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INDIAN EDUCATION: BILINGUAL EDUCATION— A LEGAL RIGHT FOR NATIVE AMERICANS

Melissa Annis*

Culture is both the catalyst of individualism and a tool of discrimination. We are who we are because of the influences of our cultural heritage on our outlook on life. A need to identify with a group or a subgroup has led to the faithful rendition of ancient customs and rituals. A culture becomes paralyzed when it is not accepted by the dominant culture, however, and coexistence is an unsatisfactory solution. Total assimilation is usually the goal of a dominant culture, and it can involve the absolute destruction of a people's ideals, tradition, and language. Native Americans have been fighting this battle for centuries. Some tribes are no longer identifiable because of the success of assimilation; those languages and customs are lost forever. Indians today are fighting to keep their cultures alive with their Indian languages, a part of culture most susceptible to extinction. Historically, formal education of Indians has been their damnation, but perhaps bilingual education can be the salvation of their languages and culture.

By every standard, Indians receive the worst education of any children in the country. They attend shabby, overcrowded public schools which lack even basic resources. They are taught by teachers untrained, unprepared, and sometimes unwilling to meet their needs. They enter school late and leave early. The percentage of Indians who drop out of school is twice that for all other children. Among the Indian population, fully two-thirds of the adults have not gone beyond elementary school, and one-quarter of Indian adults are functionally illiterate—they can't read street signs or newspapers. The educational system has failed Indians.¹

The salvaging of a culture and a language is a realistic goal. Perhaps more urgent, however, is the educational disadvantage Indian children are placed under when their language deficiencies are not given proper attention. Indian children have a right to a bilingual education. The source of this right is found in legisla-

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1. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, AN EVEN CHANCE: A REPORT ON FEDERAL FUNDS FOR INDIAN CHILDREN IN PUBLIC SCHOOL DISTRICTS 2 (1971) [hereinafter cited as AN EVEN CHANCE]. See also Chavers, *Indian Education: Failure for the Future?*, 2 AM. INDIAN L. REV. 161 (1974).

tion dedicated to the effective education of Indian children, in funding programs designed to meet that end, and in the trust relationship between the federal government and Indians. The judiciary has repeatedly upheld pleas for bilingual instruction for children of other ethnic backgrounds. Indian children, given their unique situation, have an even greater claim on the right to a bilingual education.

Historical Background

The history of American Indian education began before the arrival of the first Europeans.² Indians had developed an educational process whereby they taught their children to meet the demands of their society, and one important function of this preparation for life was to transfer their culture and heritage from one generation to the next. This function was primarily carried out by the family of the child.

With the arrival of the Europeans, the Indians received their first formal education. This responsibility fell primarily upon the churches during the first three centuries of Indian-white relations.³ Concerted efforts were made to christianize the Indians. The churches found that a formal educational system was the most appropriate vehicle of conversion. Several individuals stand out in early Indian education. A Massachusetts minister, John Eliot, established a school in 1632 where he instructed Indians in Christian ethics and various arts and crafts. Thirty years later he succeeded in establishing fourteen towns of "praying Indians." John Sargent carried on this work in Stockbridge, Massachusetts, where he established a boarding school, a day school, and an "outing system." The Reverend Eleazer Wheelock's philosophy was to remove Indian children from their natural environment and surround them with Puritan influences.⁴ The school he established to carry out his philosophy eventually became Dartmouth College.

These early educators/missionaries found their educational systems inappropriate to teaching Indians. There was a language barrier, and Indian parents resented their children being removed

2. Otis, *Indian Education: A Cultural Dilemma*, in AMERICAN INDIAN READER 66 (Jeanett Henry ed. 1972).

3. Berry, *The Histories of American Indian Education*, in AMERICAN INDIAN READER 31 (Jeanett Henry ed. 1972).

4. *Id.* at 33.

from home and placed in mission schools. The European-style education was irrelevant and meaningless to the Indians. It conflicted with their perception of education, which was the preparation to live in tribal society.

In the 1700s the federal government began to take on some responsibility for educating Indians by providing funds. Some support was promised the Indians in treaties. The first treaty to mention Indian education was made in 1794 with the Oneida, Tuscarora, and Stockbridge tribes.⁵ In 1803 in a treaty with the Kaskaskia Tribe, the United States agreed to give \$100 a year for seven years toward the support of a priest who would instruct their children.⁶

Following the Civil War a concern for the deplorable status of the Indians arose. An 1868 congressional report calling for reform of the condition of the Indians produced two significant consequences. First, the federal government assumed a much larger role in Indian education. Second, the reform ushered in the era of the off-reservation boarding school.

The boarding school was seen as the solution to the "Indian problem." The theory of this educational system was total assimilation of the Indians into white culture. The boarding school "forbade the speaking of any other language except English" and outlawed "Native American religious celebrations."⁷ The model for this brand of Indian education was a school in Carlisle, Pennsylvania, established in 1879 by an army officer, Richard Pratt. The philosophy of boarding schools was to remove the children from the reservation, to subject them to strict military discipline, and to establish them in a work and study program. Most of these schools were vocational schools, teaching skills that could only be used off the reservation.

Living conditions in the boarding schools were abhorrent. There was severe overcrowding, long hours of work to subsidize their existence in the school, and an insufficient amount of food. The 1928 Meriam Report stated that the minimum figure for feeding boarding-school children was 11 cents a day per child. Nutrition experts of the time said 35 cents a day was the minimum amount for enough food of a sufficient variety to keep

5. 7 Stat. 47, 48 (1974). See generally Note, *Indian Education: Federal Compulsory School Attendance Law Applicable to American Indians: The Treaty-Making Period: 1857-1871*, 5 AM. INDIAN L. REV. 393 (1977).

6. 7 Stat. 78, 79 (1803).

7. A. BEUF, RED CHILDREN IN WHITE AMERICA 20 (1977).

a growing child healthy.⁸ These children also were subjected to harsh discipline at the whim of the school superintendent.

The single greatest impression these boarding schools made on their Indian inmates was one of overwhelming brutality. The tone was set by the staff member called the disciplinarian—whose task it was to keep the students in line. . . . The disciplinarian delegated authority to the older boys, who were allowed to whip the younger children with impunity. Students who misbehaved, even to the extent of getting their shoes wet, were forced to “run the belt line,” which means to crawl between the legs of other students, who lashed out at them with their belt buckles. At girls’ boarding schools, the matrons did the whipping with lengths of rubber hose. Those who were caught speaking their own languages had their mouth washed out with lye soap.⁹

Perhaps the philosophy behind establishing these schools can be summed up in the three resolutions passed by the National Educational Convention at Los Angeles in 1889:

1. Resolved, that the true object of the Indian schools and of Indian management is to accomplish the release of the Indian from the slavery of tribal life and to establish him in the self-supporting freedom of citizenship to take his place in the life of the nation, and that whatever in our present system hinders the attainment of this object should be changed.

