

## *Leandro's Left Behind: How North Carolina's English Learners Have Been Denied Their Fundamental Right to a Sound Basic Education*

*Under Leandro v. State, the North Carolina Constitution guarantees a sound basic education for all students enrolled in public schools. This Comment addresses the state's current system for educating the rising number of non-native English speaking students and demonstrates how that system has failed to meet Leandro's command.*

*This Comment uses the framework constructed in Leandro to explore North Carolina's current challenges in educating English Learners ("EL"). It examines the long-standing achievement gap that exists between EL students and their native-English speaking peers and demonstrates that EL students are not receiving a sound basic education. Additionally, this Comment examines the language-acquisition programs currently used throughout the state and the promising steps North Carolina has taken to address the needs of these students. It also considers programs implemented in other jurisdictions and offers proposed solutions for further improvement to ensure that North Carolina's EL students obtain their constitutionally guaranteed opportunity to a sound basic education.*

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## INTRODUCTION

The North Carolina Constitution guarantees all children the right to an “opportunity to receive a sound basic education.”<sup>1</sup> For the increasing number of English Learners (ELs)<sup>2</sup> living in North Carolina, that guarantee remains unfulfilled. From 2003 to 2014, North Carolina’s population of EL students increased by over 30,000 and now comprises 6.5% of the State’s public school students.<sup>3</sup> This growth will likely continue. In fact, scholars predict that by the 2030s, EL students will comprise approximately 40% of the national school-aged population.<sup>4</sup>

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1. *Leandro v. State (Leandro I)*, 488 S.E.2d 249, 255 (N.C. 1997), *aff’d sub nom. Hoke Cty. Bd. of Educ. v. State (Leandro II)*, 599 S.E.2d 365 (N.C. 2004). The North Carolina Constitution states “[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.” N.C. CONST. art. I, § 15. For a discussion of what constitutes a “sound basic education,” see *infra* Part I.

2. 20 U.S.C. § 7801(20) (2012 & Supp. 2015). The statute defines an EL student as an individual

- (A) who is aged 3 through 21;
- (B) who is enrolled or preparing to enroll in an elementary school or secondary school;
- (C)(i) who was not born in the United States or whose native language is a language other than English;
- (ii)(I) who is a Native American or Alaska Native, or a native resident of the outlying areas; and
- (II) who comes from an environment where a language other than English has had a significant impact on the individual’s level of English language proficiency; or
- (iii) who is migratory, whose native language is a language other than English, and who comes from an environment where a language other than English is dominant; and
- (D) whose difficulties in speaking, reading, writing, or understanding the English language may be sufficient to deny the individual—
  - (i) the ability to meet the challenging State academic standards;
  - (ii) the ability to successfully achieve in classrooms where the language of instruction is English; or
  - (iii) the opportunity to participate fully in society.

*Id.* The Every Student Succeeds Act, enacted in 2015, adopted the phrase “English Learner” (EL) to replace the previously used phrase “Limited English Proficient” (LEP). This Comment will utilize “English Learner” and “EL”; however, some academic material cited herein uses the designation LEP.

3. THOMAS D. SNYDER, CRISTOBAL DE BREY & SALLY A. DILLOW, U.S. DEP’T OF EDUC., DIGEST OF EDUCATION STATISTICS 2015, at 116 (2016), <https://nces.ed.gov/pubs2016/2016014.pdf> [<https://perma.cc/CGH3-LRRZ>].

4. Celeste Roseberry-McKibbin & Alejandro Brice, *Acquiring English as a Second Language: What’s “Normal,” What’s Not*, AM. SPEECH-LANGUAGE-HEARING ASS’N, <http://www.asha.org/public/speech/development/easl.htm> [<https://perma.cc/4THW-MDPX>].

In testimony given to the House Education and Labor Committee regarding the impact of the No Child Left Behind Act on EL students, Peter Zamora, Regional Counsel for the Mexican American Legal Defense and Educational Fund, stated, “[EL students’] academic performance levels are significantly below those of their peers in nearly every measure of academic performance.”<sup>5</sup> This remains true in North Carolina. The most recent North Carolina Consolidated State Performance Report indicates that in the 2014–2015 school year, only 18.46% of EL students attained proficiency on the English Language Proficiency assessment.<sup>6</sup> In fact, of those students who met the criteria to exit the language instruction program and be reclassified as “monitored former English learners” (MFEL),<sup>7</sup> only 26.21% were proficient in reading and language arts.<sup>8</sup> The graduation rate of North Carolina EL students who entered high school in 2012–2013, and were expected to graduate in 2016, was 57.2%—the lowest of any subgroup by more than 10%.<sup>9</sup>

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5. *Impact of No Child Left Behind on English Language Learners: Hearing Before the Subcomm. on Early Childhood, Elementary and Secondary Educ. of the H. Comm. on Educ. and Lab.*, 110th Cong. 30 (2007) [hereinafter *Impact of No Child Left Behind on English Language Learners*] <http://www.spannj.org/032307PeterZamoratestimony.pdf> [https://perma.cc/Q265-KL3W] (statement of Peter Zamora, Hispanic Education Coalition).

6. U.S. DEP’T. OF EDUC., CONSOLIDATED STATE PERFORMANCE REPORT: PARTS I AND II FOR STATE FORMULA GRANT PROGRAMS UNDER THE ELEMENTARY AND SECONDARY EDUCATION ACT AS AMENDED IN 2001 FOR REPORTING ON SCHOOL YEAR 2014–15: NORTH CAROLINA 49 (2015–2016) [hereinafter *PERFORMANCE REPORT 2014–15*], <http://www.ncpublicschools.org/docs/data/management/federal-reports/cspr/2014-15/cspr.pdf> [https://perma.cc/Y3XQ-EPC4]. The State Board of Education provides that a student “may exit EL identification,” provided that the student “meet the Comprehensive Objective Composite (COC)[,]” which is demonstrated by “reaching an overall composite score of 4.8 or above, with at least a 4.0 on the reading domain and at least a 4.0 on the writing domain for kindergarten and tiers B and C in grades 1–12.” DIV. OF ACCOUNTABILITY SERVS., DEP’T OF PUB. INSTRUCTION, GUIDELINES FOR TESTING STUDENTS IDENTIFIED AS ENGLISH LEARNERS 3 (2016) <http://www.ncpublicschools.org/docs/accountability/policyoperations/lep/eltstgd1617.pdf> [https://perma.cc/5A36-NBX4].

7. DIV. OF ACCOUNTABILITY SERVS., *supra* note 6, at 4. The North Carolina Department of Education recently changed the terminology from “Limited English Proficient” to “English Learners” and “Monitored Former LEP” to “Monitored Former English Learner (MFEL).” *See id.* at 1, 4.

8. *PERFORMANCE REPORT 2014–15*, *supra* note 6, at 54. Monitored former LEP students include those “[s]tudents who have transitioned out of a language instruction educational program,” and “[s]tudents who are no longer receiving LEP services and who are being monitored for academic content achievement for [two] years after the transition.” *Id.* at 53.

9. 4-Year Cohort Graduation Rate Report: State Wide Results, PUB. SCH. OF N.C., <http://accrpt.ncpublicschools.org/app/2016/cgr/> (select “State Wide” for school system, and then choose “view report”) (last visited Mar. 24, 2017) [hereinafter *Graduation Rate*].

This data raises concerns about whether North Carolina's growing population of EL students receives a sound basic education. The North Carolina Constitution, as interpreted by the Supreme Court of North Carolina in *Leandro v. State*, requires that *all* North Carolina public school students have the opportunity to receive a sound basic education.<sup>10</sup> While North Carolina has taken steps towards improving outcomes for these students, the statistics above indicate that the State still falls short of this constitutional requirement.<sup>11</sup>

Part I of this Comment provides background on North Carolina's constitutional guarantee that all students have an opportunity to receive a sound basic education as explained in *Leandro*. Part II examines North Carolina's current system of educating EL students and demonstrates how that system has fallen short of the *Leandro* requirement. Part III considers how other states have recently addressed the needs of EL students. Part IV acknowledges and commends the positive measures taken by leaders in North Carolina, critiques the shortcomings of those measures, and offers suggestions for further improvement. Ultimately, this Comment argues that the State has denied EL students their constitutionally guaranteed right to a sound basic education. In order to remedy this violation, the State should implement changes to teacher licensure requirements to ensure that all teachers are prepared to adequately instruct EL students. Additionally, the State should implement more dual-language programs throughout North Carolina.

## I. THE STATE'S LEGAL OBLIGATIONS TO ITS STUDENTS UNDER NORTH CAROLINA LAW

As first articulated in *Leandro*, the North Carolina Constitution requires the State to ensure that all students, including EL students, have an "opportunity to receive a sound basic education."<sup>12</sup> This Part examines that constitutional guarantee, explores the evidentiary factors courts consider in determining whether students have been denied this right, and reviews the evidence presented in *Leandro*. An examination of *Leandro* provides a framework for addressing the State's current constitutional violations in regard to EL students.

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Report]. The subgroup with the next lowest graduation rate for the same year was students with disabilities at 68.9%. *Id.*

10. *Leandro v. State (Leandro I)*, 488 S.E.2d 249, 255 (N.C. 1997), *aff'd sub nom* Hoke Cty. Bd. of Educ. v. State (*Leandro II*), 599 S.E.2d 365 (N.C. 2004).

11. *Id.* See also discussion *infra* Part I.

