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ORIGINAL PAPER

Is language a 'right' in U.S. education?: unpacking *Castañeda's* reach across federal, state, and district lines

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Abstract

Castañeda v. Pickard (648 F.2d 989, [5th Cir. 1981]) was a significant legal case in the history of educational policy for non-native English-speaking students in the United States. The case established a three prong 'test' for programs for those students, including the right for students to have an educational program based on sound educational theory; resources and personnel to properly implement the program; and evaluation of the effectiveness of the program. After 40 years of interpretation of the *Castañeda* case, the issue of language rights for non-native English speakers in United States public schools continues to be debated by scholars and interpreted through various legal statutes and case holdings. This article examines the *Castañeda* case and its recent interpretations in the literature as applied to non-native English-speaking students. We use a theoretical lens of orientations in language planning (Ruíz 1984) and language policy text as reported by Lo Bianco and Aliani (Language planning and student experiences: Intention, rhetoric, and implementation, Multilingual Matters, 2013). We then discuss the socio-historical context of the case and position it with respect to the 1974 seminal case of *Lau v. Nichols.* Using the state of Florida as an example, we next describe the complex language ecology of local and state language policies and how those relate to *Castañeda* and inhibit progress for bilingual students in Florida. We conclude with caution to academics and advocates who work on behalf of language minoritized students in the United States, with implications for international scholars.

Keywords Legal rights · English language learners · Bilingual education · State language policy · Federal language policy

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Introduction

> We were initially incredibly disappointed at the way it came down the second time around. After the Fifth Circuit had explained it all to Judge Garza, he still didn't get it. But like the rest of the folks, on reflection, we, too, decided that a lot of change had occurred and things had been much improved and we ought to just count it as a success--so we did… What really counts is the courage of people to step up--that's so hard to find. And you've got to have people who are in the community and who are willing to take the strong position and be the ones that step up there… every one of the plaintiffs in this case fit that profile, they had to.
> David G. Hall, Esq., reflecting on the *Castañeda* case (Guajardo, 2013, 1:17:07)

Native language use is not an enumerated right in the United States. Both case and statutory laws shape educational policies in ways that affect—for both better and for worse—the educational programs and practices for students whose first language is not English. Some of the most compelling laws affecting bilingual students learning English have not been a question of language but, rather, legal actions in response to race, national origin, or equitable educational access to education. Consequently, language 'rights' in the United States are much more opaque than advocates and scholars might assume or hope for them to be, and this seems particularly the case with *Castañeda* in respect to the academic literature on bilingual education and in the context of teacher education programs.

This article examines the 1981 U.S. Fifth Circuit Court of Appeals legal case, *Castañeda v. Pickard*, and its effects on educational policies and practices for English Learner (EL) students at various systemic levels. We begin by unpacking the layers of the U.S. legal system, federal and state, as it directly impacts language policies and practices to reveal a wealth of complexities and misinterpretations that affect the educational outcomes of ELs and the preparation of teachers at both pre- and in-service levels. The purpose of the overview is for national and international readers to capture the unique structure of the U.S. legal system, which is more decentralized and state-based than most countries around the world. We also situate the *Castañeda* case within the U.S. legal hierarchy, thereby juxtaposing the impermanent nature of the *Castañeda* prongs compared to statutes or even court orders.

Using Ruíz's (1984) Language Orientations framework and Lo Bianco and Aliani (2013) Intention, Rhetoric and Implementation in Language Planning, we examine the intricate relationship between educational laws and schools to discuss their known effects on one state, Florida. We argue that the dynamic interplay between federal and state laws and policies restricts the ability of school districts to respond to the growing cultural diversity in classrooms and the linguistic needs of the communities they serve. In essence, despite decades of advocacy and work among scholars and language rights activists, minoritized languages are still very much "language as problem" in the United States (Bale, 2016). This holds

significant implications for language policies and practices, and for language rights. Finally, we posit the limitations of mandated preparation for teachers, namely the lack of evidence of impact on student achievement for ELs. We end this article with a caution and suggestions for teachers, scholars, and advocates who work in the context of educational equity and who aim to improve education for ELs in the United States and language minoritized students internationally.

The term EL is used throughout this article to underscore the temporality of the *Castañeda* case. We recognize that more recent nomenclature underscores the linguistic resources (bilingual, multilingual) of students and has shifted to bilingual or Emergent Bilingual (EB) students. However, in this article we use the term EL to emphasize the legal basis and rationale for the *Castañeda* case for students learning English, who at the time were referred to as "limited English-speaking students" (Castañeda v. Pickard, 1981). Moreover, current federal policy, Every Student Succeeds Act (ESSA), identifies bilingual students as English Learners.

Notably, the literature frequently used in pre- and in-service teacher education regarding legal cases that affect EL students in the U.S. paints a neutral, if not rosy, picture of *Castañeda* and its outcomes (Ariza, 2002; García & Kleifgen, 2018; Hurley, 2003). Textbooks describe the *Castañeda* case without critical examination of its deleterious effects on language policies for EL students today. Few scholars (e.g., Faltis & Arias, 2012; Wright, 2019) actually critique the case for the limitations of the three-prong test and its subsequent impact on effective educational programs for ELs. Specifically, the relationship between federal and state case law, state constitutions, and restrictive language policies are seldom critically discussed in teacher education programs, despite the importance of understanding how language policies affect instruction for ELs nationally (Gándara & Hopkins, 2010; Lucas & Grinberg, 2008). Additionally, the only discussion of *Castañeda* by the U.S. Supreme Court thus far has been the 2009 case, *Horne v. Flores,* which merely cited the case to support the proposition that U.S. states have "substantial amount of latitude" in deciding how to meet their obligations under the Equal Educational Opportunity Act (EEOA) (Horne v. Flores, 2009). There was no mention of the three-prong test, so often touted in the education literature, nor any acknowledgement that *Castañeda* was a major defeat for bilingual education, especially when compared to the far greater protections that would have been afforded ELs had the 1974 *Lau v. Nichols* decision not been undone.