2. Resolved, that the public schools of the United States are fundamentally and supremely the Americanizers of all people within our limits and our duty to the Indian requires that all Indian school efforts should be directed toward getting the Indian youth into these schools.

3. Whereas, local prejudice on the part of the whites against the Indians in the vicinity of every tribe and reservation is such as to make attendance of the Indian youth in public schools there impracticable, and Whereas, there is no prejudice preventing the attendance of Indian youth in public schools from nonreservation schools as are remote from the tribes or reservations, therefore BE IT RESOLVED that it is the duty of the government to establish industrial schools in our well-populated districts as remote from the tribes as possible, and it

8. L. MERIAM, *THE PROBLEM OF INDIAN ADMINISTRATION* 11 (1928).

9. R. BURNETT & J. KOSTER, *THE ROAD TO WOUNDED KNEE* 45 (1974).

is hereby suggested that ten more such schools be tentatively established at once, with a distinct understanding that each such school shall carry 300 additional pupils placed out in public schools living in white families where the children shall give service in the home to pay for their keep.¹⁰

After World War I another reform movement was triggered by the publication of the Meriam Report. The report suggested that education be the primary function of the Bureau of Indian Affairs (BIA), advised that education be closely tied with the community, encouraged day schools, recommended a raise in salaries and standards of personnel, and suggested that an educator be appointed Director of Education. The report also recommended extensive reform of the boarding schools. It attacked the physical conditions, the enrollment of pre-adolescents, and the inadequacy of personnel in boarding schools.¹¹

The BIA gave the Meriam Report some attention. Williard Walcott Beatty, education director of the BIA, developed one of the earliest bilingual programs in the country.¹² He brought an enthusiasm to his office that had not existed before. Problems in Indian education were met head-on by the energetic Beatty. He recognized the language problem was one of the greatest barriers for Indian children. Beatty began publication of a number of bilingual pamphlets. His efforts were hampered by problems of finding people who could write and translate stories and by the lack of written Indian languages.¹³ Beatty concerned himself as well with training Indian Service teachers in the skills of bilingual teaching. He recognized the value of Indian assistance in classrooms where little English was spoken. A program was also initiated by Beatty to train professional Indian educators. These programs, which did not begin until shortly before World War II, ended before that war was over. Although the programs were short-lived, it is significant that Beatty realized that language was the greatest obstruction to an adequate education for Indian children.

World War II had a disastrous effect on the progress that had been made since World War I. The federal government retreated into a policy of dormancy on BIA programs. Termination of In-

10. Otis, *supra* note 2, at 68.

11. M. SZASZ, *EDUCATION AND THE AMERICAN INDIAN* 3 (1974).

12. *Id.* at 74.

13. Materials developed by: Santa Clara Day School, ESEA Title VII Bilingual Education Project Tewa-English, Teresa Guittierrez, Director (no date).

dian tribes and coercive assimilation were the philosophies of the day. The attitude of this period is best stated by the Special Subcommittee on Indian education in 1944 when it said the goal of Indian education "should be to make the Indian child a better American rather than to equip him simply to be a better Indian."¹⁴ The Meriam Report was shoved into a bottom drawer and given little attention by educators.

Although termination was a continual threat to tribal existence, the 1950s did see a move for an educational system suited to a technological society. The high school curriculum was shifted from vocational to academic. Indian schools were also encouraging post-high school training. In the 1960s, Indian education gained new hope. With the movement for Indian self-determination, the BIA recognized that Indian parents should have a voice in their children's educational programs. With veto power over all proposed programs, Indian parents could provide new directions for the educational world to best serve their children.

It should be recognized that formal education is not solely a device the Anglo culture has sought to impose on the Indians. Very early in American history, the Indians recognized the usefulness of education. The Senecas asked General Washington for teachers to teach their men to build and to farm, their women to spin and weave, and their children to read and write.¹⁵ The Indians also bargained for education in some of their treaties. The price the Indians had to pay to educate their children was their valuable land and they did not obtain quality education in return. Still, formal education for Indians has been in existence for four hundred years, and a Senate Subcommittee on Indian Education in 1968 summarized: "formal education began with the coming of the white man, and has continued to the present time, with conspicuous lack of success."¹⁶

Problems in Indian Education

Important to any revolution in Indian education are the identification and evaluation of the problems resulting from inept educational systems. In evaluating the deficiencies in Indian educa-

14. Otis, *supra* note 2, at 70.

15. Berry, *supra* note 3, at 36.

16. Bearking, *Indian Education Under Federal Domination*, in AMERICAN INDIAN READER 83 (Jeanett Henry ed. 1972).

tion, the problems seem to be related mostly to language barriers, cultural deprivation, and negative self-concept.¹⁷ Historically, Indian students have not performed in the classroom at the level they are capable of performing. Indian students may have graduated, but they have not been educated. This is not a reflection on the intelligence level of the Indian population. Rather, it is an indication of the level of proficiency the child has attained in the English language. Test results indicate that Indian children perform almost as well as white children on nonverbal achievement tests.¹⁸ The problem stems from the fact that the Anglo classroom is an alien environment to an Indian child. The children often speak their tribal language at home and have had little exposure to standard English. This presents a serious problem when the most basic educational skills are conveyed in a language they do not understand. To compound the problem, the Indian child of limited English proficiency is tested on these skills, and their performance is judged in terms of a national norm. This is not a fair standard to hold a child to and an extremely inaccurate one in view of the circumstances.

Anglo bias is also the rule in the cultural setting of the classroom. Only one culture is set forth as the acceptable culture and that is the white culture. Indian culture and traditions are completely ignored. The implication is that there is no culture in the Indian home, a compromising situation for Indian children. They are forced to choose between being good students and being good Indians.

Another factor in poor school performance by Indian students is a negative self-image. Having low self-esteem is not a surprising characteristic in view of the first two factors—the language barrier and cultural deprivation. When children have low self-esteem, the negative effects of depriving children of their cultural heritage and of teaching them in a language they cannot understand are reinforced. Reciprocally, if children do not understand what is being taught in the classroom, they will be unable to test well and this serves to reinforce their low self-esteem.