12. *Id.*

A. *The Constitutional Guarantee That Students Have the Opportunity to Receive a Sound Basic Education*

Unlike the U.S. Constitution, North Carolina's constitution includes a right to education for all children: "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."<sup>13</sup> Further, the General Assembly shall provide "a general and uniform system of free public schools . . . wherein equal opportunities shall be provided for all students."<sup>14</sup> In *Leandro*, the Supreme Court of North Carolina held these constitutional provisions, when considered together, guarantee every child "an opportunity to receive a sound basic education."<sup>15</sup>

The plaintiffs in *Leandro* consisted of students, their parents or guardians, and the school boards from relatively poor school districts in eastern North Carolina.<sup>16</sup> They brought the action seeking declaratory and injunctive relief, claiming the North Carolina Constitution creates a fundamental right to education, which the State denied to these students.<sup>17</sup> The State Board of Education filed a motion to dismiss, asserting that the court lacked both personal and subject matter jurisdiction and that the plaintiffs failed to state a claim for which relief could be granted.<sup>18</sup> The trial court denied the motion to dismiss.<sup>19</sup>

Defendants appealed the denial of their motion to dismiss and the North Carolina Court of Appeals reversed.<sup>20</sup> The court of appeals "concluded that the right to education guaranteed by the North Carolina Constitution is limited to one of equal access to the existing system of education and does not embrace a qualitative standard."<sup>21</sup> However, the Supreme Court of North Carolina reversed, determining that the right to education *does* have a qualitative standard and requires the opportunity to receive a "sound basic education."<sup>22</sup> The court emphasized the importance

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13. N.C. CONST. art. I, § 15.

14. *Id.* art. IX, § 2.

15. *Leandro I*, 488 S.E.2d at 255, 259.

16. *Id.* at 252. Specifically, the plaintiffs were from Cumberland, Halifax, Hoke, Robeson, and Vance counties. However, students, their parents or guardians, and the school boards from the relatively "wealthy school systems of the City of Asheville and of Buncombe, Wake, Forsyth, Mecklenburg, and Durham Counties" intervened as plaintiffs. *Id.*

17. *Id.*

18. *Id.* at 253.

19. *Id.*

20. *Id.*

21. *Id.* (citing *Leandro v. North Carolina*, 468 S.E.2d 543, 550 (N.C. Ct. App. 1996)).

22. *Id.* at 254.

of preparing students to be productive citizens, stating “[a]n education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate.”<sup>23</sup> The court went on to define a “sound basic education” as:

[O]ne that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.<sup>24</sup>

The *Leandro* court offered a non-exclusive list of evidentiary factors that a court may consider when determining whether students have been denied their right to an opportunity to receive a sound basic education.<sup>25</sup> The court considered “inputs,” such as the state's general education and per pupil expenditures, and the educational goals and standards adopted by the legislature.<sup>26</sup> It also examined “outputs,” particularly student performance on standard achievement tests.<sup>27</sup> The court emphasized that none of these factors alone is determinative and that a court should consider other relevant factors as appropriate.<sup>28</sup> When considering whether students have been denied the right to a sound basic education, “the courts of the state must grant every reasonable deference to the legislative and executive branches.”<sup>29</sup> The court then remanded the case to allow the trial court to

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23. *Id.*

24. *Id.* at 255 (citing *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989); *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979)).

25. *Id.* at 259–60.

26. *Id.* (citing *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359, 369 (N.Y. 1982), *appeal dismissed*, 459 U.S. 1139 (1983)).

27. *Id.* (citing Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 332 (1991)).

28. *Id.* Examples of additional factors the court considered on appeal after remand include the student graduation rate, employment potential, and deficiencies related to school administration. *Hoke Cty. Bd. of Educ. v. State (Leandro II)*, 599 S.E.2d 365, 381 (N.C. 2004).

29. *Leandro I*, 488 S.E.2d at 261.

consider these factors in determining whether the plaintiffs had been denied their right to a sound basic education.<sup>30</sup>

*B. Evidence Presented in Leandro II Demonstrated the Students Were Denied the Right to a Sound Basic Education*

On remand, the plaintiffs from Hoke County presented evidence in accordance with the evidentiary factors that the Supreme Court of North Carolina suggested.<sup>31</sup> This evidence included comparative standardized test score data, student graduation rates, data demonstrating the students' employment potential and post-secondary education success, as well as deficiencies of educational offerings and administrative deficiencies.<sup>32</sup>

The trial court considered the standardized test scores for End of Grade (EOG) and End of Course (EOC) tests and determined that when achievement levels are measured on a scale from I to IV, a Level III is the proper standard of proficiency when determining compliance with *Leandro*.<sup>33</sup> In applying this standard on remand, the court determined that the number of students failing to achieve Level III proficiency in Hoke County was substantial enough to be considered “contributing evidence that Hoke County students were being denied their constitutional right to the opportunity for a sound basic education.”<sup>34</sup> In evaluating the test score data, the trial court found

[t]hat throughout the 1990s, Hoke County students in all grades trailed their statewide counterparts for proficiency by a considerable margin. For example, in 1997–98, only 46.9% of Hoke students scored at Level III or above in algebra while the state average was 61.6%. Similar disparities occurred in other high school subjects such as Biology, English, and American History. . . . [I]n grades 3–8, Hoke County students trailed the state average in each grade, with gaps ranging from 11.7% to 15.1%.

In addition, the trial court noted that Hoke County students fared poorly in comparison with the state's other students in computer skills testing (51.2% passing in Hoke, 74.8% passed statewide), and the “high school” competency test (52.7% passed in Hoke, 68.4% passed statewide). The trial court also considered the findings of a state education assistance team, who worked at South Hoke Elementary School. The team determined that

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30. *Id.*

31. *Leandro II*, 599 S.E.2d at 381–82.

32. *Id.*

33. *Id.* at 382. At the time of the *Leandro* litigation, the North Carolina Board of Education defined Level III proficiency as: “Students performing at this level consistently demonstrate mastery of the course subject matter and skills and are well prepared to be successful at a more advanced level in the content area.” *Id.*

34. *Id.* at 383.



test scores showed Hoke County elementary school students were deficient in higher order thinking skills, such as problem solving.<sup>35</sup>

In addition to evidence regarding standardized test scores, the plaintiffs presented evidence demonstrating only 41% of the freshmen in the district successfully graduated from high school, far below the statewide graduation rate of 60%.<sup>36</sup> Of those students going on to graduate and enroll in community colleges or the University of North Carolina system, a significant number were placed in remedial classes for the core academic subjects.<sup>37</sup> This evidence demonstrated that even graduating students were not properly prepared to receive higher education. Further, employers in the local area testified that their employees from Hoke County Schools were not properly prepared for work.<sup>38</sup>

Based on the evidence presented regarding the standardized test score data, student graduation rates, alarming student employment potential and post-secondary education success, as well as deficiencies in educational offerings and administrative training, the trial court found the education provided to Hoke County students did not comply with the requirements articulated in *Leandro*.<sup>39</sup> The Supreme Court of North Carolina upheld this finding, noting the academic performance of Hoke County students, compared with their statewide counterparts, demonstrated that they “failed to obtain a *Leandro*-comporting education.”<sup>40</sup>

However, the court emphasized that the plaintiffs must show both that a large number of students have been deprived of their constitutional right to an opportunity to receive a sound basic education and the deprivation was the result of state action or inaction.<sup>41</sup> In *Leandro II*, the State argued the evidence demonstrated that it recognized the problem and had taken steps to improve the educational offerings in Hoke County.<sup>42</sup> The State further argued that if Hoke County students were not obtaining a sound basic education, “it [was] due to factors other than educational offerings provided by the State.”<sup>43</sup> Conversely, the plaintiffs contended that the

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35. *Id.*

36. *Id.* at 384.

37. *Id.* at 385. The evidence showed “55 percent of Hoke County graduates attending community college in 1996 were placed in one or more remedial classes” and “Hoke County graduates in the UNC system were required to take remedial core courses at nearly double the rate of the statewide counterparts.” *Id.*

38. *Id.* at 384–85.

39. *Id.* at 372.

40. *Id.* at 386.

41. *Id.*

42. *Id.*

43. *Id.*

students in Hoke County had been denied their right to a sound basic education because the State failed to provide adequate teachers, administrators, and funding.<sup>44</sup> Further, the plaintiffs argued that the State failed to “implement alternative educational offerings that have and/or would address and correct the problems that have placed . . . Hoke county students *at risk* of academic failure.”<sup>45</sup>

The supreme court held that both state action and inaction contributed to the students’ deprivation of their constitutional right.<sup>46</sup> The court particularly emphasized Hoke County’s failure to address the needs of “at-risk” students.<sup>47</sup> In defining “at-risk,” it listed six characteristics, one of which is limited proficiency in English.<sup>48</sup> The court determined the State failed to identify Hoke County’s “at-risk” students and meet their needs with educational resources such as tutoring, extra class sessions, counseling, and other programs.<sup>49</sup> The court then concluded that the State failed to address the needs of these students in a manner that would “enable them to compete among their non ‘at-risk’ counterparts and thus avail themselves of their right to the opportunity to obtain a sound basic education.”<sup>50</sup> Thus, in addition to *Leandro*’s requirement that the State provide all students the opportunity to receive a sound basic education, *Leandro II* held the State has a distinct burden with regard to “at-risk” students such as EL students.<sup>51</sup>

The plaintiffs in *Leandro II* also argued that the State’s use and implementation of educational funding and resources in Hoke County schools was insufficient.<sup>52</sup> The court affirmed the trial court’s ruling that “the State’s overall funding and resource provisions scheme was adequate on a statewide basis.”<sup>53</sup> Yet, it emphasized that the critical analysis did not concern the *amount* of funding but rather the *effective allocation* of those funds.<sup>54</sup> Thus, the court also affirmed the trial court’s order requiring the State to “assess its education-related allocations . . . so as to correct any deficiencies that presently prevent the county from offering its students the

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44. *Id.*

45. *Id.* at 387.

46. *Id.* at 390.

47. *Id.* at 387–95.

48. *Id.* at 389–90 n.16.

49. *Id.* at 389.

50. *Id.* at 390.

51. *Id.*

52. *Id.*

53. *Id.* at 390–91.

54. *Id.*

opportunity to obtain a *Leandro*-conforming education.”<sup>55</sup> The court ultimately held there was “a clear showing” of a denial of the Hoke County students’ right to a sound basic education.<sup>56</sup> As follows, the court affirmed the portions of the trial court order requiring the State to take action to correct the problem.<sup>57</sup>

Like the students in Hoke County, North Carolina’s EL students have a constitutional right to the opportunity to receive a sound basic education. Applying the evidentiary factors considered in *Leandro* demonstrates that, like the students in Hoke County, these EL students are currently being denied their constitutional right.

