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Note: Bilingual Education - A Problem of "Substantial" Numbers

BILINGUAL EDUCATION—A PROBLEM OF "SUBSTANTIAL" NUMBERS?

I. Introduction

It is generally agreed that learning English is essential to economic and social mobility in an English speaking society.[1] The Bilingual Education Act[2] provides for the federal funding of compensa-

1. STAFF OF SENATE SELECT COMM. ON EQUAL EDUCATIONAL OPPORTUNITY, 92d Cong., 2d Sess., TOWARD EQUAL EDUCATIONAL OPPORTUNITY 4 (Comm. Print 1972) [hereinafter cited as SEN. SELECT COMM.].

The United States Office of Education estimated in 1975 that at least five million children needed remedial English language programs. U.S. COMM'N ON CIVIL RIGHTS, A BETTER CHANCE TO LEARN: BILINGUAL BICULTURAL EDUCATION 13 (1975) [hereinafter cited as A BETTER CHANCE TO LEARN.].

2. 20 U.S.C. §§ 880b-880b-13 (Supp. V, 1975). The Bilingual Education Act, Title VII of the Elementary and Secondary Education Act, provides for aid to "local education agencies" or an "institution of higher education" that elects to participate in a compulsory language program. 20 U.S.C. § 880b-7 (Supp. V, 1975). Section 880b-7(a) provides:

> Funds available for grants under this part shall be used for—
>
> (1) the establishment, operation, and improvement of programs of bilingual education;
>
> (2) auxiliary and supplementary community and educational activities designed to facilitate and expand the implementation of programs described in clause (1), including such activities as (A) adult education programs related to the purposes of this subchapter, particularly for parents of children participating in programs of bilingual education, and carried out, where appropriate, in coordination with programs assisted under the Adult Education Act, and (B) preschool programs preparatory and supplementary to bilingual education programs. . . .

In 1974 Congress expanded the eligibility requirements of the statute to include schools which did not have a high concentration of children from families with incomes less than $3000 a year or from families receiving social security benefits under the Aid to Families with Dependent Children Program. Act of August 21, 1974, Pub. L. No. 93-380, § 105(a)(1), 88 Stat. 503. The former requirements were found at 20 U.S.C. § 880b-2 (1970), which expired on June 30, 1975.

In order to be eligible for federal funds, the local education agency or institution of higher education must enter into an agreement with the Commissioner of Education. 20 U.S.C. § 880b-7(b)(1) (Supp. V, 1975). The agreement can only be approved after the Commissioner has consulted with the state educational agency in order to achieve an "equitable distribution of assistance" within the state based on the following factors:

> (i) the geographic distribution of children of limited English-speaking ability, (ii) the relative need of persons in different geographic areas within the State for the kinds of services and activities described in [20 U.S.C. § 880b-7 (a)] of this section, (iii) with respect to grants to carry out programs described in [20 U.S.C. §§ 880b-7(a)(1)-(2)] of this section, and (iv) with respect to such grants, the relative numbers of persons from low-income families sought to be benefitted by such programs. . . .

Id. § 880-7(b)(2)(A). An applicant for federal funds must also agree to abide by the HEW

tory language programs to assist children in learning English. Numerous class action suits have been instituted on behalf of language minority students against school districts to obtain these remedial programs.[3] These suits alleged violations of section 601 of the Civil Rights Act of 1964[4] (42 U.S.C. § 2000d), and the equal protection clause of the fourteenth amendment.[5]

Educators have proposed two main methods to compensate for the language deficiencies of non-English speaking students.[6] The first type of program is called the "English as a Second Language" (ESL) approach.[7] ESL programs employ English as the language of instruction for courses such as science or social studies.[8] Additionally, in a typical ESL plan, non-English speaking students attend a class to develop their English language skills.[9] ESL programs are most beneficial to language minority children in a transitional stage from their native language to English.[10]

The second main plan, termed "bilingual/bicultural" education, is significantly different from the ESL approach.[11] In a bilingual/bicultural program, children are taught in their native language.[12] Under this program, children also receive instruction in English language skills as a separate class.[13] Another distinguishing facet of the bilingual/bicultural approach is its emphasis on the retention of the child's native historical, literary and cultural traditions.[14] Advocates of the bilingual/bicultural program contend that the rejection of a child's native language and customs, in an attempt to teach him English, could result in a psychological trauma by

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guidelines. *See* 45 C.F.R. §§ 123.01-.63 (1976). The Commissioner must give priority in distributing funds "to areas having the greatest need for [compensatory language] programs . . . ." 20 U.S.C. § 880b-7(c) (Supp. V, 1975).

