

NOTE

FEDERAL FUNDING FOR NEWCOMER SCHOOLS: A BIPARTISAN IMMIGRANT EDUCATION INITIATIVE

Over the past year, immigration has gripped the nation's attention, and for good reason. Immigration is increasing at a furious rate, and the number of immigrants living in the United States is at an all-time high.¹ This surge in immigration has sparked concerns about how the children of immigrants from non-English-speaking countries — who constitute over 90% of those arriving in the United States² — should be educated.

Students from non-English-speaking backgrounds make up the fastest growing segment of the American student population: the number of students with limited English proficiency in U.S. schools has almost doubled over the past decade.³ Such students face special challenges upon arrival, not only because they do not speak the language, but also because often they have received little or no formal schooling in their native countries. The public schools in which they enroll, however, often fail to respond effectively to the needs of many of these immigrant students, who are far more likely to drop out of school than their nonimmigrant peers.⁴

To better serve high-risk immigrant populations, school districts in many states have for years experimented with a promising initiative that deserves increased federal attention: the newcomer school. Newcomer schools, which cater exclusively to non-English-speaking immigrants, are designed to help these students — particularly those who have little prior schooling — learn the English language, learn about American culture and how to balance the cultural environment at school with the native cultural environment many still find at home, and learn remedial academic content that will facilitate their transition into the mainstream classroom.⁵

¹ See Sandra Yin, Population Reference Bureau, *The United States at 300 Million* (Sept. 2006), <http://www.prb.org/Template.cfm?Section=PRB&template=/ContentManagement/ContentDisplay.cfm&ContentID=14314>.

² Katherine Stapp, *Newcomer Schools Reach Out to Older Students in the United States* (Apr. 4, 2000), <http://www2.unesco.org/wef/en-news/usa.shtm>.

³ JANA ECHEVARRIA ET AL., *SCHOOL REFORM AND STANDARDS-BASED EDUCATION 2* (2005), available at http://www.cal.org/crede/pubs/tech_report_E53C6.pdf.

⁴ See *infra* note 26 and accompanying text.

⁵ See MONICA FRIEDLANDER, *THE NEWCOMER PROGRAM: HELPING IMMIGRANT STUDENTS SUCCEED IN U.S. SCHOOLS* (Nat'l Clearinghouse for Bilingual Educ., Program Information Guide Series No. 8, 1991), available at <http://www.ncela.gwu.edu/pubs/pigs/pig8.htm>. These schools generally are meant to be temporary placements; students usually stay for six to eighteen months before moving into mainstream bilingual or English-as-a-second-language (ESL)

Widespread proliferation of newcomer schools has been hindered, however, by a lack of adequate funding. This Note attempts to demonstrate that this funding gap represents a unique opportunity for federal lawmakers eager to provide needed federal support to programs that address issues that matter to voters,⁶ and this Note thus serves to encourage members of Congress and the executive branch to make federal funding for newcomer schools a priority. Part I explores the failure of American public schools to educate at-risk immigrant students. Part II introduces the newcomer school model. Part III then proposes a two-part initiative to improve education for at-risk immigrants. First, it encourages federal legislation authorizing grants to states to administer newcomer programs to recent immigrants. Second, it urges federal lawmakers to commission, through the Department of Education, randomized, controlled studies of newcomer program models to evaluate what types of programs most effectively improve student achievement. Part IV concludes.

I. THE PROBLEM: FAILURE TO EDUCATE AT-RISK IMMIGRANT STUDENTS

Historically, within two or three generations immigrants to the United States could penetrate high-wage professions and enjoy the accompanying lifestyle.⁷ Today, such success is more difficult to achieve. Many immigrants face special challenges that make them far less likely than native-born Americans to succeed in school. As a result, they also are less likely to obtain high-paying jobs and are more likely to need social services later in life.⁸

The problem is one of significant magnitude. The U.S. immigrant population increased over 30% during the 1990s, and among children, immigrants constitute the fastest growing group.⁹ Moreover, immigration accounts for nearly the entire increase in public school enrollment

programs. For older students, including those who might be age-ineligible to attend mainstream public schools, newcomer schools assist with obtaining a GED, applying to college, and developing skills that are useful in the job market. See, e.g., TAMARA LUCAS, CTR. FOR APPLIED LINGUISTICS, PROMOTING SECONDARY SCHOOL TRANSITIONS FOR IMMIGRANT ADOLESCENTS (1996), <http://www.cal.org/resources/digest/lucas001.html>; *All Things Considered: School Targets Older, Immigrant Students* (National Public Radio broadcast Dec. 6, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=5041406>.

⁶ See *infra* pp. 813–15.

⁷ See, e.g., STEPHAN THERNSTROM, *POVERTY AND PROGRESS* (5th ed. 1971) (1964).

⁸ See *infra* notes 32–33 and accompanying text.

⁹ Carola Suárez-Orozco, *Afterword: Understanding and Serving the Children of Immigrants*, 71 HARV. EDUC. REV. 579, 579 (2001). Twenty percent of children in the United States live in immigrant-headed households, and experts predict that this number will grow to over 30% by 2040. *Id.*

over the past two decades.¹⁰ The challenges posed by immigrant education thus become more pressing every day.

A. The Unique Needs of High-Risk Immigrant Students

Not all immigrant students struggle academically, but some subpopulations experience considerable difficulty succeeding in school. One subpopulation that fares especially poorly is students with limited English proficiency (LEP).¹¹ Teachers report that familiarity with the English language is the single most important predictor of immigrant students' academic success.¹² A second — and usually overlapping — subpopulation that faces a substantial risk of school failure is immigrant children who have received limited or interrupted formal schooling in their native countries.¹³ Teachers indicate that the second most important predictor of school success for immigrant students is the quality and quantity of education they have previously received.¹⁴

Students with low native-language literacy and those with limited English proficiency confront many challenges when they enroll in American schools. They need not only intensive English-language instruction — including specialized language instruction that teaches them the academic vocabulary they need to succeed in their content-based classes (for example, science, math, or history) — but also remedial content-based instruction before they can be expected to participate in mainstream classes.¹⁵ Many older students who have little previous education and limited literacy may not be able to graduate on time, so they need either to work toward a diploma on an extended timeline, to work toward a GED, or to receive career training.¹⁶ In addition, many students struggle to navigate between two distinct cultures: the American culture they encounter at school and the native culture they find at home.¹⁷ Finally, some immigrant students are ex-

¹⁰ STEVEN A. CAMAROTA, CTR. FOR IMMIGRATION STUDIES, IMMIGRANTS IN THE UNITED STATES — 2002, at 2 (2002), available at <http://www.cis.org/articles/2002/back1302.pdf>.

¹¹ JORGE RUIZ-DE-VELASCO ET AL., OVERLOOKED & UNDERSERVED, at vii (2000).

¹² *Id.* at 46.

¹³ *Id.* at vii.

¹⁴ *Id.* at 46. For example, students from Central America, Mexico, and the Caribbean, who are unlikely to have continued in school past the sixth grade, are especially at risk of experiencing school failure. *Id.*

¹⁵ *See id.*

¹⁶ *See* CTR. FOR RESEARCH ON EDUC., DIVERSITY & EXCELLENCE, PROGRAM ALTERNATIVES FOR LINGUISTICALLY DIVERSE STUDENTS 16 (Fred Genesee ed., 1999), available at <http://www.cal.org/crede/pubs/edpractice/EPR1.pdf>; SHELLEY SPAULDING ET AL., COUNCIL OF CHIEF STATE SCH. OFFICERS, IMMIGRANT STUDENTS AND SECONDARY SCHOOL REFORM 13–14 (Kimberly Ball Smith ed., 2004).