## II. NORTH CAROLINA’S CURRENT SYSTEM OF EDUCATING EL STUDENTS FALLS SHORT OF THE *LEANDRO* REQUIREMENT

The language instruction programs currently used in North Carolina do not meet *Leandro*’s requirement that the State provide all students—including EL students—the opportunity to receive a sound basic education. Section A of this Part offers an overview of the State’s current system of educating EL students, including the types of language-instruction programs most often used in North Carolina’s public schools. Section B examines recent test score data, graduation rates, and evidence of teacher preparedness and compares these to the data examined in *Leandro*. This comparison demonstrates the similarities between the constitutional violation found in *Leandro* and the ongoing violations regarding EL students in North Carolina.

### A. *Federal Requirements for Educating EL Students*

Under federal law, states must ensure students who do not understand English are able to effectively participate in the education program.<sup>58</sup> The

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55. *Id.* at 391.

56. *Id.*

57. *Id.*

58. *See* *Lau v. Nichols*, 414 U.S. 563, 568 (1974) (“Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.” (quoting *Identification of Discrimination and Denial of Services on the Basis of National Origin*, 35 Fed. Reg. 11595 (July 18, 1970))); *see also* *Castaneda v. Pickard*, 648 F.2d 989, 1009 (1981) (holding that “Congress’ use of the less specific term, ‘appropriate action,’ rather than ‘bilingual education,’ indicates that Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations

states' obligations stem from federal requirements found in Title VI of the Civil Rights Act of 1964,<sup>59</sup> the Every Student Succeeds Act,<sup>60</sup> and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.<sup>61</sup>

Title VI of the Civil Rights Act provides “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>62</sup> The United States Supreme Court interpreted a state’s Title VI compliance requirements in *Lau v. Nichols*.<sup>63</sup> In that case, non-English speaking Chinese students sued school officials in San Francisco, alleging violations of the Fourteenth Amendment and Title VI.<sup>64</sup> Many of the non-English speaking students in the school district did not receive any supplemental courses in the English language,<sup>65</sup> even though state standards provided that education was compulsory, English was the language of instruction, and no student could graduate if he had not met proficiency standards in English.<sup>66</sup> The Supreme Court found the state had not provided “equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.”<sup>67</sup> The Court ultimately held that in order to comply with Title VI, school districts must take affirmative steps to ensure students who are

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under the [Equal Education Opportunity Act]. However, by including an obligation to address the problem of language barriers in the EEOA and granting limited English speaking students a private right of action to enforce that obligation . . . Congress also must have intended to insure that schools made a genuine and good faith effort, consistent with local circumstances and resources, to remedy the language deficiencies of their students and deliberately placed on federal courts the difficult responsibility of determining whether that obligation had been met.”)

59. Civil Rights Act of 1964, 42 U.S.C. § 2000d (2012 & Supp. 2015).

60. Every Student Succeeds Act, 20 U.S.C. §§ 6301–7014 (2012 & Supp. 2015).

61. U.S. CONST. amend. XIV, § 1.

62. 42 U.S.C. § 2000d.

63. *Lau*, 414 U.S. 563.

64. *Id.* at 564–65.

65. *Id.* at 564.

66. *Id.* at 565–66 (summarizing various provisions of California’s Education Code, which provided that the state’s compulsory education system’s instruction would be in English but granted school districts flexibility to decide “when and under what circumstances instruction [could] be given bilingually.”)

67. *Id.* at 566.

unable to understand English are able to effectively participate in the education program.<sup>68</sup>

The Equal Educational Opportunity Act of 1974 codified the *Lau* holding by requiring all schools, regardless of whether they receive state or federal funding, to implement programs to help students learn English.<sup>69</sup> The Act provides that

[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . 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.<sup>70</sup>

In *Castaneda v. Pickard*, the United States Court of Appeals for the Fifth Circuit recognized that although *Lau* and the Equal Educational Opportunity Act require states to take action to ensure all students are enabled to effectively participate in the educational program, states have wide latitude in determining how to meet this obligation.<sup>71</sup>

The most recent federal legislation regarding EL students is found in the Every Student Succeeds Act,<sup>72</sup> which amended the No Child Left Behind Act of 2001 (NCLB).<sup>73</sup> Title III of NCLB specifically addressed language instruction for LEP students.<sup>74</sup> One of the stated purposes of the section was to allow state and local educational agencies flexibility in implementing language-instruction programs.<sup>75</sup> The Act merely required that the programs be “based on scientifically based research on teaching [EL] children, that the agencies believe to be the most effective for teaching English.”<sup>76</sup> NCLB also required annual testing to hold schools accountable for student success.<sup>77</sup> The Every Student Succeeds Act kept the foundational aspects of NCLB in place; however, the Act replaced the

68. *Id.* at 568.

69. Equal Education Opportunities Act of 1974, 20 U.S.C. §§ 1701–1721 (2012).

70. *Id.* § 1703.

71. *Castaneda v. Pickard*, 648 F.2d 989, 1009 (5th Cir. 1981) (“[A]lthough the Act empowered the U.S. Office of Education to develop model programs, Congress expressly directed that the state and local agencies receiving funds under the Act were not required to adopt one of these model programs but were free to develop their own.” (citing CONF. REP. NO. 93–1026 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4093, 4206)).

72. Every Student Succeeds Act, Pub. L. No. 114–95, 129 Stat. 1802 (2015) (codified as amended at 20 U.S.C. § 6812 (2012 & Supp. 2015)).

73. No Child Left Behind Act of 2001, Pub. L. No. 107–110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

74. *Id.* §§ 3001–3304 (codified as amended at 20 U.S.C. §§ 6801–7014 (2012)).

75. *Id.* § 3102(a)(9) (codified as amended at 20 U.S.C. § 6812).

76. *Id.*

77. *Id.*

requirement that language-instruction programs be scientifically based with the more stringent requirement that those programs be “effective.”<sup>78</sup> Additionally, the Act does not include the stated purpose of flexibility in program implementation.<sup>79</sup>

Under the Equal Protection Clause of the Fourteenth Amendment, a state cannot deny access to public education to students who are illegal aliens.<sup>80</sup> In *Plyler v. Doe*, the Supreme Court struck down a Texas law that denied undocumented children access to public education.<sup>81</sup> The *Plyler* Court held that the Texas law violated the Equal Protection Clause because there was no showing that the law furthered a substantial state interest.<sup>82</sup> Quoting *Brown v. Board of Education*, the Court stated, “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”<sup>83</sup>

In sum, the federal government recognizes the right of all EL students, including those who are undocumented, to effectively participate in the educational programs of states. Further, schools are required under federal law to implement programs toward that end. However, aside from the requirement that the programs “be effective,”<sup>84</sup> the federal government does not provide specific guidance on how states should protect this right. States are given wide latitude to develop and implement their own policies.<sup>85</sup>

### *B. North Carolina’s Current System for Educating EL Students*

In North Carolina, as permitted by federal law, each local school board has discretion to determine how it will provide services to EL students, and services may even vary among schools in a single district.<sup>86</sup> The State Board of Education’s Guidelines for Limited English Proficient Programs declares:

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78. Every Student Succeeds Act, 20 U.S.C. § 6812(a)(4) (2012 & Supp. 2015).

79. *Id.*

80. *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

81. *Id.*

82. *Id.*

83. *Id.* at 223 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

84. 20 U.S.C. § 6812(a)(4).

85. Marie C. Scott, *Resegregation, Language, and Educational Opportunity: The Influx of Latino Students into North Carolina Public Schools*, 11 HARV. LATINO L. REV. 123, 132 (2008).

86. 16 N.C. ADMIN. CODE 6D.0106(d) (2016).

[Local Education Agencies]<sup>87</sup> shall adopt a program or programs for limited English proficient students who need assistance which have a reasonable chance of allowing students to progress in school. The program may be one of the following unless some other method or process can be effectively substituted: (1) English as a second language (ESL); (2) bilingual education; (3) programs which provide neither instruction in the native language nor direct instruction in ESL but which adapt instruction to meet the needs of these students.<sup>88</sup>

ESL programs consist of special curriculum and techniques to teach EL students about the English language and the academic vocabulary needed to develop their proficiency in speaking, listening, reading, and writing.<sup>89</sup> These programs typically instruct students in English, “with little use of the EL students’ primary language(s).”<sup>90</sup> The majority of North Carolina districts implement ESL programs, known as “pull-outs,” in which the school places EL students in a mainstream classroom where the teacher delivers all of the content instruction in English, but the students are taken out of that class to attend separate ESL classes for a specified amount of time.<sup>91</sup> “This method can minimize the cost to the school district because it only has to pay for a few ESL specialty teachers, rather than an entire bilingual staff. However, this pull-out method does not ensure that the children maintain the benefits of their native language.”<sup>92</sup> Additionally, when students are pulled out of their mainstream classroom, they miss the content instruction that the rest of their class receives, which can cause them to fall further behind their native English-speaking peers.<sup>93</sup> Regularly

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87. *Education Acronyms*, N.C. DEP’T. OF PUB. INSTRUCTION, <http://www.ncpublicschools.org/acronyms/#1> [<https://perma.cc/7B6K-3GDH>]. The North Carolina Department of Public Instruction defines Local Education Agency (LEA) as “[s]ynonymous with a local school system or a local school district, indicating that a public board of education or other public authority maintains administrative control of the public schools in a city or county.” *Id.*

88. 16 N.C. ADMIN. CODE 6D.0106(d).

89. CATHERINE E. LHAMON, ASSISTANT SEC’Y FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., & VANITA GUPTA, ACTING ASSISTANT ATTORNEY GEN. FOR CIVIL RIGHTS, U.S. DEP’T OF JUSTICE, DEAR COLLEAGUE LETTER: ENGLISH LEARNER STUDENTS AND LIMITED ENGLISH PROFICIENT PARENTS 12 n.35 (Jan. 17, 2015), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf> [<https://perma.cc/G9M8-4F2F>].