Frustrations because of an inability to achieve in the white classrooms are reflected in the drop-out and suicide rates of Indian youths. The drop-out rate for Indian students is 50% higher than for the rest of the population. This is evident in the

17. BEUF, *supra* note 7, at 29.

18. *Id.* at 28.

statistics, which estimate the educational level of all Indians at less than half of the national average. Less than one fourth as many Indians enter college as non-Indians. Here, the drop-out rate is only part of the problem. The reports of personality disorders, insecurity, and aggressive behavior indicate an even more severe problem. Assuming Indian children stay in school, the emotional effects may be of a permanent nature. "The high incidence of psychological and emotional problems reflected in drop-out and suicide rates provides convincing and alarming evidence of the seriousness of the failure of the American educational system to provide an educational program appropriate for the majority of Indian people."¹⁹

Programs of Bilingual Education

Bilingual education is gaining popularity as a possible solution to Indian education problems. It is believed that bilingual education will motivate the child to learn by making the school a more familiar environment. Language is used as a symbol of cultural identity. Bilingual instruction involves instruction in both the child's native language and English. The instruction in the native language facilitates learning until the child has become proficient in English. The English instruction in conjunction with the native language provides a smoother avenue of transition into the English-speaking classroom than would otherwise be available. The children are not thrust into a classroom and expected to adapt. Edward Dozier, in an article addressed to teachers of Indian students, stated, "Bi-lingualism is no detriment—indeed the acquisition of several languages tends to enhance learning in other areas as well, . . ."²⁰ For Indian children, bilingual education serves another important function. Bilingual instruction helps the Indian tribe to preserve its language, and the tribal members can be sure their heritage will be preserved for another generation. This benefit is particularly important to Native Americans. America is their only homeland and if their languages are allowed to die here, they will be lost forever. Bicultural education is used in the same context to help the Indian child make the transition into Anglo culture. When Indian culture is present in the child's curriculum, he develops a pride in his

19. Otis, *supra* note 2, at 72.

20. Dozier, *The Teacher and the Indian Student*, in *AMERICAN INDIAN READER* 23 (Jeanett Henry ed. 1972).

heritage and a desire to maintain tribal customs and rituals. A bilingual/bicultural program may help eliminate stereotypes cultivated over the years by treating tribal languages and cultures on an equal basis with their Anglo counterparts.

There are two educational approaches to teaching children of limited English-speaking ability.²¹ The first is the English as a Second Language program (ESL). The priority of an ESL program is a rapid transition to the English language. There is little reinforcement of the native language in this program. The goal of ESL is acculturation. As soon as the child reaches a certain level of skill in the eyes of the educational agency, he will be placed in a monolingual classroom. The second approach to teaching children of limited English proficiency is a bilingual educational program. Ideally, under a bilingual education program a child becomes literate in both English and his native language. The ultimate goal of bilingual education is to prepare an individual to live in whichever world he chooses. Necessarily bilingual education incorporates ESL into its program. The result again is acculturation, but to a lesser degree. In the bilingual program the native and English languages are each taught. In a bilingual classroom neither language emerges as superior, and they both gain the respect of the students. In *United States v. Texas* the federal court decided that an ESL program was ineffective without a bilingual program.²²

Within bilingual education there are three types of programs. The first is one of enrichment. This program is designed for the child who speaks English. It is used to teach a foreign language and is therefore not necessary to the child's academic success. Second is a maintenance program designed for children who do not speak English. English is taught as a second language because it is crucial to academic success. The third program, one of transition, is designed to teach the child of limited English-speaking ability to speak English as soon as possible. With the mastery of English the student makes the transition into a monolingual educational program. Yet these programs may not be acceptable solutions to an Indian child's educational deficiencies. For example, the enrichment program is completely inapplicable to the Indian situation. The transitional program, as well, is probably not

21. Bartelt, *Two Approaches to Acculturation: Bilingual Education and ESL*, 18 J. OF AM. INDIAN EDUC. 15 (May 1979).

22. 506 F. Supp. 405 (E.D. Tex. 1981).

the ideal program to remedy the language barriers of Indian children. Although the child learns the English language quickly, little attention is given to the native language to help maintain it in a manner that avoids negative stereotypes. An ideal program would teach English because of its importance to academic success, and at the same time it would instruct in the native language because of its value to the child in helping him to learn English and also to enhance his awareness and appreciation of his heritage.

Bilingual Education Act

The Bilingual Education Act was originally adopted by Congress in 1968 as an amendment to the Elementary and Secondary Education Act.²³ Title VII has been amended over the years to reflect the growing understanding by Congress of the educational needs of children who are not proficient in English. The latest amendment, in 1978, recognizes and delineates the reasons and need for bilingual education and states:

The Congress declares it to be the policy of the United States, in order to establish equal educational opportunity for all children (A) to encourage the establishment and operation, where appropriate, of educational programs using bilingual educational practices, techniques, and methods, and (B) for that purpose, to provide financial assistance to local educational agencies and to State educational agencies for certain purposes, in order to enable such local educational agencies to develop and carry out such programs in elementary and secondary schools, including activities at the preschool level, which are designed to meet the educational needs of such children, with particular attention to children having the greatest need for such programs; and to demonstrate effective ways of providing, for children of limited English proficiency, instruction designed to enable them, while using their native language, to achieve competence in the English language.²⁴

Congress continues in section 703 to define the term "limited English proficiency" when used in reference to individuals to mean

individuals who are American Indian and Alaskan Native

23. Bilingual Education Act, Pub. L. No. 90-247, 81 Stat. (1968).

24. Bilingual Education Act, Pub. L. No. 95-561, § 702, 92 Stat. 2268 (1978).

students and who come from environments where a language other than English has had a significant impact on their level of English language proficiency, subject to such regulations as the Commissioner determines to be necessary; and, by reason thereof, have sufficient difficulty speaking, reading, writing, or understanding the English language to deny such individuals the opportunity to learn successfully in classrooms where the language of instruction is English.²⁵

It is significant that specific mention of Indians is made in the Bilingual Education Act. When the Act was originally under consideration, a great deal of time was spent in congressional hearings on the specific needs of Indian children for a bilingual education.²⁶ In recognition of these special educational needs, Congress authorized grants to state and local educational agencies and to tribal and other Indian community organizations to assist them in designing improved educational opportunities for Indian children.²⁷ Bilingual educational programs are specifically mentioned as an appropriate educational service.