¹⁷ *See, e.g.,* Loukia K. Sarroub, *The Sojourner Experience of Yemeni American High School Students: An Ethnographic Portrait*, 71 HARV. EDUC. REV. 390 (2001).

pected to contribute to family income, so attending school full time is difficult.¹⁸

B. Failure To Meet Immigrant Students' Specialized Needs

School districts frequently expect newcomers with limited English proficiency and low native-language literacy to enter mainstream classes at the age-appropriate grade. Yet mainstream faculty often are unprepared to meet the needs of these low-literacy immigrants.¹⁹ Consequently, low-literacy students sometimes are placed into remedial classes that do not offer credit toward graduation.²⁰ In other schools, they are assigned to standard age-appropriate courses that they simply cannot understand.²¹ Mainstreamed students receive some language support,²² but frequently it is insufficient.²³ The only specialized English instruction that many receive comes in the form of ESL classes, which typically meet for only one or two class periods per day and which emphasize acquisition of survival language rather than academic language.²⁴ Moreover, mainstreamed students often receive little or no counseling at school.²⁵ As a result, they often see little value in their education and are far more likely than their English-speaking classmates to drop out of school.²⁶

¹⁸ See RUIZ-DE-VELASCO ET AL., *supra* note 11, at 46 & n.6.

¹⁹ See FRIEDLANDER, *supra* note 5.

²⁰ See SPAULDING ET AL., *supra* note 16, at 13.

²¹ See *id.* at 12–13.

²² The Supreme Court established in *Lau v. Nichols*, 414 U.S. 563 (1974), that non-English-speaking students could not be placed in a mainstream classroom without any language support. See *id.* at 568–69.

²³ See RUIZ-DE-VELASCO ET AL., *supra* note 11, at 47; SPAULDING ET AL., *supra* note 16, at 26.

²⁴ See SPAULDING ET AL., *supra* note 16, at 12.

²⁵ See, e.g., Ray Hagar, *Breaking Down the Language Barrier*, RENO GAZETTE-J., Mar. 20, 2005, at 1A, LEXIS, News Library, Reno File.

²⁶ According to U.S. Census data from 2000, for example, high school-aged Latino students who classify themselves as not speaking English well are over four times more likely than their peers who do speak English well to drop out of school. RICHARD FRY, PEW HISPANIC CTR., HISPANIC YOUTH DROPPING OUT OF U.S. SCHOOLS 8, 10 fig.6 (2003). Among those who speak English poorly, the dropout rate is 59%. *Id.* at 10 fig.6.

Indeed, a recent survey of English-language learners in Reno, Nevada, indicated that many feel confused and frightened at school because they do not understand their teachers or peers. Hagar, *supra* note 25. They report feeling isolated and often are afraid to talk in their classes. *Id.* Many do not understand graduation requirements, and they often are assigned to counselors with whom they are unable to communicate and who do not have time to help them assimilate. *Id.* The same survey found that many LEP students fail two or more of their classes, and that they drop out of school with troubling frequency. *Id.* Even if they do make it through their senior year, many fail to graduate, and most do not even know the purpose of the SAT and ACT college-entrance tests. *Id.*

C. Increasing Urgency

The failure of local public schools to meet the needs of immigrant students is growing more pressing every day. A rapid increase in the high-risk immigrant student population — that is, those students with both limited former schooling and limited English proficiency — has rendered many states' schools less prepared than ever to meet the challenge of educating new immigrants.

As the United States's immigrant population has grown, its composition has changed. Whereas forty years ago most immigrants arrived from Canada or Europe, most immigrants today come from developing countries and as a result often have received little or no formal schooling.²⁷ In 2000, over 22% of the immigrants in the United States had no high school education.²⁸ Moreover, fully 40% of immigrant students were limited English proficient.²⁹ Many existing programs are overburdened by the size, diversity, and needs of the immigrant populations they are receiving.³⁰ As a result, a significant portion of school-aged American immigrants are at significant risk for school failure.³¹

²⁷ See Marcelo M. Suárez-Orozco, *Globalization, Immigration, and Education: The Research Agenda*, 71 HARV. EDUC. REV. 345, 349–51 (2001).

²⁸ *Id.*

²⁹ RUIZ-DE-VELASCO ET AL., *supra* note 11, at 2.

³⁰ As immigration has swelled, immigration patterns have shifted. While certain cities and states that traditionally have received large numbers of immigrants continue to enroll significant numbers of immigrant students in their public schools, *see, e.g.*, Suárez-Orozco, *supra* note 27, at 352 (noting that approximately 48% of New York City public school students come from immigrant households), immigration now touches every area of the country. In Dodge City, Kansas, for example, nearly 40% of the student population comes from immigrant backgrounds. *Id.* Likewise, last year Wisconsin expected to receive 3200 Hmong refugees from Thailand, many of whom had no formal schooling and were illiterate, and some of whom were parents who attended school in the same district as their children. *Refugees Challenge Schools*, CAPITAL TIMES (Madison, Wis.), May 30, 2005, at 3A, LEXIS, News Library, Captns File; *see also* Michael Powell, *In Maine Town, Sudden Diversity and Controversy*, WASH. POST, Oct. 14, 2002, at A1 (noting that many immigrants are now moving to small towns, including Lewiston, Maine, and Holyoke, Massachusetts, which experienced a substantial influx of Somali immigrants, and Wausau, Wisconsin, where thousands of Hmong immigrants have settled). Suburban towns like Westborough, Massachusetts, are seeing an explosion in their immigrant student populations and are struggling to accommodate students who speak languages ranging from Korean to Luganda (an African language) to Teluga (a language spoken in India). Emily Shartin, *A Language To Learn: Newcomers, Schools Share Challenges of Life After Bilingual Ed*, BOSTON GLOBE, Jan. 19, 2006, at W1. Many school districts unaccustomed to serving immigrant students feel overwhelmed: the teachers do not have special training in working with immigrant students, and the needs of the student body have morphed into something with which schools are unfamiliar. *See, e.g.*, RANDY CAPPS ET AL., THE NEW DEMOGRAPHY OF AMERICA'S SCHOOLS 35 (2005); Suárez-Orozco, *supra* note 9, at 579–80; Hagar, *supra* note 25. As a result, immigrant students often are offered only an education that they cannot understand.

³¹ More specifically, 19% of immigrants to the United States are from Mexico, OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2004 YEARBOOK OF IMMIGRATION STATISTICS tbl.3 (2006), the origin country with the highest dropout rate — 39%, FRY, *supra* note 26, at 7 fig.3. Sixteen percent of immigrants are from Central America and the Carib-

High immigrant dropout rates are costly for society. Evidence from the Department of Education indicates that education is directly proportional to income.³² Not surprisingly, those who drop out of school are more likely to need social assistance later in life.³³ Moreover, one study estimated that American businesses spend more than \$60 million each year on training, much of which goes toward providing remedial reading, writing, and mathematics instruction.³⁴

II. THE LOCAL RESPONSE: NEWCOMER SCHOOLS

To meet the needs of high-risk immigrant students, in the 1980s school districts around the country began experimenting with programs that were specially designed to help newly arrived students transition into the public education system and into American life in general.³⁵ Subject to certain legal constraints, the newcomer model offers school districts considerable flexibility in determining how best to meet the needs of individual newcomer students. As a result, with appropriate funding, newcomer schools can be implemented successfully anywhere and with any immigrant population.