90. *Id.*

91. Scott, *supra* note 85, at 141.

92. *Id.*

93. ROBERT LINQUANTI, FOSTERING ACADEMIC SUCCESS FOR ENGLISH LEARNERS: WHAT DO WE KNOW? 10 (1999) [https://www.wested.org/online\\_pubs/Foster\\_Academic\\_Success\\_092309.pdf](https://www.wested.org/online_pubs/Foster_Academic_Success_092309.pdf) [<https://perma.cc/ZZ9X-SGVX>].

being pulled out of mainstream classes can also have the negative effect of stigmatizing EL students.<sup>94</sup>

A more progressive type of ESL program is “structured immersion.”<sup>95</sup> Structured immersion classes generally allow EL students to receive instruction in the same classroom as their native English-speaking peers.<sup>96</sup> In these programs, teachers deliver the academic content in English, but often the teacher is bilingual and can provide critical language support to the students.<sup>97</sup> Because the EL students remain in the same classroom as native English speakers, this program “can have an integrating effect,”<sup>98</sup> as opposed to the stigmatizing effect of pull-out programs.

Other progressive programs, less commonly used in North Carolina, are bilingual education programs.<sup>99</sup> Common forms of bilingual education include Transitional Bilingual Education (TBE) and Dual Language Programs. TBE programs are designed to maintain and develop “skills in the primary language while introducing, maintaining, and developing skills in English. The primary purpose of a TBE program is to facilitate the EL student’s transition to an all-English instructional program, while the student receives academic subject instruction in the primary language to the extent necessary.”<sup>100</sup> In Dual Language Programs, “the goal is for students to develop language proficiency in two languages by receiving instruction in English and another language in a classroom that is usually comprised of half primary-English speakers and half primary speakers of the other language.”<sup>101</sup> Dual Language Programs instruct EL students in the same classroom as native English-speaking students.<sup>102</sup> Unlike ESL programs and structured immersion, bilingual education programs promote the students’ proficiency in their native languages, in addition to English.<sup>103</sup> Studies indicate the “effectiveness [of these programs] in promoting

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94. *Id.*

95. Scott, *supra* note 85, at 142. “This structured inclusion model is considered to be the preferred instruction method in the state because it encourages elementary school LEP students to keep up with grade-level material, but it has not been replicated in many other districts.” *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. LHAMON & GUPTA, *supra* note 89, at 12 n.35.

101. *Id.*

102. *Id.*

103. *Id.*



academic achievement and high levels of language proficiency for both [EL students and primary-English speakers].”<sup>104</sup>

Since pull-out systems represent the majority of EL language-instruction programs used in North Carolina, most EL students participate in a mainstream classroom and are taught the regular content standards throughout most of the school day.<sup>105</sup> The majority of the students’ content instruction necessarily comes from their regular classroom teacher, while the ESL teacher supplements the instruction with language support. No state requirement currently mandates the amount of ESL instructional time EL students should receive in any of these various ESL programs.

C. *The State’s Current System of Educating EL Students Does Not Satisfy Leandro*

North Carolina’s system of educating EL students does not satisfy the State’s constitutional obligation to provide these students with an opportunity to receive a sound basic education. This Section examines recent test score data and graduation rates of North Carolina EL students, as well as the qualifications for teachers, and compares the findings to the evidence offered in the *Leandro* litigation. This comparison demonstrates that, like the students in Hoke County, the state’s EL students have been denied their constitutional right to a sound basic education.

The most recent North Carolina Consolidated State Performance Report shows only 18.46% of the EL students tested in 2014–2015 attained proficiency on the State English Language Proficiency assessment.<sup>106</sup> A wide gap exists between the scores of EL students on state standardized tests as compared to their native English-speaking classmates.<sup>107</sup> On language arts/reading EOG tests, EL students in third through eighth grade fell below the state average for proficiency by 27.3% to 48%.<sup>108</sup> On the mathematics EOG tests, similar gaps exist, ranging from 15.4% to 35.8%.<sup>109</sup> High school EL students trail the state average overall on EOC

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104. LINQUANTI, *supra* note 93, at 9.

105. Scott, *supra* note 85, at 141.

106. PERFORMANCE REPORT 2014–15, *supra* note 6, at 49.

107. End of Grade: Percent of Proficient Students State of North Carolina, PUB. SCH. OF N.C., [https://ncreportcards.ondemand.sas.com/SASVisualAnalyticsViewer/VisualAnalyticsViewer\\_guest.jsp?reportPath=/ReportCard/NC\\_SRC&reportName=NC+Report+Cards](https://ncreportcards.ondemand.sas.com/SASVisualAnalyticsViewer/VisualAnalyticsViewer_guest.jsp?reportPath=/ReportCard/NC_SRC&reportName=NC+Report+Cards) (last visited Mar. 26, 2017) (follow State Report Card hyperlink; then select “End of Grade” subheading to compare proficiency rates).

108. *Id.*

109. *Id.*

tests by 44.8%.<sup>110</sup> By contrast, the Hoke County students represented in the *Leandro* litigation only trailed their peers by at most 23.6%.<sup>111</sup>

This achievement gap between EL students and their peers is not a recent phenomenon. In fact, EL students, as a group, scored significantly below their peers on EOG tests every year of the past decade. From 2006 to 2015, the percentage of EL students proficient on the language arts/reading EOG fell below state proficiency by 21.6% to 38.7%.<sup>112</sup> Differences between statewide proficiency and EL proficiency on the math EOG ranged from 12.5% to 25.9%.<sup>113</sup> For reading, the widest achievement gaps over the last decade occurred in each of the past six years, and for math, the widest gaps have occurred in the past three years.<sup>114</sup>

The wide achievement gap between EL students and their native English-speaking peers does not close when EL students exit the language instruction program. Monitored Former EL (MFEL)<sup>115</sup> students consistently outperformed their counterparts prior to 2010.<sup>116</sup> However, in

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110. *Id.*

111. Hoke Cty. Bd. of Educ. v. State (*Leandro II*), 599 S.E.2d 365, 383 (N.C. 2004) (noting that 51.2% of Hoke County students passed computer skills testing, compared to 74.8% of students who passed the same test statewide).

112. See End of Grade: Percent of Proficient Students State of North Carolina, *supra* note 107.

113. *Id.*

114. *Id.* In reading, the EL achievement gaps (the difference between the percentage of proficient EL students and statewide proficiency) from 2010 to 2015 were 33.3%, 33.3%, 36.4%, 34.5%, 38.7%, and 38.3%, respectively. *Id.* Prior to 2010, the widest EL achievement gap was 32.5% in 2008. *Id.* For math, the EL achievement gaps from 2013 to 2015 were 25.9%, 25.4%, and 25.1%, respectively. *Id.* Prior to 2013, the largest gap in math was 21.8% in 2006. *Id.*

115. North Carolina recently transitioned to using the acronym MFEL to refer to Monitored Former EL students; however, the Report Cards retain the previously used acronym MFLEP.

116. U.S. DEP'T. OF EDUC., CONSOLIDATED STATE PERFORMANCE REPORT: PARTS I AND II FOR STATE FORMULA GRANT PROGRAMS UNDER THE ELEMENTARY AND SECONDARY EDUCATION ACT AS AMENDED IN 2001 FOR REPORTING ON SCHOOL YEAR 2009–10: NORTH CAROLINA 49 (2010–2011); U.S. DEP'T. OF EDUC., CONSOLIDATED STATE PERFORMANCE REPORT: PARTS I AND II FOR STATE FORMULA GRANT PROGRAMS UNDER THE ELEMENTARY AND SECONDARY EDUCATION ACT AS AMENDED IN 2001 FOR REPORTING ON SCHOOL YEAR 2008–09: NORTH CAROLINA 49–50 (2009–2010); U.S. DEP'T. OF EDUC., CONSOLIDATED STATE PERFORMANCE REPORT: PARTS I AND II FOR STATE FORMULA GRANT PROGRAMS UNDER THE ELEMENTARY AND SECONDARY EDUCATION ACT AS AMENDED IN 2001 FOR REPORTING ON SCHOOL YEAR 2007–08: NORTH CAROLINA 58–59 (2008–2009); U.S. DEP'T. OF EDUC., CONSOLIDATED STATE PERFORMANCE REPORT: PARTS I AND II FOR STATE FORMULA GRANT PROGRAMS UNDER THE ELEMENTARY AND SECONDARY EDUCATION ACT AS AMENDED IN 2001 FOR REPORTING ON SCHOOL YEAR 2006–07: NORTH CAROLINA 52 (2007–2008); U.S. DEP'T. OF EDUC., CONSOLIDATED STATE PERFORMANCE REPORT: PARTS I

recent years that trend has reversed. In the 2014–2015 school year, only 26.21% of MFEL students achieved proficiency in language arts/reading, compared to 56.3% of students statewide.<sup>117</sup> This difference represents a gap of over 30%. The gap between the percentage of proficient MFEL students and statewide proficiency was only 13.2% in 2013, but this gap widened to over 30% in 2014 and remained slightly above 30% in 2015.<sup>118</sup> These statistics indicate that many students who exited the language instruction program in the past few years have not in fact become proficient in English. Further, this MFEL data demonstrates that when these students are reclassified and placed in mainstream classrooms, a large achievement gap remains between former EL students and their peers. The results also raise the question of whether the exit criteria for language instruction programs are sufficiently stringent.

Research shows “when [EL students] initially attend segregated, remedial programs, these students do not close the achievement gap after reclassification and placement in the English mainstream. Instead they maintain or widen the gap in later years.”<sup>119</sup> This is because such programs do not effectively lead students to English language proficiency. Unfortunately, the North Carolina Department of Public Instruction only monitors MFEL students for two years after they exit the ESL program.<sup>120</sup> Therefore, not much is known about the long-term academic achievement

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AND II FOR STATE FORMULA GRANT PROGRAMS UNDER THE ELEMENTARY AND SECONDARY EDUCATION ACT AS AMENDED IN 2001 FOR REPORTING ON SCHOOL YEAR 2005–06: NORTH CAROLINA 49 (2006–2007).