Undoubtedly, under Title VII, Indians have a statutory right to a bilingual education. Congress has specifically named them as probable recipients and has provided funds to achieve that purpose. Still, it seems from the language of the Act that a bilingual program of education may be appropriate only in a limited number of situations. One limitation is that the program applies only to children who are of limited English-speaking proficiency. This will include individuals whose native language is one other than English, where a language other than English is the dominant language in the home, or when the child would have difficulty speaking and understanding instruction in English. Another limiting factor is at what point a bilingual program in a given school district becomes necessary. *Serna v. Portales Municipal Schools* held that a "substantial group" of children is required before a bilingual program is mandatory.²⁸ Some state bilingual education acts outline the minimum number of students necessary to generate the program. For example, the Texas Bilingual Education Act has set the criterion for a bilingual pro-

25. *Id.* at § 703(a)(1)(c).

26. *Bilingual Education Programs: Hearings on H.R. 9840 and 10224 Before the Subcomm. on Education, 90th Cong., 1st Sess., 351-57 (1967)* (Statement of B. Gaarder, Chief, Modern Foreign Language Section, U.S. Office of Education).

27. 20 U.S.C. § 3385 (Supp. IV 1980).

28. 499 F.2d 1147 (10th Cir. 1974).

gram in a school district where there is an enrollment of twenty or more students of limited English proficiency, in any language classification, in the same grade level.²⁹

Legislators have identified further requirements in establishing bilingual programs, that is, nonsegregation of bilingual students and classification of bilingual students in their appropriate grade levels. Students who qualify for bilingual instruction are not to be separated from the rest of the students. The educational agency should avoid any classification of these students as different. Segregation would serve only to reinforce the old stereotypes of stupidity and nonconformity.

As long as a child has "limited proficiency in English," and he is one of a "substantial group," that child has a legal right to a bilingual education under Title VII. Admittedly, "limited proficiency" would include a broad category of children. Problems develop when a child in that category is not joined by a substantial number of other children lacking proficiency. What did the *Serna* court mean by a "substantial group?" If the goal of Congress in developing bilingual programs is to provide equal educational opportunities for all children, can this be accomplished by only mandating bilingual instruction when a sufficient number of children are enrolled to justify the costs? Indian children who live on very small reservations or who do not live on the reservation at all might have difficulty in meeting the numerical requirements of a school district. Indian children who meet every other requirement to be included in a program will be denied effective participation in the education setting merely because there are not enough children to warrant the expense. However, this might be a dangerous precedent for an educational agency to set. Because of the Indian population's special relationship with the federal government, it is not outside the federal government's power to withdraw financial support from those institutions who are not providing equal educational opportunities to the Indian students.

A second problem area in bilingual programs is providing bilingual instruction for only those students whose native language is not English. In an ideal bilingual program the students will emerge literate in both languages. When this is the case, the English-speaking student is at an educational disadvantage because he is proficient in only one language. Admittedly the aim of a bilingual program is to help a student who does not speak

29. TEX. CODE ANN. EDUC. § 21.453(c) (Vernon 1982).

English to assimilate into the Anglo classroom. Would it not be an even more conducive situation to provide all school children with an understanding of the language and culture of their peers? This would help put to rest negative self-concepts on the part of the Indian students because their language and culture are expected to take a back seat to English and white culture. It would also serve to instill in the other students an understanding and appreciation of Indian languages and cultures. The Bilingual Education Act does provide for voluntary enrollment, to a limited degree, of children whose language is English, but priority must be given to these children of limited English-speaking ability. The Act provides that in no event shall the purpose of bilingual instruction be to teach a foreign language to English-speaking children.³⁰

Difficulties also emerge in bilingual programs in determining which languages to use for instruction when there are more than two cultures present. If the language of the largest minority is selected, it may have a negative effect on an unselected group.

Finally, there is the never ending problem of finding teachers qualified to teach in a bilingual program. It can be difficult to hire teachers fluent in a particular tribal language. The Bilingual Education Act provides funds for training teachers interested in bilingual education.³¹ Until enough teachers can be trained for that special task, the schools must do their best with the limited number of teachers available.

Native Americans present unique problems in establishing bilingual programs. Often there will be no bilingual materials available in a particular Indian language. This could be for any number of reasons, including the fact there may be no written language. Many tribes are reluctant to work with nontribal members to preserve their language in writing for fear of exposing their secret rituals to outsiders. Some Indian parents have also shown reluctance in placing their children in a bilingual program. Having spent their school years being punished for speaking their tribal language, they are fearful of having their children in a school where it is the language of instruction.³²

It is questionable whether the Bilingual Education Act can be used to revive a dying tribal language. A tribal language has limited use; it can only serve the child on the reservation or

30. Bilingual Education Act § 880, 20 U.S.C. § 880b-1(a)(4)(B) (1976).

31. *Id.* at 880b-7(a)(3)(A).

32. BEUF, *supra* note 7, at 54.

among his own people. The Bilingual Education Act is concerned primarily with the use of the tribal language to facilitate the child in learning the English language and making the transition a smooth one. The preservation of a dying language is not a priority of educational systems. Given the unique situation of the Indians and the special relationship they enjoy with the federal government, an argument for the maintenance of Indian languages through bilingual education can be made.

Education—A Fundamental Legal Right

Although the Bilingual Education Act provides the statutory basis for Indians' right to a bilingual education, the constitutional grounds for the right have not been clearly defined. The Supreme Court has considered on several occasions whether education is a fundamental right. In *San Antonio Independent School District v. Rodriguez*³³ the Court held that education is not a fundamental right. Yet, compelling arguments have been made and will continue to be made that there is a constitutional basis for a right to an education. In his dissenting opinion in *Rodriguez*, Justice Marshall was concerned by the close relationship between education and some of our most basic constitutional values. He stated: "Education directly affects the ability of a child to exercise his first amendment rights, both as a source and as a receiver of information and ideas, whatever interests he may pursue in life."³⁴ Implicit in the right to vote and the right of free speech is the right to an effective education. Though the Supreme Court has not given education the protection of a fundamental right, it has come close to doing so. Recognizing the important role education plays in society and the lasting impact it has on a child, the Supreme Court has given it an elevated position compared with other forms of social welfare legislation: "Public education has a pivotal role in maintaining the fabric of our society and in sustaining our political and cultural heritage; the deprivation of education takes an inestimable toll on the social, economic, intellectual, and psychological well-being of the individual, and poses an obstacle to individual achievement."³⁵

Given the fundamental importance of education as indicated by prior court decisions, it would be illogical to assume that

33. 411 U.S. 1, 35 (1973).

34. *Id.* at 112.

