarin, *supra* note 3, at 20 (recommending the Department of Education guide states on using "an appropriate n-size across all AYP groups").

135. See Zamora, *Policies to Help*, *supra* note 126, at 80 (arguing that officials at all levels need to improve the academic needs of ELLs in order for NCLB to eliminate educational disparities in the United States).