117. End of Grade: Percent of Proficient Students State of North Carolina, *supra* note 107. This comparison is imperfect as the proficiency of MFEL students is not assessed by grade level, but instead merely by a statewide average. MFEL students include those “[s]tudents who have transitioned out of a language instruction education program” and “[s]tudents who are no longer receiving LEP services and who are being monitored for academic content achievement for two years after the transition.” PERFORMANCE REPORT 2014–15, *supra* note 6, at 53.

118. PERFORMANCE REPORT 2014–15, *supra* note 6, at 53–54; U.S. DEP’T. OF EDUC., CONSOLIDATED STATE PERFORMANCE REPORT: PARTS I AND II FOR STATE FORMULA GRANT PROGRAMS UNDER THE ELEMENTARY AND SECONDARY EDUCATION ACT AS AMENDED IN 2001 FOR REPORTING ON SCHOOL YEAR 2013–14: NORTH CAROLINA 53–54 (2014–2015); U.S. DEP’T. OF EDUC., CONSOLIDATED STATE PERFORMANCE REPORT: PARTS I AND II FOR STATE FORMULA GRANT PROGRAMS UNDER THE ELEMENTARY AND SECONDARY EDUCATION ACT AS AMENDED IN 2001 FOR REPORTING ON SCHOOL YEAR 2012–13: NORTH CAROLINA 53–54 (2013–2014).

119. VIRGINIA P. COLLIER & WAYNE P. THOMAS, CTR. FOR RES. ON EDUC., DIVERSITY & EXCELLENCE, A NATIONAL STUDY OF SCHOOL EFFECTIVENESS FOR LANGUAGE MINORITY STUDENTS’ LONG-TERM ACADEMIC ACHIEVEMENT 7 (2002) <http://cmmr.usc.edu/CollierThomasExReport.pdf> [<https://perma.cc/X74P-Q6KD>].

120. DIV. OF ACCOUNTABILITY SERVS., *supra* note 6, at 4.

of these students. Yet, it appears unlikely that such large achievement gaps will close, even in the long term, if North Carolina's current system of educating these students is not reformed.

Another significant gap exists in the graduation rates of EL students compared to the statewide graduation rate.<sup>121</sup> For North Carolina students expected to graduate high school in 2016, the statewide graduation rate was 85.9%, while the graduation rate of EL students was 57.2% (28.7% lower than the state average).<sup>122</sup> The graduation rate for EL students was the lowest rate of any subgroup monitored by the Department of Public Instruction by more than 10%.<sup>123</sup>

In *Leandro II*, 41% of Hoke County freshmen graduated from high school—19% below the statewide graduation rate of 60%.<sup>124</sup> While the current statewide EL graduation rate of 57.2% is higher than that of the Hoke County students and only 2.8% below the 60% average that served as a benchmark in *Leandro*, the gap between the EL graduation rate and the current graduation rate of their peers is significant. The gap between the statewide graduation rate and the rate for EL students is 28.7%, while the gap for the Hoke County students was 19%.<sup>125</sup> Thus, by comparison, the situation for North Carolina EL students is even more dismal than it was for the Hoke County students. The large percentage of EL students failing to graduate from high school, along with the significant achievement gap between EL students and their peers demonstrates that North Carolina, is failing to meet the *Leandro* requirements.

Accordingly, this data demonstrates that there is a significant achievement gap between North Carolina's EL students and their native English-speaking peers. The achievement gaps exist both in EOG and EOC proficiency, as well as in graduation rates. The demonstrated gaps are even larger than those in *Leandro II*. This evidence strongly suggests that just like the students of Hoke County, North Carolina's EL students have been denied their constitutional right to a sound basic education.

In order to demonstrate that the State has violated *Leandro's* constitutional requirement to provide a sound basic education to EL students, a plaintiff must demonstrate not only that these students have been deprived of their constitutional right, but also that this deprivation is

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121. Graduation Rate Report, *supra* note 9.

122. *Id.*

123. *Id.* Students with disabilities had the next lowest graduation rate for the same year at 68.9%. *Id.*

124. Hoke Cty. Bd. of Educ. v. State (*Leandro II*), 599 S.E.2d 365, 384 (N.C. 2004).

125. See Graduation Rate Report, *supra* note 9; *Leandro II*, 599 S.E.2d at 384.

the result of action or inaction on the part of the State.<sup>126</sup> In *Leandro II*, after the court determined that a significant number of students had not obtained “a *Leandro*-comporting education,” it then considered whether that was due to action or inaction on the part of the State.<sup>127</sup> The State argued it recognized the gap in student achievement and took measures to address it.<sup>128</sup> The State offered evidence to show that it took steps to improve educational opportunities significantly in the preceding years, but the court did not find this argument convincing.<sup>129</sup> The court affirmed the trial court, which held:

[T]he State’s failure to meet such needs had significantly impacted such students’ *opportunity* to obtain a sound basic education. Specifically . . . there was ample evidence demonstrating that the State was failing both to identify “at-risk” students and to address their needs with educational resources . . . in an effort to enable them to compete among their non “at-risk” counterparts and thus avail themselves of their right to the opportunity to obtain a sound basic education.<sup>130</sup>

Like the students of Hoke County in *Leandro*, North Carolina’s current EL students can demonstrate that the State has failed to provide adequately trained teachers and to implement alternative educational offerings that could correct the problems placing EL students at risk of academic failure.

First, many North Carolina teachers are not adequately prepared to effectively educate EL students. The majority of North Carolina EL students spend most of their time in a mainstream classroom, participating in ESL instruction only through pull-out programs.<sup>131</sup> Yet, North Carolina’s mainstream-classroom teachers are not required to have any training in ESL instruction in order to receive a license.<sup>132</sup> Therefore, EL students spend the majority of their school day in a classroom with a teacher that has not been trained to effectively teach them.

A 2011 survey of middle school teachers in North Carolina’s piedmont region showed 76% of those surveyed with master’s degrees and 70% of those with bachelor’s degrees completed no EL education courses

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126. *Leandro II*, 599 S.E.2d at 386.

127. *Id.* at 385.

128. *Id.* at 386.

129. *Id.*

130. *Id.* at 390.

131. VICTORIA MIKOW-PORTO ET AL., *SERVE, ENGLISH LANGUAGE LEARNERS IN THE SOUTHEAST: RESEARCH, POLICY & PRACTICE* 64 (Donna Nalley & Karen DeMeester eds., 2004).

132. *See Professional Educator’s Licensure*, PUB. SCH. OF N.C., <http://www.ncpublicschools.org/licensure/> [<https://perma.cc/2FUD-3QV2>].

while completing their degrees.<sup>133</sup> Only 30% of the teachers surveyed received any professional development instruction relevant to EL education via seminars or multiple-day training sessions after obtaining licensure.<sup>134</sup> The survey also revealed that 20.2% of the teachers were unaware of their EL students' proficiency levels in listening, speaking, reading, or writing.<sup>135</sup> Additionally, approximately 17% of those surveyed did not know what testing accommodations their EL students were entitled to receive.<sup>136</sup> Furthermore, 15–20% of the teachers surveyed acknowledged feeling uncomfortable adapting their instruction and assignments to meet the needs of EL students.<sup>137</sup>

Even ESL teachers, specifically hired to provide language instruction support for EL students, may not be adequately trained to effectively educate them. To obtain a license under North Carolina law, ESL teachers must (1) complete an approved teacher education program from an accredited university and (2) pass a licensure exam for “English to Speakers of Other Languages.”<sup>138</sup> No particular degree or coursework specific to EL instruction is required.<sup>139</sup>

Second, the State has failed to implement alternative educational offerings that are more effective than the language-acquisition programs most North Carolina schools currently use. Unlike ESL pull-out programs, which a majority of North Carolina schools use, two-way, dual-language programs instruct *all* students—EL students as well as native English-speaking students—in two languages.<sup>140</sup> All forms of dual-language programs yield better outcomes for all students (including both ESL and native-English-speakers) than other programs.<sup>141</sup> Currently,

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133. AMANDA K. SOX, TEACHER PREPARATION FOR INSTRUCTING MIDDLE SCHOOL ELL STUDENTS: A NORTH CAROLINA PIEDMONT PERSPECTIVE 109 (2011) [http://arizona.openrepository.com/arizona/bitstream/10150/202755/1/azu\\_etd\\_11741\\_sip1\\_m.pdf](http://arizona.openrepository.com/arizona/bitstream/10150/202755/1/azu_etd_11741_sip1_m.pdf) [https://perma.cc/47FT-QNRB].

134. *Id.* at 111.

135. *Id.* at 114.

136. *Id.*

137. *Id.*

138. See PUB. SCH. OF N.C., *Professional Educator's Licensure*, <http://www.ncpublicschools.org/licensure/> [https://perma.cc/2FUD-3QV2]; EDUC. TESTING SERV., *North Carolina Test Requirements* (2017), <http://www.ets.org/praxis/nc/requirements> [https://perma.cc/5NC5-VJGT]; see also 16 N.C. ADMIN. CODE 6D.0106(m) (2016) (“ESL training and add-on ESL licensure for teachers currently licensed in areas other than ESL is an appropriate strategy to obtain qualified staff.”).