3. *See* text accompanying notes 43-74 *infra*.

4. Civil Rights Act of 1964, 56d, 42 U.S.C. § 2000d (1970).

5. U.S. CONST. amend XIV, § 1.

6. *Inequality in Education*, Harv. Center for Law and Educ., Feb. 1975, at 35.

7. A BETTER CHANCE TO LEARN, *supra* note 1, at 22.

8. *Id.*

9. *Id.*

10. *See* Grubb, *Breaking the Language Barrier: The Right to Bilingual Education*, 9 HARV. C.R.-C.L. L. REV., 56 (1974).

11. SEN. SELECT COMM., *supra* note 1, at 287.

12. A BETTER CHANCE TO LEARN, *supra* note 1, at 29.

13. *Id.*

14. SEN. SELECT COMM., *supra* note 1, at 286.

making the child feel inferior.[15] Thus, educators favor the bilingual/bicultural approach when the student does not have the ability to use English in his studies.[16]

Even though the Supreme Court in *Lau v. Nichols*[17] held that language minority students are entitled to receive compensatory language instruction under 42 U.S.C. § 2000d, several courts have concluded that this decision does not require a federally funded school system to implement special language programs in every case.[18] This Note will examine the rights of non-English speaking children under section 2000d and under the equal protection clause of the fourteenth amendment.

II. The Right to a Compensatory Language Program

In *Lau v. Nichols*[19] a class action was brought on behalf of non-English speaking Chinese students against defendant officials of the San Francisco Unified School District. The existing program of instruction in defendants' school district did not accommodate all of the Chinese students who required special English instruction.[20] Petitioners alleged that this unequal educational opportunity violated 42 U.S.C. § 2000d and the equal protection clause of the fourteenth amendment.[21]

The Ninth Circuit Court of Appeals,[22] in affirming the district court's decision,[23] found that the petitioners did not state a valid cause of action under section 2000d or the equal protection clause.[24] The court of appeals disposed of the petitioners claim under 42 U.S.C. § 2000d without an opinion.[25] In rejecting the petitioners'

15. *Id.*

16. A BETTER CHANCE TO LEARN, *supra* note 1, at 78.

17. 414 U.S. 563 (1974).

18. *See* text accompanying notes 45-74 *infra.*

19. 414 U.S. 563 (1974).

20. *Id.* at 564.

21. *Id.* at 564-65. The majority opinion, before addressing the merits, noted that petitioners did not request any specific relief. Rather, petitioners asked that defendant school officials be ordered to recognize and make a good faith effort to alleviate the problem. *Id.*

22. 483 F.2d 791 (9th Cir. 1973). For a discussion of the Ninth Circuit's decision in *Lau*, see 2 FORDHAM URBAN L.J. 122 (1973).

23. Civ. No. C-70 627 (N.D. Cal., May 26, 1970).

24. 483 F.2d at 797.

25. *Id.* at 794 n.6. Plaintiffs' cause of action based on section 2000d relied on the third party beneficiary rationale of Lemon v. School Bd., 240 F. Supp 709, 713 (W.D. La. 1965), *aff'd*, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967).

claim under the equal protection clause, the court stated: "Every student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school system."[26] Therefore, the Ninth Circuit held that the defendants had no duty to take any affirmative steps to correct inequalities over which they had no control, since the peitioners were receiving the same education on the same terms as other students within the school district.[27]

Mr. Justice Douglas, writing for the majority of the Supreme Court, found that the inability of the Chinese students to understand English foreclosed them from a meaningful education.[28] He noted that the defendant school district had agreed to comply with the terms of 42 U.S.C. § 2000d, and the regulations imposed by the Department of Health, Education and Welfare (HEW), since it received federal funds.[29]