35. *Plyler v. Doe*, 102 S. Ct. 2382 (1982).

anything less than an effective education would be acceptable. Obviously a child of limited English-speaking proficiency will not receive an effective education unless measures are taken to weaken the language barrier. Nonetheless, in *United States v. Texas* it was decided that bilingual education per se is not required.³⁶ Other courts have held different programs of education as sufficient, finding no duty to provide bilingual instruction.³⁷ There is no duty to use a bilingual program as long as steps are taken to eradicate the child's language deficiency and such methods are effective.

The critics and advocates of bilingual education have debated the effectiveness of bilingual programs. Critics of the programs have voiced concern about the relatively small amount of research on the long-term effects of bilingual instruction. Bilingual programs have been accused of being just a sophisticated form of "linguistic imperialism" whose real goal is acculturation.³⁸ On the other hand, research study of the effects of bilingual education on the Cherokee Nation appears to dispute some of these accusations.³⁹

The research involved three carefully selected groups. Treatment group one consisted of seventeen students who participated in a bilingual program for five consecutive years (grades 1-5). Treatment group two contained eighteen students who for four years (grades 2-5) had participated in a bilingual program. Group three was selected from carefully developed criteria: A participant must have had a Cherokee blood quantum of one-quarter or more, must never have failed a grade level, and must never have been a participant in a bilingual program. Students meeting these requirements were pooled if they were within the I.Q. limits of the treatment groups. From this pool a control group of eighteen students were randomly selected.

At the time of the research project, all participants in groups 1, 2, and 3 were eighth graders. The SRA Achievement Series was administered to each. The reading achievement scores of the

36. *United States v. Texas*, 506 F. Supp. 405, 433 (E.D. Tex. 1981). The Court did, however, require bilingual education in this particular case because of the past history of discrimination in the geographical area involved.

37. *Guadalupe Org. v. Tempe Elementary School*, 587 F.2d 1022, 1027 (9th Cir. 1978).

38. Bartelt, *supra* note 21, at 19.

39. Bacon, Kidd & Seaburg, *The Effectiveness of Bilingual Instruction with Cherokee Indian Students*, 21 J. OF AM. INDIAN EDUC. 34 (February 1982).

children who received bilingual instruction for five years were significantly higher than those not receiving bilingual instruction. The same was true of the children who received bilingual instruction for four years, with no significant differences. On the mathematics achievement subtest the children receiving bilingual instruction again scored significantly higher than those who did not receive bilingual instruction. This strengthens the theory that developing a native language helps the child in learning the second language.

There is support for the argument that states which have assumed total responsibility for the education of Indians within their borders (Washington, Oregon, Idaho, California, Texas, Nebraska, Michigan, Minnesota, and Wisconsin), have given Indians a legitimate entitlement to an effective education.⁴⁰ The Court in *Goss v. Lopez*⁴¹ directed Ohio to recognize students' entitlement to an education in Ohio's schools because of statutes guaranteeing an education to all students between five and twenty-one years of age. "Among other things, the state is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause. . . ."⁴² This "property interest" may be applied to federal schools operated for Indians through the fifth amendment.

Equal Education Opportunity

The fundamental goal of the federal government is to "provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being."⁴³ Simply stated, the goal is equal educational opportunities for Indian children. This goal can never be realized as long as language deficiencies prevent the Indian child from receiving the full benefits of his educational experience. The Equal Educational Opportunities Act states: "No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex,

40. Lewis, *The Indian and Equality of Educational Opportunity*, in 1 STUDIES IN AMERICAN INDIAN LAW 326, 339 (R. Johnson ed. 1971).

41. 419 U.S. 565 (1975).

42. *Id.* at 574.

43. Indian Self-Determination and Education Assistance Act, § 450, 25 U.S.C. § 450a(c) (1976).

or national origin, by . . . (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.”⁴⁴

Talk of equal treatment of a culturally different group naturally raises the issue of the equal protection clause of the fourteenth amendment. The issue becomes whether discrepancies in educational achievement due to a dominant culture dictating the mode of instruction violates the equal protection clause. In *Guadalupe Organization v. Tempe Elementary School*,⁴⁵ the court held that different treatment of students does not violate the equal protection clause if such differences are rationally related to legitimate state interests. The court did give some guidance as to what might be considered a “legitimate state interest” by suggesting that a legitimate state interest is absent when the educational system fails to provide each child with the skills necessary to enjoy the rights of speech and full participation in the political process. The state does have an interest in educating its students in the national language. The question is whether the state’s interest is strong enough to deny to Indian children an equal opportunity to an education simply because they are not proficient in the national language. Understanding their obligation to educate the Indian population, the Elementary and Secondary Education Act announced that: “Congress declares it to be the policy of the United States, in order to establish equal educational opportunity for all children (A), to encourage the establishment and operation, where appropriate, of educational programs using bilingual educational practices, techniques, and methods, . . .”⁴⁶ It is also true that once a state has taken action and provided an educational system, it must be made available to all on an equal basis.⁴⁷ This includes Indians especially because they enjoy a trust relationship with the federal government.

*Lau v. Nichols*⁴⁸ is the landmark decision in the area of bilingual education. This case was a class action brought on behalf of non-English-speaking Chinese students in San Francisco schools. The complaint alleged that the school system’s failure to

44. Equal Educational Opportunities Act of 1974, § 1701, 20 U.S.C. § 1703(f) (1976).

45. 587 F.2d 1022, 1026 (9th Cir. 1978).

46. Educational Amendment of 1973, Pub. L. No. 95-561, 92 Stat. 2153 (1978).

47. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

48. 414 U.S. 563 (1974).

educate these children in a language they could understand was discrimination in violation of Title VI of the Civil Rights Act of 1964 and the fourteenth amendment's equal protection clause. The Court never reached the constitutional question but relied solely on Title VI in finding unlawful discrimination. The Court made three basic findings. It was concerned that language barriers linked to ethnicity will effectively preclude educational opportunity unless overcome. The Court found that school officials have an affirmative duty to remedy the language problem, and that only a discriminatory effect was necessary to find unlawful action under Title VI.

Title VI of the Civil Rights Act of 1964 bans discrimination based on race, color, or national origin in any program or activity receiving federal financial assistance.⁴⁹ The reasoning of the *Lau* Court applies to the Indian situation. Whether the educational agencies intend it or not they are discriminating against Indian students because of their cultural heritage. An Indian pupil unfamiliar with standard English is denied an equal opportunity to achieve in the Anglo classroom. This is a violation of Title VI as interpreted in *Lau*.