A. The Newcomer School Model

1. *Basic Program Elements.* — Newcomer schools vary from district to district, but most share certain core characteristics. Placements

bean. OFFICE OF IMMIGRATION STATISTICS, *supra*, at tbl.3. Among students from Central America, the dropout rate is 25%. FRY, *supra* note 26, at 7 fig.3. Significant numbers of immigrants also arrive from Asia: about 35% of American immigrants are Asian, of whom 13% are from Cambodia, Laos, Myanmar, Thailand, or Vietnam. OFFICE OF IMMIGRATION STATISTICS, *supra*, at tbl.3. Studies indicate that among Asian students in American public schools, students from Southeast Asia are the most likely to experience school failure and to drop out, sometimes at a rate significantly higher than that for white students. SAU-FONG SIU, ASIAN-AMERICAN STUDENTS AT RISK 14-17 (1996).

³² Over his lifetime, a man with a high school diploma will earn almost \$333,000 more than a high school dropout; a man with some college will earn \$538,000 more than a high school dropout; and a man with a college degree will earn nearly \$1 million more than a high school dropout. ALLIANCE FOR EXCELLENT EDUC., FACT SHEET: IMPACT OF EDUCATION ON: PERSONAL INCOME & EMPLOYMENT (2003), *available at* <http://www.all4ed.org/publications/PIE%20Factoids%20for%20Website.doc>. Similarly, in 2000, 6.4% of high school dropouts over age twenty-five were unemployed, whereas only 3.5% of high school graduates and 1.7% of college graduates of the same age were unemployed. *Id.*

³³ Recent data suggest that high school dropouts are approximately two-and-a-half times as likely as high school graduates and nearly five times as likely as those who attended some college to receive government assistance. ALLIANCE FOR EXCELLENT EDUC., FACT SHEET: THE IMPACT OF EDUCATION ON: POVERTY & HOMELESSNESS (2003), *available at* <http://www.all4ed.org/publications/Poverty%20Factoids%20for%20Website.doc>.

³⁴ ALLIANCE FOR EXCELLENT EDUC., FACT SHEET: THE IMPACT OF EDUCATION ON: THE ECONOMY (2003), *available at* <http://www.all4ed.org/publications/Economy%20Factoids%20for%20Website.doc>.

³⁵ FRIEDLANDER, *supra* note 5.

in the schools generally are temporary and voluntary,³⁶ and are designed to facilitate LEP students' transition to mainstream classes. Newcomer schools are unique in that they recognize the importance of helping students transition to an entirely foreign country, and sometimes a foreign way of life.

Administrators of newcomer programs unequivocally believe that their programs improve the achievement of high-risk immigrant populations.³⁷ In particular, they often cite the benefits of content-relevant language acquisition, specially trained staff, orientation programs, and an emphasis on post-secondary education.³⁸

Advocates for newcomer programs believe that one of the programs' most important aspects is their emphasis on content-relevant language acquisition.³⁹ Rather than providing students only with English-language courses that are divorced from their content-based coursework, many newcomer programs encourage development of English-language skills through content-based instruction.⁴⁰ Ensuring acquisition of content-relevant language eases the transition to mainstream classes.⁴¹

³⁶ Initial enrollment in newcomer programs is voluntary, although programs differ in how they determine eligibility. See CTR. FOR RESEARCH ON EDUC., DIVERSITY & EXCELLENCE, *supra* note 16, at 17; DEBORAH J. SHORT ET AL., CTR. FOR APPLIED LINGUISTICS, FINAL PROJECT REPORT: FIRST NATIONAL CONFERENCE FOR EDUCATORS OF NEWCOMER STUDENTS AND PILOT STUDY ON NEWCOMER PROGRAM LITERACY AND ASSESSMENT PRACTICES 11 (2003).

³⁷ See, e.g., *All Things Considered: School Targets Older, Immigrant Students*, *supra* note 5.

³⁸ In addition, some program administrators have found that holding classes at nontraditional times is an effective way to improve student retention since many newcomers work to provide for their families. For example, one newcomer school in Houston offers classes at night and on weekends. Through various outreach efforts, the program found an entire population of high school-aged newcomers who had never registered for school upon their arrival in the United States but were desperate for an education. The program currently has a waiting list of 200 people. See *All Things Considered: School Targets Older, Immigrant Students*, *supra* note 5; see also CTR. FOR APPLIED LINGUISTICS, QUALITIES OF EFFECTIVE PROGRAMS FOR IMMIGRANT ADOLESCENTS WITH LIMITED SCHOOLING (1998), <http://www.cal.org/resources/digest/goldendoor.html>.

³⁹ See SPAULDING ET AL., *supra* note 16, at 25; AÍDA WALQUI, CTR. FOR APPLIED LINGUISTICS, STRATEGIES FOR SUCCESS: ENGAGING IMMIGRANT STUDENTS IN SECONDARY SCHOOLS (2000), <http://www.cal.org/resources/digest/ooo3strategies.html>.

⁴⁰ FRIEDLANDER, *supra* note 5. For example, by teaching remedial math classes primarily in English, newcomer schools can ensure that students learn the basic vocabulary associated with the subject. This specialized vocabulary normally would not be taught in an ESL class, but it is essential to ensuring that students can succeed in mainstream classes.

⁴¹ WALQUI, *supra* note 39. Separating newcomer and mainstream students during content-based instruction likely also benefits mainstream students. Placing a sixteen-year-old newcomer who is nearly illiterate and has had almost no formal instruction into a mainstream tenth-grade classroom not only will be frustrating and discouraging for him, but also may frustrate the learning of mainstream students in the class. Although arguments suggesting that countervailing benefits flow from having a diversity of backgrounds and perspectives in the classroom may be in vogue, see, e.g., Kathy Flores, *Special Needs, "Mainstream" Classroom*, CHILDREN'S

Program advocates also agree that employing specialists, like bilingual staff, is key to success.⁴² Bilingual staff facilitate communication with parents and allow students to receive specialized attention and some native-language assistance when they are struggling in class.⁴³ Similarly, teachers who are trained in instructing immigrant students using techniques that help students learn content and language simultaneously are particularly effective with newcomer students.⁴⁴

Advocates also consider orientation programs essential to the success of newcomer schools.⁴⁵ Orientation both to the United States and to the public school system are important.⁴⁶ For some students, learning social customs is harder than learning academic content. For example, students unfamiliar with the idea of liberty might need to become accustomed to the freedom to make choices.⁴⁷ Similarly, familiarity with the rules, procedures, and services available in public schools facilitates a successful integration for both students and families.⁴⁸

Finally, special services to help immigrants access post-secondary education are crucial.⁴⁹ Some programs — in addition to providing instruction on how to apply to college and assistance completing the application process — provide mentoring programs that pair immigrant students with local college students.⁵⁰ The mentors help students learn about college, understand its value, and see it as a possibility for themselves.⁵¹ For many of these students, believing that college is an option is the first step toward pursuing post-secondary education.

ADVOCATE, Jan. 2003, at 13, *available at* <http://www.4children.org/pdf/103spec.pdf>, they are unpersuasive in the case of newcomers. These students, often frightened and rarely eager to participate, are unable and unwilling to communicate with their peers. Allowing them to develop basic language and literacy skills in a more appropriate environment would allow them to contribute much more upon entry into mainstream classes and would alleviate the need for mainstream teachers to stop classes periodically to offer very basic instruction to newcomers. Initial segregation thus ultimately helps to facilitate cultural exchange and learning in the mainstream classroom.

⁴² CTR. FOR APPLIED LINGUISTICS, *supra* note 38.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ FRIEDLANDER, *supra* note 5.

⁴⁶ *Id.*

⁴⁷ *See Refugees Challenge Schools*, *supra* note 30.