139. See 16 N.C. ADMIN. CODE 6D.0106(m).

140. Scott, *supra* note 85, at 141–43.

141. *Id.*

less than five percent of the language instruction programs in the state are dual-language programs.<sup>142</sup>

The North Carolina Department of Public Instruction contracted with nationally renowned researchers Wayne Thomas and Virginia Collier to study the effectiveness of the state's two-way, dual-language programs from 2007–2010.<sup>143</sup> The Thomas and Collier study included the following school systems, which had been operating a dual-language program for at least four years: Chapel Hill-Carrboro City, Charlotte-Mecklenburg, Chatham County, Durham County, Greene County, and Winston-Salem/Forsyth County.<sup>144</sup> Results of the study found the programs remarkably successful, as compared to other language-acquisition programs across the state, in boosting the performance of all students and closing the achievement gap between EL students and their native English-speaking peers.<sup>145</sup>

The results demonstrated that students enrolled in the dual-language schools score significantly higher than other students in both reading and math.<sup>146</sup> For example, by fifth grade these students score the same as non-dual-language students in sixth grade, and this trend continues through higher grades.<sup>147</sup> Thomas and Collier's research demonstrates that all student groups benefit from dual-language programs, not just EL students.<sup>148</sup> Specifically, their studies show that African American native English speakers, enrolled in dual-language programs, score higher on state

142. There are 121 dual-language/immersion programs in North Carolina out of 2,592 total schools, which represent less than 5% of the language programs in the state. N.C. DEP'T OF PUB. INSTRUCTION, ST. BD. OF EDUC., 2016–2017 NORTH CAROLINA DUAL LANGUAGE/IMMERSION (DLI) PROGRAMS (2017) [hereinafter DUAL LANGUAGE/IMMERSION PROGRAMS] <http://ncdliprograms.ncdpi.wikispaces.net/NC+DLI+Programs> (select "By District"); see PUB. SCH. OF N.C., NORTH CAROLINA PUBLIC SCHOOLS' FACTS AND FIGURES 2015–16, <http://www.ncpublicschools.org/docs/fbs/resources/data/factsfigures/2015-16figures.pdf> [<https://perma.cc/8NF4-QNY8>].

143. WAYNE P. THOMAS & VIRGINIA P. COLLIER, DUAL LANGUAGE EDUCATION FOR A TRANSFORMED WORLD 65 (2012) [hereinafter DUAL LANGUAGE]; see also *Dual Language/Immersion Research, Reports and Articles*, N.C. DEP'T OF PUB. INSTRUCTION, ST. BD. OF EDUC., <http://ncdliprograms.ncdpi.wikispaces.net/Research> [<https://perma.cc/8MDA-SKCX>].

144. DUAL LANGUAGE, *supra* note 143, at 69–70.

145. WAYNE P. THOMAS & VIRGINIA P. COLLIER, ENGLISH LEARNERS IN NORTH CAROLINA 44 (2010) [hereinafter ENGLISH LEARNERS], [http://p1cdn3static.sharpschool.com/UserFiles/Servers/Server\\_4502383/File/NC\\_ELL\\_Study\\_Yr2\\_Final%20Report\\_Jul27\\_2011.pdf](http://p1cdn3static.sharpschool.com/UserFiles/Servers/Server_4502383/File/NC_ELL_Study_Yr2_Final%20Report_Jul27_2011.pdf) [<https://perma.cc/4GMT-EVVC>].

146. DUAL LANGUAGE, *supra* note 143, at 72, 77.

147. ENGLISH LEARNERS, *supra* note 145, at 12–13.

148. *Id.* at 44.

tests than African American students in mainstream classrooms.<sup>149</sup> The same is true for white students and special needs students who are native English speakers.<sup>150</sup> Additionally, “dual language students report high levels of satisfaction and enjoyment in [dual-language] classes.”<sup>151</sup> They “have stronger cultural identity and high self-esteem.”<sup>152</sup> Further, dual-language programs report fewer behavioral problems and higher attendance.<sup>153</sup>

Despite these results, in the six years since the study concluded, the State has not implemented education standards based on the findings of the study. Dual-language programs still represent less than 5% of the language programs across North Carolina.<sup>154</sup> Failure to implement more effective alternative educational offerings is evidence of the State’s inaction and its failure to ensure that EL students receive their constitutional right to the opportunity to receive a sound basic education. Just as the State’s inaction significantly impacted the Hoke County students’ opportunity to obtain a sound basic education, the State’s inaction today is similarly impacting EL students.

### III. HOW OTHER STATES ADDRESS THE NEEDS OF EL STUDENTS

The rise of the EL population in public schools is not a situation unique to North Carolina, but a trend across most of the country.<sup>155</sup> Like North Carolina’s EL population, EL students in other states similarly experience an achievement gap when compared to their native English-speaking peers.<sup>156</sup> States across the nation are reacting in different ways to address the needs of EL students.<sup>157</sup> For North Carolina to remedy

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149. DUAL LANGUAGE, *supra* note 143, at 2.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. See DUAL LANGUAGE/IMMERSION PROGRAMS, *supra* note 142; see also PUB. SCH. OF N.C., NORTH CAROLINA PUBLIC SCHOOLS’ FACTS AND FIGURES 2015–16, <http://www.ncpublicschools.org/docs/fbs/resources/data/factsfigures/2015-16figures.pdf> [<https://perma.cc/8NF4-QNY8>].

155. See *Impact of No Child Left Behind on English Language Learners*, *supra* note 5, at 1.

156. *Id.* at 1–2.

157. See CONOR P. WILLIAMS & COLLEEN GROSS EBINGER, THE MCKNIGHT FOUNDATION, THE LEARNING FOR ENGLISH ACADEMIC PROFICIENCY AND SUCCESS ACT: ENSURING FAITHFUL AND TIMELY IMPLEMENTATION 4 (2014), [https://www.mcknight.org/system/asset/document/696/McK.LEAPS\\_FINAL.pdf](https://www.mcknight.org/system/asset/document/696/McK.LEAPS_FINAL.pdf) [<https://perma.cc/7E3A-J3AD>]; see also OFF. OF BILINGUAL EDUC. & FOREIGN LANGUAGE STUD., THE UNIV. OF THE STATE OF N.Y.,



the constitutional violation of denying EL students their right to an opportunity to receive a sound basic education, the General Assembly should consider reforms similar to those recently implemented in Minnesota and New York.<sup>158</sup>

State leaders in Minnesota and New York recently took steps to improve the education of EL students in their states. In 2014, Minnesota enacted the Learning for English Academic Proficiency and Success Act (LEAPS Act).<sup>159</sup> Some consider this to be “the nation’s most comprehensive legislation in support of English Learners.”<sup>160</sup> Likewise, in 2014, the New York State Department of Education released the “Blueprint for English Language Learners (ELLs) Success,” which includes a framework of eight guiding principles.<sup>161</sup> These principles aim “to clarify expectations for administrators, policymakers, and practitioners to prepare [EL students] for success, beginning in Prekindergarten, to lay the foundation for college and career readiness.”<sup>162</sup> Both of these recent overhauls include two key components for success: (1) they include provisions aimed at improving teacher preparedness, and (2) they emphasize the importance of embracing the diversity of these students and valuing their bilingualism as a skill to be refined rather than a deficit to be reformed.<sup>163</sup>

Both Minnesota’s and New York’s reform measures contain components focusing on improved teacher preparation.<sup>164</sup> The Minnesota LEAPS Act (“the Act”) addresses teacher preparation by requiring districts to provide materials, resources, and professional development opportunities to assist teachers in meeting the needs of these students.<sup>165</sup> It provides that

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BLUEPRINT FOR ENGLISH LANGUAGE LEARNERS (ELLS) SUCCESS 1 (2014) [*hereinafter* BLUEPRINT], <http://usny.nysed.gov/docs/blueprint-for-ell-success.pdf> [<https://perma.cc/4DZN-DL48>].

158. WILLIAMS & EBINGER, *supra* note 157, at 4; BLUEPRINT, *supra* note 157, at 1.

159. *See* WILLIAMS & EBINGER, *supra* note 157, at 4.

160. *Id.*

161. *Id.*

162. *Id.*

163. *See* Learning for English Academic Proficiency and Success (LEAPS) Act sec. 3, 12, 2014 Minn. Laws 1051–52, 1067–69 (codified as amended at MINN. STAT. §§ 120B.022, 122A.09 (2016)); *see also* BLUEPRINT, *supra* note 157, at 3–4; WILLIAMS & EBINGER, *supra* note 157, at 5; Conor Williams, *New York Kicks Off a New ELLs Conversation*, NEW AMERICA (Apr. 16, 2014), <http://www.edcentral.org/new-york-kicks-new-ells-conversation/> [<https://perma.cc/YX3X-BNJK>].

164. *See* LEAPS Act sec. 3, 12; *see also* BLUEPRINT, *supra* note 157, at 3–4; WILLIAMS & EBINGER, *supra* note 157, at 5; Williams, *supra* note 163.

165. LEAPS Act sec. 7, 2014 Minn. Laws 1058–59 (codified as amended at MINN. STAT. § 120B.025 (2016)).

each district should ensure that “licensed teachers recognize students’ diverse needs in cross-cultural settings and are able to serve the oral language and linguistic needs of students who are [EL] by maximizing strengths in their native languages in order to cultivate students’ English language development.”<sup>166</sup> Furthermore, the Act ensures that teacher candidates receiving licenses and current teachers renewing licenses are properly prepared to instruct EL students.<sup>167</sup> Section twelve of the Act directs the Board of Teaching to change licensure renewal requirements to mandate that teachers who are renewing their licenses have some type of continuing education in English language development and content instruction for EL students.<sup>168</sup> Further, the Act does not just address the preparation of teachers, but also the preparation of administrators. Under the Act, school administrator preparation programs must include content specifically focused on EL students, and school administrators must participate in continuing education to further train them on effective EL education.<sup>169</sup>

New York’s Blueprint (“the Blueprint”) also emphasizes the importance of teacher preparedness, but does not address the licensure or professional development requirements that Minnesota’s LEAPS Act does.<sup>170</sup> The first principle of the Blueprint states, “[a]ll teachers are teachers of [EL students], and need to plan accordingly.”<sup>171</sup> The Blueprint encourages teachers to offer language support to the students by utilizing appropriate resources and collaborating with other teachers, personnel, and community-based human resources to best meet the needs of EL students.<sup>172</sup>

Additionally, both Minnesota and New York’s reform measures emphasize an appreciation for the diversity of EL students and the importance of embracing their bilingual skills.<sup>173</sup> The LEAPS Act requires that school districts adopt plans to improve the native language

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166. *Id.* sec. 6, 2014 Minn. Laws 1057–58 (codified as amended at MINN. STAT. § 120B.12).