The socio-historical context of *Castañeda*

To summarize, the *Castañeda* case was brought about by Mexican-background, Spanish-speaking students against the Raymondville Independent School District (RISD), Texas, in 1978. This high poverty school district, located close to the U.S.-Mexican border (see Figure 1), was primarily comprised of students whose first language was Spanish. Three quarters of the RISD students qualified for federally subsidized free lunch at the time of the case. In the circuit court decision to the case, Judge Randall noted the demographics of RISD students and families:

Figure 1 Location of Raymondville Independent School District, Texas, United States

> 77 percent of the population is Mexican American and almost all of the remaining 23 is "Anglo". The student population of RISD is about 85% Mexican American. Willacy County ranks 248th out of the 254 Texas counties in average family income. Approximately one-third of the population of Raymondville is composed of migrant farm workers. (*Castañeda v. Pickard*, 648 F.2d 989, 993 [5th Cir. 1981])

The plaintiff students in *Castañeda* alleged that RISD engaged in racially discriminatory policies and practices that deprived them of rights guaranteed under the Fourteenth Amendment of the U.S. Constitution, Title VI, and the Equal Educational Opportunity Act (EEOA) of 1974. The Fourteenth Amendment grants equal civil and legal rights to all U.S. persons regardless of race or national origin, while Title VI prohibits discrimination on the basis of race, color, or national origin in any program that receives federal funding. The EEOA, the legal statute central to the *Castañeda* case, furthers this prohibition against discrimination by stating that race, color, and national origin discrimination occurs when schools fail to take "appropriate action" in overcoming language barriers for students (The Equal Educational Opportunities Act [EEOA], 1974) (Figure 2).

The students argued that the ability grouping system employed by RISD was based on racially and ethnically discriminatory criteria and resulted in classroom segregation. Initially, the district court sided with RISD, finding that the ability grouping system, along with RISD's policies for the hiring and promotion of staff and teachers and its implementation of bilingual education programs, did *not* violate any statutory or constitutional rights of the students. The students appealed the district court's decision to the Fifth Circuit Court of Appeals. The Fifth Circuit's review of that appeal is what today is commonly cited as the "*Castañeda*" decision. In their decision, the Fifth Circuit established a three-part assessment to

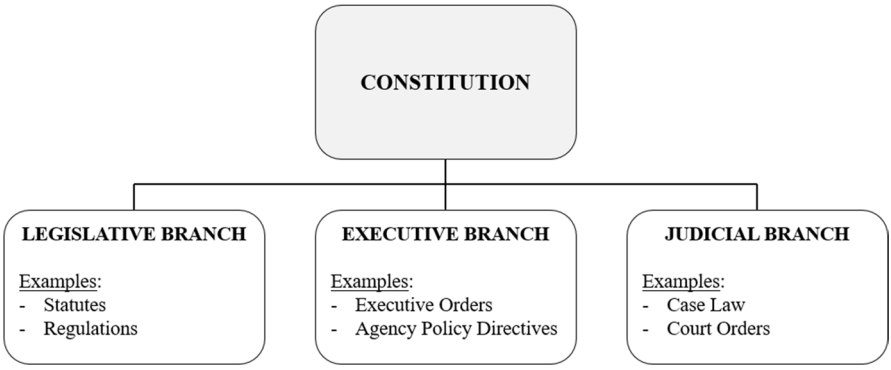

Figure 2 Federal Legal Hierarchy in the United States. *Note* The figure highlights the separation of powers within the U.S. federal government

determine how districts can meet the requirements of the EEOA. The three-prong test that resulted was based on the following three questions:

> (1) is ...[t]he program based on an educational theory recognized as sound by experts in the field or, alternatively, considered by experts as a legitimate experimental strategy; (2) are the programs and practices, including resources and personnel, reasonably calculated to implement this theory effectively; and (3) is the program successful, after a legitimate trial, in producing results indicating that the language barriers confronting students are actually being overcome? (Krebs et al., 2008: p. 48).

Although the *Castañeda* decision resulted in these three areas to determine the adequacy of programs for ELs, and this decision has been lauded for its potential positive impact on EL educational programs, it remains unclear how effective this three-prong test has been in improving EL education across the United States. More problematic is the blow to bilingual education programs that resulted from the *Castañeda* decision.

Overview of the U.S. legal system

To appreciate where *Castañeda* is positioned within the larger framework of the U.S. legal system, we must review the structure of the U.S. law. The U.S. legal system includes various bodies creating, implementing, and interpreting rules, and the providence of those rules determines which are legally binding and to whom. Unfortunately, represents one of the *least* binding laws for school districts and schools to follow, because it is judge-made "case law", or common law, which can be superseded by other laws, such as statutes, can be overturned, and can even be outright ignored if the school does not fall within the jurisdiction of the court who wrote the *Castañeda* opinion.

The primary or superior law in the United States is the U.S. Constitution. The very framework of the U.S. government—three branches, equal in power, with

unique duties to perform—derives from the first three articles of the Constitution. The articles of the Constitution are followed by amendments, which detail the rights of all people who fall under the jurisdiction of the laws, such as the right to freedom of religion, or the prohibition of slavery. Important to this discussion is the Tenth Amendment to the U.S. Constitution, which states that any powers not explicitly given to the federal government in the Constitution are reserved for the states. Because education is not one of the explicitly listed duties or powers given to the federal government, the Tenth Amendment dictates that education lies within the states' domain.

While the "laws" of the Constitution are superior, next in the hierarchy are laws created by the respective branches of government. In the United States, the three branches are the legislature, the executive, and the judiciary, which are headed by Congress, the President, and the Supreme Court, respectively. Similarly, each state has its own parallel state legislature, governor, and state supreme court. Traditionally, it is the work of the legislature to make the laws and the executive's job to enforce the laws. For example, Congress has the authority to pass a law, such as a law guiding immigration. The executive branch, in turn, enforces that law via its various executive-branch agencies, such as the U.S. Citizenship and Immigration Services (USCIS). In reality, law-making is not a simple, linear process. Statutes are rarely all-encompassing, and situations frequently occur which a statute did not envision. If such a gap in the law occurs, then the President can, for example, pass an executive order, filling in the gap and providing additional guidance to its agencies. Thus, executive orders appear as another type of law.

While the legislature and executive create and enforce laws, the judiciary's primary task is to interpret the laws. It is also the judiciary's job to resolve conflicts within the law in accordance with other laws and the Constitution. When the court makes a decision in a legal case, they write an 'opinion,' which usually lays out the facts of the case, the legal principles supporting the court's decision, and the decision itself, called a 'holding.' Although the opinion for a case may span several dozen pages, the holding is typically comprised of only a sentence or two. Furthermore, most opinions are filled with multiple remarks or statements by the opining judge which are not critical to the holding but can provide insight or context to the decision. These statements are 'dicta' and are not binding legal precedent, though over time can become influential if other courts choose to adopt the language within their opinions. The collective result of these opinions is referred to as 'common law', which is a historical collection of case law reaching back to English common law. Older opinions within the common law are called 'precedent'. Deference to these prior opinions helps ensure continuity in the U.S. legal system and limits the ability of judges to drastically change the law from case to case. In many ways, the common law system is like a legal quilt, with statutes, regulations, orders, and case law making up the myriad threads which weave together into 'the law'. Although each branch attempts to work in harmony to craft the law, large conflicts sometimes occur, and precedent can be overturned.