⁴⁸ SPAULDING ET AL., *supra* note 16, at 39. Some administrators emphasize that the best programs do not rely only on written material, but also meet with students and parents to discuss orientation information orally. Like students, parents may have limited education and may not be literate, even in their native languages. *See* LUCAS, *supra* note 5.

⁴⁹ *See* LUCAS, *supra* note 5.

⁵⁰ *See id.*

⁵¹ *See id.*

B. The Universality of Newcomer Schools

Newcomer schools are a particularly attractive candidate for federal support because the program model is extremely flexible and can easily be adapted to meet the needs of any target population. Indeed, although all newcomer programs conceive of themselves as providing temporary transitional assistance to immigrant students, few programs are the same.

For example, districts locate their programs differently depending on the facilities available and the size of the population the newcomer program serves. A 2000 study by the Center for Applied Linguistics and the Center for Research on Education, Diversity & Excellence (CAL/CREDE) indicates that 77% of programs are located within a mainstream school.⁵² Students in these programs often have some classes, such as physical education or art, with mainstream students. An alternative for districts lacking space in existing schools is to locate the newcomer program at a separate site, such as a district intake center, where students receive instruction for a short period of time before being placed in mainstream classes. Seventeen percent of programs are located at separate sites.⁵³ Finally, for districts with very large newcomer populations, the best alternative may be to create a stand-alone newcomer school that students can attend on a more permanent basis. Currently, just 6% of programs are stand-alone schools.⁵⁴

Similarly, newcomer schools may enroll students for varying lengths of time, depending on student needs and available resources. The majority of programs enroll students for one year or more; over the four years of the CAL/CREDE study, there was a slight trend toward longer enrollments, which researchers speculated was due to an increase in immigrants with limited formal schooling and low native-language literacy.⁵⁵

Likewise, schools may vary the length of daily programming according to the needs of the newcomer population. While those serving

⁵² See CTR. FOR APPLIED LINGUISTICS, SUMMARY OF DATA IN *DIRECTORY OF SECONDARY NEWCOMER PROGRAMS IN THE UNITED STATES, REVISED 2000* (2003), <http://www.cal.org/crede/newcsummary.htm>; DEBORAH J. SHORT & DENNIS TERDY, EFFECTIVE PROGRAMS FOR NEWCOMER STUDENTS (2005), <http://www.cal.org/crede/TESOL2005newcomer.htm>. Many programs have been established in the six years since the data was collected, although newcomer programs have by no means become the norm.

⁵³ CTR. FOR APPLIED LINGUISTICS, *supra* note 52.

⁵⁴ *Id.* The city of St. Paul, Minnesota, has a permanent option for Hmong immigrants (International Academy–LEAP), but enrollment in the immigrant high school is not required. The school district emphasizes that refugee students may move to mainstream classes at any time, but students are strongly encouraged to utilize transitional learning centers. See St. Paul Pub. Sch., International Academy–LEAP, http://www.spps.org/International_Academy-LEAP.html (last visited Dec. 9, 2006).

⁵⁵ CTR. FOR APPLIED LINGUISTICS, *supra* note 52.

students with very low native-language literacy and no knowledge of English may prefer to administer full-day programs, schools serving students with high native-language literacy and some knowledge of English may find more limited programming appropriate. Although most existing programs are full-day programs, 19% of programs offer a combination of options.⁵⁶ Combination programs may offer full- and half-day programs, or they may offer both class-time and after-school programming to students, according to their needs.

Newcomer schools also enjoy flexibility in selecting the educational model through which to deliver content-based instruction. Depending on local politics, the age of students, and the native-language literacy of students, for example, newcomer schools may adopt bilingual or sheltered immersion models or a combination of the two. Almost all existing programs teach at least some content using sheltered immersion, a model in which the primary language of instruction is English. However, most programs also teach at least some content — most frequently math, language arts, social studies, or science — in the native language of students.⁵⁷

Finally, newcomer schools have significant flexibility in determining what sorts of services to offer students and their families. Most programs offer physical health services, and a smaller fraction also offer mental health services. The majority of programs offer some sort of family outreach services, varying from liaison services to adult ESL, basic education classes, or native-language literacy classes.⁵⁸ Through program design, schools can best target their resources to meet the needs of the local immigrant population.

C. Legal Constraints on Flexibility

Program administrators do not exercise completely unfettered discretion. In particular, they are constrained by civil rights and English-only laws.⁵⁹ Neither, however, poses a serious obstacle to the design or implementation of a newcomer program.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ In some areas, newcomer schools also might invite freedom of religion challenges. Newcomer schools that serve students whose religious practices conflict with generally applicable school rules or procedures must walk a fine line between permissibly accommodating religious practices and impermissibly establishing religion. Even if it is not constitutionally required to do so, *see* *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990) (prohibiting enforcement of a facially neutral rule of general applicability only if there is a deliberate singling out of religious conduct, if the rule interferes with another constitutional right in addition to free exercise, or if there is already a system of exemptions in place and no compelling reason prevents extension of that system to cases of religious hardship), a school may feel that it would prefer to accommodate students to help ease their transition. Many types of accommodations are likely to pose Establishment Clause problems, however. In general, affirmative religion-related action on the part of newcomer

1. *Civil Rights Constraints.* — At first glance, the segregation inherent in newcomer schools might seem counter to the separate-is-never-equal norm of *Brown v. Board of Education*.⁶⁰ Yet, with certain programmatic safeguards in place, newcomer schools are unlikely to violate the Constitution or federal civil rights laws.

The Supreme Court has indicated that voluntary segregation does not pose a constitutional problem.⁶¹ Thus, despite protests by some civil rights activists, a court would be hard-pressed to find newcomer schools — none of which are mandatory — per se violative of the Fourteenth Amendment.⁶² A constitutional problem could arise, however, if students were to get “stuck” in segregated programs. For example, if a newcomer school had indefinite criteria for transferring students to mainstream classes, such that students remained in segregated classes even after they attained a level of English proficiency sufficient to understand mainstream programming, a court might find that participation no longer was voluntary. Similarly, if a student specifically requested a transfer to a mainstream program and no mechanism was in place to effectuate that transfer on a timely basis, a Fourteenth Amendment challenge could be brought.

An equal protection claim brought against a newcomer school likely would be subject to minimum rationality review.⁶³ In *Castaneda v. Pickard*,⁶⁴ which concerned a bilingual education program that seg-

schools is likely to violate the Establishment Clause, whereas excusing students from complying with generally applicable rules is more likely to be constitutional. Compare *Edwards v. Aguillard*, 482 U.S. 578, 596–97 (1987) (holding that public schools may not alter their curricula to accommodate particular religious beliefs), and *McCullum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948) (holding that public schools may not offer religious classes during the school day), with *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (requiring free exercise exception to school attendance laws for the Amish), *Zorach v. Clauson*, 343 U.S. 306, 315 (1952) (allowing students to leave school grounds during the school day to attend off-campus religious classes), and *Cheema v. Thompson*, 67 F.3d 883, 889 (9th Cir. 1995) (considering Sikh’s free exercise challenge to school’s ban on weapons without raising Establishment Clause concerns), *overruled on other grounds by City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁶⁰ 349 U.S. 294 (1955).

⁶¹ See *Lau v. Nichols*, 414 U.S. 563, 568–69 (1974) (providing for bilingual education for non-English-speaking students).

⁶² The Supreme Court has held many times that there is no right to education under the Federal Constitution, see, e.g., *Plyler v. Doe*, 457 U.S. 202, 221 (1982); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35–37 (1973), but every state guarantees such a right in its own constitution, and the states are required by the Fourteenth Amendment to provide education in a nondiscriminatory manner.