167. *Id.* sec. 12, 16, 2014 Minn. Laws 1067–69, 1071 (codified as amended at MINN. STAT. §§ 122A.09, 122A.18).

168. *Id.* sec. 12.

169. *Id.* sec. 14, 2014 Minn. Laws 1069 (codified as amended at MINN. STAT. § 122A.14).

170. *See* BLUEPRINT, *supra* note 157.

171. *Id.* at 2.

172. *Id.*

173. *See* LEAPS Act sec. 3–16; *see also* BLUEPRINT, *supra* note 157, at 1.

development of students, where practicable.<sup>174</sup> The Act instructs local school boards to adopt plans aimed at creating the world's best workforce, including "strategies for improving . . . English, and where practicable, the native language development and the academic achievement of English learners."<sup>175</sup> The Act requires reading assessments to be conducted not only in English, but also in the predominant native languages of students so as to measure their native language development.<sup>176</sup> Likewise, New York's plan allows students the opportunity to participate in Bilingual Education programs with the twin aims of maintaining and developing the students' native language while also becoming proficient in English.<sup>177</sup> The plan requires districts and schools to provide "[r]igorous Bilingual Education programs for [EL students] aimed at maintaining and developing the home language and attaining English proficiency as well as biliteracy."<sup>178</sup>

Further, New York and Minnesota, along with other states, offer seals of biliteracy to high school graduates, demonstrating their commitment to honor bilingualism as an academic achievement and an asset to society.<sup>179</sup> These states add seals of biliteracy to students' transcripts or high school diplomas to signify their proficiency in two or more languages.<sup>180</sup> "The Seal is intended to make bilingual students more attractive to universities and employers, to entice students to study other languages, and to protect the cultural heritage of [EL students'] native languages."<sup>181</sup> Several states across the nation joined this effort to begin recognizing students' native language as an asset to be further developed.<sup>182</sup> Currently, twenty-two states and the District of Columbia offer a seal of biliteracy to their high school graduates.<sup>183</sup>

Through these reforms, the legislators of Minnesota and the New York State Education Department demonstrated their commitment to meeting the needs of EL students. More importantly, such reforms

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174. LEAPS Act sec. 4, 2014 Minn. Laws 1053–56 (codified as amended at MINN. STAT. § 120B.11 (2016)).

175. *Id.*; MINN. STAT. § 120B.11(1a)(4) (2016).

176. LEAPS Act sec. 6.

177. BLUEPRINT, *supra* note 157, at 5.

178. *Id.* at 3.

179. LEAPS Act sec. 3–16; BLUEPRINT, *supra* note 157, at 1.

180. Isabella Sanchez, *What the Seal of Biliteracy Can Do for English Language Learners*, NEW AMERICA (June 4, 2015), <http://www.edcentral.org/seal-of-biliteracy-ells/> [<https://perma.cc/C5H6-THJL>].

181. *Id.*

182. *Id.*

183. See *California Seal of Biliteracy*, SEALOFBILITERACY.ORG, <http://sealofbiliteracy.org/california> [<https://perma.cc/J5HC-VPEJ>].

demonstrate that state leaders recognize the value and potential of EL students as future members of the state's workforce. These reforms comport with *Leandro*'s direction that a sound basic education includes "sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society."<sup>184</sup> Although it is too early to evaluate whether these reforms improved the academic achievement of EL students, both of the plans include measures that attempt to ameliorate the problems EL students face through a commitment to improved teacher training and valuing the students' native language as an asset.

The North Carolina General Assembly should consider the reforms recently implemented in Minnesota and New York and, in light of Thomas and Collier's findings regarding the success of bilingual education programs in North Carolina, take a similar approach in addressing the needs of EL students in the state. Particularly, the General Assembly should adopt measures to improve teacher preparation, celebrate diversity, and emphasize the benefits of bilingualism.

#### IV. HOW NORTH CAROLINA CAN CONTINUE TO IMPROVE THE EDUCATION OF ITS EL STUDENTS

It is apparent that North Carolina's leaders in public education recognize the unique challenges EL students face. Given the amount of state funding provided for EL students,<sup>185</sup> research studies conducted,<sup>186</sup> and the establishment of a task force on global education,<sup>187</sup> it is evident that the state's education leaders are invested in finding a means to address the needs of EL students. However, there is still much to be done in order for these students to obtain their constitutional right to receive a sound basic education.

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184. *Leandro v. State (Leandro I)*, 488 S.E.2d 249, 254 (N.C. 1997), *aff'd sub nom* Hoke Cty. Bd. of Educ. v. State (*Leandro II*), 599 S.E.2d 365 (N.C. 2004) (citing *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989); *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979)).

185. See Sonya Douglass Horsford & Carrie Sampson, *High-ELL-Growth States: Expanding Funding Equity and Opportunity for English Language Learners*, VUE, Summer 2013, at 50–51, <http://files.eric.ed.gov/fulltext/EJ1046135.pdf> [<https://perma.cc/XY5R-FXNL>]. Of the top ten states with growing EL populations, North Carolina provided by far the highest per-pupil funding for ELL programs. *Id.*

186. See DUAL LANGUAGE, *supra* note 143, at 65.

187. See TASK FORCE ON GLOBAL EDUC. FOR N.C. STATE BD. OF EDUC., PREPARING STUDENTS FOR THE WORLD: FINAL REPORT OF THE STATE BOARD OF EDUCATION'S TASK FORCE ON GLOBAL EDUCATION 6 (2013), <http://www.dpi.state.nc.us/docs/globaled/final-report.pdf> [<https://perma.cc/YNQ4-C4G9>].

A. *Some Movement in the Right Direction*

Recent actions by the North Carolina Department of Public Instruction demonstrate that the State's leaders in public education are exploring how to effectively close the achievement gap between EL students and their peers. The State demonstrates this commitment in several ways. First, the State provides funding comparable to that in other high-EL-growth states.<sup>188</sup> Additionally, the Department of Public Instruction partnered with researchers to study the effectiveness of the State's dual-language programs,<sup>189</sup> and the State established a task force on global education with goals related to the State's language instruction programs.<sup>190</sup> Finally, the State Board of Education recently adopted a Seal of Biliteracy to honor bilingual high school graduates.<sup>191</sup>

North Carolina's efforts in funding its EL students' education should be applauded. Of the ten states with the highest percentage of growth in the number of EL students between the 2000–2001 school year and the 2010–2011 school year, North Carolina allocated the most per-pupil funding for EL students.<sup>192</sup> Some states provide no funding to EL students and rely solely on federal programs to fund EL education.<sup>193</sup> North Carolina recognizes the importance of contributing state funds to EL students, providing \$741 per EL student in addition to the regular per-pupil funding.<sup>194</sup> The second-highest state is Kansas, providing supplemental funds of only \$469 per EL student.<sup>195</sup>

However, it is not clear that an increased amount of funding necessarily results in improved student outcomes. In fact, the *Leandro* court observed that “output” measurements, such as student performance on standard achievement tests, “may be more reliable than measurements of ‘input’ such as per-pupil funding or general educational funding provided by the state.”<sup>196</sup> Additionally, the *Leandro* court emphasized that effective allocation of funds is more important than the amount of funding.

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188. Horsford & Sampson, *supra* note 185, at 50–51.

189. See DUAL LANGUAGE, *supra* note 143, at 69.

190. TASK FORCE ON GLOBAL EDUC. FOR N.C. STATE BD. OF EDUC., *supra* note 187, at 6.

191. *High School Diploma Endorsements*, N.C. STATE BD. OF EDUC. (Mar. 3, 2016), <http://stateboard.ncpublicschools.gov/policy-manual/Graduation-Related-Policies/high-school-diploma-endorsements> [<https://perma.cc/EK4Y-ZSQU>] [hereinafter *Diploma Endorsements*].

192. Horsford & Sampson, *supra* note 185, at 50–51.

193. *Id.*

194. *Id.* at 51.

195. *Id.*

196. *Leandro v. State (Leandro I)*, 488 S.E.2d 249, 260 (N.C. 1997), *aff'd sub nom* Hoke Cty. Bd. of Educ. v. *State (Leandro II)*, 599 S.E.2d 365 (N.C. 2004).

Therefore, although North Carolina may be adequately funding EL education, the State is not necessarily using those funds effectively. The State must ensure those funds go toward the effective implementation of programs designed to provide EL students with educational opportunities that will allow them to be successful members of society.

North Carolina took another positive step when its Department of Public Instruction contracted with Thomas and Collier to study the effectiveness of the State's two-way, dual-language programs.<sup>197</sup> The results demonstrated that the students enrolled in the dual-language schools score significantly higher than other students in both reading and math.<sup>198</sup> The Department of Public Instruction's commitment to this study indicates a desire to implement proven and effective programs to improve outcomes for North Carolina's EL students. However, should the State fail to act on the study's results and expand these successful programs, its inaction could constitute a failure to meet its constitutional obligation under *Leandro*.

North Carolina should also be commended for establishing a task force on global education.<sup>199</sup> This task force recently identified several goals to help improve student achievement, including the expansion of K–12 dual-language/immersion schools within North Carolina.<sup>200</sup> The task force's report stated, "Pilot programs won't cut it. Preparing globally competitive graduates requires a comprehensive approach."<sup>201</sup> The report cites Thomas and Collier's study and the positive effects of dual-language/immersion programs on student achievement and proposes the implementation of statewide access to dual-language programs.<sup>202</sup> But even so, dual-language programs still represent less than 5% of the language programs across the state.<sup>203</sup>

In 2015, North Carolina took a significant step in the right direction by following the lead of New York and Minnesota in adopting the Seal of Biliteracy.<sup>204</sup> Now, upon graduation, North Carolina's bilingual students will receive recognition for demonstrating proficiency in multiple languages. This measure demonstrates that North Carolina views

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197. See DUAL LANGUAGE, *supra* note 143, at 69.

198. *Id.* at 72, 77.