Section 2000d bans discrimination based "on the grounds of race, color, or national origin . . . [in] any program or activity receiving Federal financial assistance."[30] Section 2000d-1 authorizes HEW to issue rules, regulations and order of general applicability effectuating the objectives of section 2000d.[31] The HEW regulations amplify the anti-discriminatory objectives of section 2000d.[32] In 1970 HEW issued a clarifying memorandum which requires federally funded school districts to rectify language deficiencies in their schools by including children with linquistic deficiencies in special language programs.[33] This memorandum also requires a school district to take "affirmative steps" as "soon as possible" when the inability of minority group children to speak and understand English excludes them from effective participation in the educational program.[34]

Relying on the provisions of section 2000d and the HEW regulations, Mr. Justice Douglas concluded that the Chinese students

26. 483 F.2d at 797.
27. *Id.* at 799.
28. 414 U.S. at 566.
29. *Id.* at 568-69.
30. 42 U.S.C. § 2000d (1970).
31. *Id.* § 2000d-1.
32. 45 C.F.R. § 80.3(b)(1) (1976).
33. 35 Fed. Reg. 11595 (1970).
34. *Id.*

were entitled to receive compensatory language instruction.[35] He therefore remanded the case so that the district court could take immediate measures to effectuate the defendants' contractural obligations under the statute and under the HEW regulations.[36]

Although Mr. Justice Douglas avoided a constitutional confrontation by granting relief under the statute, he did acknowledge the possibility of a successful equal protection claim: "Under these state-imposed standards [for graduation] there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum . . . ."[37] However, Mr. Justice Douglas did not indicate if such a claim would be successful under the facts of *Lau*.

In a concurring opinion, Mr. Justice Blackmun, joined by Mr. Chief Justice Burger, indicated that he would limit the broad sweep of the HEW regulations so that special instruction is only required in certain circumstances.[38] Mr. Justice Blackmun stated that he would qualify the Court's holding by restricting it to situations involving a "substantial" number of minority children.[39] He concluded that the 1,800 language minority children attending the defendants' school system constituted a "substantial" number.[40] Mr. Justice Blackmun also indicated that the HEW guidelines would not require a school district to provide special language instruction for a few minority children.[41] He concluded that "numbers are at the heart of this case . . . ."[42]

III. Post-*Lau* Cases: The Problem of "Substantial" Numbers

Most of the cases construing *Lau* have arisen in Tenth Circuit

35. 414 U.S. at 568-69.

36. *Id.* at 569.

37. *Id.* at 566. The court was under no compulsion to consider whether there was an equal protection violation. When the issue before the court involves alleged violations of both statutory and constitutional rights, the court may find a violation of statutory rights and give the relief requested without deciding the constitutional aspect of the issue. *See* King v. Smith, 392 U.S. 309 (1968).

38. *Id.* at 571-72 (Blackmum, J., concurring).

39. *Id.* at 572. Mr. Justice Blackmun stated that "when, in another case, we are concerned with a very few youngsters, or with just a single child . . . I would not regard today's decision . . . as conclusive upon the issue. . . ." *Id.*

40. *Id.*

41. *Id.*

42. *Id. See generally* Sugerman, *Equal Protection for Non-English Speaking School Children: Lau v. Nichols*, 62 CALIF. L. REV. 157, 270 (1974).

courts.[43] These cases seem to indicate that the *Lau* decision is limited by the rationale of Mr. Justice Blackmun's concurring opinion, even though only one other Justice joined in that opinion.[44] If other courts follow this line of reasoning, many language minority children may not receive the special instruction needed to pass required courses which are taught in English.

In *Serna v. Portales Municipal Schools,*[45] Spanish surnamed students brought a class action through their parents for alleged statutory and constitutional violations by defendant school district. The Spanish speaking students comprised 34 percent of the children attending the district's elementary schools.[46] Plaintiffs' evidence revealed that defendant school district was not making a sufficient attempt to rectify the language deficiencies of its students.[47]

The district court held that defendant's failure to provide a compensatory language program for its Spanish speaking students constituted a violation of the equal protection clause of the fourteenth amendment.[48] On appeal, the Tenth Circuit Court of Appeals examined the case in light of the Supreme Court's decision in *Lau.*[49] Althought the court of appeals concluded that the district court had made the proper decision on the equal protection claim,[50] it granted relief under the provisions of section 2000d and the HEW regulations.[51] Reiterating Mr. Justice Blackmun's concurring opinion in *Lau,* it noted that a violation of section 2000d only exists when a "substantial" group of language minority students are being deprived of a meaningful education.[52] The court did not define what constitutes a "substantial" group of minority students.