An additional layer of complexity is that there are hundreds of courts all over the nation, some at the state level and others at the federal level. The court in *Castañeda* was the Fifth Circuit Court of Appeals, a federal court which currently

has jurisdiction over the U.S. states of Texas, Louisiana, Mississippi. This means that, legally speaking, the *Castañeda* decision and its three-prong test is only binding over federal courts within those locations, while all other courts merely consider it persuasive, meaning the decision does not have to be followed and can be directly contravened.

To compound matters, Alabama, Georgia, and Florida were also formerly part of the Fifth Circuit, but on October 1, 1981, Congress transferred jurisdiction over these states to the newly created Eleventh Circuit Court of Appeals. However, because *Castañeda* was decided on June 23, 1981, prior to the split, the holding of *Castañeda* is still binding over what is now the Eleventh Circuit. Complexities such as these are part of what makes the law so difficult to navigate for those outside the legal profession, and contribute to misunderstandings of how and where the law is applied. A student in Arkansas who brings suit against their school district for violations of the EEOA would not be able to cite directly to the *Castañeda* decision as precedent, and would instead need to find support in case law from within their circuit. Similarly, a student in Florida today might not know that *Castañeda* does apply to them as, on its face, the Eleventh Circuit is not beholden to the Fifth Circuit precedent. Thus, it is difficult for scholars, activists, and educators to fully grasp not only *what* the three-prong *Castañeda* test is but *where* it can be properly applied.

Lau v. Nichols and the equal education opportunities act

To understand *Castañeda*, we must address one legal case in particular: the 1974 *Lau v. Nichols* case. The results of the case are often taught as part of teacher education programs to demonstrate the legality of EL students' 'rights', yet, in reality, *Lau v. Nichols* no longer has an impact on current policy or within the courts. This is because the *Lau* case was effectively overturned by later U.S. Supreme Court decisions, rendering it moot.

In *Lau*, about 1800 non-English-speaking Chinese students brought a legal suit against the San Francisco Unified School District (SFUSD) in California for failing to provide equal education opportunities to them in violation of the Fourteenth Amendment. Although a decision was rendered in the lower courts, the case was appealed in the U.S. Supreme Court. The Supreme Court determined that basic English skills are the very core of what schools teach. They noted that to require students to achieve this mastery before they may participate in educational programs "is to make a mockery of public education" (Nichols, 1974). Judge Douglas ultimately held that the school district had violated Title VI, which forbids discrimination based on race, color, or national origin in any program receiving federal funding. In retrospect, *Lau* was especially forward-thinking at the time the case was decided, as it acknowledged that students who did not understand English were essentially deprived of meaningful education.

Additionally, in 1974 Congress codified (i.e., passed into statute) the *Lau* holding by passing the EEOA. The EEOA mirrored much of the legal language in the *Lau* case and mandated that all children in public schools be given "equal educational opportunity without regard to race, color, sex, or national origin" (20 U.S.C.,1974).

Because the Supreme Court in *Lau* had protected ELs' needs as a derivative of 'national origin' discrimination, Congress went one step further and specifically included EL needs in Section 1703(f) of the EEOA. Section 1703(f) mandates that schools are required to take "*appropriate action* to overcome language barriers that impede equal participation by its students in its instructional programs" (20 U.S.C. 1703[f], 1974). This means that all schools now have an obligation to meet the needs of EL students, though the contours of that obligation, that is, what constitutes 'appropriate action', remains unclear (Berenyi, 2008). Unfortunately, two additional legal cases, *Washington v. Davis* and *University of California Regents v. Bakke*, restricted the reach of *Lau*, and as a result the one-two punch of case law and statute (i.e., *Lau* and EEOA Section 1703[f]) was reduced to simply the statute.

In *Lau*, the Supreme Court had specifically stated that "discrimination is barred which has that effect even though no purposeful design is present." *Lau v. Nichols*, 414 U.S. 563, 568 (1974). In other words, even unintentional discrimination was illegal under federal anti-discrimination statutes. In *Lau*, this had been discrimination against national origin, a protected class under the U.S. Constitution. However, two years later in *Washington* the Court held that a disparate impact was *not* enough to find a violation of the Equal Protection Clause. *Washington v. Davis*, 426 U.S. 229, 232 (1976). Two years after that, the Court in *Bakke* found Title VI to be coextensive with the Equal Protection Clause, i.e., Title VI is not *more* restrictive than the Constitution. *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978). While the holding in Lau had prohibited disparate impacts *regardless* of intent, the decisions in *Washington* and *Bakke* essentially overturned this holding. After *Bakke*, schools only needed to prove that any disparate impact on protected classes, for example, race, sex, and national origin, was unintentional in order to avoid Equal Protection or Title VI claims.

Without *Lau* to act as interpretative case law for the EEOA, the statute's requirements in the context of EL education was again made vague, hampering its application. Fortunately, in 1981, the Fifth Circuit Court ruled on what constituted appropriate action in the *Castañeda v. Pickard* case.

'Appropriate action' and *Castañeda v. Pickard*

At its core, *Castañeda* is a discussion of what constitutes appropriate action in removing language barriers for students in the United States under the EEOA. As discussed above, case law is an interpretation of explicit laws and not a replacement of those laws. In many ways, case law illuminates the statutes brought before the court, not changing them but instead helping to better define them. In the case of *Castañeda,* the court sought to interpret the legislative intent behind the EEOA. This analysis yielded the now-famous three-prong test described above. Thus, the 'law' as it stands today is that schools *must* take appropriate action to remove language barriers for students (per the EEOA), and that appropriate action should be comprised of sound educational theories which are effectively implemented and reviewed for efficacy after being afforded a trial period. Moreover, the determination that a school system has adopted a sound program for alleviating the language

barriers for its students and that it has made bona fide efforts to ensure that the program works does not definitively answer the 'appropriate action' issue. As noted in *Castañeda*,

> [i]f a school's program, although premised on a legitimate educational theory and implemented through the use of adequate techniques, fails [. . .] to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned. (*Castañeda v. Pickard*, 648 F.2d 989, 1010 [5th Cir. 1981])

Thus, although *Castañeda* provided guidance surrounding what constitutes appropriate action for EL students under the EEOA, in practicality the language of the case provides tremendous leeway for school districts to decide what that means, and this decision does not equate to language rights for EL students. This is doubly true considering the jurisdictional limitation of *Castañeda*, as it only is binding on schools within the Fifth and Eleventh Circuit, while other circuits are free to adopt or ignore as much of *Castañeda* and its three-prong test as they please. This was shown most clearly in the recent 2009 US Supreme Court *Horne v. Flores* decision, in which the U.S. Supreme Court interpreted the strictures of the *Castañeda* decision quite differently.