199. TASK FORCE ON GLOBAL EDUC. FOR N.C. STATE BD. OF EDUC., *supra* note 187, at 6.

200. *Id.*

201. *Id.* at 13.

202. *Id.* at 14–15.

203. See DUAL LANGUAGE/IMMERSION PROGRAMS, *supra* note 142; see also PUB. SCH. OF N.C., NORTH CAROLINA PUBLIC SCHOOLS' FACTS AND FIGURES 2015–2016, <http://www.ncpublicschools.org/docs/fbs/resources/data/factsfigures/2015-16figures.pdf> [<https://perma.cc/8NF4-QNY8>].

204. See *Diploma Endorsements*, *supra* note 191.

bilingualism as an asset to be encouraged and nurtured. The opportunity to receive this recognition will likely encourage the State's bilingual students to continue developing both languages so they are more globally competitive citizens upon graduating.

Through the State's funding, conducting the study of dual-language programs, establishing the task force on global education, and adopting the Seal of Biliteracy, it is apparent that North Carolina's leaders in education are aware of the challenges related to effectively educating EL students and are interested in taking steps to improve the outcomes for these students. Yet, no amount of funding is sufficient if not used in the most effective manner, and successful research studies and task force recommendations are not helpful if the findings are not implemented.

### *B. How the State Can Further Improve EL Education*

North Carolina is uniquely positioned to begin making significant changes to the way it educates its EL students. Action needs to be taken to remedy the constitutional violation and to ensure EL students are provided with the opportunity to receive a sound basic education. In *Leandro*, the court ordered the State "to assess its education-related allocations to the county's schools so as to correct any deficiencies that . . . prevent the county from offering its students the opportunity to obtain a *Leandro*-conforming education."<sup>205</sup> In the same vein, the State should assess its current programs for EL students and correct the deficiencies preventing EL students from receiving their opportunity to obtain a *Leandro*-conforming education.

In particular, North Carolina should take two steps to ensure that EL students receive a sound basic education. First, all teachers and administrators should be prepared to effectively instruct EL students. Second, the implementation of dual-language programs should be increased.

#### *1. All Teachers and Administrators Should Be Prepared to Effectively Instruct EL Students*

The General Assembly should mandate that teacher education programs require courses in EL education and language acquisition for all teachers and administrators.<sup>206</sup> The legislature should model the provision of Minnesota's LEAPS Act requiring new and renewing teacher licensure

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205. Hoke Cty. Bd. of Educ. v. State (*Leandro II*), 599 S.E.2d 365, 391 (N.C. 2004).

206. See discussion *infra* Section II.B.

candidates to be properly prepared to instruct EL students.<sup>207</sup> Further, the State Board of Education should require that all state-funded college teacher education programs leading to licensure include components that would prepare *all* teachers for instructing EL students. This will ensure that North Carolina institutions of higher education include required courses on second language acquisition and teaching methods for college students working toward education degrees. The same provisions should be made with a focus on administrators to ensure that the individuals charged with leading the state's schools understand how to ensure that EL students in their schools are being effectively educated. Every person who obtains a teaching license in North Carolina should be adequately prepared to instruct North Carolina's EL students.<sup>208</sup>

The General Assembly should also modify the qualifications to be considered a "highly qualified teacher."<sup>209</sup> No teacher should be considered highly qualified unless they are highly qualified to teach *all* students, including EL students. Thus, the qualifications should include

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207. LEAPS Act §§ 1, 12, 16, 2014 Minn. Laws 1050–51, 1067–69, 1071 (codified as amended at MINN. STAT. §§ 119A.50, 122A.09, 122A.18 (2016)).

208. See, e.g., SOX, *supra* note 133, at 35. Sox argues that the teacher's classroom practices are exceedingly important, and that:

Particularly, teachers must have an understanding of second language acquisition theories and how these theories are applied to the classroom context. Teachers need to know the difference between social and academic language; they must understand the importance of scaffolding their instruction for ELLs; and understand how students' first language can facilitate the acquisition of the second language. Teachers must know how to provide their ELL students opportunities to use English in a variety of contexts, and give them opportunities to interact with others, as language development, like academic development is socially constructed. Teachers must also know how to adapt their instruction to facilitate second language acquisition and know how to create a learning environment that is conducive for second language acquisition.

*Id.*

209. N.C. STATE BD. OF EDUC., POLICY NO. LICN-0011.1 (2016). Currently, an elementary school teacher is "highly qualified" if he or she "obtain[s] an appropriate license for the core academic subjects taught" and passes the State Board's licensure exams. *Id.* A middle or high-school teacher is "highly qualified" if he or she passes the State Board's "approved test(s) in each academic subject" taught, or if he or she "[s]uccessfully complet[es] in each academic subject [taught] (a) An undergraduate major; or (b) Coursework equivalent to an undergraduate major; or (c) Graduate degree in the core teaching subject area(s); or (d) Master's level licensure or above in the appropriate subject area; or (e) BPTS certification in the related subject area(s)." *Id.*



required coursework at the bachelor's or master's degree level related to second language acquisition or teaching methods for EL students.<sup>210</sup>

2. *The Implementation of Dual-Language Programs Should Be Increased*

The General Assembly should mandate the expansion of dual-language programs, such as those utilized in Chapel Hill-Carrboro City, Charlotte-Mecklenburg, Chatham County, Greene County, and Winston-Salem/Forsyth County school districts.<sup>211</sup> Although it is important that the General Assembly allow local school districts flexibility in determining how to implement programs to best meet the needs of their students, the current state of EL education warrants stricter guidance from the legislature.

In addition to studying North Carolina's dual-language programs, Thomas and Collier conducted a five-year national study comparing the long-term outcomes of student achievement for eight different types of programs used for EL students throughout the country.<sup>212</sup> The study found that of all the programs examined, *only* dual-language and bilingual immersion programs "assist students to fully reach the 50th percentile in both [their native language] and [English] in all subjects and to maintain that level of high achievement, or reach even higher levels through the end of schooling."<sup>213</sup> Additional findings of the study show that these programs lead to the fewest number of dropouts.<sup>214</sup>

The majority of EL programs in North Carolina have not been effective in educating EL students. Yet, research consistently shows that expanding existing dual-language programs could very likely be the solution North Carolina needs.<sup>215</sup> A recent report by The Global Task Force states that it is precisely this lack of a uniform strategy—focused on global knowledge and language learning—that is slowing North Carolina's educational progress:

Despite the wealth of assets we have on global education, the lack of a coherent strategy that places a priority on global knowledge and language learning—and the associated curriculum, instruction and teacher development—is slowing our state's progress. Relying on unique projects in pockets around the state will not move the state forward. . . .

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210. See discussion *infra* Section II.B.

211. ENGLISH LEARNERS, *supra* note 145.

212. COLLIER & THOMAS, *supra* note 119, at 1–2.

213. *Id.* at 7.

214. *Id.*

215. *Id.*

....  
... The imperative to expand dual language/immersion choices goes beyond improving student global awareness. A recent study of dual language/immersion program effects on student achievement in North Carolina has shown that, all else equal, students in dual language/immersion programs perform better in all subjects, and acquire enhanced and critical ‘non-cognitive’ skills such as creativity, perseverance and lateral thinking.<sup>216</sup>

With the research supporting the success of dual-language programs, the proven success of pilot programs across the state, and the continual failure of the current EL education system, it is time for North Carolina to implement changes to EL instruction. Dual-language programs offer an effective solution to North Carolina’s EL dilemma. The legislature should ensure that the option to attend a dual-language program is available to all EL students in the state. This change could be implemented by initially requiring at least one dual-language program per district and giving any EL student in the district the option to attend that program. The State would need to provide additional funding to hire bilingual teachers and train teachers and administrators to implement the new program. Adopting these measures to ensure teachers and administrators are prepared to effectively educate EL students and the most effective language-acquisition programs are in place across the state will guarantee North Carolina’s EL students the opportunity to obtain a sound basic education.

#### CONCLUSION

The North Carolina Constitution guarantees that *all* students have the opportunity to receive a sound basic education.<sup>217</sup> The Supreme Court of North Carolina in *Leandro* emphasized the importance of preparing students to be productive citizens when it held “[a]n education that does not serve the purpose of preparing students to participate in the society in which they live and work is devoid of substance and is constitutionally inadequate.”<sup>218</sup> Recent scores on standardized tests, as well as graduation rates, show the system of educating EL students across the state fails to meet that constitutional requirement.

Admittedly, EL students and the teachers responsible for educating them, face a considerable challenge. When EL students begin school

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216. TASK FORCE ON GLOBAL EDUC. FOR N.C. STATE BD. OF EDUC., *supra* note 187, at 14–15 (citing DUAL LANGUAGE, *supra* note 143).

217. *See Leandro v. State (Leandro I)*, 488 S.E.2d 249, 254 (N.C. 1997), *aff’d sub nom* Hoke Cty. Bd. of Educ. v. State (*Leandro II*), 599 S.E.2d 365 (N.C. 2004).

218. *Id.*

knowing little to no English, they are already at a substantial academic disadvantage compared to their native English-speaking peers. To learn English while also learning additional academic content is a formidable challenge. Yet, the existence of such a challenge is no justification for the State to resign itself to continuing the status quo in the way these students are educated. The reality of a difficult challenge does not relieve the State of its constitutional obligation to guarantee *all* of North Carolina's students the opportunity to receive a sound basic education.

Now, to remedy the *Leandro* violation, the legislature needs to take bolder steps to close the achievement gap. "State policymakers and education leaders should not regard such demographic and educational trends as a challenge or a problem to be solved, but rather as an opportunity to modernize their states' approaches to educating our nation's diversifying student population."<sup>219</sup> The suggested solutions of improving teacher preparedness and increasing the implementation of dual-language programs are necessary reforms to remedy the constitutional violation and to ensure that *all* of North Carolina's students have the opportunity to receive a sound basic education so as to become productive members of society. These reforms are necessary and well worth the effort.

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219. Horsford & Sampson, *supra* note 185, at 53.

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