Since *Lau* affirmed that a student cannot be discriminated against because he does not speak English, an effective program to arrest the inequity of discriminatory effect must be developed. *Morales v. Shannon*⁵⁰ used the language of the Equal Educational Opportunities Act stating that it was an unlawful educational practice to fail "to take appropriate action to overcome language barriers." The words "appropriate action" are the key to the *Morales* decision. They seem to indicate that not just any program adopted to help the child of limited English-speaking ability will be acceptable. The court in *Rios v. Read*⁵¹ thought the effect of the program should be the yardstick for determining whether it was appropriate. *Rios* struck down a transitional program adopted by the educational agency because it was the quickest method of teaching English. This goal cannot be allowed to compromise the student's right to meaningful education before he is proficient in English.

In 1975 the Office of Civil Rights Division of the Department of Health, Education and Welfare issued a memorandum entitled

49. Civil Rights Act of 1964, Pub. L. No. 88-352 (Title VI) § 601, 78 Stat. 252 (1964).

50. 516 F.2d 411, 415 (5th Cir. 1975).

51. 480 F. Supp. 14, 23 (E.D.N.Y. 1978).

"Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful Under *Lau v. Nichols*," better known as the "*Lau* Guidelines."⁵² The *Lau* Guidelines provide schools with some direction in what the appropriate steps are in correcting language deficiencies. The guidelines require the school district to

- (1) assess the language ability of the student
- (2) identify the nature and extent of the students' educational needs and utilize the most effective teaching style to meet those needs
- (3) implement the type of educational programs dependent upon the degree of linguistic proficiency of the students in question and
- (4) train bilingual teachers.⁵³

There is a split of authority among the courts as to how much weight should be given the *Lau* Guidelines. Some believe they provide considerable guidance but are in no way binding,⁵⁴ while other courts think the guidelines should be given great weight.⁵⁵

Some further guidance provided by the *Rios* court established that objective. Validated tests conducted by competent personnel must be used to identify children who should be enrolled in a bilingual program and to identify children ready to exit the program. The school district must also establish procedures for monitoring the student's progress.⁵⁶ These procedures will eliminate arbitrariness in executing a bilingual program.

Decisions like *Rios v. Read* and *United States v. Texas* make it clear that whatever language program an educational agency chooses to implement, it must be appropriate to the situation of the students it is to help. The language problem of Indian children is unique. Special care must be used in designing a program for them if it is to be effective. A program established simply to embellish a state's appropriations from the federal government is inexcusable. A program that is arbitrary in its application must be avoided at all costs. An uneven application of program opportunities would create feelings of inferiority in the children. Special instruction should also be given Indian children regarding

52. *Cintrion v. Brentwood Union Free School Dist.*, 455 F. Supp. 57, 62 (E.D.N.Y. 1978).

53. *Id.* at 62-63.

54. *United States v. Texas*, 506 F. Supp. 405, 439 (E.D. Tex. 1981).

55. *Cintrion v. Brentwood Union Free School Dist.*, 455 F. Supp. 57, 62 (E.D.N.Y. 1978).

56. *Rios v. Read*, 480 F. Supp. 14, 23 (E.D.N.Y. 1978).

their culture to ensure it will not be extinguished by the assimilation process.

If a legal right to an equal education is going to mean anything, a determination must be made as to when an Indian student has a cause of action for discriminatory practices by the educational agency. In *Lau* all that was required was discriminatory effect for the action to be unlawful under Title VI.⁵⁷ No intent to discriminate had to be shown by the plaintiffs. Two years later in *Washington v. Davis*⁵⁸ the court held that an allegation of discriminatory purpose, in addition to discriminatory impact, was necessary to state a cause of action under the fourteenth amendment. This is a much heavier burden of proof for the plaintiff to bear. Even after *Washington*, however, a plaintiff could argue that these cases are distinguishable by the fact *Lau* was dealing with a Title VI claim and *Washington* was decided in reference to the fourteenth amendment. The Court in *Regents of University of California v. Bakke*⁵⁹ laid that argument to rest when it found that Title VI and the equal protection clause are coextensive. Now Title VI is no broader than the constitutional standard. *Washington* and *Bakke* read together undercut the doctrine in *Lau*, though they do not expressly overrule it. The courts seem to be following the doctrine established in *Washington* and *Bakke*. *United States v. Texas* held that Texas' failure to provide bilingual instruction to Mexican-American students did not constitute a violation of the equal protection clause because there was no purposeful discrimination.⁶⁰ If Indians find little relief in the courts due to a high standard of proof, there is a remedy available from Congress. Built into much of the funding legislation is the reservation by the federal government of the right to cut off support to schools not providing Indian students with an education equal to other students. This remedy cuts much deeper than Indian parents like. It not only punishes the school but the students as well. With no funding, no attempts will be made to meet the special educational needs of Indian students.

Indian students bringing discriminatory actions may find more relief under the Equal Educational Opportunities Act.⁶¹ This Act

57. 414 U.S. 563, 568 (1974).

58. 426 U.S. 229, 240 (1976).

59. 438 U.S. 265, 352 (1978).

60. 506 F. Supp. 405 (E.D. Tex. 1981).

61. Equal Educational Opportunities Act of 1974, § 1701, 20 U.S.C. § 1703(f) (1976).

has been held not to be coextensive with the fourteenth amendment. *United States v. Hinds County School Board*⁶² held that the Equal Educational Opportunities Act encompasses forms of conduct not within the purview of the equal protection clause. An Indian student would not have to show purposeful discrimination in order for the court to find a violation of the Act. A violation can be found for any failure to overcome a language barrier regardless of how the barrier arose or why the school has neglected to take corrective measures.

Trust Relationship

The Indian's legal right to bilingual education must be defined with reference to the special relationship between the United States government and Indian tribes. It is a novel legal and political relationship sometimes referred to as a "trust relationship." This relationship is defined by history, treaties, statutes, court decisions, and the United States Constitution. The Supreme Court has stated that it is a relationship unique in that nothing like it exists in the world.⁶³ It has been interpreted to mean a variety of things. One general definition of this special relationship is: "The United States Trust responsibility toward American Indians is the unique legal and moral duty of the United States to assist Indians in the protection of their property and rights."⁶⁴

There are certain general powers in the Constitution which are a source of power over Indian affairs. The two most important grants of power are the commerce clause⁶⁵ and the treaty-making power.⁶⁶ The commerce clause gives Congress the power to regulate the commerce with Indian tribes. The treaty-making power gives the President the power to make treaties, with the advice and consent of the Senate. Although treaties with Indian tribes are no longer being negotiated, Indian treaties continue to constitute a major source of federal Indian law. Numerous treaties have acknowledged in their provisions the guardian-ward relationship between the federal government and the Indian tribe.⁶⁷ In the process of negotiations, Indians have entrusted the federal government with the continued care and well-being of the

62. 560 F.2d 619, 624 (5th Cir. 1977).