As in *Castañeda*, the case in *Horne* was brought by EL students and their parents who argued that the Arizona state government and the Nogales Unified School District (NUSD) failed to take "appropriate action" under the EEOA by failing to properly fund schools with low-income minority children, resulting in "(1) too many students in a class room, (2) not enough class rooms, (3) not enough qualified teachers, including teachers to teach ESL and bilingual teachers to teach content area studies, (4) not enough teacher aids, (5) an inadequate tutoring program, and (6) insufficient teaching materials for both ESL classes and content area courses." *Flores v. Arizona*, 172 F. Supp. 2d 1225, 1239 (D. Ariz, 2000). The district court reviewed the state plan with a three-fold inquiry which mirrored the three *Castañeda* prongs, and found that Arizona had violated the EEOA by failing to complete the second and third prongs effectively by failing to "follow through with practices, resources and personnel necessary to transform theory into reality." *Flores v. Arizona*, 172 F. Supp. 2d 1225, 1239 (D. Ariz. 2000). The Court of Appeals for the Ninth Circuit reviewed and upheld this decision, initially making it a great success for proponents of the *Castañeda* three-prong test. However, upon reaching the Supreme Court, the decision was reversed and remanded. The District Court had found the NUSD in violation of the EEOA as interpreted through the *Castañeda* prongs. The Supreme Court, however, interpreted the NUSD's action without using the *Castañeda* prongs, and found the District and Circuit court reliance on such factors to be excessively narrow and a misunderstanding of the EEOA's requirements. Instead, the Supreme Court focused on many of the actions taken by NUSD, including implementation of sheltered English immersion (SEI) methodology and implementation of the No Child Left Behind Act (NCLB) as proof of "appropriate action" and EEOA compliance. No discussion of the three-prong test occurred in the Supreme Court decision, and *Castañeda* decision was solely mentioned to argue that the EEOA "leave[s]

state and local educational authorities a substantial amount of latitude" when choosing how to comply. *Horne v. Flores*, 557 U.S. 433 (2009). That language from *Castañeda*, discussing the latitude of local authorities, was merely dicta, but the Supreme Court used it within their decision while passing over *Castañeda*'s central holding, an incredibly narrow interpretation that the dissent in *Horne* found was unnecessarily sensitive to Arizona's freedom from federal educational oversight despite years of noncompliance with the EEOA. Regardless, as the highest court in the land, the Supreme Court was within their rights to selectively interpret a circuit court decision. It is for this very reason that ephemeral case law, such as the *Castañeda* three-prong test, should be viewed with caution, as courts are wont to reinterpret cases for myriad reasons unlike statutes which they are required to adhere to.

Theoretical framework

Our framework for examining the *Castañeda* case is grounded in language policy planning and based on the work of Ruíz's (1984) Orientations in Language Planning, and Lo Bianco and Aliani's (2013) framework of Intention, Rhetoric and Implementation in Language Planning. These two theories aid in examining the case and the complex social arena in which it is implemented and interpreted at the state and local levels.

Orientations in language planning

In 1984, Ruíz offered a heuristic for examining various orientations related to languages and language planning. His work was grounded in the sociology of language and described implications of language planning for language minoritized students, families, and communities in the United States. Ruíz defined language orientations as "complex of dispositions toward language and its role, and toward languages and their role in society" (p. 16). Although he did not reference *Castañeda* in his description of the orientations, it is noteworthy that several important legal decisions, including *Castañeda*, surrounding language rights for bilingual students took place prior to and during Ruiz's penning of the orientations in language planning (del Valle, 2003; Wright, 2019).

Ruiz's three positions include language-as-problem, language-as-right, and language-as-resource. Ruíz recognized that the three orientations were not discrete constructs but rather social orientations that could overlap and be simultaneously present in language policies and practices at various levels. A language-as-problem orientation is characterized by views and beliefs that there are problems associated with having or using more than one language. By extension, language 'problems' are often associated with speakers of those languages who themselves become viewed socially as 'problems'. For example, the U.S. 1968 Bilingual Education Act (BEA) that provided federal funding for bilingual education programs and educator preparation was arguably the result of a language-as-problem orientation. The

BEA offered legal remedies to resolve the problem of language faced by schools with significant numbers of EL students. In this orientation, Ruíz (1984) concludes that "since language problems are never merely language problems… this particular orientation toward language planning may be representative of a more general outlook on cultural and social diversity" (p. 21).

A language-as-rights orientation speaks to the legal mechanisms that protect or promote the use of language in society or speakers of those languages. Legal rights to language are intertwined with social policies, educational practices, and community beliefs. As Ruíz points out, because of the pervasive nature of language in society, many aspects of social life are affected by a rights orientation. Some additional aspects of this involve legal or judicial proceedings, voting rights, and personal freedoms to use or choose language. However, as we noted earlier, native languages are not enumerated rights in the United States.

The language-as-resource orientation operates essentially as a counter-narrative to the dominating stances of language-as-problem and language-as-right. This orientation has gained ground in the literature in recent years by scholars, particularly with the growth of dual language programs and scholarly literature on educational equity for language minoritized students (e.g., see Dorner & Cervantes-Soon, 2020). Those scholars posit that all languages are valid and useful resources, and should be supported and promoted through bilingual education programs. For advocates of this position, a resource approach to language planning would expand multiple language programs in schools, including dual language bilingual education programs, ensure access to learning through students' multiple linguistic repertoires (García, 2009), and build linguistic resources in the United States. Ruíz theorized that society could benefit from this orientation, stating that "the situation could be different. A fuller development of a resources-oriented approach to language planning could help to reshape attitudes about language and language groups" (1984, p. 27).

Scholars have examined, applied, and critiqued these orientations over time (Fránquiz et al., 2016; Hornberger, 2016; Hult & Hornberger, 2016; May, 2003), and significant scholarship has centered on the orientations heuristic. May (2003), for instance, argued that discussions surrounding minority language rights (MLR) should include an analysis of the sociohistorical and sociopolitical contexts. Scholars, he notes, should examine the instrumental nature of minoritized languages and their social contributions in order to make political headway for minoritized languages. Going further, Ricento (2005) critiqued Ruíz's language-as-resource orientation, arguing that "[t]he field of language planning has yet to demonstrate adequately how such an approach can move beyond academic theorizing and affect societal attitudes towards non-English languages in U.S. society (or anywhere else, for that matter)" (p. 349). The metaphor, he argued, fails to align to the historical experiences of minoritized language speakers and their contributions to society. Ruíz (2010) later responded to that and other critiques of the resource orientation (e.g., as an economic construct, as an instrument, and its need for established language rights), ultimately noting that " I conclude that early formation of [LAR] may have given little attention to language rights… the conceptual point to be made is that strong rights affirmation is not possible without acknowledging that rights are resources—that they

are good in themselves" (p. 167). Despite these critiques, Hult and Hornberger (2016) comment that the orientations framework has been so pervasive, it has effectively risen to the level of "paradigm" (p. 30) since its 1984 publication and used, for instance, in the work of scholars to examine how dialogue surrounding language-as-problem can transform local language policies and practices toward more affirming and healthy orientations of minoritized languages (e.g., Wright & Boun, 2016, Cambodia).