⁶³ See *Rodriguez*, 411 U.S. at 17. Although alienage is a suspect classification requiring strict scrutiny review, *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971), a court would likely determine that newcomer schools do not segregate on the basis of alienage, but rather on the basis of length of time in the United States and ability to speak English. The Court has previously applied minimum rationality when evaluating differential treatment of a subgroup of immigrants. See *Plyler*, 457 U.S. at 223–24.

⁶⁴ 648 F.2d 989 (5th Cir. 1981).

regated non-English speakers from English speakers, the Fifth Circuit indicated that at least some involuntary segregation is constitutionally permissible. The *Castaneda* court explicitly approved of partial segregation of LEP students because “the benefits [that] would accrue to [LEP] students by remedying the language barriers [that] impede their ability to realize their academic potential in an English-language educational institution may outweigh the adverse effects of such segregation.”⁶⁵ Here, a court could well find that separating students to facilitate language and content acquisition is rationally related to the government’s interest in the students’ academic success.⁶⁶

In addition to complying with the Fourteenth Amendment, newcomer schools also must comply with Title VI of the Civil Rights Act of 1964,⁶⁷ which prohibits discrimination on the basis of race, color, or national origin in programs receiving federal financial assistance.⁶⁸ Newcomer schools risk violating the disparate impact prong of Title VI, which prohibits facially neutral policies that have a disproportionate impact on a protected group.⁶⁹

In December 1990, the Office for Civil Rights (OCR) of the Department of Education — which evaluates Title VI complaints — issued a policy memo to its regional offices specifying factors to consider when determining whether a newcomer school violates Title VI. These factors include: whether the district is under a desegregation order; whether enrollment is voluntary and parents understand that they have the option of enrolling their children in mainstream schools with language support services; whether the newcomer school is ethnically, racially, and linguistically diverse; whether enrollment at the newcomer school exceeds one year and any students leave in less than one year; whether selection for enrollment at the newcomer school is based on English-language ability and need for transition assistance; and whether the facilities, courses, and extracurricular activities available to newcomer students are comparable to those offered to mainstream students.⁷⁰ OCR has found at least one newcomer program to be in

⁶⁵ *Id.* at 998.

⁶⁶ Even under a permissive standard of review, however, ongoing segregation could be held unconstitutional in some cases. Similarly, a court could find that there is no rational relationship between the asserted government interest and segregating students during nonacademic classes and activities; newcomer students can, and in many places do, attend mainstream art, music, and gym classes, for example. Given the sensitivity of segregation in American history, a court might not be inclined to view nonacademic separation as favorably as academic separation.

⁶⁷ 42 U.S.C. §§ 2000d–2000d-7 (2000).

⁶⁸ *See id.*

⁶⁹ Although in the past there has been some dispute as to whether Title VI prohibits unintentional discrimination, the Supreme Court upheld administrative regulations making policies with a disparate impact violative of Title VI in *Guardians Ass’n v. Civil Service Commission of New York*, 463 U.S. 582, 607 n.27 (1983).

⁷⁰ FRIEDLANDER, *supra* note 5.

compliance with Title VI⁷¹ but has expressed concern over at least one other program in part because of a lack of after-school programming.⁷²

Ensuring compliance with the Fourteenth Amendment and the Civil Rights Act of 1964 thus likely requires newcomer schools to have well-established transition procedures for students who achieve some minimum level of English proficiency. Likewise, allowing newcomer students to attend mainstream nonacademic classes if they prefer to do so and affording them access to the sorts of gifted and talented, special needs, and after-school programs that their mainstream counterparts enjoy will safeguard newcomer schools against challenges.

2. *English-Only Constraints.* — One might imagine that newcomer programs would face serious constraints as a result of English-only laws intended to prohibit bilingual education in public schools. Beginning in the 1990s, English-only movements gained momentum in several states and culminated with popular referenda that put to voters the question whether bilingual education should be available in public schools. Today, approximately half of the states have English-only laws, many of which restrict bilingual education.⁷³

Despite the apparent conflict, English-only laws actually do not interfere with a school or a school district's ability to offer a newcomer program; rather, these laws simply dictate what instructional model must be employed by that program.⁷⁴ The most stringent English-only laws require LEP students to attend sheltered English immersion classes for a period before transitioning into the mainstream classroom. Many newcomer programs offer just such an opportunity. Other

⁷¹ See Memorandum from Michael Williams, Assistant Sec'y for Civil Rights, Dep't of Educ., to OCR Senior Staff n.8 (Sept. 27, 1991), available at <http://www.ed.gov/about/offices/list/ocr/docs/lau1991.html>.

⁷² See Liz Fox, *Language Center's Closing Leaves Future Unknown*, EL MENSAJERO, Feb. 13, 2005, at 4, LEXIS, News Library, Curnws File. The Haywood, California, program closed in response. See *id.*

⁷³ Wikipedia, English-Only Movement, http://en.wikipedia.org/wiki/English-only_movement (last visited Dec. 9, 2006).

⁷⁴ Federal law requires even school districts with English-only laws to provide some specialized services to non-English-speaking students. In the late 1960s and early 1970s, the Department of Health, Education, and Welfare issued increasingly specific sets of guidelines requiring publicly funded schools to offer non-English-speaking students an education they could understand. See Policies on Elementary and Secondary School Compliance with Title VI of the Civil Rights Act of 1964, 33 Fed. Reg. 4955, 4956 (Mar. 23, 1968) ("School systems are responsible for assuring that students of a particular race, color, or national origin are not denied the opportunity to obtain the education generally obtained by other students in the system."); Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595, 11,595 (July 18, 1970) ("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."). Thereafter, in *Lau v. Nichols*, the Supreme Court held that failure to provide specialized language instruction to non-English-speaking students violates Title VI of the Civil Rights Act of 1964. 414 U.S. 563, 566 (1974).

states' laws are more flexible and permit provision of bilingual education in newcomer schools.⁷⁵

Indeed, the goals of newcomer schools parallel those espoused by English-only advocates. Those promoting English-only laws emphasize the importance of English-language acquisition to educational and professional success, and evidence indicates that many voters, including parents of immigrant children, vote for these initiatives simply because they believe they will help immigrants better assimilate into American society.⁷⁶ This emphasis on and desire to promote assimilation suggests that those who support English-only laws also should favor the expansion of newcomer schools.

III. A ROLE FOR THE FEDERAL GOVERNMENT

Faltering school achievement among high-risk immigrant students presents a unique opportunity for federal action at the intersection of two hot-button issues — immigration and education. Newcomer programs offer substantial promise for improving the educational outcomes of immigrant students. Yet newcomer schools still are relatively rare,⁷⁷ due in part to a lack of adequate funding. Although education traditionally is thought of as a local issue, a federal initiative that pro-

⁷⁵ For example, although California voters passed Proposition 227, *see* CAL. EDUC. CODE §§ 300–340 (West 2002 & Supp. 2006), in June 1998 with the intention of requiring sheltered immersion, bilingual education is still commonplace in many districts. Proposition 227 included a waiver provision that has been interpreted by some districts essentially to allow bilingual education for any student who does not speak English. The provision allows the parent of a student to apply for a waiver of the English-only requirement if the student is over ten years old, knows English already, or has special needs. *See id.* § 311. Some districts that preferred to continue offering bilingual education have classified students who are LEP as having special needs. *See* James Crawford, *English-Only vs. English-Only: A Tale of Two Initiatives* (2000), <http://ourworld.compuserve.com/homepages/JWCRAWFORD/203-227.htm>. The result is that, despite the English-only law, newcomer schools have considerable leeway in adopting any educational model they choose. By contrast, in November 2002, Massachusetts voters passed a ballot initiative, *see* MASS. GEN. LAWS ANN. ch. 71A §§ 1–9 (West Supp. 2005), that, in response to the broad readings of Proposition 227, used much tighter language than the California initiative. The waiver provisions remain the same, *see id.* § 5, but the Massachusetts law specifies that LEP does not qualify as a special need, *see id.* § 5(b)(3). As a result, newcomer schools in Massachusetts are limited to the sheltered immersion model.