Unlike *Lau,* the Tenth Circuit in *Serna* also addressed the issue of what type of compensatory language program is an appropriate

43. *See, e.g.,* Serna v. Portales Mun. Schools, 499 F.2d 1147 (10th Cir. 1974); Otero v. School Dist. No. 51, 408 F. Supp. 162 (D. Colo. 1975).

44. *See text* accompanying notes 38-42 *supra.*

45. 499 F.2d 1147 (10th Cir. 1974).

46. *Id.* at 1149.

47. *Id.* There was a bilingual program for preschool and first grade students and an ethnic studies program in the high schools. *Id.* at 1150. The school district also asserted that the trial court improperly interfered in the internal affairs of the school district. *Id.* at 1154.

48. 351 F. Supp. 1279, 1282-83 (D.N.M. 1972).

49. 499 F.2d at 1152.

50. *Id.* at 1153.

51. *Id.*

52. *Id.* at 1154.

remedy. In upholding the district court's implementation of a bilingual/bicultural program, the court of appeals reasoned that "the trial court had a duty to fashion a program which would provide adequate relief for Spanish surnamed children."[53] In reaching this conclusion the court of appeals relied on the Supreme Court's statement in *Swann v. Charlotte-Mecklenburg Board of Education*,[54] a school desegregation case in which the Court noted that "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[55]

In *Otero v. School District No. 51*,[56] plaintiffs brought a class action suit on behalf of Mexican-American students seeking injunctive relief which would have required the defendant school district to implement a type of the bilingual/bicultural program. Plaintiffs attributed the substantial dropout rate of these students from school to their language deficiency in English.[57] The United States District Court for the District of Colorado held that plaintiffs failed to establish a basis for relief under 42 U.S.C. § 2000d or the equal protection clause.[58] The district court attributed the poor performance of the Mexican-American children to their income and social status rather than their language deficiency.[59]

In applying the *Lau* and *Serna* decisions, the *Otero* court concluded that these cases required "large numbers" of language minority students before relief could be granted.[60] The court stated

53. *Id.*

54. 402 U.S. 1 (1971).

55. *Id.* at 15. *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

56. 408 F. Supp. 162 (D. Colo. 1975).

57. *Id.* at 164.

58. *Id.* at 172.

59. *Id.* at 168. Out of the 628 Mexican-American students tested for English proficiency, fifty-four had low scores. *Id.* at 165. These fifty-four students in all cases had English scores higher than their Spanish scores. *Id.* at 165-66. In addition, not one of the named plaintiffs demonstrated a proficiency in Spanish greater than his proficiency in English. *Id.* at 166. The school district's expert testified that less than 3 percent of the elementary Mexican-American students had any proficiency in speaking or comprehending Spanish. *Id.* at 165. The school district's expert testified that the poor performance of Chicano students was less severe than it was nationally, and the court agreed. *Id.* at 166.

60. *Id.* at 171.

that since only a "few" students were involved, *Lau* and *Serna* were not controlling.[61]

The *Otero* court also noted that the *Lau* and *Serna* decisions involved school systems which were "making no real effort" to solve their language minority problems.[62] This additional factor was not present in *Otero;* the defendant school district was "making a real, conscientious effort to recognize, face and solve" its language minority problems.[63] Therefore, the court refused to grant the requested relief.[64]

Addressing the plaintiffs' equal protection claim, the *Otero* court deferred to the Tenth Circuit's decision in *Keyes v. School District No. 1.*[65] Plaintiffs in *Keyes* alleged that the defendant school board had perpetuated and intensified racial segregation within its school system. The district court held for the plaintiffs, and fashioned a remedy when it became apparent that the defendant would not comply with the desegregation order.[66] Relying on the Supreme Court's statement in *Swann* concerning the scope and flexibility of a "district court's equitable powers to remedy past wrongs,"[67] it adopted the Cardenas plan, a version of the bilingual/bicultural

61. *Id.* According to the expert's testimony presented in *Otero,* the student population of defendant's school district was comprised as follows: 89.8 percent of the pupils were Anglos; 2 percent were either black, oriental or Native American; and 8.2 percent were Mexican-American. *Id.* at 165. The minority group students were distributed throughout the school district in the following manner: 6.4 to 9.4 percent were in the three high schools; 6.4 to 11.8 percent were in the six junior high schools; and 1.1 to 30.1 percent were in the nineteen elementary schools. *Id.*

62. *Id.* at 171.