63. *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831).

64. G. HALL, *THE FEDERAL-INDIAN TRUST RELATIONSHIP* 3 (1979).

65. U.S. CONST. art. I, § 8, cl. 3.

66. U.S. CONST. art. II, § 2, cl. 2.

67. See, e.g., Treaty with the Creeks, Aug. 7, 1790, art. 2, 7 Stat. 78.

Indian people. The obligation accepted in the treaties has been confirmed through recognition of treaties as superior to any conflicting state law.⁶⁸

The judiciary has played an important role in establishing the responsibilities of the federal government to the Indian people. In some instances the courts acknowledged the trust responsibility in such a way as to benefit Indians,⁶⁹ while in other cases the special relationship worked to the Indians' detriment.⁷⁰ *Cherokee Nation v. Georgia*⁷¹ was the first case in which the Supreme Court discussed this unique relationship. The Court described Indian tribes as "domestic dependent nations."⁷² More recently, *Passamaquoddy Tribe v. Morton*⁷³ confirmed the trust relationship using the Trade and Intercourse Act of 1790. That court held that when the federal government enters into a treaty with an Indian tribe or enacts a statute on its behalf, the government commits itself to a guardian-ward relationship with that tribe.⁷⁴ The trade and intercourse acts were adopted to protect Indians from being defrauded in commercial transactions. The acts dealt with the licensing of trade with Indian tribes, the scope of federal criminal jurisdiction, the prohibition of the sale of liquor to Indians, the control of disposition of Indian land, and the promotion of civilization and education among Indians.⁷⁵

The Indian Self-Determination and Education Assistance Act of 1975 made significant steps toward fulfilling the federal government's obligations under the trust relationship.⁷⁶

The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy

68. *United States v. Washington*, 520 F.2d 676, 684 (9th Cir. 1975).

69. Trusteeship includes the obligation to provide health care to Indians. *White v. Califano*, 437 F. Supp. 543 (D.S.D. 1977).

70. Trust relationship has been interpreted as a source of power for Congress in some instances, rather than a check on the federal government. *United States v. Kagama*, 118 U.S. 375 (1886).

71. 30 U.S. 1 (1831).

72. *Id.* at 16.

73. 528 F.2d 370 (1st Cir. 1975).

74. *Id.* at 379-80.

75. 18 U.S.C. §§ 1152, 1160, 1165 (1976); 25 U.S.C. §§ 177, 179, 180, 193, 294, 201, 229, 230, 251, 263, 264 (1976).

76. Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450a (1976).

which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of these programs and services.⁷⁷

The underlying purpose of this special relationship between the federal government and Indian nations is the continued survival of Indian tribes as self-governing people. Indian parents have been greatly encouraged to help develop an effective educational plan for their children. Self-determination is a part of the obligation to the Indian people.

Education is another obligation which flows from the trust. It is not a service gratuitously provided by the federal government. Education was repeatedly promised Indians in treaties.⁷⁸ Commonly the treaty would require the federal government to erect a schoolhouse for every thirty children.⁷⁹ The long history of formal Indian education concedes the federal government's obligation to educate Indians, although the education process was neither diligently carried out nor done with the noblest of intentions. The underlying question seems to be how far the obligation extends. Given the authority of treaties, the esteemed role of education in society, and the federal government's unique moral and legal responsibilities to Indians, clearly Indian children have a right to an *effective* education—a *bilingual* education. It is inconceivable that education would not be a right highly protected by the trust relationship given the basis for adopting such a relationship. Educating Indians is the nexus of all the rights and obligations flowing from the trust relationship. The relationship has been used to protect Indian lands, to provide health services, to avoid taxation, and most recently Congress has acknowledged its responsibility to help Indians achieve the ultimate goal of self-determination. What must be understood is that providing Indian children with the opportunity to attend school is meaningless unless the goal is to provide an effective education, one in which the Indian child is given the opportunity to learn, develop, and achieve in the classroom.

If no treaty or executive order exists establishing an obligation on the part of the federal government to educate Indians, or such

77. *Id.* at 450a(b).

78. *See, e.g.*, Treaty with the Kickapoo, May 18, 1854, art. 2, 10 Stat. 1078; Treaty with the Pawnee, Sept. 24, 1857, art. 3, 11 Stat. 729.

79. M. PRICE, *LAW AND THE AMERICAN INDIAN: READINGS, NOTES AND CASES* 684 (1973).

treaty is ineffective today, there is another basis from which Indians' right to an effective education may be derived. As noted earlier, general trust responsibilities may be established through any legislation Congress initiates on Indians' behalf.⁸⁰ The Bilingual Education Act specifically deals with Indians in its efforts to reverse the effects of discrimination against non-English-speaking students. This Act encompasses all Indian students under the protection of the trust relationship, granting to each the right to a bilingual education.

The trust theory of protected rights and obligations may be taken one step further. The persuasiveness of the courts in finding a legal and moral obligation on the part of the federal government and the legislation and treaties directed toward that same end lead to the conclusion that Indians have an elevated right to a bilingual education under the trust relationship. Moreover, there is persuasive authority that the right to a bilingual education exists outside the trust relationship.⁸¹ When the unique relationship between the federal government and the Indians is considered, that right is magnified in importance.

Funding of Indian Education

The major impact of the federal government in the area of Indian education has been through its funding legislation. It has been the most effective approach to Indian education, although it is the result of partisan politics which has led to some inconsistencies, duplication, and waste.⁸² State educational agencies respond best to pecuniary incentives to provide educational programs for Indians. The responsibility of educating Indian residents is often a sore point in a state with a large population of Indians. Indian trust lands are not subject to property taxes. One-half of the public schools in the United States are funded primarily by large property taxes.⁸³ With a majority of the Indian children attending public schools, it can become a large financial burden to a state. It should not be overlooked, however, that Indians do generate taxable wealth within the states from their enterprises.⁸⁴ Although

80. *Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975).

81. See, e.g., *Bilingual Education Act*, Pub. L. No. 95-561, § 702, 92 Stat. 2268 (1978); *Lau v. Nichols*, 414 U.S. 563 (1974).

82. Rosenfelt, *Toward a More Coherent Policy for Funding Indian Education*, 40 L. & CONTEMP. PROB. 190 (1976).

83. *Id.* at 192.