Intention, rhetoric and implementation in language planning

Complementing Ruíz's work is an ecological framework on language planning by Lo Bianco and Aliani (2013). The authors describe a model of analysis that aims to examine how language planning policy plays out at various social levels. Building upon the notion of varied chains of "text" (p. 3), they describe language planning processes in three forms:

> Texts with authority, issued by categories of people charged juridically with the control of public resources; texts of debate, interpretation, contestation or affirmation of the official texts; and texts of implementation and reception, but which have the power to confirm, modify and even subvert or redirect the language policy plans. (Lo Bianco & Aliani, 2013: p. 3)

These three areas of text—authority, debate, and implementation—provide a lens through which language policies and planning activities operate. For instance, official language policies surrounding formal declarations, such as the act of official status designated to a language in a national constitution is an authority text. Formal resources allocated to language policies also operate in this realm. Texts of debate, conversation, and discussion serve to legitimize or confirm official texts through civic organizations and events where language policies are discussed and challenged. Finally, text of implementation involves those who are actual implementers of language policies, frequently in the role of teachers, paraprofessionals, and educational leaders. Lo Bianco and Aliani include the often-absent voices of students in this third area as well.

Lo Bianco (2021) notes the imperfection of language policy, that is, policies are often not enacted or received as planned, stating that "[w]hile some level of policy failure is common in all areas of policy activity, making language an object of policy attention does contain some special characteristics that mark language policy as wicked and especially challenging" (2021, n.p). The wickedness of language policy planning may lie in the intent of policymakers to shape individual and societal attitudes towards languages, language use, and language users, and to confer status to language(s) as inferior or superior (Cooper, 1989; Fishman, 1999). These two frameworks together offer a clearer lens through which language policies and planning can be viewed across an ecological system. We describe such a system below using the U.S. state of Florida as an example.

Ecology of language policies for English learners in the state of Florida

Language policies in the United States are difficult to navigate, due in part to the structure of the legal system, described above, which consists of case law that is open to repeated interpretation, legal statutes, and the often-incongruent relationship between state and federal policies that conflict with local learner needs and resources (Coady et al., 2019). As noted above, the decentralized structure of the United States and the Tenth Amendment of the U.S. Constitution leave many policies' interpretations and implementations to the individual states and, as seen below, this can conflict with federal policies. The state of Florida is a somewhat unique case through which to examine the *Castañeda* case because of the state's rich history of language diversity and its mandated preparation for all educators of ELs students.

We use Florida as an example for several reasons: first, it is the context in which we work as professionals and advocates for EL students and know best; second, the federal, state, and local level policies for ELs highlight the tensions within the language policy ecology; third, Florida has the third largest number of ELs in the United States (about 300,000, FL DOE, 2020), making language policies and planning in Florida a topic with significant implications for teacher educators, educators, students, and families; and, finally, Florida has one of the few states of mandated teacher preparation for all teachers under the 1990 META Consent Decree, which continues to guide policy for teacher education across the state (FL DOE, 1990). Examination of language policies in the state of Florida with an understanding of the legal hierarchy of the U.S. legal system demonstrates the tensions between policies and practices for EL students.

Noted earlier, federal laws preside over state laws and policies in terms of their enforceability. However, because state laws are 'closer' to the actual practices of schools and educators, they are more palpable to educators, especially when states engage in direct punitive measures over school districts, such as assigning grades based on state standardized tests and controlling funding to school districts. A 1990 Florida settlement agreement, the Multicultural Education Training and Advocacy (META) Consent Decree, currently presides over language policy for EL students in Florida, and districts must demonstrate ongoing compliance to this legal agreement in order not to face punitive measures.

The 1990 META consent decree

Like *Castañeda's* three prong test, the META Consent Decree was the result of a lawsuit between students, educators, and the state. In 1990, the League of United Latin American Citizens (LULAC), together with 14 other plaintiffs, brought suit against the Florida Board of Education, Department of Education and related defendants in the Florida government. The suit alleged that Florida had failed to adequately support ELs' learning needs, specifically regarding compliance with the EEOA and Title VI (the federal law that prohibits discrimination on the basis of

race, color, or national origin), the Florida Educational Equity Act (a state equivalent to the EEOA), and related federal and state provisions. Ultimately, both parties agreed to what is now known as the Consent Decree, an extensive settlement agreement with six distinct sections (Identification and Assessment, Equal Access to Appropriate Programming, Equal Access to Categorical Programs, Personnel, Monitoring, and Outcome Measures) designed to ensure equal educational opportunities for EL students in Florida.

Perhaps the most explored of these sections have been the Decree's Section two, Equal Access to Appropriate Programming, and Section four, Personnel, likely because they are related to the instructional aspects of ELs' education and they most closely align with *Castañeda's* three prong test. The state's position towards equal opportunity has been implemented primarily via an inclusion model of instruction (Platt et al., 2003). In inclusion models of instruction at the elementary (grades K-6) level, identified EL students are instructed in mainstream classrooms with an ESOL (English to Speakers of Other Languages)-endorsed teacher. Funding from the state allocates some financial resources for ESOL specialists or bilingual paraprofessionals at the school level to either 'pull-out' or 'pull-in' to the classroom in support of the mainstream teacher. However, it is the duty of the district, also referred to as the Local Educational Authority (LEA), to determine local needs and to assign specialists. This terrain is uneven and more complicated than appears at the surface level because of the inherent inequities of school funding based on local property tax (Kozol, 1991). For example, local programs and school operations are heavily dependent on local funding. Other local persistent challenges for EL student education include access to bilingual and ESOL-prepared teachers; funding for curriculums and assessments; and the local linguistic resources to implement a chosen instructional model with fidelity.

This model of school finance and funding is especially hard-hitting for rural school districts, where agricultural land is taxed at a much lower rate and therefore generates much less revenue to run schools (USDA-ERS, 2019; Wunderlich & Blackledge, 1997). In Florida, 30 of the 67 school districts are considered rural (USDA-ERS, 2019) and in the 37 urban districts, at least a million people reside in those counties' rural areas (Rural Health Information Hub, 2020). In rural districts, schools find themselves covering increased costs for transportation with elevated gas prices, repairs to buses that traverse vast distances to transport students, and extremely-reduced revenue for teachers and substitute teachers.