63. *Id.*

64. *Id.* at 177. The court did not appear to be particularly sensitive to the plaintiffs' assertions. One of the plaintiffs' expert witnesses, Dr. Jose Cardenas, a noted educator, was described by Judge Winner as "[a]n expert in curriculum, bilingual/bicultural education and all sorts of other things." *Id.* at 164-65. This description of professional credentials seems somewhat casual when contrasted with the terse, more extended descriptions given the professional credentials of the experts called by the defendants.

Judge Winner expressed his general concern with recent increases in litigation involving school policies. He seemed to feel that efforts to expand educational services were being made on behalf of ungrateful and undeserving students: "I confess that I wonder if school personnel should not be awarded combat pay for their efforts in trying to educate in today's climate." *Id.* at 170 n.3.

65. 521 F.2d 465 (10th Cir. 1975), *cert. denied.* 96 S. Ct. 806 (1976).

66. 313 F. Supp. 61 (D. Colo. 1970), *cert. denied,* 413 U.S. 921 (1973).

67. 380 F. Supp. 673, 683 (D. Colo. 1974), *cert. denied,* 423 U.S. 1066 (1976).

plan.[68] The district court decided this was necessary to the effective desegregation of some of the schools.[69]

The Tenth Circuit concluded that the district had overstepped the limits of its powers by instituting the Cardenas plan.[70] It rejected the plaintiffs equal protection argument stating, "Although enlightened educational theory may well demand as much [as the Cardenas plan], the Constitution does not."[71] However, the court of appeals did leave open the possibility of using some other type of compensatory language program "to ensure that Hispano and other minority children will have the opportunity to acquire proficiency in the English language."[72]

The *Otero* court, basing its decision on *Keyes*, stated: "It is settled, then, that under Tenth Circuit law there is no constitutional right to bilingual/bicultural education . . . ."[73] Thus, the court declined to accept plaintiffs' argument for a bilingual/bicultural plan under the equal protection clause of the fourteenth amendment.[74]

IV. Equal Educational Opportunity

The right to an equal educational opprtunity was discussed by the Supreme Court in the seminal case of *San Antonio School District v. Rodriguez*.[75] Plaintiffs in *Rodriguez* were parents of Mexican-American children who alleged that the Texas system of financing public education operated to the disadvantage of the poor and impinged upon a fundamental right thereby violating the equal protection clause of the fourteenth amendment.[76] Defendant school district contended that a legitimate state interest was served by the Texas plan and, therefore, it should not be subject to strict judicial scrutiny.[77]

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68. 380 F. Supp. at 692.

69. *Id.*

70. 521 F.2d at 481. The Cardenas Plan is a comprehensive approach to education that extends to "matters of educational philosophy . . . instructional scope, and . . . curriculum, student evaluation, staffing, non-instructional service and community involvement." *Id.*

71. *Id.* at 482.

72. *Id.* at 483.

73. 408 F. Supp. at 170.

74. *Id.* at 169-70.

75. 411 U.S. 1 (1973). *See* Note, *The Right of Handicapped Children to an Education: The Phoenix of Rodriguez*, 59 CORNELL L. REV. 519 (1974).

76. 411 U.S. at 4.

77. *Id.* at 40.