⁷⁶ *See, e.g.,* Alice Callaghan et al., *Argument in Favor of Proposition 227*, <http://primary98.ss.ca.gov/VoterGuide/Propositions/227yesarg.htm> (last visited Dec. 9, 2006). The same was true in Massachusetts, where many voters supported Question 2 without even knowing the details because they believed it was about fostering assimilation. *See* Anand Vaishnav, *English Immersion Plan Wins over Bilingual Ed*, BOSTON GLOBE, Nov. 6, 2002, at A1.

⁷⁷ The most recent comprehensive survey, completed in 2000, identified only 115 secondary-school newcomer programs in the 14,928 public school districts in the United States. BEVERLY A. BOYSON & DEBORAH J. SHORT, *SECONDARY SCHOOL NEWCOMER PROGRAMS IN THE UNITED STATES* (2003); NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., *OVERVIEW OF PUBLIC ELEMENTARY AND SECONDARY SCHOOLS AND DISTRICTS: SCHOOL YEAR 1999–2000*, at 1 (2001), available at <http://nces.ed.gov/pubs2001/2001339rev.pdf>.

vides funding to support state efforts but leaves control in local hands could win public approval.

A. An Opportunity To Respond to Voter Concerns

Voters of all persuasions are concerned about both immigration and education. An immigrant education initiative addresses both issues simultaneously.

1. *Immigration.* — In a recent poll conducted by *Time* magazine, Americans indicated that they are seriously concerned about immigration.⁷⁸ Yet they are sympathetic toward those immigrants who they feel have made an effort to integrate themselves into American society. Seventy-eight percent of respondents favored allowing citizenship for illegal immigrants already in the country who have jobs, can demonstrate English proficiency, and pay taxes.⁷⁹

Indeed, among those who worry about immigration, some of the biggest concerns are that immigrants fail to assimilate, contribute to crime, and increase the risk of terrorism.⁸⁰ Taking continued immigration as given, an immigrant education initiative — independently desirable for ethical and economic reasons — would address such concerns directly. For example, English-language acquisition, so important in many Americans' minds, is a focus of immigrant education. Likewise, immigrants who stay in school are more likely later to be productive members of society.

Americans recognize the importance of educating the children of immigrants, including illegal immigrants. A March 2006 survey by the Pew Research Center found that 71% of Americans support allowing the children of illegal immigrants to attend public schools.⁸¹ This support was consistent across all segments of the population: Republicans, Democrats, Independents, the elderly, the young, college graduates, and the less educated all agree that children of illegal immigrants should have access to the same educational opportunities as American children.⁸² In addition, even states that traditionally have been viewed as hostile to illegal immigrants recently have taken steps to facilitate

⁷⁸ *Time* Poll: *Let Them Stay, But Get Tough*, TIME, Apr. 2, 2006, <http://www.time.com/time/nation/article/0,8599,11179336-1,00.html> (reporting that 82% of respondents believe the government is not doing enough to prevent illegal immigration and 75% do not believe illegal immigrants should have access to government programs like Medicaid and food stamps).

⁷⁹ *Id.*

⁸⁰ PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, AMERICA'S IMMIGRATION QUANDARY 14 (2006), available at <http://people-press.org/reports/pdf/274.pdf>.

⁸¹ *Id.* at 22. Although the Supreme Court held in *Plyler v. Doe* that states could not deny the children of illegal immigrants access to public schools, 457 U.S. 202, 230 (1982), public sentiment is relevant here because voters may (incorrectly) perceive that newcomer schools serve primarily children of illegal immigrants.

⁸² PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, *supra* note 80, at 22.

these immigrants' access to education. In 2001, for example, California passed a law that extended eligibility for in-state tuition rates at the state's colleges and universities to illegal aliens living in the state.⁸³

2. *Education.* — Americans rank education the second most important issue for the President and Congress to address, behind only terrorism.⁸⁴ Education is a persistent concern: four years after the passage of the No Child Left Behind Act⁸⁵ (NCLB), the most significant education reform law in recent history, 93% of Americans still think that it is important for the federal government to deal with education-related issues.⁸⁶ According to an April 2006 *Time* magazine poll, 64% of Americans believe we spend too little on public education and 59% would be willing to pay higher taxes to improve outcomes in public schools.⁸⁷

Although some parents no doubt would prefer that any spending on education go to programs that benefit their own children,⁸⁸ several vocal interest groups are particularly likely to support an immigrant education initiative. First, the business community is likely to approve of a policy expanding access to education for immigrant students. Business lobbies often encourage education-related reform and are likely to support initiatives that promise to better educate the workforce.⁸⁹ Second, teachers' unions are likely to embrace proposals to reform how public schools educate immigrant students. Public school

⁸³ CAL. EDUC. CODE § 68130.5 (West 2003). Several other states, including New York, *see* N.Y. EDUC. LAW § 355(2)(h)(8) (McKinney 2006), and Texas, *see* TEX. EDUC. CODE ANN. § 54.052 (Vernon 2006), also have enacted such laws. NAT'L IMMIGRATION LAW CTR., STATE PRO-POSED OR ENACTED LEGISLATION REGARDING IMMIGRANT ACCESS TO HIGHER EDUCATION (2003), *available at* http://www.nilc.org/immlawpolicy/DREAM/DREAM_Bills.pdf.

⁸⁴ Public Agenda, Education: People's Chief Concerns (Jan. 2006), http://www.publicagenda.org/issues/pcc_detail.cfm?issue_type=education&list=1.

⁸⁵ Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended primarily in scattered sections of 20 U.S.C.).

⁸⁶ Public Agenda, *supra* note 84. The popular media is only fueling the concern; the cover story of a recent issue of *Time* magazine was titled *Dropout Nation*. *See* Nathan Thornburgh, *Dropout Nation*, *TIME*, Apr. 17, 2006, at 31.

⁸⁷ *Time* Poll: What Course Should We Take?, *TIME*, Apr. 9, 2006, <http://www.time.com/time/magazine/article/0,9171,1181673,00.html>. Eighty-nine percent of respondents felt that the U.S. dropout rate is a serious problem. *Id.*

⁸⁸ *See, e.g.*, Florangela Davila, *Blossoming School Facing Closure*, *SEATTLE TIMES*, Apr. 22, 2005, at B1, LEXIS, News Library, Seattm File (reporting that as part of a cost-saving measure the Seattle School District decided to close an innovative public-private partnership school for high-poverty students and use the facility for a newcomer program, and noting resistance to the decision).

⁸⁹ *See, e.g.*, Bus. Roundtable, Position Statement, The Business Roundtable Education Initiative: 2000 and Beyond (Dec. 4, 2000), <http://www.businessroundtable.org/taskForces/taskforce/document.aspx?qs=6965BF159F849514481138A74EB1851159169FEB56A3A> (noting the relationship between elementary and secondary education and the competitiveness of the domestic workforce and urging business coalitions to "stimulate . . . education reform, particularly in schools that serve large numbers of poor and minority children").

teachers, concerned about meeting the requirements of NCLB and tired of taking much of the blame for student failure,⁹⁰ are likely to welcome a policy that targets resources to at-risk students. Finally, as more and more immigrants become citizens, the composition of the voting public will evolve. Naturalized voters are likely to support initiatives that allow immigrant children access to the educational opportunities so essential for social and economic advancement in this country.