Despite these inequities, each school district must comply with all aspects of the Decree equally. Under the Decree and in order to monitor educational programs for EL students in Florida, once every three years the state requires each of the school districts and four educational laboratory or teaching schools to submit an 'ELL Plan'. The ELL Plan consists of required documentation that delineates the programs for EL students, how students are assessed and monitored for progress, and how teachers work with EL students. The most recent ELL plans were submitted to the state and approved in 2019. Section 4 of the ELL Plan, Comprehensive Program Requirements and Student Instruction, lists six program model options when a school district report on programming for EL students. Districts describe how the selected instructional models or programs are implemented for ELs. Although a

brief description of each instructional model is provided to school districts in the EL Database and Program Handbook (FL DOE, 2012, p. 26), in reality, the models are much more nuanced, and actual implementation of instructional models is quite varied in Florida as it is across the United States (Crawford, 2004).

Mandated teacher preparation

Section 4 of the Decree, Personnel, mandates ESOL training of all teachers of ELs, both pre- and in-service. At the elementary school level, teachers must have 300 h of professional preparation to work with ELs through five curricular areas: applied linguistics; cross cultural communication; testing and evaluation; ESOL methods; and curriculum and instruction. Secondary content teachers, administrators, and guidance counselors must have 60 h, the equivalent to one graduate level, 3 credit hour course. In essence, the mandate to have all teachers prepared for EL student learning has effectively eroded the need for ESOL-specialized teachers across the state, especially for rural school districts that have limited funding for additional, specialized teacher.

This is even further diluted through "infused" preservice teacher preparation programs where ESOL content is sprinkled into courses such as Science Methods and Emergent Literacy. Research into infused preparation of pre-service teachers has revealed uneven results in terms of teacher efficacy, perceptions of ELs and their families (Coady et al., 2011, 2016). In fact, over time the compulsory teacher preparation requirements under the Decree are likely *less* effective. Some data indicate that the infusion model of teacher preparation has had wishy-washy results at best (de Jong & Naranjo, 2019) and though some teachers report positive perceptions of their teacher preparation, there is no evidence of impact on student learning as the achievement gap between ELs and non-ELs remains stagnant (de Jong, 2021). Additional research has shown the difficulty to differentiate instruction in inclusive classroom settings for ELs (Coady et al., 2016).

Official English

A layer of complexity to Florida's language ecology was the 1988 amendment to the state constitution that declared English as the official language of the state (Florida Constitution, 1988), one of states at the present time (ProEnglish, 2020). According to state language rights activists, at the time of the amendment, the state purported to agree that the official status of English would *not* interfere with sound educational policies for EL students (Castro Feinberg, 2020). However, some 30 years later, the state unleashed this amendment as justification for refusing to provide assessments in students' native language, which are an essential part of planning sound instructional practices for EL students. The state noted that because Florida was an official English state, it did not have the obligation to provide assessments of student learning in languages other than English.

In its 2018 federal accountability Every Student Succeeds Act (ESSA) educational plan, approved by then-Secretary of Education, Betsy de Vos, the state asked the federal government for a waiver from this federal requirement, arguing that Florida has an official language policy amendment of English (FL DOE, 2018; Solochek, 2018). Governor Scott's complaint also balked at the cost of producing native language assessments, arguing that it was too burdensome to do so. In the same plan, the state also pushed back on the federal government which requested mathematics assessments for secondary students as part of the overall state evaluation. The state argued that the federal government could not force that requirement upon them and refused to modify its ESSA plan before being approved by de Vos (Solochek, 2018). In his letter to Secretary de Vos, Governor Rick Scott wrote,

> The Every Student Succeeds Act was hailed as the ushering in of a new era of state flexibility... As with all federal partnerships, Florida's expectation is that our state is treated fairly and given full flexibility to provide the greatest return to our students. (Solochek, 2018, n.p.)

Recent language-as-resource initiatives in Florida

Recent grassroots efforts by advocating scholars and educators have gained ground across the state in an effort to promote more equitable educational programs for EL students through bilingual education and use of the first language for learning academic content. One effort was the establishment of a website that began to document the varied bilingual education programs in the state (Florida Bilingual Programs, 2020). Although to date there is no state level mechanism to identify the number and features of various instructional program models for ELs, this first effort documented that 13 out of Florida's 67 districts reported having some form of bilingual education program.

A second effort took place in 2019 with the re-establishment of the Florida Association for Bilingual Education (FABE, 2021a) an advocacy group for teachers, paraprofessionals, parents, and teacher educators who work with bilingual and EL students. The first virtual conference for FABE, held in early 2021, was well attended and had state-wide representation. Some of the concerns that Florida educators raised at the conference included the need for bilingual teacher credentialing and reciprocity of the bilingual teacher credential with other states; the need to promote first language instruction for ELs; and the need for native language assessments for teachers to target instruction for ELs (FABE, 2021b). Currently, although Florida has mandated teacher preparation for all teachers of ELs through the Decree, it does not offer support for the preparation of bilingual teachers, has no teacher reciprocity for bilingual education teachers who come from other states, and has no guidelines for bilingual teacher education. Some progress has been made in this area using federally-funded grants (e.g., see Nutta et al., 2020); however, the conservative state policies, hiding behind official English, fail to keep pace with national growth and demand for bilingual and dual language educational programs (Center for Applied Linguistics, 2020).

Discussion

Castañeda juxtaposed with state policies in Florida

The language ecology of the state of Florida demonstrates the tensions that arise when a federal policy, with albeit good intent, comes into practice at the state and local levels. The intent of *Castañeda* in essence was to clarify the EEOA Section 1703(f) by specifically outlining what 'appropriate action' means for EL students' educational programs, resources, and teacher education. Clearly, over time what constitutes appropriate action for the education of ELs students in the United States has demonstrated its limited reach and enforceability at the state and local levels. Below we describe how the decision of the *Castañeda* case on the surface appears to offer a language-as-right orientation; however, in reality, its actual implementation with mandated compliance and limited resource base is more accurately a language-as-problem position.

Although Ruíz (1984) did not specifically note *Castañeda* when he posited the language-as-right orientation, the fact that the case aims to provide guidance on what constitutes appropriate action for ELs, whose language was considered problematic to the school district, suggests that *Castañeda* follows a language-as-problem orientation. Here, language-as-problem becomes aligned with EL students, that is, speakers of minorized language, as problem. However, here we have revealed two limitations to that position. First, structurally speaking, case laws are highly suspect mechanisms through which legal rights can be either viewed or enforced. Important here is that subsequent to the *Castañeda* decision, there have been additional interpretations on the language rights of EL students. As noted above, the US Supreme Court in *Horne* vastly undercut the holding in *Castañeda*, for example by stating unequivocally that 'appropriate action' does *not* require "the equalization of results between native and nonnative speakers on tests administered in English" (*Horne v. Flores*, 557 U.S. 433, 467 [2009]).