The Supreme Court concluded that education is not among the rights afforded protection by the Constitution.[78] It stated that even if some quantum of education is protected by the Constitution, it is no more than "the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."[79]

This "basic minimal skills" standard as the only requirement of the equal protection clause was impliedly questioned by Mr. Justice Douglas in *Lau v. Nichols.*[80] He reasoned in *Lau* that there was "no equality of treatment" when the state imposed standards for graduation and then foreclosed non-English speaking students from a meaningful education by providing them with the same curriculum as English speaking students.[81] Although the *Lau* majority did not reach the equal protection claim, it did imply that language minority children have a right to equal educational opportunity and placing them in an English speaking classroom makes "a mockery of public education."[82]

Class actions brought on behalf of handicapped children have established their right to compensatory educational programs under the equal protection clause of the fourteenth amendment.[83] In *Mills v. Board of Education,*[84] seven handicapped children alleged that defendant school board violated their constitutional rights to an equal educational opportunity by failing to provide them with education suited to their needs and by excluding them from all public education.[85] The United States District Court for the District of Columbia found defendants' failure to provide "not just an equal publicly supported education but all publicly supported education while providing such education to other children . . . ." was a violation of the equal protection clause as a component of the due process clause of the fifth amendment.[86]

78. *Id.* at 38.
79. *Id.* at 37.
80. 414 U.S. at 566. *See* text accompanying notes 19-42 *supra.*
81. *Id.*
82. *Id.*
83. *See* 18 VILL. L. REV. 277 (1972).
84. 348 F. Supp. 866 (D.D.C. 1972). *See* Herr, *Retarded Children and the Law: Enforcing the Constitutional Rights of the Mentally Retarded,* 23 SYR. L. REV. 995 (1972).
85. 348 F. Supp. at 868.
86. *Id.* at 875.

In *Failkowski v. Shapp,*[87] plaintiffs, multiple handicapped brothers represented by their parents, alleged that defendant school district's educational program was in no respect beneficial to them, and that defendant "did no more than babysit . . . because it offered no training appropriate to their learning capacities."[88] Plaintiffs also claimed that defendant school board violated their rights under the equal protection clause because it failed to provide them with a meaningful education.[89] Defendant school board, on a motion to dismiss, argued that it was under no obligation to provide a special education to plaintiffs under the Supreme Court's decision in *Rodriguez.*[90] The *Failkowski* court distinguished *Rodriguez* on its facts and concluded that although there may not be a right to a particular level of education, there is a right to some minimum level of education.[91]

V. Conclusion

In *Lau v. Nichols,*[92] the Supreme Court established the right of non-English speaking children to receive compensatory language instruction under 42 U.S.C. § 2000d. Various lower courts,[93] relying on Mr. Justice Blackmum's concurring opinion in *Lau,*[94] have restricted this right to situations involving a "substantial" number of language minority students. Therefore, whether a language minority child will receive compensatory language instruction will depend on the fortuitous circumstance of which school he attends.

Arguably, language minority children may analogize their position to handicapped children. The constitutional argument which was successful in *Mills*[95] and in *Failkowski*[96] for handicapped children might also be successfully argued by language minority children. Although the Supreme Court's decision in *Rodriguez* held that

87. 405 F. Supp. 946 (E.D. Pa. 1975).
88. *Id.* at 948.
89. *Id.*
90. *Id.* at 957.
91. *Id.* at 958 (dictum).
92. 414 U.S. 563 (1974); *see* notes 19-42 and accompanying text.
93. *See, e.g.,* Serna v. Portales Mun. Schools, 499 F.2d 1147 (10th Cir. 1974); Otero v. School Dist. No. 51, 408 F. Supp. 162 (D. Colo. 1975).
94. 414 U.S. at 572 (Blackmun, J., concurring).
95. *See* 348 F. Supp. at 875.
96. *See* 405 F. Supp. at 958-59 (dictum).

there is no fundamental right to a particular level of education,[97] the *Mills*[98] and *Failkowski*[99] courts concluded that handicapped children are entitled to receive a minimal education which is geared to their needs. Since language minority students may not be able to obtain a minimal education without compensatory language instruction, they may be entitled to such instruction.

The Supreme Court should reexamine the rights of language minority students under 42 U.S.C. § 2000d in order to clarify its holding in *Lau*. If compensatory language programs can only be implemented when a "substantial" number of minority children are attending a school system, the Court should adopt this requirement. On the other hand, explicit rejection of the requirement will prevent evasion of section 2000d and the HEW guidelines.

97. 411 U.S. at 38.
98. 348 F. Supp. at 878.
99. 405 F. Supp. at 959 (dictum).