B. The Need for Funding

Developing and administering a newcomer program is an expensive undertaking.⁹¹ Many factors contribute to the high cost of newcomer programs, including specialized training for teachers, lower teacher-pupil ratios, specialized instructional materials, and transportation costs. Funding challenges often are exacerbated by the fact that many immigrant students live in high-poverty areas.⁹² Estimates of the additional cost of bringing an LEP student up to age-appropriate grade level vary considerably, from 10 to 100% of standard student costs, in part because the cost depends on the particular student's situation and characteristics.⁹³ Currently, many programs are unable to meet the demand from immigrants in their communities and focus only on older students to help them prepare for graduation exams.⁹⁴

There are two federal funding streams typically available to newcomer programs. First, Title I of the Elementary and Secondary Education Act⁹⁵ (ESEA) makes federal funds available to high-poverty schools. However, secondary schools, where newcomer students often are concentrated, but which usually have fewer language acquisition resources than primary schools, are considerably less likely than pri-

⁹⁰ See Public Agenda, *supra* note 84, http://www.publicagenda.org/issues/pcc_detail.cfm?issue_type=education&list=10 (noting that 76% of teachers feel that they are made scapegoats for the problems facing education).

⁹¹ Officials in Houston estimated the cost of a newly opened newcomer school at \$454,000, and a program in Fresno, California, cost nearly \$1 million. Jason Spencer, *A Plan To Keep Immigrants in School*, HOUSTON CHRON., Sept. 8, 2004, at A1, LEXIS, News Library, Hchrn File.

⁹² See RUIZ-DE-VELASCO ET AL., *supra* note 11, at 11.

⁹³ U.S. GEN. ACCOUNTING OFFICE, ILLEGAL ALIEN SCHOOLCHILDREN: ISSUES IN ESTIMATING STATE-BY-STATE COSTS 9-10 (2004), available at <http://www.gao.gov/new.items/do4733.pdf>. Average per-student costs differ from state to state (and district to district) and can be as high as \$10,000 per year. *Id.* at 7-8. The average per-pupil cost at the high school level is approximately \$6000 per year. GEORGES VERNEZ ET AL., CLOSING THE EDUCATION GAP: BENEFITS AND COSTS app. G at 179 (1999).

⁹⁴ See, e.g., Lisa B. McPheron, *Fitting In: Students Work To Improve English-Language Skills*, PRESS ENTERPRISE (Riverside, CA), Apr. 5, 2005, at B01, LEXIS, News Library, Prsent File.

⁹⁵ 20 U.S.C.A. §§ 6301-7941 (West 2003 & Supp. 2005).

mary schools to receive Title I funding.⁹⁶ In addition, they tend to receive less funding per eligible student than primary schools.⁹⁷

Furthermore, Title I funding is increasing only half as quickly as the number of children in poverty.⁹⁸ Indeed, for the 2005–2006 school year, many districts received fewer Title I funds than in previous years. Notably, some of the districts that lost the most funding — at least \$500,000 — are districts that have newcomer programs in place, such as Salem, Oregon, and Bridgeport, Connecticut.⁹⁹

The second source of federal funding for newcomer schools is Title III of ESEA, which allocates grants to states based on their share of the nation's LEP and recent immigrant student populations. States must use at least 95% of Title III grants to make subgrants to local school districts,¹⁰⁰ and they may target up to 15% of the value of these subgrants to districts that have experienced substantial increases in the absolute or relative enrolled immigrant population over the preceding two years.¹⁰¹ The remainder of the subgrant funds must be distributed to local districts based only on their percentage of the state's LEP population, without consideration of the actual size of their immigrant population.¹⁰² As a result, no funding is specifically targeted to districts that educate large but stable populations of immigrant students, even if the education those students receive is inadequate.

Equally discouraging is the level of funding budgeted for immigrant students. The Title III budget for 2006 (and requested budget for 2007) is \$669 million,¹⁰³ of which about \$123 million is allocated based on newcomer population.¹⁰⁴ This amount — which is the only targeted immigrant funding in the education budget — represents less than 0.2% of the federal education budget¹⁰⁵ and breaks down to ap-

⁹⁶ U.S. Dep't of Educ., Targeting Schools: Study of Title I Allocations Within School Districts, Analysis and Highlights, <http://www.ed.gov/rschstat/eval/disadv/target.html?exp=3> (last visited Dec. 9, 2006).

⁹⁷ One study found that secondary schools received only 75% as much funding per eligible student as primary schools. *Id.*

⁹⁸ THOMAS W. FAGAN, CTR. ON EDUC. POLICY, TITLE I FUNDS — WHO'S GAINING AND WHO'S LOSING: SCHOOL YEAR 2005–06 UPDATE 1–2 (2005), available at http://www.cep-dc.org/pubs/TitleI_Funds_6July2005/Title_I_Funds_6July2005.pdf.

⁹⁹ *Id.* at 4.

¹⁰⁰ 20 U.S.C. § 6821(b)(1) (Supp. III 2003).

¹⁰¹ *Id.* § 6824(d)(1).

¹⁰² *Id.* § 6824(a).

¹⁰³ U.S. DEP'T OF EDUC., FISCAL YEAR 2007 BUDGET SUMMARY AND BACKGROUND 34 (2006), available at <http://www.ed.gov/about/overview/budget/budget07/summary/07summary.pdf>.

¹⁰⁴ See 20 U.S.C. § 6821(c)(1), (3)(a)(ii).

¹⁰⁵ U.S. DEP'T OF EDUC., *supra* note 103, at 1.

proximately \$168 per eligible student,¹⁰⁶ far short of the additional per-pupil cost of a newcomer school.

C. The Federal Policy Initiative

Federal lawmakers should adopt a two-part initiative to help states and localities address the school failure of low-literacy and LEP immigrant students by implementing newcomer programs. First, Congress should authorize federal funding to assist with the creation and maintenance of newcomer schools.¹⁰⁷ Second, it should commission reliable quantitative research on newcomer schools.

1. *Funding.* — The centerpiece of Congress's immigrant education reform initiative should be a federal commitment to funding a significant portion of the cost of educating an eligible student in a newcomer school over and above the cost of educating a mainstream student. More specifically, Congress should authorize a federal match for state and local spending on newcomer programs over average per-pupil spending up to \$3000 per eligible student per year. Title I and Title III funds would be eligible for this purpose.

Funding each eligible student up to \$3000 would allow the federal government to cover half of the excess cost of a newcomer program in a state with average per-pupil spending. The funds should be phased in over five years, starting with those districts with large or rapidly growing low-literacy and LEP immigrant populations.¹⁰⁸ When fully

¹⁰⁶ An eligible student is an immigrant between the ages of three and twenty-one who has been enrolled in an American school for three or fewer years. 20 U.S.C. § 7011(6). This calculation assumes constant legal immigration since 2004, *see* OFFICE OF IMMIGRATION STATISTICS, *supra* note 31, at tbl.6; OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2003 YEARBOOK OF IMMIGRATION STATISTICS tbl.6 (2004), and that 30% of immigrant students are illegal immigrants, *see* CAMAROTA, *supra* note 10, at 3 (reporting that there are 32.5 million immigrants living in the United States); Brad Knickerbocker, *Illegal in U.S. — Just How Many?*, CHRISTIAN SCI. MONITOR, May 16, 2006, at 1 (reporting estimates of illegal immigrants living in the United States ranging from seven million to twenty million). It approximates the student population as children between the ages of five and nineteen years old. *See* OFFICE OF IMMIGRATION STATISTICS, *supra* note 31, at tbl.6; OFFICE OF IMMIGRATION STATISTICS, *supra*, at tbl.6.