Secondly, when federal case law is unpacked and interpreted at the state and local levels, the reality of how it is implemented is likely to differ in response to local demographics and resources. As noted herein, some limitations on the effects of the *Castañeda* decision include: (a) the ability for districts to use their own staff as educational experts to testify as to the soundness of the educational theory; and (b) the ability of districts to simply state that they are using all available resources to implement the program. Thus, the bar for implementing sound educational programs for ELs can be both ambiguous and low when considering the limited revenue and resources that local educational agencies such as rural school districts have. We argue here that educational equity for EL students is unlikely to be reached until or unless equitable revenue streams are generated across various local schools and districts with EL students.

In addition, when considering language policy implementation at state level, when there is mandated preparation for all teachers of EL students, it seems that "widespread response is non-compliance" (Ruíz, 1984: p. 24). This seems to be the case in Florida where specialized ESOL preparation has eroded over the past

two decades in favor of the all-prepared mainstream teacher. Ruíz further suggests that "legal manipulation is another way of avoiding compliance and it has a long history" (p. 24). As such, the state of Florida's position on official English essentially has had the effect of non-compliance with federal policy as it has used its power under the Tenth Amendment of the U.S. Constitution to buck federal educational mandates for EL students. Ironically, Florida was the state with the first publicly funded dual language bilingual education program in the United States in 1963 (Coady, 2020a). The development of this program was the result of large numbers of Cuban immigrants to the Miami area in the early 1960s and local leaders and educational visionaries who understood the social and academic benefits of bilingualism and biliteracy. Although the program forged a strong path for bilingual education programs in the state, with an estimated 125 programs today (Coady, 2020b), these were the result of local efforts rather than any support from the state (Florida) department of education. These three areas—limited and inequitable educational funding, mandated teacher education and compliance, and the state's refusal to implement native language assessments for ELs—clearly demonstrate that language planning for ELs in the state of Florida continues as a language-as-problem orientation. There are, in effect, no language rights for ELs in Florida through education, nor native language rights for ELs in the United States.

The language-as-problem position contrasts sharply with the work of grassroots advocates, educators, and scholars who are identifying ways to work around the state's conservative posture and deficit orientation by building native language resources and bilingual education programs for ELs. Some examples of this include using federal grant funding to identify new avenues for bilingual teacher education and credentialing, holding open discussions and debates to identify new ways to support EL students on the ground, and creatively building new educational program 'models' in rural school districts that use students' first languages as resources for learning (Coady et al., 2019).

Intersecting with these efforts is Lo Bianco and Aliani's (2013) varied text positions, which provide a lens for interpreting these various contrasting language planning positions. On the one hand, state and federal policies through the 1990 META Consent Decree, Florida's Official English policy, and the *Castañeda* case indicate a text-as-authority position. These legal documents are powerful examples of the limitations of law to advocate for legal rights. However, as we noted earlier in this paper, closer to the work of educators in schools is how policies are implemented on the ground. In Florida, as online resources grow and school districts learn of a growing network of bilingual education programs through organizations such as FABE, text-as-debate and text-as-implementation efforts can push back against deficit language policies. As Lo Bianco (2016) notes in his work, both top-down and bottom-up efforts are essential in order to address issues of language at the school, district, and state levels. It will take strong and dedicated local advocacy groups—like those mentioned in the opening quote by Attorney Hall in the Castañeda case—before advocates, scholars, and educators can legally challenge the state's failure to meet at least prong 3 of *Castañeda* and

Section 6 of the Decree (evaluation of programs for EL students). Until that time, little change or enforceability of the authority text can occur.

Specifically, with respect to sound educational programs for EL students in the state of Florida, most programs, at the elementary level, are inclusion classrooms with purported differentiated instruction for EL students. Little data have been compiled to indicate if, in fact, these programs provide sound programming for EL students. Some evidence has emerged as to the limitations of these programs for EL learning (Coady et al., 2016; de Jong, 2021). In contrast, a multitude of research has been compiled over the past 50 years surrounding the effectiveness and superiority of bilingual education programs, ironically in the state of Florida which opened the first public dual language educational program, the Coral Way Bilingual Program, in 1963 (Coady et al., 2019; McField & McField, 2014; Thomas & Collier, 1997). The lack of programs and support for bilingual education in Florida should call into question violations of *Castañeda* (and EEOA) in the state. The fact that English learners are essentially deprived of the benefits of bilingual education programs could potentially set the stage for a future test for the Office of Civil Rights, rather than seeking redress under Castañeda.

There remains a strong, local desire to challenge both outdated state policies and negative attitudes towards language minoritized students and families. These local efforts to promote bilingualism and bilingual education underscore a language-as-resource orientation whereby language minoritized students' linguistic resources ensure equitable access to the curriculum and can reverse decades of conservative educational policies. Nonetheless, the reality is that no forward-thinking progressive, state level language policies are currently being implemented in Florida for its EL students that would affirm students' linguistic backgrounds to support learning. We theorize that until the original plaintiffs in the 1990 META Consent Decree legal case, the federal Department of Justice, or the U.S. Office of Civil Rights bring legal challenges to the state, the authoritative power of the state and compliance mandates will remain in place (Figure 3).

Language-as-problem pretending to be language-as-right

With respect to Ruíz's framework for language policy, states can, unfortunately, continue to operate with a language-as-problem orientation. Through legal mechanisms such as constitutional amendments and language policies, like the META Consent Decree, language issues are brought into focus under compliance and mandatory preparation and programming, alluding to a 'rights' orientation but not quite attaining a rights status, because of the limited ability to enforce these policies. META was nonetheless squarely the result of language-as-problem orientation, with its speakers similarly perceived as problematic by education authorities. As Ruíz (1984) acknowledged, important questions emerge when "standards" for these rights must be integrated at various levels (p. 25).