84. *Prince v. Board of Educ.*, 543 P.2d 1176 (N.M. 1975).

states often resent the hardship of educating Indians who pay no taxes, they do have a legal duty to provide educational services to Indian children. As citizens of the state in which they reside, Indian children have an equal right to a free public education.⁸⁵ A state cannot justify excluding Indians from public schools merely because Indian schools provided by the BIA exist.⁸⁶

The United States government has responded to the burden placed on the states to educate Indians by increasing funding. Basic support of Indian education is provided for in impact aid programs.⁸⁷ This program allocates funds to school districts encompassing Indian reservations. Impact aid funds are the single most important source of revenue for some districts. These funds help compensate the school district for lost revenue caused by the presence of nontaxable Indian lands in their district. Payments are computed by multiplying the number of children whose parents live on Indian land by the amount comparable school districts spend per student from local funds. While these funds serve an important function, they do not meet the special educational needs of Indian children.

Supplemental funding programs have been developed to meet the special educational needs of Indian children. These programs were established with the problems of language barriers and cultural differences of Indian children in mind. The Johnson-O'Malley Act (JOM), passed by Congress in 1934,⁸⁸ gives the Secretary of the Interior the power to contract with the states for the education of Indian children. It was designed to encourage the states to accept responsibility for Indian education. JOM funds were to be devoted to special programs for Indians, but the BIA failed to establish any criteria for how the money should be used. The result was that states frequently used the money as they saw fit. Frequently, Indian students never benefited from the funds allocated for their special educational needs. In 1975 the JOM regulations were revised to help curb the past abuses of JOM funds.⁸⁹ Now a candidate for JOM benefits no longer needs to be

85. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

86. *United States v. Dewey County*, 14 F.2d 784 (8th Cir. 1926).

87. Impact Areas Aid Act of 1950, Pub. L. No. 81-847, 64 Stat. 1110 (1970), codified at 20 U.S.C. § 236 (1976).

88. Johnson-O'Malley Act of 1934, ch. 147, 48 Stat. 596, codified as amended at 25 U.S.C. §§ 452-457 (1976).

89. Indian Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2213 (1975), codified at 25 U.S.C. § 455 (1976). See also Note, *Indian Education: Johnson-O'Malley Funds After Natonabah v. Board of Education*, 2 AM. INDIAN L. REV. 89 (No. 2 1974).

a resident on the reservation; the funds may only be spent on Indians, but expenditures are not restricted to schools; and Indian parents are given full veto power over all proposed programs. JOM assistance finds much support from the fact that it is a flexible program. More Indian communities are actively involved in JOM programs than in any other educational program.

The first program to realize that economically and educationally deprived children may need compensatory educational programs to perform well in school was Title I of the Elementary and Secondary Education Act of 1965.⁹⁰ Title I directs federal funds to the school districts with the greatest need. The amount of funds allocated to a school district depends on the number of children from low-income families and the state's average expenditure per student. The federal Office of Education allocates the funds to the states, which evaluate programs proposed by school districts within that state for educationally disadvantaged students. Title I requires school officials to select target schools within a school district to receive these funds. This is done to ensure that the majority of students receiving these funds are in fact needy. Generally a child not attending a target school may not participate under Title I. Within a target school funds may be concentrated on children with the greatest need. Under Title I some children who are in need of the benefits of the program will be excluded from participating. The Office of Education acknowledges that Indian students are not greatly benefited under this Act. Many of the dollars attracted by the presence of Indian children are not necessarily being used to correct their educational disadvantages.⁹¹

The Indian Education Act of 1972 is the most comprehensive federal program providing for the special needs of Indian children.⁹² The statute defines "Indian" broadly, providing for children who might otherwise be overlooked. It is the only Indian education program that serves the special educational needs of the nonreservation Indians as well as reservation Indians. The Act established broad programs of assistance and created a bureau within the Office of Education to manage the Act. There are three funding programs established under this Act. Part A provides grants to local educational agencies based on the

90. Elementary and Secondary Education Act of 1965, 20 U.S.C. § 236.

91. Rosenfelt, *Toward a More Coherent Policy for Funding Indian Education*, 40 L. & CONTEMP. PROB. 190 (1976).

92. Indian Education Act of 1972, 20 U.S.C. §§ 241aa-241ff (1976).

number of Indian children enrolled and the average per pupil expenditure in the state. These funds may only be spent on the special educational needs of Indian children, such as bilingual and/or bicultural programs. Under this section, applications for federal assistance are not approved unless the school complies with certain requirements. Indian parents must be involved in planning their children's educational progress, and specific plans must be set forth for the operation, administration, and evaluation of the special programs funded under this Act. Part B authorizes discretionary grants to improve educational opportunities for Indian children. Grants may be given for almost any purpose relating to Indian education. Indian organizations that submit applications for these discretionary funds are generally given priority over other applicants. Grants for adult education are provided for in Part C of the Act. Little attention has been given to adult education, and the funds available under this section have generally been inadequate.

Most of the funding legislation recognizes the special educational needs of Indian children and has set out to provide a means to eradicate past discrepancies. The great potential for abuse of these funds may be curbed by Indian parents, who are acquiring more influence in making educational decisions on behalf of their children.⁹³

Conclusion

The Court in *Brown v. Board of Education* stated, "Today education is perhaps the most important function of state and local government."⁹⁴ The unique relationship between Indians and the federal government extends this function to the federal government as well. Governmental responsibilities to the Indian people have been acknowledged in treaties and legislation. Indeed, certain obligations have become much more than mere responsibilities the government may at its discretion execute with varying degrees of success. Education for American Indians is the core of their continued existence as a self-governing, self-perpetuating people. Its importance to the cultural survival more than qualifies it as a right. The right to an education is an absurdity unless there is also the right to an effective education. The

93. Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450a (1976).

94. 347 U.S. 483, 493 (1954).

history of formal Indian education points to the grave injustice of providing an educational setting where students' educational deficiencies are not corrected. The greatest barrier to an effective education for Indian children is language. The *Lau* court decided that the school agency must take affirmative steps to remedy language problems. "Imposition of a requirement that before a child can effectively participate in the educational program, he must have already acquired these basic skills is to make a mockery of public education."⁹⁵ Bilingual programs have been promoted by Congress as an equitable solution to language barriers of Indian students, and funding programs have been initiated by Congress to this end. Once such an important responsibility is accepted by the federal government, it cannot turn back in midstream. *Brown* stood for the proposition that once the state has undertaken to provide education, "it is a right which must be made available to all on equal terms."⁹⁶

95. 414 U.S. 563, 566 (1974).

96. 347 U.S. 483, 493 (1954).