¹⁰⁷ Federal government expenditures currently account for about 10% of national education spending, and about 8% of that funding comes from the Department of Education, which was created in 1867 primarily as a resource for local educational agencies. The Department originally was charged with collecting information on schools and teaching for states to use in setting education policy. Although it has maintained some of its research focus, the Department also views itself today as an "emergency response system" that provides additional — monetary — support to states and localities "when critical national needs arise." U.S. Dep't of Educ., *The Federal Role in Education*, <http://www.ed.gov/about/overview/fed/role.html?src=ln> (last modified Feb. 4, 2006).

¹⁰⁸ This scheme would permit lawmakers to distribute funding to a significant number of states early in the process. *See* BRIAN K. RAY ET AL., MIGRATION POLICY INST., IMMIGRANTS AND HOMEOWNERSHIP IN URBAN AMERICA: AN EXAMINATION OF NATIVITY, SOCIO-ECONOMIC STATUS AND PLACE fig.3 (2004), available at http://www.migrationpolicy.org/pubs/ray_homeownership.pdf.

funded, the program would cost approximately \$800 million per year, more than doubling the federal government's current commitment to English-language acquisition.¹⁰⁹

Requiring a state or locality match is important to create an incentive for districts to take program design and administration seriously. Creating such an incentive is particularly important, given that states and localities should retain complete discretion to determine program design, including eligibility for newcomer schools. Local officials are most familiar with the students they serve, and as a result they are best placed to determine how to meet the students' needs. Deemphasizing funding conditions also will make the proposal more palatable to local administrators¹¹⁰ while reinforcing voters' perceptions of a commitment to improving immigrant education.

2. *Research.* — Evaluations of newcomer programs to date have been qualitative rather than empirical, and as a result, advocates have been unable to offer objective evidence of the perceived success of these programs.¹¹¹ The lack of empirical assessment is due primarily to a lack of data: until recently, many programs did not test newcomers in any way comparable to that in which mainstream students are tested.¹¹² Although this dynamic has changed since the passage of

¹⁰⁹ This estimate assumes constant immigration since 2004 and that students are eligible for a newcomer program for one year, and approximates the student population as children between the ages of five and nineteen years old. See OFFICE OF IMMIGRATION STATISTICS, *supra* note 31, at tbl.6.

¹¹⁰ Particularly in the wake of the requirement-heavy NCLB, states and localities are likely to appreciate federal funding that does not come with a long list of instructions.

¹¹¹ See, e.g., CTR. FOR RESEARCH ON EDUC., DIVERSITY & EXCELLENCE, *supra* note 16, at 12–17; SHORT ET AL., *supra* note 36. The newcomer model does incorporate findings from several areas of education policy research. For example, parental outreach efforts draw on research on the effect of parental involvement on student success. See, e.g., ANNE T. HENDERSON & KAREN L. MAPP, A NEW WAVE OF EVIDENCE: THE IMPACT OF SCHOOL, FAMILY, AND COMMUNITY CONNECTIONS ON STUDENT ACHIEVEMENT 7, 21, 24, 28, 73 (2002), available at <http://www.sedl.org/connections/resources/evidence.pdf> (reviewing fifty-one studies and finding that outreach efforts are successful at engaging parents, and that students with involved parents have higher grades, attend school more regularly, and are more likely to pass and to pursue higher education than students whose parents are not involved in their education). Similarly, education policy research suggests that creating a less intimidating, see, e.g., Sylvia Alatorre Alva & Rydda de Los Reyes, *Psychological Stress, Internalized Symptoms, and the Academic Achievement of Hispanic Adolescents*, 14 J. ADOLESCENT RES. 343 (1999) (finding that stress has a significant negative impact on student achievement), and more intimate, see, e.g., ELIZABETH WORD ET AL., THE STATE OF TENNESSEE'S STUDENT/TEACHER ACHIEVEMENT RATIO (STAR) PROJECT: FINAL SUMMARY REPORT, 1985–1990, at 17 (1990) (finding that class size has significant positive effects on student achievement); Jeremy D. Finn et al., *The Enduring Effects of Small Classes*, 103 TCHRS. C. REC. 145, 153, 167 (2001) (finding that over the long term small-class students achieve at higher rates than larger-class students), learning environment will significantly improve student achievement.

¹¹² Cf. SHORT ET AL., *supra* note 36, at 67–68 (noting that empirical evaluation of newcomer programs has not yet been possible and that such evaluation requires that school districts test newcomer and mainstream students comparably).

NCLB, states still may exempt immigrant students from some testing for one year,¹¹³ so newly established programs may not have achievement data available. Moreover, programs traditionally have not tracked newcomer students once they have entered mainstream programs or dropped out of or graduated from school.¹¹⁴ Nor have programs collected data from newcomers' families.¹¹⁵ Finally, control groups are hard to come by: to date there has been no randomized, controlled study of a newcomer program, and many programs operate on the district level, so no natural in-district control group exists.¹¹⁶

Federal lawmakers should commission randomized, controlled studies of newcomer programs to assess whether certain aspects of the model are more or less effective than others.¹¹⁷ These studies would be funded out of the Institute of Education Sciences — essentially the Department of Education's research arm — which has a yearly budget of approximately half a billion dollars.¹¹⁸ Supporting research that will aid states and localities with policymaking fits well within the federal government's traditional role in education policy.

Sponsored studies should be comprehensive and long-term. Researchers should be required to work with school districts to develop and track indicators, including data on student language acquisition and achievement in content-based classes; absentee rates; dropout and graduation rates; college application, acceptance, and attendance rates; levels and quality of employment; and data on criminal activity. Future research also should analyze "softer" indicators, such as student evaluations of self-confidence, stress, and contentment, and student perceptions of the value of education. Researchers may also wish to evaluate the success of family outreach efforts by tracking family indicators, such as parental employment, parental language acquisition, parental assessments of access to services, parental satisfaction with the program, and parental comfort in American society.

Such studies are costly, requiring implementation of two separate educational models and extensive ongoing monitoring. States and localities have little incentive to fund such studies because they hope to free-ride on others' efforts. As a result, without federal support, rigorous evaluations of newcomer program models are unlikely to be conducted. The federal government could thus play a crucial role in the

¹¹³ Title I — Improving the Academic Achievement of the Disadvantaged, 71 Fed. Reg. 54,188, 54,188 (Sept. 13, 2006).

¹¹⁴ See SHORT ET AL., *supra* note 36, at 67–68.

¹¹⁵ See *id.* at 68.

¹¹⁶ See *id.* at 67.

¹¹⁷ The Department of Education already has sponsored a pilot study of newcomer programs that resulted in a qualitative endorsement of their effectiveness. See *id.* at 4.

¹¹⁸ U.S. DEP'T OF EDUC., *supra* note 103, at 73.

expansion of newcomer schools by funding high-quality research to identify those variations on the model that are most effective.

IV. CONCLUSION

Providing federal support for newcomer schools would allow lawmakers to address issues that are important to American voters and to do so in a way Americans will appreciate. Offering condition-free matching grants to states and districts for newcomer schools and funding research to inform program design would allow Congress to assist in the improvement of immigrant education without usurping the states' policymaking role. Doing so also would truly make a difference in the lives of countless children. By instituting federal funding for newcomer schools, Congress could achieve that rarest of outcomes: it could do well by doing good. It is an opportunity that any lawmaker should seize.