Rather than raising the bar for educational programs and practices for EL students, the *Castañeda* case effectively removed any bar, because districts and states can demonstrate, using in-house "experts" on, first, the effectiveness of a

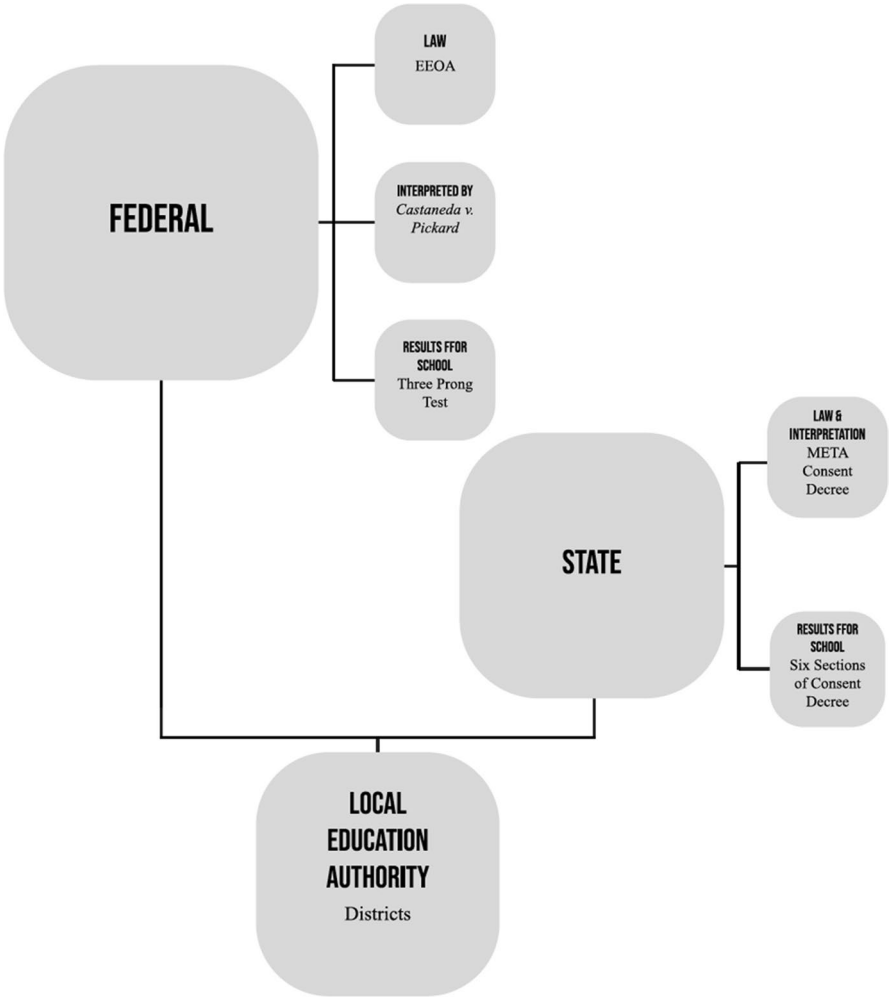

Figure 3 Legal Liability of LEAs

model and, second, that they have put their resources behind the model for ELs. In other words, language policies for EL students regressed from the *Lau* decision in 1974. Our examination of the State of Florida indicates further that states have tremendous leeway in determining language policies and practices for ELs and, as a result, often flout the requirements of *Castañeda*.

Advocates for language minoritized students in the U.S. context invoke language rights as a basis for educational equity. At the same time, scholars of language policy use an equity lens to support a language-as-resource orientation. Legally, language is not an enumerated right in the United States, and arguments for language rights by advocates and scholars are currently without legal merit,

despite the fact that that language orientation has a good feel to it. As Lo Bianco reminds us the *experienced* language policy is.

> …what the language report or law 'feels' and 'looks' like when it is converted into a classroom program, and focuses on the activities, resources, timetabling, sense of commitment from institutions etc. The experienced policy is where the citizen, the main but not sole intended recipient of the policy, encounters what the announced government policy really becomes. (Lo Bianco, 2021: n.p.)

In sum, what has become of *Castañeda* is played out at state and local levels; its iteration in Florida, the META Consent Decree, continues to foster two separate and markedly unequal narratives (Platt et al., 2003). Dual language, bilingual education programs, following the promise of *Castañeda*'s first prong to provide programs with sound pedagogy, bypass the feeble but omnipresent META Consent Decree and operate through grassroots efforts. Bilingual programs train its own specialists and operate in the shadows without state support or recognition. The second, prevalent and official storyline affirms the Decree as a protector of EL 'rights' in the state by requesting that identification and assessment of ELs is complied with and that teacher preparation programs implement weakened (infused) preparation of mainstream teachers of ELs. This view upholds the narrative that students' minoritized languages are a problem in need of correction. Regardless of whether language policies in Florida portray a problem approach or a resource approach, one thing is clear—the Consent Decree, and by extension the *Castañeda* decision, does not protect ELs' language rights.

Final thoughts for scholars and advocates

Approaches to teacher preparation regarding language rights cases must be cautious not to misinterpret or portray them in an overly positive, if not protective, light. As made evident in this article, existing cases and policies represent weak 'rights' often superseded by much stronger rights or pressing concerns. Just as cases can be overturned, or consent decrees superseded by constitutional provisions such as official language, the three-prong test explained in *Castañeda* has incredibly limited scope within the larger legal hierarchy. It cannot be viewed as a panacea for solving the challenges of ELs in the U.S. education system.

In light of the tragic challenges provoked by the COVID-19 global pandemic, the politized discourse that characterized President Trump's four years in office and the social unrest following the death of George Floyd in 2020, it is possible that another moment of progress and shift is on the horizon. It is time to revisit the sentiments expressed by David Hall, cited at the start of this article. Interestingly, with respect to *Castañeda* and the person-hours dedicated to the case, Attorney Hall noted at the time that his firm put in between 3 and 4000 hours of legal time in preparation, arguments, and appeals. Theorizing what it would take for another legal case to result in more positive changes in the legal system to improve the rights of bilingual students, Hall argued that there must first be a recognized "[n]eed to have some chance of

success to pursue that." In other words, there must be a clear path to a successful legal outcome. That, coupled with the cost and time of litigation, and requisite courage from a community to lead such an effort, makes it highly unlikely that changes to legal rights for EL students are imminent.

Conclusion

This article examined the *Castañeda* case and its reach beyond federal policy to the state and local levels. Using the state of Florida as a case-in-point, we argue that there is mal-alignment between *Castañeda* and the actual implementation of the policy and the spirit of the case to address language learning and effective programming for EL students. Essentially, violations of language rights for EL students can only be argued in relation to discriminatory practices related to race, color, and national origin. Thus, language rights for EL students are open to repeated interpretation in relation to those areas with little prospect for change in the near future. In practice, language policies that are promulgated via case law such as *Castañeda* are limited in both jurisdiction and enforceability. In practice, state level policies and local implementation practices are closer to the work of educators and activists, and therein lies the strength of communities to foster change. As this article opened with the insightful words of Attorney Guajardo in 2013, "What really counts is the courage of people to step up—that's so hard to find." We concur that networks of advocates who challenge deficit orientations and take up text as debate and implementation are likely to be most successful in the coming decades to improve learning for EL students and to shape the narrative, nationally and internationally, for language minoritized students.

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